SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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JOHN DAVID BURTON,

Plaintiff,

-against-

198 WEST 10th STREET LLC; BENJAMIN BOTTNER; REBUS REALTY LLC, CHOICE NY PROPERTY MANAGEMENT, LLC a/k/a CHOICE NEW YORK MANAGEMENT; CHOICE NEW YORK PROPERTIES; CHRISTOPHER TRUNELL; JOHN OZTURK; and HEATHER WILLIAMS,

Defendants.

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Index No. 153575/2017
Motion Seq: 001

DECISION & ORDER

HON. ARLENE P. BLUTH

The motion by plaintiff for summary judgment and the cross-motion for *inter alia* partial summary judgment by all defendants except 198 West 10th Street LLC (hereinafter "Moving Defendants") are resolved as follows: This matter is dismissed pursuant to the doctrine of primary jurisdiction on the ground that the Division of Housing and Community Renewal ("DHCR") should make an initial determination in this matter.

Background

This overcharge complaint arises out of an apartment rented by plaintiff at 198 West 10th Street, New York, New York. Plaintiff complains that the owners of the building last registered his apartment in 1998 with a monthly rent of $527.18. Plaintiff signed a lease to live in the subject apartment in February 2015 for a monthly rent of $3,800 per month. Plaintiff subsequently signed two renewal leases at $3,900 per month and at $4,000 per month. Plaintiff

insists that the apartment was improperly deregulated because the last registered rent was below the vacancy threshold and that based on *Altman v 285 West Fourth LLC* (127 AD3d 654, 8 NYS2d 295 [1st Dept 2015]), this Court must grant its motion for summary judgment.

Moving Defendants claim that the First Department has overturned *Altman sub silento* and stress that there have been at least four different tenants since 2010, all of whom have paid well over the luxury deregulation threshold. Moving Defendants emphasize that plaintiff has no knowledge about the rental history of the instant apartment and insist that there are issues of fact relating to whether individual apartment improvements ("IAIs") and statutory vacancy increases moved the legal rent above the threshold for luxury deregulation. Moving Defendants also note that there has been no discovery in this case yet.

Discussion

> "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" (*Capital Telephone Co. v Pattersonville Telephone* Co., 56 NY2d 11, 22, 451 NYS2d 11 [1982]).

"Deference to primary administrative review is particularly important where the matters under consideration are inherently technical and peculiarly within the expertise of the agency" (*Davis v Waterside Hous. Co., Inc.*, 274 AD2d 318, 319, 711 NYS2d 4 [1st Dept 2000] [dismissing plaintiff's complaint seeking a declaration that his apartment was rent-stabilized on the ground that the factual analysis required was within DHCR's area of expertise]).

Although this Court does have jurisdiction to consider overcharge complaints, this Court

believes that the issues presented in this action justify the invocation of the doctrine of primary jurisdiction and the dismissal of this case. DHCR's expertise is needed given that this matter involves numerous factual, rather than legal, issues. As an initial matter, there appears to be numerous property owners of the subject building since the last rent registration in 1998. The current property owner, defendant Rebus Realty LLC, took title to the subject premises in June 2016. Defendant 198 West 10th Street LLC claims that it was a prior owner of the building but that it sold the building to PPNY 26, LLC in January 2016 and that PPNY sold the property to Rebus in June 2016.

To resolve this matter requires evaluating vacancy increases, the validity of alleged IAIs, reviewing documentation from successive property owners, analyzing the failure to register and determining when or if the deregulation threshold was met. And if plaintiff's claim that there was an overcharge is successful, then this case will require a determination of the new monthly rent and the damages plaintiff is owed (potentially including whether treble damages are owed). Under similar circumstances, the First Department dismissed a case on the basis of primary jurisdiction because DHCR had "expertise in rent regulation" and can "determine the regulatory status of the apartment, and, if warranted, apply the default formula adopted in *Thornton* to determine the base rent"(*Olsen v Stellar West 110, LLC*, 96 AD3d 440, 442, 946 NYS2d 128 [1st Dept 2012] *lv dismissed* 20 NY3d 1000 [2013]). Further this Court notes that in *Olsen*, the First Department appears to have invoked primary jurisdiction *sua sponte*. A review of the parties' appellate briefs and the underlying Supreme Court decision (all available on Westlaw) reveals no mention of primary jurisdiction. Therefore, the fact that the parties in this action do not cite primary jurisdiction does not prevent this Court from invoking the doctrine.

In all aspects, this is a classic DHCR overcharge complaint (*see e.g., Matter of Bronx Boynton Ave. LLC v New York State Div. of Hous. & Community Renewal,* – NYS3d – 2018 NY Slip Op 01287 [1st Dept 2018] [finding that DHCR's denial of a PAR in an overcharge complaint was rational based on a DHCR inspector's findings that defects in the apartment were inconsistent with the alleged IAIs]). The DHCR has been allocated resources to make factual evaluations and has the expertise to do so. There is no reason why DHCR should not make a determination concerning this plaintiff's claims in the first instance.

While the Court has concurrent jurisdiction over this matter, this is not a case where there is a discrete legal issue that the Court can readily resolve or a unique factual scenario where the Court might be better situated to handle plaintiff's claim. This is not a case, such as *Gerard v Clermont York Assocs. LLC* (81 AD3d 497, 916 NYS2d 502 (Mem) [1st Dept 2011] where the First Department found that the Supreme Court abused its discretion in dismissing the complaint under the doctrine of primary jurisdiction because the action involved legal issues left open after a Court of Appeals case. This is a routine overcharge complaint like those handled by the DHCR every day and "the Legislature has specifically authorized [DHCR] to administer questions relating to rent regulation" (*Davis*, 274 AD2d at 319).

Accordingly, it is hereby

ORDERED that this action is dismissed pursuant to the doctrine of primary jurisdiction.

This is the Decision and Order of the Court.

Dated: March 4, 2018
New York, New York

ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH