

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. KELLY
Justice

IAS PART 16

WILLIE CHAVIS on behalf of himself
and Tenants affected by DHCR Order
issued May 9, 2002 and August 26,
2002,

INDEX NO. 13926/2004

MOTION

DATE January 25, 2005

Plaintiff,

MOTION

CAL. NO. 11

- against -

ALLISON & CO, c/O JMS REHAB ASSOC.
LTD.,

Defendant.

The following papers numbered 1 to 12 read on this motion by the plaintiff for leave to substitute Alberto Felfle as representative of the class. The defendant cross-moves to dismiss the complaint.

	<u>PAPERS NUMBERED</u>
Notice of Motion/Affid(s)-Exhibits.....	1 - 4
Notice of Cross Motion/Affid(s) in Opp.-Exhibits...	5 - 8
Affid(s) in Opp.-Exhibits.....	9 - 10
Replying Affidavits-Exhibits.....	11 - 12

Upon the foregoing papers the motion and cross-motion are determined as follows:

In this action, the plaintiff seeks to recoup damages for a rent increase affecting all the residents of a building located at 81-10 135th Street, Jamaica, New York. The Major Capital Improvement ("MCI") rent increase grant obtained by the defendant was authorized by the New York State Division of Housing and Community Renewal ("DHCR") for alleged capital improvements made to the premises where the putative class members reside. The plaintiff asserts that since the capital improvement, an upgrade of electrical wiring at the premises, was performed inadequately and not in accordance with requisite codes, the defendant is liable to the tenants of the building for damages resulting from fraudulent representations in its application to DHCR.

By this motion, the plaintiff seeks to amend the complaint and substitute Alberto Felfle for Willie Chavis as the representative of the class purportedly sought to be established in this case.

The defendant cross-moves to dismiss the plaintiff's complaint on the basis that the cause of action is barred by collateral estoppel, expiration of the statute of limitations and by the failure of the putative class members to exhaust their administrative remedies.

The rent increase based on the MCI was granted by DHCR on August 26, 2002 after all the tenants were afforded an opportunity to comment. To challenge DHCR's grant of the rent increase, the tenants were required to file a Petition for Administrative Review ("PAR") within 35 days of the issuance of DHCR's order (See, Rent Stabilization Code §2529.2 [9 NYCRR]; Clarendon Mgmt. Corp. v N.Y. State Div. of Hous. & Cmty. Renewal, 271 AD2d 688). Judicial review of a denial of a PAR in an action brought pursuant to Article 78 of the Civil Practice Law and Rules must be commenced within 60 days after issuance of the order (Rent Stabilization Code §2530.1 [9 NYCRR]).

Here, there is proof that only one tenant, Willie Chavis, filed a PAR which was denied in a decision dated December 31, 2002, approximately eighteen months before this action was commenced. The plaintiff's counsel acknowledges that Mr. Chavis is collaterally estopped from bringing this action because Mr. Chavis failed to bring a timely Article 78 proceeding. However, amending the pleading to substitute a tenant who presumably did not file a PAR does not remedy the defect in this action.

The within action attempts to obtain for the tenants in the building in question through the back door, what they are at this point foreclosed from obtaining through the front. Where, as here, governmental operations are at the heart of the dispute, "class actions are generally not superior to other available methods of adjudication" (Davis v Perales, 151 AD2d 749, 751). Potential class members can not circumvent the requirement that they exhaust their administrative remedies and subvert the regulatory scheme by the mechanism of class certification (See, Leone v Blum, 73 AD2d 252, 274). The logic behind this theory is that similarly situated plaintiffs will be protected by the principle of stare decisis (See, Davis v Perales, supra; Leone v Blum, supra). As the forum for disputing the propriety of the rent increase in question was in the administrative proceeding before DHCR established by the Rent Stabilization Law and the Rent Stabilization Code, the action by the tenants as the putative class action plaintiffs is defective as they failed to exhaust their administrative remedies.

Collateral estoppel bars re-litigation of identical issues, necessarily decided in a prior action and decisive of the present action where there was a full and fair opportunity to contest the issue in the prior action (Buechel v Bain, 97 NY2d 295, 303-04). The principle applies not only to those who were parties to the prior proceeding, but also those in privity with them (See e.g., Russell v N.Y. Cent. Mut. Fire Ins. Co., 11 AD3d 668). "To establish privity, the connection between the parties must be such that the interests of the nonparty can be said to have been represented in the prior proceeding" (Green v Santa

Fe Industries, Inc., 70 NY2d 244, 253; see also, Russell v N.Y. Cent. Mut. Fire Ins. Co., 11 AD3d 668).

The crucial issue in both the administrative proceeding before DHCR and in the present action based upon fraud, was the meritoriousness of the defendant's application for a rent increase as a result of its alleged MCI. The issue was pivotal in DHCR's determination and there is no proof that DHCR did not afford the tenants an opportunity to contest the defendant's application for a building-wide rent increase. Although all the tenants in the building were not parties to the PAR, they were de facto parties to the initial proceeding before the Rent Administrator as they are required to be notified of the proceeding and given an opportunity to submit written opposition to the application (See, Rent Stabilization Code §2527.3 [9 NYCRR]).

Moreover, under the circumstances, all the tenants were also, for collateral estoppel purposes, in privity with Willie Chavis at the PAR. Since the dispute centered on an across the board rent increase to all the apartments in the building and not just certain apartments, if one of the tenants had prevailed at either the hearing before DHCR or at the PAR by demonstrating that the defendant was not entitled to the rent increase because the wiring was not appropriately installed, the rent increase would have to have been denied as to all the tenants. Thus, the assumptive class action plaintiffs are collaterally estopped from disputing the rent increase at issue.

Accordingly, as the amendment in question is patently lacking merit (See, CPLR §3025[b]; McCaskey, Davies & Associates, Inc. v NYCHHC, 59 NY2d 755, 757; Lang v Dachs, 303 AD2d 645; Duffy v Wetzler, 260 AD2d 596), the plaintiff's motion is denied and the defendant's cross-motion to dismiss the plaintiff's complaint is granted.

Dated: February 28, 2005

Peter J. Kelly, J.S.C.