SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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INDEX NO. 450245/2019

MOTION DATE 11/19/2019

MOTION SEQ. NO. 001

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, THE PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Plaintiff,

- v -

ZARA REALTY HOLDING CORP., ZARA CONTROL LLC,KARRAN SUBRAJ, RAJESH SUBRAJ, JAIRAJ SOBHRAJ, AMIR SOBHRAJ, JASMINE SUBRAJ, DEVANAND SUBRAJ, JASMINE HOMES, LLC,JAMAICA MANAGEMENT LLC,149 ST LLC,150 PARK LLC,162-20 LLC,164-03 LLC,166 ST LLC,195 ST LLC,195-24 LLC,51-25 VAN KLEECK LLC,57 ELMHURST, LLC,8787 HILLSIDE PARK LLC,88-05 MERRICK BLVD LLC,88-15 144 ST LLC,88-22 PARSONS BLVD LLC,89-21 153 LLC,91-60 LLC,BELAIR PARK 5 LLC,BELAIR PARK 8825 LLC,HILLSIDE PARK 168 LLC,HILLSIDE PLACE LLC,HUDSON HOUSE LLC,JAMAICA ESTATES LLC,JAMAICA SEVEN LLC,KING'S PARK 148 LLC,KING'S PARK 8809 LLC,NINETY ONE SIXTY ONE LLC,ONE NINETY SIXTH ST LLC,PARK HAVEN, LLC,PARSONS 88 REALTY LLC,PARSONS MANOR LLC,WOODHULL PARK 191 LLC,WOODSIDE PROPERTIES 45 ST LLC

Defendant.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for DISMISSAL.

In this action stemming from alleged violations of the Rent Stabilization Law ("RSL") and Rent Stabilization Code ("RSC"), defendants move, pursuant to CPLR 3211(a)(7), to dismiss the complaint against defendants Karran Subraj a/k/a Kenneth Subraj, Rajesh Anthony a/k/a Tony Subraj, Jairaj a/k/a Jay Sobhraj, Amir Sobhraj, Jasmine Subraj and Devanand Subraj ("the individual defendants"); to dismiss, pursuant to CPLR 3211(a)(2), the third cause of action in the

complaint regarding illegal key fees; and the sixth cause of action relating to illegal on-time rent discount provisions in leases based on the doctrine of collateral estoppel (Doc. 6). Plaintiffs New York State Division of Housing and Community Renewal ("the DHCR") and the People of the State of New York, by Letitia James, Attorney General of the State of New York ("OAG") oppose the motion (Doc. 19). After oral argument, as well as a review of the parties' papers and the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

On March 1, 2019, after a two-year investigation by the DHCR's Tenant Protection Unit ("TPU") into defendants' operation of 38 buildings consisting of more than 2,500 rent-stabilized units in New York City, plaintiffs commenced this action to enjoin defendants' continued violations of the RSL and RSC and seeking an order and judgment directing disgorgement, restitution, and other equitable relief necessary to redress said violations (Doc. 1). As pertinent here, in the third cause of action of the complaint, plaintiffs alleged, *inter alia*, that "[the D]HCR is entitled to an injunction barring the [d]efendants from violating RSC § 2523.4 by requiring rent-stabilized tenants to pay fees and fulfill arbitrary requirements in order to receive keys to new door-locking systems installed by [d]efendants in their properties" (Doc. 1 ¶ 176). The sixth cause of action pertains to allegations that defendants violated, and continued to violate, RSC § 2521.2 by including and enforcing illegal on-time discount penalty provisions in rent-stabilized leases (Doc. 1 ¶ 193).

In lieu of an answer to the complaint, defendants filed the instant motion on July 9, 2019 (Doc. 6). Defendants contend, *inter alia*, that the complaint should be dismissed as against the

individual defendants because no conduct is alleged beyond their role as owners of the landlord LLCs and, moreover, that plaintiffs have failed to plead facts sufficient to pierce the corporate veil (Doc. 16 at 5-8). Additionally, they assert that the individual defendants do not qualify as "owners" within the meaning of RSC § 2520.6 [i] (Doc. 16 at 7).

Defendants also represent that this Court lacks subject matter jurisdiction over plaintiffs' third cause of action related to alleged improper key fees because petitions for administrative review ("PAR") were filed by defendants on these issues, and such petitions are still pending with the DHCR (Doc. 16 at 8-9). Thus, claim defendants, plaintiffs have failed to exhaust their administrative remedies and, thus, are unable to assert this cause of action (Doc. 16 at 8-9). Lastly, defendants rely on four decisions in asserting that the issue raised in plaintiffs' sixth cause of action (for violations of on-time discount rent provisions) has already been decided and, consequently, that they are collaterally estopped from asserting this claim (Doc. 16 at 10-12).

In opposition to the motion, plaintiffs argue, *inter alia*, that they have sufficiently pleaded facts alleging that the individual defendants are "owners" within the broad definition of the RSC (Doc. 19 at 12-13). Moreover, claim plaintiffs, defendants ignore the applicability of Executive Law § 63(12), which allows the OAG to bring suit against the individual defendants without having to pierce the corporate veil (Doc. 19 at 13). With respect to the third cause of action, plaintiffs maintain that the pending PARs do not compel the DHCR to exhaust its administrative remedies because the DHCR is vested with authority under both the RSL and the RSC to bring actions in the Supreme Court to enjoin violations of law (Doc. 19 at 15). Thus, assert plaintiffs, it would be nonsensical for the DHCR to be required to exhaust its own administrative remedies before it can exercise its express authority (Doc. 19 at 15). Further, plaintiffs contend that the DHCR and the OAG are not parties to the pending administrative proceedings and that defendants have furnished

no authority requiring plaintiffs to resort to the administrative process under these circumstances (Doc. 19 at 16-17). Plaintiffs also argue that defendants' argument based on collateral estoppel is without merit because the OAG was not a party to those actions and, furthermore, nothing in those decisions preclude the DHCR from claiming that the on-time rent discount provisions at issue here are equivalent to excessive late fees (Doc. 19 at 17, 19).

LEGAL CONCLUSIONS:

When determining a motion to dismiss pursuant to CPLR 3211, "the pleading is to be afforded a liberal construction. [The court is to] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [internal citations omitted]). Dismissal of a claim is warranted pursuant to CPLR 3211(a)(7) only when the pleading fails to state a cause of action (*see M.H.B. v E.C.F.S.*, 177 AD3d 479, 480 [1st Dept 2019]). Moreover, if this Court lacks subject matter jurisdiction over a claim, such as where plaintiffs have failed to exhaust their administrative remedies before commencing the action, the cause of action is subject to dismissal pursuant to CPLR 3211(a)(2) (*see Matter of Gottlieb v City of New York*, 126 AD3d 903, 903 [2d Dept 2015]).

To the extent defendants seek dismissal of the complaint against the individual defendants, that branch of their motion is denied. Pursuant to the RSC, an "owner" is defined as "[a] fee owner, lessor, sublessor, assignee, . . . or any other person or entity receiving or entitled to receive rent for the use or occupation of any housing accommodation, or an agent of any of the foregoing" (RSC § 2520.6 [i]). Although New York courts have rejected the argument that merely existing

as an agent of an LLC makes an individual an "owner" within the meaning of the statute (*Mahmood v Mason Mgt. Servs. Corp.*, 2019 NY Misc LEXIS 4080, *12-13 [Sup Ct, NY County 2019]; *Siguencia v BSF 519 W. 143rd St. Holding LLC*, 2018 NY Slip Op 33000[U]; 2018 NY Misc LEXIS 5594, *4-5 [Sup Ct, NY County 2018]), here plaintiffs specifically assert that the individual defendants were "receiving or entitled to receive rent for the use and occupation of any housing accommodations owned by the Landlord LLCs" (Doc. 7 ¶ 16, 87) (*compare Akter v Zara Realty Holding Corp.*, Index No. 11164/ 2016 [Sup Ct, Queens County 2016]) (Doc. 9). Thus, according plaintiffs the benefit of every favorable inference, that branch of defendants' motion seeking dismissal of the complaint against the individual defendants is denied (*see Haygood v Prince Holdings 2012, LLC*, 2018 NY Slip Op 51182[U], 2018 NY Misc LEXIS 3361, *29 [Sup Ct, NY County 2018]; *560-568 Audubon Tenants Assoc. v 560-568 Audubon Realty, LLC*, 2017 NY Slip Op 31739[U], 2017 NY Misc LEXIS 3125, *4-5 [Sup Ct, NY County 2017]).

Moreover, New York Executive Law § 63(12) authorizes the OAG to commence an action to enjoin and seek restitution for fraudulent or illegal business activity against "*any person,*" and this authority has been broadly construed (*see People v Northern Leasing Sys., Inc.*, 60 Misc 3d 867, 872-873 [Sup Ct, NY County 2017]; *see generally State v Feldman*, 210 F Supp 2d 294, 300 [SDNY 2002]). Plaintiffs allege that the individual defendants owned and had control over the landlord LLCs and their alleged illegal activities (Doc. ¶ 15-51, 86-87), which this Court finds is sufficient under New York Executive Law § 63(12) to withstand dismissal of the OGA's claims against the individual defendants (*see generally People v Concert Connection*, 211 AD2d 310, 320 [2d Dept 1995], *lv dismissed* 86 NY2d 837 [1995]; *People v Apple Health & Sports Clubs, Ltd.*, 206 AD2d 266, 266-267 [1st Dep't 1994], *lv denied* 84 NY2d 1004 [1994]).

Defendants have also failed to establish their entitlement to dismissal of the third cause of action. They claim that this Court lacks subject matter jurisdiction over plaintiffs' third cause of action alleging improper key fees in violation of RSC § 2523.4 because PARs were filed by defendants in connection with these alleged violations which are still pending with the DHCR (Doc. 16 at 8-9). Specifically, defendants contend that "[t]enants from three of [d]efendants' premises previously filed substantively identical applications for a rent-reduction with [the DHCR], alleging that the Owner failed to issue additional keys to the entrance door of the respective buildings, after the lock was transitioned to a non-duplicable metal key door lock system. The Rent Administrator issued three substantively identical Orders Reducing Maximum/Legal Rent, and [d]efendants timely filed a [PAR] with respect to each of the Orders" (Docs. 16 at 9; 11, Exhibit E). Defendants maintain that, since the PARs are still pending with the DHCR, plaintiffs must first exhaust their administrative remedies before they can assert this cause of action (Doc. 16 at 8). However, this argument is without merit.

The DHCR is vested with authority to commence actions in this Court to enjoin violations of the RSL and RSC (*see* RSL § 26-516[e]; RSC § 2526.3), and the DHCR need not exhaust its own administrative remedies before it can exercise such authority (*see People by Vacco v Woodlawn Cemetery*, 173 Misc 2d 846, 847-848 [Sup Ct, Albany Cty 1997). Although "[o]ne who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law" (*Town of Oyster Bay v Kirkland*, 19 NY3d 1035, 1038 [2012], *cert denied* 568 US 1213 [2013]), the DHCR is not a party to the administrative proceedings concerning the pending PARs and, contrary to plaintiffs' contention (Doc. 16 at 9), it cannot file an article 78 proceeding against itself. Further, plaintiffs have failed to establish that

the OAG is required to resort to the administrative processes before commencing an action pursuant to Executive Law § 63(12).

With respect to the sixth cause of action, defendants rely on four decisions to argue that plaintiffs are collaterally estopped from asserting that the on-time discount rent provisions in the subject leases violate the RSC (Doc 16 at 10-11). It is well-established that the "doctrine of collateral estoppel, or issue preclusion, is a 'narrower species of res judicata,' which 'precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same'" (*Country-Wide Ins. Co. v Ospina*, 2019 NY Slip Op 30444[U], 2019 NY Misc LEXIS 773, *11 [Sup Ct, NY County 2019] [Freed, J.], *quoting Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). Since the OAG was not a party to these actions, the doctrine of collateral estoppel cannot apply against this defendant (*see Netzahuall v All Will LLC*, 145 AD3d 492, 493 [1st Dept 2016]; *Norddeutsche Landesbank Girozentrale v Tilton*, 2019 NY Slip Op 32470[U], 2019 NY Misc LEXIS 4609, *15 [Sup Ct, NY County 2019]; *Roell v Velez Org.*, 2010 NY Slip Op 30972[U], 2010 NY Misc LEXIS 1862, *31-32 [Sup Ct, NY County 2010]).

Further, the case law defendants provide does not preclude plaintiffs from alleging that the on-time discount provisions at issue here qualify as excessive illegal fees (*see Hillside Park 168 LLC v New York State Div. of Hous. and Cmty. Renewal*, Index No. 14/2018 [Sup Ct, Queens Cty 2019] [Leverett, J.] [affirming the DHCR's order that "the on-time discount rent clause is not a fixed preferential rent but an excessive illegal fee"] [Doc. 14]; *One Ninety Sixth St LLC v New York State Div. of Hous. and Cmty. Renewal*, Index No. 5070/2018 [Sup Ct, Queens Cty 2019] [Leverett, J.] [affirming that "the on-time discount rent clause is not a fixed preferential rent but an excessive late fee"] [Doc. 13]; *Kings Park 8809 LLC v New York State Div. of Hous. and Cmty.*

Renewal, Index No. 11593/2017 [Sup Ct, Queens Cty 2018] [Raffaele, J.] [affirming the DHCR's order that found that the subject lease included an impermissible on-time discount clause because it demanded a late fee greater than 5%] [Doc. 19, Appendix A]; *Zara Realty Holding Corp. v New York State Div. of Hous. and Cmty. Renewal*, Index No. 5223/2017 [Sup Ct, Queens Cty, 2018] [Raffaele, J.] [finding that the DHCR's determination that the discount rent was not a preferential rent, and that the legal regulated rent was to be rescinded and replaced by the discounted rent, was arbitrary and capricious and lacked a rational basis in the law and the record] [Doc. 19, Appendix A]). Thus, that branch of the motion seeking dismissal of the sixth cause of action is denied.

The remaining arguments are either without merit or need not be addressed given the findings above.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that defendants' motion to dismiss is denied in its entirety; and it is further

ORDERED that plaintiffs' counsel shall serve a copy of this order, with notice of entry, upon defendants within 30 days of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference at 80 Centre Street, Room 280, on September 8, 2020, at 2:30 p.m.; and it is further

ORDERED that this constitutes the decision of the Court.

4/29/2020
DATE

KATHRYN E. FREED, 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