[* 1]

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

PRESENT: SALIANN SCARPULLA PART 19

Justice

Index Number : 105995/2010

REBIBO, DAVID

VS.

AXTON OWNER LLC

SEQUENCE NUMBER : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this motion to/for _____

	PAPERS NUMBERED
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 and cross-motion are decided in accordance with the accompanying memorandum decision.

FILED

JAN 18 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/18/12

Saliann Scarpulla J.S.C.

SALIANN SCARPULLA

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: IAS PART 19

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DAVID REBIBO, AVNER NEBEL, and CHRISTINE HEALEY, on behalf of themselves and all others similarly situated,

Plaintiffs,

Index No.: 105995/2010

-against-

AXTON OWNERS, INC.,

DECISION AND ORDER

Defendant.

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For Plaintiffs:
Bernstein Liebhard LLP
10 East 40th Street
New York, NY 10016

For Defendant:
Borah, Goldstein, Altschuler, Nahins & Goidel, P.C.
377 Broadway
New York, NY 10013

Papers considered in review of this motion to dismiss:

Notice of Motion 1
Mem of Law in Support of Motion 2
Aff of Paul Kahn. 3
Notice of Cross Motion 4
Mem of Law in Opposition to Defendant's Motion and in Support of Cross-Motion 5
Aff of Gabriel Galletti. 6
Mem of Law in Reply and in Opposition to Cross-Motion 7
Reply affirmation 8
Reply Mem of Law in Support of Cross-Motion 9

HON. SALIANN SCARPULLA, J.:

In this rent overcharge action, defendant Axton Owners, Inc. ("Axton") moves pursuant to CPLR §§ 3211(a)(1), (5) and (7) to dismiss the complaint against it. Plaintiffs

[* 3]

Davis Rebido, Avner Nebel, Christine Healey ("plaintiffs"), on behalf of themselves and all others similarly situated, cross-move for class certification pursuant to CPLR §§ 901 and 902.

Plaintiffs allege that Axton illegally charged them market rate rents for their apartments located at 733 Amsterdam Avenue in Manhattan, New York. Axton receives real estate tax benefits under New York City's J-51 (now Administrative Code of the City of New York § 11-243) program, which grants property owners tax abatements and exemptions for rehabilitative work done to their buildings. Plaintiffs allege that as a J-51 recipient, Axton was required to keep rent stabilized the 733 Amsterdam Avenue apartments pursuant to the October 2009 Court of Appeals decision, *Roberts v. Tishman Speyer Properties, L.P.*, 13 N.Y.3d 270 (2009). Plaintiffs are suing under the Rent Stabilization Law (RSL) for reimbursement of the excess rent amounts they allegedly paid while Axton was participating in the J-51 tax benefit program.

Axton now moves to dismiss the complaint against it. Axton argues that the Court should apply *Roberts* prospectively only. Axton further asserts that in November 1, 2009, immediately after the *Roberts* decision, Axton reduced, where necessary, plaintiffs' rent to the legal regulated rent. Moreover, Axton argues that class certification is improper here because CPLR § 901(b) bars recovery of penalties through class actions and plaintiffs may not waive their right to penalties to proceed as a class action. Axton

maintains that, in any event, the proposed class does not satisfy the CPLR § 901(a) requirements for class certification.

In opposition, plaintiffs argue that *Roberts* should be applied retroactively. They maintain that Axton has continued to overcharge them rent after the *Roberts* decision. Plaintiffs also argue that they may waive their right to treble damages to be certified as a class, and that they meet the CPLR § 901(a) requirements for class certification.

Discussion

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction. Under CPLR § 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the claims as a matter of law. *See Leon v. Martinez*, 84 N.Y.2d 83 (1994); *Jones Lang Wooton USA v. LeBoeuf, Lamb, Greene & Macrae*, 243 A.D.2d 168 (1st Dept. 1998). On a motion to dismiss a pleading under CPLR § 3211(a)(7), the sole inquiry is whether, according the facts alleged in the complaint every favorable inference, any cognizable cause of action can be made out. *See Leder v. Spiegel*, 31 A.D.3d 266 (1st Dept. 2006) *affd* 9 N.Y.3d 836 (2007); *Franklin v. Winard*, 199 A.D.2d 220 (1st Dept. 1993).

In *Roberts*, the Court of Appeals held that landlords receiving tax incentive benefits under the New York's J-51 program are prohibited from deregulating apartments. *Roberts*, 13 N.Y.3d at 287. The Rent Regulation Reform Act (RRRA), enacted in 1993, permitted landlords to deregulate "luxury" units. RSL §§ 26-504.1, 26-504.2. However,

the RRRA prohibited deregulation of apartments that became rent-stabilized "by virtue of" their landlords' receipt of J-51 tax benefits. RSL §§ 26-504.1, 26-504.2. The *Roberts* Court interpreted the RRRA as prohibiting all landlords, even those whose apartments were regulated before receiving J-51 benefits, from deregulating their apartments. *Roberts*, 13 N.Y.3d at 287. Though the *Roberts* Court left open the question of whether its holding was retroactive, the First Department recently held that *Roberts* applies retroactively. *See Gersten v. 56 7th Ave. LLC*, 88 A.D.3d 189, 198 (1st Dept. 2011). Thus, Axton's motion to dismiss plaintiffs' complaint is denied as to rents it allegedly overcharged before *Roberts*.

As to claims for rent Axton allegedly overcharged since *Roberts*, Axton argues that the cause of action should be dismissed because in November 2009, Axton reduced, where necessary, plaintiffs' rent to the legal regulated rent. However, plaintiffs contend that Axton did not register the apartments, or provide plaintiffs with properly rent-stabilized leases, thus barring Axton from collecting any rent above the last registered rent. RSL § 26-517. As Axton does not contest plaintiffs' assertions in its reply papers, the Court will not dismiss the cause of action as to alleged overpayments plaintiffs made after Axton reduced rents.

In their cross-motion for class certification, plaintiffs seek to certify as a class all 733 Amsterdam Avenue tenants "who were or continue to be charged market rents during

the period in which [Axton] participated in the J-51 program." Pursuant to CPLR § 901(a), a court may certify a proposed class only if:

> 1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
> 2. there are questions or law or fact common to the class which predominate over any questions affecting only individual members;
> 3. the claims or defense of the representative parties are typical of the claims or defenses of the class;
> 4. the representative parties will fairly and adequately protect the interests of the class; and
> 5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Plaintiffs have failed to show that they possess the personal characteristics to adequately represent the class. "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 class counsel." *Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 202 (1st Dept. 1998). The proponent of a class certification bears the burden of tendering admissible evidence beyond conclusory statements to meet CPLR § 901(a) requirements for class certification. *See Pludeman v. Northern Leasing Sys., Inc.*, 74 A.D.3d 420, 422 (1st Dept. 2010).

Though counsel for plaintiffs has attested to plaintiffs' adequacy as representatives, plaintiffs themselves have not provided any affidavits confirming this attestation, nor have they verified the complaint. Thus, they have not met their burden under § 901(a), *See Borden*, 2011 N.Y. Misc. LEXIS 6141, at *6, and their cross-motion

is dismissed without prejudice to renew. *See Katz v. NVF Co.*, 100 A.D.2d 470, 476 (1st Dept. 1984).[1]

In accordance with the foregoing, it is

ORDERED that defendant Axton Owner LLC's motion to dismiss is denied; and it is further

ORDERED that the cross-motion for class certification by plaintiffs David Rebibo, Avner Nebel, and Christine Healey, on behalf of themselves and all others similarly situated, is denied, without prejudice to renew.

This constitutes the decision and order of the Court.

Dated: New York, New York
January 11, 2012

ENTER:

Saliann Scarpulla, J.S.C.

[1]Because the Court holds that plaintiffs have not met their burden of establishing adequacy of representation under § 901(a), it will not address whether plaintiffs may waive their right to treble damages to proceed as a class action, or whether they have satisfied the remaining § 901(a) requirements.