

Chester v Cleo Realty Assoc., L.P.
2017 NY Slip Op 31673(U)
August 8, 2017
Supreme Court, New York County
Docket Number: 151972/17
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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AILEEN CHESTER, EVELYN DELUCA, JULIE and
WILLIAM HARDING, KATIE LACHTER, PHYLLIS
LARICCIA, SUZANNE NORTHROP, and CILDA
SHAUR,

Index No. 151972/17
Motion Seq. 001

DECISION & ORDER

Plaintiffs,

-against-

CLEO REALTY ASSOCIATES, L.P.,

Defendant.

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SHERRY KLEIN HEITLER, J.:

This action was brought by eight plaintiffs (“Plaintiffs”) who reside in six apartments in a building located at 201 West 85th Street in Manhattan. The complaint alleges that Defendant Cleo Realty Associates, L.P. (“Defendant”), which owns the building, improperly deregulated Plaintiffs’ apartments while at the same time receiving J-51 tax benefits for the building.

Defendant now moves pursuant to CPLR 3211(a)(2)¹ for an order dismissing this action on the ground that the claims herein should be adjudicated by the New York State Division of Housing and Community Renewal (“DHCR”). As more fully set forth below, the motion is granted.

Plaintiffs commenced this action on February 28, 2017. The complaint seeks single and treble damages arising from alleged rent overcharges as well as attorneys’ fees. Plaintiffs also seek to reform their leases to reflect the stabilized status of their apartments.

Defendant argues that the complaint should be dismissed because DHCR has primary jurisdiction over the claims asserted herein. Plaintiffs oppose the motion, arguing that this court

¹ CPLR 3211(a)(2) provides that a party may move to dismiss a complaint for lack of subject matter jurisdiction.

has concurrent jurisdiction over their claims and that Plaintiffs would be prejudiced if this case were to be dismissed.

The primary jurisdiction doctrine, which “represents an effort to ‘co-ordinate the relationship between courts and administrative agencies,’ generally enjoins courts having concurrent jurisdiction to refrain from adjudicating disputes within an administrative agency’s authority, particularly where the agency’s specialized experience and technical expertise is involved” *Sohn v Calderon*, 78 NY2d 755, 768 (1991) (internal citations omitted). In *Davis v Waterside Hous. Co.*, 274 AD2d 318, 318-319 (1st Dept 2000), the First Department explained the primary jurisdiction doctrine as follows (internal citations omitted):

“The doctrine of primary jurisdiction is intended to co-ordinate the relationship between courts and administrative agencies to the end that divergence of opinion between them not render ineffective the statutes with which both are concerned, and to the extent that the matter before the court is within the agency’s specialized field, to make available to the court in reaching its judgment the agency’s views concerning not only the factual and technical issues involved but also the scope and meaning of the statute administered by the agency” “[W]hile concurrent jurisdiction does exist, where there is an administrative agency which has the necessary expertise to dispose of an issue, in the exercise of discretion, resort to a judicial tribunal should be withheld pending resolution of the administrative proceeding”

Since *Davis*, several appellate and trial courts have applied the primary jurisdiction doctrine to dismiss actions filed in Supreme Court in favor of administrative proceedings before DHCR.

See Olsen v Stellar W. 110, LLC, 96 AD3d 440, 441 (1st Dept 2012); *Wilcox v Pinewood Apt.*

Assoc., Inc., 100 AD3d 873, 874 (2d Dept 2012); *Frischia v Lem Lee 13th Ltd. Partnership*, 37

AD3d 168, 168 (1st Dept 2007); *Collazo v Netherland Property Assets LLC*, Index No.

157486/16 (Sup. Ct. NY Co., Mar. 6, 2017, Cohen, J, nor.); *Page v O’Porto Holding Co., Inc.*,

2015 WL 4722335, *1 (Sup. Ct. NY Co., Aug. 5, 2015, Engoron, J.); *Davidson v 730 Riverside*

Drive, LLC, 2015 NY Misc. LEXIS 3379, *27 (Sup. Ct. NY Co., Sept. 1, 2015, Kalish, J.).

Plaintiffs' attempt to distinguish these cases from the case at bar is unavailing.² As in those cases, this court will almost certainly be required to consider issues that fall squarely within the purview and expertise of DHCR, including whether and when the apartments at issue should have been registered with DHCR, what the base rent should be for each apartment, and whether there were any rent overcharges with respect to the apartments.

It is possible that Plaintiffs would suffer some prejudice in light of DHCR's alleged policy of only looking back four years preceding the date of filing when determining whether to award damages for overcharges.³ To avoid Plaintiffs losing some of their overcharge claims, Defendant's counsel has agreed to stipulate that DHCR can measure the four-year look-back period from the date of filing of this action.⁴

In light of the foregoing, it is hereby

ORDERED that Defendant's motion to dismiss is granted upon condition that, within 15 days of the date of entry of this decision and order, the parties stipulate that the "base date" for purposes of Plaintiffs' overcharge claims herein shall be February 28, 2017, and further stipulate that this dismissal shall be without prejudice to renew if DHCR declines to consider any of the issues raised herein; and it is further

² Also unavailing is Plaintiffs' reliance upon *Altschuler v Jobman* 478/480, 135 AD3d 439 (1st Dept 2016). In that case, unlike this one, there is no evidence that the building owner raised the issue of primary jurisdiction.

³ Plaintiffs' claim that they would be prejudiced by DHCR's purported policy of denying any claim for willful overcharge where the owner adjusts the rent before responding to a DHCR complaint is without merit. This improperly assumes that any complaint filed by Plaintiffs with DHCR would be resolved in their favor and that Defendant's conduct requires the imposition of treble damages. Moreover, if Plaintiffs are unsatisfied with DHCR's ruling they have the right to seek relief therefrom.

⁴ Counsel indicated at oral argument that he would so-stipulate. He confirmed this by email to the court.

ORDERED that Plaintiffs are hereby granted leave to assert the within claims before DHCR, to the extent permitted by law, within 30 days from the date of entry of this decision and order.

This constitutes the decision and order of the court.

ENTER:

DATED: 8-8-17


SHERRY KLEIN HEITLER, J.S.C.