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

PRESENT: MADDEN Justice

PART 11

CAMBRIDGE HOUSE TENANTS' ASSOCIATION, ET AL.

-v-

CAMBRIDGE DEVELOPMENT, LLC, ET AL.

INDEX NO. 106632/09

MOTION DATE

MOTION SEQ. NO. 04

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on 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 is decided in accordance with the annexed Memorandum Decision + Order.

FILED

JAN 19 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: January 12, 2012

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

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CAMBRIDGE HOUSE TENANTS' ASSOCIATION, ANNETTE GOURGEY, ELIZABETH BOYAR, and all other persons similarly situated,

Index No. 106632/2009

Plaintiffs,

-against-

CAMBRIDGE DEVELOPMENT, L.LC., CAMBRIDGE AFFILIATES, LLC, ATRIA SENIOR LIVING GROUP, INC., SENIOR QUARTERS MANAGEMENT CORP. d/b/a/ ATRIA WEST SIDE a/k/a ATRIA 86TH STREET a/k/a ATRIA RETIREMENT AND ASSISTED LIVING, and KAPSON SENIOR QUARTERS CORP.,

Defendants.

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JOAN A. MADDEN, J.:

In this putative class action, plaintiffs move, by order to show cause, for an order (1) pursuant to CPLR 3025(b) and/or a stipulation regarding the discontinuation of the claims by plaintiff Elizabeth Boyar (hereinafter "the Boyar stipulation"), granting plaintiffs leave to amend the complaint, (2) pursuant to CPLR 1013 and/or the Boyar stipulation, permitting Gregory Shultz, Albina Tamlonis, Melorra Sochet, Andrea Truppin and Chris Spring to intervene as plaintiffs in this action, and (3) deeming the amended class action complaint served on defendants. Defendants oppose the motion, which is granted for the reasons below.

Background

This action arises out of allegations made Cambridge House Tenants Association ("CHTA"), an unincorporated tenants' association for a building located at 33 West 86th Street, New York, NY and two of individual tenants who are members of the CHTA. Defendants

consist of the lessee of the Building, the fee owner and other corporate entities that are affiliates of the lessee. The verified class action complaint alleges causes of action for nuisance, breach of the warranty of habitability and harassment under New York City's Administrative Code during a span of six years preceding the filing of the complaint. It is alleged that defendants attempted to induce plaintiffs to give up possession of their rent regulated apartments by, among other things, engaging "in a course of conduct designed to convert the Building, in whole or in part, into assisted living residences, an enhanced assisted living facility, adult care facility and/or nursing home" (Verified Class Action Complaint, ¶ 24). It is further alleged that defendants failed to provide repairs and services, left common areas in an unsanitary condition, permitted elevators to become overcrowded, and allowed unsupervised workers in the Building and provided inadequate security. Twenty-three members of the CHTA signed a form giving support to file the action.

Defendants previously moved to dismiss the complaint, arguing that CHTA lacked standing to bring the action, and that the statutory requirements for a class action as set forth in CPLR 901 had not been satisfied. Defendants also argued that the claims for personal injury, property damage and emotional distress contained in the second cause of action did not state a claim.

By decision and order dated January 14, 2010, the court dismissed the complaint as to CHTA for lack of standing and found that plaintiffs' claim for the intentional infliction of emotional distress failed to state a cause of action. However, the court denied the motion to dismiss the class action allegations and directed that pre-certification disclosure be conducted regarding whether plaintiffs satisfy the numerosity, commonality and superiority requirements of

CPLR 901.

On or about March 22, 2011, plaintiff Elizabeth Boyar ("Boyar") settled and discontinued her claims against defendants. The Stipulation of Discontinuance executed by counsel for the parties herein provides that "plaintiff shall have 60 days to substitute a plaintiff in this action, if necessary." On May 20, 2011, or within the 60 days permitted to substitute for Boyar, counsel for plaintiffs sent defense counsel a fax and proposed stipulation substituting George Shultz ("Shultz") as a plaintiff; however, a dispute arose regarding whether, for statute of limitations purposes, Shultz's claims related back to the filing of the original complaint. On June 7, 2011, the remaining plaintiff Annette Gourgey entered into a settlement agreement with defendants; however, no stipulation of discontinuance was filed by Ms. Gourgey.

On July 22, 2011, plaintiffs made this motion, by order to show cause, for leave to amend and to permit Shultz and four other rent regulated tenants who reside in the Building to intervene.

Defendants oppose the motion, asserting that the newly added plaintiffs should not be permitted to add two years to the statute of limitations to their claims asserted for the first time in 2011 to relate back to the 2009 commencement of the instant action. In this connection, defendants argue that they did not agree in the Stipulation of Discontinuance regarding Boyar's claim that Shultz could be added as a plaintiff or that his claims related back to those in the original complaint. Moreover, defendants assert that intervention should not be permitted as the claims of the proposed plaintiffs do not raise "common issues of law and fact" and therefore do not relate back to the claims in the original complaint as they would not provide notice of those claims. Greater N.Y Health Care Facilities Ass'n v. DeBuono, 91 NY2d 716, 721 (1998). In addition, defendants argue that the motion to intervene should be denied as untimely.

Defendants further argue that leave to amend should be denied as there is no unity of interest between the original plaintiffs and the proposed additional plaintiffs, and the individual claims of original plaintiffs do not arise out of the same transactions or occurrences as those of the proposed additional plaintiffs. . See Mondella v. New York Blood Center-Greater New York, 80 NY2d 219, 226 (1992). Furthermore, defendants argue that under New York law, the filing of the class action does not toll the statute of limitations and that tolling principles discussed by the United States Supreme Court in American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974) are applicable only to federal class actions. Accordingly, defendants assert instead of being added to this action, the additional proposed plaintiffs must commence a new action and seek consolidation with this action.

In reply, plaintiffs assert that contrary to defendants' position, the conduct described in the complaint concerns a course of conduct that is not limited to individual apartments but applies building wide, including, among other things, a common scheme to harass the rent regulated tenants, elevator issues, lack of repairs, unsanitary conditions, and a lack of adequate security. Moreover, plaintiffs contend that the claims in the proposed amended complaint are the same as those in the original complaint, except for the identity of the plaintiffs. Accordingly, plaintiffs argue the original complaint gave defendants' notice of the transactions or occurrences to be proved in the amended pleading, such that the claims in the amended pleading should be deemed interposed at the same time as the claims in the original pleading. Furthermore, plaintiffs argue that in the absence of prejudice to defendants, there is no basis for denying leave to intervene based on allegations of delay.

Discussion

At issue here is when the claims of the proposed additional plaintiffs should be interposed for statute of limitations purposes. In general, the claims of a newly added plaintiff are not considered interposed at the time of the filing of the original complaint unless the claims by it relate back to the claims of the original plaintiffs. See CPLR 203(b); see also, Fazio Masonry v. Barry, Bette & Led Duke, Inc., 23 AD3d 748 (3d Dept 2005). For the relation back doctrine to apply, it must be shown that there is a "'unity of interest' between the party in the proceeding (or action) and the non-party." Emmett v. Town of Edmeston, 2 NY3d 817, 817 (2004), citing, Mondello v. New York Blood Center-Greater New York Blood Program, 80 NY2d at 226. Furthermore, to demonstrate that two parties are united in interest, it must be shown that the non-party by reason of its relationship with the original party "can be charged with notice of the institution of the [proceeding] and that [it] will not be prejudiced from [its] defense on the merits." Buran v. Coupal, 87 NY2d 173, 178 (1995). Similarly, in order to relate back to the filing date of the original action or proceeding, the claims of proposed intervenors, must arise out of "common issues of law and fact" as the claims in the original complaint.

However, the court need not reach the issue of whether the relation back doctrine applies, since the timely commencement of a putative class action tolls the statute of limitations for not only the named plaintiffs but for all members of the class for whose benefit the action is brought. See Paru v. Mutual Am. Life Ins., 52 AD3d 346 (1st Dept 2008); Yollin v. Holland America Cruises, Inc., 97 AD2d 720 (1st Dept 1983); Clifton Knolls Sewage Disposal Co., Inc. v.

Aulenbach, 88 AD2d 1024 (3d Dept 1982).[1]

Here, as the plaintiffs sought to be added are members of the proposed class of rent regulated tenants in the Building and as the allegations in the proposed amended class action complaint are essentially the same as those in the original complaint, they are entitled to the benefit of the tolling of the statute of limitations. Furthermore, since, as indicated above, New York law holds that the commencement of a class action tolls the running of the statute of limitations with respect to other potential class members, the court need not reach defendants' arguments regarding the applicability of the federal tolling doctrine articulated by the United States Supreme Court in American Pipe & Constr. Co. v. Utah, 414 U.S. 538.[2]

Finally, there is no basis for finding that this motion to intervene was untimely or prejudicial. See Yuppie Puppy Pet Products, Inc. v. Street Smart Realty, 77 AD3d 197 (1st Dept 2010) Indeed, any delay in seeking to add plaintiffs appears to be due to the dispute between counsel regarding when the claims of the proposed added plaintiffs should be interposed for statute of limitations purposes.

In view of the above, it is

ORDERED that plaintiffs' motion to amend the complaint and to permit Gregory Shultz,

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[1]While the court in New York Hormone Replacement Therapy Litigation, 2009 NY Slip Op 32905U; 2009 NY Misc Lexis 4285 (Sup Ct NY Co. 2009), found that the tolling doctrine did not apply in a class action lawsuit, it would appear that the holding was limited to the mass tort context. In any event, the court is bound by the above referenced precedent of the Appellate Division, First Department finding that the commencement of a class action tolls the limitations period for other class members.

[2]The court notes, however, in Paru v. Mutual Am. Life Ins., 52 AD3d 346 (1st Dept 2008), the Appellate Division, First Department cited, *inter alia*, American Pipe & Constr. Co. v. Utah, in support of its holding that the commencement of a class action tolls the statute of limitations.

Albina Tamlonis, Melorra Sochet, Andrea Truppin and Chris Spring to intervene as plaintiffs in is granted; and it is further

ORDERED that the proposed verified amended class action complaint in the form annexed to the motion shall be deemed served upon plaintiff's service of a copy of this decision and order with notice of entry upon defendants; and it is further

ORDERED that defendants shall serve an answer to the verified amended class action complaint within twenty days of service upon them of a copy of this decision and order with notice of entry; and it is further

ORDERED that the parties shall appear for a status conference in Part 11, room 351, 60 Centre Street, on February 16, 2012 at 9:30 am.

DATED: January 12, 2012

J.S.C.