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

**PRESENT:** HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

*Justice*

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**INDEX NO.** 153378/2018

DEAN DODOS,

**MOTION SEQ. NO.** 003

Plaintiff,

- v -

244-246 EAST 7TH STREET INVESTORS, LLC and EAST NOHO CORP.,

**DECISION AND ORDER**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 91, 92, 93, 94, 95, 96, 97, 98, 99, 101, 102, 105
were read on this motion to/for REARGUMENT/RENEW.

In this residential rent overcharge action, plaintiff Dean Dodos moves, pursuant to CPLR 2221, to reargue and/or renew a motion to dismiss by defendant East Noho Corp ("ENC") (motion sequence 001) and a summary judgment motion by defendant 244-246 East 7th Street Investors, LLC ("Investors") (motion sequence 002) (Doc. 91). By order entered June 3, 2019 ("the 6/3/19 order"), this Court granted defendants' motions and dismissed Dodos' complaint without prejudice, directing him to file an appropriate claim with the New York State Division of Housing and Community Renewal ("the DHCR") (Doc. 86). After oral argument, and after a review of the parties' papers and the relevant statutes and caselaw, it is ordered that the motion is **denied**.

**FACTUAL AND PROCEDURAL HISTORY:**

The underlying facts of this matter are set forth in detail in the 6/3/19 order (Doc. 86). Other relevant facts are set forth below. In the 6/3/19 order, this Court reasoned that the DHCR was in a better position to determine and calculate the amount of damages, if any, and that the facts warranted a transfer of Dodos' claims to the DHCR pursuant to the doctrine of primary jurisdiction (Doc. 86).

As an initial matter, although Dodos characterizes his motion as one to renew and/or reargue, this Court concludes, based on the arguments raised in his papers, that his motion is actually one to renew (*see generally Rosenthal v Cooper*, 224 AD2d 330, 330 [1st Dept 1996]). In the motion, Dodos argues, *inter alia*, that the recent enactment of the Housing Stability and Tenant Protection Act of 2019 ("HSTPA") renders moot the case *Collazo v Netherland Prop. Assets LLC*, 2017 NY Slip Op 31709 [U], *1, *affd* 155 AD3d 538 [2017]), on which this Court relied in determining the underlying motions (Doc. 92). Dodos argues that, pursuant to HSTPA, tenants have a choice of forum in rent overcharge actions and that such matters cannot be transferred to the DHCR when the tenant initiates the case in the courts (Docs. 92, 94).

In opposition to Dodos' motion to renew, defendants argue, *inter alia*, that Dodos fails to cite to a change in law that would alter this Court's prior determination (Doc. 95).[1] Specifically, they argue that HSTPA does not alter the law regarding choice of forum, concurrent jurisdiction or this Court's ability to invoke the doctrine of primary jurisdiction (Docs. 95, 101). Defendants also argue that, even if HSTPA changed the law in the manner asserted by Dodos, the legislature

[1] ENC's opposition to Dodos' motion to reargue and/or renew was untimely; however, since there was no objection on timeliness grounds, this Court accepts the papers. ENC adopts and incorporates the procedural history and legal arguments set forth in Investors' papers in opposition to Dodos' motion to reargue and/or renew (Doc. 101).

did not intend for it to apply retroactively, and, thus, it has no effect on the 6/3/19 order (Doc. 95).

**LEGAL CONCLUSIONS:**

"The doctrine of primary jurisdiction provides that where the courts and an administrative agency have concurrent jurisdiction over a dispute involving issues beyond the conventional experience of judges, the court will stay its hand until the agency has applied its expertise to the salient questions" (*Flacke v Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 362 [1987] [internal quotation marks, brackets, ellipsis and citations omitted]; *see Sohn v Calderon*, 78 NY2d 755, 768 [1991]; *Matter of Schwartz v East Ramapo Cent. Sch. Dist.*, 127 AD3d 763, 764 [2d Dept 2015]; *Katz 737 Corp. v Cohen*, 104 AD3d 144, 150 [1st Dept 2012], *lv denied* 21 NY3d 864 [2013]; *Matter of Neumann v Wyandanch Union Free School Dist.*, 84 AD3d 816, 818 [2d Dept 2011]). It is well-settled that, "[t]he doctrine . . . 'applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views'" (*Staatsburg Water Co. v Staatsburg Fire Dist.*, 72 NY2d 147, 156 [1988], *quoting United States v Western Pac. R. Co.*, 352 US 59, 64 [1956]).

As the Court of Appeals has held, the doctrine "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 Tel. Co., Inc. v Pattersonville Tel. Co., Inc.*, 56 NY2d 11, 22 [1982] [citations omitted]; *see 150 Greenway Terrace, LLC v Gole*, 37 AD3d 792, 792-793 [2d Dept 2007]). Moreover, "[d]eference 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 Housing Co., Inc.*, 274 AD2d 318, 319 [1st Dept 2000], *lv denied* 95 NY2d 770 [2000]; *see Capers v Giuliani*, 253 AD2d 630, 633 [1st Dept 1998], *lv dismissed and denied* 93 NY2d 868 [1999]).

A brief overview of the DHCR is necessary to understand the implausibility of Dodos' arguments. The DHCR is tasked with supervising, maintaining and developing affordable and moderate-income housing in New York state (Division of Housing and Community Renewal, https://hcr.ny.gov/division-housing-and-community-renewal [last accessed Nov. 19, 2019]). It oversees the regulation of public and publicly assisted rental housing; it administers the states' rent regulation and the protection of rent regulated tenants, and the DHCR also manages housing developments and community preservation programs (*id.*). The DHCR also plays a pivotal role in the enforcement of rent regulation (*id.*). In 2012, Governor Cuomo created the Tenant Protection Unit ("TPU"), which functions as a proactive law enforcement office within DHCR, to detect and curtail patterns and practices of fraud and harassment by landlords (*id.*). TPU conducts audits and investigations, and it informs tenants and owners of their rights and responsibilities under the rent regulation laws (*id.*).

As relevant here, "[the] DHCR's field of expertise, without question, is issues related to rent regulation, including the determination of the regulated rent over a retroactive period and the award of refunds and penalties for landlords' overcharges to tenants" (*Dugan v London Terrace*

*Gardens, L.P.*, 34 Misc. 3d 1240 [A], 2011 NY Slip Op 52501[U], *6 [Sup Ct, NY County 2011] [internal citations omitted], *affd* 101 AD3d 648 [2012]; *see* McKinney's Uncons. Laws of N.Y. § 8628 [c]; *390 West End Assoc. v Nelligan*, 35 AD3d 306, 306 [1st Dept 2006]; *Davis v Waterside Housing Co., Inc.*, 274 AD2d at 319) and, thus, unless the action raises legal questions that must be addressed by the courts in the first instance (*see Hess v EDH Assets LLC.*, 171 AD3d 498, 498 [1st Dept 2019]; *Kresiler v B–U Realty Corp.*, 164 AD3d 1117, 1117 [1st Dept 2018], *lv dismissed* 32 NY3d 1090 [2018]; *Dugan v London Terrace Gardens, L.P.*, 101 AD3d 648, 648 [1st Dept 2012]), courts have generally invoked the doctrine of primary jurisdiction to transfer complex rent overcharge actions to the DHCR given its expertise and skills with these matters (*see Olsen v Stellar W. 110, LLC.*, 96 AD3d 440, 441-442 [1st Dept 2012], *lv dismissed* 20 NY3d 1000 [2013]; *Wilcox v Pinewood Apt. Assoc., Inc.*, 100 AD3d 873, 874-875 [2d Dept 2012]; *Collazo v Netherland Property Assets LLC*, 2017 NY Slip Op 31709 [U] at *1).

The DHCR is far more equipped than the courts to interpret and apply the Rent Stabilization Code ("RSC"), and it is in the best position to determine and calculate the amount of treble damages, if any, that the RSC allows for willful rent overcharges (*see* 9 NYCRR § 2526.1; *Williams v Daphne Realty Corp.*, 2019 NY Slip Op 31739 [U], *3 [Sup Ct., NY County, 2019]). It can investigate fraud allegations, determine the regulatory status of the apartment, and, if warranted, it can apply the "default formula" described below, and adopted in *Thorton v Baron*, 4 AD3d 258, 259-260 (1st Dept 2004), *affd* 5 NY3d 175 (2005) to determine a "base date" for calculating the legal regulated rent for an apartment (*see Olsen v Stellar W. 110, LLC.*, 96 AD3d at 441-442; *see generally Simpson v 16-26 E. 105, LLC*, ___ AD3d ____, ____, 2019 NY Slip Op 07026, *1-2 [1st Dept 2019]).

Pursuant to 9 NYCRR 2522.6 (b) (2), RSC requires that a base date be established to determine the legal regulated rent of an apartment (*Simpson v 16-26 E. 105, LLC*, 2019 NY Slip Op 07026 at *1). This base date is also used to calculate overcharges (*id.*). It should be noted that the legal regulated rent is the rent registered with the DHCR (*id.*). Certain circumstances warrant the application of the default formula, including situations where, "1) the base date rent cannot be determined, 2) a full rent history is not provided, or 3) the owner has engaged in fraudulent practices" (*id.*). The default formula provides that the base date must be "established at the lowest of 1) the lowest registered rent for a comparable apartment in the building at the time the complaining tenant moved in, 2) the complaining tenant's initial rent reduced by a certain percentage, 3) the last registered rent paid by the prior tenant within the lookback period, or 4) if none of those is appropriate, an amount set by [the] DHCR based on its relevant data (9 NYCRR 2522.6[b][3] and 2526.1[g])" (*id.*). Insofar as the relevant records used to determine the base date in overcharge actions lie within the DHCR's possession, the DHCR, and not the courts, is better equipped to address rent overcharge actions.

This Court finds that Dodos fails to demonstrate that HSTPA overruled longstanding precedent regarding the courts' discretion to invoke the doctrine of primary jurisdiction to transfer rent overcharge actions to the DHCR. Contrary to Dodos' contention, tenants have always had the choice of forum and, thus, the language that he relies on in Part F, § 1 of HSTPA, providing that the courts and the DHCR "shall have concurrent jurisdiction *subject to the tenant's choice of forum*" (emphasis added), cannot be reasonably interpreted as the legislature's intent to inhibit this Court's discretion to transfer highly technical rent overcharge cases to the DHCR (*compare 560-568 Audubon Tenants Association v 560-568 Audubon Realty*, LLC, 65 Misc 3d 759, 762 [Sup Ct, NY County 2019]; *Stafford v A&E Real Estate Holdings, LLC*, 2019 NY Slip

Op 33039 [U], *6 [Sup Ct, NY County 2019]). An intent to overrule the doctrine of primary jurisdiction by the legislature is not supported by the legislative materials of the bill (*see* 2019 New York Senate Bill 6458) and, if the legislature intended to limit the courts' discretion in this regard, it would have done so explicitly. In the summary section of the committee report, the legislature only indicated that Part F of HSTPA was intended to allow "[the D]HCR or a court of competent jurisdiction to look back at 6 years of rent history when determining rent overcharges, or a longer look back period if it is reasonably necessary to make a determination," and that it "[e]liminates the ability of an owner to escape punitive damages where the overcharges were willful" (NY Comm Report, 2019 New York Senate Bill S6458). Thus, contrary to Dodos' contention, there is nothing in the plain meaning of the statute or the accompanying legislative history to support a finding that the legislature intended that HSTPA override the doctrine of primary jurisdiction.

This Court rejects Dodos' contention during oral argument that this case involves a simple mathematical equation. Notwithstanding his contention, even if this case is as simple as Dodos contends and, thus, can be easily addressed by this Court, his argument that HSTPA overruled primary jurisdiction for rent overcharge actions is exceedingly broad and could not possibly have been the legislature's intent. Such an interpretation would effectively eviscerate this Court's discretion to transfer to the DHCR *any* rent overcharge action commenced in the courts, even complex actions that would benefit from the DHCR's expertise [emphasis added]. This interpretation is problematic since rent regulation matters are within the DHCR's expertise and discretion, especially as it relates to calculating legal rent and determining whether a unit is subject to rent stabilization (*see Williams v Daphne Realty Corp.*, 2019 NY Slip Op 31739 [U] at *2-3).

Dodos' interpretation of HSTPA would also burden the appellate process. As it stands, an aggrieved party may file a petition for administrative review ("PAR") with the DHCR and allege errors or issues upon which the order should be reviewed. Given the agency's expertise, the review of these matters by DHCR would be more expeditious than a review by the courts. Thus, if the courts can no longer transfer such cases to the DHCR, the appellate courts will become burdened with matters that can be more readily addressed by the DHCR's administrative review process. Based on the foregoing, the exercise of primary jurisdiction in these complex matters remains a valuable resource for courts, and Dodos' motion to renew is denied insofar as he fails to cite to "a change in the law that would change th[is Court's] prior determination" (CPLR 2221 [e] [2]).

Even assuming, *arguendo*, that HSTPA prevents a court from dismissing an action in favor of such claims being heard by the DHCR (*see 560-568 Audubon Tenants Association v 560-568 Audubon Realty, LLC*, 65 Misc 3d at 762; *Stafford v A&E Real Estate Holdings, LLC*, 2019 NY Slip Op 33039 [U] at *6), Dodos' motion to renew must be denied. HSTPA provides "that the statutory amendments contained in Part F shall take effect immediately and shall apply to any claims *pending* or *filed on or after such date*" (*Stafford v A&E Real Estate Holdings, LLC*, 2019 NY Slip Op 33039 [U] at *3 [internal quotation marks and citation omitted] [emphasis added]). HSTPA specifically provides that it cannot be applied retroactively. Since the 6/3/19 order dismissed the instant action prior to HSTPA's enactment on June 14, 2019, the disposed action is not a "pending" matter as contemplated by the statute (*compare Dugan v London Terrace Gardens, L.P.*, 177 AD3d 1, 8 [1st Dept 2019]; *Alekna v 201-217 W. Portfolio Owner LLC*, 2019 NY Slip Op 33256 [U], *2 [Sup Ct, NY County 2019]). Thus, the recent enactment, as interpreted by Dodos, has no bearing on this Court's prior determination.

Therefore, in light of the foregoing, it is hereby:

**ORDERED** that plaintiff Dean Dodos' motion seeking leave to renew and/or reargue the motion to dismiss by defendant East Noho Corp. (motion sequence 001) and the summary judgment motion by defendant 244-246 East 7th Street Investors, LLC (motion sequence 002) is denied; and it is further ordered

**ORDERED** that defendant 244-246 East 7th Street Investors, LLC shall serve a copy of this order, with notice of entry, upon all parties within 30 days of entry; and it is further

**ORDERED** that this constitutes the decision of the Court.

1122/2019
DATE

KATHRYN E. FREED, J.S.C.

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