

Hess v EDR Assets LLC
2018 NY Slip Op 32182(U)
August 22, 2018
Supreme Court, New York County
Docket Number: 160494/2017
Judge: Frank P. Nervo
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

-----X
MICHELE E. HESS, JILL GOLDRING, MATTHEW
HEAP, RUXANDRA HEAP, CRAIG GIBSON, JR.,
A. MICHELLE PACE and ANNA MILLER, on
behalf of themselves and all others similarly
situated,

DECISION AND ORDER
Index Number
160494/2017

Plaintiffs,

-against-

EDR ASSETS LLC, and PARKOFF OPERATING CORP.,

Defendants.
-----X

FRANK P. NERVO, J:

Defendants move, prior to answering the complaint, to dismiss plaintiffs' first, second and third causes of action and plaintiffs' class action allegations. Defendants allege that the class action allegations must be dismissed under CPLR 3211 (a) (7) because plaintiffs have not adequately pleaded the prerequisites to class action treatment required by CPLR §§ 901 and 902, and that the cause of action is barred by documentary evidence. Defendants allege that the first, second and third causes of action must be dismissed pursuant to CPLR 3211 (a) (1) and 3211 (a) (7) on the grounds that they are barred by documentary evidence and that they fail to state a cause of action.

Plaintiffs cross-move, pursuant to CPLR 901, *et seq.*, to certify the class and sub-class.

The complaint alleges that defendants failed to register the apartments as rent stabilized units with the New York State Division of Housing and Community Renewal (DHCR) and to offer leases at the lawful rent stabilized levels to plaintiffs and the proposed class and sub-class. The class and sub-class consist of current and former residents in defendants building. The complaint alleges that instead of rent stabilized leases, defendants furnished market value leases.

In their first cause of action, on behalf of the class, plaintiffs claim that in addition to rent stabilized leases, they are entitled to monetary damages in the amount of rent that they were overcharged as a result of paying fair market rent. In the second cause of action, on behalf of the sub-class of prior tenants, plaintiffs seek a declaration that they and the members of the sub-class were subject to a rent overcharge and that they are entitled to a determination of the amount of rent they should have been charged. In the third cause of action for declaratory relief, plaintiffs allege that defendants' actions were a willful attempt to remove plaintiffs and members of the sub-class from the protection of rent stabilization. In addition to class

certification, they seek a declaration of the amount of lawful rent, monetary damages for the overcharge, injunctive relief enjoining defendants from violating the rent stabilization law and “disgorgement” of defendants’ profits from rent overcharges.

Defendants first argue that the class allegations must be dismissed as a matter of law. They argue that although they reserve the right to oppose any motion for class certification in the event their motion to dismiss is denied, the court should dismiss those allegations now. In a post-submission letter to the court, plaintiffs, relying on *Maddicks v. Big City Properties, LLC*, 163 AD3d 501, ask the court to decide the issue now.

Defendants next argue that DHCR has already adjudicated the question of whether the apartments are subject to rent stabilization and plaintiffs concede that defendant has offered rent stabilized leases. Defendants, in their memorandum argue that there is no longer a justiciable controversy, alleged in the first and second causes of action, on the question of whether plaintiffs are entitled to a declaratory judgment that the apartments are rent stabilized. Continuing, defendants argue that plaintiffs’ request for an order directing that they be given leases on a particular form be dismissed for lack of subject matter jurisdiction. Defendants argue that only DHCR can grant the relief plaintiffs request. They argue that under the Emergency Tenant Protection Act of 1974, a court may only award damages in the event of a rent overcharge but that only DHCR may direct the provision of a rent stabilized lease or rider.

Finally, defendants argue that the rent overcharge claims should be dismissed. Defendants argue that under the doctrine of primary jurisdiction, even though this court has concurrent jurisdiction with DHCR to determine the question of lawful, rent amounts, once the class action allegations are dismissed the court should defer to that agency to determine the proper rent. In any event, defendants argue, the overcharge claims should be dismissed for failure to state a cause of action. They assert that the complaint fails to reveal “even such basic information as what rent he or she currently pays, what rent he or she paid at the beginning of the tenancy, how much such rent increased at each renewal, what the (public record) permissible increases would have been, or any other information necessary to state an actual cause of action for rent overcharge.” They allege that the complaint merely asks for leases in a form prescribed by DHCR and containing such terms as required by that agency.

As will be discussed later, the court, at this time, will neither dismiss the class action allegations nor grant the cross-motion to certify the class. However, at the appropriate time, the court may certify this case as a class action. Therefore, the court will not invoke the doctrine of primary jurisdiction, as DHCR cannot adjudicate matters on a class basis.

In their memorandum of law opposing the motion, plaintiffs dispute defendants’ contention that they knew that the defendants registered the apartments as rent stabilized and that registering them renders the matter academic.

Plaintiffs demonstrate that the last written communication they received about the status of the apartments stated that they were not rent stabilized. In any event, plaintiffs correctly argue that this matter is not moot.

Plaintiff's argue, in their memorandum of law, at pages 14 and 15, that if defendants merely registered the apartments at the old rents, without regard to whether these rents were proper, they were engaged in a scheme to evade the rent regulations; and, a question exists on the proper amount of the rent. They argue that the court can determine whether the rents are at the correct level.

The question of whether the current and past rents are in the correct amounts, both for current and prior tenants, remains a live controversy; the court may still determine the question of whether the tenants are entitled to retroactive payments for any overcharges that defendants may have imposed. (see *Taylor v. 72A Realty Associates, L.P.*, 151 AD3d 95, 100) The questions of whether the rent stabilized leases were in proper form and whether the legal rents were calculated using a proper formula are questions that remain open for adjudication.

Defendants have not provided documentary evidence that would entitle them to dismissal under CPLR 3211 (a)(1). In order to obtain a dismissal under this section, the movant must provide documents that unequivocally resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim. (*Nevin v. Laciède Professional Products, Inc.*, 273 AD2d 453) Defendants have failed to provide any documents that provide such a basis for dismissal.

Contrary to defendants' contention, the complaint states a cause of action. While defendants dispute the assertion that this court should determine the rent overcharge claim, they acknowledge, at page 15 of their memorandum of law, that plaintiffs have raised this claim. Thus, they concede that plaintiffs' complaint pleads this cause of action. The court finds that there is no basis under CPLR 3211 (a)(7) to dismiss the complaint.

Contrary to defendants' argument, plaintiffs' memorandum of law does address the issue of whether the complaint states a cause of action. In any event, the burden does not shift to a plaintiff on this issue unless the movant makes a showing of entitlement to dismissal. (see *Trump Village Section 4, Inc. v. Bezvoleva*, 181 AD 3d 916) Defendants in this case have not established their entitlement to dismissal; therefore, plaintiffs had no burden of rebutting their argument. The court is limited to an examination of the pleadings to determine whether a plaintiff has stated a cause of action. The court must accept the facts alleged are true and must interpret them in a light most favorable to the plaintiff. If the pleading is facially sufficient, the plaintiff is not obligated to come forward with claim-sustaining proof, unless the court, on notice to the parties, treats the motion as one for summary judgment. (*Miglino v. Bally Total Fitness of Greater New York, Inc.*, 20 NY3d 342, 351)

While court may examine affidavits in support of a motion to dismiss under CPLR 3211(a)(7) to determine whether a plaintiff has not merely alleged a cause of action, but rather possesses a

cause of action (see *Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 AD3d 128, 135), defendants in this case have not submitted any affidavits that demonstrate that plaintiffs have no cause of action. Their memorandums of law similarly do not demonstrate that plaintiffs do not possess a cause of action.

In examining the complaint, the court is satisfied that plaintiffs plead facts that establish their causes of action. As noted above, the complaint alleges facts that show that prior to the DHCR determination, the tenants were given market value leases. Thus, the complaint alleges facts that show that plaintiffs were paying a higher rent than defendants were entitled to. The complaint alleges that defendants willfully misrepresented the amount of rent they were entitled to by issuing improper leases. Thus, the question of fraud is raised by the pleading. (*Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc., id.*) The complaint raises the question of how the legal regulated rent should be determined. As noted above, it alleges facts that show there is an issue of whether the rents should be adjusted retroactively to the inception of the various tenancies at issue in this case. (*Taylor v. 72A Realty Associates, id.*) In addition to showing possible past and present rent overcharges, the complaint alleges facts that raise the question of whether leases are in proper form, that is, one promulgated by the DHCR, were provided to the plaintiffs. Therefore, the branch of the motion seeking dismissal based on documentary evidence and for failure to state a cause of action is denied.

The remaining issue is whether to certify this action as a class action. The court declines to do so, as issue has not been joined and there are questions of whether the named plaintiff, Hess, is the appropriate class representative.

Under CPLR § 902, the appropriate time to move for class certification is sixty days after issue is joined. While both parties seek a determination now, the court will defer any decision until issue is joined and appropriate discovery is completed. (*Maddicks v. Big City Properties, LLC, id.*) Defendants, in their opposition to the cross-motion, raise arguments that question whether the designated class representative suffered a rent overcharge, as she may not be entitled to rent stabilization status and has been receiving a preferential rent. Plaintiffs have not replied to this opposition. Thus, there may be arguments contrary to those raised by the opposition that may be fully addressed after discovery. At that time, if so advised, plaintiffs may make a new motion for class certification. Therefore, plaintiffs' cross-motion is denied without prejudice to a new motion after appropriate discovery is completed.

Accordingly, it is

ORDERED that the motion to dismiss under CPLR 3211 (a) (1) and CPLR 3211 (a)(7) is denied; and it is further

ORDERED that within twenty days of service of a copy of this order with notice of entry, defendants shall serve and file their verified answer; and it is further

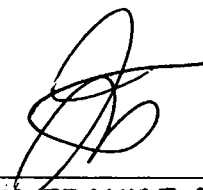
ORDERED that the cross-motion is denied without prejudice to a new motion after issue is joined and appropriate and necessary discovery is completed; and it is further

ORDERED that the attorneys for the parties shall report for a preliminary conference in Part 4 of this court, 80 Centre Street, New York, New York, room 327, on December 14, 2018, at 10:00 AM.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: August 22, 2018

ENTER:



HON. FRANK P. NERVO
JSC