

Roberts v Ocean Prime, LLC
2018 NY Slip Op 32635(U)
October 12, 2018
Supreme Court, New York County
Docket Number: 150612/2013
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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CAROLYN ROBERTS, ALEXANDER WOOD, and
MAYER & LEE, P.C., individually and on
behalf of all other similarly situated
Plaintiffs,

Index No. 150612/2013

Plaintiffs

- against -

DECISION AND ORDER

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 GGMAC PARKING, LLC,
BATTERY COMMERCIAL ASSOCIATES, LLC,
and NEWMARK KNIGHT FRANK GLOBAL
MANAGEMENT SERVICES, LLC,

Defendants
-----x

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiffs, a class of residential and commercial tenants in
two buildings at 1 West Street and 17 Battery Place, New York
County, seek to recover damages caused by Superstorm Sandy in
October 2012 for which plaintiffs claim defendants are
responsible as owners and managers of the buildings. Plaintiffs
allege that the storm flooded the premises' basement and parking
garage, damaging the buildings' mechanical and electrical
systems, and causing 20,000 gallons of previously delivered
heating oil to be released into the water that entered the
buildings, which damaged plaintiffs' personal property and
rendered the premises uninhabitable for a month or more.

Plaintiffs claim defendants were negligent in failing to take adequate measures to prepare the premises for the storm and protect the premises from the storm.

In an order dated January 21, 2016 (Mendez, J.), affirmed by the Appellate Division, First Department, the court granted plaintiffs' motion to certify the class, finding that plaintiffs met the requirements of C.P.L.R. §§ 901(a) and 902, and appointing plaintiffs Carolyn Roberts, Alexander Wood, and Mayer & Lee, P.C., as class representatives. Roberts v. Ocean Prime, LLC, 148 A.D.3d 525, 525 (1st Dep't 2017). Plaintiffs now move to withdraw Mayer & Lee, P.C., as a named plaintiff and class representative and to substitute in its place AdCloud, Inc., principally owned by George Nassef, as a named plaintiff and class representative. C.P.L.R. §§ 901(a)(3) and (4), 1021.

Plaintiffs urge that the opposition by defendant Newmark Knight Frank Global Management Services, LLC, to plaintiffs' motion be rejected because Newmark Knight Frank filed its opposition one day late. Plaintiffs were afforded ample time, however, to file a reply, did so, and have presented no evidence that this late opposition prejudiced plaintiffs' preparation of their reply. The court therefore accepts the late opposition. JPMorgan Chase Bank, N.A. v. Hayes, 138 A.D.3d 617, 617 (1st Dep't 2016); Serradilla v. Lords Corp., 117 A.D.3d 648, 649 (1st Dep't 2014); Marte v. City of New York, 102 A.D.3d 557, 558 (1st Dep't 2013).

II. REQUIREMENTS FOR A CLASS REPRESENTATIVE

Defendants maintain that Nassef, on behalf of AdCloud, Inc., does not meet the requirements for class certification. Plaintiffs need not establish satisfaction of the requirements of C.P.L.R. §§ 901(a) and 902, however, to substitute AdCloud, Inc., as a named plaintiff and class representative, since the court already determined that plaintiffs met those requirements and certified the class. At most, plaintiffs need establish only that AdCloud's claims are typical of the class' claims and that AdCloud is an adequate representative of the class. C.P.L.R. § 901(a)(3) and (4).

George Nassef attests that his corporation AdCloud, Inc., entered a lease with defendant Battery Commercial Associates, LLC, for office space at the 17 Battery Place building. Aff. of George Nassef ¶ 1. He attests that his business sustained significant damage from Superstorm Sandy and was unable to use the leased office space for 180 days after the storm due to defendants' negligence in preparing and securing the premises. Id. ¶¶ 3-4. AdCloud thus has shown that it is a member of the class; that its claims are typical of the class' claims, since it leases space in one of the two buildings where the class members lease space; and that its injuries derive from defendants' same course of conduct: failure to prepare and secure the building against damage from Superstorm Sandy. Roberts v. Ocean Prime, LLC., 148 A.D.3d at 525-26. Nassef also attests to his awareness that other businesses at 17 Battery Place have suffered similar

damage due to defendants' negligence; his willingness to participate in this class action on AdCloud's and the other businesses' behalf; his knowledge of a class representative's duties; and his readiness, willingness, and ability to assume those duties. Nassef Aff. ¶¶ 5-10. Thus AdCloud, Inc., is an adequate class representative. Borden v. 400 E. 55th St. Assoc., L.P., 24 N.Y.3d 382, 400 (2014); Stecko v. RLI Ins. Co., 121 A.D.3d 542, 543 (1st Dep't 2014).

Newmark Knight Frank nonetheless maintains that AdCloud's interests conflict with the class' interests because AdCloud and Nassef are being sued by defendant Battery Commercial Associates, LLC, for past rent. AdCloud's and Nassef's positions in that action, however, are consistent with the class' interests in this action. AdCloud and Nassef in that action do not deny leasing and taking possession of office space in the premises or deny or admit any other fact that renders their defenses there inconsistent with the class' interests here. AdCloud and Nassef deny only that the lease's rent payments are enforceable when the premises' conditions forced AdCloud out of possession, that AdCloud regained possession before April 2013 and fell behind in rent payments in 2013, and that Nassef personally guaranteed the lease. Defendants present no other reasons why AdCloud's or Nassef's defenses against Battery Commercial Associates' action for nonpayment of rent or any other interests of AdCloud conflict with the class' interests in pursuing damages for defendants' negligence in this action.

III. CONDUCT BY MAYER & LEE, P.C.

Defendants also claim that plaintiff Mayer & Lee, P.C., may not withdraw as a class representative because it has not explained or justified its withdrawal. Yet defendants present no authority requiring Mayer & Lee to justify its withdrawal. To the contrary, the court may not force an unwilling plaintiff to remain a class representative, to the potential detriment of the class. Hurrell-Harring v. State of New York, 112 A.D.3d 1213, 1216 (3d Dep't 2013).

Defendants rely on C.P.L.R. § 3217(b) for the proposition that Mayer & Lee may not discontinue its claims because such a discontinuance would prejudice defendants, who have spent significant time and resources pursuing disclosure from this plaintiff. Mayer & Lee is not, however, discontinuing its claims as a class member. Even if it were, delay, frustration, and expenses incurred in preparing a defense to its claims do not constitute prejudice under C.P.L.R. § 3217(b). Eugenia VI Venture Holdings, Ltd. v. Maplewood Equity Partners, L.P., 38 A.D.3d 264, 265 (1st Dep't 2007); Hurrell-Harring v. State of New York, 112 A.D.3d at 1215. Nor have defendants shown either that Mayer & Lee or the other plaintiffs seek its withdrawal as a class representative or that Mayer & Lee seeks to discontinue its claims to avoid an adverse determination or gain an unfair advantage. Bank of Am., N.A. v. Douglas, 110 A.D.3d 452, 452 (1st Dep't 2013); Hurrell-Harring v. State of New York, 112 A.D.3d at 1215. Insofar as Mayer & Lee has failed to respond to

disclosure requests, such conduct militates in favor of substituting another class representative for Mayer & Lee, not against this result.

IV. CONCLUSION

Consequently, for all the reasons explained above, the court grants plaintiffs' motion to withdraw Mayer & Lee, P.C., as a named plaintiff and class representative and to substitute in its place AdCloud, Inc., as a named plaintiff and class representative. C.P.L.R. §§ 901(a)(3) and (4), 1021. Since Mayer & Lee is not discontinuing its claims as a class member, the court grants plaintiffs' motion on the condition that plaintiffs produce Mayer & Lee, P.C., for its continued deposition and respond to any outstanding requests for documents regarding Mayer & Lee, insofar as defendants still seek that disclosure. C.P.L.R. §§ 3107, 3120(1)(i) and (2). Within seven days after entry of this order, unless the parties agree to a longer period, defendants shall notify plaintiffs in writing whether defendants still seek the continued deposition of Mayer & Lee and what outstanding documents regarding Mayer & Lee they still seek. Plaintiffs shall produce Mayer & Lee for its continued deposition and respond to any outstanding document requests regarding Mayer & Lee within 20 days after receipt of notification that defendants still seek the deposition or

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documents, unless the parties agree to a longer period. C.P.L.R.
§§ 3107, 3120(2). This decision constitutes the court's order.

DATED: October 12, 2018

Lucy Billings

LUCY BILLINGS, J.S.C.

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