SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PHAEDRA F. PERRY** **PART** **35**

Justice

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JDRA, LLC, LLC a/k/a/ J.D. REALY ASSOCIATES, LLC

Plaintiff,

- v -

DELIA O'SHEA, NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Defendant.

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INDEX NO. 160729/2024

MOTION DATE 02/21/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

Defendant New York State Division of Housing and Community Renewal (DHCR, Defendant) moves for an Order pursuant to CPLR 3211 (a)(2) and (a)(7) to dismiss Plaintiff's Complaint for lack of subject matter jurisdiction and for failure to state a cause of action. Plaintiff JDRA, a/k/a J.D. REALTY ASSOCIATES, LLC (Plaintiff) opposes the motion. For the reasons discussed below, the motion to dismiss is granted.

BACKGROUND

This proceeding concerns a Tenant Protection Unit (TPU) Audit determination regarding the apartment located at 200 Riverside Drive, Apartment 8A, New York, NY 10025, (Apartment). Plaintiff is the owner of the Apartment.

The Notice and Audit Determination (Audit) found that the submitted documentation by Plaintiff, did not support the legal rent registered for the 2020 registration year. The Audit also found that the lease was subject to the provisions of the Housing Stability and Tenant Protection Act of 2019 (HSTPA) and instructed Plaintiff to take remedial actions. This included *inter alia*, refunding or crediting the current tenant any rent collected in excess of $1,785.51 per month plus interest calculated on the rent established by the TPU audit from the date the tenant took

occupancy. In addition, the Audit warned that if the owner did not correct the rent disparity, TPU reserved the right to commence an overcharge proceeding before the Office of Rent Administration (ORA) which could result in the imposition of treble damages or other penalties. The letter further warned that the tenant could commence such a proceeding as well.

The Plaintiff requested a 30-day extension to review and respond to the Audit, which was granted by TPU. Instead of reviewing and responding to the Audit, Plaintiff commenced the instant proceeding, naming DHCR and the current tenant, Delia O'Shea as defendants.

DHCR claims they have since referred the overcharge complaint to ORA so they can conduct their own *de novo review* of the overcharge complaint and issue a final determination of the overcharge. They contend that if Plaintiff is not satisfied with the ORA decision; Plaintiff could then seek an administrative appeal by filing a Petition for Administrative Review (PAR) where arguments on the merits would be heard. If the Plaintiff was again not satisfied with the PAR decision, at that point, having fully exhausted its administrative remedies, an Article 78 proceeding in Supreme Court would then be appropriate.

In its opposition, Plaintiff challenges the constitutionality of DHCR's policy which requires the retroactive application of the HSTPA. They argue that the true issue is whether the Apartment is rent stabilized. Additionally, they argue that "the exhaustion rule…need not be followed… when an agency's action is challenged as unconstitutional or wholly beyond its grant of power or when resort to an administrative remedy would be futile or when its pursuit would cause irreparable injury".

DISCUSSION

"'It is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law'" (*Matter of Welch v New York State Div. of Hous. & Community Renewal*, 287 AD2d 725, 726 [2d Dept 2001], quoting *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]; *Town of Oyster Bay v Kirkland*, 19 NY3d 1035, 1038 [2012]).

While Supreme Court has the authority to adjudicate such disputes "by virtue of its constitutional role as a court of general original jurisdiction [this] does not prohibit the Legislature from conferring exclusive original jurisdiction upon an agency in connection with the administration of a statutory regulatory program" (*Sohn v Calderon*, 78 NY2d 755, 766–767

[1991]; *Uniformed Firefighters Assn. v City of New York*, 79 NY2d 236, 241–242 [1992]). "In situations where the Legislature has made that choice, the Supreme Court's power is limited to article 78 review, except where the applicability or constitutionality of the regulatory statute, or other like questions are in issue (*Sohn*, 78 NY2d at 767; *Katz 737 Corp. v Cohen*, 104 AD3d 144, 149 [1st Dept 2013], *lv denied* 21 NY3d 864 [2013]). Where the "issues to be decided in this action involve factual evaluations which must be made based almost entirely upon the interpretation of DHCR orders pertaining to the premises, [a plenary action in Supreme Court is inappropriate, but the proper forum is rather] a determination by DHCR" (*Wilcox v Pinewood Apt. Assoc., Inc.*, 100 AD3d 873, 874-875 [2d Dept 2012]; *Wong v Gouverneur Gardens Hous. Corp.*, 308 AD2d 301, 303-304 [1st Dept 2003]).

In this case it is undisputed that no further action was taken by TPU after the Audit was issued. It is further undisputed that Plaintiff did not seek a review of the Audit and instead filed the instant proceeding.

The Audit determination was not a final determination, and Plaintiff did not proceed to the ORA for further adjudication. Thus, Plaintiff has not exhausted its administrative remedies and seeks to circumvent the process by filing the instant proceeding. Plaintiff will have the opportunity to present its case at the ORA hearing and again, if dissatisfied with the OAR decision, by filing a PAR, none of which Plaintiff has attempted to do.

To the extent that Plaintiff challenges the constitutionality of DHCR's policies and argues that the real issue is whether the Apartment is rent stabilized, these arguments are misplaced.

It is well settled that "the question of whether a particular space is subject to rent stabilization falls within DHCR's administrative expertise" (*Gracecor Realty Co. v Hargrove*, 90 NY2d 350, 357 [1997]; accord *Davis v Waterside Hous. Co.*, 274 AD2d 318 [1st Dept 2000], lv denied 95 NY2d 770 [2000])." [in an action in which the plaintiffs-tenants sought a preliminary injunction to prevent defendant cooperative from withdrawing from the Mitchell-Lama program, which plaintiffs feared would cause their apartments to lose rent-stabilized status, the court held that under the doctrine of primary jurisdiction, judicial review of these matters should await exhaustion of administrative remedies, since primary administrative review is particularly important where the matters under consideration are inherently technical and peculiarly within the expertise of the agency]).

Moreover, "[a] constitutional claim that may require the resolution of factual issues reviewable at the administrative level should initially be addressed to the administrative agency having responsibility so that the necessary factual record can be established. Moreover, merely asserting a constitutional violation will not excuse a litigant from first pursuing administrative remedies that can provide the requested relief" (*Matter of Schulz v State of New York*, 86 NY2d 225, 232 [1995], *lv denied* 87 NY2d 803 [1995] [citations omitted]).

CONCLUSION

The Court agrees with DHCR that the TPU audit is not a final determination, and Plaintiff has failed to exhaust its administrative remedies, especially where as here, the Audit could not lead to enforcement against the Plaintiff without further proceedings, namely, a *de novo* review before the ORA.

The Court has reviewed Plaintiff's remaining contentions and finds them unavailing. It is therefore

ORDERED that DHCR's motion to dismiss is granted and the Complaint is dismissed as to Defendant, New York Sate Division of Housing and Community Renewal **only**.

10/9 /2025
DATE

PHAEDRA F. PERRY-BOND, J.S.C.

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