

To Be Submitted By:
Roger Sachar

APL-2018-00108

New York County Clerk's Index No. 157486/16

Court of Appeals

STATE OF NEW YORK

▶◀▶◀

DANIEL COLLAZO, MICHELLE COLLAZO, CHRISTOPHER ORTIZ, ANGELA WU, RENANA BEN-BASSAT, JONATHAN ROSS, BENJAMIN SHEFTER, MICHAEL SUH, JOHN WEISS, HOLLY WEISS, GABRIEL KRETZMER-SEED, NINA KRETZMER-SEED, CATHERINE ELLIN, NURIKA PADILLA, ALYSSA HENSKE, DANIEL ABAROA, DIANA POTTS, TIA TRATE, TYSON COLLAZO, RITA LOMBARDI, YANIRA SANCHEZ, DARIEL RODRIGUEZ, MEIR LINDENBAUM, SHARON GORDON, RUSSELL POLTRACK, MEGAN BOYCE, ELAN KATTAN, SHOSHANA COHEN, JONATHAN ABIKZER and ALEXANDRA ABIKZER,

Plaintiffs-Appellants,

against

NETHERLAND PROPERTY ASSETS LLC and PARKOFF OPERATING CORP.,

Defendants-Respondents.

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

NEWMAN FERRARA LLP
Attorneys for Amici Curiae
Lawrence Chaifetz, Dawn Fadely,
Michelle Hodkin,
Hajera Dehqanzada-Lyle and
Clement Chan
1250 Broadway, 27th Floor
New York, New York 10001
212-619-5400
rsachar@nflp.com

Of Counsel:

Roger Sachar

Date Completed: November 22, 2019

TABLE OF CONTENTS

PRELIMINARY STATEMENT..... 4

INTERESTS OF THE *AMICI*..... 6

ARGUMENT 8

 I. HSTPA ELIMINATES PRIMARY JURISDICTION 8

 II. A CLASS ACTION CANNOT BE DISMISSED ON PRIMARY
 JURISDICTION GROUNDS..... 9

CONCLUSION..... 11

TABLE OF AUTHORITIES

Cases

<i>Dugan v London Terrace Gardens, L.P.</i> , 34 Misc 3d 1240(A) (Sup Ct, NY County 2011)	5, 10
<i>Dugan v London Terrace Gardens, L.P.</i> , 101 AD3d 648 (1st Dept 2012)	10
<i>Hess, et al., v EDR Assets</i> , 171 AD3d 498 (1st Dept 2019)	8
<i>Stafford et al., v A&E Real Estate Holdings, et al.</i> , 2019 NY Slip Op. 33039(U), (Sup Ct, NY County 2019)	9

Statutes and Code Sections

CPLR 905	9
Laws 2019, ch 36 at Part F § 1 (HSTPA)	6, 9
RSC § 2207.1	9

Lawrence Chaifetz, Dawn Fadely, Michelle Hodkin, Hajera Dehqanzada-Lyle, and Clement Chan (collectively, the “*Amici*”) respectfully submit this brief as *amici curiae* in support of Plaintiffs-Appellants Daniel Collazo, Michelle Collazo, Christopher Ortiz, Angela Wu, Renana Ben-Bassat, Johnathan Ross, Benjamin Shefter, Michael Suh, John Weiss, Holly Weiss, Garbiel Kretzmer-Seed, Nina Kretzmer-Seed, Catherine Ellin, Nurika Padilla, Alyssa Henske, Daniel Abaroa, Diana Potts, Tia Trate, Tryson Collazo, Rita Lombardi, Yanira Sanchez, Dariel Rodriguez, Meir Lindenbaum, Sharon Gordon, Russell Poltrack, Megan Boyce, Elan Kattan, Shoshana Cohen, Jonathan Abikzer, and Alexandra Abikzer (“Appellants”). For the reasons detailed below – in addition to those detailed in Appellants’ own briefing – the Order of the Appellate Division, First Department¹ should be reversed.

PRELIMINARY STATEMENT

This action is one of the quintet of the currently pending cases which address the intersection of the Housing Stability and Tenant Protection Act of 2019 (“HSTPA,”), various tax benefits programs (such as J-51), and registration of regulated rent. Each of these cases presents questions that will affect thousands of tenants in currently pending actions before the lower courts.

¹ Sachar Affirmation in Support of Motion to Appear as *Amici Curiae*, (“Sachar Aff.”) Ex. A.

In this action, the primary argument relates to whether a rent-overcharge action may be dismissed in favor of DHCR's primary jurisdiction, especially following HSTPA's enactment. The *Amici* submit their brief to address one aspect of that question directly affecting them: may class action rent-overcharge cases be dismissed in favor of DHCR's "primary jurisdiction?"

The *Amici* are plaintiffs in five rent overcharge class actions. In each of their cases, the defendants (including defendants represented by Respondents-Defendants-Respondents' counsel herein) have argued that the claims must be dismissed in favor of DHCR's primary jurisdiction. The courts have universally rejected that contention. As the Honorable Lucy Billings explained, in a class action, "even if DHCR may be counted on to act, a remand to DHCR of these building-wide actions or other building by building or unit by unit actions would prompt an adjudication only within the same context as the particular action. DHCR would be even further limited in these two actions, as it is unauthorized to decide whether to certify a class, determine its parameters, adjudicate plaintiffs' classwide claims, or grant the classwide relief plaintiffs seek." (*Dugan v London Terrace Gardens, L.P.*, 34 Misc 3d 1240(A) [Sup Ct, NY County 2011], *affd*, 101 AD3d 648 [1st Dept 2012].) Thus, the answer to the question, may class action rent-overcharge cases be dismissed in favor of DHCR's "primary jurisdiction" - is "no," - because DHCR cannot afford full and complete relief.

That statement was true before HSTPA, and it is doubly-so, now. The Act's plain language provides that "the courts and [DHCR] shall have concurrent jurisdiction, subject to the tenant's choice of forum." (Laws 2019, ch 36 at Part F § 1, emphasis added.)

In any event, the *Amici* are certain that primary jurisdiction is no longer applicable in rent-overcharge claims. Nevertheless, to the extent that this Court finds anything in Defendants-Respondents' ("Respondents") supplemental briefing convincing, such that it does retain the doctrine of primary jurisdiction with respect to rent-overcharge claims, the *Amici* submit that in so holding, to avoid further confusion in the lower courts, this Court expressly provide that primary jurisdiction does not apply to class claims. An express statement from this Court, on that issue, will provide finality on that point (to the extent such is needed) in the lower courts.

INTERESTS OF THE AMICI

The *Amici* are each plaintiffs in overcharge class actions currently pending in the New York City courts. Each *Amici* is either rent-stabilized or, at a minimum, asserts that their apartment would be rent-stabilized, but for their landlord's misconduct. In each of *Amici's* cases, the landlords-defendants have insisted that their claims be dismissed in favor of DHCR's primary jurisdiction.

Lawrence Chaifetz is a plaintiff in *Chaifetz et al. v Weinreb Management, et al.* (Index No. 2844/2018 [Sup Ct., Bronx County]), a J-51 class action. The

landlord's counsel in that action (represented by counsel for Respondents herein) asserts that his claims should be dismissed in favor of DHCR's primary jurisdiction.²

Dawn Fadely is a plaintiff in *Yang, et al. v Creative Industries, Inc.*, (Index No. 155681/2017 [Sup Ct., NY County]), a J-51 class action. The landlord's counsel in that action asserts that her claims should be dismissed in favor of DHCR's primary jurisdiction.³ Justice Kalish rejected that argument.⁴

Michelle Hodkin is a plaintiff in *Connors, et al. v Kushner Companies LLC* (Index No. 522076/2017 [Sup Ct., Kings County]) a class action asserting that her landlord illegally deregulated units following the end of a temporary exemption from rent regulation. The landlord's counsel in that action asserts that her claims should be dismissed in favor of DHCR's primary jurisdiction.⁵ Justice Walker denied that request.⁶

Hajera Dehqanzada-Lyle is a plaintiff in *Stafford et al v A&E Real Estate Holdings, LLC, et ano.* (Index No. 655500/2016 [Sup Ct. NY County]), a class action asserting, *inter alia*, that the landlord inflated costs related to Individual Apartment Improvements. The landlord in that action asserts that her claims should

² Sachar Aff. Ex. B at 24.

³ Sachar Aff., Ex. C at 3-6.

⁴ Sachar Aff., Ex. D at 7.

⁵ Sachar Aff., Ex. E at 19-23.

⁶ Sachar Aff., Ex. F at 2.

be dismissed in favor of DHCR’s primary jurisdiction.⁷ Justice Cohen disagreed, and denied the motion to dismiss.⁸

Clement Chan is a plaintiff in *Chang et al. v Bronstein Properties LLC, et al.* (Index No. 153031/2018 [Sup Ct, NY County]) a class action asserting, *inter alia*, that the landlord inflated costs related to Individual Apartment Improvements. The landlord in that action asserts that her claims should be dismissed in favor of DHCR’s primary jurisdiction.⁹ Justice Kalish disagreed, and denied the motion to dismiss.¹⁰

ARGUMENT

I. HSTPA ELIMINATES PRIMARY JURISDICTION

HSTPA is abundantly clear, and provides that with respect to overcharge claims “the courts and [DHCR] shall have concurrent jurisdiction, subject to the tenant’s choice of forum.” (Laws 2019, ch 36 at Part F § 1, emphasis added.)The choice belongs to the tenants, and the *Amici*, and the tenants like them have chosen the Supreme Court as their preferred forum.

Just a few weeks ago, the Honorable Joel Cohen of the Commercial Division, New York County Supreme Court recognized that principle, holding that “Part F of the HSTPA now explicitly directs “[t]he courts and the [DHCR] shall have

⁷ Sachar Aff., Ex. H at 5-6.

⁸ Sachar Aff., Ex. H at 12-13.

⁹ Sachar Aff., Ex. I at 16-18.

¹⁰ Sachar Aff., Ex. J at 20.

concurrent jurisdiction, subject to the tenant’s choice of forum.’ HSTPA, Part F, §1 (emphasis added). Therefore, the Court declines to dismiss Plaintiffs’ Complaint on the basis of DHCR’s jurisdiction.” (*Stafford et al. v A&E Real Estate Holdings, et al.*, 2019 NY Slip Op. 33039[U], 8 [Sup Ct, NY County 2019].)

In sum, regardless of whether or not it is a class action, a rent-overcharge action cannot be dismissed, on primary jurisdiction grounds, pursuant to HSTPA.

II. A CLASS ACTION CANNOT BE DISMISSED ON PRIMARY JURISDICTION GROUNDS

Cases seeking class certification, such as the *Amici*’s cases, cannot be sent to DHCR, because that agency has no authority to entertain a class action. (*Compare* RSC §§ 2207.1, 2207.5, 2207.6, 2526.1, and 2527.1 with CPLR 905.) In that regard, Justice Billings’s opinion in *Dugan* is instructive. There, the court held “[n]evertheless, even if DHCR may be counted on to act, a remand to DHCR of these building-wide actions or other building by building or unit by unit actions would prompt an adjudication only within the same context as the particular action. DHCR would be even further limited in these two actions, as it is unauthorized to decide whether to certify a class, determine its parameters, adjudicate plaintiffs’ classwide claims, or grant the classwide relief plaintiffs seek.” (*Dugan v London Terrace Gardens, L.P.*, 34 Misc 3d at *3.) On appeal, the First Department further held that the “Supreme Court properly declined to cede primary jurisdiction of these actions to DHCR, since the actions raise legal issues, including class certification and applicable limitations

periods, that should be addressed in the first instance by the courts.” (*Dugan*, 101 AD3d 648 [1st Dept 2012]). The First Department reinforced that position just this year, in *Hess, et al., v EDR Assets*, (171 AD3d 498 [1st Dept 2019]), writing “we reject respondent's request for dismissal of this action on the ground that DHCR has primary jurisdiction since the action raises legal issues, including class certification, that must be addressed in the first instance by the court.” (*Id.* at 498). (*Amici*'s counsel herein represented the *Hess* plaintiffs, and Respondents' counsel represented the landlord [operated by the same parent entity that manages the building in this action]).

Setting aside that primary jurisdiction is unavailable in class actions, the Court should take note of what landlords, such as the *Amici*'s landlords, are actually trying to accomplish. Cloaking their motivations behind the doctrine of primary jurisdiction, they seek to suborn the courts into allowing them to escape the ramifications of their misconduct, without repercussion. DHCR is an agency of limited power and jurisdiction, and can only hear the claims of the parties before it. In other words, if putative class actions could be dismissed in favor of DHCR's primary jurisdiction, the *Amici* and their fellow plaintiffs would have their claims adjudicated, but the claims of the absent class members, who suffered identical wrongs, would remain unaddressed. Fadely, for example, would have her overcharge claims decided, but the more than one-hundred similarly harmed individuals at 28

Bedford Street, each of whom was deprived of rent-stabilized rights, would have their claims not only not remedied, but ignored entirely.

This Court should make clear that landlords are not permitted to use primary jurisdiction as a means to circumscribe the ramifications of their misconduct, and deprive tenants of a remedy to which they are entitled.


CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Appellants' own briefing, the Appellate Division's order should be reversed. In any event, to avoid further issues in the courts below, the *Amici* respectfully request that, when issuing its order in this appeal, the Court make clear that primary jurisdiction is unavailable in class action litigation.

DATED: New York, New York
November 22, 2019

NEWMAN FERRARA LLP

By: _____


Lucas A. Ferrara
Jarred I. Kassenoff
Roger Sachar
1250 Broadway, 27th Floor
New York, New York 10001
(212) 619-5400
lferrara@nflp.com
jkassenoff@nflp.com
rsachar@nflp.com

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c) that the foregoing brief was prepared on a computer.

A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of the statement of the status of related litigation; the corporate disclosure statement; the table of contents, the table of cases and authorities and the statement of questions presented required by subsection (a) of this section; and any addendum containing material required by § 500.1(h) is 1,698.

Dated: November 22, 2019

Respectfully Submitted,



NEWMAN FERRARA LLP

Attorneys for Amici Curiae

Lawrence Chaifetz, Dawn Fadely,

Michelle Hodkin, Hajera

Dehqanzada-Lyle and Clement Chan

1250 Broadway, 27th Floor

New York, New York 10001

212-619-5400