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United States District Court,
S.D. New York.

James D. HARMON, Jr., and Jeanne Harmon, Plaintiffs,
v.
Marvin MARKUS, individually and in his official capacity as Member and Chair of the New York City Rent Guidelines Board, City of New York; Deborah Van Amerongen, individually and in her official capacity as Commissioner, Division of Housing & Community Renewal, State of New York, Defendants.

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Attorneys and Law Firms

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Michelle L. Goldberg–Cahn, Amy Lynn Abramowitz, Anthony John Tomari, Office of the Attorney General, New York, NY, for Defendants.

Opinion

Order

BARBARA S. JONES, UNITED STATES DISTRICT JUDGE

***1** Plaintiffs James D. Harmon, Jr. and Jeanne Hannon ("Plaintiffs") filed this action on June 18, 2008, against Marvin Markus, individually and in his official capacity as a member and chairperson of the New York City Rent Guidelines Board (hereinafter "City Defendant"), and Deborah Van Amerongen, individually and in her official capacity as Commissioner of the New York State Division of Housing and Community Renewal (hereinafter "State Defendant" and collectively "Defendants"). Plaintiffs allege that the rent stabilization provisions of the New York City Administrative Code are unconstitutional. In October 2008 Defendants both submitted motions to dismiss the Plaintiffs' Complaint, arguing among other things that Plaintiffs' claim is not ripe for adjudication. For the foregoing reasons, Defendants' Motions to Dismiss are GRANTED.

BACKGROUND

Plaintiffs are owners of a five-story brownstone constructed in 1891 in the Upper West Side/Central Park West Historic District. Plaintiffs currently reside on the entire first floor of the building with the rest of the building occupied by renters in six apartments. Of these six apartments, three are subject to rent regulation under New York's Rent Stabilization Law, and three are rented at market rates. Plaintiffs claim that the regulated apartments are currently rented at 59% below market value.

Plaintiffs seek declaratory and injunctive relief declaring the Rent Stabilization Law of 1969 ("RSL"), N.Y. City Admin. Code § 26–501 et seq. (McKinney 2000), to be unconstitutional as applied to Plaintiffs and their property, declaring that the three regulated apartment leases are null and void, and permanently enjoining the Defendants, the City of New York, and the State of New York, from enforcing the RSL to Plaintiffs. (Compl. ¶ 5.) Plaintiffs argue that the RSL violates the Takings Clause of the Fifth Amendment, the Due Process Clause, the Contract Clause of Article I, § 10, the Thirteenth Amendment, and the Equal Protection Clause of the United States Constitution.

Plaintiffs bring this action against two defendants. City Defendant Marvin Markus is a Member and Chair of the New York City Rent Guidelines Board ("RGB"). In 1969, the New York City Council ("City Council") established the RSL which limited the percentage by which rents could be raised for certain apartments "in order to prevent speculative, unwarranted and abnormal increases in rents." Admin. Code § 26–501. The RSL was amended in 1974 by state legislation [1] which authorized the City Council to declare the existence of a housing emergency, after which housing accommodations become subject to rent guidelines boards in each county. For over two decades, the City Council has periodically declared the continued existence of a housing emergency. [2] In New York City, the Rent Guidelines Board ("RGB") establishes annual guidelines for rent adjustments. Defendant Markus is the RGB's chief administrative officer. Once the RGB establishes its annual guidelines for rent adjustments, "no owner of property ... shall charge or collect any rent in excess of the [regulated rent amount] until such a time as a different legal regulated rent shall be authorized." Id. § 26–512.

***2** Plaintiffs also bring this action against State Defendant Deborah Van Amerongen, the Commissioner of New York State Division of Housing and Community Renewal ("DHCR"). The DHCR is responsible for the administration and enforcement of the RSL. Property owners may apply for a hardship exception with the DHCR which would exempt them from the RGB guidelines. Id. § 26–511(c). Plaintiffs have made no application for a hardship exception with the DHCR.

LEGAL STANDARD

The Fifth Amendment of the U.S. Constitution prohibits the taking of private property without just compensation. See U.S. Const. amend. V. The taking of private property by the government for public use may occur when the government physically occupies or acquires ownership of private property or when the government enacts or enforces laws, regulations or rules that restrict some beneficial use or the full exploitation of private property. See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982). In analyzing a regulatory takings claim, the Court looks at several factors. See Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). Chief among those factors are "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." Id.; see also Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537–40 (2005). Thus, to determine whether a regulatory taking has occurred, the Court must analyze to what extent the RSL has deprived the Plaintiffs of economically viable uses of their property. See Federal Home Loan Mortgage Corp. v. DHCR, 83 F.3d 45, 48 (2d Cir. 1996).

Ripeness is a judicially-created doctrine designed to avoid premature review or adjudication of administrative actions. See de St. Aubin v. Flacke, 68 N.Y.2d 66, 75 (1986). The rationale for the doctrine is "to conserve judicial machinery for problems which are real and present or imminent, not to squander it on abstract or hypothetical or remote problems." 4 Davis, Administrative Law, § 25:1, at 350 (2d ed. 1983). The ripeness requirement also ensures that a dispute satisfies the case and controversy requirement of Article III of the U.S. Constitution by preventing a federal court from entangling itself in disagreements where the injury is merely speculative and may never occur, depending on the final administrative resolution. See Abbott Laboratories et al. v. Gardner, 387 U.S. 136, 148 (1967); Marchi v. Board of Coop. Educ. Servs., 173 F.3d 469, 478 (2d Cir. 1999)(stating ripeness is a "constitutional prerequisite of jurisdiction by federal courts.").

Under the doctrine of ripeness or finality, judicial review of an administrative determination may not be sought until the decision maker has come to "a definitive position" which has caused "actual, concrete injury." Dozier v. New York City, 130 A.D.2d 128, 133 (2d Dep't 1987). Thus, the focus of a ripeness inquiry is on the "finality and effect of the challenged action and whether harm from it might be [subsequently] prevented or cured by administrative means available to the plaintiff." Id. at 33 (quoting Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 192–93 (1985) [hereinafter Williamson]). [3] Accordingly, a "controversy cannot be ripe [for judicial review] if the claimed harm may be prevented or significantly ameliorated by further administrative action...." Church of St. Paul & St. Andrew v. Barwick, 67 N.Y.2d 510, 520, cert. denied, 479 U.S. 985 (1986).

DISCUSSION

A. Plaintiffs' Takings Claim

1. Plaintiff's 5th Amendment Claim Is Not Ripe For Judicial Determination

***3** As alleged in the Complaint, Plaintiffs are seeking a judgment declaring the RSL "unconstitutional as applied to" them. (Compl. ¶ 4.) Specifically, Plaintiffs argue that the RSL violates their constitutional rights under the Fifth Amendment, the Due Process Clause, the Contract Clause of Article I, § 10, the Thirteenth Amendment, and the Equal Protection Clause. However, Plaintiffs have not applied to the DHCR for a rent adjustment based on any hardship, as set forth in the RSL. See 9 NYCRR § 2522.4(b)–(c). Therefore, this action is not ripe for judicial review.

Facial challenges to regulations are generally considered "ripe the moment the challenged regulation or ordinance is passed." Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 736, n.10 (1997). However, Plaintiffs specifically allege that this case is an "as applied" challenge to the RSL. (Compl. ¶¶ 4–5, passim). Indeed, Plaintiffs had to do so in response to the well-settled law that a facial taking challenge to rent stabilization laws will not lie as of right. See Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Hodel, 452 U.S. at 294–95 (1981); Pennell v. City of San Jose, 485 U.S. 1, 10 (1988); Rent Stabilization Ass'n v. Dinkins, 5 F.3d 591, 596–97 (2d Cir. 1993).

The ripeness doctrine bars land use challenges under the Takings Clause, as well as equal protection and due process claims, which are not based on a final decision. See Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186–90 (1985); Dougherty v. Town of North Hempstead, 282 F.3d 83 (2d Cir. 2002). In Williamson, the Supreme Court established a two-prong test for analyzing ripeness claims asserted under the Fifth Amendment's Takings Clause. 473 U.S. at 194–95. First, the Court held that a takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Id. at 186. Second, the Court held that a takings claim is not ripe until the landowner has availed itself of the state's procedures for obtaining just compensation. Id. at 195.

Here, Plaintiffs fail to meet the first Williamson prong because Plaintiffs have not applied to the DHCR for any of the hardship exceptions permitted by the RSL statute. See Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 294–95 (1981)("[T]he constitutionality of statutes ought not be decided except in an actual factual setting."); Rent Stabilization Ass'n v. Dinkins, 5 F.3d 591, 596–97 (2d Cir. 1993)(dismissing association's takings challenge to RSL on standing grounds based on fact that Court would have to engage in *ad hoc* factual inguiry for each landlord). [4] The absence of a final determination—or any determination for that matter—by the DHCR regarding the appropriateness of the hardship exceptions of the RSL to Plaintiffs, prevents a determination of the constitutional harm incurred. "[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Williamson, 473 U.S. at 186–88.

***4** Plaintiffs fail to meet the second prong of the Williamson test because they have not applied to New York State Court seeking just compensation for the alleged taking. "A landowner 'has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State'." Villager Pond, Inc. v. Town of Darien, 56 F.3d 375, 379 (2d Cir. 1995) (citing Williamson, 473 U.S. at 195). "Thus, before a plaintiff may assert a federal takings claim, he must first seek compensation from the state if the state has a 'reasonable, certain and adequate provision for obtaining compensation.' " Villager Pond, Inc., 56 F.3d at 379–80 (citing Williamson, 473 U.S. at 194). "Even in physical takings cases, compensation must first be sought from the state if adequate procedures are available." Villager Pond, Inc., 56 F.3d at 380. Here, Plaintiffs have failed to seek compensation in state court for the alleged taking. As such, Plaintiffs' claims are not ripe. [5]

2. Plaintiffs' Other Takings Arguments Fail to Satisfy Ripeness

Plaintiffs cite three main reasons as to why this Court should ignore the ripeness deficiency: (1) Plaintiffs allege that the RSL constitutes a *per se* taking, (2) Plaintiffs request injunctive relief rather than compensation, and (3) Plaintiffs argue that they are an exception to the ripeness doctrine. These arguments fail to establish that their takings claim is ripe.

First, Plaintiffs allege that the RSL constitutes a "taking by physical occupation" and not a regulatory taking, a claim articulated for the first time in Plaintiffs' opposition papers. Plaintiffs claim that the RSL compels Plaintiffs to permit three tenants to reside in their building in a way which conveys to the tenants by operation of law many of the attributes of fee ownership, including succession rights. This allegedly constitutes a taking by physical occupation and the RSL is thus a *per se* taking under the Loretto standard and "qualitatively more intrusive than perhaps any other category of property regulation." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

Plaintiffs do not meet the standard for a *per se* taking. In Loretto, the Supreme Court found that a regulation requiring a property owner to permit a cable company to install its cable facilities upon his property amounted to a permanent physical occupation of the plaintiff's property. The Court held that regardless of the economic impact on the property owner, when government action produces or allows such an invasion, a taking occurs and just compensation must be provided to the owner. However, the Court's holding in Loretto does not dictate that the regulations challenged here effect a taking. The RSL's mandatory lease and service provisions are not comparable to the statute involved in Loretto. Indeed, the Supreme Court in Loretto emphasized that its decision did not affect the government's power to legislate with respect to housing conditions and landlord-tenant relations. Id. at 440. Moreover, a number of courts have expressly held that land use and housing laws which restrict the owner's use or control of his property or even place affirmative obligations on property use do not amount to the type of physical intrusion found in Loretto. See Yee v. City of Escondido, 503 U.S. 519, 527–28 (1992) (rejecting petitioners' claims that the rent control laws effected a physical taking of their property); Penn Central Transp. Co. v. City of New York, 438 U.S. at 135; Nasca v. Town of Brookhaven, 2008 U.S. Dist. LEXIS 73644, **22–28 (E.D.N.Y. Sept. 28, 2008) ("The Fifth Amendment is deemed to allow state and local governments broad power to regulate housing conditions without paying compensation for all resulting economic injuries."). Here, Plaintiffs have suffered no physical occupation of their property, despite their claims to the contrary. [6]

***5** Second, Plaintiffs argue that because they are seeking injunctive relief and not compensation that the Williamson ripeness standard (requiring a landowner to first seek compensation through State procedures) does not apply. This argument is premised upon the flawed notion that an injunction removing Plaintiffs' property from the RSL is appropriate in a takings claim, particularly in the case of an alleged taking that has already occurred as here. "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 297, n.40 (1981) (emphasis added). The government may effect a "taking" of property, so long as it provides "just compensation" to do so. [7] Plaintiffs' request for injunctive relief does not make the Supreme Court's precedent in Williamson inapplicable to them.

Third, Plaintiffs cannot demonstrate that the exceptions to the ripeness doctrine apply to them. The ripeness doctrine contains exceptions which permit early review when (a) "the legal question is 'fit' for resolution and delay means hardship," or (b) when exhaustion would prove "futile." Shalala v. IL Council on Long Term Care, 529 U.S. 1, 13 (2000) (citations omitted). Plaintiff has shown neither. Plaintiffs claim that appealing to the DHCR would be a hardship "by causing them the expense and effort of participating in a complex administrative process which cannot compensate them ... especially true considering the plaintiffs' ages of 65 and 64," and the tenants' similar ages. (Pl. Opp. Memo, at 25.) Such time and expense to wade through a complex process is a consequence of being in a regulated industry, and Plaintiffs' ages do not show any particular hardship deserving of exception. Further, Plaintiffs argue that an application for exception before the DHCR would be "futile." However, they do not claim that the DHCR lacks the power to grant them a hardship exception or that the DHCR "has dug in its heels and made clear that all such applications will be denied." Southview Assoc. Ltd. v. Bongartz, 980 F.2d 84, 98–99 (2d Cir. 1992). Plaintiffs merely believe that their hardship application will likely not prevail. That Plaintiffs may not ultimately obtain any relief by proceeding through the proscribed administrative process does not render the requirement that they apply for hardship exemptions to the DHCR as "futile." [8]

B. Plaintiffs' Due Process and Equal Protection Claims Are Also Unripe

***6** Plaintiffs also put forth equal protection, and substantive and procedural due process claims. "The ripeness requirement of Williamson, although announced in a takings context, has been extended to equal protection and due process claims asserted in the context of land use challenges." Dougherty v. Town of North Hempstead, 282 F.3d 83, 89–90 (2d Cir. 2002). Plaintiffs' equal protection and both due process claims thus fail due to ripeness as well.

C. Plaintiffs' Other Claims Fail as a Matter of Law

Plaintiffs make two other claims: that the RSL is unconstitutional because it violates and deprives Plaintiffs of their rights under (1) the Contract Clause of Article I, § 10 of the Constitution, and (2) the Thirteenth Amendment. Both of these claims fail as a matter of law.

Plaintiffs' Complaint alleges that the RSL violates the Contracts Clause of the Constitution. Article I, § 10 provides: "No State shall ... pass any ... Law impairing the Obligation of Contracts ...." To state a claim for violation of the Contract Clause, a plaintiff must allege facts sufficient to demonstrate that a state law has "operated as a substantial impairment of a contractual relationship." General Motors Corp. v. Romein, 503 U.S. 181, 186 (1992) (citation omitted). One component to this inquiry is "whether a change in law impairs that contractual relationship." Id. Here, there was no change in the law impairing any contractual relationship that Plaintiffs were parties to. See Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411–12 (1983). Plaintiffs first took ownership of the subject premises in 2005, long after the RSL was in effect and applicable to the building. Such an argument could only be asserted by the prior owners of the premises who were parties to existing contracts at the time the RSL was enacted in 1969. Plaintiffs have not shown that a change in law impaired their contractual relationships with the rent-stabilized tenants. [9] Plaintiffs' Contract Clause claim fails as a matter of law.

Plaintiffs' Complaint also alleges that the RSL has forced Plaintiffs into involuntary servitude in violation of the Thirteenth Amendment by forcing Plaintiffs to provide repairs, maintenance, utilities, and janitorial services to the regulated tenants. The Thirteenth Amendment commands: "Neither slavery nor involuntary servitude ... shall exist within the United States." New York courts have found Thirteenth Amendment challenges to rent control provisions to be "frivolous." Dawson v. Higgins, 197 A.D.2d 127, 138 (1st Dep't 1994), appeal dismissed 83 N.Y.2d 996, cert. denied, sub nom., Dawson v. Halperin, 513 U.S. 1077 (1995). In Dawson, the court noted that the plaintiffs purchased their property "knowing that it was occupied by rent-controlled tenants and that its use was regulated." Id. at 138. Moreover, the Court observed that "Plaintiffs need only sell their building to escape the minimal restrictions placed upon them by the challenged provisions." Id. Here, too, Plaintiffs took possession of the subject premises knowing that it was subject

to the provisions of the RSL. (See Compl. ¶ 6, 24.) Indeed, like the plaintiffs in Dawson, Plaintiffs can easily escape the rent stabilization provisions on certain apartments in their building by selling it. Plaintiffs' Thirteenth Amendment claim fails as a matter of law.

D. Request to Amend Complaint and Add Defendants

***7** On March 4, 2009, Plaintiffs moved to add the City of New York as a party defendant in this action, amend the complaint, submit a sur-reply, and permit oral argument on Defendants' pending motions to dismiss. On July 1, 2009, Plaintiffs further requested leave to serve a supplemental pleading setting forth events which have happened since the filing of the Complaint in this action, namely the City Council's 2009 renewal of Local Law 3 which extended the RSL another 3 years. Plaintiffs entered these motions respectively three and seven months after the motions to dismiss were fully briefed and submitted.

Rule 15(a) of the Federal Rules of Civil Procedure directs that leave to amend a pleading "shall be freely given." State Teachers Ret. Bd. v. Fluor Corp., 654 F.2d 843, 856 (2d Cir. 1981). However, a court may deny an amendment to a pleading as futile if the newly added claim "would be subject to immediate dismissal." Lavaggi v. The Republic of Argentina, 2008 U.S. Dist. LEXIS 76422, at *4 (S.D.N.Y. Sept. 30, 2008) (quoting Jones v. New York State Div. of Military & Naval Affairs, 166 F.3d 45, 55 (2d Cir. 1999). The Court has reviewed Plaintiffs' proposed Amended Complaint as well as their other papers. The Court finds that adding a party defendant, amending the complaint, serving a supplemental pleading, and submitting a sur-reply all would be futile as none of these actions would remedy the ripeness or failure to state a claim deficiencies as detailed above. Such motions are therefore DENIED.

CONCLUSION

Defendants' Motions to Dismiss (Dkt. # 12 and #19) are GRANTED. Plaintiffs' Motion to Amend the Complaint (Dkt. # 28), Request for Oral Argument (Dkt. # 28), and Motion to Permit Supplemental Pleading (Dkt. #34) are DENIED. The Clerk of the Court is directed to close this case.

SO ORDERED:

All Citations

Slip Copy, 2010 WL 11530596

Footnotes

1 See Chapter 576 of the Laws of 1974, which enacted, among other things, the Emergency Tenant Protection Act of 1974 ("ETPA"). The ETPA was designed to facilitate the extension of rent stabilization.

2 Although these statutes have been in effect for an extended period, each of them, by its terms, is of limited duration, and must be periodically reenacted by the City Council. § 26–502 states: "The council hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons within the City of New York and will continue to exist on and after April first, two thousand six and hereby reaffirms and repromulgates the findings and declaration set forth in section 26–501 of this title."

3 The requirement that an administrative action be ripe or final before it may be judicially reviewed is "conceptually distinct" from the requirement that administrative remedies be exhausted. Williamson, at 192–93. "While the policies underlying the two concepts often overlap," the ripeness or "finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate." Id.

4 Further, in Hodel v. Virginia Surface Mining & Reclamation Ass'n, the Supreme Court rejected a claim that the Surface Mining Control and Reclamation Act of 1977 constituted a taking because there was no indication in the record that the plaintiffs had availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance or a waiver from the restrictions set forth in that Act. 452 U.S. 264 (1981). The Court concluded that if the plaintiffs were to seek such administrative relief "a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions. The potential for such administrative solutions confirms the conclusion that the taking issue decided by the District Court simply is not ripe for judicial resolution." Id. at 297. Similarly, in Agins v. Tiburon, the Supreme Court held that a challenge to the application of a zoning ordinance was not ripe because the property owners had not yet submitted a plan for development of their property. 447 U.S. 255, 260 (1980). Also, in Penn Central Transp. Co. v. New York City, the Supreme Court declined to find that the application of the New York City Landmarks Preservation Law to Grand Central Terminal effected a taking because the property owners had not sought approval for any plan other than the one disapproved, and it was thus unclear whether the New York City Landmarks Commission "would deny approval for all uses that would enable the plaintiffs to derive economic benefit from the property." 438 U.S. 104, 136–37 (1978).

5 In a recent submission, Plaintiffs notified the Court of a recent Ninth Circuit Court of Appeals decision Plaintiffs feel is relevant. Guggenheim v.City of Goleta, 582 F.3d 996 (9th Cir. Sept. 28, 2009). The Court finds this case unpersuasive. Notwithstanding the non-precedential effect of a Ninth Circuit decision on this Court and the fact that it directly conflicts with decisions of the Second Circuit already cited above, the Ninth Circuit in Guggenheim found that the plaintiffs' takings claim was ripe for review on the merits because the defendant City of Goleta "forfeited its claim that the case was not ripe for decision" and the parties had already "litigated and settled several state law issues relevant to the alleged taking" in state court "several times over." Guggenheim, 582 F.3d at 1005, 1011–12; see also Thunderbird Hotels, LLC v. City of Portland, 2009 U.S. Dist. LEXIS 103371, **10–11 (D. Ore. Nov. 5, 2009)(distinguishing Guggenheim). Here, Defendants have made no such concessions or forfeitures.

6 Further, a regulatory action will be deemed a *per se* taking if the regulations completely deprive an owner of "all economically beneficial use" of their property. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992). As Plaintiffs allege that they receive market-rate rents for three of the apartments in the subject premises (Compl. ¶ 27), and still collect rents for three other apartments on the premises (Compl. ¶¶ 27–43), Plaintiffs clearly do retain some economically viable use of their property.

7 The only case Plaintiffs rely on in support of their injunction argument is Goldstein v. Pataki, 2007 WL 1695573, 2007 U.S. Dist. LEXIS 44491 (E.D.N.Y. Feb. 23, 2007). The Court finds this case inapposite to the present action. First, the parties in Goldstein agreed that the Williamson framework was inapplicable because the plaintiffs there sought relief pursuant to the Fifth Amendment's "Public Use Clause" with respect to the government eminent domain procedures, which is not at issue herein. Id. at *——, 2007 U.S. Dist. LEXIS 44491 at *34. Second, in Goldstein, the Court relied on the fact that the taking had not yet occurred. Id. at **—— – ——, 2007 U.S. Dist. LEXIS 44491 at **35–36. Here, Plaintiffs are complaining about an alleged taking that occurred beginning 40 years ago. Third, the Court in Goldstein concluded that the matter was ripe for review based on the highly specific "unique facts" therein. Id. Moreover, when the Second Circuit reviewed the case on appeal, it noted that the defendants conceded the ripeness issue because the condemnation was much further along at the time of the appeal than it was at the time the action was commenced. Goldstein v. Pataki, 516 F.3d 50, 54, n.2 (2d Cir. 2008).

8 While DHCR cannot provide Plaintiffs with the equitable relief that they seek herein, a hardship exemption increasing the amount of rents that Plaintiffs may charge their rent-regulated tenants would be directly relevant to reviewing Plaintiffs' "as applied" takings claim—i.e., the economic impact of the RSL "as applied" to Plaintiffs' property. See, e.g., Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978); Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537–40 (2005); Federal Home Loan Mortgage Corp. v. DHCR, 83 F.3d 45, 48 (2d Cir. 1996). Because Plaintiffs couch their takings challenge as an "as applied" challenge, in the absence of a final determination by DHCR or by the state court that Plaintiffs are not entitled to compensation, this Court cannot determine whether the Plaintiffs have suffered any constitutional harm. See Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Rent Stabilization Ass'n v. Dinkins, 5 F.3d 591, 596–97 (2d Cir. 1993).

9 In their opposition papers, Plaintiffs argue that the Contract Clause argument should survive because the Legislature's periodic extension of rent regulation served as a change in the law. However, it is well-settled that the RSL's extensions of rent regulation do not create a Contract Clause problem. The regular renewals of the RSL are fully predictable and were authorized by the overarching scheme of the Emergency Tenant Protection Act of 1974 and the local laws comprising the RSL. Thus, Plaintiffs cannot claim that each extension of the RSL impaired existing contracts. See Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 242 (1978); Freeport Randall Co. v. Herman, 56 N.Y.2d 832 (1982).

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