

Yang v Creative Indus. Corp.

2020 NY Slip Op 30008(U)

January 2, 2020

Supreme Court, New York County

Docket Number: 155681/2017

Judge: Robert David Kalish

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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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INDEX NO. 155681/2017

A. YANG, JACQUELINE SUBRAMANIAM, MORGAN CASTILLA, E. STEEL, DAWN FADELY, and P. SHARMA, on behalf of themselves and all others similarly situated,

MOTION DATE 09/16/2019

MOTION SEQ. NO. 008

Plaintiffs,

- v -

CREATIVE INDUSTRIES CORPORATION and RUDD REALTY MANAGEMENT CORPORATION,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 247, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 281

were read on this motion to/for AMEND/MODIFY DECISION/ORDER/JUDGMENT .

Motion by Plaintiffs pursuant to CPLR 3025 (b) and 901 (a) (3) and (4) for an order granting leave to Plaintiffs to amend the complaint and class certification order to remove plaintiff Arun Yang as a lead/representative plaintiff and to name plaintiff Morgan Castilla as a lead/representative plaintiff and to change the class definition to extend the look back period from four to six years and to reflect the expiry of J-51 benefits and, upon such amendment, for an order approving the amended class definition and new notices to the class is granted to the following extent. Cross motion by Defendants pursuant to CPLR 902 for an order decertifying the class action denied.

BACKGROUND

As is relevant here, in this class action involving alleged rent overcharges in a building located at 28 Bedford Street, New York, New York, on December 13, 2018, the Court issued an order in motion sequence number 005 certifying this action as a class action and appointed named plaintiffs A. ("Arun") Yang and Dawn Fadely, named plaintiffs in the putative class action, as lead/representative plaintiffs in the certified class action. At the request of Plaintiffs, named plaintiffs Jacqueline Subramaniam, Morgan Castilla, E. Steel, and P. Sharma were not made lead/representative plaintiffs in the certified class action, although their names remain in the case caption.

On July 19, 2019, Plaintiffs filed the instant motion to amend the complaint changing the relevant "look back" period from four to six years prior to the filing of the complaint, removing Yang as a lead/representative plaintiff, appointing Castilla as a lead/representative plaintiff, and

amending the class definition to reflect the change in the look back and that the J-51 benefits previously received by the building have now expired. Plaintiffs cite to the Housing Stability and Tenant Protection Act of 2019 (“HSTPA”), signed on June 14, 2019, which extended the look back window for rent overcharge claims from four to six years.

Plaintiffs submit an affidavit from Castilla and argue that she, like Fadely, has claims typical of the class and will fairly and adequately protect the interests of the class. (NYSCEF Doc No. 236 [aff of Castilla].) Castilla states in her July 19, 2019 affidavit that she has resided at the building since October 1, 2015, and seeks to be named a lead plaintiff and class representative and to represent the subclass of current tenants. Castilla further states that she understands she would owe a duty of loyalty to the class, meaning she must look after the interests of the class, undertake her best efforts to prosecute this action vigorously on behalf of the class, and ensure the class and its interests are treated fairly. Castilla then states that she will make herself available as necessary to participate in the case and will not compromise the interests of the class for her own personal gain. Castilla then indicates her understanding that treble damages, available to her on an individual basis, are not available to her in this class action. The Court notes that the relevant language from this affidavit is substantially similar to, or verbatim when compared with, the affidavit of Fadely submitted in support of motion sequence number 005 (NYSCEF Doc No. 103 [aff of Fadely]), which the Court previously regarded favorably to the extent that this Court approved the appointment of Fadely as a class representative based upon the affidavit.

Plaintiffs annex a proposed amended complaint reflecting the changes described herein.

Defendants argue in opposition and in support of their cross motion to decertify the class that Yang is not an appropriate lead/representative plaintiff. Defendants then argue that as Fadely is a lead/representative plaintiff, the addition of Castilla as a lead/representative plaintiff is unnecessary. Defendants further argue that the class must be decertified because class counsel have inflated the amount of the attorneys’ fees that they will seek in this action through their motion practice in this matter and their concurrent representation of Yang in a separate, tangentially related housing court action. Further, Defendants do not dispute that HSTPA changed the look back window but argue that the change does not apply to cases that were pending, as this was, at the time the law was enacted. Defendants further argue that the motion is deficient because it fails to include an affidavit of merit. In any event, Defendants argue that the proposed amendment is devoid of merit and that the Court should apply the four-year look back that was in effect when the action was filed in 2017. Defendants do not dispute that the J-51 benefits have expired.

Plaintiffs argue in reply that to the extent Defendants argue Yang is not a suitable class representative, the issue is moot if the relief sought by Plaintiffs to remove him as a class representative is granted. Plaintiffs further argue that any objection as to prospective attorneys’ fees to be sought by Plaintiffs is premature as Plaintiffs would submit an application for fees pursuant to CPLR 909 should they prevail and at the close of the action and is not cause for decertifying the class.

Plaintiffs further argue in reply that pursuant to this Court's prior decision in *Gould, et al. v Fort 250 Associates, LLC* (2019 Slip Op. 30501[U], 3 [Sup Ct, NY County 2019, Kalish, J.], citing *Hickey v Kaufman*, 156 AD3d 436, 436 [1st Dept 2017] and *Lucido v Mancuso*, 49 AD3d 220, 228-229 [2d Dept 2008], *appeal withdrawn* 12 NY3d 813 [2009]) no affidavit of merit is required on a motion for leave to amend the complaint. The Court also cited in that decision *Boliak v Reilly* (161 AD3d 625, 625 [1st Dept 2018]), which stated that "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]." Plaintiffs further argue that the recent decision of the Appellate Division, First Department in *Dugan v London Terrace Gardens* (177 AD3d 1 [1st Dept 2019]) held that the HSTPA applies to cases pending on the date it was enacted. Specifically, the Appellate Division, First Department quoted the relevant part of the HSTPA, Part F, which states that the relevant statutory amendments "shall take effect immediately and shall apply to any claims pending or filed on or after such date" and held that in *Dugan*, a 2009 action, "[b]ecause plaintiffs' overcharge claims were pending on the effective date of Part F of the HSTPA, the changes made therein are applicable here." (*Id.* at 8 [citations omitted].)

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].)

Here, Plaintiffs have correctly cited this Court's decision in *Gould* in response to the opposition argument regarding an affidavit of merit. The Court has previously addressed this well-settled issue and again finds that the papers submitted, which do not contain an affidavit of merit, are sufficient and will consider the proposed amendments based upon the standard of whether they are patently improper or devoid of merit.

Based upon the papers submitted, the plain meaning of the language used in the HSTPA, and the recent holding in *Dugan*, the Court finds that the proposed amendment of the look back

period from four years to six years is not palpably improper or devoid of merit. *Dugan* was brought in 2009 and was still pending on June 14, 2019, the date of the enactment of the HSTPA, as was the instant matter. Further, there has been no objection to amending the class definition to reflect the expiry of J-51 benefits.

As to the issue of the proposed change in lead/representative plaintiff removing Yang and adding Castilla, as a preliminary matter, the Court notes that Castilla, along with Subramaniam, Steel, and Sharma have remained in the caption as named plaintiffs. In the class action complaint both as originally filed and proposed as an amendment in the instant motion, Yang, Subramaniam, Castilla, Steel, Fadely, and Sharma are the named plaintiffs suing Defendants “on behalf of themselves and all others similarly situated.” (NYSCEF Doc No. 241.) Nevertheless, once Plaintiffs elect to proceed with certification naming some, but not all, of the originally named plaintiffs as class representatives, or lead plaintiffs (the meaning is the same), those originally named plaintiffs who will not be class representatives should be removed from the caption in the interest of clarity and to conform the pleading to the facts of the case. Moreover, an award of attorneys’ fees available to a prevailing class may be made “to the representatives of the class” pursuant to CPLR 909, and plaintiffs in the caption who are not class representatives may cause confusion later in the case on an application for an award to class representatives, as in most, if not all, cases, the named plaintiffs and class representatives (or lead plaintiffs) are one and the same.

That said, based upon the papers submitted, the Court will approve the removal of Yang as a class representative and the appointment of Castilla as a class representative. In a class action involving multiple class representatives, a class representative may be removed as a class representative, and this is not fatal to the certification of the class. (*See Fiala v Metropolitan Life Ins. Co.*, 52 AD3d 251 [1st Dept 2008].) Here, the removal of Yang as a class representative is anticipatory in nature based upon Defendants’ arguments that Yang is not an adequate class representative. Further, the Court finds there is no prejudice to Defendants as to the addition of Castilla on substantially similar grounds as those submitted in support of the appointment of Fadely, which was previously approved by the Court without objection as to substance. Discovery in this action is not yet complete, and Defendants may notice the deposition of Castilla in accordance with this order. As such, the branch of the motion removing Yang and inserting Castilla as a class representative is granted, but the names of Yang, Subramaniam, Steel, and Sharma must be removed as named plaintiffs from both the caption and the body of complaint, as, now that the class has been certified, the named plaintiffs, only, shall be the class representatives/lead plaintiffs.

Further, the Court declines to decertify the class based on allegations, in sum and substance, that the actions of class counsel are running up attorneys’ fees. The Court will consider the reasonableness of any attorneys’ fees application by class counsel at the appropriate time, if applicable. Moreover, Defendants in their papers have cited to no authority for the proposition that a class may be decertified based on an allegation that class counsel are inflating their fees, which in any event have not yet been presented in any way to the Court in this matter and no award of fees has been requested or set by the Court as of this time.

CONCLUSION

Accordingly, it is

ORDERED that the motion by Plaintiffs is granted to the extent that it is

ORDERED that Yang is removed as a class representative; and it is further

ORDERED that Castilla is appointed as a class representative; and it is further

ORDERED that previously named plaintiffs Subramanian, Steel, and Sharma shall be removed as named plaintiffs from both the caption and the body of the complaint, while Fadely shall remain a named plaintiff and class representative; and it is further

ORDERED that the motion is otherwise granted, and the cross motion is denied in its entirety; and it is further

ORDERED that Plaintiffs shall e-file a first amended complaint reflecting the changes authorized and ordered herein within 10 days of the NYSCEF filing date of the decision and order on this motion, and this shall be the amended complaint in this action; and it is further

ORDERED that Plaintiffs shall serve a copy of this order with notice of entry on Defendants within 10 days of the NYSCEF filing date of the decision and order on this motion; and it is further

ORDERED that Defendants shall, answer, move, or otherwise respond to the amended complaint on or before February 21, 2020; and it is further

ORDERED that all parties are directed to appear in Part 29, located at 71 Thomas Street Room 104, New York, New York 10013-3821 on Wednesday, March 11, 2020, at 9:30 a.m. for a status conference, at which the Court will address any outstanding discovery issues, including, but not limited to, the mailing of the approved updated class notice and the deposition of Castilla.

The foregoing constitutes the decision and order of the Court.

1/2/2020
DATE


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

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input checked="" type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
	<input type="checkbox"/> DENIED	<input type="checkbox"/> REFERENCE