

**SUPREME COURT OF THE STATE OF NEW YORK  
QUEENS COUNTY**

**PRESENT: HON. LOURDES M. VENTURA PART 37**

*Justice*

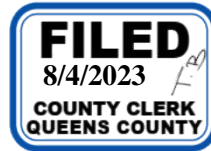
-----X **INDEX NO.** 711414/2022

RISHAV BINAYAK DAS, K CLARY, C SYLVIA,  
JARED JULIUS,  
Plaintiff, **MOTION SEQ.**  
**NO.** 001

- v -

THE DELMAR OWNER LLC,  
Defendant.

**ORDER ON MOTION**



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The following numbered papers read on this motion by the defendant The Delmar Owner LLC., (Delmar), against the plaintiff class of tenants, represented by named tenants Rishav Binayak Das, K. Clary, C. Sylvia and Jared Julius, (Plaintiffs), seeking an order pursuant to CPLR 3211 (a) (1) and/or (7) dismissing the complaint.

	Papers <u>Numbered</u>
Notices of Motions - Affidavits - Exhibits .....	EF 5-23
Answering Affidavits - Exhibits .....	EF 26-37
Reply Affidavits .....	EF 38

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is an action by the plaintiff class of tenants seeking relief from an alleged fraudulent scheme whereby they claim the defendant Delmar, as owner, illegally used “rent concessions”, in order to establish an artificially higher initial legal rent for the apartments in this rent stabilized building. The defendant contends that the one-time rent concessions afforded to plaintiffs were legitimate exercises of its rights afforded to owners by the rent stabilization laws. The “scheme” alleged by the plaintiffs, is that the use of these rent concessions hid the fact that over the course of the full year, the “net effective rent” was several hundred dollars lower than the calculation of the initial legal regulated rent moving forward, which is described by rule and statute as “the monthly rent charged and paid by the tenant.” The rent concession provided by Delmar, waived two designated months of rent for each of the plaintiff-tenants within the first twelve-month period of their leases. These two waived months of rent were not included in the calculation of initial legal regulated rent. The plaintiffs aver that the twelve months of rent should be averaged out, including the zero amounts for the two months waived, in order to make this determination. It is alleged that Delmar gains the benefit of using the higher initial legal rent as its base for future calculations of increases, which subjects the plaintiff tenant and future tenants of that apartment with higher rents than they would have had to pay.

In support of its motion, the defendant submitted, among other things, a copy of its attorney's affirmation, a copy of the pleadings, copies of the relevant leases, copies of the relevant DHCR registrations, a copy of the Certificate of Occupancy, and a copy of DHCR Fact Sheet #40. In opposition, the plaintiff class submitted, inter alia, their attorney's affirmation.

On a motion to dismiss a complaint pursuant to CPLR § 3211 (a) (1), the documentary evidence must utterly refute the plaintiff's allegations. (*See Phillips v Taco Bell Corp.*, 152 AD3d 806 [2d Dept 2017].) Such evidence must be unambiguous, authentic and undeniable such as judicial records and documents such as a contract, the contents of which are essentially undeniable. (*Id.*)

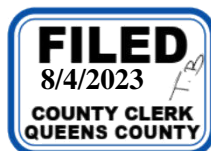
When considering a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only if the facts alleged fit within any cognizable legal theory. (*See Leon v Martinez*, 84 NY2d 83 [1994]; *Polite v Marquis Marriot Hotel*, 195 AD3d 965 [2d Dept 2021]; *Travelsavers Enterprises, Inc., v Analog Analytics, Inc.*, 149 AD3d 1003 [2d Dept 2017].) However, if it is shown that a material fact as claimed by the pleader is not a fact at all, dismissal is warranted. (*See Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]; *MJK Building Corp., v Fayland Realty Inc.*, 181 AD3d 860 [2d Dept 2020]; *Pinnacle Realty of New York, LLC, v 255 Butler, LLC*, 125 AD3d 952 [2d Dept 2015].

One-time rent concessions have been found to be legitimate exercises of the rights afforded to landlords in setting initial legal regulated rents for apartments subject to rent stabilization and the buildings that are under the 421-a program. (*See Flynn v Red Apple 670 Pac. St., LLC*, 200 AD3d 607 [1<sup>st</sup> Dept 2021].) In other words, a landlord may provide a one-time concession, whereby zero rent is collected for up to three months in a one-year period, as long as they refer to waivers of specific months, and are not "prorated concessions", or "preferential rents." (*Id.*) In a very recent case, on point with the one at bar, the court found that the two-month concession provided to the tenant by the landlord, was properly applied, and did not affect the calculation of the initial legal rent. (*See Burrows v 75-25 153<sup>rd</sup> Street, LLC*, 215 AD3d 105 [1<sup>st</sup> Dept 2023]) Simply put, merely alleging that the landlord utilized the rent concession as permitted by Fact Sheet #40, and gleaned the benefit of not counting the concession towards the calculation of the initial legal regulated rent, is insufficient to make out a meritable cause of action. (*Id.*; *Flynn*, 200 AD3d 607.)

Accordingly, the defendant's motion pursuant to CPLR § 3211 (a) (7) is granted. The court need not address the remaining branch of defendant's motion.

This shall constitute the Decision and Order of the Court.

Dated: August 3, 2023



A handwritten signature in black ink, appearing to be "L. Ventura".

HON. LOURDES M. VENTURA, J.S.C.