

**Dougherty v E.B.D. Assoc.**

2016 NY Slip Op 31483(U)

August 5, 2016

Supreme Court, New York County

Docket Number: 151589/16

Judge: Geoffrey D. Wright

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 47

-----X  
MELISSA DOUGHERTY,

Plaintiff,

-against-

Index No.:  
151589/16

E.B.D. ASSOCIATES, E.B.D. ASSOCIATES LLC,  
BUCHBINDER & WARREN LLC and CHAN  
BEN-DOV,

DECISION/ORDER

Defendants.

**Present:**  
Hon. Geoffrey D. Wright

-----X Acting Justice Supreme Court

RECITATION , AS REQUIRED BY CPLR § 2219 (A), of the papers considered in the review of this Motion/Order to Dismiss.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed.....	_____ 1 _____
Order to Show Cause and Affidavits Annexed	_____
Answering Affidavits.....	_____ 2 _____
Replying Affidavits.....	_____ 3 _____
Exhibits.....	_____
Memoranda.....	_____ - _____
Cross-Motion .....	_____

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

In this rent overcharge action, defendants E.B.D. Associates, E.B.D. Associates LLC (together, owner), Buchbinder & Warren LLC (manager) and Chan Ben-Dov (collectively, defendants) move, pursuant to CPLR 3211 (a) (2), (4) and (7) to dismiss this action or, in the alternative, for a stay of this matter, pursuant to CPLR 2201 and Rent Stabilization Code (RSC) § 2529.12 (9 NYCRR 2529.12), pending the determination of defendants' petition for

administrative review (PAR) that is currently pending before the New York State Division of Housing and Community Renewal (DHCR).

### **BACKGROUND**

According to the complaint, plaintiff Melissa Dougherty (Dougherty), is the former tenant in apartment 6A in an apartment building located at 214 East 11<sup>th</sup> Street in New York City (the building). E.B.D. Associates LLC, the successor to E.B.D. Associates, is the owner and landlord of the building. Buchbinder & Warren LLC manages the building (Languedoc affirmation, exhibit A [Complaint], ¶¶ 8, 9).

Dougherty moved into apartment 6A in July 2006, pursuant to a one-year, non-stabilized lease at a rent of \$2,500 per month. After several annual lease renewals, Dougherty's rent increased to \$2,825.00 per month for her lease ending June 30, 2015 (*id.* ¶¶ 20, 31-36).<sup>1</sup>

By letter dated April 9, 2015, defendants informed Dougherty that they elected not to renew her lease (*id.*, exhibit C).

In August 2015, Dougherty found another apartment, executed a new lease and engaged a mover to accomplish her move (*id.*, complaint, ¶¶ 46-49).

However, Dougherty alleges that, five days before she was to vacate apartment, she learned that the building had been receiving J-51 tax benefits during her tenancy and that, as a result, she had been a rent stabilized tenant throughout her tenancy (*id.*, ¶ 52). By that time, she had incurred non-refundable expenses associated with her move and she vacated apartment 6A, as planned (*id.*, ¶ 53).

Dougherty contacted DHCR and was advised that no rent stabilized registration forms had been filed for the apartment and, accordingly, there was no record of any rental history (*id.*, ¶¶ 56,

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<sup>1</sup> Dougherty negotiated a two-month extension of her tenancy from July 1, 2015 to August 31, 2015, when she vacated the apartment. Her monthly rent for those two months was \$2,900.

57 and exhibit B).

Thereafter, plaintiff filed a rent overcharge complaint with DHCR (*id.*, ¶ 58).

In October 2015, defendants contacted plaintiff's attorney and conceded that plaintiff had been a rent stabilized tenant during her occupancy because, until 2004, the apartment had been occupied by a rent controlled tenant and after the rent controlled tenant moved, they mistakenly treated the apartment as exempt from rent regulation even though they were receiving J-51 tax benefits. Defendants tendered a \$690.64 check to plaintiff which they claimed covered of her rent overcharges plus interest. Dougherty returned the check on the ground that it did not cover the overcharges (*id.*, exhibit H).

In January 2015, defendants answered Dougherty's DHCR complaint and, in the answer they contended that, at all times, Dougherty had been charged less than what the legal regulated rent would have been (Brett affirmation, exhibit B).

On February 25, 2016, Dougherty filed the complaint in this action and on March 7, 2016, she withdrew her DHCR complaint. By order dated March 15, 2016, DHCR terminated the rent overcharge proceeding because the complaint had been withdrawn (Languedoc affirmation, exhibit K). However, on May 2, 2015, defendants filed a Petition for Administrative Review (PAR) seeking the revocation or modification of DHCR's March 15, 2016 order terminating the DHCR proceeding. In the PAR, defendants argue that, by filing the complaint in the Supreme Court and withdrawing the DHCR rent overcharge complaint, Dougherty was forum shopping (Brett affirmation, exhibit D).

### CONTENTIONS

In support of the motion to dismiss the complaint or alternatively for a stay, defendants contend that DHCR's termination of the overcharge proceeding was improper because forum shopping was the only reason the DHCR complaint was withdrawn. It is defendant's position that filing the PAR had the effect of immediately staying the enforcement of the challenged termination order until the DHCR Commissioner rules on the PAR and that this action should be dismissed, or at minimum stayed, until such ruling. Defendants also argue that, while the

Supreme Court does have jurisdiction to adjudicate this dispute, DHCR has primary jurisdiction, it has the necessary expertise to determine the issues in this matter, and it has already begun the adjudicative process.

In opposition to the motion to dismiss, Dougherty contends that there is not another action pending because DHCR issued an order termination the overcharge proceeding; that DHCR and the Supreme Court have concurrent jurisdiction, and that the complaint asserts a General Business Law (GBL) § 349 claim and a claim for expenses associated with her move in addition to the overcharge causes of action, which claims cannot be adjudicated before DHCR.

### **DISCUSSION**

CPLR 2201 provides, “[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just”. A stay of proceedings on the ground of another action pending is warranted where there is substantial identity of the parties and the subject matter in both actions and the stay will promote orderly procedure and judicial economy (*see e.g. Certain Underwriters at Lloyd’s London v Pneumo Abex Corp.*, 36 AD3d 441, 441 [1<sup>st</sup> Dept 2007]; *Trinity Prods., Inc. v Burgess Steel LLC*, 18 AD3d 318, 318 [1<sup>st</sup> Dept 2005]; *Asher v Abbott Labs.*, 307 AD2d 211, 211-212 [1<sup>st</sup> Dept 2003]). The court will also take into account “any prejudice that a stay may cause to the party opposing it (*Chan v Zoullas*, 34 Misc 3d 1210[A]; 2012 NY Slip Op 50027[U], \*3 [Sup Ct, NY County 2012]).

As previously discussed, it is defendant’s position that filing the PAR had the effect of immediately staying the enforcement of the challenged termination order until the DHCR Commissioner rules on the PAR and that this action should be dismissed, or at minimum stayed, until such ruling. This Court disagrees. There is no case with the DHCR for Defendants to challenge. The complaint, having been withdrawn by Plaintiff resulted in the proceeding being terminated by DHCR. Defendant appears to argue that DHCR should have known that Plaintiff was allegedly forum shopping and thus should have denied her the opportunity to pursue her

complaint in Supreme Court. The record does not reflect that the DHCR made any finding of law or fact before Plaintiff withdrew the Complaint and Plaintiff was well within her right to do so. Moreover, contrary to Defendant's assertion, there is nothing to demonstrate Plaintiff will have a greater likelihood of success by having the complaint adjudicated in Supreme Court.

Accordingly, it is ORDERED that defendant E.B.D. Associates, E.B.D. Associates LLC, Buchbinder & Warren LLC and Chana Ben-Dov's motion to dismiss the complaint pursuant to CPLR 3211 (a)(2), (a)(4) and (a)(7) or in the alternative stay this proceeding is denied.

This constitutes the Decision and Order of the Court.

August 5, 2016

ENTER:



**GEOFFREY D. WRIGHT**

GEOFFREY D.S. WRIGHT

A.J.S.C.