Montera v KMR Amsterdam LLC
2019 NY Slip Op 31668(U)
June 11, 2019
Supreme Court, New York County
Docket Number: 160550/17
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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KEN MONTERA, on behalf of himself and all others similarly situated,

Plaintiffs,

Index No.: 160550/17

-against-

DECISION/ORDER

KMR AMSTERDAM LLC,

Defendant.

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HON. SHLOMO S. HAGLER, J.S.C.:

In this proposed class action involving allegations of residential rent overcharge, defendant KMR Amsterdam LLC ("KMR") moves for summary judgment to dismiss the complaint [Motion Sequence Number 002]. Plaintiff opposes defendant's motion. Plaintiff Ken Montera ("Montera") moves separately for class certification [Motion Sequence Number 003]. Defendant opposes plaintiff's motion. The motions are consolidated herein for disposition.

BACKGROUND FACTS

Montera is the tenant of apartment 4E in a building located at 2201 Amsterdam Avenue in the County, City and State of New York (the "Building") (Notice of Motion [Motion Sequence Number 002], Exhibit "A" [Complaint], ¶ 17. KMR is the Building's owner (*Id.*, ¶¶ 1, 28).

Montera took possession of apartment 4E in March 2010, pursuant to a "free market" rate lease with a monthly rent of $1,150.00 (*Id.*, ¶ 19). Montera states that he subsequently executed regular renewal leases for apartment 4E at higher "market rate" rents. Montera alleges that his unit was actually subject to the Rent Stabilization Law ("RSL"), and that KMR had improperly deregulated it along with many of the Building's other apartment units (*Id.*, ¶¶ 20-23, 47-51).

Specifically, Montera alleges that the Building was enrolled in the "J-51" real estate tax abatement program "until approximately June of 2013," and notes that the program required landlords to register the apartments in such enrolled buildings as rent stabilized units, and to provide the units' tenants with rent stabilized leases and J-51 Riders (*Id.*, ¶¶ 1-5).

Montera proffers copies of his market rate 2010-2011 initial lease and his 2017-2018 lease extension. Both leases are neither rent stabilized nor include a rent stabilization rider or a J-51 rider (*see* Notice of Motion [Motion Sequence Number 002], Affirmation in Opposition, Exhibits "A", "B"). Montera also submits a "Registration Apartment Information" statement from the New York State Division of Housing and Community Renewal ("DHCR") which lists apartment 4E as rent stabilized from 1988 through 2009, and indicates that the Building was enrolled in the J-51 program from 2004-2009 *(Id.*, Exhibit "C"). In addition, Montera has presented copies of the Building's 2018 New York City Department of Finance ("DOF") Property Tax Benefit Information sheet and its 2013 tax bill, which show that the Building contains a total of 85 apartment units, and that 58 of them were recorded as rent stabilized through 2013 (*see* Notice of Motion [Motion Sequence Number 003], Exhibits "B", "C").

It is uncontroverted that the Building's prior owner had enrolled it in the J-51 program in 2003, that KMR purchased the Building in 2004, that it deregulated apartment 4E in 2010 when plaintiff leased the apartment, and that the Building's J-51 benefits expired in June of 2013 (Notice of Motion [Motion Sequence Number 002], Yaghoubzadeh Affidavit, ¶¶ 4-7). KMR nevertheless asserts that it properly deregulated apartment 4E and other units in the Building.

Montera commenced this action on November 29, 2017 by filing a Complaint that seeks class certification on behalf of two proposed classes of plaintiffs. A 'Class' of tenants seeks

certification of claims for money damages. The proposed Class is defined as

> "all tenants at [the Building] living, or who had lived, in apartments that were deregulated during the period when J-51 benefits were being received by [KMR], except that the [C]lass shall not include (i) any tenants who vacated before November 29, 2013, or (ii) any tenants whose occupanc[y] in any such apartment commenced after such J-51 tax benefits to the [B]uilding had ended."

The proposed Sub-Class of tenants seeking certification of claims for declaratory and injunctive relief consists of 'all current tenants at [the Building] who currently reside in unlawfully deregulated apartments' (Notice of Motion [Motion sequence number 002], Exhibit "A" [Complaint], ¶¶ 52-56). The Complaint asserts causes of action for: 1) rent overcharge in violation of RSL § 26-512, on behalf of the Class; 2) rent overcharge in violation of RSL § 26-512, on behalf of the Sub-Class; and 3) a declaratory judgment of regulatory status, on behalf of the Sub-Class (*Id.*, ¶¶ 69-89). On February 2, 2018, KMR filed an answer with counterclaims for: 1) a declaration that its deregulation of the Building was proper; 2) a rental offset to any plaintiffs' award of money damages; 3) money and/or possessory judgments against any plaintiffs found to owe rental arrears in excess of any award of damages; and 4) a declaration that the Court of Appeals holding in *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]) cannot be applied retroactively (*Id.*, Exhibit "B"). Montero filed a reply to KMR's counterclaims on February 12, 2018 (*Id.*, Exhibit "C"). This Court dismissed KMR's fourth counterclaim on the record at oral argument held on September 6, 2018 (tr oral argument, dated September 6, 2018 at 2-3). Now before this Court are KMR's motion for summary judgment to dismiss the complaint (motion sequence number 002) and Montero's motion for class certification (motion sequence number 003).

DISCUSSION

Although KMR's motion seeks summary judgment to dismiss the complaint on the ground that the claims therein "should be determined by the [DHCR] due to its primary jurisdiction" (*Id.*, Guiliano Affirmation, ¶¶ 21-30), this Court must address issues of class certification in the first instance *before* it may consider any dismissal applications based on the doctrine of primary jurisdiction. KMR argues that plaintiff's claims should be determined by DHCR due to its primary jurisdiction since the proposed class fails as a matter of law (Affirmation in Reply [Motion Sequence Number 002], ¶¶ 49-63).

It is uncontroverted that the DHCR has no authority to entertain a class action (*See Hess v EDR Assets LLC*, 171 AD3d 498 [1st Dept 2019] [the court rejected "respondent's request for dismissal of [an] action on the ground that DHCR has primary jurisdiction since the action raises legal issues, including class certification, that must be addressed in the first instance by the court"], citing *Dugan v London Terrace Gardens, L.P.*, 101 AD3d 648, 649 [1st Dept 2012].

Class Certification (Motion Sequence Number 003)

Montera posits that the Building was enrolled in the J-51 real estate tax abatement program from 2003 until June of 2013, but that KMR nevertheless deregulated many of the Building's rent-stabilized apartments during that time. Montera relies on the Court of Appeals' decision in *Borden v 400 E. 55th St. Assoc., L.P.* [24 NY3d 382 [2014] for the general argument that groups of rent-stabilized tenants in J-51 buildings whose apartments were improperly deregulated are "regularly and without exception" found to

be viable classes (Notice of Motion [Motion Sequence Number 003], plaintiff's Memorandum of Law at 5).

Applications for class certification are governed by CPLR 901, which imposes the following requirements:

> "a. One or more members of a class may sue or be sued as representative parties on behalf of all if:
>
> 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 (a). Montera argues that "certification is appropriate" for both "the Class" and "the Sub-Class," because all of "the CPLR 901 (a) requirements are met" (Notice of Motion [Motion Sequence Number 003], plaintiff's Memorandum of Law at 4-11). In opposition, KMR argues neither of Montera's proposed classes meets any of the individual CPLR 901 (a) requirements (Notice of Motion [Motion Sequence Number 003], Affirmation in Opposition, ¶¶ 28-77).

"As to the question of whether the putative classes meet the standards for class certification, the nature of CPLR 901 (a) places determination of those factors within the sound discretion of the trial court and reviewable by [the Court of Appeals] only for an abuse of discretion" (*Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d at 398 [internal quotation marks and

citations omitted]).

Numerosity

Montera maintains that the Building "contains 85 residential units, and that "[Department of Finance ("DOF")] records indicate that, at the time the J-51 benefits expired, [KMR] was treating only 58 of these units as rent stabilized," with the result that "class members resided in 27 units" (Notice of Motion [Motion Sequence Number 003], plaintiff's Memorandum of Law at 7) . As such, Montera argues that given it is likely that many of these units are occupied by more than one person, there would be "significantly more than the 40 members required to establish a presumption of numerosity" (*Id.*).[1] Montera also contends that in any event, CPLR 901 (a) (1) does not define the term "numerosity" by a specific number, but by whether or not joinder of proposed class members is "impracticable", such as when tenants have moved out of a building (*Id.*, plaintiff's Reply Memorandum of Law, at 8-10; *See Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d at 399). In opposition, KMR argues that Montera failed to met his burden of proving numersosity in admissible form given that Montera only proffers his attorney's unsworn affirmation and the uncertified DOF records (Notice of Motion [Motion Sequence Number 003], Affirmation in Opposition, ¶¶ 53-74).

Here, Montera has satisfied the numerosity requirement of CPLR § 901(a)(1). Although Montera cannot avail himself of the "40 member class" numerosity presumption, Montera has presented documentary evidence that shows that KMR treated 27 of the Building's apartment

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[1]Montera cites the Court of Appeals' observations in *Borden* that "[a]s to . . . numerosity, the legislature contemplated classes involving as few as 18 members," and that "numerosity is presumed at a level of 40 members." *Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d at 399 [internal quotation marks and citations omitted].

units as deregulated at a time when all of its units should have been registered as rent stabilized. This proof, together with the allegation that [some of the deregulated units' tenants have since left the Building], is sufficient to show that joinder of all proposed "Class" and "Sub-Class" members is impracticable in this action, so as to satisfy CPLR 901 (a) (1). KMR's objection that the DOF records are uncertified is unpersuasive. KMR's argument characterizing Montera's proposed "Class" and "Sub-Class" as speculative is unavailing. At this juncture, it is not yet incumbent on Montera to identify each specific tenant who may have been overcharged or each individual apartment which may still be improperly deregulated. Instead, the current task is to determine whether Montera has sufficiently alleged the existence of a proposed class.

Predominance and Typicality

The statute's second and third proposed class requirements are referred to as "predominance" and "typicality;" i.e., whether "there are questions of law or fact common to the class which predominate over any questions affecting only individual members," and whether "the claims or defenses of the representative parties are typical ... of the class." CPLR 901 (a) (2), (a) (3). In *Borden*, the Court of Appeals stated that:

> "As to predominance and typicality, the predominant legal question involves one that applies to the entire class - whether the apartments were unlawfully deregulated pursuant to the *Roberts* decision. It should be noted that the legislature enacted CPLR 901 (a) with a specific allowance for class actions in cases where damages differed among the plaintiffs, stating 'the amount of damages suffered by each class member typically varies from individual to individual, but that fact will not prevent the suit from going forward as a class action if the important legal or factual issues involving liability are common to the class.'"

Borden v 400 E. 55th St. Assoc., L.P., 24 NY3d at 399 [internal citations omitted]. Montera cites this portion of the Borden decision to argue that the "predominance" and "typicality" factors are

present with respect to both "the Class" and "the Sub-Class" (Notice of Motion [Motion Sequence Number 003], plaintiff's Memorandum of Law at 7-9). Montero asserts that the requests by "the Class" for various amounts of money damages and the proposed equitable relief sought by "the Sub-Class" both involve KMR's "failure to follow the strictures of the J-51 benefits program", and present the same scenario as *Borden* (*Id.*). With respect to "predominance," Montera argues that there are common questions concerning each member of "the Class" and/or "the Sub-Class" as regards: 1) whether their apartments were improperly deregulated; and 2) what methodology should be used to calculate their "legal regulated rent" (*Id.*, plaintiff's Reply Memorandum of Law, at 4-7). Montero maintains further that his claims arising out of failure to follow the strictures of J-51 are "not merely typical of those of all other class members; they are identical" (*Id.*, plaintiff's Memorandum of Law at 9).

In opposition, KMR argues that Montera has failed to establish either "predominance" or "typicality" because the claims of each member of "the Class" and "the Sub-Class" require individualized analysis of: 1) the applicable statute of limitations; and 2) his/her apartment's rent history (Notice of Motion [Motion Sequence Number 003], Affirmation in Opposition, ¶¶ 28-52).

Here, the facts of this action are similar to those of *Borden* in that both cases involve a "J-51 deregulation." Montero has met the predominance and typicality prongs of CPLR 901(a)(2) and (3) with respect to both the Class and Sub-Class, given that in *Borden*, the Court of Appeals determined that such a factual scenario satisfies said "predominance" and "typicality" requirements. As in *Borden*, "the amount of damages suffered by each class member typically varies from individual to individual, but that fact will not prevent the suit from

going forward as a class action if the important legal or factual issues involving liablility are common to the class" (*Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d at 399).

With respect to "adequacy of representation,""[t]he factors to be considered . . . are whether any conflict exists between the representative and the class members, the representative's familiarity with the lawsuit and his or her financial resources, and the competence and experience of class counsel" (*Ackerman v Price Waterhouse*, 252 AD2d 179, 202 [1st Dept 1998], citing *Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 24 [1st Dept 1991]). Montera asserts in his affidavit that he "owes a duty of loyalty to the class" and "will undertake his best efforts to prosecute this action vigorously on behalf of members of the class" (Montera Affidavit, ¶ 10). Montera's counsel has sufficiently demonstrated that they are experienced class counsel and the record reveals no known conflicts between Montera and his counsel with any of the other members of the putative classes. In opposition, KMR does not raise any argument regarding "adequacy of representation." As such, Montera has sufficiently demonstrated the satisfaction of the adequacy requirement set forth in CPLR 901 (a) (4).

Finally, with regard to "superiority," the First Department has recognized that a "proposed class action is superior to the prosecution of individualized claims in an administrative proceeding," where factors exist, including: 1) difference in litigation costs; 2) the likelihood that an individual plaintiff/tenant lacks substantial means; and 3) the probability of modest damages to be recovered. *See e.g.*, *Dabrowski v Abax Inc.*, 84 AD3d 633, 635 [1st Dept 2011]; *Nawrocki v Proto Constr. & Dev. Corp.*, 82 AD3d 534, 536 [1st Dept 2011]). Montera asserts a class action is the best way to address the alleged wrongs in the instant matter and that "requiring each current and former tenant to individually bring their own claim against

[d]efendant would not only discourage tenants from seeking redress, but would also strain an already overburdened court by requiring that identical claims be re-litigated over and over again, and may lead to inconsistent rulings" (Notice of Motion [Motion Sequence Number 003], Plaintiff's Memorandum of Law, at 10-11). In opposition, KMR maintains that a class action is not superior to other methods given that "class treatment would be inappropriate" in this action "in light of the extensive individual proof that each class member's proof would inevitably require" (Affirmation in Opposition, ¶¶ 75-77).

It is well established that "the amount of damages suffered by each class member typically varies from individual to individual, but that fact will not prevent the suit from going forward as a class action if the important legal or factual issues involving liability are common to the class" (*Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d at 399) [internal quotation marks and citation omitted]). Here as in *Borden* "to preserve judicial resources, class certification is superior to having these claims adjudicated individually" (*Id.* at 400).

Accordingly, based on the foregoing, Montera has satisfied the statutory factors set forth in CPLR 902(a) and as such, the instant matter may proceed as a class action.

Statute of Limitations

KMR argues that Montera's first cause of action for rent overcharge on behalf of "the Class" is barred by the statute of limitations (Notice of Motion [Motion Sequence Number 002], Affirmation in Support, ¶¶ 31-34). KMR asserts that Montera's action should have been filed within four years of the first overcharge which occurred on March 10, 2010 (*Id.* at 34). In opposition, plaintiff asserts that the "first overcharge alleged took place in November 2013," and notes that Montera filed the instant complaint on November 29, 2017 (Notice of Motion [Motion

Sequence Number 002], plaintiff's Memorandum of Law in Opposition at 3-11).

"An action on a residential rent overcharge shall be commenced within four years of the first overcharge alleged, [is construed] to mean that the action must be brought within four years of the first month for which damages are sought to be recovered and not . . . that an action is forever barred where the overcharge extends over a period in excess of four years" (*Crimmins v Handler & Co.*, 249 AD2d 89, 91 [1st Dept 1998]; *see Conason v Megan Holding, LLC*, 25 NY3d 1 [2015]. "In general, while the regulatory status of an apartment may be challenged at any time during a tenancy, challenges to the level of rent charged must be made within a four year statute of limitations period (CPLR 213-a). Moreover, examination of the rental history is usually limited to the four-year period immediately preceding the filing of a complaint or petition" (*Taylor v 72A Realty Assoc., L.P.*, 151 AD3d 95, 102 [1st Dept 2017] [internal citations omitted]).

Fraud

However, "where the overcharge complaint alleges fraud . . .DHCR has an obligation to ascertain whether the rent on the base date is a lawful rent" (*Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 366 [2010]). A court can properly look "beyond the four-year limitations period for plaintiff's rent-overcharge claim (CPLR 213-a) to establish the proper base rent, [when] sufficient indicia of fraud exists" (*Butterworth v 281 St. Nicholas Partners, LLC*, 160 AD3d 434, 434 [1st Dept 2018]).

Montera maintains that KMR did not re-register apartment 4E with the DHCR until May 1, 2018, after this action was commenced, and nearly a decade after the Court of Appeals decided *Roberts* (Notice of Motion [Motion Sequence Number 003], plaintiff's Memorandum of

Law in Further Support at 10). KMR argues that apartment 4E's rental history from before the four-year limitations period cannot be examined for evidence of overcharge because its deregulation was based upon a mistaken pre-*Roberts* belief that the apartment had been deregulated, which does not constitute fraud (Notice of Motion [Motion Sequence Number 002], Affirmation in Reply, ¶ 24).

In *Nolte v Bridgestone Assoc. LLC*, 167 AD3d 498, 498-499 [1st Dept 2018] (internal citations omitted), the First Department found that the landlord's "fail[ure] to promptly register the apartments and 30 other apartments in the building as rent-stabilized in March 2012 ["post-*Roberts*"], when the applicability of *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]) was clear" constituted proof that the landlord "was engaged in a fraudulent scheme to deregulate apartments." As a result of such finding of fraud, the court could properly examine "the rental history of the subject apartment beyond the four year statutory limitations period (CPLR 213-a)" (*Id.* at 498).[2] The Building's DOF records also disclose that a total of 27 of its apartments were listed as unregulated in 2013, despite the Building still being enrolled in the J-51 program (Notice of Motion, Ferrara Affirmation (Motion Sequence Number 003), Exhibit "C"). Here, given that *Roberts* had been decided four years previously (in 2009), any re-registration in 2018 could not be deemed "prompt," pursuant to the *Nolte* holding. As a result of such indicia of fraud, the apartment rental history may be examined beyond the four-year look-

[2]In contrast to the post-*Roberts* analysis, an owner does not engage in fraud due to the removal of an apartment from rent regulation when it relies on a pre-*Roberts* interpretation by DHCR that owners of already regulated buildings can take advantage of high-rent/luxury decontrol while receiving J-51 benefits (*see Matter of 160 E. 84th St. Assoc. LLC v New York State Div. of Hous. & Community Renewal*, 160 AD3d 474, 475 1st Dept 2018]; *Matter of Park v New York State Div. of Hous. & Community Renewal*, 150 AD3d 105, 114-115 [1st Dept 2017]).

back period to determine the proper base rent (*see e.g. Kreisler v B-U Realty Corp.*, 164 AD3d 1117, 1118 [1st Dept 2018]; *Butterworth v 281 St. Nicholas Partners, LLC*, 160 AD3d 434, 434 [1st Dept 2018]).

In addition, KMR's argument that Montera's second and third causes of action on behalf of "the Sub-Class," which respectively request money damages for rent overcharges and related declaratory relief, "are moot because defendant will provide [Montera] with a rent stabilized lease prior to April 30, 2019" and therefore upon settlement of Montera's personal claims for relief, "he will not be able to represent the class" is unavailing (Notice of Motion [Motion Sequence Number 003], Affirmation in Opposition, ¶¶ 25-27). KMR asserts that upon settling Montera's personal claims for relief, "he will not be able to represent the class." *Id.* "[t]he fact that [a defendant] has now offered plaintiffs a rent-stabilized lease . . . does not render the issue of plaintiffs' rent-stabilized status moot," because "[t]he declaration . . . is retroactive to the inception of plaintiffs' tenancy and affects their rights from that point in time to the present" *Taylor v 72A Realty Assoc., L.P.*, 151 AD3d 95, 100 [1st Dept 2017]; *but see Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 164 AD3d 420 [1st Dept 2018) (partially abrogating *Taylor* on other grounds).

In light of the foregoing, this Court finally concludes that Montera's motion for class certification should be granted, with the concomitant result that it must deny KMR's motion for summary judgment to dismiss pursuant to the doctrine of primary jurisdiction. *Hess v EDR Assets LLC*, _ AD3d _, 95 NYS3d at 806.

CONCLUSION

On the basis of the foregoing, it is

ORDERED, the motion of defendant KMR Amsterdam LLC for summary judgment pursuant to CPLR 3212 [Motion Sequence Number 002] is denied, and it is further

ORDERED, the motion of plaintiff Ken Montera pursuant to CPLR 901 (Motion Sequence Number 003) is granted in the form of the proposed order annexed to plaintiff's motion as Exhibit "F".

Dated: June 11, 2019

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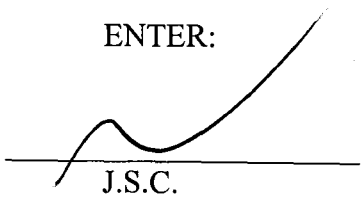

J.S.C.