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

PRESENT: MANUEL J. MENDEZ *Justice* **PART** 13

CAROLYN ROBERTS, ALEXANDER WOOD, and MAYER & LEE, P.C., individually and on behalf of all other similarly situated Plaintiffs,

Plaintiffs,

-against-

OCEAN PRIME, LLC, OCEAN PARTNERS, LLC, OCEAN PARTNERS SPE CORP., RESIDENTIAL MANAGEMENT GROUP, LLC., d/b/a DOUGLAS ELLIMAN PROPERTY MANAGEMENT, OCEAN CAR PARK, LLC, d/b/a CGMC PARKING, LLC, BATTERY COMMERCIAL ASSOCIATES, LLC and NEWMARK KNIGHT FRANK GLOBAL MANAGEMENT SERVICES, LLC,

Defendants.

INDEX NO.	150612/13
MOTION DATE	12-02-15
MOTION SEQ. NO.	006
MOTION CAL. NO.	

The following papers, numbered 1 to 15 were read on this Motion to/for Class Certification:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits ____ cross motion ____	5 - 7, 8 - 10, 12 - 14
Replying Affidavits ____	15

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers it is Ordered that plaintiffs' motion seeking to certify this action as a class action pursuant to CPLR Article 9, appointing plaintiffs as class representative and appointing Napoli Bern Ripka Shkolnik LLP (by Hunter J. Shkolnik and Brian H. Brick) and Imbesi Christensen (by Vincent Imbesi) as class counsel, is granted.

This action seeks recover damages resulting from the effects of Superstorm Sandy on the residential and commercial tenants of 1 West Street, New York, N.Y. and 17 Battery Place, New York, N.Y. (hereinafter referred to collectively as "the Premises") which are high-rise buildings. The Premises consists of 492 residential apartments and fifteen floors of commercial space, located in Zone A, designated a "low-lying area" that is vulnerable to flooding. On October 29, 2012, Superstorm Sandy flooded Zone A, the water entered the basement and parking garage of the Premises causing significant damage to the mechanical and electrical systems. Plaintiffs allege that approximately 20,000 gallons of heating oil delivered days before the storm was released into the flood waters that entered the building, together with oil and gasoline from vehicles parked in the garage, causing fumes and other damage to the building which was uninhabitable for at least a month, until November 30, 2012, for residential tenants and for commercial tenants even longer.

Ocean Prime, LLC, Ocean Partners, LLC, Ocean Partners SPE Corp. (hereinafter referred to as the "Ocean Defendants") are the owners of the premises. Battery Commercial Associates, LLC (hereinafter referred to as "Battery") and Residential Management Group, LLC d/b/a Douglas Elliman Property Management (hereinafter referred to as "DEPM") are the residential property management companies. Newmark Knight Frank Global Managment Services, LLC (hereinafter referred to as "Newmark") is the commercial property management company. The action was commenced on January 22, 2013, by Yin Hou, individually and on behalf of all other similarly situated plaintiffs (DEPM Opp., Exh. A). The complaint was amended on February 11, 2013,

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

removing Yin Hou as plaintiff, and asserting claims by Matthew Bobrow and Damola Adamolekun on behalf of themselves and similarly situated residential plaintiffs, together with Mayer & Lee, P.C., individually and on behalf of similarly situated commercial tenants (Newmark Opp., Exh. A).

The Amended Complaint asserts causes of action against all named defendants for negligence before and after Superstorm Sandy made landfall for failing to prepare and protect the premises, and for breach of warranty of habitability in violation of Real Property Law §235-b asserted solely against Ocean Premises, LLC. The residential plaintiff claims breach of warranty of habitability resulting from the inability to occupy the premises on October 30, 2012 through November 30, 2012.

In Motion Sequence 005, submitted to the Hon. Anil C. Singh, plaintiffs sought to substitute Carolyn Roberts and Alexander Wood, for Matthew Bobrow and Damola Adamolekun. Justice Singh's Decision and Order for Motion Sequence 005, dated March 26, 2015, granted plaintiffs' motion. The parties do not provide any other Amended Complaint and there appears to be no modification of the causes of action asserted in the February 11, 2013, Amended Complaint. By Order dated April 25, 2014, the Court recused itself and this action was randomly reassigned to this Court.

Plaintiffs' motion seeks to certify this action as a class action pursuant to CPLR Article 9, appointing plaintiffs as class representatives and appointing Napoli Bern Ripka Shkolnik LLP (by Hunter J. Shkolnik and Brian H. Brick) and Imbesi Christensen (by Vincent Imbesi) as class counsel.

The determination concerning qualification of a lawsuit as a class action under the statutory requirements, rests within the sound discretion of the trial court (Small v. Lorillard Tobacco Co., 94 N.Y. 2d 43, 720 N.E. 2d 892, 698 N.Y.S. 2d 615 [1999]). The burden is on the class representative to produce evidence that establishes the prerequisites of certification. A certification motion is required to establish that the proposed class can be identified (Kudinov v. Kel-Tech Constr. Inc., 65 A.D. 3d 481, 884 N.Y.S. 2d 413 [1st Dept., 2009]).

The five criteria that must be met in determining class action status are stated in CPLR §901(a), as follows: "(1) the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable; (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members; (3) the claims or defenses 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" (CPLR §901 and Small v. Lorillard Tobacco Co., 94 N.Y. 2d 43, supra).

Plaintiffs argue that they satisfy all the elements of CPLR §901(a). They claim the numerosity requirement can be satisfied because there are 492 residential apartments and fifteen floors of commercial space located in the premises, with between 500 to 600 potential class members.

CPLR §901(a)(1), the numerosity requirement, is dependent on the circumstances of each case (Pesantez v. Boyle, 251 A.D. 2d 11, 673 N.Y.S. 2d 659 [1st Dept., 1998]). The Court should take into consideration "reasonable inferences and common sense assumptions" of the facts (Globe Surgical Supply v. GEICO Ins. Co., 59 A.D. 3d 129, 871 N.Y.S. 2d 263 [2nd Dept., 2008]). The class must be, "so numerous that joinder of all members is impracticable (Nicholson v. KeySpan Corp., 65 A.D. 3d 1025, 885 N.Y.S. 2d 106 [2nd Dept., 2009]). A class of approximately forty (40) potential members or larger has typically been deemed sufficient for certification (Galdamez v. Biordi Construction Corp., 13 Misc. 3d 1224(A), 8231 N.Y.S. 2d 347 [N.Y. Sup. Ct., 2006], aff'd 50 A.D. 3d 357, 855 N.Y.S. 2d 104 [1st Dept., 2008]).

The number of residential and commercial tenants located in the building is substantial, and 500 to 600 potential class members is sufficient to satisfy the numerosity requirement. The size of the potential class is sufficient to established that joinder is impracticable.

Plaintiffs argue that CPLR §901(a)(2) is satisfied because of common questions of law and fact related to defendants negligence and failure to mitigate potential damages resulting from SuperStorm Sandy. They claim that liability issues predominate because all potential class members would be similarly harmed and that the premises were rendered uninhabitable for the same period.

The commonality requirement of CPLR §901(a)(2) is liberally construed and applies to predominance of common issues to members of the proposed class. There is no mechanical test, and factual questions specifically applying to each individual are not fatal to certification (City of New York v. Maul, 14 N.Y. 3d 499, 929 N.E. 2d 366, 903 N.Y.S. 2d 304 [2010]). The Court is required to determine whether a class action will "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated" (Globe Surgical Supply v. GEICO Ins. Co., 59 A.D. 3d 129, supra, citing to Friar v. Vanguard Holding Corp., 78 A.D. 2d 83, 434 N.Y.S. 2d 698 [2nd Dept., 1980]).

Plaintiffs have established common questions of law or fact from negligence and the defendants alleged failure to mitigate damages which predominates over the differences between the tenants and their potential damages. The defendants' liability for the alleged negligence is common to all members of the potential class, predominates over individual claims, and the extent of damages (Borden v. 400 East 55th Street Associates, L.P., 105 A.D. 3d 630, 964 N.Y.S .2d 115 [1st Dept., 2013).

Plaintiffs argue that they meet the typicality and adequate representation requirements of CPLR §901(a)(3). They argue that their claims are typical of the potential class because they arise from the same events and similar law.

CPLR §901(a)(3), is the typicality of claims requirements, applies when the named plaintiffs' claims are derived from the "same course of conduct as the class members claims and are based on the same cause of action" (Pruitt v. Rockefeller Center Properties, Inc., 167 A.D. 2d 14, 574 N.Y.S. 2d 672 [1st Dept.1991]). Potential differences in defenses, underlying facts and amount of damages for each individual claim fails to preclude certification (Borden v. 400 East 55th Street Associates, L.P., 105 A.D. 3d 630, supra).

Defendants have not established that the claims from the alleged negligence and failure to avoid or mitigate damages from Superstorm Sandy, are atypical of those of the class. The commercial and residential tenants are both represented by the named plaintiffs and differences related to potential damages are not substantial enough to preclude certification.

Plaintiffs argue that the adequacy requirement is met because there are no conflicts of interests and plaintiffs are able to demonstrate that they are willing and able to assume responsibility for the class.

Adequate representation pursuant to CPLR §901(a)(4), requires no conflict of interest between the putative class members and their representatives (Nawrocki v. Proto Constr. & Dev. Corp., 82 A.D. 3d 534, 919 N.Y.S. 2d 11 [1st Dept., 2011]). The interests of the class involves consideration of potential conflict of interest, including, "..the representative's background and personal character as well as his familiarity with the lawsuit..." (Pruitt v. Rockefeller Center Properties, Inc., 167 A.D. 2d 14, supra).

Plaintiffs have established that the named representatives are sufficiently familiar with the facts by participating in discovery, which included depositions. Their interests are aligned with those of the class, because they were similarly affected by the defendants' alleged negligence. Defendants have not established that the named representatives background and personal character will create a conflict of interest with the potential class.

Pursuant to CPLR §901(a)(4), proposed class counsel is required to have experience in representation of class action and demonstrate they are competent and skilled (Fiala v. Metropolitan Life Ins. Co., 52 A.D. 3d 251, 859 N.Y.S. 2d 426 [1st Dept., 2008] citing to Pruitt v. Rockefeller Center Properties, Inc., 167 A.D. 2d 14, supra).

Plaintiffs have provided proof that proposed class counsel have jointly brought similar class actions on behalf of residents in other locations affected by Superstorm Sandy, have experience, and are competent and skilled in class action litigation. Defendants reference to litigation involving a highly publicized partnership dispute at the firm of Napoli Bern Ripka Shkolnik LLP, does not establish that the named counsel, specifically Hunter J. Shkolnik, Esq. and Brian H. Brick, Esq. are unable to provide representation or that the firm would in any way prevent the prosecution of the class action. Defendants provide no proof in support of their contention that because Imbesi Christensen is a small firm they would be unable to provide adequate representation.

Plaintiffs argue that the superiority requirement of CPLR §901(a)(5), has been met because it would avoid multiple actions and conserve judicial resources resolving the issues common to the class derived from defendants' alleged negligence. They claim that a class action is superior to joinder and consolidation because it would encourage participation by the members that might otherwise find individual actions cost prohibitive.

Pursuant to CPLR §901(a)(5), the parties are required to establish a class action is the best or most superior method of adjudicating the controversy (Osarczuk v. Associated Universities, Inc., 82 A.D. 3d 853, 918 N.Y.S. 2d 538 [2nd Dept., 2011]). The demonstration that adjudication of issues common to the class will conserve judicial resources and result in disposal of a majority of the claims establishes superiority (Ackerman v. Price Waterhouse, 252 A.D. 2d 179, 683 N.Y.S. 2d 179 [1st Dept., 1998]). Superiority also applies when bringing separate actions for individual class members' claims would not be financially feasible or would result in small recoveries providing no incentive for separate actions (Globe Surgical Supply v. GEICO Ins. Co., 59 A.D. 3d 129, supra).

Plaintiffs have established that a class action is the most superior method of adjudicating the similar factual issues concerning defendants potential negligence. The class action will conserve judicial resources and dispose of a majority of the potentially numerous claims. Any disincentive to individual actions derived from smaller amounts of potential damages will also be avoided by certification of the class action, which demonstrates it is the superior method of adjudicating the claims.

Pursuant to CPLR §902, additional factors the Court, "shall consider" in determining whether a lawsuit should be certified a class action are: "(1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) the impracticality or inefficiency of prosecuting or defending separate actions; (3) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (4) the desirability or undesirability of concentrating the litigation of the claim in the particular forum; and (5) the difficulties likely to be encountered in the management of a class action" (CPLR §902 and Fleming v. Barnwell Nursing Home and Health Facilities, Inc., 309 A.D. 2d 1132, 766 N.Y.S. 2d 241 [2nd Dept., 2003]).

The additional factors stated in CPLR §902, do not suggest a different result. Defendants have not established that pursuant to CPLR §902(1) there is an economic interest of other class members in bringing separate actions, especially since the negligence and mitigation of damages issues are essentially similar for the proposed class. The impracticality or inefficiency of prosecuting separate actions as stated in CPLR §902 (2) was already addressed in this decision under CPLR §901(a)(5), and is not a block to certification. Defendants vague references to a possibility of other litigation brought by potential members of the class which could not be established until the members are identified, does not, pursuant to CPLR §902 (3), avoid the certification of the class. Defendant did not challenge venue or certification under CPLR §902(4). Defendants contentions that pursuant to CPLR §902(5) certification should be denied because of the plaintiffs inability to manage the damages claims, fails to address the similar factual issues concerning potential negligence and those class members that might otherwise find separate actions cost prohibitive. Pursuant to CPLR §901(a)(4), plaintiffs have established that they can manage the multiple claims and the potential class counsel will have no apparent difficulties. Plaintiffs have established they are entitled to class certification pursuant to CPLR Article 9.

Accordingly, it is ORDERED that plaintiffs' motion seeking to certify this action as a class action pursuant to CPLR Article 9, appointing plaintiffs as class representative and appointing Napoli Bern Ripka Shkolnik LLP (by Hunter J. Shkolnik and Brian H. Brick) and Imbesi Christensen (by Vincent Imbesi) as class counsel, is granted, and it is further,

ORDERED, that plaintiffs, Carolyn Roberts, Alexander Wood and Mayer & Lee, P.C., are appointed as class representatives, and it is further,

ORDERED, that Hunter J. Shkolnik, Esq. and Brian H. Brick, Esq., of Napoli Bern Ripka Shkolnik LLP, and Vincent Imbesi, Esq., of Imbesi Christensen, are appointed as counsel for the class as certified, and it is further,

ORDERED, that within thirty (30) days from the date of this Order, defendants shall furnish plaintiffs' counsel with a list of the names and last known addresses of the tenants of 1 West Street, New York, N.Y. and 17 Battery Place, New York, N.Y. as of the date of evacuation (October 29, 2012); and it is further,

ORDERED, that plaintiffs shall send a notice to all of the tenants identified by the defendants and individuals residing at1 West Street, New York, N.Y. and 17 Battery Place, New York, N.Y., with the tenants permission, within sixty (60) days from the date of this Order, and that such notice shall include a provision that each individual tenant may "opt out" of the class action, by sending a signed form to plaintiffs' counsel; the form of said notice shall be approved by this Court; such proposed notice shall be sent to counsel for defendants and the Court within thirty (30) days from the date of this Order for comment, which shall be submitted in writing to opposing counsel and the Court within seven (7) days thereafter, and it is further,

ORDERED, that all discovery is stayed pending approval of notice and identification of all participating members of the class.

ENTER:

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ,
J.S.C.

Dated: January 21, 2016

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE