At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27th day of October, 2014.

PRESENT:

HON. RICHARD VELASQUEZ,

Justice.

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PORTOFINO REALTY CORP.,
PROMETHEUS REALTY CORP.,
SYLVAN TERRACE REALTY LLC,
WINDSOR REALTY LLC,
UNICORN 151 CORP.,
TUSCAN REALTY CORP.,
90 STATE STREET ASSOCIATES, INC.,
274 HENRY ASSOCIATES, INC.,
141 WADSWORTH, LLC,
RENT STABILIZATION ASSOCIATION OF N.Y.C., INC.,
COMMUNITY HOUSING IMPROVEMENT PROGRAM, INC.,
and THE SMALL PROPERTY OWNERS OF NEW YORK, INC.,

Plaintiffs,

and

APARTMENT OWNERS ADVISORY COUNCIL,
ADVISORY COUNCIL OF MANAGING AGENTS,
THE BUILDING AND REALTY INSTITUTE OF WESTCHESTER & THE MID-HUDSON REGION,
STEPPING STONES ASSOCIATES, L.P.,
and DEROSA BUILDERS INC.,

Intervenor-Plaintiffs,

- against -

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL and
DARRYL C. TOWNS, as Commissioner of the NEW YORK STATE HOMES AND COMMUNITY RENEWAL and
THE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Defendants,

and

MAKE THE ROAD NEW YORK,
NEW YORK STATE TENANTS AND NEIGHBORS,
and THE ASSOCIATION FOR NEIGHBORHOOD HOUSING AND DEVELOPMENT,

Intervenor-Defendants.

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DECISION AND ORDER

Index No. 501554/2014 (NYSCEF)

Mot. Seq. No. 1 and 3

The following e-filed papers read herein:	NYSCEF No.
Notice of Motion/Order to Show Cause/Cross Motion Affidavits (Affirmations) Annexed	3-53, 91-92, 94-96
Opposing and Reply Affidavits (Affirmations)	73, 86-90
Memoranda of Law	55, 85, 93, 103
Letter Submissions to the Court	104-107, 111, 113

After oral argument and a review of the aforementioned submissions, the Court finds as follows. Plaintiffs Portofino Realty Corp., Prometheus Realty Corp., Sylvan Terrace Realty LLC, Windsor Realty LLC, Unicorn 151 Corp., Tuscan Realty Corp., 90 State Street Associates, Inc., 274 Henry Associates, Inc., and 141 Wadsworth, LLC are owners of various residential buildings in New York City. Plaintiffs Rent Stabilization Association of N.Y.C., Inc., Community Housing Improvement Program, Inc., and Small Property Owners of New York, Inc. are non-profit organizations, whose members are owners and managers of rent-stabilized properties throughout New York City. Defendants are the New York State Division of Housing and Community Renewal (the Division) and the Commissioner of the New York State Homes and Community Renewal, which includes the Division. In this action, plaintiffs challenge defendants' (1) adoption of the amendments, effective Jan. 8, 2014, to the New York City Rent Stabilization Code (the 2014 amendments),[1]

[1] Plaintiffs also challenge corresponding amendments to the New York State Emergency Tenant Protection Regulations (McKinney's Uncons Laws of NY § 2500.1 et seq.), which are the counterpart of the Rent Stabilization Code for the rent-stabilized apartments in the municipalities of the Nassau, Rockland, and Westchester counties. To reduce the number of citations, the Court cites only the Rent Stabilization Law (Administrative Code of the City of New York [Administrative Code] § 26-501 et seq) and the Rent Stabilization Code, although the Court's reasoning and conclusions apply with equal force to the New York State Emergency Tenant Protection Regulations and their enabling act, the Emergency Tenant Protection Act of 1974 (McKinney's Uncons Laws of NY § 8621 et seq.). The Court further notes that plaintiffs do not challenge the Division's amendment of the regulations governing rent-controlled apartments (Administrative Code § 26-401, et seq.) (*see* Complaint, at 2 n 1).

(2) establishment of a Tenant Protection Unit within the Division, and (3) use of the Tenant Protection Unit to investigate rent increases and issue determinations.

In Seq. No. 1, plaintiffs move (1) for a preliminary injunction enjoining defendants from enforcing the 2014 amendments and further enjoining the Tenant Protection Unit from auditing the owners of rent-stabilized properties and issuing determination letters, and (2) for limited, expedited discovery. Defendants oppose and, in Seq. No. 3, cross-move for an order, pursuant to CPLR 3211 (a) (1), dismissing the complaint on the sole ground that this action is barred by documentary evidence. Intervenor plaintiffs and intervenor defendants support their parties' respective applications.[2]

Background

Rent stabilization in New York City is governed by the Rent Stabilization Law of 1969 (Administrative Code § 26-501 et seq.) (RSL). It was enacted (1) to remedy "an acute shortage of dwellings which creates a special hardship to persons and families occupying rental housing," (2) to "prevent exactions of unjust, unreasonable and oppressive rents and rental agreements," as well as of "speculative, unwarranted and abnormal increases in rents," and (3) to "forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and general welfare. . . " (RSL 26-501). The RSL "represent[s] a pragmatic balance between affording the owners of properties adequate

[2] By Stipulation Consenting to Intervenor Parties, so ordered May 5, 2014 (NYSCEF 115), Apartment Owners Advisory Council, Advisory Council of Managing Agents, The Building and Realty Institute of Westchester & The Midhudson Region, Stepping Stones Associates, L.P., and DeRosa Builders, Inc. were permitted to intervene in the action as plaintiffs, whereas Make the Road New York, New York State Tenants and Neighbors, and The Association for Neighborhood Housing and Development were permitted to intervene in the action as defendants. The stipulation resolved motions in Seq. No. 2 and 4 by intervenor plaintiffs and intervenor defendants, respectively.

periodic rent increases to enable them to properly maintain their properties in the face of rising costs, while at the same time affording to tenants an assurance against unreasonable escalations in rent and also various other rights and protections" (*Matter of Avon Furniture Leasing, Inc. v Popolizio*, 116 AD2d 280, 283-284 [1st Dept 1986], *appeal denied* 68 NY2d 610 [1986]).

Under the Omnibus Housing Act of 1983 (L 1983, ch 403), all functions and responsibilities of administering and implementing the rent-stabilization program were delegated to the State in the guise of the Division (*see Matter of London Terrace Assoc., L.P. v DHCR*, 35 Misc 3d 525, 572 [Sup Ct, NY County 2012]). Pursuant to this authorization, the Division promulgates, amends, and enforces the New York City Rent Stabilization Code (9 NYCRR § 2520.1 et seq.) (RSC). The RSC "provides safeguards against unreasonably high rent increases and, in general, protects tenants and the public interest," as well as requires owners "not to exceed the level of lawful rents as provided by [the RSL]" (RSL 26-511 [c] [1]-[2]).

The Legislature has granted the Division broad authority to enforce the RSL. The Division is empowered, among other things, "to administer oaths, issue subpoenas, conduct investigations, make inspections and designate officers to hear and report" (RSL 26-516 [f]). The Division may take action on its own initiative to penalize owners who collect rent overcharges from their tenants (*see* RSL 26-516 [a]). The Division may commence proceedings in Supreme Court to enjoin violations of the RSL, the RSC, or orders issued

pursuant thereto (*see* RSL § 26-516 [e]). "In addition to issuing the specific orders provided for by other provisions of [the RSL], the [Division] . . . [is] empowered to enforce [the RSL] and the [RSC] by issuing, upon notice and a reasonable opportunity for the affected party to be heard, such other orders as it may deem appropriate" (RSL 26-156 [b]).

The Rent Act of 2011 (L 2011, ch. 97), effective June 24, 2011, added further protections for tenants, including a limit on the maximum allowable rent increase based on apartment improvements, a limit on the annual vacancy rent increases, and a change in the monetary thresholds for apartment deregulation.[3] The Rent Act of 2011 requires (in § 44) that the Division "promulgate rules and regulations to implement and enforce all provisions of this act and any law renewed or continued by this act."

On Feb. 17, 2012, Governor Andrew M. Cuomo announced the appointment of a deputy commissioner to lead the new Tenant Protection Unit at the Division.[4] According to the press release issued by the Governor's Office:

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[3] More particularly, the Rent Act of 2011 provides that:

- The rent laws are extended until June 15, 2015.
- Effective Sept. 24, 2011, individual apartment improvements increased the monthly rent by 1/60th of the total allowable cost (instead of 1/40th) in multiple dwellings with 36 or more apartments. The fraction remains 1/40th for multiple dwellings with 35 or fewer apartments.
- The statutory vacancy allowance (20%) may now only be taken once in a calendar year, notwithstanding the number of vacancy leases entered into in such year.
- Threshold rent level for both high income and vacancy luxury deregulation has been increased from $2,000 per month to $2,500 per month.
- The annual income level for high income luxury deregulation has been increased from $175,000 to $200,000.

[4] *See* "Governor Cuomo Announces Appointment of Senior Official to Oversee Historic Expansion of Rent Law Enforcement," dated Feb. 17, 2012 (available at https://www.governor.ny.gov/press/02172012Rent-Law [last accessed Oct. 22, 2014]). The Court has authority to take judicial notice of a government-issued press release (*accord People v Larsen*, 29 Misc 3d 423, 427 [Crim Ct, NY County 2010] [taking judicial notice of a privately issued press release]).

> "'In 2011, we passed the greatest strengthening of the state's rent laws in forty years, and today we are taking the next step to protect tenants by appointing Deputy Commissioner White,' Governor Cuomo said. 'Our new Tenant Protection Unit will proactively prevent problems and root out fraud that can wreak havoc in the lives of rent-regulated residents. With his deep background in both law enforcement and real estate law, Deputy Commissioner White is just the person our state needs for this crucial new position.'"[5]

On Jan. 9, 2014, following several years of comments and drafts, the Division promulgated the 2014 amendments to address the changes made by the Rent Act of 2011. In addition, the Division, by way of the 2014 amendments, further revised the RSC "[t]o address scenarios that its decades of experience administering the rent stabilization laws had revealed were rife with risks of fraud and abuse" (Defendants' Opening Brief at 14). As is relevant to plaintiffs' motion, the 2014 amendments:

- codify the Tenant Protection Unit (*see* RSC 2520 [o]);

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[5] The creation of the Tenant Protection Unit was consistent with the Governor's responsibility to enforce the Rent Stabilization Code:

> "There are 2.5 million New Yorkers who are living in rent-regulated apartments. . . . The average income in a rent-stabilized household is $38,000. We have done the best that we can. There are folks who wanted more. If we could have done more, we would have done more. We were unable to, but this does represent the first significant strengthening in 20 years. In 1993 we slid backward. In 1997 we slid backward. In 2003 we slid backward. But, for the first time in more than 20 years, in 2011 we're taking a meaningful step forward. *And now the responsibility shifts to Governor Andrew Cuomo to bring life . . . to [the Division] to enforce the law, to look out, as is your responsibility under the laws of this great State, for the 2.5 million New Yorkers living in rent-stabilized apartments*."

(Record of Proceedings, NY State Assembly, Bill 8518, Statement of Assemblymember Hakeem Sekou Jeffries, at 173-174 [emphasis added]) (available at http://assembly.state.ny.us/write/upload/session/2011/20110624.pdf [last accessed Oct. 22, 2014]). *See also* Statement of Assemblymember Linda B. Rosenthal (at page 184 ["I call on this government and the (Division) to immediately, once this is passed and signed into law, to go about the business of fixing this (Division), hiring more people, upgrading the computer system, creating a system of transparency where tenants can feel that they are being heard and that they are being given justice."]).

- incorporate case law exceptions to the four-year statute of limitations for reviewing rent records (*see* RSC 2526.1 [a] [2] [iii] - [viii], 2521.2 [c], and 2526.1 [a] [2] [ix]);

- expand the sources of information the Division may consider in determining whether the premises contain current, immediately hazardous violations of law that relate to the maintenance of legally required services (*see* RSC 2522.4 [a] [13])

- preclude landlords from collecting rent increases on account of vacancies or major capital improvements for as long as rent-reduction orders are in effect (*see* RSC 2523.4 [a] [1] - [2]);

- eliminate a requirement that tenants provide their landlords with prior notice of service interruptions before complaining to the Division (*see* RSC 2523.4 [c]);

- require that landlords obtain prior approval of the Division before amending their annual rent registrations (*see* RSC 2528.3 [c]);

- require that lease riders advise tenants of their right, within sixty days of the execution of the lease, to obtain from their landlords the documentation supporting the detailed description on how their rent was calculated (*see* RSC 2522.5 [c] [1] [i] - [ii]); and

- establish a default formula for calculating the legal rent in instances where either (1) the rent charged on the base date cannot be determined; (2) a full rental history from the base date is not provided; (3) the base date rent is the product of a fraudulent scheme to deregulate the apartment; or (4) a "conditional rental practice" – rental conditioned on non-primary residence, rental conditioned on the use of corporate name or professional/commercial use, or illusory/collusive tenancy – has been committed (*see* RSC 2522.6 [b] [2] and 2526.1 [g]).

Discussion

Defendants' cross motion to dismiss plaintiffs' complaint under CPLR 3211 (a) (1) is denied. Defendants' so-called documentary evidence, which is the only ground on which they are moving to dismiss, does not utterly refute plaintiffs' allegations or conclusively establish a defense as a matter of law (*see Attias v Costiera*, 120 AD3d 1281, 1282-1283 [2d Dept 2014]; *Jackson v Bank of Am., N.A.*, 40 Misc 3d 949, 956 [Sup Ct, Kings County

2013]). Pursuant to CPLR 3211 (f), defendants shall serve an answer to the complaint, together with all of their discovery demands, within ten days after service of this decision and order with notice of entry on defense counsel.

Plaintiffs' motion for a preliminary injunction and other relief is granted solely to the extent that both sides, including intervenors, are hereby given expedited, limited preliminary conference (PC) in the PC Part in Room 282 on Tuesday, December 2, 2014, at 9:30 A.M. The expedited discovery will be limited to the issue of the 2014 amendments' ultimate validity (or not) under the separation-of-powers principle and, in the instance of the Tenant Protection Unit, also under the doctrine of procedural due process. Any discovery dispute arising at the PC shall be referred to the undersigned. The parties must show a copy of this decision and order to the court attorney who will be conferencing the PC. All other relief sought by plaintiffs in their motion, including their request for a preliminary injunction, is denied as premature because the current record is contradictory and insufficiently developed.

Subsequent motion practice should be focused on the facts and the law that are directly relevant to the aforementioned dispute. Ancillary issues, such as defendants' assertion that the 2014 amendments may be challenged only if no set of circumstances exists under which they would be constitutionally valid, as well as plaintiffs' assertion that defendants violated the State Administrative Procedure Act, will be reserved for separate determination. If the parties intend to argue that the 2014 amendments codify or, in the alternative, contradict the prior case law, subsequent motion papers should include, for the

Court's assistance, a table correlating or, in the alternative, distinguishing such case law as to each particular amendment.

Separately, the Court directs the Part Clerk to mark motions in Seq. No. 2 and 4 as granted by the Stipulation Consenting to Intervenor Parties, so ordered May 5, 2014 (NYSCEF 115).

This constitutes a decision and order of the Court.

ENTER,

J. S. C.

Hon. Richard Velasquez, JSC

OCT 27 2014

Deemed as the Original

Hon. Richard Velasquez, JSC

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