

Dugan v London Terrace Gardens, L.P.

2017 NY Slip Op 33217(U)

September 5, 2017

Supreme Court, New York County

Docket Number: 603468/2009

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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WILLIAM DUGAN, MARSHA D'YANS, GEORGETTE
GAGNON, LOWELL D. KERN, MICHAEL MCCURDY,
JOSE PELAEZ, TRACY SNYDER, MICHAEL J.
WALSH, LESLIE M. MACK, ANITA ZITIS, and
JAMES DOERR, on Behalf of Themselves
and All Other Persons Similarly
Situated,

Index No. 603468/2009

Plaintiffs

- against -

DECISION AND ORDER

LONDON TERRACE GARDENS, L.P.,

Defendant

-----X

APPEARANCES:

FILED
SEP 11 2017
COUNTY CLERKS OFFICE
NEW YORK
Donoghue & Joseph LLP

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LUCY BILLINGS, J.S.C.:

Plaintiffs, a class of tenants at defendant's building complex London Terrace Gardens in New York County, move for approval of a proposed notice and plan for dissemination of the notice to all class members other than the named representative plaintiffs, providing all other class members an opportunity, within a proposed time frame, to opt out of the class action. C.P.L.R. §§ 903, 904. Defendant cross-moves for a different form of notice, but the parties agree on the plan for dissemination.

I. THE DEFINITION OF THE CLASS AND THE RECIPIENTS OF THE NOTICE

In 2013, the court certified a plaintiff class of:

all past and current tenants of London Terrace Gardens who have been charged or continue to be charged deregulated rents during defendant's receipt of J-51 tax benefits under New York Real Property Tax Law § 489(1)(a) and New York City Administrative Code §§ 11-243 and 11-244.

Dugan v. London Terrace Gardens, L.P., 45 Misc. 3d 362, 380 (Sup. Ct. N.Y. Co. 2013). See C.P.L.R. §§ 902, 903. In substance, this definition of the class is equivalent to the two definitions plaintiffs proposed when they moved for class certification in 2011.

Since the class includes past tenants, it encompasses more persons than the tenants who currently reside throughout the 10 buildings and 976 units within the London Terrace Gardens complex. Because the applicable statute of limitations bars plaintiffs' recovery for the claimed rent overcharges more than four years before plaintiff commenced this action in November 2009, however, the class does not include any tenant who moved from the complex before November 2005, C.P.L.R. § 213-a; N.Y.C.

Admin. Code § 26-516(a); 9 N.Y.C.R.R. § 2526.1(a); Cintron v. Calogero, 15 N.Y.3d 347, 355-56 (2010); Crimmins v. Handler & Co., 249 A.D.2d 89, 91 (1st Dep't 1998), even though defendant charged deregulated rents during its receipt of J-51 tax benefits beginning before November 2005. N.Y. Real Prop. Tax Law § 489(1)(a); N.Y.C. Admin. Code §§ 11-243, 11-244 (formerly §§ J51-2.5 and J51-5).

Now, based on defendant's practices after its receipt of J-51 tax benefits ended June 30, 2014, plaintiffs propose that the notice be disseminated to a class that is broader than the class certified and in so proposing urge that the class definition be modified to encompass this broader class. Defendant estimates, and plaintiffs do not dispute, that this broader class will encompass more than 400 additional current and past tenants. Plaintiffs have not moved specifically to modify the class definition, but C.P.L.R. § 902 authorizes the court, without a motion, to adjust the class definition and the potential relief to be afforded to the class according to changed circumstances, particularly before a determination of the merits. E.g., City of New York v. Maul, 14 N.Y.3d 499, 513-14 (2010); DeFilippo v. Mutual Life Ins. Co. of N.Y., 13 A.D.3d 178, 181-82 (1st Dep't 2004); O'Brien v. GEICO Ins. Co., 99 A.D.3d 681, 683 (2d Dep't 2012). See Matter of Colt Indus. Shareholder Litig., 77 N.Y.2d 185, 198 (1991); Louisiana Mun. Employees' Retirement Sys. v. Cablevision Sys. Corp., 74 A.D.3d 1291, 1293 (2d Dep't 2010). Defendant, while understandably opposing any expansion of the

class, concedes that plaintiffs' current motion has provided defendant as full an opportunity to oppose that expansion as if plaintiffs had moved specifically for that relief.

Plaintiffs now claim, based on circumstances that did not pertain before the tax benefits expired, that after expiration of the tax benefits, the rents charged for plaintiffs' apartments, even if less than previously charged when the apartments were deregulated illegally, are still more than the legal rents would have been had the apartments never been deregulated. Therefore plaintiffs now propose that the notice be disseminated to the following class and that the class definition be modified to encompass:

all past and current tenants of London Terrace Gardens who have resided in units that were deregulated during defendant's receipt of J-51 tax benefits.

This definition more accurately reflects the purpose of this action: to recover rent overcharges due to defendant's deregulation of its units while defendant was receiving J-51 tax benefits, whether the overcharges occurred during its receipt of the benefits or since then. Insofar a defendant's illegal conduct has continued to damage its tenants, they are entitled to recovery.

Three limitations dispel defendant's concern that this reformulated class definition renders the potential for recovery endless. First, obviously no tenants may recover overcharges before the tenants moved into units that were deregulated illegally. These tenants' recovery will extend into the future

only for as long as defendant charges an illegally high rent. Finally, no more tenants may become members of the class once the notice to all class members has been disseminated.

In sum, defendant's practices after its receipt of J-51 tax benefits ended June 30, 2014, circumstances unknown when the court first certified the class, whether those practices are as plaintiffs portray or as defendant portrays and defends those practices, require modification of the class definition to address their legality. Therefore the court accommodates those changed circumstances by redefining the plaintiff class as:

all past and current tenants of London Terrace Gardens who have resided in units that were deregulated during defendant's receipt of J-51 tax benefits.

C.P.L.R. §§ 902, 903; City of New York v. Maul, 14 N.Y.3d at 513; Matter of Colt Indus. Shareholder Litig., 77 N.Y.2d at 198.

II. THE REMAINING CONTENTS OF THE NOTICE

Aside from the class definition, plaintiffs' revised proposed notice, after incorporating much of defendant's different proposed text, adequately describes the issues in, history of, and status of this action and notifies class members of their potential rights in a neutral way. The notice also identifies the attorneys for the class. Significantly, the notice discloses that this action seeks only compensatory relief without treble damages for a willful rent overcharge that may be available in an individual action, C.P.L.R. § 901(b); N.Y.C. Admin. Code §§ 26-413(d)(2), 26-516(a); 9 N.Y.C.R.R. §§ 2206.8(b)(1), 2526.1(a); Borden v. 400 55th St. Assoc., L.P., 24

N.Y.3d 382, 392-93, 395 (2014); Sperry v. Crompton Corp., 8 N.Y.3d 204, 211, 214 (2007); Dugan v. London Terrace Gardens, L.P., 45 Misc. 3d at 370-71; affords class members the opportunity to exclude themselves; and explains that, if they do not exclude themselves, they will be bound by the outcome of this action. Borden v. 400 55th St. Assoc., L.P., 24 N.Y.3d at 400; Cox v. Microsoft Corp., 8 A.D.3d 39, 40 (1st Dep't 2004); Dugan v. London Terrace Gardens, L.P., 45 Misc. 3d at 371. See Phillips Petroleum Co v. Shutts, 472 U.S. 797, 808, 812 (1985); Jiannaris v. Alfant, 27 N.Y.3d 349, 351-52 (2016); Matter of Colt Indus. Shareholder Litig., 77 N.Y.2d at 192, 197. Consequently, the notice to be disseminated, appended to this decision, is substantially in the form of plaintiffs' revised proposed notice, further revised to reflect the reformulated class definition. C.P.L.R. § 904.

III. DISSEMINATION OF THE NOTICE

The parties agree that defendant's records show all units that were deregulated during its receipt of J-51 tax benefits and all tenants of those units since they were deregulated, including past tenants and their subsequent addresses. Defendant does not oppose plaintiffs' plan to mail their notice to all those tenants and will provide plaintiffs those records and their representatives access to each building in the complex to permit them also to hand deliver the notice to the units of each class member currently residing in the complex. The court therefore approves this plan.

Within 20 days after entry of this order, defendant shall provide plaintiffs its records of all tenants since November 13, 2005, of all units that were deregulated during its receipt of J-51 tax benefits. Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 175-76 (1974). After receipt of defendant's records, plaintiffs shall notify defendant when they seek to deliver the notice to current tenants. Defendant shall provide plaintiffs access to its buildings to permit hand delivery of the notice to individual units at the time designated by plaintiffs or another agreed time. Plaintiffs shall deliver the notices and mail them to the class members defined above within 20 days after receipt of defendant's records.

IV. CONSOLIDATION

Defendant commenced a proceeding in the New York City Civil Court to evict Diahne Dea Copeland from her apartment at London Terrace Gardens because of her nonpayment of rent and to recover the unpaid rent. London Terrace Gardens L.P v. Copeland, Index No. LT: 61767/13 (Civ. Ct. N.Y. Co.). Copeland now moves to remove that proceeding from the Civil Court, C.P.L.R. § 325(b), and consolidate or jointly try the proceeding with this action. C.P.L.R. § 602(b). For the reasons explained below, the court denies her motion for removal and for consolidation or a joint trial.

The central premise of Copeland's motion is that both she and defendant are parties in the Civil Court proceeding and also parties in this action, and they raise common questions of fact

and law. The Civil Court, in denying Copeland's motion for summary judgment in the nonpayment proceeding, already determined, however, consistent with the definition of the plaintiff class certified in 2013, that Copeland was not a member of the class and therefore not a party to this action. Now that this court has modified the class definition, Copeland may fall within its parameters, but at this point, to place her in the class, she must move to renew her motion for summary judgment in the Civil Court, C.P.L.R. § 2221(e)(2); Morato-Rodriguez v. Riva Constr. Group, Inc., 147 A.D.3d 656, 656 (1st Dep't 2017); Martin v. City of New York, 103 A.D.3d 412, 412 (1st Dep't 2013); Spierer v. Bloomingdale's, 59 A.D.3d 267, 267 (1st Dep't 2009); move to vacate its order, based on modification of this court's prior order on which the Civil Court's order was based, C.P.L.R. § 5015(a)(5); see Nash v. Port Auth. of N.Y. & N.J., 22 N.Y.3d 220, 224-25 (2013); Beneficial Homeowner Serv. Corp. v. Mason, 95 A.D.3d 1428, 1429 (3d Dep't 2012); or appeal its order. Nash v. Port Auth. of N.Y. & N.J., 131 A.D.3d 164, 166-67 (1st Dep't 2015). See James v. Shave, 62 N.Y.2d 712, 714 (1984); Amona v. County of Orange, 123 A.D.3d 1117, 1119-20 (2d Dep't 2014); IndyMac Bank, F.S.B. v. Vincoli, 105 A.D.3d 704, 706 (2d Dep't 2013); Limitone Enters., Inc. v. Walker, 102 A.D.3d 697, 697-98 (2d Dep't 2013).

Moreover, in the Civil Court proceeding, Copeland raises questions of fact and law that are not involved in this action. She contends that defendant falsely claimed individual apartment

improvements (IAIs) that raised her rent level and may have removed or potentially will remove her apartment from the New York Rent Stabilization Law's regulation of rent levels. See 9 N.Y.C.R.R. § 2522.4(a)(1) and (4); Graham Ct. Owners Corp. v. Division of Hous. & Community Renewal, 71 A.D.3d 515, 515 (1st Dep't 2010); 425 3rd Ave. Realty Co. v. New York State Div. of Hous. & Community Renewal, 29 A.D.3d 332, 333 (1st Dep't 2006); Yorkroad Assoc. v. New York State Div. of Hous. & Community Renewal, 19 A.D.3d 217, 218 (1st Dep't 2005); 201 E. 81st St. Assocs. v. New York State Div. of Hous. & Community Renewal, 288 A.D.2d 89, 89-90 (1st Dep't 2001). This defense to defendant's nonpayment proceeding raises issues whether defendant's claimed improvements include ordinary maintenance and repairs that do not qualify as improvements entitling the landlord to a rent increase, whether components of the work claimed were never performed, or whether the charges were excessive for the work described. None of these issues is common to this action. Therefore this action will determine none of these significant claims.

The refunded rent overcharges to which Copeland may be entitled will be not be determined by simply applying the method of computation that the court declares is applicable and enjoins defendant to apply as the declaratory and injunctive relief sought by the plaintiff class here. The refunded overcharges to which she may be entitled may include amounts based on falsely claimed IAIs. Any treble damages for a willful overcharge to

which she may be entitled and which she would not be permitted to claim were she included in this action will be based on the amount of any refunded overcharges, computed by accounting for any falsely claimed IAIs as well as any previous illegal deregulation of her apartment during defendant's receipt of J-51 tax benefits. N.Y.C. Admin. Code §§ 26-413(d)(2), 26-516(a); 9 N.Y.C.R.R. §§ 2206.8(b)(1), 2526.1(a); Dugan v. London Terrace Gardens, L.P., 45 Misc. 3d at 370-71. Moreover, the determination of willfulness may apply to one category of overcharges but not to the other category.

Finally, defendant here, petitioner in the nonpayment proceeding, seeks possession of Copeland's apartment, a claim not involved here. A determination of that relief also would unduly complicate this action and distract it from a classwide determination of the method for computing the overcharges that defendant must apply, which in turn will determine the amount of any refunded overcharges to which class members are entitled. C.P.L.R. § 907. See, e.g., Weinstein v. Jenny Craig Operations, Inc., 132 A.D.3d 446, 446-47 (1st Dep't 2015). In any event, even if illegal deregulation of Copeland's apartment during defendant's receipt of J-51 tax benefits is an issue in common with the issues in this action, that common issue does not predominate over the issues that the factfinder must treat distinctly, arising from different circumstances, and affording different relief. Simoni v. Costigan, 100 A.D.3d 531, 531 (1st Dep't 2013); Addison v. New York Presbyt. Hosp./Columbia Univ,

Med. Ctr., 52 A.D.3d 269, 270 (1st Dep't 2008); County of Westchester v. White Plains Ave., LLC, 105 A.D.3d 690, 691 (2d Dep't 2013) at 691; Beerman v. Morhaim, 17 A.D.3d 302, 303 (2d Dep't 2005).

Allowing Copeland and defendant to pursue their respective claims in this action or in a joint trial with this action is not in the interest of judicial economy. Moreover, consolidation or a joint trial would unduly delay the resolution of the Civil Court proceeding, particularly the claims that are exclusive to that proceeding. McGinty v. Structure-Tone, 140 A.D.3d 465, 466 (1st Dep't 2016); Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 94 A.D.3d 455, 456 (1st Dep't 2012); Suckishvili v. Visiting Nurse Serv. of New York, 74 A.D.3d 433, 433 (1st Dep't 2010); Ahmed v. C.D. Kobsons, Inc., 73 A.D.3d 440, 441 (1st Dep't 2010). The undue delay that consolidation would cause warrants denial of Copeland's motion regardless of common issues of law or fact. Ahmed v. C.D. Kobsons, Inc., 73 A.D.3d at 441; Abrams v. Port Auth. Trans-Hudson Corp., 1 A.D.3d 118, 119 (1st Dep't 2003).

V. CONCLUSION

As set forth above, the court grants plaintiffs' motion for approval of a proposed notice and plan for dissemination of the notice to class members, grants defendant's cross-motion for a different form of notice to the extent that the approved notice incorporates defendant's proposals and plan for dissemination, and otherwise denies defendant's motion. C.P.L.R. §§ 903, 904.

The court also denies Diahne Dea Copeland's motion for removal of London Terrace Gardens L.P v. Copeland, Index No. LT: 61767/13 (Civ. Ct. N.Y. Co.), from the Civil Court, C.P.L.R. § 325(b), and for consolidation or a joint trial of that proceeding with this action. C.P.L.R. § 602(b).

DATED: September 5, 2017

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

FILED

SEP 11 2017

COUNTY CLERK'S OFFICE
NEW YORK