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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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JACK BEHTKE,

Plaintiff, INDEX NO. 104552/05

-against-

536 WEST 47TH STREET ASSOCIATION LLC
and JAMES KINSEY,

Defendants.

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JOAN A. MADDEN, J.:

In this action involving a dispute between a former residential tenant and his landlord, the defendant landlord moves for an order pursuant to CPLR 3211(a)(1) dismissing the action on the ground that plaintiff has elected his remedy by filing a rent overcharge complaint with the New York State Division of Housing and Community Renewal ("DHCR"), and alternatively, and order pursuant to CPLR 3211(a)(4) dismissing the action on the ground that there is another action pending between the same parties, for the same cause of action, before the DHCR.

The complaint asserts three causes of action. The First Cause of Action for rent overcharge seeks $46,800 in damages and treble damages in accordance with the provisions of the Rent Stabilization Law. In the Second Cause of Action, plaintiff asserts that defendants were not lawfully entitled to collect rent in the absence of a proper certificate of occupancy, and seeks a refund of the $24,000 he paid defendants as rent for the 12 months he occupied the apartment from May 2001 to May 2002 (rent @ $2,000 per month). In the Third Cause of Action, plaintiff seeks $200,000 in damages, alleging that defendants "violated inter alia, The Multiple Dwelling Law of the State of New York, the Building Code of the City of New York, the Penal Law of the

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State of New York, and the Rent Stabilization Code. . . .By such violations the plaintiff was deprived of an apartment with a regulated rent and a right of renewal."

Shortly after commencing the instant action, plaintiff filed a rent overcharge complaint with DHCR. On October 7, 2005, while this motion was *sub judice*, the DHCR Rent Administrator issued an order denying plaintiff's rent overcharge complaint. DHCR found that since the apartment was vacant on the base date established by DHCR, April 14, 2001, under the Rent Stabilization Code, "the legal regulated rent shall be the rent agreed to by [the] owner and the first rent stabilized tenant taking occupancy after such vacancy," i.e. $2,000. Plaintiff thereafter filed a Petition for Administrative Review ("PAR"), which was dismissed by an Order and Opinion issued December 28, 2005.[1]

Defendants are moving to dismiss the complaint based on the fact that plaintiff filed a rent overcharge complaint with DHCR. The issue of whether plaintiff's rent overcharge claim was more appropriately determined by DHCR is now moot, since DHCR has actually determined and denied plaintiff's rent overcharge complaint. However, with DHCR's decision, plaintiff can no longer maintain this action, as the doctrine of collateral estoppel bars plaintiff from relitigating the rent overcharge issue.

Generally, in all cases, two elements are necessary for application of collateral estoppel: first, there must be an identity of issue necessarily decided in a prior action and which is decisive of the present proceeding; and second, the party against whom preclusion is sought must have been afforded a full and fair opportunity to contest the determination now said to be controlling.

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[1]With the dismissal of the PAR, the administrative determination is final. If plaintiff wants to challenge the DHCR decision further, he must file an Article 78 proceeding.

See Allied Chemical v. Niagara Mohawk Power Corp., 72 NY2d 271 (1988). An administrative agency's determination may be entitled to preclusive effect, but certain additional requirements must be satisfied: 1) the administrative proceeding must have been quasi-judicial; 2) the agency must have had authority to act adjudicatively and to have decided the issue; and 3) the procedure used must have provided for adequate examination of the facts consistent with the parties' expectations that the result would be final and binding. Id at 276-277.

The issues raised in the instant action regarding the legal amount of rent for the subject premises, are identical to the issues raised in the complaint submitted to DHCR. In the complaint in the instant action, plaintiff alleges that the $2000 monthly rent he paid was "more than the legal regulated rent," as the apartment was subject to rent stabilization and the prior tenant paid a "legal rent of $700." That issue was decided in the DHCR proceeding, where plaintiff was a party, and had a full and fair opportunity to contest DHCR's determination. Moreover, a DHCR proceeding is quasi-judicial, and pursuant to the Rent Stabilization Law and regulations, DHCR has the authority to adjudicate rent overcharge complaints, and in fact decided plaintiff's rent overcharge complaint. Further, DHCR procedures provide for adequate examination of the factual record, with the parties' full knowledge that the result will be final and binding, subject to limited judicial review pursuant to CPLR Article 78. Based on the foregoing analysis, DHCR's determination denying plaintiff's rent overcharge claim is entitled to preclusive effect. See 9-10 Alden Place, L.L.C. v. Chen, 279 AD2d 618, 619 (2nd Dept 2001); Elie v. Kraus, 218 AD2d 629 (1st Det 1995), lv app dism 88 NY2d 842 (1996); Kenny v. New York City Transit Authority, 275 AD2d 639 (1st Dept 2000); Behr v. Division of Housing & Community Renewal, 158 AD2d 411 (1st Dept 1990); 190 Washington Ave., Assoc, Inc. v.

Velasquez, 10 Misc3d 1060(A), 2005 WL 3440823 (Dist Ct, Nassau Co 2005); Westmoreland Assocs, LLC v. Kispert, 2002 WL 31777885 (Civ Ct, Queens Co 2002)(n.o.r.); Gardner v. Division of Housing & Community Renewal, 166 Misc2d 290 (Sup Ct, Bronx Co 1995); Yanni v. Bruce Brandwen Productions, Inc., 160 Misc2d 109 (Civ Ct, NY Co 1994).

Plaintiff argues that the rent overcharge claim asserted in this action is separate and distinct from claims raised in the DHCR proceeding. This argument is without merit. Although plaintiff asserts that the proceeding before DHCR was simply directed to defendants' allegedly false registration, he admits that DHCR "indicated that the matter had to be filed as an overcharge complaint." It is also clear from the Rent Administrator's order that plaintiff filed a rent overcharge complaint, and that the only issue DHCR decided was the legal regulated rent for the apartment.

Thus, pursuant to the doctrine of collateral estoppel, the determination in the DHCR proceeding denying plaintiff's rent overcharge complaint precludes him from relitigating the rent overcharge issue in this action. As a result, plaintiff's First Cause of Action for rent overcharge must be dismissed.

In the Second Cause of Action, plaintiff seeks a refund of the $24,000 in rent he paid for the year he occupied the apartment from 2001 to 2002. Specifically, plaintiff alleges that absent a proper certificate of occupancy for the apartment, defendant was prohibited from collecting rent. Although the Multiple Dwelling Law prohibits an owner from collecting rent for a apartment in violation of the certificate of occupancy or an apartment without a proper certificate of occupancy, the Multiple Dwelling Law does not provide for the recovery of back rent voluntarily paid. Candela v. Fried, 3 Misc3d 136(A), 787 NYS2d 676, 2004 WL 1302029 (App

Term, 2nd Dept 2004); Commercial Hotel, Inc. V. White, 194 Misc2d 26 (App Term 2nd Dept 2002); Baer v. Gotham Craftsman Ltd, 154 Misc2d 490 (App Term, 1st Dept 1992). The Multiple Dwelling Law "may not be used as a sword to recoup rent already paid." Ovalles v. Mayer Garage Corp., 8 Misc3d 137 (A), 803 NYS2d 19, 2005 WL 1875180 (App Term 1st Dept 2005). Thus, the Second Cause of Action is dismissed.

Finally, the Third Cause of Action is also dismissed. Plaintiff's vague and conclusory allegations as to violations of state and local laws and regulations fail to identify the specific statutory or regulatory provisions allegedly violated. Moreover, the allegation that he has been "deprived of" a rent stabilized apartment is insufficient to state a cause of action, since rent regulation does not confer vested rights. Schutt v. New York State Division of Housing & Community Renewal, 278 AD2d 58 (1st Dept 2000), lv app den 96 NY2d 715 (2001).

Accordingly, it is hereby

ORDERED that the motion is granted and the complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly.

DATED: January 25, 2006

ENTER:

J.S.C.