APPENDIX

1. Court of Appeals Summary Order
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20-62-cv
Tang v. Visnauskas

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of February, two thousand twenty-one.

PRESENT: JOHN M. WALKER, JR.,
ROBERT D. SACK,
RICHARD J. SULLIVAN,
Circuit Judges.

HONG TANG,

Plaintiff-Appellant,

v. 20-62-cv

RUTHANNE VISNAUSKAS, Commissioner of the New York State Division of Housing and Community Renewal, WOODY PASCAL, Deputy Commissioner of the New York State Division of Housing and Community Renewal,

Defendants-Appellees.

For Plaintiff-Appellant: Hong Tang, pro se, San Francisco, CA.

For Defendants-Appellees: Barbara D. Underwood, Solicitor General, Jeffrey W. Lang, Deputy Solicitor General, David Lawrence III, Assistant Solicitor General, *for* Letitia James, Attorney General for the State of New York, New York, NY.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Pamela K. Chen, *Judge*.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the district court's judgment is **AFFIRMED.**

Plaintiff-Appellant Hong Tang, pro se, sued the Commissioner and Deputy Commissioner of the New York State Division of Housing and Community Renewal ("DHCR"), asserting due process and equal protection claims pursuant to 42 U.S.C. § 1983. Tang's claims arose out of an administrative proceeding with DHCR in which he alleged that he, a subtenant, had not received a copy of his lease, and in which he indicated that the tenant may have unlawfully sublet the rent stabilized apartment to him.[1] After granting Tang an opportunity to articulate

[1] We do not consider Tang's substantive due process claim, or his claim that he was deprived of a liberty interest without due process, because these claims were raised for the first time on appeal. *See, e.g., Zerilli-Edelglass v. N.Y.C. Transit Auth.*, 333 F.3d 74, 80 (2d Cir. 2003).

his claims at oral argument and leave to amend his complaint, the district court dismissed the action for failure to state a claim on which relief could be granted. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review the dismissal of a complaint pursuant to Rule 12(b)(6) de novo. *See Forest Park Pictures v. Universal Television Network*, 683 F.3d 424, 429 (2d Cir. 2012). And while we review the denial of a motion for reconsideration for abuse of discretion, "[w]e generally treat an appeal from a denial of a motion for reconsideration that largely renews arguments previously made in the underlying order as bringing up for review the underlying order or judgment." *Van Buskirk v. United Grp. of Cos., Inc.*, 935 F.3d 49, 52–53 (2d Cir. 2019).

A complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although all allegations in the complaint are assumed to be true, this tenet does not apply to legal conclusions. *Id.* When applying these principles in the context of a complaint

filed by a pro se litigant, we "conduct our examination with special solicitude, interpreting the complaint to raise the strongest claims that it suggests." *Williams v. Corr. Officer Priatno*, 829 F.3d 118, 122 (2d Cir. 2016) (internal quotation marks omitted).

I. Procedural Due Process

To prevail on a procedural due process claim, a plaintiff must (1) "identify a property right," (2) "show that the state has deprived him of that right," and (3) "show that the deprivation was effected without due process." *Mehta v. Surles*, 905 F.2d 595, 598 (2d Cir. 1990) (emphasis omitted). We reject Tang's argument that DHCR's alleged failure to apply its own procedures created a property interest in and of itself, because a state or state agency rule that is "purely procedural . . . does not give rise to an independent interest protected by the [F]ourteenth [A]mendment." *Fusco v. Connecticut*, 815 F.2d 201, 206 (2d Cir. 1987); *see also W. Farms Assocs. v. State Traffic Comm'n of Conn.*, 951 F.2d 469, 472 (2d Cir. 1991) ("[T]he Due Process Clause does not protect against the deprivation of state procedural rights."). And even if Tang had a protected property interest in the alleged rent overcharges unlawfully gained by the sublessor, he has failed to demonstrate that the *state* deprived him of these funds. In fact, Tang does not

allege that the state or DHCR owes him the funds or that the state benefitted from any alleged rent overcharges.

Tang's procedural due process claim is premised on his allegation that the defendants failed to comply with the procedures established in DHCR Fact Sheet #7. He appears to construe this fact sheet as requiring DHCR to resolve disputes over rent overcharges as part of its administrative duties pertaining to tenant complaints regarding lease renewals by owners. However, neither the fact sheet nor the complaint form provided by DHCR suggests that DHCR resolves rent disputes between tenants and owners. Moreover, Tang did not explicitly claim rent overcharges; he mentioned only that he was "a possible victim in an 'Illusory Sublet' situation." Dist. Ct. Dkt. 10-1 at 3. As noted by defendant Deputy Commissioner Woody Pascal in his administrative decision, rent overcharges were not relevant to Tang's administrative proceeding with DHCR regarding the owner's alleged failure to provide a copy of the lease. Accordingly, the district court correctly dismissed Tang's procedural due process claim.

II. Equal Protection

The district court correctly determined that Tang's equal protection claim was untimely. "The statute of limitations on an Equal Protection claim brought in

New York under 42 U.S.C. § 1983 is three years" and accrues when the plaintiff "knew or should have known of the disparate treatment." *Fahs Constr. Grp., Inc. v. Gray*, 725 F.3d 289, 292 (2d Cir. 2013). Here, Tang's unequal treatment claim accrued when DHCR issued its final decision on January 26, 2016. Although Tang's original district court complaint was filed on January 25, 2019, the last day of this three-year period, his amended complaint was filed after the statute of limitations had expired and did not relate back to his original complaint. In fact, Tang's original complaint contained no factual assertions whatsoever regarding the equal protection claim. *See Lehman XS Tr., Series 2006-GP2 by U.S. Bank Nat'l Ass'n v. GreenPoint Mortg. Funding, Inc.*, 916 F.3d 116, 128 (2d Cir. 2019) ("[E]ven where an amended complaint tracks the legal theory of the first complaint, claims that are based on an entirely distinct set of factual allegations will not relate back." (internal quotation marks omitted)). As such, the district court properly concluded that Tang's equal protection claim was barred by the three-year statute of limitations.

III. Reconsideration

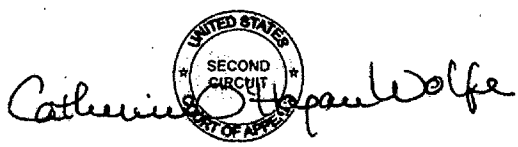
Reconsideration is "an extraordinary request that is granted only in rare circumstances," and "will generally be denied unless the moving party can point

to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Van Buskirk*, 935 F.3d at 54 (internal quotation marks omitted). In his motion for reconsideration, Tang did not cite controlling decisions that the district court had overlooked, and although he correctly noted that the court had misattributed a quote from defendant Pascal's administrative decision to the state court judge presiding over his Article 78 proceeding, that error did not affect the court's conclusion that he lacked a property interest necessary to state a due process claim. Accordingly, the district court did not abuse its discretion in denying his request for reconsideration.

* * *

We have considered all of Tang's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of April, two thousand twenty-one.

Hong Tang,

Plaintiff - Appellant,

v.

RuthAnne Visnauskas, Commissioner of the New York State Division of Housing and Community Renewal, Woody Pascal, Deputy Commissioner of the New York State Division of Housing and Community Renewal,

Defendants - Appellees.

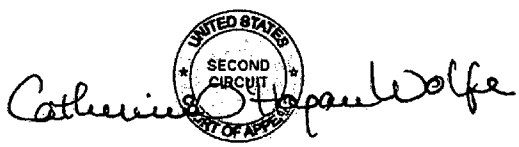
ORDER

Docket No: 20-62

Appellant, Hong Tang, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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HONG TANG,

Plaintiff,

JUDGMENT
19-CV-00508 (PKC) (PK)

-against-

RUTHANNE VISNAUSKAS, Commissioner of the New York State Division of Housing and Community Renewal, and WOODY PASCAL, Deputy Commissioner of the New York State Division of Housing and Community Renewal,

Defendants.

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A Memorandum and Order of Honorable Pamela K. Chen, United States District Judge, having been filed on September 20, 2019, dismissing this action for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6); certifying pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this Memorandum & Order would not be taken in good faith; and denying *in forma pauperis* status for the purpose of an appeal; *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962); it is

ORDERED and ADJUDGED that pursuant to Fed. R. Civ. P. 12(b)(6) this complaint is dismissed for failure to state a claim; that pursuant to 28 U.S.C. § 1915(a)(3) any appeal from this Memorandum & Order would not be taken in good faith, although Plaintiff has paid the filing fee to initiate this action; and that *in forma pauperis* status is denied for the purpose of an appeal; *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

Dated: Brooklyn, NY
September 23, 2019

Douglas C. Palmer
Clerk of Court

By: */s/Tiffany Campbell*
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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HONG TANG,

Plaintiff,

- against -

RUTHANNE VISNAUSKAS, Commissioner of the New York State Division of Housing and Community Renewal, and WOODY PASCAL, Deputy Commissioner of the New York State Division of Housing and Community Renewal,

Defendants.

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MEMORANDUM & ORDER
1:19-CV-00508 (PKC) (PK)

PAMELA K. CHEN, United States District Judge:

Plaintiff, proceeding *pro se*, initiated this action on January 25, 2019. (Dkt. 1.) Defendants sought permission to file a motion to dismiss on May 16, 2019 (Dkt. 7), and the Court held oral argument on August 14, 2019, at which Plaintiff requested, and was granted, permission to file an "amended complaint"[1] (Minute Entry, dated 8/14/19). On September 13, 2019, Plaintiff filed his Second Amended Complaint ("SAC"), alleging due process and equal protection claims in connection with Defendants' handling of Plaintiff's "Illusory Sublet" complaint with the New York State Division of Housing and Community Renewal ("DHCR"). (*See* Dkt. 17.) The Court dismissed the SAC in its entirety. *See Hong Tang v. Visnauskas*, No. 19-CV-00508 (PKC) (PK), 2019 WL 4575366 (E.D.N.Y. Sept. 20, 2019). On October 10, 2019, Plaintiff moved for reconsideration. (Dkt. 21.) Although filed after the 14-day period provided for under Local Rule

[1] Though referred to at the oral argument as the "amended complaint," it was in fact Plaintiff's second amended complaint.

6.3, given Plaintiff's *pro se* status, the Court has considered, and now denies, that motion for the reasons set forth below.

"A motion for reconsideration should be granted only when the [party] identifies an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Arutyunyan v. Fields*, No. 17-CV-5009 (AMD), 2018 WL 5776534, at *2 (E.D.N.Y. Nov. 2, 2018) (quoting *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 104 (2d Cir. 2013)). None of these factors is present here.

First, Plaintiff argues that the Court improperly applied and overlooked the case *Mace v. County of Sullivan*. No. 05-CV-2786 (SCR) (GAY), 2009 WL 413503 (S.D.N.Y. Feb. 11, 2009). However, the Court's September 20, 2019 Order specifically addressed and properly applied the relevant finding from *Mace*, namely, that the "failure to follow proper state procedures in itself . . . does not create a cognizable federal due process claim," and, thus, that the DHCR's failure to follow its own procedure was, by itself, insufficient to create a cognizable federal due process claim. *Hong Tang*, 2019 WL 4575366, at *3. Plaintiff cannot re-litigate an argument already addressed, and therefore not overlooked, by the Court.

Second, Plaintiff identifies that the Court's September 20, 2019 Order mistakenly attributed the following statement to the Honorable Barbara Jaffe of the Supreme Court of New York, New York County, as having been made while she presided over his Article 78 Proceeding:

> The tenant [Plaintiff] further alleges that he had various communications by email and in person with the owner, and the owner did not mention that the Rent Administrator's [ ] finding; that [the DHCR Fact Sheet] states that, if a complaint is justified, the owner will be required to recognize the subtenant as the actual tenant, the illusory prime tenant will be legally responsible to refund all overcharges collected from the subtenant, and if the subtenant can prove that the owner received part or all of the overcharges the owner will also be responsible for refunding the rent overcharges; that the Rent Administrator found that the subtenant had the right to the renewal lease, and so terminated the proceeding, which was incorrect as the issue of overcharges had not been resolved; that *Thornton v. Baron*, 4 AD 258 (1st

> Dept. 2004[)] applies to this case; that, despite the owner's 9/16/14 statement that the owner did not know of the sublease or of the subtenant, the owner sent an email to the subtenant on 12/9/14; and that the Rent Administrator did not review or address this issue....
>
> The instant proceeding was commenced by the subtenant's (the "tenant" herein) filing of a Tenant's Complaint of Owner's Failure to Renew Lease and/or Failure to Furnish a Copy of Signed Lease, and the instant proceeding is confined solely to a determination of said Complaint. The Rent Administrator terminated the proceeding based upon the fact that the owner and the tenant both submitted copies of the same executed renewal lease for the term from 6/15/15 to 6/14/16. *Because the subtenant, the tenant herein and now the prime-tenant of the subject apartment, has received a signed renewal lease, the Rent Administrator properly found that the matter had been resolved and was correct to accordingly terminate the proceeding.*

Hong Tang, 2019 WL 4575366, at *3 (emphasis in original). Plaintiff correctly points out that these comments were in fact made by Defendant Woody Pascal in his January 26, 2016 Order and Opinion. (*See* Dkt. 17-1, at ECF[2] 7.) However, despite this misattribution, the quote serves only to illustrate the intended point, namely, that Plaintiff's proceeding, in which he argued that DHCR failed to properly apply its own rules in denying his overcharge refund request, was correctly terminated. Thus, the alleged "clear error" is inconsequential and does not warrant reconsideration.

Third, Plaintiff argues that the Court made a clear error in finding that his equal protection claim, as stated in the SAC, did not relate back to his original complaint and was therefore time-barred. However, the Court's analysis separately assumed that Plaintiff's equal protection claim was not time-barred and found that the claim still could not survive a motion to dismiss because of insufficient pleading. *See Hong Tang*, 2019 WL 4575366, at *4 ("Assuming, *arguendo*, that

[2] Citations to "ECF" refer to the pagination generated by the Court's electronic docketing system and not the document's internal pagination.

Plaintiff's equal protection claim is not time-barred, it would nevertheless have to be dismissed for failure to state a claim."). Thus, the Court did not clearly err.

Plaintiff's final argument as to the insufficient pleading of his equal protection claim is plainly an attempt to re-litigate issues already addressed by the Court.

Accordingly, Plaintiff's motion for reconsideration is denied in its entirety. Although Plaintiff has paid the filing fee to initiate this action, the Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this Memorandum & Order would not be taken in good faith and, therefore, *in forma pauperis* status is denied for the purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444–45 (1962). This case remains closed.

SO ORDERED.

/s/ Pamela K. Chen
Pamela K. Chen
United States District Judge

Dated: December 10, 2019
Brooklyn, New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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HONG TANG,

Plaintiff,

- against -

RUTHANNE VISNAUSKAS, Commissioner of the New York State Division of Housing and Community Renewal, and WOODY PASCAL, Deputy Commissioner of the New York State Division of Housing and Community Renewal,

Defendants.

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MEMORANDUM & ORDER
1:19-CV-00508 (PKC) (PK)

PAMELA K. CHEN, United States District Judge:

Plaintiff, proceeding *pro se*, initiated this action on January 25, 2019. (Complaint, Dkt. 1.) On May 16, 2019, Defendants sought permission to file a motion to dismiss. (Motion for Pre-Motion Conference, Dkt. 7.) The Court construed Defendants' pre-motion conference letter as a dismissal motion and set an expedited briefing schedule. (Scheduling Order, dated 5/24/19.) On August 14, 2019, the Court held oral argument on Defendants' motion, during which Plaintiff requested, and was granted, permission to file an "amended complaint."[1] (Minute Entry, dated 8/14/19.) On September 13, 2019, Plaintiff filed his Second Amended Complaint (the "SAC"). (Dkt. 17.) On September 19, 2019, Defendants renewed their request to move to dismiss, this time as to the SAC. (Dkt. 18.)

Because Plaintiff has been permitted both an opportunity to orally articulate and clarify his claims and to amend his original complaint, the Court construes Defendants' initial motion to dismiss (Dkt. 8), along with their recently filed pre-motion conference letter seeking dismissal of

[1] Though referred to at the oral argument as the "amended complaint," it is in fact Plaintiff's second amended complaint.

the SAC (Dkt. 18), as a motion to dismiss the SAC and grants that motion. For the following reasons, this action is dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

DISCUSSION

In the SAC, Plaintiff advances two claims under 42 U.S.C. § 1983: a due process claim and an equal protection claim. (SAC at 2–7.) The Court addresses each claim in turn.

I. Due Process

Plaintiff's due process claim is based on the following.[2] In July of 2014, Plaintiff filed an "Illusory Sublet" claim with the New York State Division of Housing and Community Renewal ("DHCR") pursuant to the provisions in DHCR's "Fact Sheet #7 'Sublets, Assignments and Illusory Tenancies.'" (*Id.* at 2.) However, in violation of DHCR's own policies, Defendants only reviewed the renewal lease portion of Plaintiff's claim and refused to review the overcharge refund portion. (*Id.* at 2–3.) Defendants rendered an initial decision on Plaintiff's Illusory Sublet claim—though only on the lease renewal portion—on June 3, 2015, and rendered a final decision on January 26, 2016. (*Id.* at 2.) Plaintiff avers that he has "property interests in being refunded the rent overcharges since 2007, including the treble damage penalty authorized by the law." (*Id.* at 2.) Additionally, Plaintiff states that "Defendants deprived Plaintiff of [his] pre-deprivation due process right" and that the "failure of Defendants fully to process Plaintiff's claim, enforce the

[2] "At the pleadings stage of a case, the court assumes the truth of 'all well-pleaded, nonconclusory factual allegations' in the complaint." *Durant v. N.Y.C. Housing Auth.*, No. 12-CV-937 (NGG) (JMA), 2012 WL 928343, at *1 (E.D.N.Y. Mar. 19, 2012) (quoting *Kiobel v. Royal Dutch Petrol. Co.*, 621 F.3d 111, 123 (2d Cir. 2010)). Additionally, because Plaintiff is *pro se*, the Court liberally construes his submissions and interprets them "to raise the strongest arguments that they suggest." *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) (quotation and italics omitted). However, the Court notes that it "'need not act as an advocate for'" Plaintiff. *Curry v. Kerik*, 163 F. Supp. 2d 232, 235 (S.D.N.Y. 2001) (quoting *Davis v. Kelly*, 160 F.3d 917, 922 (2d Cir. 1998)).

stated policy and follow [DHCR's own] procedures violated Plaintiff's right to due process, which is protected under clearly established law." (*Id.* at 3.)

"[I]n evaluating what process satisfies the Due Process Clause, the Supreme Court has distinguished between (a) claims based on established state procedures and (b) claims based on random, unauthorized acts by state employees." *Rivera-Powell v. N.Y.C. Bd. of Elections*, 470 F.3d 458, 465 (2d Cir. 2006) (quotation omitted). Because the due process claim at issue here is based on DHCR's failure to apply its own explicitly outlined procedures (SAC at 2–3), Plaintiff's claim falls in the former category. *See Hellenic Am. Neighborhood Action Comm. v. City of New York*, 101 F.3d 877, 880 (2d Cir. 1996) ("When the deprivation occurs in the more structured environment of established state procedures, rather than random acts, the availability of postdeprivation procedures will not, ipso facto, satisfy due process." (citing *Hudson v. Palmer*, 486 U.S. 517, 532 (1986))).

Plaintiff fails to state a due process claim because he had access to an adequate post-deprivation remedy in the form of an Article 78 proceeding.[3] In reaching this conclusion, the

[3] (*See* Ex. C to Aff. & Decl. in Supp. of Defs.' Mot. to Dismiss, Dkt. 10-3 (Plaintiff's verified Article 78 petition, in the matter assigned Index No. 100373/16 before the Supreme Court of the New York, New York County, dated March 10, 2016); Ex. D. to Aff. & Decl. in Supp. of Defs.' Mot. to Dismiss, Dkt. 10-4 (order of Supreme Court of New York County, dated October 7, 2016, denying Plaintiff's petition and dismissing Plaintiff's Article 78 proceeding); Ex. E to Aff. & Decl. in Supp. of Defs.' Mot. to Dismiss, Dkt. 10-5 (order of Supreme Court of New York County, dated October 13, 2017, denying leave to reargue following dismissal of Plaintiff's Article 78 proceeding); Ex. F. to Aff. & Decl. in Supp. of Defs.' Mot. to Dismiss, Dkt. 10-6 (order of Supreme Court of New York County, dated March 26, 2018, again denying leave to reargue following dismissal of Plaintiff's Article 78 proceeding).)

For purposes of ruling on a motion to dismiss, "[a] court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings." *Global Network Commc'ns*, 458 F.3d 150, 157 (2d Cir. 2006) (quotations omitted); *see* Fed. R. Evid. 201. The Court takes judicial notice of the cited documents and is satisfied that they demonstrate that an Article 78 proceeding took place. *See Missere v. Gross*, 826 F. Supp. 2d 542, 553 (S.D.N.Y. 2011) ("The Court may

Court recognizes that the mere availability of an Article 78 proceeding does not preclude a due process claim. *Kraebel v. Comm'r of N.Y. State Div. of Housing & Cmty. Renewal*, No. 93-CV-4344 (LAP), 2000 WL 91930, at *10 (S.D.N.Y. Jan. 26, 2000) ("[W]hile the existence of Article 78 proceedings may satisfy due process under some circumstances, these proceedings may not be adequate to redress unconstitutional deprivations effectuated by established state procedure." (citations omitted)). In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court set forth a three-factor balancing test to determine the extent of process due: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of that interest; and (3) the governmental interest in additional safeguards. *Id.* at 334–45. The balancing of these factors is fact-specific. *Zinermon v. Burch*, 494 U.S. 113, 127 (1990).

In this case, Plaintiff's only factual averment in support of his due process claim is that DHCR failed to properly apply its own rules in denying his overcharge refund request. (SAC at 2–3.) Plaintiff advanced this precise argument before the Honorable Barbara Jaffe of the Supreme Court of New York, New York County, in challenging the Rent Administrator's resolution of his Article 78 petition. Justice Jaffe specifically addressed Plaintiff's argument regarding his overcharge refund request, reasoning as follows:

> The tenant [Plaintiff] further alleges that he had various communications by email and in person with the owner, and the owner did not mention that the Rent Administrator's [] finding; that [the DHCR Fact Sheet] states that, if a complaint is justified, the owner will be required to recognize the subtenant as the actual tenant, the illusory prime tenant will be legally responsible to refund all overcharges collected from the subtenant, and if the subtenant can prove that the owner received part or all of the overcharges the owner will also be responsible for refunding the rent overcharges; that the Rent Administrator found that the subtenant had the right to the renewal lease, and so terminated the proceeding, which was incorrect as the issue of overcharges had not been resolved; that *Thornton v. Baron*, 4 AD 258 (1st

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also take judicial notice of all documents in the public record, including . . . the decisions of the Supreme Court in the Article 78 proceedings . . . that the Parties have submitted in affidavits with their motion papers.").

Accordingly, Plaintiff's due process claim is dismissed.

II. Equal Protection

Assuming, *arguendo*, that Plaintiff's equal protection claim is not time-barred,[5] it would nevertheless have to be dismissed for failure to state a claim. To state a class-of-one equal protection claim, the plaintiff must "allege[] that []he has been intentionally treated differently from others similarly situated[6] and that there is no rational basis for the difference in treatment." *Harlan Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 499 (quotation omitted). To survive a motion to dismiss, a plaintiff must allege facts sufficient to demonstrate that, "'compared with others similarly situated, [he] was selectively treated'" and that this treatment was "motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure the person.'" *Weinberger v. City of New York*, No. 17-CV-9998 (JMF), 2018 WL 3996935, at *2 (S.D.N.Y. Aug. 21, 2018) (quoting *Zahra v. Town of Southold*, 48 F.3d 674, 683 (2d Cir. 1995)).

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[5] Plaintiff's original complaint—filed one day before the statute of limitations was set to expire on his § 1983 claims—did not allege an equal protection violation. (*See generally* Complaint, Dkt. 1.) It appears that Plaintiff's equal protection claim, alleged for the first time in the amended complaint, does not relate back to the original complaint and is, therefore, untimely:

> Under [Fed. R. Civ. P.] 15, the central inquiry is whether adequate notice of the matters raised in the amended pleading has been given to the opposing party within the statute of limitations by the general fact situation alleged in the original pleading. Where the amended complaint does not allege a new claim but renders prior allegations more definite and precise, relation back occurs.

Slayton v. Am. Express Co., 460 F.3d 215, 228 (2d Cir. 2006) (quotation and citation omitted).

[6] "An individual is 'similarly situated' when []he is 'similarly situated in all material respects to the individuals with whom []he seeks to compare [him]self.'" *Sagaponack Realty LLC v. Vill. of Sagaponack*, No. 2:17-CV-5277 (DRH) (SIL), 2018 WL 4259988, at *6 (E.D.N.Y. Sept. 6, 2018) (quoting *Mandell v. Cty. of Suffolk*, 316 F.3d 368, 379 (2d Cir. 2003)).

Plaintiff alleges that he "was treated differently in the administrative proceeding and was subject to 'reverse []selective enforcement'[] (Defendants refused to fully enforce the policy and procedure that are clearly stated in DHCR Fact Sheet #7, Section 'Illusory Sublets', due to Plaintiff's race, national origin, ethnicity, citizenship/immigration status, and tenant (subtenant) status." (SAC at 5.) But Plaintiff offers no specific facts to substantiate this conclusion. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (holding that "threadbare recitals of a cause of action's elements, supported by mere conclusory statements," are plainly insufficient to state a claim).

Accordingly, Plaintiff's equal protection claim is dismissed.

CONCLUSION

For the reasons set forth above, this action is dismissed for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). The Clerk of Court is respectfully directed to enter judgment and close this case. Although Plaintiff has paid the filing fee to initiate this action, the Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this Memorandum & Order would not be taken in good faith and therefore *in forma pauperis* status is denied for the purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444–45 (1962).

SO ORDERED.

/s/ Pamela K. Chen
Pamela K. Chen
United States District Judge

Dated: September 20, 2019
Brooklyn, New York