SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH **PART** IAS MOTION 29EFM

Justice

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MORGAN GOULD, STEVEN ESTEVEZ, and ANNE DOHERTY, on behalf of themselves and all others similarly situated,

Plaintiffs,

- v -

FORT 250 ASSOCIATES, LLC,

Defendant.

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INDEX NO. 160190/2017

MOTION DATE 02/19/2019

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Motion by Plaintiffs pursuant to CPLR 3025 (b) for an order granting them leave to amend the complaint is granted to the extent discussed below. The branch of the motion that is for an order deeming the proposed amended complaint annexed to the motion papers interposed is denied.

BACKGROUND

On December 14, 2018, this Court issued a decision and order denying Plaintiffs' motion seq. 001 for class certification. (Beerman affirmation, exhibit B.) A full recitation of the background facts and posture of this case is discussed therein. Briefly, the matter involves Plaintiffs and a proposed class who are all tenants in a residential apartment building. Plaintiff commenced an action against Defendant landlord on November 15, 2017, alleging that their building is rent-stabilized and that Defendant engaged in a scheme to evade the Rent Stabilization Law. The Court denied the prior motion with leave to renew based upon that Plaintiffs' definition of the class was overbroad and undefined as initially pled.

In the instant motion, Plaintiffs seek leave to amend their complaint to address the issues raised in their motion for class certification. Plaintiffs argue that they "seek to amend to clarify the statutory period, to distill the allegations, to refine the definition of the proposed class, and to allocate the causes of action amongst the proposed class and subclasses." (Affirmation of Weissman ¶ 13.) Plaintiffs further argue that the changes do not prejudice Defendant.

Plaintiffs have annexed to their motion a redline and clean copy of their proposed amended class action complaint (the "Proposed Complaint"). The 154-paragraph Proposed Complaint alleges causes of action for: (1) declaratory relief; (2) violation of the Rent Stabilization Law entitling the sub-class to reformed leases; (3) violation of the Rent Stabilization Law entitling the class to damages; (4) violation of General Business Law § 349; and (5) legal fees.

Defendant in its opposition papers advances a two-point argument. Defendant's first point is that the motion should be denied because it does not make the required showing of merit: an affidavit substantiating the claims in the Proposed Complaint. Defendants complain that Plaintiffs do not submit any documentation or sworn statements by a person with knowledge who can attest to the validity of Plaintiffs' unsubstantiated allegations. Defendants argue that the failure to provide such an evidentiary showing cannot be cured in Plaintiffs' reply papers.

Defendant's second point is that each cause of action in the Proposed Complaint lacks merit. Specifically, Defendant argues that the first and second causes of action seek a "rent freeze," which it argues is an unrecoverable penalty in a class action pursuant to CPLR 901 (b). Defendant further argues that the third cause of action seeks damages under the "default formula," which it argues is another prohibited penalty under CPLR 901 (b). Defendant then argues that Plaintiff should not be permitted to include the fourth cause of action in its Proposed Complaint because General Business Law § 349 applies to conduct directed at the public at large not, as here, to private disputes between landlords and tenants. Defendant last argues that an attorney's fees cause of action is improper as a matter of law and cannot be maintained as a separate cause of action.

Plaintiffs argue in reply that they have sufficiently particularized their Proposed Complaint in accordance with the Court's decision on motion seq. 001. Plaintiffs then argue that they have already annexed sufficient documentary evidence as to the merits of their Proposed Complaint to their prior motion for class certification. In addition to asking for its motion for leave to amend to be granted, Plaintiffs then request in the "wherefore" clause that "this Court grant class certification [and] appoint Grimble & LoGuidice, LLC and the Law Offices of Jack Lester, Esq., as co-counsel to the class."

DISCUSSION

CPLR 3025 provides

> "(b) Amendments and supplemental pleadings by leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading."

"As a general rule, leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . . , and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court." (*Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015] [internal quotation marks omitted]; *see also Y.A. v Conair Corp.*, 154 AD3d 611 [1st Dept 2017] [holding that leave should be granted "absent . . . surprise resulting therefrom"].) "[P]laintiff need not establish the merit of its proposed new allegations, but simply show that the proffered

amendment is not palpably insufficient or clearly devoid of merit." (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010].)

Contrary to Defendant's contentions, a plaintiff is not required to support a motion to amend the complaint with an affidavit of merit. (*See Hickey v Kaufman*, 156 AD3d 436, 436 [1st Dept 2017], citing *Lucido v Mancuso*, 49 AD3d 220, 228–229 [2d Dept 2008], *appeal withdrawn* 12 NY3d 813 [2009] and *MBIA*.) Any other case law requiring an affidavit of merit is "older precedent" and is not to be followed. (*Hickey* at 436; *see Lucido*.) Admittedly, even the Appellate Division, First Department has cited to such "older precedent" as recently as 2017, in *Velarde v City of New York* (149 AD3d 457, 457 [1st Dept 2017]) where it cited the 2007 case *American Theater for Performing Arts v Consolidated Credit Corp.* (45 AD3d 506 [1st Dept 2007]). *Velarde*, insofar as it relies upon a case that was published before and is contrary to the express holding in *Lucido*, is of no precedential value on this point and is not to be followed. As the Appellate Division, First Department has repeatedly held, "Plaintiffs were not required to submit an affidavit of merit or make any other evidentiary showing in support of their motion [for leave to amend]." (*Boliak v Reilly*, 161 AD3d 625, 625 [1st Dept 2018].) As such, the Court rejects point one of Defendant's two-point argument.

Turning to Defendant's second point, the Court finds that neither the "rent freeze" as characterized by Defendant in its opposition papers nor the application of the "default formula" as termed by Defendant constitute a penalty prohibited in a class action. It was already resolved in the prior motion that Plaintiffs have waived any treble damages, in accordance with *Borden v 400 East 55th Street Associates, L.P.* (24 NY3d 382 [2014].) Moreover, the Proposed Complaint does not seek treble damages. Defendant's reliance on *Sperry v Crompton Corp.* (8 NY3d 204 [2007]) is misplaced, in that it also deals specifically with "treble" damages in a class action—there, regarding alleged antitrust violations.

As the *Sperry* Court noted, quoting Judge Cardozo, "We are to remember that the same provision may be penal as to the offender and remedial as to the sufferer. The nature of the problem will determine whether we are to take one viewpoint or the other." (*Id.* at 213.) "In determining whether a statute imposes a penalty, courts look primarily to the statute's description of the recovery it authorizes." (*Pruitt v Rockefeller Ctr. Props., Inc.*, 167 AD2d 14, 27 [1st Dept 1991].) Here, Plaintiffs seek through their request for a "rent freeze" mere injunctive relief to prevent further windfalls to a Defendant accused of perpetrating a fraud. Similarly, Plaintiffs' request for the use of the "default formula" is fact-dependent and will, if applied, serve merely to return to Plaintiffs monies which should not have been taken from them in the first instance. The Court finds that such remedies are compensatory in nature and are not penalties within the meaning of CPLR 901 (b). (*See Dugan v London Terrace Gardens, L.P.*, 45 Misc3d 362 [Sup Ct, NY County 2013, Billings, J.].) As such, the Court rejects Defendant's argument as to the first, second, and third causes of action in the Proposed Complaint. The Court finds that, for the purposes of the instant motion for leave to amend, Plaintiff has shown that the first, second, and third causes of action are not palpably insufficient or clearly devoid of merit.

As to the fourth cause of action alleging violations of General Business Law § 349, the Court agrees with Defendant that Plaintiffs' allegations in the Proposed Complaint "present[] only private disputes between landlords and tenants, and not consumer-oriented conduct aimed at

the public at large, as required by the statute." (*Aguaiza v Vantage Props., LLC*, 69 AD3d 422, 423 [1st Dept 2010].) The Court finds further that the damages alleged in the fourth cause of action are indirect and derivative of the injuries alleged to have been sustained by Plaintiffs in the first, second, and third causes of action, and are therefore barred. (*See City of New York v Smokes-Spirits.com, Inc.*, 12 NY3d 616, 622 [2009].)

As to the fifth cause of action for legal fees, the Court finds that a Plaintiff may properly allege a cause of action for attorney's fees based upon a violation of a statute. The cases cited by Defendant in its opposition papers refer to the severability of an attorney's fees provision situated in a "wherefore" clause and to such fees as an element of contract damages. Moreover, the cited cases are not class actions. The Appellate Division, First Department has permitted an attorney's fees cause of action to survive a CPLR 3211 (a) (7) motion to dismiss and remain a separated cause of action as limited by the facts of that case. (*See Green v Fischbein Olivieri Rozenholc & Badillo*, 119 AD2d 345, 351 [1st Dept 1986].) Similarly, here, while Plaintiffs' recovery under its fifth cause of action necessarily depends upon what happens during the course of litigation and is not premised upon a contract, but upon a statute, Defendant's objection to Plaintiff proceeding with a discrete legal fees cause of action is a complaint about form over substance that is ultimately unavailing. As such, the Court finds that Plaintiff has shown for the purposes of the instant motion that its fifth cause of action is not palpably insufficient or clearly devoid of merit.

As to Plaintiffs' request to deem the Proposed Complaint interposed, that request is denied, as Plaintiffs must revise the Proposed Complaint in accordance with this order to remove the fourth cause of action and renumber the paragraphs that follow. As to Plaintiffs' request in its reply papers that "this Court grant class certification [and] appoint Grimble & LoGuidice, LLC and the Law Offices of Jack Lester, Esq., as co-counsel to the class," that request is premature. Plaintiffs shall move for class certification in accordance with the CPLR.

CONCLUSION

Accordingly, it is

ORDERED that Plaintiffs' motion is granted to the extent that Plaintiff is granted leave to serve Defendant per the CPLR with an amended complaint alleging everything in the Proposed Complaint except the proposed fourth cause of action, provided that Plaintiff serves a copy of this order with notice of entry on Defendant within 10 days of the date of the decision and order on this motion and serves the amended complaint within 20 days of service of the order.

The foregoing constitutes the decision and order of the Court.

3/1/2019
DATE

HON. ROBERT D. KALISH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

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