| **Barry v Berkley Realty Assoc., L.P.** |
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| 2019 NY Slip Op 34718(U) |
| March 20, 2019 |
| Supreme Court, Queens County |
| Docket Number: Index No. 701799/2018 |
| Judge: Chereé A. Buggs |
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
**Justice**

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THOMAS BARRY, MARK RODRIGUEZ
on behalf of themselves and all others similarly situated,

Index No. 701799/2018

Plaintiffs,

-against-

Motion
Date: January 23, 2019

Motion Cal. No.: 4

BERKLEY REALTY ASSOCIATES, L.P. a/k/a BERKLEY REALTY ASSOC,

Motion Sequence No.: 1

Defendant.

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The following e-file papers numbered 12-25 submitted and considered on this motion by defendant BERKLEY REALTY ASSOCIATES, L.P. a/k/a and BERKLEY REALTY ASSOC (hereinafter referred to as "Defendant") seeking an Order pursuant to CPLR 3211 (a)(7) dismissing the plaintiffs THOMAS BARRY and MARK RODRIGUEZ on behalf of themselves and all others similarly situated (hereinafter referred to as "Plaintiffs") Fourth Cause of Action and such other further relief as the Court deems just and proper.

| | Papers Numbered |
|---|---|
| Notice of Motion-Affirmation-Exhibits..... | EF 12-14 |
| Memorandum of Law..... | EF 15-16 |
| Affirmation in Opposition-Affidavits-Exhibits.... | EF 17-20 |
| Reply Affirmation-Memorandum of Law..... | EF 21-25 |

This action is brought on behalf of the tenants of a building (Plaintiffs) who allege that the landlord (Defendant) overcharged them while receiving tax benefits from the City of New York. Plaintiffs allege that they are and were entitled to rent stabilization when the Defendant received J-

51 tax benefits. Plaintiffs rely on the Housing Preservation and Development (hereinafter referred to as "HPD") guidelines which states that all rental units are subject to rent stabilization or rent control for the duration of the J–51 benefits.

Now, Defendants seek an Order pursuant to CPLR 3211(a)(7) dismissing the Fourth Cause of Action alleged against movant in Plaintiffs Verified Complaint. The Fourth Cause of Action alleges violation of General Business Law (hereinafter referred to as "GBL") § 349 (h).

"On a motion to dismiss pursuant to CPLR 3211 (a) (7), the claim must be afforded a liberal construction, the facts therein must be accepted as true, and the plaintiff must be accorded the benefit of every favorable inference" (*Leon v Martinez*, 84 NY2d 83 [1994]; *see also Sawitsky v State*, 146 AD3d 914 [2d Dept 2017]).

> GBL § 349 (h) states:
> (h) In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff.

As demonstrated within the four corners of the Verified Complaint, Plaintiffs' Fourth cause of action alleges Defendants violated GBL § 349 (h). Plaintiffs' allege: they were offered leases and subsequent leases stating their apartments were not subject to rent stabilization laws; Defendant misrepresented that the apartments were not subject to rent stabilization laws and Plaintiffs were misled by the Defendant's actions and misrepresentations to believe the same; Plaintiffs received neither rent stabilization nor J-51 riders at the inception of their tenancies; Defendant misrepresented to the public and to tenants of the building that their apartments were not subject to rent stabilization laws.

In *Van Straaten et al. v. 125 Court Street LLC.* the defendant owned the apartment building and was allegedly receiving tax benefits pursuant to Real Property Tax Law § 421-a since 2006 which then caused the apartments to become subject to rent stabilization laws. (*Van Straaten et al. v. 125 Court Steet LLC.* NYLJ 120263118972 *4 [Sup Ct, Kings County 2013]). Plaintiffs claim the defendant registered each apartment with the Division of Housing and Community Renewal (hereinafter referred to as "DHCR") at a rent that was in excess of the actual legal regulated rent. (*Id*). Also, plaintiffs claim, commencing with their first lease and continuing through present, defendant entered into leases with plaintiffs that stated the apartments were subject to rents higher than the lawful amount and defendant continuously advertised the units for unlawful rates.(*Id*). Plaintiffs claim the statements are false and misleading and they relied, and many in their class continue to rely, on these illegal representations.(*Id* at 5). Among other things plaintiffs allege the

defendant violated GBL §349. To establish a viable claim under GBL §349 plaintiff must prove that: 1) the challenged conduct was consumer-oriented; 2) the conduct or statement was materially misleading; and 3) damages (*Id* at 7). Consumer-oriented conduct must have a "broader impact on customers at large. Private contract disputes, unique to the parties, for example, would not fall within the ambit of the statute" (*Id*). Defendant alleges their actions were not consumer oriented, and moved to dismiss plaintiffs cause of action. First, the court analyzed whether GBL §349 applies to prospective customers or existing tenants, since the complaint claims the deception started at the door of defendant's rental office and continued throughout the former customers/current tenants' occupancy of their apartments (*Id* at 9). Prospective tenants were not locked into any contractual relationship with the defendant they were free to contract with others (*Id*). Existing tenants signed renewal leases that falsely represented the inflated renewal rent as the actual legal regulated rent (*Id*). The court found that GBL §349 is applicable to prospective customers (*Id* at 10). The court reasoned that case law supports application of GBL §349 when there is no ongoing leasing relationship (*Id*). According to the court, defendant's conduct here is akin to "an extensive marketing scheme, where it involved the multi-media dissemination of information to the public, and where it constituted a standard or routine practice that was consumer-oriented in the sense that it potentially affected similarly situated consumers" (*Id* at 12). Therefore, plaintiffs rent related claims withstood defendants motion to dismiss (*Id* at 13).

Here, Plaintiffs similarly allege that the Defendant's "deception started at the door of defendant's rental office..." (*Id* at 9). Specifically, Plaintiffs claim they "were offered leases and subsequent leases and/or renewal leases, which stated that their apartments were not subject to rent stabilization laws." Furthermore, plaintiffs claim they were not given rent stabilization or J-51 rider at the inception of their tenancies.

Plaintiffs also points to *Johnathan Haygood v. Prince Holdings 2012, LLC*, there plaintiff was a tenant in one of defendants apartments. Plaintiff alleged, among other things, that defendants violated GBL § 349. (*Johnathan Haygood v. Prince Holdings 2012, LLC*.60 Misc 3d 1220(A), 2018 N.Y. Slip Op 51182[U] [Sup Ct NY County 2018]). Plaintiff claims that his lease contained no indication that his apartment was previously subject to rent stabilization laws and there was no rider to indicate that fact. (*Haygood*, 2018 NY Slip Op 51182[U], *1). That defendants owned numerous residential buildings across New York City that were the subject of both a civil proceeding and criminal indictment connected to "widespread practices constituting unfair and illegal business practices against tenants throughout New York."(*Haygood*, 2018 NY Slip Op 51182[U], *1). Plaintiff was seeking a judgment against defendant for rent overcharges. The defendants moved to dismiss. The court recognized that in various other cases New York Courts have held that GBL § 349 was applicable in certain landlord and tenant matters.(*Haygood*, 2018 NY Slip Op 51182[U], *9). The court considered that defendants allegedly made false statements about the regulatory status of the apartment to the plaintiff that he relied on and that this was not an isolated example of alleged rent overcharge by the defendants. (*Haygood*, 2018 NY Slip Op 51182[U], *9). The court denied the defendants motion.(Haygood, 2018 NY Slip Op 51182[U], *10)

Here, Plaintiffs allege *Van Straaten, Haygood* and the case at bar are all similar, in that they

all involve deceptive practices of a landlord to prospective customers regarding the regulatory status of the apartments. Therefore, Plaintiffs believe they are entitled to similar treatment and the Defendant's motion to dismiss should be denied.

Defendant points to conflicting case law in *Daniel Collazo v. Netherland Prop. Assets LLC.* Defendant also attaches the Verified Complaint from *Collazo* ("*Collazo* Complaint"), to its Reply in order to demonstrate the similarities between the complaint in that case and the case at bar. Based on a review of the *Collazo* Complaint the plaintiffs alleged the landlord improperly treated the building as deregulated while simultaneously receiving J-51 tax benefits, the leases did not provide proper notice of the regulatory status of the apartments, that the landlord misled the plaintiffs and the public at large as to the regulatory status of the apartments. In *Collazo,* the Supreme Court, NY County held that this was a private dispute. (*Daniel Collazo et al. v. Netherland Property Assets LLC* et al., 2017 WL 947618, *2 [Sup Ct, NY County March 7, 2017, No. 157486/2016]). Thus the Supreme Court, NY County held that the plaintiffs facts did not support a consumer-related transaction within the ambit of GBL § 349, and the defendants' motion to dismiss was granted. (2017 WL 947618, *2 ). The Appellate Division, First Department affirmed. (*Daniel Collazo et al. v. Netherland Property Assets LLC* et al., 155 A.D.3d 538 [1st Dept App Div 2017]).

The facts within, are very similar to the case at bar. In fact, this Court finds no substantive distinction between *Collazo* and the matter herein. This court also takes into account the doctrine of stare decisis in making its ultimate decision.

In *Van Straaten,* the plaintiff alleges the defendant based its claim on the landlords receipt of Real Property Tax Law § 421-a, here, the Plaintiff bases its claim on Defendant's receipt of J-51 tax benefits. In *Haygood,* the court considered the status of the aforementioned civil proceedings in which it was alleged the defendants engaged in "widespread practices constituting unfair and illegal business practices against tenants throughout New York."(*Haygood.* 2018 NY Slip Op 51182[U], *1) in making its final determination. Here, there is no similar allegation. This case most closely aligns with *Collazo.* Therefore it is,

**ORDERED**, that Defendant's motion under CPLR 3211 (a)(7) is granted in its entirety, and it is further;

**ORDERED**, that Defendant's shall file a verified answer within 30 days of the filing of this order.

The foregoing constitutes the decision and order of this Court.

FILED
APR 04 2019
COUNTY CLERK
QUEENS COUNTY

Dated: March 20, 2019

**Hon. Chereé A. Buggs, JSC**

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