

Antollino v Wright

2014 NY Slip Op 31486(U)

June 6, 2014

Sup Ct, New York County

Docket Number: 157929/2012

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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CHRISTOPHER ANTOLLINO, MARK FRUCE, and
ALEXIS HOPKINS,

Index No.: 157929/2012

Plaintiffs,

Motion Seq. No. 003

-against-

ELVA WRIGHT,

Defendant.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action to recover on rent overcharges, defendant Elva Wright (“Wright”) moves pursuant to CPLR 602(a) to consolidate this action (the “First Action”) with a later-filed action pending before Hon. Shlomo Hagler entitled *Elva Wright and Orlando Pomatana v. 620 LLC and Ben Rieder*, Index No. 155568/13 (the “Second Action”) for discovery and trial.

Factual Background

The First Action

On November 12, 2012, plaintiffs Christopher Antollino (“Antollino”), Mark Fruce (“Fruce”), and Alexis Hopkins (“Hopkins”)¹ (collectively, “plaintiffs”) commenced the First Action against Wright. Plaintiffs allege they were subtenants of Apartment 32 in the building located at 622 West 137th Street in Manhattan (the “Building”) pursuant to a sublease and/or subleases with Wright, the alleged tenant of record at Apartment 32. Wright allegedly resided in Apartment 31, and previously resided at Apartment 32 before subleasing it to plaintiffs.

¹ By stipulation dated September 3, 2013, Hopkins discontinued her claim against defendants with prejudice.

The First Action seeks damages for rent overcharges in violation of 9 N.Y.C.R.R. 2525.6(b) (“2525.6”). By her answer, Wright asserted various counterclaims, including breach of contract for rent owed, attorneys’ fees (based on the sublease with plaintiffs, which provides that the rent stabilization codes do not apply to the Building), and unjust enrichment. Thereafter, plaintiffs amended their complaint to add a second cause of action for attorneys’ fees.

The Second Action

On June 5, 2013, Wright and Orlando Pomatana (“Pomatana”) commenced the Second Action against 620 LLC and Ben Rieder (collectively, “defendants”), the alleged owner and managing agent, respectively, of the Building. Pomatana is allegedly a former tenant of Apartment 32, who resided there with Wright before the unit was subleased to plaintiffs. Wright and Pomatana’s complaint asserts causes of action pertaining to both Apartments 31 and 32 for violations of the rent stabilization codes, attorneys’ fees, lease reformation (to reflect the proper rent and successive terms of two years, as Wright and Pomatana allege that defendants improperly failed to offer them the option of entering into two-year leases), and a declaratory judgment that both apartments are subject to the rent stabilization codes.

Arguments

In support of consolidation, Wright argues that CPLR 602(a) gives the trial court discretion to consolidate actions involving common questions of law or fact and the issue of whether the Apartments are subject to the rent stabilization codes is central to both the First and Second Actions. As such, discovery would be identical in both actions.

Both actions here are inextricably intertwined, and none of the parties involved will suffer prejudice as a result of the consolidation. In the First Action, plaintiffs (subtenants) allege that

Wright (tenant) overcharged their rent in violation of the RSC. In the Second Action, plaintiffs (tenants) allege that defendants (landlord and managing agent) committed the same violation for apartments in the same Building. Thus, both actions concern identical issues and all the parties are related to one another, as they all have an interest in the Building.

As such, consolidation will avoid the potential waste of court resources, which would occur if two separate actions and trials are maintained.

Additionally, plaintiffs contend that the Second Action should have been marked as “related” and assigned to this court. Alternatively, Wright could have brought a third-party action within the First Action. Plaintiffs also note that their prior request to amend the complaint to add defendants (in the Second Action) was denied due to the fact that they are not in privity with them. At that time, Wright still had a lease with 620 LLC. However, since then, Wright has vacated Apartment 31. Thus, for reasons of judicial economy, the actions should be consolidated.

In opposition, defendants argue that consolidation will result in substantial prejudice to plaintiffs and defendants, and the Second Action raises different issues of fact and different causes of action.

Although both actions concern rent overcharges in the Building, the two matters vary substantially with respect to the relief sought and the parties involved. The Second Action features Pomatana and Apartment 31, an individual and apartment which do not factor into the First Action. Thus, different contracts are at issue for different individuals and apartments. As such, the allegations involve new factual allegations that would require additional inquiry and are not related to the substance of the First Action.

Moreover, Wright and Pomatana are not merely alleging claims of rent overcharge, but also seek a declaratory judgment that the apartments are subject to the rent stabilization codes and a reformation of the lease. Thus, they seek equitable relief which is not contemplated in the First Action. Actions for monetary damages and equitable relief are sufficiently distinct in their facts and in the applicable law so as to prevent their consolidation.

Additionally, there is substantial prejudice based on the delay to plaintiffs and defendants that will result if consolidation is ordered. The note of issue deadline in the First Action is June 30, 2014; thus, trial is soon approaching. Meanwhile, no conferences have been held in the Second Action, nor has any discovery been ordered. Considerable time must elapse before the Second Action would be ready for trial. As a result, the First Action will be unduly delayed by consolidation, and there is no showing that trial of the First Action would impair or prejudice any right of Wright, the movant herein.

Also, defendants would be prejudiced if they are denied the opportunity to fully litigate the issues involved and conduct full and fair discovery. It appears that Wright brought this motion to delay resolution on the merits. As such, the interests of judicial economy and justice would not be best served by consolidation.

In reply, Wright contends that defendants ignore the central issue at stake in both actions; *i.e.*, whether defendants, as landlord and managing agent, properly destabilized all the apartments in the Building. Thus, that Apartment 31 is at issue in the Second Action is of no concern.

Moreover, defendants fail to illustrate how they would be prejudiced by consolidation. The only parties that could be prejudiced in either scenario are Wright (in the First Action) and Wright and Pomatana (in the Second Action), if the actions are not consolidated. Wright and

Pomatana would be prejudiced in that their rights would be at issue in two separate actions that involve identical issues, an identical Building and apartment (Apartment 32), and an identical landlord and managing agent. And, both actions seek identical discovery: the documents that establish whether both apartments are subject to the rent stabilization codes, and the documents filed with the Division of Housing and Community Renewal in connection with the Building. Further, defendants are the only ones who possess such documents.

It is inconsequential, despite defendants' assertions to the contrary, that Wright and Pomatana seek a declaratory judgment in the Second Action. The declaratory judgment would provide an answer that is at the crux of both actions; whether the rent stabilization codes apply to the Apartments. Furthermore, that is only one of many causes of action in the Second Action, and defendants cite no case law for their contention that the actions cannot be consolidated in light of this particular claim.

The pleadings and parties in both actions undermine defendants' argument that there is no real commonality of issues. Both Apartments 31 and 32 are in the Building, and Pomatana, who is Wright's brother, was a tenant of Apartment 32 along with Wright. Wright and Pomatana resided in Apartment 32 as tenants before they sublet that apartment to plaintiffs. Thus, the Second Action included Apartment 31 and Pomatana in order to have all interested parties and relevant apartments brought into the action.

Defendants' argument that they will be prejudiced based on delay and an inability to fully litigate the issues involved, especially regarding discovery, is inaccurate, given the history of the matters. In the Second Action, Wright and Pomatana attempted to seek discovery from defendants for months, and eventually made a motion to compel. Although the motion was

denied on default due to Wright and Pomatana's failure to appear as a result of an office calendaring conflict, instead of making a motion to restore or reargue, Wright and Pomatana attempted to resolve the matter amicably by asking defendants' counsel again to provide the requested discovery. Thus, for defendants to argue now that they would be denied the opportunity to fully litigate the issues involved and conduct full and fair discovery is questionable at best. In short, it is Wright and Pomatana who have been denied full and fair discovery.

The cases cited by defendants in support of their contention that the First Action will be unduly delayed by consolidation involved situations in which trial was imminent. Here, trial is not imminent, and plaintiffs' counsel has indicated that he would like the matters to be consolidated, and that he is not concerned by any potential delay.

Plaintiffs submit a reply in support of Wright's motion, noting that defendants do not deny that the case should have been marked as "related" and assigned to this court when it was filed. Plaintiffs argue that the only potential prejudice is to them, and not to defendants. In any event, delay alone, without more, is not prejudice.

Discussion

CPLR 602(a) provides that when actions involving a common question of law or fact are pending before a court, "the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." Moreover, great deference is to be accorded to the trial court's discretion, and there is a preference for consolidation in the interest of judicial economy and ease of decision-making where there are common questions of

law or fact, unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right (*see Matter of Progressive Ins. Co. (Vasquez—Countrywide Ins. Co.)*, 10 A.D.3d 518, 782 N.Y.S.2d 21 [1st Dept 2004]). The possibility of inconsistent verdicts is another justification for consolidation (*see Progressive, supra*).

As plaintiffs aver that consolidation will not prejudice them (and join in Wright's application for consolidation), defendants' contention that plaintiffs would be prejudiced based on delay resulting from consolidation is unavailing. Thus, the only potential prejudice is claimed by defendants. As such, the court must decide: (a) whether there are common questions of law or fact in the two actions; and, if so, (b) whether a substantial right of defendants will be prejudiced by consolidation.

The First Action is based on an alleged violation of 2525.6 in that plaintiffs were overcharged as Wright's subtenants, and plaintiffs seek damages and attorneys' fees. 2525.6 applies to subletting and assignment, and provides that "[t]he rental charged to the subtenant by the tenant shall not exceed the legal regulated rent plus no more than a 10-percent surcharge payable to the tenant if the housing accommodation is sublet fully furnished. Where a tenant violates the provisions of this subdivision, the subtenant shall be entitled to treble damages." The complaint in the First Action alleges that the apartment in question (Apartment 32) is subject to the rent stabilization laws of the State of New York, and has never been destabilized. Wright denied the above in her answer to the First Action's complaint and asserted in her counterclaims that the rent stabilization law does not apply to the Building; thus, she was entitled to charge whatever monthly rent to the plaintiffs/subtenants she desired.

The Second Action's causes of action for damages are based on alleged violations of the

New York City Administrative Code §§ 26-501, *et seq.* These sections apply when landlords overcharge tenants for rent stabilized apartments (*see* section 26-516(a) and (b)).

Thus, although the complaints allege violations of different codes -- as the First Action pertains to the rights of subtenants, and the Second Actions pertains to the rights of tenants -- a crucial issue at stake in both matters is whether the apartments are subject to the rent stabilization laws/codes.

Also, the fact that Pomatana is not referenced in the pleadings of the First Action is of no moment. Pomatana alleges that he was a tenant of Apartment 32, the same apartment at issue in the First Action. Likewise, it is irrelevant that the Second Action concerns Apartment 31 in addition to Apartment 32, as both apartments are in the Building -- the key is whether the Building (and therefore its apartments) are subject to the rent stabilization codes (*see Philip Shlansky & Bro., Inc. v. Grossman*, 273 A.D. 544, 78 N.Y.S.2d 127 [1st Dept 1948]). Also, the fact that the Second Action seeks monetary damages and equitable relief does not mean the two actions do not contain common questions of law or fact (*id.*).

Grossman is particularly instructive, because in that case, the First Department ruled that consolidation was appropriate despite the facts that the two actions to be consolidated featured different parties, and that one action was at law and the other in equity:

“Consolidation is particularly appropriate where, as here, both actions clearly arise out of the same series of transactions and the relief sought in one action would constitute an offset to that sought in the second. Consolidation is not prevented by the circumstance that one action is at law and the other in equity . . . Nor is it a bar to consolidation that the parties in the two actions are not identical ...”
Grossman, 273 A.D. at 546.

Accord: Goldey v. Bierman, 201 A.D. 527, 194 N.Y.S. 373 [1st Dept 1922]; *see also* Siegel’s

New York Practice, 4th Ed., § 128).

Here, although the actions arise from different leases for different parties, and the Second Action seeks equitable relief, both actions are factually based on the Building and whether the rent stabilization codes apply to the subject subleases and leases. Thus, both actions contain common questions of law and/or fact (*see Dugan v. London Terrace Gardens, LP*, - N.Y.S.2d -, 2013 WL 8482180 [Sup Ct New York Cty 2013] (consolidation ordered in actions concerning alleged violations of rent stabilization codes regarding multiple apartments in building complex)).

Further, here, like in *Dugan*, maintaining the actions separately would pose a risk of inconsistent dispositions. It is possible, for example, that in the First Action, the factfinder could determine that the rent stabilization codes apply, while another factfinder could reach a contrary result in the Second Action (*id.* at * 5).

Next, defendants failed to establish that their rights would be substantially prejudiced by consolidation. Defendants' contention that they would be prejudiced by the delay caused by consolidation is meritless. A trial of the First Action is not "imminent," which was the basis for the Second Department's denial of consolidation in the cases cited by defendants (*see Halpern v. Rodway*, 3 A.D.2d 941, 163 N.Y.S.2d 806 [2d Dept 1957]; *Yorks v. Biederman*, (9 A.D.2d 764, 192 N.Y.S.2d 447 [2d Dept 1957])). The note of issue in the First Action is due on June 30, 2014, and no trial date has been scheduled, let alone is imminent.

Defendants' remaining claim, that they would be prejudiced if they are denied the opportunity to fully litigate the issues involved and/or conduct full and fair discovery, is similarly unavailing. Extending the discovery deadline to account for consolidation would not prejudice

the parties in the First Action, as plaintiffs and Wright aver that consolidation is in their best interests; additionally, the court has the discretion to extend the time for discovery upon terms that may be just and upon good cause shown (*see* CPLR 2004; *Miller-Francis v. Smith-Jackson*, 113 A.D.3d 28, 976 N.Y.S.2d 34 [1st Dept 2013]).

Although courts have denied motions to consolidate where the two actions are at different procedural stages (*see, e.g., Abrams v. Port Auth. Trans-Hudson Corp.*, 1 A.D.3d 118, 119, 766 N.Y.S.2d 429 [1st Dept 2003]); *F & K Supply, Inc. v. Johnson*, 197 A.D.2d 814, 602 N.Y.S.2d 970 [3d Dept 1993]), those cases, like *Halpern* and *Yorks*, involved situations where consolidation would result in undue and prejudicial delay in the resolution of the matters.

Here, the potential for delay pertains to only the First Action, which is closer to trial than the Second Action. The parties in the First Action have made clear that they would not be prejudiced by any delay, as they are the parties seeking consolidation. Defendants, who oppose consolidation, cannot argue that they would be prejudiced by consolidation regarding delay, as discovery in the Second Action is indisputably in the early stages. Defendants do not allege that discovery in the Second Action would be hindered by consolidation; rather, they argue that the *First Action* would be delayed. However, based on plaintiffs' and Wright's affirmations, this contention lacks merit.

Accordingly, the motion to consolidate is granted and discovery of the consolidated actions will proceed in accordance with the schedule and requirements of the Second Action.

Conclusion

Based on the foregoing, it is hereby

ORDERED that TSI's motion to consolidate is granted, and *Elva Wright, Orlando*

Part 35 for a status conference on July 8, 2014, 2:30 p.m.

This constitutes the decision and order of the Court.

Dated: June 6, 2014

A handwritten signature in black ink, appearing to read 'C.R. Edmead', written over a horizontal line.

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD