

Deleon v 560-568 Audubon Realty, LLC

2023 NY Slip Op 34158(U)

December 1, 2023

Supreme Court, New York County

Docket Number: Index No. 154546/2022

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. NANCY M. BANNON PART 42

Justice

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INMACULADA DELEON, RUFINO DISLA, GRISAIDA
FERNANDEZ, IDALMI MERCADO,

Plaintiffs,

INDEX NO. 154546/2022

MOTION DATE 01/31/2023

MOTION SEQ. NO. 001

- v -

560-568 AUDUBON REALTY, LLC, HAYCO
CORPORATION, FRED HAY, ALEX HAY, ALFONSO
DEJESUS, RUBY ECHEVARRIA,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for DISMISSAL.

In this rent overcharge action commenced by tenants of 560-568 Audubon Avenue in Manhattan (the Building), the defendants 560-568 Audubon Realty, LLC, Hayco Corporation, Fred Hay, and Alex Hay (the Defendants), the owners and/or managers of the Building move, pr-
answer, pursuant to CPLR 3211(a)(7), to dismiss the plaintiffs’ second cause of action alleging
violations of New York General Business Law (GBL) § 349(a), third and fourth causes of action
seeking declaratory and injunctive relief, tenth cause of action alleging violations of the federal
Residential Lead-Based Paint Hazard Reduction Act (RLPHRA), 42 U.S.C. § 4852d, and
eleventh cause of action for attorneys’ fees to the extent it is based upon the violation of the
RLPHRA; and, pursuant to CPLR 3211(a)(5), to dismiss as time-barred all causes of action
asserted by plaintiff Idalmi Mercado to the extent they relate to Mercado’s lease of apartment 7C
in the Building. The plaintiffs oppose the motion. The motion is granted in part.

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-52 (2002). To determine whether a cause of action is adequately stated, the court must "liberally construe" the pleading, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference, and determine only whether the facts, as alleged, fit within any cognizable legal theory. Id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 (2013); Simkin v Blank, 19 NY3d 46 (2012); Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 W. 232nd Owners Corp. v Jennifer Realty Co., supra, at 152 (internal quotation marks omitted); see Leon v Martinez, supra; Guggenheimer v Ginzburg, 43 NY2d 268 (1977).

The defendants' motion to dismiss the plaintiffs' second cause of action alleging violations of GBL § 349(a) is granted. GBL § 349(a) prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." To successfully assert a claim under the statute, a plaintiff must allege a deceptive act or practice that is "consumer oriented." See City of New York v Smokes-Spirits.Com, Inc., 12 NY3d 616, 621 (2009). "Deceptive acts or practices may be considered 'consumer oriented' when they have a broad impact on consumers at large." Flax v Lincoln Nat. Life Ins. Co., 54 AD3d 992, 994 (2nd Dept. 2008), citing Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, 85 NY2d 20, 25 (1995). "In contrast, private contract disputes which are unique to the parties do not fall within the ambit of the statute." Id. at 994-95.

Here, the plaintiffs' allegations of unlawfully deceptive acts and practices all relate to their rent overcharge claims, specifically to allegedly fraudulent misrepresentations concerning the proper rent for their individual apartments. As such, the plaintiffs present only private disputes between landlords and tenants rather than consumer-oriented conduct aimed at the public at large, as required to state a GBL § 349 claim. See Haygood v Prince Holdings 2012 LLC, 186 AD3d 1157, 1158 (1st Dept. 2020) (GBL § 349 claim in rent overcharge case should have been dismissed because it concerned a private dispute rather than consumer-oriented conduct aimed at the public at large); Sutton Apts. Corp. v Bradhurst 100 Dev., LLC, 107 AD3d 646, 648 (1st Dept. 2013) (GBL § 349 claim was properly dismissed because the action was limited to the parties in the subject building and did not concern the public at large); Aguaiza v Vantage Props., LLC, 69 AD3d 422, 423 (1st Dept. 2010) (GBL § 349 claim was properly dismissed because it presented only private disputes between landlords and tenants); see also Collazo v Netherland Prop. Assets LLC, 35 NY3d 987, 991 (2020) (affirming dismissal of GBL § 349 claim in rent overcharge case where plaintiffs failed to allege "affirmative conduct that would tend to deceive consumers").

Therefore, the branch of the defendants' motion seeking to dismiss the plaintiffs' second cause of action for violations of GBL § 349 is granted.

The plaintiffs' third and fourth causes of action for declaratory and injunctive relief are likewise subject to dismissal. These causes of action seek an order (1) declaring that the initial leases issued to the plaintiffs, and the rent registrations filed by the defendants with the DHCR for the plaintiffs' individual apartments, were illegal and fraudulent, and (2) enjoining the defendants to issue the plaintiffs new leases at the proper stabilized rents, and to permanently refrain from engaging in the illegal and fraudulent practices alleged in the complaint. These

causes of action, insofar as they seek declaratory relief, are duplicative of, *inter alia*, the plaintiffs' first cause of action for fraud, which likewise alleges the illegal and fraudulent nature of the plaintiffs' initial leases and the rent registrations filed by the defendants for the plaintiffs' individual apartments. Further, these claims for injunctive and declaratory relief fail because the plaintiffs have an adequate remedy at law in the form of the monetary damages they seek for the defendants' alleged rent overcharges in the first cause of action for fraud and the fifth and sixth causes of action for overcharge and willful overcharge. See Coleman v Kirby, 201 AD3d 402, 403 (1st Dept. 2022); El Toro Group, LLC v Bareburger Group, LLC, 190 AD3d 536, 537 (1st Dept. 2021); Regini v Bd. of Managers of Loft Space Condo., 107 AD3d 496, 497 (1st Dept. 2013).

Moreover, as noted in the complaint, the defendants' allegedly fraudulent inflating of rents for apartments in the Building was the subject of an investigation by the Office of the Attorney General of the State of New York, which was resolved pursuant to an Assurance of Discontinuance (AOD) signed by the defendants and dated January 24, 2022. Pursuant to the AOD, which the plaintiffs attached as an exhibit to the complaint, the defendants agreed, *inter alia*, to refund alleged overcharges; reduce the legal regulated rents for all apartments in the Building, including those of the plaintiffs herein; register the new rents with DHCR; and not to engage in future conduct in violation of any applicable laws, including the Rent Stabilization Law and Rent Stabilization Code. Notably, the plaintiffs do not allege that the defendants breached or failed to comply with the terms of the AOD, nor do the plaintiffs allege any wrongdoing subsequent to the date of the AOD. As such, the third and fourth causes of action seek to enjoin conduct that has allegedly already ceased. No cognizable cause of action is alleged.

Therefore, the branch of the defendants' motion seeking to dismiss the plaintiffs' third and fourth causes of action for declaratory and injunctive relief is granted.

The tenth cause of action alleging violations of the RLPHRA is also subject to dismissal. The RLPHRA requires, as relevant here, that residential landlords provide to lessees a lead hazard information pamphlet and disclose the presence of any known lead-based paint hazards, and "creates a private right of action in favor of purchasers or lessees who incur lead-related damages." Hamilton v Miller, 106 AD3d 1476, 1477 (4th Dept. 2013); see 42 USC § 4852d(b)(3). Although the court has found no binding authority directly on point, federal district courts have consistently held that allegations of actual damages caused by a violation of the statute are required to state a claim under the RLPHRA. See Smith v. Coldwell Banker Real Est. Servs., 122 F. Supp. 2d 267, 274 (D. Conn. 2000) (RLPHRA provides for "private enforcement by means of civil actions brought by individuals who sustain actual damage" caused by violations of the statute); Sipes ex rel. Slaughter v Russell, 89 F Supp 2d 1199, 1202 (D. Kan. 2000) (RLPHRA "provide[s] a private cause of action for *compensatory* damages") (emphasis added); Huang v. Phan, No. 21-CV-0057, 2021 WL 7707759, at *2 (E.D. Pa. May 26, 2021), aff'd, No. 21-2040, 2022 WL 2752218 (3d Cir. July 14, 2022); Christian v. Warwick Realty, LLC, No. CA 14-152 S, 2014 WL 2434626, at *4 (D.R.I. May 29, 2014); Kaye v Acme Invs., Inc., No. 08-12570, 2008 WL 5188712, at *3 (E.D. Mich. Dec. 8, 2008); McCready v Main St. Tr., Inc., No. 07-CV-2096, 2008 WL 3200651, at *3 (C.D. Ill. Aug. 5, 2008); see also Hamilton v Miller, supra. Here, the plaintiffs do not allege any actual, non-speculative damages as a result of the defendants' alleged violations of the RLPHRA. Again, no cognizable cause of action is alleged.

Therefore, the branch of the defendants' motion seeking to dismiss the plaintiffs' tenth cause of action for violations of the RLPHRA is granted.

Because the plaintiffs' RLPHRA claim is dismissed, the branch of the defendants' motion seeking to dismiss the plaintiffs' eleventh cause of action for attorneys' fees to the extent it is based upon the alleged violation of the RLPHRA is also granted.

The defendants also seek to dismiss all causes of action asserted by plaintiff Idalmi Mercado to the extent they relate to Mercado's lease of apartment 7C in the Building. In response, the plaintiffs contend that the court should disregard this branch of the defendants' motion because the complaint does not actually advance any claims based on Mercado's residency in apartment 7C. According to the plaintiffs, the complaint includes factual allegations regarding Mercado's residency in apartment 7C only to provide additional context for the claims asserted based on her subsequent residency in apartment 4C. The defendants, correctly in the court's view, respond that the complaint, as written, does indeed appear to implicitly assert claims based on Mercado's residency in apartment 7C. As such, the court will deem the plaintiffs' contention on this motion that they are not asserting any claims based on Mercado's residency in apartment 7C to be a withdrawal of any such claims to the extent they are asserted in the complaint. Because any such claims are deemed withdrawn, the branch of the defendants' motion that seeks the dismissal of these claims is moot.

The disposition of this motion leaves the following causes of action for the defendants to answer. - first (fraud), fifth (overcharge), sixth (willful overcharge), seventh (breach of warranty of habitability), eight (order to perform repairs), and ninth (breach of lease).

Accordingly, upon the foregoing papers, it is.

ORDERED that the motion of defendants 560-568 Audubon Realty, LLC, Hayco Corporation, Fred Hay, and Alex Hay to dismiss pursuant to CPLR 3211(a)(7), is granted to the extent that the second, third, fourth, and tenth causes of action of the complaint, as well as so much of the eleventh cause of action as is based upon the violation asserted in the tenth cause of action, is granted, those claims are hereby dismissed, and the motion is otherwise denied; and it is further

ORDERED that, to the extent the plaintiffs' complaint asserts claims based upon plaintiff Idalmi Mercado's lease of apartment 7C in the Building, those claims are deemed withdrawn; and it is further

ORDERED that the defendants shall answer the remaining causes of action within 30 days of the date of this order, and it is further

ORDERED that counsel shall appear for a status conference on February 8, 2024, at 12:00 p.m., as previously scheduled, and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.



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

	12/1/2023 <hr style="width: 100%;"/> DATE	
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE