

Gudz v Jemrock Realty Co., LLC

2011 NY Slip Op 31647(U)

June 16, 2011

Supreme Court, New York County

Docket Number: 603555/09

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER

PART 15

Justice

Index Number : 603555/2009
GUDZ, YANELLA
 vs.
JEMROCK REALTY COMPANY, LLC
 SEQUENCE NUMBER : 001
 ORDER MAINTAIN CLASS ACTION

INDEX NO. 603555/09
 MOTION DATE _____
 MOTION SEQ. NO. 001
 MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED	
1, 2	_____
3	_____
4, 5	_____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: 6/16/07

[Signature]
HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
YANELLA GUDZ, on behalf of herself and all others similarly
situated,

Plaintiff,

Index No.
603555/09

Mot. Seq. 001
& 002
Decision and
Order

- against -

JEMROCK REALTY COMPANY, LLC,
Defendant.

-----X
HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff brings this action on behalf of herself and others similarly situated seeking an order: (1) granting a monetary award for rent overcharges, including attorney's fees; and (2) declaring that the units in 210 West 101st Street are subject to rent stabilization, and will continue to be stabilized until the last J-51 tax benefit period expires.

Plaintiff alleges that she, and other tenants of the building, have been charged, and continue to be charged, market rate rents on their apartments while defendant Jemrock Realty Company, LLC ("Jemrock") has been receiving tax benefits under New York City's J-51 tax abatement program. The J-51 program grants owners of affordable housing projects, who perform certain major capital improvements to their buildings, a 34 year exemption from an increase in real estate taxes. (*see*; Real Property Tax Law §421-a and §429, and Administrative Law §11-243).

The exemption is conditioned upon landlords forfeiting their rights under the luxury decontrol provisions of the Rent Stabilization Code ("RSL"), for the duration of the exemption period. Luxury decontrol is permitted either when legal rent reaches \$2000.00, or when the combined income of all occupants of an apartment exceeds

\$175,000.¹ As codified in the RSL, Section 26-504.1² states, in relevant part:

Upon the issuance of an order by the division, "housing accommodations" shall not include housing accommodations which: (1) are occupied by persons who have a total annual income in excess of one hundred seventy-five thousand dollars per annum for each of the two preceding calendar years, as defined in and subject to the limitations and process set forth in section 26-504.3 of this chapter; and (2) have a legal regulated rent of two thousand dollars or more per month. Provided, however, that *this exclusion shall not apply to housing accommodations which became or become subject to this law (a) by virtue of receiving tax benefits pursuant to section four hundred twenty-one-a or four hundred eighty-nine of the real property tax law . . .*

Jemrock's J-51 exemption began in 1999/2000.

Plaintiff has been a tenant since 2006. Her initial monthly rent was \$4,400.00, and has increased, as per her 2009 lease, to \$4600.00. The DHCR rent registration records shows that plaintiff's apartment was destabilized in 1998 due to "high rent vacancy." Thereafter the apartment was listed as exempt (the rent roll shows records until 2008). Plaintiff alleges that there are "approximately 90 deregulated units as well as many tenants who formerly resided in these same units."

Plaintiff now moves for class certification pursuant to CPLR §901 and CPLR §902. Jemrock opposes and moves separately for a stay of the action pursuant to CPLR §2201. Plaintiff opposes Jemrock's motion.

Plaintiff, in support of her motion, argues that the instant action satisfies all necessary elements required to certify a class. Thus, the Court should grant the motion and appoint plaintiff as the class representative. Jemrock, in opposition, argues that the motion should be denied because plaintiff fails to meet the necessary

¹The code was amended in 1997 to lower the income requirement from \$250,000 to \$175,000.

²Section 26-504.2 contains a similar provision.

requirements of CPLR §901.³

Jemrock, in support of its motion for a stay, argues that there are issues on appeal which would influence the outcome of the instant action. Jemrock points out that, although the court in *Roberts v. Tishman Speyer Props., L.P.*, 13 NY3d 270[2009] decided the ultimate issue of whether the language of Section 26-504.1 and 26-504.2 applied to all landlords receiving J-51 benefits, regardless of the reason for destabilization⁴, it left open such issues as: retroactivity⁵, class certification, base date, and method of calculation.⁶

Plaintiff argues, in opposition, that a stay is not appropriate where, as here, there are no parties in common, and a judgment in the cases on appeal will not resolve the instant matter. Additionally, plaintiff argues that the stay would be premature, as the cases on appeal only address damages, and liability has yet to be determined here.

Initially, the motion for a stay is denied. CPLR 2201 authorizes the granting

³Jemrock also argues that plaintiff is barred from bringing a class action because she is seeking treble damages. However, that point is moot as plaintiff, in her reply papers, states that she is withdrawing her claim for treble damages.

⁴The trial court in *Roberts* granted the owner's motion to dismiss based on its interpretation of Administrative Code 26-504.1 and 26-504.2. The Appellate Division, First Department unanimously reversed, finding that the motion court was incorrect in limiting the exclusionary language only to apartments destabilized "solely by virtue of" the receipt of J-51 benefits. The Appellate Division found that if the Legislature had intended such a result, it would have inserted the word "solely," into the language of Administrative Code 26-504.1 and 26-504.2. By Order dated October 22, 2009, the Court of Appeals affirmed and agreed with the Appellate court's interpretation. Subsequent to the Court of Appeals decision, the Honorable Richard B. Lowe III issued an order, dated July 19, 2010, granting the Roberts' plaintiffs class certification, on consent from the defendants.

⁵ On, or about, July 30, 2010, Judge Lowe issued a decision on a motion to dismiss, finding that *Roberts* "should be given full retroactive effect," because defendant failed to make a showing that the decision was "a new rule of law." Defendant, who had argued that it should not be in the action because it sold the subject property in 2006, filed a Notice of Appeal, dated September 10, 2010. As of the date of this decision, the Appellate Division, First Department has not issued a decision.

⁶ On January 18, 2011, Judge Lowe issued an Order of Referral, referring the matter to DHCR "to the limited extent of providing guidance to the Court, in the form of a nonbinding advisory opinion," on the issues of how to calculate the current legal regulated rent, and the appropriate formula for calculating past rent overcharge remedies.

of a stay:

in a proper case, upon such terms as may be just . . . [h]owever, [a stay is proper only where] “a decision in one action will determine all the questions in the other action, and the judgment on one trial will dispose of the controversy in both actions . . . [w]hat is required is complete identity of parties, causes of action and judgment sought . . . (*Hope’s Windows v. Albro Metal Products Corp.*, 93 AD2d 711,712[1st Dept. 1983]).

Jemrock urges the Court to stay the instant action pending decisions from the Appellate Division in entirely different actions, involving different parties. Although a ruling on the aforementioned issues will be relevant to the calculation of damages in the instant action, they will have no bearing on the issue of whether or not Jemrock has violated the law. Nor would a judgment rendered in those cases completely “dispose of the controversy” here.

CPLR §901(a) contains five prerequisites that must be satisfied before a class may be certified. These are: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members; (3) the claims or defenses of the representative parties are typical of the class; (4) the representative parties will fairly and adequately protect the interest of the class; and (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

The action may only be maintained as a class action if the court finds that the prerequisites under CPLR §901(a) have been satisfied. If the court finds that the prerequisites have been met, additional matters the court shall consider in deciding whether the action may proceed as a class action are: (1) the interest of members of the class in individually controlling the prosecution and defense of separate actions; (2) the impracticability or inefficiency of prosecuting or defending separate actions; (3) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (4) the desirability or undesirability of concentrating the litigation of the claim in the particular forum; and (5) the difficulties likely to be encountered in the management of a class action. (see CPLR §902).

As to numerosity, “[t]here is no mechanical test or set quantity of prospective class members which must exist to determine whether the class membership is so numerous as to be ma[ke] actual joinder impracticable.” (*Pajaczek v. Cema Construction Corp.*, 18 Misc.3d 1140(A)[Sup. Ct., NY County 2008]), citing to *Pesantez v. Boyle Environmental Services, Inc.*, 251 AD2d 11[1st Dept. 1998]). In *Pajaczek*, the court found that the numerosity requirement was satisfied by forty class members. In *Dabrowski v. Abax Inc.*, 2011 WL 1990663[1st Dept.], the court held that a class of “between 50 and 100 laborers,” was sufficient to satisfy the numerosity requirement. (*Id.*)

Here, plaintiff claims that potential class members consist of tenants who live in approximately 90 deregulated units, plus former tenants of those units. Jemrock concedes that at least 78 apartments in the building were deregulated, but asserts that only 24 of those apartments will be part of the proposed class because those apartments were deregulated before Jemrock received its J-51 benefits.⁷ The court in *Roberts* was clear that: “all apartments in buildings receiving J-51 tax benefits are subject to the RSL during the entire period in which the owner receives such benefits.” (*Roberts* at 81). Thus, there are at least 78 de-regulated tenants, and plaintiff will be able to satisfy the numerosity requirement.

The second factor, the predominance of law or fact over individual claims, is also satisfied here. The rule requires “predominance not identity or unanimity among class members . . .” (*Pludeman v. Northern Leasing Systems, Inc.*, 74 AD3d 420[1st Dept. 2010])(internal citations omitted). “The decision as to whether there are common predominating questions of fact or law so as to support a class action should not be determined by any mechanical test, but rather, whether the use of a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated.” (*Friar v. Vanguard Holding Corp.*, 78 AD2d 83,97[2nd Dept. 1980]).

The predominant question here is whether or not Jemrock, in violation of the RSL, was receiving J-51 benefits while collecting market rents from the tenants residing at 201 West 101st Street. Issues such as: when individual apartments were deregulated, the last regulated rental amount of each apartment, and the method of

⁷ Jemrock fails to submit evidence of the number of apartments that were deregulated.

* 7]

calculation to be used, need not prevent certification, as “[c]lass certification is appropriate even when there are questions of law or fact not common to the class.” (*Pludeman* at 423).

Moreover, “[t]o the extent that there may be differences among the class members as to the degree in which they were damaged, the court may try the class aspects first and have the individual damage claims heard by a special master or create subclasses.” (*Godwin Realty Associates v. CATV Enterprises, Inc.*, 275 AD2d 269,270[1st Dept. 2000]).

Typicality requires “that a plaintiff’s claims derive from the same practice or course of conduct that gave rise to the remaining claims of other class members and is based upon the same legal theory . . .” (*Pludeman* at 423)(internal citations omitted). Here, plaintiff’s claim is typical of other potential class members, because her grievance is based on the central issue of Jemrock’s illegal receipt of tax exemptions for a building which contained unregulated apartments.

“The factors to be considered in determining adequacy of representation are whether any conflict exists between the representatives and the class members, the representative’s familiarity with the lawsuit and his or her financial resources, and the competence and experience of counsel.” (*Ackerman v. Price Waterhouse*, 252 AD2d 159[1st Dept. 1998]).

Plaintiff’s interest and the other class member’s interests are not in conflict. Nevertheless, Jemrock points to the lack of evidence of plaintiff’s financial ability as a reason to deny the motion. Although plaintiff’s financial status is relevant in determining if she is an adequate representative, it “is but one factor to be considered.” (*Pruitt v. Rockefeller Center Properties, Inc.*, 167 AD2d 14[1st Dept. 1991]). Indeed, plaintiff’s counsel submits an affidavit, wherein she states:

“[t]he firm has undertaken the work and has incurred, and will continue to incur, large litigation expenses and costs at its full risk . . .

Plaintiff counsel’s assumption of the full risk of the litigation renders plaintiff’s personal financial condition irrelevant. (see; *Wilder v. May Dept. Stores, Co.*, 23 AD3d 646[2nd Dept. 2005]). Plaintiff also submits a printout from her counsel’s website which demonstrates the firm’s “experience and skill in class action

litigation.”(Ackerman at 202).

With respect to the final requirement, whether a class action is a superior method of adjudication, the court finds that it is. “The criteria for class certification should be broadly construed . . . CPLR Article 9 is modeled on rule 23 of the Federal Rules of Civil Procedure . . . the policy of this rule is to favor the maintenance of class actions and for a liberal interpretation . . . even to the extent that a class should be permitted to go forward if it would clear up a goodly proportion of what appears to be the overall dispute.” (Brandon v. Chefetz, 106 AD2d 162, 168[1st Dept.1985])(internal citations omitted).

The potential class, consisting of past and present destabilized tenants, all have an interest in a determination of whether or not Jemrock was in violation of RSL Sections 26-504.1 and 26-504.2. Further, the declaratory relief sought by plaintiff will affect numerous future tenants of the subject building. Requiring each tenant to separately seek redress on this central issue would be a waste of time and resources, will not promote uniformity of decision , and would be contrary to public policy.

Plaintiff has satisfied the requirements of CPLR §901(a). In addition, the Court has considered the factors relevant to CPLR §902, and finds that they weigh in favor of certification.

Wherefore it is hereby

ORDERED that defendant’s motion for a stay of proceedings is denied; and it is further

ORDERED that plaintiff’s motion for certification is granted; and it is further

ORDERED that plaintiff shall submit a proposed order, on notice to all parties, in accordance with this decision, within 20 Days of the date of entry thereof.

This constitutes the decision and order of the Court. All other relief requested is denied.

DATED: June 16, 2011


EILEEN A. RAKOWER, J.S.C.