SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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STUART DAVIDSON TRIBBS, on behalf of himself al all others similarly situated

Plaintiff,

- v -

326-338 E 100TH LLC, STEVE CROMAN

Defendant.

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INDEX NO. 150179/2018

MOTION DATE March 14, 2019

MOTION SEQ. NO. 002 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 72, 73, 74, 75, 76, 77, 78, 79, 80, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 111, 112, 113, 116, 123

were read on this motion to/for ORDER MAINTAIN CLASS ACTION.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 57, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 81, 82, 83, 84, 85, 86, 108, 110, 118, 121, 126

were read on this motion to/for DISMISSAL

In this proposed class action involving allegations of residential rent overcharge, plaintiff seeks an order pursuant to CPLR §901 *et seq.* in motion sequence number 002, certifying this action as a class action. Defendants oppose the motion and move separately in motion sequence number 003, to dismiss the complaint. The motions are consolidated for disposition.

BACKGROUND

On January 8, 2018, this action was commenced as a putative class action by plaintiff Tribbs, on behalf of himself and on behalf of all other tenants in the building complex known as and located at 326-338 East 100th Street, New York, New York (the "Buildings"), currently living in, or who have lived in apartments in the Buildings that were deregulated during the period when the Buildings were receiving J-51 benefits, except those tenants who vacated before

January 8, 2014, and a proposed sub-class consisting of all current tenants at the Buildings "who currently live in an unlawfully deregulated apartment". (NYSCEF Doc. No. 2). According to the complaint, defendant 326-338 E 100th LLC is the registered owner of the Buildings and defendant Steve Croman is the managing member of 326-338 E 100th LLC, who is alleged to have directed all aspects of leasing for the Buildings, including the failure to register the apartments with Division of Housing and Community Renewal, n/k/a Homes and Community Renewal ("DHCR"), as required. (NYSCEF Doc. No. 2, ¶¶29-34).

It is alleged that plaintiff did not receive a rent-stabilized lease at the time he moved in May, 2015 and has been provided non-rent stabilized lease renewals; additionally, plaintiff alleges that a rider to his lease specifically noted that his unit was exempt from rent control and rent stabilization laws. (NYSCEF Doc. No. 2, ¶5). Plaintiff alleges that landlords of buildings receiving J-51 tax benefits, such as defendants here, are legally required pursuant to Administrative Code § 26-504(c), to provide tenants with appropriate riders (the "J-51 Rider") detailing the tax credit, and disclosing when it expires. (id. ¶6). Plaintiff contends that because he did not receive a J-51 Rider, plaintiff and the members of the putative class are entitled to rent-stabilized leases for as long as they occupy their apartments. Plaintiff alleges that defendants' failure to properly register his apartment with DHCR deprived him of a full rental history from the date he moved in and as such he is entitled to utilize the default formula, codified in Rent Stabilization Code ("RSC") §2522.6(b)(3) to determine the legal regulated rent for his apartment.

Plaintiff alleges that defendants' June 2015 property tax statements for the Buildings, demonstrate that only 36 out of 92 units were listed as rent-stabilized and that this is in violation of the rent-stabilization laws and the J-51 program's rules, which require that all 92 units,

including the unit occupied by plaintiff, be rent-stabilized. (id. at ¶¶18-21). Plaintiff alleges that his apartment and those of the Class were all subject to rent control and/or rent stabilization and previously registered as such with DHCR. (id. at ¶53). Based on conduct that plaintiff alleges demonstrates defendants' intent to circumvent the requirements of New York's rent regulations at the expense of plaintiff and all tenants residing in the Buildings, the complaint alleges three causes of action on behalf of the putative class and sub-class, seeking to recover monetary damages from defendants based on the unlawful overcharges, in violation of Rent Stabilization Law ("RSL") §26-512; seeking a declaratory judgment that plaintiff and members of the sub-class are entitled to reformation of their leases to represent accurately the amount of rent defendants are legally entitled to charge plaintiff and members of the sub-class; and seeking a declaratory judgment that the apartments of plaintiff and members of the sub-class are subject to the RSL and RSC and any purported deregulation by defendants was invalid as a matter of law, and that each are entitled to a rent stabilized lease in a lease form promulgated by DHCR. (NYSCEF Doc. No. 2, ¶¶74-94).

On January 11, 2018, three days after the commencement of this lawsuit, the Tenant Protection Unit ("TPU") of the DHCR sent notice to defendants that "there has been a significant increase in the reported legal regulated rent for the apartment" occupied by plaintiff and that it was conducting an audit for the unit noted. (NYSCEF Doc. No. 36). On June 29, 2018, TPU sent a notice of audit determination to defendants' attorney indicating that it had calculated the legal regulated rent for the apartment and directing the owner to register the unit for registration years 2014-2017; the letter also listed remedial actions that the owner must undertake to resolve the discrepancies identified by the audit. (NYSCEF Doc. No. 94).[1]

[1] The timing of this audit determination resulted in the withdrawal of defendants' initial motion to dismiss filed under sequence number 001, scheduled to be argued on June 28, 2018, which defendants have now re-filed as

Defendants contend that TPU's audit determination demonstrates that plaintiff's motion seeking class certification is premature and further demonstrates that plaintiff Tribbs is not an adequate class representative and that plaintiff cannot satisfy the prerequisites of CPLR 901(a). Additionally, defendants argue that jurisdiction of the overcharge claim lies with DHCR, the agency with the expertise to adjudicate overcharge complaints and as it has already begun the process of auditing all other similarly situated apartments in the Buildings, it should retain jurisdiction of the claims alleged here. Plaintiff argues that he did not participate in the TPU audit as he received no notice of the audit nor does he agree with the formula utilized by TPU to calculate the legal regulated rent. To the contrary, plaintiff maintains that defendants are simply attempting to delay adjudication of the claims alleged in the complaint and that a review of the record demonstrates that plaintiff's motion seeking class certification should be granted and that defendants' motion to dismiss should be denied by the court.

STANDARD OF REVIEW/ANALYSIS

It is well established that DHCR has no jurisdiction to adjudicate a class action alleging rent overcharges and as such, the court will address the issue of class certification raised in motion sequence number 002, before it considers defendants' motion to dismiss the action based on the doctrine of primary jurisdiction in motion sequence number 003. (*Hess v EDR Assets LLC,* 171 AD3d 498, 95 NYS3d 805 [1st Dept 2019], citing, *Kreisler v B-U Realty Corp.*, 164 A.D.3d 1117, 83 N.Y.S.3d 442 [1st Dept 2018], lv dismissed 32 N.Y.3d 1090, 90 N.Y.S.3d 636, 114 N.E.3d 1089 [2018]; *Dugan v London Terrace Gardens, L.P.*, 101 AD3d 648, 955 N.Y.S.2d 873 [1st Dept 2012] [holding that Supreme Court properly declined to cede primary jurisdiction

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motion sequence number 003. (NYSEF Doc. No. 27). In August 2018, plaintiff learned that his landlord had acknowledged that his apartment is rent stabilized. (NYSCEF Doc. No. 51, ¶10).

of these actions to DHCR, since the actions raise legal issues, including class certification and applicable limitations periods, that should be addressed in the first instance by the courts]).

Whether a lawsuit qualifies as a class action rests within the sound discretion of the trial court. (*Askey v Occidental Chem. Corp.*, 102 A.D.2d 130, 477 N.Y.S.2d 242 [4th Dept. 1984].) The movant bears the burden of proving that the prerequisites set forth in CPLR 901 (a) have been met. (*Kudinov v. Kel-Tech Constr. Inc.*, 65 A.D.3d 48, 884 N.Y.S.2d 413 [1st Dept. 2009].) It is well settled that CPLR 901(a) "should be broadly construed" and that "the Legislature intended article 9 to be a liberal substitute for the narrow class action legislation which preceded it" (*City of New York v Maul*, 14 NY3d 499, 509, 929 NE2d 366, 903 NYS2d 304 [2010]; see also, *Brandon v Chefetz*, 106 A.D.2d 162, 168, 485 N.Y.S.2d 55 [1st Dept. 1985] [holding that the prerequisites of CPLR 901(a) are to be liberally construed, since the State's policy favors the maintenance of class actions]).

The court must also consider the five factors enumerated in CPLR 902, but consideration of those factors is not triggered until the prerequisites of CPLR 901(a) have been met. (2 Weinstein-Korn-Miller, NY Civ Prac P 902.06.) If there is any doubt in deciding whether to certify a class, the court should err in favor of allowing the class action. (*Super Glue Corp. v Avis Rent A Car Sys.*, 132 A.D.2d 604, 517 N.Y.S.2d 764 [2d Dept. 1987]). The court may consider the merits of plaintiffs' claims only to the extent of ensuring those claims are not a sham, (*Pludeman v. Northern Leasing Sys., Inc.*, 74 A.D.3d 420, 422, 904 N.Y.S.2d 372 [1st Dep't 2010]; *Kudinov v. Kel-Tech Constr. Inc.*, 65 A.D.3d at 482; *Jim & Phil's Family Pharm. v. Aetna U.S. Healthcare*, 271 A.D.2d 281, 282, 707 N.Y.S.2d 58 [1st Dep't 2000]), as C.P.L.R. §902 contemplates a determination of class certification "early in the litigation . . . well before any

determination on the merits." (*O'Hara v. Del Bello,* 47 N.Y.2d 363, 369, 391 N.E.2d 1311, 418 N.Y.S.2d 334 [1979]).

CPLR § 901(a) sets forth five threshold requirements that must be satisfied before a class action may be maintained:

> 1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
>
> 2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
>
> 3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> 4. the representative parties will fairly and adequately protect the interests of the class; and
>
> 5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Initially, defendants maintain that plaintiff's motion is premature as defendants have not filed a responsive pleading and relying on the recent decision in *Hess v EDR Assets LLC,* seek dismissal of the certification motion, claiming the appropriate time to move for class certification is sixty days after issue is joined. The court rejects this argument noting that the time limit set forth in CPLR §902 does not bar pre-answer class certification here, but rather sets a limit as to the time within which a certification motion must be filed. Careful review of the trial court's decision in *Hess*, reveals that the court reached its decision on the basis that plaintiffs had not replied to defendants' argument that the designated class representative had not suffered a rent overcharge and she may not be entitled to rent stabilization status, noting specifically that there "may be arguments contrary to those raised by the opposition that may be fully addressed after discovery." *Hess v EDR Assets LLC,* 2018 NY Slip Op 32182(U) at **4.

Unlike the record in *Hess,* the record before this court is adequately established with respect to the five threshold factors the court must consider in determining whether to exercise its discretion regarding plaintiff's motion seeking class certification. Moreover, unlike the class representative in *Hess,* here Mr. Tribbs vehemently opposes the claim that TPU correctly calculated the legal regulated rent for his unit and maintains that he can demonstrate that he is entitled to damages for the alleged overcharge. Specifically, plaintiff asserts that defendants' multi-year failure to follow the rent regulations requires the use of the statutory default formula to determine his legal regulated rent and to calculate his damages. (NYSCEF Doc. No. 2, ¶¶12-20). Finally, here, TPU has determined that Mr. Tribbs' apartment is rent stabilized and that defendants must register the unit for years 2014 to 2017. (NYSCEF Doc. No. 94).

The court further notes that defendants have had a full opportunity to respond to plaintiff's arguments on the merits, as demonstrated by their voluminous submissions in support of dismissal. Denying the motion solely on the basis that defendants have not filed a responsive pleading, would exalt form over substance and ignore the legislature's desired goal to determine the appropriateness of class action relief at the outset of the litigation. (see *O'Hara v Del Bello,* 47 NY2d 363, 368, 391 NE2d 1311, 418 NYS2d 334 [1979] [noting that the CPLR 902 requirement that a motion for class action certification be made no later than 60 days after the time expires for the service of all responsive pleadings is designed to promote the early determination of whether class action relief is appropriate consistent with the legislative intent of allowing a wide range of discretion that would enable the court to vary the order at any time before reaching a decision on the merits].

Here, the court finds that the record is sufficiently established to undertake the analysis necessary to determine whether plaintiff has satisfied the prerequisites set forth in §901(a). The

court's role at this stage is to determine whether this action is entitled to class action certification, not to determine the merits of the claims alleged in the complaint. The fact that defendants have not answered the complaint but rather moved to dismiss, does not preclude the court from reviewing the defendants' alleged conduct, against the applicable legal standards to determine whether class action relief is appropriate.

Plaintiff maintains that he has satisfied each of the five prerequisites for class certification and that litigating these claims as a class action is the superior mechanism to combat the alleged systemic denial of rent regulatory rights in buildings receiving the financial benefits of the J-51 tax subsidy, as is alleged in the complaint. (see, *Borden v. 400 East 55th Street Associates, LP,* 24 NY3d 382 [2014]; *Downing v. First Lenox*, 107 AD2d 86 [1st Dept. 2013]; *Gudz v. Jemrock*, 105 AD3d 625 [1st Dept. 2013]; *Dugan v. London Terrace*, 101 AD3d 648 [1st Dept. 2012]). Specifically, plaintiff maintains that landlords, like defendants here, were on notice, by March 2012, that they were required to retroactively register apartments in those buildings receiving J-51 benefits, and to provide their tenants with rent-stabilized leases, consistent with the decisions in *Roberts v Tishman Speyer Props., L.P.,* 13 NY3d 270, 279, 918 NE2d 900, 902 NYS2d 388 [2009] and *Gersten v. 567th Avenue LLC*, 88 AD3d 189, 928 N.Y.S.2d 515 [1st Dept. 2011]. Plaintiff argues that denying class certification here will result in the claims of the tenants in more than 50 similarly situated units in the building being completely ignored and deprive these putative class members of a remedy to which they are lawfully and rightfully entitled. (NYSCEF Doc. Nos. 2 and 107).

As to numerosity, plaintiff alleges that defendants' June 2015 property tax statements for the Buildings, demonstrate that only 36 out of 92 units were listed as rent-stabilized, thus indicating that class members appear to reside in 56 units. (NYSCEF Doc. Nos. 2, ¶¶18-21; 46

and 47). Here, plaintiff seeks certification for a class defined as: "All tenants at the Buildings living, or who had lived, in apartments that were deregulated during the period when J-51 tax benefits were being received by owner of the Buildings, except that the class shall not include: (i) any tenants who vacated before January 8, 2014, or (ii) any tenants whose occupancy in any such apartment commenced after such J-51 tax benefits to the building ended. In addition, plaintiff seeks certification of a sub-class comprised of current tenants at the Buildings who seek injunctive relief only. As the Court of Appeals has noted, the Legislature contemplated classes with as few as 18 members (see *Borden v 400 E. 55th St. Assoc.*, L.P., 24 NY3d 382, 399, 998 NYS2d 729, 23 NE3d 997 [2014]). Here, plaintiff has provided the 2015 tax records for the Buildings which show that 56 units were allegedly wrongfully deregulated by defendants. (NYSCEF Doc. No. 68). Plaintiff alleges that it is reasonable to conclude that defendants alleged wrongful conduct has affected more than 100 current and former tenants in the Buildings. (NYSCEF Doc. No. 2, ¶3). Thus, the court finds that plaintiff has satisfied the numerosity requirement of CPLR §901(a)(1).

Similarly, plaintiff has demonstrated that there are questions of law or fact common to the class which predominate over any questions affecting only individual members, thereby meeting the commonality requirements of CPLR §901(a)(2). (NYSCEF Doc. No. 2, ¶¶62-67). The issue of when defendants received J-51 benefits, whether defendants deregulated apartments while receiving those benefits, which tenants resided in those apartments during those time periods, and whether defendants wrongfully charged market rents while accepting J-51 benefits are common issues that predominate. (see *Borden v 400 E. 55th St. Assoc.*, L.P., 24 NY3d at 399). Indeed, the TPU audit of plaintiff Tribbs' unit highlights the typicality of the alleged claims, including how the legal regulated rents for the putative class members are to be

determined in order to calculate plaintiffs' alleged damages. Although plaintiff argues that the formula utilized by TPU was incorrect and violates the standard set forth by the First Department in *Matter of Regina Metro. Co., LLC v N.Y. State Div. of Hous. & Community Renewal,* 164 AD3d 420, 432, 84 N.Y.S.3d 91 [1st Dept 2018], appeal dismissed 32 N.Y.3d 1085, 90 N.Y.S.3d 633, 114 N.E.3d 1086 [2018]), the TPU audit here, provides credible proof that the rent overcharge claims alleged in the complaint do present common questions of law and fact, even if individual units may utilize different methods to calculate damages based on individual apartment improvements.

Contrary to defendants' arguments, the TPU audit tends to support plaintiff's claims that defendants engaged in a common practice of deregulating rent during its participation in the J-51 program and issuing market rate leases when the tenants should have been receiving regulated leases. Even if discovery proves that the class members are not entitled to rent overcharges, a claim that is contested by plaintiff notwithstanding the TPU audit determination, the claims for declaratory and injunctive relief in the form of directing rent stabilized leases to be issued, must still be determined by the court.

Defendants contend that the TPU audit is determinative of the rent overcharge claim alleged by plaintiff Tribbs and that the audit precludes Tribbs from being the named class representative. The court rejects this argument for several reasons. As noted, plaintiff never received notice of the audit commenced by TPU three days after the complaint in this action was filed, nor did he participate in the audit or have an opportunity to rebut the methodology utilized by TPU in determining the rent overcharge or the defendants' submissions with respect to the claimed improvements. (NYSCEF Doc. No. 36). Moreover, the claim that the audit moots the rent overcharge claims alleged in the complaint is equally unpersuasive. The question of

whether the current and past rents have been correctly calculated, both for current and prior tenants, is certainly at issue and the court must decide whether the tenants are entitled to retroactive payments for any overcharges that defendants may have imposed. In addition, whether TPU correctly calculated Tribbs' legal regulated rent is certainly not moot as plaintiff argues that TPU did not utilize the correct formula in calculating the legal regulated rent for his unit and commenced this action raising rent overcharge issues, prior to the TPU audit.

Moreover, as noted, the TPU audit determination supports plaintiff's allegation that defendants improperly deregulated the unit while receiving J-51 benefits and highlights the common inquiry for the entire class in determining defendants' liability arising out of the alleged failure to follow the rules of the J-51 program. Thus, contrary to defendants claims, plaintiff Tribbs does in fact meet the statutory criteria and has demonstrated that his claims, as alleged in the complaint, are not moot.[2]

As to "adequacy of representation", defendants argue that resolution of this issue is premature as there has been no discovery to test plaintiff's conclusory allegations set forth in his affidavit. To evaluate whether plaintiffs are suitable class representatives, the court must consider whether any conflict of interest exists between the representative and the class members; the representative's familiarity with the lawsuit; and the competence and experience of class counsel (*Pruitt v. Rockefeller Center Properties, Inc.*, 167 AD2d 14, 24, 574 N.Y.S.2d 672 [1st Dept., 1991]; *Ackerman v. Price Waterhouse*, 252 AD2d 179, 202, 683 N.Y.S.2d 179 [1st Dept., 1998]).

[2] The court rejects defendants request to stay this action pending the Court of Appeals' resolution in *Maddicks v Big City Properties, LLC*, 163 A.D.3d 501, 84 N.Y.S.3d 4 [1st Dept 2018]; this court is well equipped to resolve the issues presented by the motions filed in this action and any such delay would be unduly prejudicial to plaintiff.

Plaintiff Tribbs has submitted an affidavit indicating that he is aware of his responsibilities as lead class representative and that he owes a duty of loyalty to the class. In addition, plaintiff has stated that he will not seek treble damages if the class is certified and that proposed class counsel has explained his rights and responsibilities as class representative and the various developments that have occurred since this action was commenced. (NYSCEF Doc. No. 51).

In addition, plaintiff and the putative class members share a common goal in ensuring that they are charged the legal maximum rent and that defendants comply with the requirements set forth in the rent regulations cited in the complaint. Likewise, plaintiffs have demonstrated that proposed class counsel, Newman Ferrara LLP, has substantial expertise in class actions and complex commercial cases, including cases involving luxury deregulation and rent overcharges. (NYSCEF Doc. No. 48). Accordingly, class counsel possesses the requisite "competence, experience and vigor" to serve as class counsel (see *Fiala v Metropolitan Life Ins. Co.*, 52 AD3d 251, 251, 859 NYS2d 426 [1st Dept. 2008]). Based on a review of the submissions, this court finds that plaintiff has satisfied the adequacy of representation requirement set forth in CPLR §901(a)(4).

As to superiority, the alternatives to a class action would be individual actions by tenants or administrative proceedings. The court finds that litigating the claims alleged in the complaint as a class action will conserve judicial resources by avoiding a multiplicity of lawsuits involving the same basic facts. The liability determinations are the same for the proposed class members; thus, adjudicating the claims individually would be inefficient. (see *Borden v 400 E. 55th St. Assoc.*, L.P., 24 NY3d 382, 399, 998 NYS2d 729, 23 NE3d 997 [2014]). Accordingly, plaintiffs have satisfied the final requirement of CPLR 901(a).

Consideration of the requirements set forth in CPLR 902 does not compel a different result. In addition to the prerequisites of CPLR 901, other factors that a court may consider under CPLR 902 in deciding whether to certify a class action are: (1) the interest of the class members in individually controlling the prosecution of separate actions; (2) the impracticality of prosecuting separate actions; (3) the extent of any litigation already commenced by members of the class; (4) the desirability of concentrating the litigation in a particular forum; and (5) the difficulties likely encountered in the management of a class action. CPLR §902. "Most of these considerations [in CPLR 902] are implicit in CPLR 901" and the court's analysis as set forth above, demonstrates that plaintiff has met his burden for class certification. (*Gilman v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 93 Misc. 2d 941, 948, 404 N.Y.S.2d 258 [Sup Ct, NY County 1978]).

Having found that plaintiff has established the requirements to certify this action as a class action, the court turns now to defendants' motion to dismiss the complaint. Defendants seek dismissal on three grounds; first, defendants argue that the TPU audit determination demonstrates that plaintiff suffered no overcharge, and therefore, is not a member of the proposed class and cannot be a class representative and/or a named plaintiff; second, defendants claim that DHCR has primary jurisdiction to determine the rent overcharge claims alleged in the complaint; and finally, defendants seek dismissal of the complaint as against individual-defendant, Croman.

As this court has already discussed, defendants motion to dismiss the complaint based on the TPU audit determination is denied as plaintiff did not participate in that audit, never received notice of the audit and maintains that the methodology utilized by TPU to calculate plaintiff's legal regulated rent was incorrect. As plaintiff correctly posits, one cannot be bound by a

proceeding to which one was not a party. (*Hansberry v Lee*, 311 US 32, 40 [1940] ["It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."]; see also, *Pennoyer v Neff*, 95 US 714, 714 [1877]).

Additionally, defendants request that this court cede primary jurisdiction to DHCR is denied, since the action raises legal issues that must be addressed in the first instance by the court. (See *Hess v EDR Assets LLC,* 171 AD3d 498 [1st Dept 2019], citing *Kreisler v B-U Realty Corp.*, 164 A.D.3d 1117, 83 N.Y.S.3d 442 [1st Dept 2018], lv dismissed 32 N.Y.3d 1090, 90 N.Y.S.3d 636, 114 N.E.3d 1089 [2018]; *Dugan v London Terrace Gardens, L.P.,* 101 AD3d 648, 955 N.Y.S.2d 873 [1st Dept 2012]). As this court has found that the action may proceed as a class action, DHCR has no jurisdiction to adjudicate the rent overcharge claims alleged in the complaint.

Defendants also seek dismissal of the claims alleged against defendant Croman, claiming that a member of an LLC is not individually liable for the actions or contracts of the entity. Plaintiff alleges that defendant Croman is the managing member of 326-338 E 100th LLC, and in that capacity directed all aspects of leasing for the Buildings, including the failure to register the apartments with DHCR, as required. (NYSCEF Doc. No. 2, ¶¶31-34, 52-56).

It is well settled that "officers and directors of a corporation may be held liable for fraud if they participate in it or have actual knowledge of it . . . ," (*People v. Apple Health & Sports Clubs, Ltd.*, 80 N.Y.2d 803, 807, 587 N.Y.S.2d 279, 282, 599 N.E.2d 683 [1992]; see also *Marine Midland Bank v. John E. Russo Produce Co.,* 50 N.Y.2d 31, 44, 427 N.Y.S.2d 961, 968-69, 405 N.E.2d 205 [1980]; *A-1 Check Cashing Service, Inc. v. Goodman,* 148 A.D.2d 482, 482,

538 N.Y.S.2d 830, 831 [2d Dep't 1989] ["A corporate officer is individually liable for fraudulent acts or false representations of his own, or in which he participates, even though his actions in such respect may be in furtherance of the corporate business . . . ."]). As noted, the complaint alleges that Croman directed all aspects of leasing, Croman's position as a managing member of defendant 326-338 E 100th LLC, without any further proof, affords no basis for dismissal on this record. Accordingly, it is hereby,

ORDERED that plaintiff's motion sequence number 002 pursuant to CPLR §901 for class certification is granted; and it is further

ORDERED that defendants' motion sequence number 003 to dismiss the complaint is denied; and it is further

ORDERED that defendants' answer shall be served and filed within 20 days after service on plaintiff's attorney of a copy of this order with notice of entry; and it is further

ORDERED that the certified Class consists of all tenants at the Buildings living, or who had lived, in apartments that were deregulated during the period when J-51 tax benefits were being received by owner of the Buildings, except that the class shall not include any tenants who vacated such apartment prior to January 8, 2014, or any tenants whose occupancy in any such apartment commenced after such J-51 tax benefits to the buildings ended; and it is further

ORDERED that the certified sub-class consists of all current tenants at the Buildings, whose tenancy commenced prior to the expiration of the J-51 tax benefits; and it is further

ORDERED that the named plaintiff, Stuart Davidson Tribbs, is appointed as class representative; and it is further

ORDERED that Newman Ferrara LLP, is appointed as counsel for the class; and it is further

ORDERED that the parties are directed to appear in Part 23, Room 307, at 80 Centre Street, on September 24, 2019 at 9:30 a.m. for a conference to identify the form of the class notice to be distributed.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

7/15/2019
DATE

W. FRANC PERRY, J.S.C.

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