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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

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GARY BAUER, suing individually and as an officer of Waterside Tenants Association, for and on behalf of the residents of 10 Waterside Plaza, WATERSIDE TENANTS ASSOCIATION, PHYLLIS BALCHARSH and MICHAEL SCHLUETER,

Index No. 102781/04

Plaintiff,

- against -

WATERSIDE PLAZA, LLC

Defendant.

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JOAN A. MADDEN, J.:

Defendant Waterside Plaza, LLC ("Waterside") moves for an order (1) dismissing this action on the grounds that plaintiffs lack the authority, and do not have standing, to commence this action on behalf of the "Residents of 10 Waterside Plaza," and (2) precluding plaintiffs from offering any evidence of damages suffered by the individual tenants based on their alleged failure to provide disclosure. Plaintiffs oppose the motion, which is granted to the extent set forth below.

Background

This action arises out of Waterside's alleged failure to provide adequate heat to the tenants of 10 Waterside Plaza (hereinafter "Building 10") during the winter of 2002-2003, after the Waterside installed new heating/air conditioning units. Building 10 is part of four apartment towers and four townhouses, owned by Waterside (hereinafter "the Waterside complex"). Under the Mitchell-Lama Law, the apartments and townhouses in the Waterside complex were rented to, and served as home for, 1,470

moderate and middle income families.

The new units were installed pursuant to a settlement agreement dated July 26, 2001 (hereinafter "the Settlement Agreement"), under which certain tenants of Building 10 and other buildings in the Waterside complex (hereinafter "the Settling Tenants") withdrew their opposition to Waterside's pending application to pay off a Mitchell-Lama mortgage and to free Waterside Plaza from the requirements of regulated rents and services. In exchange, Waterside agreed to a schedule of limited rent increases, together with other benefits, including the replacement of heating and air conditioning "incremental units with new units...."[1] Settlement Agreement, ¶ 41.

The new units, however, were defective, and as a result, it is alleged that the apartments at Building 10 were not kept at habitable temperatures, and that the tenants were forced to pay additional electrical charges.

Plaintiff Waterside Tenants Association ("WTA") was designated as the tenants association representing the interests of all the residents of the Waterside complex under the rules promulgated by the New York City Department of Housing Preservation and Development, which implements the Mitchell-Lama Law.

WTA agreed, along with the Settling Tenants, to the terms

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[1]It is unclear whether the so-called "incremental" heating and air conditioning units existed throughout the Waterside complex or only in Building 10.

of the Settlement Agreement. Paragraph 27 of the Settlement Agreement provides that:

> [Waterside] shall continue to recognize WTA as the official representative of the Settling Tenants for the purpose of dealing with [Waterside] on issues of general applicability which may arise under the Agreement upon Dissolution [i.e. upon the paying off of the Mitchell-Lama mortgage]. The rights and privileges granted to the designated Tenants Association under the [the Mitchell-Lama Law] shall no longer exist. Notwithstanding the foregoing, [Waterside] and the Tenants shall be permitted to resolve any issues or disputes between them without WTA's participation.

In addition, under paragraph 31 of the Settlement Agreement, Waterside agreed that it would "discuss and attempt, in good faith, to reach agreement with WTA upon matters of common concern such as...apartment maintenance, equipment and services."

The action is brought by Gary Bauer, individually and as an officer of the WTA, for and on behalf of the residents of Building 10, the WTA, and two other individual tenants of 10 Waterside Plaza. Plaintiffs seek an 80% rent abatement for the relevant period, reimbursement of electrical charges, together with various expenses incurred as a result of the lack of heat and attorneys' fees.

Waterside argues that the complaint should be dismissed as the Settling Tenants at Waterside Plaza did not authorize the commencement of this action on their behalf. In support of its position, Waterside submits minutes from WTA Board meetings held

on May 12, 2003 and June 9, 2003. The minutes reflect that certain tenants of Building 10 met with WTA's lawyer, David Rosenberg, Esq., and that a $5,000 retainer fee was advanced to Mr. Rosenberg to "start a lawsuit, on the condition that Bldg 10 tenants vote for a lawsuit and pay for it." Waterside maintains that there is no evidence that a vote of the tenants was ever taken.

Waterside also submits affidavits from four tenants who reside at Building 10, who aver that they never authorized plaintiffs' attorneys to commence a lawsuit on their behalf, and were never consulted regarding the action.[2] Waterside further argues that WTA lacks standing to assert a claim based on lack of adequate heat and the high electricity bills.

In opposition, plaintiffs submit Mr. Bauer's affidavit in which he states that "the action was fully authorized prior to its commencement" and that "[w]hen we were unable to find a document to evidence this, WTA voted at its January 4, 2005 meeting to ratify the action and the representation of the Settling Tenant[s] in 10 Waterside Plaza."

Plaintiffs provide a copy of the January 4, 2005 resolution, which "confirms the prior authorization for the commencement of the action as a plaintiff representative and as a representative of the class of Settling Tenants, along with its officer and the

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[2]Waterside also asserts that it offered a 15% rent abatement for a six month period and that most of the tenants of Building 10 were satisfied with the offer.

individual tenant plaintiffs, and that at least 88 households of settling tenants contributed to the initial costs for commencement of the litigation." Plaintiffs also submit a list of Settling Tenants who contributed to the WTA legal fund for 10 Waterside Plaza.

In further support of their position that they were authorized to bring this action, plaintiffs submit affidavits from 43 of the Settling Tenants from 10 Waterside Plaza. The tenants each state, inter alia, that they signed the Settlement Agreement authorizing WTA to continue to serve as their representative, that they suffered through the winter of 2002-2003 as a result of defective heating and ventilation that left their apartment intolerably cold, and that they oppose the motion to dismiss and want their day in court.

Discussion

"Unincorporated associations are voluntary congregate entities, which have the legal capacity to sue." See Locke Associates Inc. v Foundation for the Support of the United Nations, 173 Misc2d 502, 506 (Civ Ct NY Co. 1997), citing, Community Bd 7 of the Borough v. Schaffer, 84 NY2d 148 (1994). Section 12 of the General Associations Law, authorizes the president or treasurer of an unincorporated association to bring an action or special proceeding on behalf of the association "to recover property, or upon any cause of action, for or upon which all the associates may maintain such an action or special

proceeding, by reason of their interest or ownership therein either jointly or in common."

Thus, Bauer, as the former treasurer of the WTA, an unincorporated association, would appear to have the capacity to sue on behalf of the members of the WTA in order to vindicate the rights of the Settling Tenants.[3] However, notwithstanding Bauer's apparent capacity to sue, the first issue raised on this motion is whether Bauer and the WTA were authorized by the Settling Tenants to bring this action. Furthermore, if such authority exists, the issue remains as to whether Bauer and/or the WTA have standing to sue on behalf of the residents of Building 10.

With respect to the first issue, the court finds that the record raises factual questions regarding whether the WTA was properly authorized to bring this action. The Settlement Agreement contemplates that WTA would continue to play a role in representing the rights of the Settling Tenants, including in negotiating with Waterside regarding apartment maintenance,

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[3]Although Bauer is the former treasurer as opposed to the treasurer, to the extent he performs the duties as treasurer, he would have the right to bring this action on behalf of the association. See Locke Associates Inc. v Foundation for the Support of the United Nations, 173 Misc2d at 506 Alternatively, the members of the WTA would have a common law right to bring a representative action in the name of the association. See Douglas E. McOwen Hamp Funeral Home v. Boccaccio, 79 AD2d 1098 (4th Dept 1981).

equipment and services.[4]

Moreover, the affidavits from the four tenants who state that they did not authorize this action are not dispositive of the issue, particularly as plaintiffs submit evidence that these tenants variously are not members of the WTA or Settling Tenants, or that they previously indicated that they had authorized the action. Additionally, Bauer's affidavit and the January 4, 2005 resolution are sufficient to raise a factual question as to whether a vote to authorize the commencement of this action was taken. Accordingly, it would be premature to dismiss this action on the ground that its commencement was not properly authorized.

The next issue, then, is whether Bauer and the WTA have standing to bring this action on behalf of the Settling Tenants residing at Building 10. "Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria." Society of Plastics Industry Inc. v. County of Suffolk, 77 NY2d 761, 769 (1991). "The various tests for standing are designed to ensure that a party seeking relief has a sufficiently cognizable stake in the outcome so as to 'cast[ ] the dispute in a form traditionally capable of judicial

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[4] At the same time, however, the Settlement Agreement provides that the WTA will not have the same rights and privileges accorded to it under the Mitchell-Lama Law. Waterside, however, does not suggest that this language would prevent WTA from bringing this action.

resolution.'" Community Bd 7 v. Schaffer, 84 NY2d at 154-155, quoting, Society of Plastics v. County of Suffolk, 77 NY2d at 772-773 (internal citations omitted).

In applying these principles to determine if an unincorporated association has standing to bring an action, the courts examine whether the injury alleged belongs to the association itself or to all of its members such that "the association itself has a genuine stake in the outcome" of the action. Locke Associates Inc. v Foundation for the Support of the United Nations, 173 Misc2d at 505; see also, Connolly v. O'Malley, 18 AD2d 620 (1st Dept 1962).

The rationale underlying this rule, was articulated by Justice Bloom in Shapiro v. Sobel, 85 AD2d 552 (1st Dept 1981), appeal dismissed, 56 NY2d 648 (1982). Justice Bloom wrote that "an unincorporated association has no life separate and apart from its members" (citation omitted). Id. at 553. Nonetheless, General Associations Law section 12, "provides a shorthand technique... [that] permits [the] initiation [of an action] without naming each of the individual members as parties plaintiff ...." Id. However, [the members'] interest in the subject matter of the suit must be an interest sufficiently common so that in an action brought by ...the association...each could be properly named as a plaintiff." Id.

Thus, when the unincorporated association itself suffers no injury or the claims are not common to all the members of the

association, it has been found that the association lacks standing to sue. Bartley v Walentas, 78 AD2d 310 (1st Dept 1980), involved a claim for the breach of the warranty of habitability brought by a tenants association against the landlord and managing agent, alleging the denial and deprivation of building services and necessary repairs to the premises, including water leaks, improper lighting, defective terraces, and inadequate elevator service. The Appellate Division, First Department dismissed the claims brought by the tenants association, noting that the association itself did not suffer any damage. In addition, based on the facts of the case, it would appear that certain of the complained-about defects were not common to all the tenants, and thus an action could not be brought on behalf of all the members. Shapiro v. Sobel, (dissent), 85 AD2d at 553.

In contrast, in Martha Washington Tenants Association v. Roberts, 292 AD2d 225 (1st Dept 2002), the First Department found that a tenants association had standing to challenge agency determination granting a certificate of no harassment to hotel owner where members of association were tenants in the hotel owner's building, and therefore had a common interest in the proceeding.

Here, the WTA itself suffered no injury as a result of the defective heating and air conditioning. Thus, it is incumbent on the WTA and Bauer to show that all the members of the association

were harmed. In this case, such a showing cannot be made. Notably, the WTA is the representative of all the tenants in the Waterside complex and not only those residing in Building 10 who allegedly suffered damages as the result of the defective heating/air conditioning units. Thus, the injuries alleged in the complaint are not common to all the members of the WTA and the members do not have a common interest in the relief sought.

Accordingly, since Bauer, as an officer of the WTA and the WTA lack standing to bring this action on behalf of the Residents of Building 10 the claims asserted by these plaintiffs must be dismissed. Such dismissal is without prejudice to the tenants, who were allegedly damaged as a result of the lack of heat during the winter of 2002-2003, from asserting individual claims in this action.

Conclusion

In view of the above, it is

ORDERED that the motion to dismiss is granted to the extent of dismissing and severing the claims asserted by Gary Bauer, as an officer of Waterside Tenants Association for and on behalf of the residents of 10 Waterside Plaza, and by the Waterside Tenants Association; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that motion to preclude is denied as moot with respect to Gary Bauer, as an officer of Waterside Tenants

Association for and on behalf of the residents of 10 Waterside Plaza, and the Waterside Tenants Association; and it is further

ORDERED that the motion to preclude with respect to the individual tenants who remain as plaintiffs in this action shall be determined at a status conference previously scheduled to be held on June 23, 2005 at noon in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: June 21, 2005

J.S.C.