SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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LUCY ARROYO,

Plaintiff,

-against- Index No. 451329/2018

PLOVER HOUSING DEVELOPMENT FUND COMPANY, INC., PLOVER APARTMENTS, LLC, and LEMLE & WOLFF as managing agent, and

MARIA TORRES-SPRINGER, as Commissioner of the DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, and

the CITY OF NEW YORK,

Defendants.

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DECISION and ORDER

HON. NANCY M. BANNON, J.:

I. INTRODUCTION

In this action, plaintiff Lucy Arroyo (Arroyo), a tenant residing at 1175 Gerard Avenue in the Bronx (the Building), seeks an order: (1) directing defendants to readjust plaintiff's rent so that it reflects the terms of a 2014 regulatory agreement and the 2017 amendment to that agreement (together, the Regulatory Agreement); (2) directing her landlord to issue to her a lease with a rent of $565.68 per month, and to amend the registration of plaintiff's legal regulated rent with the New York State Division of Housing and Community Renewal (DHCR) to reflect that amount; and (3) enjoining her landlord from seeking to collect rent in excess of the rent permitted under the Regulatory Agreement, or from suing Arroyo based upon her alleged

nonpayment of an illegal rent. Arroyo also seeks compensation for rent overcharges and her attorney's fees and costs.

All of the defendants seek dismissal of the complaint pursuant to CPLR 217 (1), 3211 (a) (5) and 7804 (f). Defendants Plover Housing Development Fund Company, Inc., Plover Apartments, LLC, and Lemle & Wolff (together, the Plover Defendants), also move, pursuant to CPLR 3211 (a) (7), to dismiss the complaint for failure to state a cause of action.

II. BACKGROUND

Arroyo is a long-time tenant in the Building, in which the Plover entity defendants (Plover Entities), the Building's owners, performed rehabilitation work financed with government loan money (*see* Private Housing Finance Law (PHFL) § 800 et seq [promoting rehabilitation of housing accommodations in areas where there is an inadequate supply of safe, lower income housing]). In April 2014, HPD sent a letter to the Building's tenants informing them of the proposed rehabilitation, and that rent increases for some of the apartments in the Building would follow at the rehabilitation's completion. This letter also stated that current tenants, who were income eligible, as determined by income certifications that the tenants were advised to submit, would have their rent set at the greater of 30% of their income or their existing rent (Preferred Rent). Plaintiff's existing rent was then $565.68 per month.

In June 2014, the Plover Entities, the New York City Department of Housing and Development (HPD) and the New York City Housing Development Corporation entered into the Regulatory Agreement. That Agreement included restrictions upon the rent that could be charged to Building tenants, and provided that rents would be set based upon a schedule annexed

to the Agreement (Schedule B) (*see* NYSCEF Doc. No. 12; *id.*, ¶¶ 5.02, 5.03). The Regulatory Agreement also includes language providing for a Preferred Rent for certain eligible low income tenants.

HPD states that it sent plaintiff a letter, on December 31, 2016, advising her that the work in the Building was substantially completed, and urging her to apply for a "Section 8"[1] subsidy in order to maintain her current rent. HPD asserts that plaintiff's application for a Section 8 subsidy was not timely submitted. Plaintiff asserts that she attempted to file a Section 8 application in 2016, and that it was not until July 31, 2018 that HPD finally processed an application for plaintiff. There is no dispute that plaintiff has, now, submitted a Section 8 application. In reply, HPD states that the application has been processed, and a Section 8 voucher issued, but that plaintiff has not yet sought to schedule a required inspection.

There is no dispute that HPD issued a rent order, dated January 13, 2017 (Rent Order), setting the monthly rent for plaintiff's apartment at $877. The complaint alleges that plaintiff received the Rent Order in or around February 2017. Petitioner states that, in March 2017, she was offered a rent-stabilized lease by the Plover Defendants, but with an improper monthly rent of $877, when it should have been $565.68 per month.

HPD argues that this action should be dismissed because Arroyo should have styled this action as a CPLR Article 78 proceeding, instead of a plenary action. Generally, where an action is not properly denominated, a court may simply convert the action to the proper form (CPLR

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[1] "Pursuant to Section 8 of the U.S. Housing Act of 1937 (42 USC § 1437f [hereinafter Section 8]), the federal government provides rent subsidies to low-income individuals and families to enable them to rent privately-owned housing" (*Matter of Banos v Rhea*, 25 NY3d 266, 273 [2015]).

103 (c); *Pella Realty v Commissioner of Fin.*, 5 AD3d 278, 279 [1st Dept 2004]; *Rosenthal v City of New York*, 283 AD2d 156, 158 [1st Dept 2001]; *see* Siegel, NY Prac ¶ 4 [6th ed 2019] [court may convert action to proceeding and vice versa]). However, defendants characterize plaintiff's claim as a challenge to the Rent Order which, they argue, is time-barred based upon the four-month statute of limitations for an Article 78 proceeding (CPLR 217). Whether plaintiff's claims are time-barred is a threshold issue.

In moving, HPD contends that it was authorized to set plaintiff's rent pursuant to PHFL § 804, and that the four-month Article 78 statute of limitations applies, as Arroyo is challenging HPD's rent determination in the Rent Order. In opposition, Arroyo argues that the statute of limitations for her claim is the six-year period for a breach of contract, as her claim is for breach of the Regulatory Agreement. In support, Arroyo cites to cases in which courts have determined that, where a party has a contract with the government, and a plaintiff alleges that the contract was breached, a breach of contract claim, as opposed to an article 78 proceeding, is stated (*see e.g. Matter of Cromwell Towers Redevelopment Co. v City of Yonkers*, 41 NY2d 1, 2 [1976] [converting Article 78 proceeding to contract claim where municipality attempted to tax a developer even though the developer was a party to a contract with an express provision granting a tax exemption]). Arroyo argues that her complaint is based on HPD's breach of the Regulatory Agreement, and that she seeks declaratory relief and specific performance of the Agreement.

III. DISCUSSION

When a party brings a suit for declaratory relief, "but an alternative form of relief is available, and the period of limitations for such relief has expired prior to commencement [of the

plenary] action, "the latter action also is barred" (*see Solnick v Whalen*, 49 NY2d 224, 230 [1980]). It falls upon courts to "examine the substance of [the] action to identify the relationship out of which the claim arises and the relief sought" (*id.* at 229; *ABC Radio Network v State of New York Dept. of Taxation & Fin.*, 294 AD2d 213, 214 [1st Dept 2002] ["the essential nature of a proceeding may not be changed, thereby lengthening the statute of limitations, merely by denominating it as something other than what it actually is"]).

Arroyo, who is not a signatory to the Regulatory Agreement, argues that she is entitled to the benefits of the Agreement as a third-party beneficiary. In *Commissioner of the Dept. of Social Servs. of the City of N.Y. v New York-Presbyt. Hosp.* (164 AD3d 93 [1st Dept 2018]), the court stated that:

> "an intention of the parties to a contract to benefit a third party, thereby conferring on the third party the right to enforce the contract, will be found (apart from situations where the third party is the only party that could recover for the breach) only when it is . . . clear from the language of the contract that there was an intent to permit enforcement by the third party[.] Thus, it is well established that a third party cannot be deemed an intended beneficiary of a contract unless the parties' intent to benefit the third party . . . [is] apparent from the face of the contract"

(id. at 98 [internal quotation marks and citations omitted]).

To demonstrate that she is a third-party beneficiary of the Regulatory Agreement, plaintiff relies solely on section 6.08 of the Agreement (Section 6.08), which expressly states that individuals who meet an income limitation standard are "intended third-party beneficiaries of" that particular section, for purposes of enforcing requirements and prohibitions of 26 USC 42 (h) (6) (B) (i), a specific section of Internal Revenue Code of 1986 (Section 42). Section 42 addresses the circumstances under which buildings may be entitled to tax credits, and requires

that the taxpayer have an agreement with a housing credit agency that provides for certain items. However, those items are unrelated to how a housing agency is to set a particular tenant's rent, and the amount at which that rent is to be set.

In addition, the language of Section 6.08 expressly states that there are "intended third-party beneficiaries" of that specific section of the Agreement, indicating that the Agreement's drafters intended those other than HDC and HPD to be able to enforce that particular section of the Agreement. Unlike Section 6.08, the section of the Agreement upon which Arroyo relies, specifically, section 5.03, and "Schedule B," of the Agreement, which involve the amount of rent to be charged to tenants, are devoid of any third-party beneficiary language. That the drafters of this sophisticated agreement included specific intended third-party beneficiary language in Section 6.08, but omitted that language in section 5.08 and Schedule B, cannot be deemed unintentional, and plaintiff has not demonstrated that the Agreement's drafters intended that she be able to enforce Sections 5.03 and Schedule B.[2]

Furthermore, PHFL § 804 specifically provides that:

> "[u]pon completion of the rehabilitation of an existing multiple dwelling . . . aided by a participation loan, the agency must establish the initial rent for each dwelling unit within the rehabilitated . . . multiple dwelling."

Thus, PHFL § 804 provides a statutory basis for HPD to set an initial rent for plaintiff's apartment after the rehabilitation. That the rent amounts were incorporated into the Regulatory Agreement does not change this. Plaintiff challenges the Rent Order as incorrectly set, seeks,

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[2] Although not cited by Arroyo, section 11.08 of the Agreement provides that the Regulatory Agreement is intended to benefit people who are not served by the mainstream rental property market. This appears to come closer to describing plaintiff, but Section 11.08 also specifically states that the Agreement is enforceable by HDC and HPD, and does not state that it is enforceable by a tenant.

ultimately, to have defendants adjust her rent (*see* NYSCEF doc no. 1 at ¶¶ 34, 44, 57), and her landlord offer her a lease with a rent other than the one set by HPD, and to register that rent as the legal regulated rent with DHCR. The reason plaintiff is requesting this relief is because she contends that HPD set the wrong rent for her apartment in the Rent Order, when it should have determined that she was entitled to a Preferred Rent, of $565.68, as reflected in the Regulatory Agreement. Assuming, arguendo, that plaintiff is correct, and that HPD set the wrong rent, Arroyo could have challenged HPD's determination in an Article 78 proceeding (*see Matter of Ahmed v New York State Div. of Hous. & Community Renewal, Off. of Rent Control*, 15 AD3d 216, 216 [1st Dept 2005] [if petitioner "wished to challenge the initial post-renovation rents set by HPD . . . the proper course would have been to proceed, pursuant to CPLR article 78, against HPD"]; *see also Matter of Winston v Torres*, 73 AD3d 537, 538 [1st Dept 2010] [landlord petitioner]). Where Arroyo alleges that she received the Rent Order around February 2017, but only filed this complaint on July 13, 2018, over a year after receipt of the Rent Order, her claim is time-barred (CPLR 217 [four-month statute of limitations]). Consequently, the merits of the rent determination in the Rent Order, even if faulty, may not be addressed here (*see Banos v Rhea*, 25 NY3d 266, 279 [2015] [stating that as pleading was being dismissed due to untimeliness, no Article 78 review of whether the determination violated lawful procedure was permissible]).

The Plover Defendants also move to dismiss the complaint against them as time-barred and for the failure to state a clause of action. Plaintiff opposes the motion and contends that these defendants do not fall into the category of "a body or officer" entitled to CPLR 217's four-month statute of limitations. The parties discuss Appellate Division authority, primarily

involving zoning determinations, to demonstrate their respective positions about application of the Article 78 statute of limitations to a nonmunicipal respondent including: *Matter of Save the Woods & Wetlands Assn. v Village of New Paltz Planning Bd.* (296 AD2d 679 [3d Dept 2002] [nonmunicipal party could avail itself of statute of limitations in Article 78 proceeding where village planning board did not waive that defense]); *Matter of McGregor v Town of Hastings* (62 AD2d 1178, 1178 [4th Dept 1978] [town did not raise statute of limitations defense in Article 78 proceeding and defense was not available to nonmunicipal respondent]); *Matter of Hans v Burns*, (48 AD2d 947, 947-948 [3d Dept 1975] [shorter statute of limitations not available to nonmunicipal respondent]).[3] In these cases, the Courts determined that the nonmunicipal respondents could avail themselves of the CPLR 217 statute of limitations as a defense, provided that the municipal defendant did not waive the defense. In this action, HPD raised and has prevailed on its statute of limitations defense. Consequently, those cases provide support for dismissal of plaintiff's action against the Plover Defendants.

However, even if the statute of limitations defense were not dispositive, the Plover Defendants also moved pursuant to CPLR 3211(a)(7), for dismissal of the complaint for failure to state a clause of action, arguing that the action must be dismissed because the Rent Order is binding. Arroyo's claim against HPD has been dismissed as time-barred. Consequently, the rent determination, of $877, in the Rent Order, is the initial rent for plaintiff's apartment. Arroyo submits the Rent Order in opposition to the motion (*see M & B Joint Venture, Inc. v Laurus*

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[3] While the parties do not cite to First Department authority on the issue of a nonrespondent's assertion of the four-month Article 78 statute of limitations, cases of other appellate divisions are binding on this court in the absence of First Department authority (*Nachbaur v American Tr. Ins. Co.*, 300 AD2d 74,76 [1st Dept 2002], citing *Mountainview Mountain View Coach Lines v Storms*, 102 AD2d 663, 664-665 [2d Dept 1984]).

Master Fund, Ltd., 12 NY3d 798, 800 [2009] ["[b]ecause plaintiff's own evidentiary submissions 'conclusively establish that [it] has no cause of action,' dismissal of the complaint as to [two defendants] is appropriate," [quoting *Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]). Under these circumstances, plaintiff's claims against the Plover Defendants, including for an order compelling them to issue a lease at a rent of $565.68 per month, which are derivative of plaintiff's claim challenging the Rent Order, fail as a matter of law.

IV. CONCLUSION

Accordingly, it is

ORDERED that the motions to dismiss of defendants Plover Housing Development Fund Company, Inc., Plover Apartments, LLC, Lemle & Wolff, Maria Torres-Springer, as Commissioner of the Department of Housing Preservation and Development, and the City of New York (MOT SEQ 001 and 002) are granted and the complaint is dismissed; and it is further

ORDERED and ADJUDGED that the proceeding is dismissed, and it is further,

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

Dated: July 26, 2019

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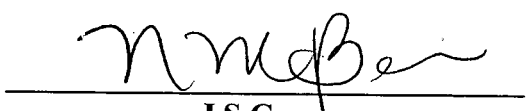

J.S.C.
HON. NANCY M. BANNON