SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THERESA MADDICKS, JOHN AMBROSIO, PAUL WILDER, SAMUEL WILDER, ALYSSA O'CONNELL, JOHANNA S. KARLIN, BRIAN WAGNER, TYLER STRICKLAND, DANIEL ROBLES, ELENA RICARDO, LIAM CUDMORE, JENNIFER MAK, JOSHUA BERG, ANISH JAIN, JOHN CURTIN, JONATHAN FIEWEGER, MARIA FUNCHEON, JORDANI SANCHEZ, MELISSA MICKENS, M.D. IVEY, DEVIN ELTING, SEMI PAK, KAITLIN CAMPBELL, SARAH NORRIS, MIKIALA JAMISON, SHERESA JENKINS-RISTEKI, YANIRA GOMEZ and KRISTEN PIRO, on behalf of themselves and all others similarly situated, Plaintiffs, -against- BIG CITY PROPERTIES, LLC, BIG CITY REALTY MANAGEMENT, LLC, BIG CITY ACQUISIONS, LLC, 145 PINEAPPLE LLC, 2363 ACP PINEAPPLE, LLC, 408-412 PINEAPPLE, LLC, 510-512 YELLOW APPLE, LLC, 513 YELLOW APPLE, LLC, 535-539 WEST 155 BCR, LLC, 545 EDGECOMBE BCR, LLC, 603-607 WEST 139 BCR, LLC, 106-108 CONVENT BCR, LLC, 110 CONVENT BCR, LLC, 3660 BROADWAY BCR, LLC, 3750 BROADWAY BCR, LLC, 559 WEST 156 BCR LLC, 605-607 WEST 141 BCR, LLC, 605 WEST 151 BCR, LLC, 580 ST. NICHOLAS BCR, LLC and XYZ CORPORATIONS 1-99, Defendants.	Index No.: 656345/2016 DECISION/ORDER Motion Sequence 002

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits/Affirmations/ Memos of Law annexed	1

Opposition Affidavits/Affirmations and Memo of Law annexed	2
Reply Affidavits/Affirmations/Memos of Law annexed	3

ERIKA M. EDWARDS, J.S.C.:

Plaintiffs Theresa Maddicks, John Ambrosio, Paul Wilder, Samuel Wilder, Alyssa O'Connell, Johanna S. Karlin, Brian Wagner, Tyler Strickland, Daniel Robles, Elena Ricardo, Liam Cudmore, Jennifer Mak, Joshua Berg, Anish Jain, John Curtin, Jonathan Fieweger, Maria Funcheon, Jordani Sanchez, Melissa Mickens, M.D. Ivey, Devin Elting, Semi Pak, Kaitlin Campbell, Sarah Norris, Mikiala Jamison, Sheresa Jenkins-Risteki, Yanira Gomez and Kristen Piro, on behalf of themselves and others similarly situated, (collectively "Plaintiffs") brought this putative class action suit requesting declaratory and injunctive relief for claims alleging improper rent stabilization overcharges against Defendants Big City Properties, LLC,[1] Big City Realty Management, LLC, Big City Acquisitions, LLC, 145 Pineapple LLC, 2363 ACP Pineapple, LLC, 408-412 Pineapple, LLC, 510-512 Yellow Apple, LLC, 513 Yellow Apple, LLC, 535-539 West 155 BCR, LLC, 545 Edgecombe BCR, LLC, 603-607 West 139 BCR, LLC, 106-108 Convent BCR, LLC, 110 Convent BCR, LLC, 3660 Broadway BCR, LLC, 3750 Broadway BCR, LLC, 559 West 156 BCR LLC, 605-607 West 141 BCR, LLC, 605 West 151 BCR, LLC, 580 St. Nicholas BCR, LLC and XYZ Corporations 1-99 (collectively "Defendants").

Defendants now move pre-Answer to dismiss Plaintiffs' amended complaint pursuant to CPLR 3211 (a)(1)(2)(3), (5) and (7). Plaintiffs' oppose the motion. For the reasons set forth herein, the court grants Defendants' motion to dismiss Plaintiffs' amended complaint without prejudice.

In their amended complaint, Plaintiffs allege in substance that Defendants or their predecessors illegally and fraudulently engaged in a scheme and pattern to inflate rents in apartments located in over 20 buildings owned or operated by Defendants ("Big City Portfolio") in violation of the rent stabilization laws. Plaintiffs allege that Defendants and/or their predecessors relied on various methods to illegally overcharge their tenants, including: 1) failing to provide their tenants with rent-stabilized leases as required for Defendants to receive J-51 tax incentives; 2) misrepresenting and obfuscating the costs of Individual Apartment Improvements ("IAIs") performed on Plaintiffs' apartments; 3) failing to register rental information necessary to calculate the correct legal regulated rent; and/or 4) inflating the fair market rent on apartments and deregulating such apartments.

Plaintiffs' proposed class includes current and former tenants of Big City Portfolio buildings, from December 6, 2012 to present, who resided in rent-stabilized or unlawfully-deregulated apartments who overpaid their rent based on Defendants' or their predecessors' misrepresentations of the amount of the legal regulated rents and improvements. Additionally, Plaintiffs' proposed sub-class consists of all current tenants of Big City Portfolio buildings, who currently reside in rent-stabilized apartments or unlawfully deregulated apartments.

[1] Plaintiffs previously voluntarily discontinued the action against Defendant Big City Properties, LLC without prejudice and without costs.

Defendants argue in substance that Plaintiffs' attempt to bring this action as a class action fails as a matter of law because Defendants are unrelated, separate entities and Plaintiffs improperly attempt to impute alleged wrongful acts of one defendant against another without demonstrating how the entities are affiliated or legally intertwined; there is no class representative related to eight of the sixteen properties, nor allegations of any wrongdoing against eight of the sixteen property owners; there are different time periods; there are different property owners; Plaintiffs fail to allege the dates of Defendants' ownership and fail to differentiate between the culpable conduct of the Defendants and their non-party prior owners; many of the claims are time barred; and the claims are improper for a class action because they are fact specific and require individual case-specific analysis.

Plaintiffs argue that they have properly pled each class claim and the court should deny Defendants' motion because it is premature and prior to any discovery. Plaintiffs also argue in substance that Plaintiffs' IAI claims are not barred by the statute of limitations and there is substantial indicia of fraud; Plaintiffs are not required to bring their claims before DHCR as this court has concurrent jurisdiction over many of the claims and DHCR cannot grant some of the remedies sought in Plaintiffs' amended complaint and Plaintiffs properly joined each Defendant.

When considering Defendants' motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). A court may freely consider affidavits submitted by a plaintiff to remedy any defects in the complaint, but the court should not consider whether the plaintiff has simply stated a cause of action, but rather whether the plaintiff actually has one (*Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]). Normally, a court should not be concerned with the ultimate merits of the case (*Anguita v Koch*, 179 AD2d 454, 457 [1st Dept 1992]). However, these considerations do not apply to allegations consisting of bare legal conclusions as well as factual claims which are flatly contradicted by documentary evidence (*Simkin v Blank*, 19 NY3d 46, 52 [2012]).

The trial court has broad discretion to determine whether the putative class meets the standards for class certification based upon review of the statutory criteria set forth in CPLR 901(a) as applied to the facts of the case (*Small v Lorillard Tobacco Co.*, 94 NY2d 43, 52-53 [1999]). The prerequisites for class certification are 1) the class is so numerous that joinder of all members is impracticable; 2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members; 3) the claims or defenses of the representative parties are typical of the class; 4) the representative parties will fairly and adequately protect the interests of the class; and 5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy (CPLR 901[a]).

If a suit meets the qualifications for class action certification, then CPLR 901(b) permits a class action suit for plaintiffs to recover compensatory overcharges, even though Rent Stabilization Code § 26-516 does not specifically authorize class action recovery and imposes treble damages upon a finding of willful violation (*Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 389-390 [2014]). Furthermore, courts have held that the recovery of the base amount

of rent overcharge is actual, compensatory damages, not a penalty, within the meaning of CPLR 901(b), and plaintiffs are permitted to voluntarily waive treble damages or opt out of the class to seek treble damages (*id.* at 390).

The First Department acknowledged that a motion to dismiss may be made prior to "a motion to determine the propriety of the class and a hearing under CPLR 902 where 'it appears conclusively from the complaint and from the affidavits that there was as a matter of law no basis for the class action relief'" (*Downing v First Lenox Terrace Assoc.*, 107 AD3d 86, 91 [1st Dept 2013], quoting *Wojciechowski v Republic Steel Corp.*, 67 AD2d 830, 831 [4th Dept 1979]).

In applying these principles to the facts of this case, the court grants Defendants' motion to dismiss Plaintiffs' amended complaint as against all Defendants. As Defendants correctly noted, there are no allegations of wrongdoing against and no class representatives for the properties owned by the following eight Defendants: 145 Pineapple LLC, 2363 ACP Pineapple, LLC, 513 Yellow Apple, LLC, 603-607 West 139 BCR, LLC, 559 West 156 BCR LLC, 605-607 West 141 BCR, LLC, 580 St. Nicholas BCR, LLC and 3660 Broadway BCR, LLC. Also, the amended complaint does not allege which entity owns 555 West 151st Street. Therefore, the court dismisses the claims against these Defendants for Plaintiffs' failure to state a claim, pursuant to 3211(a)(7).

Additionally, the court finds that the Plaintiffs and Defendants are not properly joined as parties to this action because Plaintiffs failed to properly assert how the Defendants are factually or legally related or bound in this action. It appears that Plaintiffs allege that the properties are linked simply because they are managed by the same company and the company engaged in a pattern of fraudulent rent overcharges involving each class representative. However, Plaintiffs failed to adequately assert such claims. Plaintiffs' allegations that all properties are part of the Big City Portfolio is insufficient to join all claims and all parties based on the facts alleged in the amended complaint.

Furthermore, Plaintiffs' failed to properly assert a class action. Based on the facts of this case, the court determines that this suit fails as a class action because the questions of law or fact common to the class do not predominate over questions affecting only individual members, the claims or defenses may not be typical of the class and a class action is not superior to other available methods of adjudication.

Generally, in cases involving alleged rent overcharges a class action suit may be proper if it meets the criteria under CPLR 901 when the action involves the same allegation of wrongdoing, plaintiffs who are current or former tenants of the same building and defendants who are the current or prior owners of the building. Here, Plaintiffs attempt to join former and current tenants of several different properties, owned by separate and distinct companies, which are based on different theories of recovery, involving separate and distinct law and facts. Such claims are inappropriate for a class action. Therefore, the court denies the purported class action in this case.

Additionally, for several reasons each claim requires fact-specific analysis which precludes class certification. There are different buildings involved, different owners, different dates when the owners acquired the property, different prior owners, different registration periods and since there are different theories of recovery, each theory requires different defenses

and evidence. Therefore, each theory of recovery or each owner may require different questions of law or fact which affect the individual members of the class associated with that owner and/or theory. Furthermore, since there are so many different entities and theories, each claim or defense may not be typical of the class which is necessary for class certification.

Although Plaintiffs allege that there are common questions of law or fact based on a pattern of improperly inflating the rent, Plaintiffs rely on several different theories of the manner in which Defendants inflated the rent and different Defendants and their predecessors are accused of using one or more methods at various times spanning many years. Defendants correctly note that Plaintiffs' claims based on IAIs require a determination of whether any qualified improvements were done on each individual apartment, the cost of such improvements based on the invoices submitted and the appropriate rental increase, which may require individual inspections of each apartment. On the contrary, the determination of whether Defendants or their predecessors failed to properly register each apartment requires a separate and distinct analysis of the paperwork filed for each apartment. When dealing with twenty properties and numerous owners, such individual analyses could be onerous.

Furthermore, the court agrees with Defendants that Plaintiffs' Fourth Cause of Action under General Business Law § 349 for Defendants' alleged deceptive acts and practices require individualized fact-specific analysis. Because of the Plaintiffs' different theories of recovery, the court must consider the likely defenses raised by each individual Defendant and the nature of the evidence to determine how each class member was misled by Defendants' or their predecessors' actions.

Finally, based on the alleged conduct of each Defendant and the class members' theories of recovery, a class action cannot be determined to be superior to other available methods for the fair and efficient adjudication of the controversy. As mentioned above, to proceed as a class, Plaintiffs must waive their right to seek treble damages, since treble damages are penalties which are precluded in class actions, or exercise their right to opt out. Therefore, individual class members may wish to pursue administrative remedies under the Rent Stabilization Code in a Division of Housing and Community Renewal (DHCR) proceeding or individual suit. Since the class representatives may not reflect the interests of the class based on the different theories a class action may not be the superior manner in which to bring Plaintiffs' claims.

In conclusion, the court grants Defendants' motion to dismiss Plaintiffs' amended complaint as against all Defendants. The court determines that Plaintiffs failed to state a claim, pursuant to 3211(a)(7), against Defendants 145 Pineapple LLC, 2363 ACP Pineapple, LLC, 513 Yellow Apple, LLC, 603-607 West 139 BCR, LLC, 559 West 156 BCR LLC, 605-607 West 141 BCR, LLC, 580 St. Nicholas BCR, LLC and 3660 Broadway BCR, LLC. Additionally, the court determines conclusively from the facts alleged in Plaintiffs' amended complaint and the evidence submitted that, as a matter of law, there is no basis for class action relief. Therefore, since the court dismisses the amended complaint based on these grounds, the court need not address the remainder of Defendants' arguments in favor of dismissal of Plaintiffs' amended complaint.

As such, it is hereby

ORDERED that the court grants Defendants' motion to dismiss Plaintiffs' amended complaint, Plaintiffs' complaint is dismissed without prejudice and without costs and the Clerk is directed to enter judgment accordingly in favor of Defendants as against Plaintiffs.

Date: November 8, 2017

HON. ERIKA M. EDWARDS