SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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KELLY MARAGES,

Plaintiff,

- v -

121 REALTY (2013) LLC, DORON KESSEL, GMK ORGANIZATION, INC.,

Defendants.

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INDEX NO. 158682/2016

MOTION DATE _____

MOTION SEQ. NO. 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100 were read on this motion for summary judgment.

By notice of motion, defendants move pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff opposes.

I. COMPLAINT (NYSCEF 1)

In 2008, plaintiff rented an apartment from defendants' predecessors, who advertised the apartment as a rent-stabilized, dog-friendly, one-bedroom apartment with a large outside terrace. Plaintiff continuously kept a dog and used the terrace, and she renewed her lease through 2016, which always included a preferential rent until 2014.

In 2014, the building was sold to defendants; 121 Realty (2013) LLC is the owner-landlord, Kessel is the landlord's owner and principal, and GMK Organization, Inc. is the managing agent. After defendants took control of the building, plaintiff experienced deterioration and interruption of services to her apartment and was exposed to a constant pattern of harassment and hostility.

The problems included a lack of heat, several gas leaks, retaliation and harassment against plaintiff for reporting the leaks to Con Edison, construction projects in the building that caused plaintiff's belongings to be covered in dust and dirt, created loud noise, and interrupted electricity and water to the building, and defendants' entering the apartment and terrace without prior notice or consent. Plaintiff's complaints to defendants were met with intimidation and harassment.

In 2014, defendants presented plaintiff with a renewal lease containing an almost 20 percent increase in her rent, and falsely represented to her that they were legally entitled to raise her rent and terminate her preferential rent as they were new landlords.

In 2015, defendants restricted plaintiff's access to the terrace by telling her that it needed repairs, and thereafter improperly removed and damaged her belongings that had been stored there, barred her from accessing the terrace, and later informed her that the terrace was not part of her apartment and could no longer be used by her.

In 2016, defendants harassed and threatened to evict plaintiff for keeping a dog in her apartment, even though she was legally entitled to it. Therefore, as a result of defendants' conduct toward her, plaintiff was forced to vacate the apartment and surrender her lease as of October 1, 2016. Other rent-stabilized tenants were also harassed by defendants as part of scheme to empty the building of rent-stabilized apartments.

Plaintiff asserts claims for a constructive eviction, rent overcharge, harassment pursuant to New York City Administrative Code § 27-2005 and the Rent Stabilization Law, private nuisance, intentional and negligent infliction of emotional distress, a breach of the warranty of habitability, retaliatory eviction in violation of Real Property Law § 223-b, conversion, trespass, and negligence.

II. MOTION FOR SUMMARY JUDGMENT

A. Jurisdiction of Division of Housing and Community Renewal

This court has concurrent jurisdiction with DHCR to adjudicate actions to recover rent overcharges. (*Downing v First Lenox Terrace Assocs.*, 107 AD3d 86, 91 [1st Dept 2013], *affd sub nom. Borden v 400 E. 55th St. Assocs., LP*, 24 NY3d 382 [2014]). Although appellate courts have not expressly addressed whether a court may *sua sponte* dismiss a case in favor of resolution by DHCR, a review of the filings in *Olsen v Stellar W. 110, LLC*, shows that although neither party raised the issue, the motion court dismissed the action on the basis of primary jurisdiction. (96 AD3d 440, 441-42 [1st Dept 2012], *lv dismissed* 20 NY3d 1000 [2013]; *see also Burton v 198 West 10th Street LLC*, 2018 WL 1172596, 2018 NY Slip Op 31591[U] [Sup Ct, NY County 2018] [relying on *Olsen* to *sua sponte* invoke primary jurisdiction]).

Deferral to DHCR reflects the understanding that when an administrative agency has the necessary expertise to dispose of an issue, a judicial tribunal should withhold ruling on it pending resolution of the administrative proceeding. (*Wilcox v Pinewood Apt. Assoc., Inc.*, 100 AD3d 873, 874 [2d Dept 2012], citing *Wong v Gouverneur Gardens Hous. Corp.*, 308 AD2d 301, 303 [1st Dept 2003]). It also promotes "a uniformity of ruling [which] is essential to comply with the purposes of the regulatory statute." (2 NY Jur 2d, Administrative Law § 328 [2018]). Thus, in *Davis v Waterside Hous. Co., Inc.*, the Court held that the trial court should have dismissed a complaint by tenants seeking a declaratory judgment that their apartments were subject to rent stabilization, observing that rent regulation issues are matters routinely within DHCR's area of expertise. (274 AD2d 318, 318 [1st Dept 2000], *lv denied* 95 NY2d 770). The Court quoted from *Capital Tel. Co. v Pattersonville Tel. Co.*, 56 NY2d 11, 22 (1982):

> The doctrine of primary jurisdiction is intended to co-ordinate the relationship between courts and administrative agencies to the end that divergence of opinion between them

> not render ineffective the statutes with which both are concerned, and to the extent that the matter before the court is within the agency's specialized field, to make available to the court in reaching its judgment the agency's views concerning not only the factual and technical issues involved but also the scope and meaning of the statute administered by the agency.

(274 AD2d at 318).

Here, plaintiff's overcharge claim is best decided by DHCR. (*See Olsen*, 96 AD3d at 442 [referring rent overcharge case to DHCR given its expertise in rent regulation]; *Collazo v Netherland Prop. Assets LLC*, 155 AD3d 538 [1st Dept 2017], *lv granted* 31 NY3d 910 [2018] [adjudication of claim for rent overcharge should be resolved in first instance by DHCR]; *390 W. End Assocs. v Nelligan*, 35 AD3d 306 [1st Dept 2006] [same]; *Holloway v 37 Driggs Ave., LLC*, Sup Ct, New York County, Feb. 26, 2019, Jaffe, J., index No. 152203/17; *Koslov v BPP St. Owner LLC*, Sup Ct, New York County, Dec. 10, 2018, Jaffe, J., index No. 151410/17; *Davidson v 730 Riverside Drive, LLC*, 2015 WL 5171072, 2015 NY Slip Op 31714[U] [Sup Ct, NY County] [denying tenant's motion for partial summary judgment on claim for rent overcharge and attorney fees, and severing claim, dismissing it without prejudice, and directing tenant to bring appropriate claim before DHCR]).

B. Intentional and negligent infliction of emotional distress

Plaintiff's allegations related to defendants' actions, even if true, do not constitute the extreme and outrageous conduct necessary to sustain a claim for intentional infliction of emotional distress. (*See Loch Sheldrake Breach and Tennis Inc. v Akulich*, 141 AD3d 809 [3d Dept 2016], *lv dismissed* 28 NY3d 1104 [allegations that defendants engaged in intentional campaign to insult, demean, threaten and injure plaintiff, including screaming and yelling at her, not sufficiently outrageous and extreme conduct]; *Graupner v Roth*, 293 AD2d 408 [1st Dept 2002] [intentional infliction claim dismissed where plaintiff alleged that defendants delayed

offering her renewal lease, refused to repair collapsed ceiling or return her apartment keys, and constructively evicted her from apartment while repairing ceiling]).

Defendants do not establish entitlement, *prima facie*, to a summary dismissal of plaintiff's cause of action for negligent infliction of emotional distress, as they may not rely on gaps in plaintiff's case. (*Hairston v Liberty Behavioral Mgt. Corp.*, 157 AD3d 404 [1st Dept 2018], *lv dismissed* 31 NY3d 1036).

C. Remaining claims

As the parties dispute whether plaintiff was entitled to use the terrace as part of her apartment and to keep a dog in the apartment, defendants do not establish entitlement to dismissal of plaintiff's claims related to these issues, including her constructive and retaliatory eviction claims. Similarly, whether there was a conversion, nuisance, trespass, and breach of the warranty of habitability depends on disputed issues of fact and credibility determinations, which are not reached on a motion for summary judgment. (*See e.g., Morales v 320 E. 176th St., LLC*, AD3d , 2019 NY Slip Op 01711 [1st Dept 2019] [party's challenge to credibility of plaintiff's evidence is for trier of fact]; *S.A. De Obras y Servicios, COPASA v Bank of Nova Scotia*, AD3d , 2019 NY Slip Op 01706 [1st Dept 2019] ["(w)here two different conclusions may reasonably be reached from the evidence, a motion for summary judgment should be denied"]; *St. Marks Assets, Inc. v Sohayegh*, 167 AD3d 458 [1st Dept 2018] [credibility determinations not appropriate on summary judgment]).

Defendants also fail to establish that plaintiff's claim of a constructive eviction has no merit as a matter of law. (*See Oresky v Azzouni*, 232 AD2d 463 [2d Dept 1996] [as plaintiff unable to use terrace for many months as result of defendants' repairs and failure to replace wooden decking, she was constructively evicted from that part of her leasehold for period in

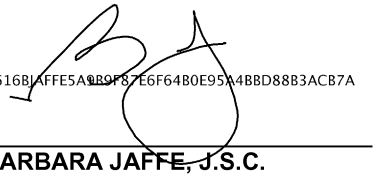
question]; 74 NY Jur 2d, Landlord and Tenant § 315 [2019] [whether tenant abandoned premises within reasonable time after constructive eviction is generally question of fact]).

Defendants do not address plaintiff's harassment and negligence causes of action.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment is granted to the extent of: (1) severing plaintiff's claim for a rent overcharge without prejudice to the filing of a complaint with DHCR, and (2) dismissing plaintiff's claim for intentional infliction of emotional distress, and is otherwise denied.



3/26/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE