# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. JAMES EDWARD D'AUGUSTE** **PART** **IAS MOTION 55EFM**

***Justice***

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STELLA QUINATOA AND ANA CABRERA, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,

Plaintiff,

- v -

HEWLETT ASSOCIATES, LP, KALED MANAGEMENT CORPORATION, CITY OF NEW YORK, MARIA SPRINGER, JACK JIHA

Defendant.

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**INDEX NO.** 151132/2018

**MOTION DATE** N/A, N/A

**MOTION SEQ. NO.** 001, 002

**DECISION ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 29, 30, 31

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the motion is

In this proposed class action, defendants the City of New York, Maria Torres-Springer and Jacques Jiha (collectively, the City) bring a pre-answer motion to dismiss under CPLR § 3211 (a) (2), (5), and (7) (Motion Sequence Number 001). Hewlett Associates, LP and Kaled Management Corporation (collectively, the Landlords), also move to dismiss pre-answer under CPLR § 3211 (a) (2) and (7) (Motion Sequence Number 002). The court consolidates these motions and resolves them as follows.

According to the complaint, which the court accepts as true for the purposes of this motion (*see Celentano v Boo Realty, LLC*, 160 AD3d 576, 577 [1st Dept 2018] [considering CPLR § 3211 (a) (7) motion]), plaintiffs Stella Quinatoa and Ana Cabrera reside in the Trafalgar Apartments

(Trafalgar) in Flushing, Queens (NYSCEF Doc. No. 12 [complaint], ¶¶ 8-9). Hewlett Associates, LP (Hewlett) is the owner and landlord of Trafalgar and Kaled Management Corporation (Kaled) is the building's manager (*id.*, ¶¶ 10-11). The City defendants –Torres-Springer, as Commissioner of the New York City Department of Housing and Public Development (HPD), and Jiha, the Commissioner of the New York City Department of Finance (DOF) implement the rent stabilization laws and tax programs at issue in this lawsuit (*id.*, ¶¶ 14-15).

Plaintiffs allege that defendants have violated the requirements of three programs. First, the New York Rent Stabilization Laws, which the State Legislature promulgated under the Emergency Tenant Protection Act of 1974 (ETPA) (N.Y. Unconsol. Law §§ 8621-34), applies to buildings with six or more units. The landlords of these buildings may only increase rents to the extent that the Rent Guidelines Board permits. On an annual basis, the Rent Guidelines Board sets a maximum permissible percentage rate for rent increases. In addition, it approves or disapproves applications for individual or building-wide increases when an apartment becomes vacant, when a landlord makes major capital improvements to the building, and when a landlord renovates a single apartment.

Second, under Administrative Code § 11-243, commonly referred to as "J-51" after its predecessor provision, landlords who undertake major capital improvements on their buildings receive tax abatements. The rent stabilization law applies to all apartments in the buildings, regardless of their pre-J-51 status. Where applicable, the landlords must notify renters that the 421-a or J-51 are about to expire and as a result the renters will lose their rent-stabilized status. If the landlord does not notify them in the proper manner, the apartment remains rent-stabilized.[1]

[1] Plaintiffs discuss RPTL § 421-a (421-a), from which the Landlords previously derived tax benefits, but, as discussed in footnote 2, they do not assert a claim based on this provision.

The third program is RPTL 467-b, which is implemented in New York City under N.Y.C. Administrative Code § 26-509. This provision of the city's administrative code is popularly known as SCRIE, a shorthand for "Senior Citizen Rent Increase Exemption." SCRIE freezes the rent of senior citizens over 62 who live in rent-stabilized housing and whose income falls below a specified level, so that the rent does not exceed the greater of 1) one-third of the household's aggregate disposable income or 2) the rent in effect immediately before the senior becomes eligible for the benefit. SCRIE is available to those fitting the requirements only after they apply for SCRIE benefits. Thus, the eligibility date for the purpose of this law is the date a qualified tenant applies for SCRIE (*see Nunez v Giuliani*, 91 NY2d 935 [1998]).

The Trafalgar Apartments were built around 1973 and the building contains 113 rental units (NYSCEF Doc. No. 1, ¶ 36). The Landlords filed for J-51 benefits in 2006 (*see* NYSCEF Doc. No. 11) and they allegedly received J-51 tax benefits commencing in 2008, if not earlier (NYSCEF Doc. No. 1, ¶ 39). According to the complaint, the Landlords have "systematically violated their obligations under the Rent Stabilization Laws . . . all the while reaping substantial tax benefits under the 421-a and J-51 programs" (*id.*, ¶ 40). As examples, the complaint notes that in 2017 only 14 of the 133 rental units were listed as rent-stabilized although the building was receiving J-51 benefits. It states that the Landlords did not notify the Trafalgar tenants that their apartments were rent-stabilized, and that the Landlords lied to tenants and others who asked about their units' rent-stabilized status. Also, the complaint states, because of these misrepresentations, senior citizen residents were unaware of their eligibility for SCRIE benefits (*id.*, ¶¶ 40-48).

In August 2017, the Landlords notified tenants, including the named plaintiffs, that they should have received leases for stabilized rents and that the Landlords had not provided notice of the apartments' statuses in the tenants' prior leases. Thus, the complaint asserts, the Landlords

acknowledged their failure to comply with J-51. As further stated in the complaint, the Landlords then sent checks, which they improperly stated provided full reimbursement for the overcharge, when in fact the Landlords only provided partial reimbursement. Additionally, the complaint alleges, those tenants who accepted the checks did not waive their right to seek full compensation (*id.*, ¶¶ 49-53).

The complaint asserts four "counts." First, plaintiffs allege that the Landlords overcharged the named plaintiffs and other tenants in violation of the Rent Stabilization Law. Plaintiffs seek full reimbursement of all overcharges, plus interest. The second count seeks a declaratory judgment that all of the rental units in the Trafalgar Apartments are subject to rent stabilization, that all class members are entitled to rent-stabilized leases, that all leases that do not comply with the Division of Housing and Community Renewal (DHCR) requirements are invalid, and that the class members need not pay rent until the Landlords provide proper leases. Plaintiffs also ask for declarations from this court as to the legal regulated rent for each apartment, and they seek "a permanent injunction against additional violations . . . of the Rent Stabilization Laws," to be regulated by an entity which will "audit and undertake an accounting of every apartment" and reform leases accordingly (NYSCEF Doc. No. 1, ¶ 117).

The third count relates to those class members who are eligible for SCRIE benefits. It asserts that SCRIE-eligible tenants could have applied for these benefits had they known of the rent-stabilized status of their apartments. Plaintiffs ask for a permanent injunction against the Landlords, which would prevent them "from charging any rent above the relevant SCRIE rent for units eligible for SCRIE and awarding damages in an amount no less than the difference between the rent paid by SCRIE-eligible tenants and the SCRIE rent for the entire period for which they would have been eligible for SCRIE."

The fourth and final count is against the City. According to the complaint, the City violated the New York Constitution's Gift Clause (NY Const art VIII, § 1), which prohibits the city from giving funds to individuals unless the gift furthers a public purpose. Because the Landlords did not treat the Trafalgar Apartments as subject to rent stabilization, the complaint states, the money the City gave to the Landlords constitutes a prohibited gift. The Gift Clause also gives rise to a taxpayer claim under General Municipal Law (GML) § 51, and the complaint seeks an order under GML § 51 mandating "the cessation of the entirely illegal payment of benefits to the Landlord[s] . . ." (NYSCEF Doc. No. 1, ¶ 127).

## *I. The City's Motion*[2]

### A. Arguments

The City contends that dismissal of the fourth count is proper because the complaint does not state a valid claim under GML § 51. It cites *Mesivta of Forest Hills Inst. v City of New York* (58 NY2d 1014, 1015 [1983]), which states that a claim only lies under GML § 51 "when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes" (citations and internal quotation marks omitted). As the complaint contains no specific allegations of waste and fraud, and does not argue that the City engaged in specific improper acts, the City states, the cause of action must be dismissed. Also, the City argues that a claim does not lie under New York Constitution's Gift Clause (NY Const art VIII, § 1) because J-51 has a public purpose (citing, inter alia, *Lavin v Klein*,

[2] The City also argued that plaintiffs' request for injunctive relief is moot to the extent that it relates to 421-a. However, plaintiffs clarify that the complaint does not seek relief under 421-a but instead discuss the City's failure to enforce 421-a as evidence of the City's "flagrant failure to enforce the Rent Stabilization Laws over the course of decades" (NYSCEF Doc. No. 29, pp 11-12). Thus, as the City acknowledges, its argument on that issue need not be addressed. Apparently for the same reason, the City does not address the statute of limitations argument in its reply.

12 AD3d 244, 244-45 [1st Dept 2004], *lv dismissed*, 4 NY3d 710, 4 NY3d 794 [2005]; *Landmark West! v City of New York*, 9 Misc 3d 563, 568-69 [Sup Ct, NY County 2005] [*Landmark West*]).

In opposition, plaintiffs state that their pleadings set forth a valid claim under GML § 51. They contend that the City's argument to the contrary relies on an overly restrictive construction of the law, which applies to prevent "any illegal official act . . . or to prevent waste" (NYSCEF Doc. No. 29, p 15). Therefore, it states, the City has violated the Gift Clause (*id.* [citing, inter alia, *Landmark West!*, 9 Misc 3d 563]). They argue that the City relies on distinguishable cases which relate to technical and procedural mistakes rather than "the kind of sustained constitutional breach alleged here" (NYSCEF Doc. No. 29, p 15). Finally, plaintiffs assert, a valid claim exists because the J-51 program, while serving a public purpose, the City has not administered it properly.

In reply, the City reiterates that dismissal of the fourth cause of action is appropriate. The Gift Clause prohibits it from spending funds that benefit individuals "'unless the expenditure is in furtherance of a public purpose and the municipality is contractually or statutorily required to do so'" (NYSCEF Doc. No. 30, p 3 [quoting *Matter of Schulz v Warren County Bd. of Supervisors*, 179 AD2d 118, 121-22 (3rd Dept), *lv denied*, 80 NY2d 754 (1992)]). It states that plaintiffs rely on cases in which the municipalities had no obligation to provide the challenged expenditures and the parties that received the expenditures performed no public service. In contrast, the City states, under J-51 it is required to provide tax benefits to the landlords who construct or improve residential buildings. According to the City, plaintiffs mistakenly believe that J-51's goal is the provision of rent-stabilized apartments. The City states that this belief is belied by the fact that condominiums and cooperative buildings participate in the program. Quoting *Matter of 31171 Owners Corp. v New York City Dept. of Hous. Preserv. and Dev.* (190 AD2d 441, 443 [1st Dept 1993]), the City states that J-51 supports "'major capital improvements, moderate rehabilitation

and conversion projects'" (NYSCEF Doc. No. 30, p 5). The City rejects the contention that J-51 envisions a quid pro quo relationship between a building owner and the City. Finally, the City states that because there is no constitutional violation, there is no GML § 51 claim.

**B. Analysis**

After careful consideration, the court grants the City's motion and dismisses the fourth count. First, the Court notes that plaintiffs raise some valid concerns. They are correct that "to be eligible to receive tax benefits under [J-51] . . . all dwelling units in buildings or structures converted, altered or improved shall be subject to rent regulation" (28 RCNY 5-03 [f] [1]). Moreover, the building must remain in compliance with the rent stabilization laws as long as the building receives J-51 benefits (28 RCNY 5-03 [f] [3]). Further, the Landlords acknowledged by their letters to the named plaintiffs and others that they wrongfully did not offer them rent-stabilized leases during the period in question. Thus, according to the complaint, the Landlords violated the terms of the program and the City failed to monitor their compliance. The complaint alleges that this failure is typical of the City's widespread failure to monitor landlords' compliance with the rent-stabilization mandate in the J-51 program. If true, this is a serious concern.

Nonetheless, the court dismisses this claim because plaintiffs have not asserted a proper legal basis upon which to challenge the City's administration of the program. Article VII, § 1 of the New York State Constitution prohibits cities from "giving and lending of public money to aid any private entity or undertaking" (*Bordeleau v State*, 18 NY3d 305, 314 [2011], *rearg denied*, 18 NY3d 918 [2012]). However, the prohibition only applies when the administrative action is "fraudulent or . . . represent[s] a use of public property or funds for entirely illegal purposes" (*Mesivta*, 58 NY2d at 1016; *see Thomas v New York City Dept. of Educ.*, 54 Misc 3d 1202 [A], *1, 2016 NY Slip Op 51810 [U] [Sup Ct, NY County 2016]). Accordingly, a municipality may

pay public funds when it has a legal or equitable obligation to do so (*Matter of Stephen B.*, 17 AD3d 584, 585 [2d Dept 2005]; *Matter of 1963 Elmwood Ave., Inc. v Tanzella*, 193 AD2d 1110, 1110-11 [4th Dept 1993]). In addition, there is no prohibition where the expenditures "further a public purpose, even if a private individual or entity derives an incidental benefit" (*Thomas*, 54 Misc 3d 1202 [A], at *2; *see Lavin*, 12 AD3d at 245). As the City did not give these tax breaks to the Landlords in furtherance of fraud or an illegal purpose, but provided the financial benefit pursuant to a legislative enactment "designed in the public interest," there is no violation (*Bordeleau*, 18 NY3d at 313 [2011]; *see Thomas v New York City Dept. of Educ.*, 151 AD3d 412, 413 [1st Dept 2017]).

The cases to which plaintiffs cite are distinguishable in that they involve situations in which the governmental authority provided benefits without an accompanying statutory or contractual obligation (*e.g., Matter of Serafin M.*, 17 AD3d 596, 597 [2d Dept 2005] [violation existed where, with no supporting authority, court required government agency to pay use and occupancy to the landlords]). Moreover, contrary to plaintiffs' contention, courts have repeatedly stressed the limited breadth of GML § 51 (*e.g., Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Hill v Giuliani*, 249 AD2d 28, 28 [1st Dept 1998]). Plaintiffs do not allege the type of governmental misconduct necessary to sustain a claim.

## *II. The Landlords' Motion*

### A. Arguments

In their motion for dismissal, the Landlords allege that there is no basis for a class action because the common legal and factual issues do not predominate, the claims of the named plaintiffs are not typical of those of the putative class members, and a class action is not the superior method for this litigation. There are 113 units at Trafalgar Apartments, nearly 100 of which allegedly are

part of the class, and each proposed class member's claim will require a different computation. The Landlords argue that this renders the proposed class action impracticable. According to the Landlords, the SCRIE claims add a distinct issue which itself shows a lack of commonality and typicality. In addition, the Landlords contend that DHCR has primary jurisdiction over rent disputes and therefore this court must dismiss the case.

Next, the Landlords state that the action is moot to the extent that it pertains to the request for declaratory and injunctive relief. They point to the fact that they wrote to the tenants in 2017, informed the tenants of the Landlords' failure to treat them as rent-stabilized, and issued refunds that purportedly cover the past overcharges. Moreover, the Landlords state that plaintiffs do not allege mutual mistake or mistake coupled with fraud, and therefore there is not a proper claim for reformation. They quote Justice Hagler's comment in *Chang v Bronstein Props., LLC* (NYSCEF Doc. No. 22, p 16) that a decision that establishes the lawful rent of an apartment renders a reformation cause of action superfluous. Finally, the Landlords state that there is no viable cause of action against defendant Kaled. They rely on the principal that Kaled acted as the managing agent for Hewlett, a disclosed principal. They cite *Paganuzzi v Primrose Mgt. Co.* (268 AD2d 213, 213-14 [1st Dept 2000]) and *West v B.C.R.E.-90 West St., LLC* (57 Misc 3d 428 [Sup Ct, NY County 2017], *revd on other grounds*, 161 AD3d 566 [1st Dept 2018]) in support.

Plaintiffs oppose this motion on several grounds. Initially, they contend that the motion is premature. Courts generally do not evaluate the class action status of a case until the plaintiffs move for class certification (NYSCEF Doc. No. 35, p 13 [citing *Downing v First Lenox Terrace Assoc.*, 107 AD3d 86, 92 (1st Dept 2013), *affd sub nom. Borden v 400 E. 55th St. Assoc.*, 24 NY3d 382 (2014)]). Prior to class certification, courts deny motions to dismiss class actions unless there is absolutely no legal basis for class relief. Plaintiffs state that "[t]he Landlord Defendants do not

come close to meeting that high bar" because plaintiffs have set forth a prima facie case (NYSCEF Doc. No. 35, p 14). Plaintiffs have shown commonality, they state, by setting forth common issues best resolved "on a classwide basis" (*id.*, p 15). Specifically, these issues are: whether the Landlord's purported wrongdoing applies generally to the class members, whether the Landlord's wrongful actions were part of a pattern and policy of misrepresentation, whether the Landlord's violated the Rent Stabilization Law, and whether and to what extent damages are awardable to the named plaintiffs and the other class members. (*id.*). In arguing to the contrary, plaintiffs state the Landlords raise purported difficulties, such as the determination of which tenants qualify as class members, which do not defeat plaintiffs' prima facie case or on this issue. Citing several examples (*e.g., Gerard v Clermont York Assoc. LLC*, 143 AD3d 478 [1st Dept 2016]; *Borden v 400 E. 55th St. Assoc., L.P.*, 105 AD3d 630 [2013], *aff'd*, 24 NY3d 382 [2014]), plaintiffs note that courts regularly certify classes in J-51 cases such as the one at hand. Moreover, they argue that the Landlords rely on cases that are distinguishable on the facts and the law.

Furthermore, plaintiffs assert that they have raised a prima facie issue as to typicality. In particular, they state, they allege on behalf of all putative class members that, while the Landlords received J-51 tax benefits, they unlawfully deregulated or did not grant stabilized status to apartments in the Trafalgar. As in *Dugan v London Terrace Gardens, L.P.* (45 Misc 3d 362, 377 [Sup Ct, NY County 2013] [*Dugan II*]), plaintiffs state, the purported wrongdoing of the Landlords arises from the same conduct and plaintiffs base their arguments on the same legal principals. They state that the inclusion of "one named Plaintiff" who asserts a SCRIE violation does not defeat class certification, because the claims need not be identical where, as here, all damages arise from the same misconduct. Moreover, if the inclusion of potential SCRIE tenants ultimately represents

a "divergence" between various claims, the court can define subclasses of the class (NYSCEF Doc. No. 35, p 19-20 [citing CPLR § 901 [a]; *Dugan II*, 45 Misc 3d at 380]).

Also, plaintiffs claim, a class action is the most efficient way to proceed. The allegations in the complaint, they argue, apply to a minimum of 100 class members, and therefore individual proceedings before the DHCR would waste administrative resources (NYSCEF Doc. No. 35, p 20 [citing *Dugan*, 45 Misc 3d at 380]). Practically, too, plaintiffs state that this method is superior because it allows for the resolution of smaller claims which might not be litigated on their own. This, plaintiffs state, potentially would deprive these litigations "'of a practical means to recover [damages and] would frustrate the intent' of the Rent Stabilization Laws" (NYSCEF Doc. No. 35, p 21 [quoting *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 98-99 [2nd Dept 1980]).

The Landlords' additional arguments, plaintiffs contend, are equally unpersuasive. Plaintiffs claim that the doctrine of primary jurisdiction does not preclude this lawsuit because 1) DHCR does not have exclusive jurisdiction over plaintiffs' challenges, 2) plaintiffs do not seek referral to DHCR, and 3) there are no prior pending administrative proceedings relating to the underlying issues (NYSCEF Doc. No. 35, p 22). Plaintiffs further note that the courts also have expertise in adjudicating overcharge claims and that, unlike DHCR, courts can preside over a class action and award the full relief plaintiffs request (*id.*, pp 22-24). Plaintiffs state that the Landlords primarily rely on cases involving an individual tenant's challenges (*id.*, pp 24-25).

Moreover, according to plaintiffs, the requests for declaratory and injunctive relief are not rendered moot by the facts that the Landlords acknowledged their violation of the rent stabilization laws and issued checks to the named plaintiffs and others. Although the Landlords' admission arguably narrows the issues, it does not eliminate them. Instead, plaintiffs state that the requests are valid to the extent that they seek a declaratory judgment as to the appropriate legal rents, a

declaration that any leases that do not include the proper lease forms are invalid, and an injunction that stays the Landlord from increasing the rent until this matter is fully adjudicated (*id.*, p 26). Plaintiffs argue that, based on their past history, the Landlords should not be trusted to comply with the Rent Stabilization Law going forward, thus necessitating declaratory and injunctive relief (*id.*, p 27 [relying on *Owner Operator Ind. Drivers Assn. v New York State Dept. of Taxation & Fin.*, 42 Misc 3d 1223 (A), *2, 2014 NY Slip Op. 50160 (U) (Sup Ct, Albany County 2014) (finding that complaint properly included request for prospective relief where defendants' violations allegedly were ongoing)]).

Plaintiffs further assert that they have a valid claim against Kaled. They state that even if, as the Landlords allege, Kaled was the managing agent for Hewlett, allegedly a disclosed principal, Kaled nonetheless is a proper subject of plaintiffs' claims for declaratory and injunctive relief to the extent that the complaint seeks to compel the agent to comply with the law (NYSCEF Doc. No. 35, p 27). Plaintiffs state that there is an issue of fact as to whether Hewlett's status as principal had been disclosed; in support of which they note that the notification letters plaintiffs received were from Kaled and that Kaled issued the refund checks. In addition, plaintiffs state that issues of fact exist as to whether Kaled was Hewlett's alter ego. In support of this contention, they note that the two entities share the same address, that Kaled is the designated agent and accepts process on Hewlett's behalf, that Kaled's CEO has a partial interest in Hewlet, and that Kaled acted directly on behalf of the building in the circumstances at issue here. Therefore, they state, and because issues of alter ego liability are not generally suited for summary disposition, plaintiffs are entitled to discovery on this issue (NYSCEF Doc. No. 35, p 29 [citing *Emposimato v CIFC Acquisition Corp.*, 89 AD3d 418, 420 (1st Dept 2011) (stating summary judgment should be denied if evidence indicates defendant was formed solely to acquire third-party corporation, had no independent

assets, and engaged in no additional business activities]). If the complaint insufficiently alleges alter ego liability, plaintiffs urge the court for leave to amend the complaint accordingly.

In reply, the Landlords reiterate that class actions may be dismissed before issue is joined where there is no legal basis for the complaint. They argue that here, where plaintiffs acknowledge that the apartments are now rent-stabilized, the only remaining problem is damages. This issue, according to the Landlords, is best resolved by DHCR rather than by "a massive building-wide rental history audit in this Court" (NYSCEF Doc. No. 40, p 6). The Landlords state that although plaintiffs cite to cases in which rent overcharge cases have been certified as class actions, these cases are distinguishable because they all involve interpretations of the Court of Appeals decision, *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]), which found that buildings receiving J-51 benefits could not take advantage of the luxury decontrol provision of the Rent Stabilization Law. Here, the Landlords state, all that is involved is the question of whether the named and putative class members have sustained computable damages. The Landlords contend that adjudicating this as a class action is not preferable to the tenants because they will forego the chance to obtain treble damages (NYSCEF Doc. No. 40, p 8 [citing *Quinn v Parkoff Operating Corp.*, 59 Misc 3d 1202 [A], *7, 2018 NY Slip Op 50349 [U] [Sup Ct, NY County 2018], *revd* 178 AD3d 850 [1st Dept 2019]).

The Landlords also reject plaintiffs' viewpoint that primary jurisdiction does not mandate dismissal (citing *Quinn*, 59 Misc 3d 1202 [A]; *Collazo v Netherland Prop. Assets LLC*, 155 AD3d 538, 538 [1st Dept 2017], *modified* -- NY3d -- [2020]). They further reject plaintiffs' argument that this court rather than DHCR must resolve this matter because it seeks declaratory and

injunctive relief. According to the Landlords, these issues are moot and therefore they are not a hindrance to DHCR resolution.[3]

In addition, the Landlords argue that plaintiffs have not set forth a viable argument in favor of keeping Kaled in the case. The Landlords note that the complaint contends that Hewlett acts through Kaled, its management company, that Kaled manages Trafalgar under its management agreement with Hewlett, and that Kaled is the manager of the building, and that these allegations defeat plaintiffs' own arguments for keeping Kaled in the lawsuit (NYSCEF Doc. No. 40, p 13 [quoting NYSCEF Doc. No. 1 (Complaint), ¶¶ 1, 11, and 37)]). Moreover, the Landlords' state, plaintiffs' alter ego argument is not even suggested anywhere in the complaint and plaintiffs' request to amend should be denied because it lacks merit.

**B. Analysis**

"CPLR 901 (b) permits otherwise qualified plaintiffs to utilize the class action mechanism to recover compensatory overcharges under *Roberts* . . . even though the Rent Stabilization Law of 1969 . . . does not specifically authorize class action recovery" (*Borden*, 24 NY3d at 389-90). Although damages may vary among the class members, this "does not per se foreclose class certification" (*Andryeyeva v New York Health Care, Inc.*, -- NY3d --, 2019 NY Slip Op 02258, *9 [2019]). It is appropriate to bring a class action with one or more representative plaintiffs if 1) the size of the class is so large that it is impracticable to include them all as named plaintiffs, 2) common questions of law or fact predominate over questions which only impact one or more class members, 3) the named plaintiffs assert claims which are typical of the claims of the class, 4) the representative plaintiffs are appropriate individuals who will fairly, adequately protect the class'

[3] The Landlords are incorrect in their assertion that plaintiffs contend that DHCR lacks the expertise to examine rent overcharge claims (NYSCEF Doc. No. 40, p 9). What plaintiffs actually argue is that the courts also have such expertise.

interests, and 5) a class action is the best and most efficient way to proceed (CPLR § 901 [a]). The court considers these five factors in its evaluation of whether a class action is appropriate (*Rabouin v Metro. Life Ins. Co.*, 25 AD3d 349, 350 [1st Dept 2006]).

Courts liberally construe the criteria in part because "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 [2010] [*Maul*] [citation and internal quotation marks omitted]). "The determination of whether or not a matter qualifies as a class action . . . rests within the sound discretion of the motion court" (*Rabouin*, 25 AD3d at 350).[4] Furthermore, because a consideration of practicality, numerosity, typicality, commonality, and representation triggers a factual analysis, it usually is premature to dismiss a class action before issue is joined and pre-certification discovery has occurred (*Downing*, 107 AD3d at 91). As the Landlord notes, if it is evident "from the complaint and from the affidavits that there was a matter of law no basis for class action relief," dismissal is proper even at this preliminary stage of the litigation (*id.*). In keeping with the liberal construction of the statute, however, this exception is narrow. Unless it "appear[s] conclusively from the complaint that, as a matter of law, there is no basis for class action relief," a pre-answer motion to dismiss must be denied (*Maddicks v Big City Props., LLC*, 163 AD3d 501, 502 [1st Dept 2018] [*Maddicks I*], *affd* 34 NY3d 115 [2019]).[5] Further, when evaluating a pre-answer motion to

[4] The appellate court "likewise is vested with the same discretionary power" (*Maul*, 14 NY3d at 509 [citation and internal quotation marks omitted]).

[5] Initially, the Landlords urged this court to follow the dissent in *Maddick I*. However, as the Court of Appeals has affirmed the majority decision since then, their argument is moot. Moreover, the dissenting opinion in *Maddicks I* did not strengthen the Landlords' position. Instead, the dissent found no legal basis for a class action because the complaint relied on several different overcharge theories for more than one building, and therefore a separate evidentiary and legal evaluation would be necessary for each tenant. Significantly, the dissent noted that with respect to the "fourth overcharge theory (deregulation of units in J-51 buildings), because landlords receive J-51 benefits with respect to buildings or complexes as a whole, class relief may potentially be appropriate on a *building-wide* or *complex-wide* basis" (*Maddicks I*, 163 AD3d at 506 [italics in original]).

dismiss, the court accepts the complaint's allegations as true and gives the plaintiff the benefit of all favorable inferences (*Maddicks v Big City Props., LLC*, 34 NY3d116, 123 [2019] [*Maddicks II*]; *Simkin v Blank*, 19 NY3d 46, 52 [2012]).

In the case at hand, the Landlords have not shown that, as a matter of law, this action is improper. Thus, the motion is premature. Plaintiffs have shown a prima facie case as to the elements with respect to their J-51-based claims. First, the proposed class exceeds 100 tenants. Therefore, the numerosity requirement is satisfied (*see, e.g., Stecko v RLI Ins. Co.*, 121 AD3d 542, 542-43 [1st Dept 2014] [class of more than 50 workers established numerosity]; *Casey v Whitehouse Estates, Inc.*, 36 Misc 3d 1225 [A], 2012 NY Slip Op 51471 [U] [Sup Ct, NY County 2012] [tenants residing in 72 apartments established numerosity]). Second, as plaintiffs note, all class members allegedly lived in apartments that should have been rent-stabilized for the duration of the J-51 benefit period. Any differences among the plaintiffs have to do with the computation of the proper rent and the overcharges and thus are secondary to the main challenge. This establishes a prima facie case as to commonality.

The Landlords' argument that common issues do not predominate over the tenants' individual claims relies on caselaw that is unpersuasive. After the Landlords argued their motion, for example, *Quinn* was reversed in light of the Court of Appeals decision in *Maddicks II*. Even the trial court's decision, moreover, was distinguishable. The proposed class in *Quin* included the tenants of four separate buildings (59 Misc 3d 1202 [A], *1). The court found that the class action should not proceed because there were two main categories of claims, there were four separate buildings, and the allegations of fraud differed with respect to different buildings and claimants (*id.*, p *7). As such, the court determined that "the lack of commonality and typicality [would] increase exponentially with the addition of the putative class members" (*id.*). The trial court

decision in *Maddicks v Big City Props., LLC* (2017 NY Slip Op 32385 [U] [Sup Ct, NY County 2017], *mod* 163 AD3d 501 [1st Dept 2018], *affd* 34 NY3d 116 [2019]) was modified as to the very point on which the Landlord relies, and the Court of Appeals affirmed the First Department's order. *Gaynor v Rockefeller* (15 NY2d 120 [1965]) relies on a class action statute, CPLR § 1005 (a), which has been repealed and replaced with the more liberal CPLR § 901 *et seq.* (*see Maul*, 14 NY3d at 509). Further, the Landlords misconstrue Justice Hagler's ruling in *Chang* (NYSCEF Doc. No. 22). The court dismissed the case, but Justice Hagler expressly noted that the dismissal was without prejudice as to this issue so that the plaintiffs could amend their complaint to conform to their arguments (*id.* at 25, lines 22-26). In the subsequent lawsuit, *Chang v Bronstein Props. LLC* (2019 NY Slip Op 30744 [U], *14-15 [Sup Ct, NY County 2019]), the trial court, relying on the First Department's decision *Maddicks I*, denied the defendants' motions for dismissal of the class action as premature. Finally, as noted above, the Court of Appeals likewise found the dismissing a similar class action at the pleading stage to be premature. Of particular relevance to this point, the Court stressed that commonality is not the same as universality, and individual differences among the claims are not per se fatal to the proposed class action (*Maddicks II*, 34 NY3d at 125).

The Landlords do not appear to object to the J-51 claims on the ground of typicality. Instead, the Landlords point out that one of the named plaintiffs, Stella Quinatoa, alleges that because the Landlords did not inform her that her apartment was rent-stabilized, she was deprived of the opportunity to apply for SCRIE benefits. The SCRIE claim, they note, is not typical of all of the potential plaintiffs. The Landlords are correct on this point, but so are plaintiffs in their argument that, if appropriate, those tenants who have claims under J-51 and SCRIE may be divided into a subclass (NYSCEF Doc. No. 35, p 19 [citing CPLR § 906]). As plaintiffs' argument

suggests, courts have "considerable flexibility in overseeing a class action" once the class is certified (*Maul*, 14 NY3d at 513). Here, the claims asserted typify those of the class as a whole to the extent that they arise from the same alleged misconduct (*see Stecko v FLI Ins. Co.*, 121 AD3d 542, 543 [1st Dept 2014]). In light of these principles – and of the fact that, at present, it is unclear how many putative plaintiffs would have been eligible for SCRIE – it is more prudent to evaluate typicality following the joinder of issue and pre-certification discovery.

As plaintiffs assert, courts examine a variety of factors when it determines whether a class action is a superior method of litigation (NYSCEF Doc. No. 35, p 20). Plaintiffs present a compelling argument as to why a class action may be the superior method of litigation. As the court in *Dugan II* stated, the numerosity of the proposed class and the money it would cost to litigate the proceedings individually militate in favor of proceeding as a class (*Dugan* II, 45 Misc 3d at 380). In addition, as the court in *Dugan II* stated, it is more efficient and apt to devise a uniform formula for calculating overcharges and determining other issues (*id.*). Furthermore, "[b]ecause these questions relating to liability are common and predominate for the entire class, a class action on liability conserves judicial resources even if . . . the use of subclasses or a special master" is necessary to make individualized assessments (*id.*). As plaintiffs also note, a class action arguably is a superior method because it enables all class members to seek relief without the potentially prohibitive cost of an individual challenge (NYSCEF Doc. No. 35, p 21 [quoting *Casey*, 36 Misc 3rd 1225 (A), *4 (Sup Ct, NY County 2012) ("When class members' claims are small in value, individual litigation simply is not a realistic prospect") (citation and quotation marks omitted)]).

The Landlords' argument that a class action is an inferior method of adjudication, in contrast, is not persuasive. They rely on the trial court order in *Quinn*, which, as previously noted,

has been reversed. They also point to the fact that a class action does not afford the tenants the right to pursue treble damages. This argument has no weight because inclusion in the class litigation is not mandatory. Those who wish to pursue individual claims, including treble damages, can opt out of the class (*see Downing*, 107 AD3d at 89). Thus, defendants have not demonstrated that, as a matter of law, a class action is the inferior way to proceed.

Furthermore, the doctrine of primary jurisdiction in rent overcharge cases has recently been eliminated. The Court of Appeals in *Collazo v Netherland Property Assets LLC* (-- NY3d --, 2020 N.Y. Slip Op. 02128 [2020]) addressed the issue of primary jurisdiction and found that the Housing Stability and Tenant Protection Act of 2019 (HSTPA) provides that "'[t]he courts and [DHCR] shall have concurrent jurisdiction, subject to the tenant's choice of forum (L 2019, ch 36, Part F, §§ 1, 3)'" (*id.* at *1). The *Collazo* court then found that "plaintiffs' choice of forum controls and these claims should be adjudicated in Supreme Court." (*id.*) Judge Rivera, who dissented in part, also concurred with the majority's effect elimination of the doctrine of primary jurisdiction: "I agree with the majority that under the Housing Stability and Tenant Protection Act of 2019 (L 2019, ch 36, Part F, §§ 1, 3), which applies here, 'plaintiffs' choice of forum controls,' meaning their claims must be adjudicated in Supreme Court." (*id.* at *2).

The court dismisses the claims as they relate to Kaled, but it does so without prejudice. At present, the complaint alleges that Kaled acted as the agent of Hewlett, and, as the Landlords claim, this is inconsistent with plaintiffs' current argument that Kaled held itself out as principal. There also is no allegation in the pleadings that Hewlett's identity as owner was undisclosed. In addition, the contention that Kaled is Hewlett's alter ego is entirely new and there is no basis for that theory in the complaint as it currently stands. However, upon a showing that the claim is not "palpably improper," plaintiffs may move for leave to amend the complaint to include an alter ego theory

(*see Crossbeat N.Y., LLC v LiiRN, LLC*, 169 AD3d 604, 604 [1st Dept 2019] [noting standard for allowing or denying amendment]).

## *III. Conclusion*

Based on the above, therefore, it is

ORDERED that motion sequence number 001 is granted, and the action as against the City defendants is severed and dismissed; and it is further

ORDERED that motion sequence number 002 is granted to the extent that it seeks dismissal of the claims against Kaled Management Corporation, and the action as against this defendant is severed and dismissed; and it is further

ORDERED that the remainder of motion sequence number 002 is denied, and the action shall continue as against Hewlett; and it is further

ORDERED that the caption is amended to reflect the dismissals, and the action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 55

STELLA QUINATOA and ANA CABRERA, on behalf of themselves and others similarly situated,

Plaintiffs,

Index No.: 151132/2018

- against -

HEWLETT ASSOCIATES, LP,

Defendant.

And it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the additional parties.

5/3/2020
DATE

JAMES EDWARD D'AUGUSTE, J.S.C.

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|---|---|---|---|---|---|---|---|
| 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 |