SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART** **58**

Justice

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ANDREW KOZAK, DANIEL PORVIN, DARLA STACHECKI, MONIQUE SAFFORD, MICHAEL MAHER, ANA SUSSMANN

Plaintiff,

- v -

KUSHNER VILLAGE 329 EAST 9TH, LLC, WESTMINSTER MANAGEMENT,

Defendant.

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INDEX NO. 157448/2020

MOTION DATE 05/02/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 133

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

This action involves the claims of plaintiffs related to their tenancy in defendants' buildings located at 329-335 East 9th Street in Manhattan (premises). By notice of motion, plaintiffs move for an order certifying a class and subclasses, and appointing their counsel, Grimble & LoGuidice, LLP and the Law Offices of Jack Lester, Esq., as class co-counsel. Defendants oppose and, by notice of cross motion, move for an order summarily dismissing the class action complaint. Plaintiffs oppose the cross motion.

I. PERTINENT BACKGROUND

In September 2020, plaintiffs commenced the instant action against their landlord, Kushner Village 329 East 9th LLC, and their management company, Westminster Management a/k/a Westminster Management, LLC a/k/a Westminster City Living. They allege that due to defendants' construction of new penthouses on the roofs of the buildings in 2015, defendants were required to obtain from the Department of Buildings (DOB) new certificates of occupancy

(COs). Instead, plaintiffs contend, defendants obtained temporary COs from 2015 to the present, in order to avoid having to comply with DOB's requirements for obtaining non-temporary COs.

By doing so, according to plaintiffs, defendants deliberately circumvented fire safety and other protections required by the DOB, including failing to install operable sprinklers and to legalize the height of the existing boiler chimney that services the premises, thereby threatening the lives and safety of tenants. Plaintiffs seek declaratory and injunctive relief, including an injunction barring defendants from collecting rent until the safety issues are corrected and permanent COs are obtained. (NYSCEF 1). Defendants filed their answer in November 2020. (NYSCEF 9).

In November 2020, plaintiff moved for an injunction related to fire safety code violations existing on the premises, as well as other relief. By decision and order dated December 2, 2020, the injunction was denied on the ground that plaintiffs failed to demonstrate that irreparable injury would result absent the injunction. (NYSCEF 39).

II. MOTION FOR SUMMARY JUDGMENT

As the summary judgment motion may be dispositive, it is addressed first.

A. Contentions

Defendants argue that plaintiffs have no viable, cognizable cause of action related to the temporary COs, as there is nothing illegal about not having a permanent, rather than temporary, CO, and that, in any event, plaintiffs may not attack the DOB's actions or inactions in this proceeding. Rather, plaintiffs must pursue their grievance administratively. (NYSCEF 98).

For the same reasons, to the extent this action may be deemed an Article 78 proceeding, defendants argue that plaintiffs' failure to name DOB as a party and/or to exhaust their administrative remedies is fatal to their claims. (*Id.*).

Plaintiffs assert that summary judgment is premature, given that no discovery aside from pre-class certification discovery has been exchanged. They contend that they have a legally actionable claim, and deny that they are attempting to collaterally attack the DOB's determinations. Rather, they allege that they are seeking an injunction directing defendants to complete the necessary work, correct any violations, and apply to the DOB for a permanent CO. (NYSCEF 103).

In reply, defendants deny that discovery is necessary, and observe that plaintiffs have not identified what discovery they seek. They otherwise reiterate their prior arguments. (NYSCEF 128).

B. Analysis

By seeking an order compelling defendants to apply for a permanent CO, plaintiffs, in effect, are requesting a mandatory injunction, which requires the showing of extraordinary circumstances (*Balay v Manhattan 140 LLC*, 204 AD3d 491 [1st Dept 2022]). Plaintiffs describe their action as "a request for injunctive relief to force the Defendants to comply with the law and the requirements for a permanent CO." (NYSCEF 103, p.2). However, they cite no authority for the proposition that defendants may be compelled, as a matter of law, to obtain a permanent CO within any specific timeframe, or that their renewal of the TCOs is either illegal or inappropriate. Indeed, the fact that the DOB continues to renew the TCOs suggests that defendants are in compliance with DOB rules and regulations.

Moreover, in *Martin v Chelsea Hotel Owner, LLC*, the Appellate Division, First Department dismissed the plaintiff-tenant's cause of action seeking an order requiring the landlord to modify the building's CO to conform to an alleged reclassification order, finding that the claim should have been raised in the first instance before the appropriate agency. The Court

also implied that the plaintiff improperly sought injunctive relief without first exhausting administrative remedies. (191 AD3d 534 [1st Dept 2021]).

Here, similarly, to the extent that plaintiffs believe that the DOB should not have granted defendants TCOs due to the existence of fire safety violations, their remedy is with the DOB.

To the extent that plaintiffs seek damages related to unsafe conditions existing in their own apartments, defendants demonstrate that plaintiffs have raised breach of warranty of habitability in their defense of the non-payment proceedings brought against them by defendants, and those claims are best adjudicated in those proceedings. (*See eg, 103rd Funding Assocs. v Salinas Realty Corp.*, 276 AD2d 340 [1st Dept 2000] *lv denied in part and dism in part*, 96 NY2d 851 [2001] [civil court is preferred forum for resolution of warranty of habitability cases]).

Plaintiffs do not specify what discovery they seek in order to defend against defendants' motion, and otherwise raise no triable issues as to the viability of their claims.

Given this result, plaintiffs' motion for class certification is denied. (*Gridley v Turnbury Vil., LLC*, 196 AD3d 95 [2d Dept 2021], *lv denied*, NY3d [2021]). Accordingly, it is hereby

ORDERED, that plaintiffs' motion for class certification is denied; and it is further

ORDERED, that defendants' cross motion for summary judgment is granted, and the complaint is dismissed in its entirety, and the clerk is directed to enter judgment accordingly.

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11/10/2022
DATE

DAVID B. COHEN, J.S.C.

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