

**Borden v 400 E. 55th St. Assoc. L.P.**

2012 NY Slip Op 33712(U)

April 11, 2012

Supreme Court, New York County

Docket Number: 650361/09

Judge: Judith J. Gische

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

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**HON. JUDITH J. GISCHE**  
PRESENT: \_\_\_\_\_  
J.S.C.  
Justice

PART 10

Index Number : 650361/2009  
BORDEN, LORRAINE  
VS.  
400 EAST 55TH STREET  
SEQUENCE NUMBER : 005  
ORDER MAINTAIN CLASS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

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

Dated: 4/11/12

\_\_\_\_\_  
**HON. JUDITH J. GISCHE**  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10**

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Lorraine Borden, o/b/o herself and all  
others similarly situated

Plaintiff,

**Decision/ Order**  
Index No.: 650361/09  
Seq. No.: 005

**-against-**

400 East 55<sup>th</sup> Street Associates L.P.

Defendant.

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**PRESENT: Hon. Judith J. Gische, J.S.C.**

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of  
this (these) motion(s):

<b>PAPERS</b>	<b>Numbered</b>
Notice of Motion.....	1
RJA Affirm., exhibits A through F.....	2
LB affd.....	3
DS affirm., exhibits A through S.....	4
TTT affirm., exhibits 1 through 16.....	5

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Upon the foregoing papers the decision and order of the court is as follows:

Plaintiff, Lorraine Borden ("Borden"), brings this renewed motion to certify this case as a class action, to have herself appointed the class representative and for her counsel to be appointed as counsel for the class. Defendant opposes the motion. Plaintiff had previously brought a motion for class certification. In a decision dated November 9, 2011 ("prior decision"), the court held that while a class action would otherwise be appropriate in this case, "Borden's failure to establish that she is an

adequate class representative, requires that the motion for certification be denied at this time, but without prejudice to renew.”

In the prior decision the court held that ...”it is important the proposed class representative demonstrate that s/he possess an adequate understanding of the litigation, including a knowledge of the claims and progress of the litigation...This must be established through a tender of evidence and not conclusory statements.” (citations omitted).

Borden has now included her own affidavit in support of this renewed motion. In addition, after this motion was brought, defendant deposed Borden specifically on the issue regarding her adequacy to serve a the class representative. The transcript of the deposition is before the court on this motion.

Borden urges the court to adhere to its findings in the prior decision except to the extent that it claims it has now demonstrated that Borden is an adequate class representative. Notwithstanding that the court examined all of the requirements regarding class certification in its prior decision, the defendant argues that the court’s findings were only dicta. It urges the court to reexamine all of the issues and find that none of the class certification requirements have been satisfied, and thereby deny this motion for class certification.

Preliminarily the court rejects defendant’s argument, that the motion should be denied because the original moving papers do not contain all of the papers submitted to the court on the prior motion. This technical defect was subsequently remedied by the plaintiff and because, as an e-filed case, the papers were immediately available to the court and opposing counsel from the time this motion was brought, there is no prejudice

to considering the parties' arguments on the merits.

Since the time the prior decision was made there has been no controlling appellate authority that would change any of the substantive findings and analysis made by the court at that time. The court, therefore, incorporates by reference the prior decision into this decision and finds that Borden has satisfied the CPLR article 9 requirements of numerosity, commonality, typicality and that a class action is superior to other available methods of adjudication.

The court also finds, for the reasons set forth in the prior decision, that there is no conflict of interest between the Borden and the class members and that counsel is aqualified to represent Borden and the putative class members in this action.

Defendant claims that recent decisions in In re: Smith Barney Transfer Agent Litigation (reported at 2011 WL 4430857 [Sept.22, 2011] and 2011 WL 6318988 [December 15, 2011]) raise new concerns about Bernstein Liberhard's ability to serve as counsel in this case. The court will not attempt to characterize those decisions, which speak for themselves. The court has, however, read the decisions and is not persuaded that they change the result in the action at bar.

The only issue left for the court's consideration is whether Borden has now demonstrated that she is an adequate class representative, based upon her personal characteristics.

After reviewing the motion, the court believes that it has sufficient information to rule on this issue, without the need for a further hearing. While in the prior decision the court reserved the right to conduct such a hearing, the court now finds that Borden's affidavit, along with the transcript of her deposition, provide sufficient information for the

court to make this determination. Significantly, the probing questioning at the deposition elicited information from Borden on which the court can properly evaluate Borden's adequacy to serve as a class representative in this case.

A primary consideration in determining whether a class representative has the personal characteristics to serve is whether s/he has an adequate understanding of the case. Fiala v. Metropolitan Life Ins. Co., 53 AD3d 251 (1<sup>st</sup> dept. 2008); Rollin v. Wm. v. Frankel & Co., Inc., 290 AD2d 368 (1<sup>st</sup> dept. 2002). An adequate understanding does not require that the representative have a command of every detail of the case. In re Coordinated Title Ins. Cases, 2 Misc3d 1007 (A)(Nass. Co. Sup. Ct. 2004). It is sufficient that the class representative be familiar with the basic elements of the claim. See: Biancur v. Hickey, 1997 WL 9857 (ND Cal 1997) ("The threshold of knowledge required to certify a class representative is low"); Greenspan v. Bassler, 78 FRD 130 (SDNY 1978). A class representative is presumed to rely on counsel's expertise and such reliance will not disqualify him or her. Fiala v. Metropolitan Life Ins. Co., *supra*. Notwithstanding such reliance, a class representative must still demonstrate a measure of independence from his or her attorneys, especially when it comes to issues of attorney's fees. Tanzer v. Turbodyne Corp., 68 AD2d 614 (1<sup>st</sup> dept. 1979).

Although it is important for a court to thoroughly vet any putative class representative, a court must be wary of a defendant's efforts to defeat representation of a class on the grounds of inadequacy where the effect of an inadequacy finding would be to eliminate any class representation. Kline v. Wolf, 702 F2d 400 (2<sup>nd</sup> cir. 1983). While the credibility of the representative may figure into the calculus ( Kline v. Wolf, *supra*), minor and collateral impeachment issues are insufficient to disqualify a class

representative. Lamarca v. Great Atlantic and Pacific Tea Co., Inc., 55 AD3d 487 (1<sup>st</sup> dept. 2008).

Applying these standards to Borden, the court finds that she is an adequate representative.

She testified at her deposition regarding her understanding of the general nature of the relief requested in the action, the differences between a class action and an individual action, her reasons for preferring one over the other, how she came to retain her present counsel before this action was commenced, and the ramifications of waving the right to proceed on a claim for treble damages. She testified that she has reviewed court documents, that she read her affidavit submitted on this motion before signing it and that she communicates with her attorneys about the case on a regular basis. She testified candidly about her health issues and no information was elicited by defendant's attorneys that her health interfered with her responsibilities to prosecute this case<sup>1</sup>.

In opposition, defendant raises no issues that would preclude a finding of adequacy. Contrary to defendant's position, there is no requirement that a class representative consult with other members of the class before making decisions about how to proceed in the litigation. Thus, Borden's failure to do so will not disqualify her.

The main arguments raised by defendant revolve around Borden's "waiver" of the treble damages claim and her consideration of an individual settlement offer previously made in this case.

Although defendant claims Borden tried to "extract" a settlement offer from it, a

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<sup>1</sup>Although defendant raised an issue about Borden's health in the prior motion, it seems to have abandoned that position in this motion.

December 6, 2011 letter from defendant's attorney makes what, on its face, appears to be a voluntary offer to resolve the matter individually with Borden. Apparently Borden consulted with her counsel of record and other counsel about the offer. The settlement never came to fruition for reasons that are not apparent in this record.

There is no proof submitted on this motion that suggests Borden was seeking to advance her individual interest at the expense of the individual members of the putative class. No settlement offer was "extracted" from defendants and none was ultimately agreed to. Moreover, Borden's consultation of with other attorneys demonstrates a degree of independence from counsel of record that is expected by a representative in class action litigation<sup>2</sup>.

The "waiver" issue is less of a problem. It is premised on there being a right to collect treble damages in overcharge cases emanating from the Court of Appeals ruling in Roberts v. Tishman Speyer (13 NY3d 270 [2009]). This right is at best, completely speculative, and in reality, virtually non-existent. The only reported case on the issue of treble damages in this case (which coincidentally was decided by this court), denied such an award. Dodd v.98 Riverside Drive, LLC, 2011 WL 5117699 (NY Co. Sup Ct. 2011). The required proof of willfulness is almost impossible to establish in any Roberts overcharge case, because the initial rents were established in reliance on DHCR regulations and the law on how to now calculate the rent stabilized rents is still emerging, without any fixed formula. Gordon v. 305 Riverside Corp., 93 AD3d 590 (1<sup>st</sup>

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<sup>2</sup>Had any individual settlement been reached, the members of the putative class, even though not certified, would have been notified. Avena v. Ford Motor Co, 85 AD2d 149 (1<sup>st</sup> dept. 1982).

dept. 2012), Gersten v. 56<sup>th</sup> 7<sup>th</sup> Ave., LLC, 88 AD3d 189 (1<sup>st</sup> dept. 2011)(1999 DHCR Luxury Decontrol order is collateral estoppel on issue of rent); 72A Realty Associates v. Lucas, 28 Misc3d 585 (NY City Civ. Ct. 2010) affd. 32 Misc3d 47 (AT1 2011); Dodd v.98 Riverside Drive, LLC, 2011 WL 5117699 (NY Co. Sup Ct. 2011); Sandlow v. Riverside Corp., 2012 WL 1141126 (NY Co. Sup Ct. 2012). See also: Dugan v. London Terrace Gardens LP, 34 Misc3d 1240 (NY Co. Sup Ct. 2011). In a similar vein, the Appellate Term has rejected any award of legal fees against an owner as unjust under these circumstances. 72A Realty Associates v. Lucas, *supra*. In any event, as the court stated in its prior decision, the putative class members rights can be completely protected by allowing them to opt out. Given all of these considerations, exactly when and why Borden decided to waive this “right” is of no moment to the issue of her adequacy.

Accordingly, the renewed motion for class certification is granted.

#### CONCLUSION

In accordance herewith it is hereby:

**ORDERED** that the motion for class certification is granted, and it is further

**ORDERED** that this action is certified as a class action on behalf of all persons who are or were residential tenants at 400 East 55<sup>th</sup> Street, New York, N.Y. and were charged and/or continue to be charged market rents during the period in which defendant, 400 East 55<sup>th</sup> Street Associates L.P. was participating in the J-51 tax benefit program, and it is further

**ORDERED** that Lorraine Borden is hereby appointed the representative of the

class as certified herein , and it is further

**ORDERED** that Bernstein Liebhard, LLP is hereby appointed as counsel for the class as certified, and it is further

**ORDERED** that any requested relief not otherwise expressly granted herein is denied, and it is further

**ORDERED** that this constitutes the decision and order of the court.

Dated: April 11, 2012  
New York, New York

SO ORDERED:

  
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J.G. J.S.C.  
**JUDITH J. GISCHE, J.S.C.**