Quinn v Parkoff Operating Corp.
2018 NY Slip Op 31628(U)
March 16, 2018
Supreme Court, New York County
Docket Number: 155195/17
Judge: Robert R. Reed

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 43

----------X

COURTNEY QUINN, et al., Index No. 155195/17

Plaintiffs,

- against -

PARKOFF OPERATING CORPORATION, GRAMERCY PARK ESTATES LLC, SEADYCK REALTY CO., LLC, 19 SEAMAN LLC, and ELBRIDGE REALTY CORPORATION,

Defendants.

----------X

ROBERT REED, J.:

Defendants Parkoff Operating Corporation (Parkoff), Gramercy Park Estates LLC (Gramercy Park), Seadyck Realty Co., LLC (Seadyck Realty), 19 Seaman LLC (19 Seaman), and Elbridge Realty Corporation (Elbridge Realty) move for an order: (1) pursuant to CPLR 3211 (a) (7) or CPLR 3016 (b), dismissing the fourth, fifth, and sixth causes of action; (2) pursuant to CPLR 3211 (a) (7), CPLR 901-902, and CPLR 3211 (a) (1), dismissing the class allegations; and (3) pursuant to CPLR 3211 (a) (1), 3211 (a) (2) or 3211 (a) (7), dismissing the first three causes of action.

Background

Complaint

Plaintiffs Courtney Quinn, Jeanne Shotzbarger, James Edwards, Claire Shriver, Anum Shah, James Ramsay, Miriam Ramsay, Lora Seo, Adam Heltzer, Christine Yi, Richard Borovoy, Idalmis Borovoy, Graham Ciraulo, Thomas Pierce, April Townes, Judith Trezza, Antonio Vazquez, Jennifer Duprey, Juliette Vaiman,

Lisavetta Reyes, Andom Ghebreghiogis, Doug Bender, Sara Bender, Charles Goldman, Christopher Ford, Steven Katchen, Ron Yosipovich, R.S. Salamon, and S.E. Falk, individually, and on behalf of all others similarly situated, commenced this purported class action against Parkoff, Gramercy Park, Seadyck Realty, 19 Seaman, and Elbridge Realty.

Plaintiffs allege that defendants used illegal and fraudulent practices in their ownership and operation of the apartment buildings located at: (1) 144 East 22nd Street in Manhattan; (2) 1-9 Seaman Avenue in Manhattan; (3) 11-19 Seaman Avenue in Manhattan; and (4) 500 West 235th Street in the Bronx (collectively, Parkoff Buildings). Allegedly, defendants: (1) inflated rents that exceeded the amounts they are legally permitted to charge tenants; (2) impermissibly failed to provide tenants in buildings receiving J-51 tax benefits with rent-stabilized leases; and (3) misrepresented the amount of "Individual Apartment Improvements" (IAIs) performed on plaintiffs' apartments and those of similarly situated tenants (complaint, ¶¶ 1-4).

The New York City Department of Housing Preservation & Development (HPD) administers tax incentive programs to promote the construction and preservation of affordable, high quality housing for low- and moderate-income families in New York City (*id.*, ¶ 5). One such New York City program is the so-called J-51 program, a property tax exemption and abatement available to landlords for renovating a residential apartment building (*id.*, ¶ 6).

The Parkoff Buildings receive, or have received, tax abatements or exemptions pursuant to the J-51 tax benefit program (*id.*, ¶ 7). Landlords of these buildings are required to provide their tenants with rent-stabilized leases as a condition of receiving tax benefits and are not permitted to avail themselves of "high rent vacancies" to deregulate rent-stabilized apartments (*id.*, ¶¶ 8-9). Such landlords are required to register the apartments with the Division of Housing and Community Renewal (DHCR), and to provide their tenants with appropriate riders detailing the tax credit (*id.*, ¶10).

Defendants, the complaint alleges: (1) have provided their tenants with free market leases, instead of their statutorily entitled rent-stabilized leases; (2) claimed erroneous and undocumented IAIs; and (3) failed to register apartments with DHCR. Defendants' conduct violates the J-51 Program and New York City's Rent Stabilization Law (RSL), as codified by the Rent Stabilization Code (RSC), and General Business Law § 349, et seq. (*id.*, ¶¶ 25-28).

Plaintiffs, individually and on behalf of the "Class," seek a judgment providing: (1) declaratory and injunctive relief, directing defendants to provide appropriate rent-stabilized leases; (2) an independent audit of rents that defendants demand; (3) disgorgement of rent overcharges; (4) compensatory and statutory damages; and (5) reasonable attorneys' fees and expenses (*id.*, ¶ 29).

The affected properties and named plaintiffs include: (1) 144 East 22nd Street: Courtney Quinn and Jeanne Shotzbarger (apartment 1A); James Edwards (2B); Claire Shriver and Anum Shah (3B); James and Miriam Ramsay (3C); Lora

Seo (4D); Adam Heltzer (5B); Christine Yi (6D); (2) 1-9 Seaman Avenue: Richard and Idalmis Borovoy (1D); (3) 11-19 Seaman Avenue: Graham Ciraulo (4C); Thomas Pierce and April Townes (5B); (4) 15 Seaman Avenue: Judith Trezza (2D); Antonio Vazquez and Jennifer Duprey (4E); Juliette Vaiman (5G); (5) 17 Seaman Avenue: Lisavetta Reyes (1J); (5) 19 Seaman Avenue: Andom Ghebreghiogis (1N); and (6) 500 West 235th Street: Doug and Sara Bender (2G); Charles Goldman (3B); Christopher Ford (3D); Steven Katchen (4F); Ron Yosipovich (4J); R.S. Salamon (6H); and S.E. Falk (6L).

Defendant Parkoff is the indirect owner, operator, and managing entity of the Parkoff Buildings. Defendants Gramercy Park, Seadyck Realty, 19 Seaman, and Elbridge Realty are the registered owners of 144 East 22nd Street, 1-9 Seaman Avenue LLC, 11-19 Seaman Avenue, and 500 West 235th Street, respectively (*id.*, ¶¶ 166-170).

Allegedly, the Parkoff Buildings are subject to the RSL because: (1) they are multiple dwelling residential buildings, containing six or more units, which were built prior to 1974, and not operated as a cooperative or condominium; or (2) they receive benefits under the J-51 tax benefit program. The apartments of plaintiffs and the class were all subject to rent control or rent stabilization and previously were registered as such with DHCR (*id.*, ¶¶ 207-208).

Allegedly, defendants failed to comply with the requirements of the RSL by failing to provide their tenants with rent-stabilized leases, failing to properly register the apartments with DHCR, increasing rents beyond the limits set forth by the

Rent Guidelines Board, and improperly declaring the apartments deregulated due to high rent vacancy. Defendants did so by: (1) altering the records provided to tenants to justify charging higher initial rents; (2) inflating or misrepresenting the amount of IAIs that were completed; and (3) using such false information to increase rents or deregulate apartments that should remain rent stabilized (*id.*, ¶¶ 209-210).

The complaint describes the proposed class (Class) as consisting of:

> "current and former tenants of the Parkoff Buildings who, between June 7, 2013 and the present date, resided in rent-stabilized or unlawfully-deregulated apartments, and who paid rent more than the legal limit based on misrepresentations by Defendants, or any predecessor in interest, concerning legal regulated rents and improvements"

(*id.*, ¶ 212). Plaintiffs also propose a sub-class (Sub-Class) consisting of all current tenants in the Parkoff Buildings who currently reside in a rent-stabilized apartment or unlawfully deregulated apartment (*id.*, ¶ 214).

The complaint contains six causes of action for: (1) violation of Rent Stabilization Law (RSL) § 26-512 (on behalf of the Class); (2) violation of RSL § 26-512 (on behalf of the Sub-Class); (3) declaratory relief (on behalf of the Sub-Class) determining: (a) the apartments are subject to the RSL and RSC; (b) plaintiffs and members of the Sub-Class are each entitled to a rent stabilized lease; (c) the amount of the legal regulated rent for their apartments; (d) any leases offered by defendants to plaintiffs and members of the Sub-Class are invalid unless they are offered on forms and terms prescribed by DHCR; and (e) plaintiffs and members of the Sub-Class are not required to pay rent increases until legal rent-stabilized lease offers are made

to, and accepted by, plaintiffs and members of the Sub-Class; (4) violation of General Business Law § 349 (on behalf of the Class); (5) illegality and mistake of contract (on behalf of the Class); and (6) illegality and mistake of contract (on behalf of the Sub-Class).

Defendants' arguments

The General Business Law § 349 claim should be dismissed because it applies only to conduct directed at the public at large, not private disputes between landlords and tenants. The disputes are governed by a separate statutory and regulatory scheme (RSL) that provides a complete remedy.

The illegality and mistake of contract claims should be dismissed because plaintiffs assert only that the leases violated the RSL, and this is not a contract claim.

The class allegations should be dismissed because: (1) the proposed class definition does not define a class in which membership can be determined prior to the determination on the merits of any claims; (2) individual issues predominate, and the named plaintiffs are not typical of the putative class; and (3) a class action will not result in a fair or efficient adjudication of each plaintiff's claims.

Each of the RSL claims should be dismissed for failure to state a cause of action, want of subject matter jurisdiction, and under the doctrine of primary jurisdiction. Resolution of plaintiffs' claims will require an examination of DHCR records and other evidence concerning the rental and improvement history of between eight and twenty-two apartments to determine the proper "base rent" for each one. These

matters are inherently technical and peculiarly within the province of DHCR, which can resolve them more efficiently than a court can.

The claims of certain plaintiffs are time-barred: Thomas Pierce and April Townes (apartment 5B at 11 Seaman Avenue); Antonio Vazquez and Jennifer Duprey (4E at 15 Seaman Avenue); Christopher Ford (3D at 500 West 235th Street); Steven Katchen (4F at 500 West 235th Street); and Ron Yosipovich (4J at 500 West 235th Street). These plaintiffs purport to challenge only the propriety of rent increases based on IAIs performed in their apartments more than four years prior to the filing of the complaint. The limitations period for an overcharge claim runs four years from the date of the first overcharge alleged.

Plaintiffs' arguments

If the court were to dismiss the action in favor of DHCR review, only the named plaintiffs will be heard, and the hundreds of class members they seek to represent will be denied relief, allowing defendants to profit from their willful failure to abide by the law.

Claims involving the J-51 tax benefit program are regularly granted class certification. That the amount of damages suffered by each class member typically varies from individual to individual is inconsequential because of the important legal or factual issues involving liability that are common to the class. The claims of the IAI tenants also are amenable to class treatment. Plaintiffs' class definition is not incurably flawed, and can be amended at any time before class certification.

The General Business Law § 349 claims are viable because the allegations involve pervasive and systemic deceptive acts and practices that impact a substantial number of rent-regulated apartments in defendants' buildings.

The contract claims are not duplicative. In calculating damages for rent overcharges, the limitations period of four years applies to the recovery of overcharges for rent-stabilized apartments. For breach of contract, the limitations period is six years.

None of plaintiffs' claims are time-barred because there is substantial indicia of fraud. Thus, the court can consider evidence to determine the legal regulated rent, even if that evidence occurred more than four years prior to the filing of the complaint. Plaintiffs' allegations of massive rent spikes in the buildings at issue are sufficient to deny defendants' pre-answer motion to dismiss.

As long as the General Business Law § 349 and contract claims remain viable, dismissal in favor of DHCR is inappropriate. Invoking primary jurisdiction is appropriate in only two circumstances, neither of which is present here: (a) where the claim is already pending before the administrative agency; or (b) where an unusually complicated factual or legal issue is presented to the court.

Determination

For the reasons discussed below, the motion is granted and the complaint is dismissed.

Discussion

RSL Claims

The first three causes of action are for violation of the RSL. The first cause of action is for defendants' violation of RSL § 26-512, by allegedly charging plaintiffs and the proposed Class members market rate rents or rents at rates otherwise exceeding the legal regulated rent for their apartments. Allegedly, they did so by: (1) altering and misrepresenting the legal regulated rent records provided to tenants to justify charging higher initial rents; (2) inflating or misrepresenting the amount of IAIs that were completed; or (3) using such false information to increase rents or deregulate apartments that should remain rent stabilized.

The second cause of action, for violation of RSL § 26-512, alleges that defendants entered into leases with plaintiffs and members of the proposed Sub-Class by misrepresenting the amount of rent defendants were legally entitled to collect, or falsely representing that their apartments were not subject to rent stabilization.

The third cause of action seeks declaratory relief determining: (1) the apartments of plaintiffs and members of the Sub-Class are subject to the RSL and RSC and any purported deregulation by defendants was invalid as a matter of law; (2) plaintiffs and members of the Sub-Class are each entitled to a rent-stabilized lease in a lease form promulgated by DHCR; (3) the amount of the legal regulated rent for the apartments of plaintiffs and members of the Sub-Class; (4) any leases offered by defendants to plaintiffs and members of the Sub-Class are invalid and unlawful un-

less they are offered on lease forms and terms prescribed by DHCR; and (5) plaintiffs and members of the Sub-Class are not required to pay any rent increases unless and until legally permissible rent-stabilized lease offers are made to, and accepted by, said plaintiffs and members of the Sub-Class.

The doctrine of primary jurisdiction "represents an effort to co-ordinate the relationship between courts and administrative agencies" and "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 quotation marks and citation omitted]).

Pursuant to the doctrine of primary jurisdiction, "the matter should be determined by DHCR, given its expertise in rent regulation" (*Olsen v Stellar W. 110, LLC*, 96 AD3d 440, 442 [1st Dept 2012], *lv dismissed* 20 NY3d 1000 [2013]). "DHCR can investigate plaintiffs' fraud allegations, determine the regulatory status of the apartment, and, if warranted, apply the default formula adopted in [*Thornton v Baron*, 5 NY3d 175 (2005)] to determine the base rate" (*Olsen*, 96 AD3d at 442).

Although the court "has jurisdiction to determine the issues of the actual amount of the overpayment, whether it was willful, and whether treble damages are warranted," DHCR would more appropriately determine those issues (*Wilcox v Pinewood Apt. Assoc., Inc.*, 100 AD3d 873, 874 [2d Dept 2012]; *see also Davis v Waterside Hous. Co.*, 274 AD2d 318, 319 [1st Dept 2000], *lv denied* 95 NY2d 770 [2000] ["Deference to primary administrative review is particularly important where the

matters under consideration are inherently technical and peculiarly within the expertise of the agency"]; *Eli Haddad Corp. v Redmond Studio*, 102 AD2d 730, 730 [1st Dept 1984] ["while 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"]).

Considering the foregoing precedent, plaintiffs have not demonstrated why the doctrine of primary jurisdiction should not be invoked here. Indeed, plaintiffs concede that DHCR has expertise in rent regulation and the ability to investigate fraud claims, albeit, they question the "level of that expertise, in the wake of [*Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270 (2009)]" (mem in opposition at 22). This challenge as to DHCR's expertise is unavailing here.

"Prior to *Roberts*, the [DHCR] took the position that where participation in the J–51 program was not the sole reason for the rent-regulated status of a building, particular apartments could be luxury decontrolled" (*Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 390 [2014]). The Court of Appeals, in *Roberts*, did not defer to DHCR's interpretation of the relevant statute, and "held that a landlord receiving the benefit of a J–51 tax abatement may not deregulate any apartment in the building pursuant to the luxury decontrol laws" (*Borden*, 24 NY3d at 390, citing *Roberts*, 13 NY3d at 286). The issues raised here, however, are not likely to involve statutory interpretations or policy determinations by DHCR.

General Business Law § 349

The fourth cause of action alleges a violation of General Business Law § 349, which provides a private right of action for any person injured by reason of a violation of section 349, and is directed at wrongs against the consuming public (*Disa Realty, Inc. v Rao.*, 137 AD3d 740, 742 [2d Dept 2016]). To state a claim under this section, a plaintiff must allege that the defendants' materially deceptive conduct caused injury, and that defendants' conduct was consumer-oriented with a broad impact on consumers at large (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 24-25 [1995]). In *Oswego Laborers' Local 214 Pension Fund*, the Court of Appeals held that "plaintiffs have satisfied the threshold test [when] the acts they complain of are consumer-oriented in the sense that they potentially affect similarly situated consumers" (*id.* at 26-27).

Here, "[p]laintiffs' allegations of unlawfully deceptive acts and practices under General Business Law § 349 present[ ] only private disputes between landlords and tenants, and not consumer-oriented conduct aimed at the public at large, as required by the statute" (*Aguaiza v Vantage Props., LLC*, 69 AD3d 422, 423 [1st Dept 2010]). The claim is not validly stated because the action is limited to plaintiffs' apartments, and does not involve "'the public at large'" (*Sutton Apts. Corp. v Bradhurst 100 Dev., LLC*, 107 AD3d 646, 648 [1st Dept 2013], quoting *Merin v Precinct Devs. LLC*, 74 AD3d 688, 689 [1st Dept 2010] [allegedly defective conditions not disclosed to plaintiffs prior to purchase involved a "private contractual dispute between the parties without ramification for the public at large"]).

It should be noted that this court has held, generally, that a landlord-tenant claim may fall within General Business Law § 349 (*see Cooper v 85th Estates Co.*, 57 Misc 3d 1223[A], 2017 NY Slip Op 51636[U], *12 [Sup Ct, NY County 2017]). Here, however, the complaint does not allege that defendants, in advertising to or recruiting plaintiffs, engaged in deceptive conduct that might otherwise constitute a situation beyond that of a private dispute.

For example, in *David v #1 Mktg. Serv., Inc.* (113 AD3d 810 [2d Dept 2014]), the defendants were operators of several "three-quarter houses," which, according to the complaint, involved recruiting people with disabilities and histories of substance abuse, and others living in shelters or re-entering the community after serving time in prison or jail, to join housing programs which purportedly offered supportive services (*id.* at 810). The complaint also alleged that "residents of three-quarter houses commit their personal incomes or housing allowances to the operators of these three-quarter houses, only to find themselves living in abject and overcrowded conditions with no support services on site" (*id.* at 810-811).

The plaintiffs in *David*, current and former residents of the respondents' three-quarter houses, alleged five causes of action, one of which was that the respondents engaged in deceptive business practices in violation of General Business Law § 349. The Appellate Division, Second Department, held that defendants (respondents) failed to establish their prima facie entitlement to judgment as a matter of law by showing that they did not engage in acts or practices that were deceptive or misleading in a material way. Allegedly, the defendants recruited the *David*

plaintiffs to move into their houses. No such consumer-oriented conduct is alleged here.

Illegality and Mistake

The fifth and sixth causes of action allege that defendants, either directly or indirectly, entered into leases which falsely misrepresented the amount of rent that defendants or the entities controlled by defendants were legally entitled to collect.

The fifth cause of action alleges that plaintiffs and members of the class are entitled to recover monetary damages from defendants based upon defendants' illegal, false, or mistaken provisions in their leases.

As for the sixth cause of action, allegedly, plaintiffs and members of the Sub-Class are entitled to reformation of their leases to provide that their units were and are subject to rent stabilization, and to represent accurately the amount of rent defendants are legally entitled to charge plaintiffs and members of the Sub-Class.

A complaint can allege both a breach of contract and a violation of RSL (*see e.g. Aijaz v Hillside Place, LLC*, 8 Misc 3d 73, 75 [App Term, 2d Dept 2005], *affd in part, revd in part on other grounds* 37 AD3d 501 [2007]). Here, however, the complaint does not identify any lease provisions that were breached (*cf. Nezry v Haven Ave. Owner LLC*, 28 Misc 3d 1226[A], 2010 NY Slip Op 51506[U], * 9-10 [Sup Ct, NY County 2010]).

Class Allegations

In *Borden*, the Court of Appeals held that "CPLR 901 (b) permits otherwise qualified plaintiffs to utilize the class action mechanism to recover compensatory

overcharges under [*Roberts v Tishman Speyer Props., L.P.*], even though [the RSL] does not specifically authorize class action recovery and imposes treble damages upon a finding of willful violation" (*Borden*, 24 NY2d at 389-390).

Pursuant to CPLR 901, one or more members of a class may sue as representatives on behalf of all if: (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 claims or defenses 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 (*City of New York v Maul*, 14 NY3d 499, 508 [2010]). "These factors are commonly referred to as the requirements of numerosity, commonality, typicality, adequacy of representation and superiority" (*id.* at 508). This action does not satisfy the commonality and typicality requirements.

Here, there are two main categories of claims as to the nature of the liability. Each category involves several properties, different defendant-landlords, disparities in relevant time periods, and variations in the fraudulent IAI claims. The lack of commonality and typicality will increase exponentially with the addition of the putative class members. "Typical claims are those that arise from the same facts and circumstances as the claims of the class members" (*Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 143 [2d Dep 2008]). Here, the representatives are not typical of the class claims because their injuries, if any, do not derive from the same course

of conduct by defendants (*Roberts v Ocean Prime, LLC*, 148 AD3d 525, 525-526 [1st Dept 2017], citing *Stecko v RLI Ins. Co.*, 121 AD3d 542, 543 [1st Dept 2014]).

In one category, plaintiffs allege that defendants impermissibly failed to file the legally required registrations for their apartments, despite the building receiving J-51 tax benefits, and that some plaintiffs have never received any of the required J-51 riders. These plaintiffs include: (1) Courtney Quinn and Jeanne Shotzbarger (apartment 1A at 144 East 22nd Street, from 2005-2015); (2) James Edwards (2B [same address], from 2010 to 2015); (3) James and Miriam Ramsay (3C [same address], for 2015); (4) Lora Seo (4D [same address], from 2007-2015); (5) Adam Heltzer (5B [same address], from 2011 to 2015; (6) Christine Yi (6D [same address], from 2010 to 2015); (7) Richard and Idalmis Borovoy (1D at 1 Seaman Avenue, from 2008 to 2015); (8) Judith Trezza (2D at 15 Seaman Avenue, from 2012 to at least 2015); (9) Juliette Vaiman (5G [same address], from 2008 to 2014); (10) Lisavetta Reyes (1J at 17 Seaman Avenue, from 2005 to 2014); (11) Andom Ghebreghiogis (1N at 19 Seaman Avenue, from 2011 to 2015); and (12) Charles Goldman (3B at 500 East 235st Street, from 2007 to 2015).

The differing time periods is significant. "[R]ent overcharge claims are generally subject to a four-year statute of limitations" (*Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 364 [2010]). "[U]nder certain circumstances, especially where a landlord has engaged in fraud in initially setting the rent or in removing an apartment from rent regulation, the

court may examine the rental history for an apartment beyond the four-year statutory period allowed by CPLR 213–a" (*Taylor v 72A Realty Assoc., L.P.*, 151 AD3d 95, 102 [1st Dept 2017]). Differing allegations of fraud and the time periods involved militate against a finding of commonality. "Thus, the defenses available to defendant for the representative plaintiffs are varied and individualized, as are the claims of those two plaintiffs" (*Rife v Barnes Firm, P.C.*, 48 AD3d 1228, 1230 [4th Dept 2008], *lv dismissed in part, denied in part* 10 NY3d 910 [2008]).

In the second category of claims, each plaintiff alleges that the apartment was listed as a high rent vacancy and purportedly deregulated, but that apartment inspections establish that the requisite improvements were not made.

These plaintiffs include: (1) Claire Shriver and Anum Shah (3B at 144 East 22nd Street; deregulated in 2015, requiring more than $32,300 in IAIs); (2) Graham Ciraulo (4C at 11 Seaman Avenue; between 2014 and 2015, rent increased by $646.97, a 72% increase requiring more than $24,700 in IAIs): (3) Thomas Pierce and April Townes (5B [same address]; between 2010 and 2011, rent increased by $462.70, a 55% increase requiring more than $9,700 in IAIs); (4) Antonio Vazquez and Jennifer Duprey (4E at 15 Seaman Avenue; listed as a high rent vacancy, purportedly deregulated in 2008, requiring more than $44,800 in IAIs); (5) Doug and Sara Bender (2G at 500 West 35th Street; between 2014 and 2015, rent increased by $868.24, a 98% increase requiring more than $38,300 in IAIs); (6) Christopher Ford (3D [same address]; between 2007 and 2008, rent increased by $821.48, a 123% increase requiring more than $25,900 in IAIs); (7) Steven Katchen (4F [same address];

between 2004 and 2005, rent increased by $808.58, a 110% increase requiring more than $24,700 in IAIs); (8) Ron Yosipovich (4J [same address]; between 2005 and 2006, rent increased by $1,030.91, a 171% increase requiring more than $34,900 in IAIs); (9) R.S. Salamon (6H [same address]; listed as a high rent vacancy, purportedly deregulated in 2014, requiring more than $56,600 in IAIs); and (10) S.E. Falk (6L [same address]; in 2016, rent increased by $1,131.76, a 134% increase requiring more than $54,700 in IAIs). The plaintiffs allege IAIs in differing amounts, undertaken at different times, involving different buildings, and a variety of defendant-landlords.

In contrast, in *Roberts v Ocean Prime, LLC* (148 AD3d 525), which involved a class action brought by tenants pertaining to "Superstorm Sandy," the Court found that the "commonality requirement is also satisfied in that the proof at trial will consist of evidence of defendants' efforts to prevent damage in advance of the storm and to repair damage after the storm" (*id.* at 525). The Court determined that the class consists of tenants of the building and that common questions as to liability predominated over individual questions concerning damages that each class member sustained (*id.*).

To be sure, in *Roberts v Ocean Prime, LLC*, the Court recognized that the trial court "may, in its discretion, establish subclasses" (*id.*, citing *City of New York v Maul*, 14 NY3d at 513). "The need to conduct individualized damages inquiries does not obviate the utility of the class mechanism for this action, given the predominant common issues of liability" (*Borden v 400 E. 55th St. Assoc., L.P.*, 105 AD3d

630, 631 [1st Dept 2013], *affd* 24 NY3d 382 [2014]). Here, however, as discussed above, the Sub-Class was not designated solely for the purpose of damages, but for the purpose of establishing liability in the first instance.

Time-barred

Defendants also argue that the claims of the following plaintiffs are time-barred: Thomas Pierce and April Townes (5B at 11 Seaman Avenue); Antonio Vazquez and Jennifer Duprey (4E at 15 Seaman Avenue); Christopher Ford (3D at 500 West 235th Street); Steven Katchen (4F at 500 West 235th Street); and Ron Yosipovich (4J at 500 West 235th Street). Defendants contend that these plaintiffs purport to challenge only the propriety of rent increases based on IAIs performed in their apartments more than four years prior to the filing of the complaint.

Based on the foregoing, the court does not reach this issue.

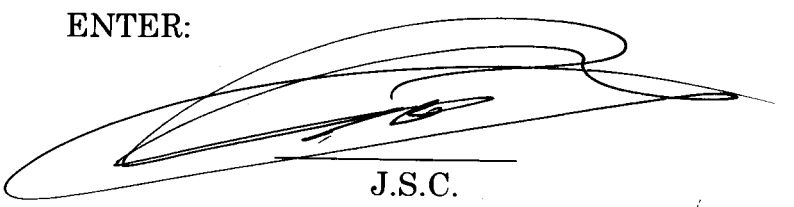
Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: March 16, 2018

ENTER:



J.S.C.

3/16/18