SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. George J. Silver PART 10
Justice

BORDEN, LORRAINE, on behalf of herself and all others similarly situated,

- v -

400 EAST 55TH STREET ASSOCIATES, L.P.

INDEX NO. 650361-2009

MOTION DATE

MOTION SEQ. NO. 009

The following papers, numbered 1 to 4, were read on this motion for Motion Sequence 009

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits ---------- No(s). 1, 2

Answering Affirmation(s) — Affidavit(s) — Exhibits ---------- No(s). 3, 4

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

In this class action to recover rental overcharge, Plaintiff Lorraine Borden, on behalf of herself and the certified class ("Plaintiff"), moves by way of Order to Show Cause pursuant to CPLR §6301 for a preliminary injunction enjoining Defendant 400 East 55th Street Associates, L.P. ("Defendant") from initiating or filing summary proceedings against Plaintiff or taking action to evict her and from communicating with Plaintiff or any of the class members without the knowledge and consent of Plaintiff's counsel. Plaintiff further seeks an Order issuing a corrective notice to class members to remedy any prejudice caused by Defendant's communications with the members. Defendant opposes Plaintiff's motion.

Plaintiff, a resident of 400 East 55th Street, New York, New York ("the building" which Defendant owns) brought suit on behalf of herself, and all residents of the building who were charged market rate rents from 1991-present. Plaintiff alleges that Defendants, despite receiving the J-51 tax benefit beginning in 1991, charged market rate rent for the apartments in the building. Plaintiff alleges charging market rate rent is unlawful, where apartments in receipt of J-51 benefits may not deregulate individual apartments pursuant to the Rent Stabilized Law ("RSL"). As such, Plaintiff alleges the apartments were improperly deregulated and brings suit to recover the difference between the regulated rent and the deregulated market rent Plaintiff and other class-members have been paying. Plaintiff moved for class-certification, which was granted by this Court in April 2012 and affirmed by the Appellate Division in April 2013. Defendant moved for leave to Appeal the Appellate Division decision to the Court of Appeals. The motion was fully submitted to the Court of Appeals on June 10, 2013.

In support of her motion, Plaintiff avers that she received a rent demand ("Three-Day Notice") from Defendant on December 17th, 2013, noticing her that she owes $85,406.91 and that failure to pay the full amount to Defendant by December 30, 2013 would result in the commencement of eviction proceedings against her. Plaintiff avers that she has been paying $778.47/month for over three years pending the resolution of this action and the Court's determination of proper rent, which Defendants now aver is $3,347.53/month. Plaintiff argues that the $778.47/month is the appropriate rent pending the outcome of the litigation as it was the last lawfully registered rent and this amount of rent has been accepted by the Defendants until it issued its rent demand. Plaintiff further avers that Defendant has been corresponding with class members about their rental overcharges and offering them refunds for the

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

1. Check one: ..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS: ☐ GRANTED ☐ DENIED ■ GRANTED IN PART ☐ OTHER
3. Check as appropriate: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

overcharge, without disclosing the existence of the class action or that the recipients are represented by class counsel. Further, as it stands now, the class is certified and Plaintiff argues that the Court has an obligation to monitor the communications with the class and to abide by the fact that all members of the class are represented by class counsel. Additionally, Plaintiff argues that class counsel must be informed of all communications that an adversary makes with the class members, which has not been adhered to in this case. Even further, if an adversary has communication with class members, it must include the subject of the litigation, which both the Three-Day Notice and the class correspondence failed to do. The communication may be coercive, where the Defendant has a leveraged relationship in this class, which, in this case, it certainly does. Plaintiff avers that the Class correspondences are an attempt to peel members away from the Class by encouraging them to opt out by accepting the refund checks, but opting out cannot be decided based on one-sided presentation, but rather only by informed consent. Such an offer of "settlement" fails to include Plaintiff's counsel or the Court, both of which are required by CPLR §908. Plaintiff avers that she has established that the preliminary injunction is necessary as she has demonstrated a probability of success on the merits (by proof of the rental overcharge based upon the Defendant's receipt of the J-51 benefits) and a danger of irreparable injury should the injunction not be granted, in terms of the possibility of losing her home as well as the irreparable injury caused from Defendant's communications with the class members. Lastly, the equities balance in favor of the class, where maintaining the status quo will prejudice and hurt the class members while allowing Defendants a windfall. If class correspondence continues as is, Defendants will continue to settle cases of class members unilaterally, which is wholly improper. Thus, Plaintiff seeks that this Court bar communications from Defendant/counsel for Defendant to the Class members about the subject of the litigation without Plaintiff's counsel's consent and asks that a corrective notice is sent out to each class member subject to Court approval advising the class members of the pendency of this litigation, the past communications from Defendant are improper and that any offer to settle may be accepted without prejudice to its status as a class member. Lastly, Plaintiff seeks that Defendant must be enjoined from taking action to evict Ms. Borden

In opposition, Defendant argues there is no legal basis to enjoin Defendants from commencing a summary nonpayment proceeding in Housing Court and any objections that Plaintiff has can be raised in Housing Court as defenses. If they are valid meritorious defenses, she will win and no irreparable harm will be caused. Further, Defendant argues its communication with tenants was simply to let them know their had been a rental overcharge, having nothing to do with the class or this particular case. The Defendant recalculated the rents of those specific tenants and for each tenant who had been overcharged, Defendant sent a letter explaining the overcharge and issuing a refund for the amount of overcharges. Defendant avers there is nothing improper about the refunds and thus, there is no need to issue corrective notices. Additionally, Defendant argues that the legal rent is $2,569.06/month, which was properly registered with the DHCR for 2008-2013. While Plaintiff has been paying only $787.46/month, the parties stipulated that Defendant may accept Plaintiff's partial payments for use and occupancy without prejudice. Defendant contends that Plaintiff paid no rent for the months of October, November, and December 2013 and on November 19, 2013, an investigator from New York City Human Resources Administration ("NYCHRA") contacted Defendant to advise that Plaintiff applied for public assistance to help pay her utilities bills. Defendant avers that it was concerned about Plaintiff's financial state as she was unable to pay her utility bills while her rent arrears were mounting and as such, Defendant prepared a rent demand dated December 17, 2013. Defendant withdrew the initial rent demand dated December 17, 2013 and served a new rent demand dated January 16, 2014, demanding payment of $59,482.48 on or before January 16, 2014.

Defendant opposes the granting of a preliminary injunction in this case, which is a drastic and inappropriate remedy for this case, where the issue of proper rent can, and should, be decided by Housing Court. Further, Defendant argues that Plaintiff did not satisfy the three-prong test necessary to obtain a temporary injunction where she did not even attempt to establish a likelihood of success on the

merits through competent evidence. Plaintiff fails to allege either that she has no rent arrears or that the rent arrears set forth are erroneous. Simply stating that the rent has not been determined (and will be by this Court upon resolution of this case) is baseless and lacks any authority. Further, Plaintiff cannot establish irreparable harm resulting from not granting this preliminary injunction where the possibility of defending a summary proceeding does not constitute irreparable harm sufficient to warrant an injunction. Absent a preliminary injunction, Plaintiff will not be evicted or irreparable harm before she is given a full and fair opportunity in Housing Court- the only harm she will face is in defending the housing court case which is hardly irreparable. Lastly, the balance of equities tip in Defendant's favor, where it is being prejudiced as Plaintiff is refusing to pay her legal, registered rent. Even if Plaintiff's request to enjoin Defendants has merit, the request is overbroad. Additionally, Defendant argues that Plaintiff's request to enjoin it from communicating with its tenants is without merit and Plaintiff fails to submit any evidence to support her requested injunction, where her affidavit only addresses the injunctive relief regarding the Three-day notice. Further, Defendant purports it did not request releases, an opt out, and nothing about the refund letter was coercive, improper, or in any way an interference with the class and the litigation at hand. If an injunction is granted, the Court should post an undertaking in an amount that Plaintiff, if determined she was not entitled to the injunction, will pay to Defendant. As such, Defendant asks that the undertaking should be in the amount of rent arrears, totaling $59,482.48.

Analysis

"A preliminary injunction will only be granted when the party seeking such relief demonstrates a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of equities tipping in favor of the moving party." (*Internal citations omitted*)(*1234 Broadway LLC v W. Side SRO Law Project*, 86 AD3d 18, 23 [1st Dept 2011]) Plaintiff seeks two disctinct types of injunctive relief and the Court will address each individually.

Summary Proceedings Against Plaintiff in Housing Court

The standard for likelihood on the merits does not require Plaintiff to "demonstrate a certainty of success but rather, [she] must make a showing of a likelihood of success on the merits"*(Doe v Dinkins,* 192 AD2d 270, 275-76 [1st Dept 1993]). Additionally, "as to the likelihood of success on the merits, a prima facie showing of a right to relief is sufficient; actual proof of the case should be left to further court proceedings."*(Terrell v Terrell,* 279 AD2d 301, 303 [1st Dept 2001]). "In light of the Court of Appeals' decision in *Roberts v. Tishman Speyer Props., L.P.,* 13 N.Y.3d 270, 890 N.Y.S.2d 388, 918 N.E.2d 900 [2009] and subsequent case law giving retroactive effect to *Roberts* (*Roberts v. Tishman Speyer Properties, L.P.,* 89 A.D.3d 444, 445 [1st Dept.2011]; *Gersten v. 56 7th Ave., LLC,* 88 A.D.3d 189, 196–197, 928 N.Y.S.2d 515 [1st Dept.2011]), tenant is entitled to rent-stabilized status for the duration of her tenancy and to collect any rent overcharges, as her apartment was improperly deregulated by landlord while it was receiving J–51 tax benefits." (*72A Realty Assoc. v Lucas*, 101 AD3d 401 [1st Dept 2012]) Thus, Plaintiff's counsel's conclusory statement that "they will succeed on the merits. The Class is defined as all tenants who resided in market-rate apartments while Defendant received J-51 benefits...[and] by residing in market-rate units while Defendant received J-51 benefits, Ms. Borden and the Class are accordingly entitled to damages and declaratory relief" is enough to establish the likelihood of success on the merits of this cause of action.

The second element required for Plaintiff's entitlement to a preliminary injunction is the demonstration of irreparable injury if the injunction is withheld. Plaintiff argues that the possibility of an eviction and/or the idea of losing her home demonstrates irreparable harm should the injunction not be granted. Courts have held that the possibility of concurrent litigation in Civil Court does not, in it of itself, pose irreparable injury. The Appellate Division, First Department held, "tenants can urge, at least in *defense* of those [summary proceedings], their contentions by way of legal or equitable defenses. If for any reason it appears that the jurisdiction of the Civil Court will be inadequate to give the parties full relief, the parties can move to consolidate the Civil Court action with the present action in the Supreme

Court for a declaratory judgment. (Cf. *Barak v 28 E. 6262 Realty Corp.*, 70 AD2d 543.) We should not at this stage preclude landlords from choosing whatever forum they wish in which to bring their suit in the first instance." (*Childress v Lipkis*, 72 AD2d 724 [1st Dept 1979]) Further, "It is well settled that the danger of impending judicial proceedings is not an injury justifying an injunction. As a specific illustration of this principle, it has been consistently held that a preliminary injunction restraining an eviction may not be granted in favor of a tenant on facts which may be effectively interposed as a defense in summary eviction proceedings (*internal citations omitted*)." (*Spellman Food Services, Inc. v Partrick*, 90 AD2d 791 [2d Dept 1982]) Thus, where there is no irreparable injury demonstrated specifically relating to Defendant's eviction proceedings, Plaintiff has not met its burden enjoining Defendant's from continuing with their eviction proceedings in Civil Court.[1]

Communication with class-members

Plaintiff has established the likelihood of success on the merits for the reasons stated above as to this portion of her application for a preliminary injunction.

As to establishing irreparable injury if the injunction is withheld, "It is well established that an irreparable injury is 'an injury that is not remote or speculative but actual and imminent, and 'for which a monetary award cannot be adequate compensation.'"*(internal citations omitted)*(*Dexter 345 Inc. v Cuomo*, 663 F3d 59, 63 [2d Cir 2011]). Courts have long been involved with the management of class-actions to ensure that the conduct of parties and counsel is appropriate. "Because of [sic] potential problems, an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties. (*Gulf Oil Co. v Bernard*, 452 US 89, 101, 101 S Ct 2193, 2200, 68 L Ed 2d 693 [1981]). In this case, Plaintiff has highlighted the potential problems that will arise from continued communication between Defendant and class members with specificity through her application for a preliminary injunction. First, all class-members are represented by Plaintiff's counsel. Pursuant to New York State's Rules of Professional Conduct 4.2(a), "In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law." (NY ST RPC Rule 4.2) Additionally, the communications/letters include refund checks for substantial amounts of money which likely will entice class-members to accept the refund, which would cause them to opt out of the class. Class-members who accept the refund checks would be left without any damages, limiting their ability to continue in the class-action. "The test for whether a party, with or without aid of its counsel, has had impermissible contact with potential members of the plaintiff class, is whether the contact is coercive, misleading, or an attempt to affect a class member's decision to participate in the litigation. *(Hampton Hardware, Inc., supra; Kleiner, supra; Burrell v. Crown Cent. Petroleum,* 176 F.R.D. 239 (E.D.Tex.1997))" (*Carnegie v H&R Block, Inc.*, 180 Misc 2d 67, 71 [Sup Ct 1999]). Arguably, the communications with the class members are misleading and have the potential to affect a class member's decision to participate in the litigation. On its face, the communications give no indication of the pending litigation or that acceptance of the refund checks may hinder class members' ability to continue with the litigation.

Lastly, the Court must look to whether the balance of equities tips in favor of the moving party. '[I]t must be shown that the irreparable injury to be sustained ... is more burdensome [to the plaintiff] than the harm caused to defendant through imposition of the injunction' " (*McLaughlin, Piven, Vogel v. Nolan & Co.*, 114 A.D.2d 165, 174, 498 N.Y.S.2d 146, *lv. denied* 67 N.Y.2d 606, 501 N.Y.S.2d 1024, 492 N.E.2d 795; *see Credit Index v. Riskwise Intl.*, 282 A.D.2d 246, 722 N.Y.S.2d 862; *Klein, Wagner &*

[1]Where Plaintiff has not demonstrated irreparable injury for the relief it seeks enjoining Defendant from continuing its eviction process, the Court does not need to determine whether the balance of equities tips in favor of the moving party, as Plaintiff must demonstrate all three prongs in order to be granted a preliminary injunction.

Morris, 186 A.D.2d at 633, 588 N.Y.S.2d 424). (*Destiny USA Holdings, LLC v Citigroup Global Markets Realty Corp.*, 69 AD3d 212, 223 [4th Dept 2009]) In this case, the Defendant argues that had they not sent out the Refund letters, it would have risked allegations of continued non-compliance with applicable law and permit interest to accrue against it for the overcharges. However, the irreparable injury to be sustained by the class members is more burdensome if this communication continues and if the class-members accept and deposit the refund checks. Doing so would jeopardize their standing as members of the class. Courts have disallowed any communications that are misleading and have the potential to affect a class member's decision to participate in the litigation, and as such, the irreparable injury to the class-members outweighs any potential accruing interest that Defendant will potentially (and only possibly) have to pay.

Issuing Corrective Notices to class members

Lastly, Plaintiff seeks an Order from this Court, issuing corrective notices to class members to remedy any prejudice caused by Defendant's communications with the members. Plaintiff has failed to provide any arguments or evidence as to why a failure to issue corrective notices to all class members is necessary. The Court has determined that it will enjoin Defendant from corresponding with class-members without consent and knowledge of Plaintiff's counsel, but there is no demonstration of any additional need for corrective notices to class-members. Accordingly, it is hereby

ORDERED that Defendant, its agents, servants, employees and all other persons acting under the jurisdiction, supervision, and/or direction of Defendant, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of Defendant or otherwise, any of the following acts: communicate with Plaintiff or any of the class members without the knowledge and consent of Plaintiff's counsel; and it is further

ORDERED that counsel for parties are to appear for a conference on December 9, 2014 at 9:30AM at 60 Centre Street, Room 422, New York, New York 10007; and it is further

ORDERED that the movant shall serve a copy of this order, with Notice of Entry, upon all parties, as well as upon the Clerk of the Trial Support Office (60 Centre Street, Room 158) within thirty (30) days of entry.

George J. Silver, J.S.C.

Dated: SEP 30 2014
New York County