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

PRESENT: MELISSA A. CRANE **PART 15**
Justice

IN RE GATEWAY PLAZA
RESIDENTS LITIGATION

INDEX NO. 651023/2014

Motion Seq No14

The following papers, numbered _ to _ were read on this motion to/for_____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause — Affidavits — Exhibits …	
Answering Affidavits — Exhibits	
Replying Affidavits	

CROSS-MOTION: ☐ YES ☐ NO

Plaintiffs, Kelley Crosson and Kathy Fernando, on behalf of themselves and all others similarly situated, and defendant Marina Towers Associates, L.P. ("Marina Towers"), seek judicial approval of a proposed settlement set forth "in the agreement presented here, signed by the parties on October 30, 2019" ("Settlement"). On March 2, 2020, the court held a fairness hearing. No one filed an objection and no objectors appeared in court for the fairness hearing.

To determine whether to approve the Settlement, the court considered:

-Plaintiffs' Memorandum of Law in Support of Representative Plaintiffs' Motion for Final Settlement Approval, Approval of Class Counsels' Application for Attorneys' Fees and Expenses, and Approval of Case Contribution Awards to the Representative Plaintiffs, dated January 13, 2020.

-Affidavit of Jeffrey M. Norton, sworn to on January 13, 2020.

-Affidavit of Peter Safirstein, sworn to on January 13, 2020.

-Affidavit of Jeremy Heisler, sworn to on January 13, 2020.

-Declaration of Lindsey Marquez, sworn to on January 10, 2020.

-Supplemental affidavit of Jeffrey M. Norton, sworn to on February 21, 2020

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

On the basis of the fairness hearing, the submissions from the parties, and lack of objectors, the court makes the following findings of fact and conclusions of law in its final order and judgment approving the settlement. The court therefore dismisses the complaint with prejudice.

I. BACKGROUND

On April 1, 2014, predecessor plaintiffs Maureen Koetz ("Koetz") and Barbara Stoebel ("Stoebel") filed two putative class actions alleging claims against, *inter alia*, Marina Towers Associates, L.P. ("Marina Towers"), Gateway Residential Management Corp. ("Gateway"), The Battery Park City Authority, and The Lefrak Organization, based on conditions in tenants' apartments located at Gateway Plaza, a complex of residential buildings in Manhattan. Specifically, plaintiffs alleged that defects in the residential complex's windows, insulation, and heating/cooling units resulted in uninhabitable temperatures. Plaintiffs also claimed that a faulty electrical submetering system resulted in excessive electricity costs for tenants. Plaintiffs sought to recover under a theory of breach of the implied warranty of habitability under RPL 235-b, unjust enrichment, and for injunctive relief.

On April 23, 2014, the court consolidated the actions under the caption *In re Gateway Plaza Residents Litigation.* On June 13, 2014, plaintiff Stoebel and David Spencer ("Spencer") filed a consolidated class action complaint. On July 18, 2014, defendants Marina Towers and Gateway moved to dismiss plaintiffs' breach of implied warranty of habitability and unjust enrichment claims, claim for injunctive relief, and to dismiss Gateway from the action. Plaintiffs withdrew the unjust enrichment claim, but otherwise opposed the motion. On December 3, 2015, the court granted plaintiffs leave to amend and replead the unjust enrichment claim against Gateway.

On January 5, 2016, plaintiffs Stoebel and Spencer amended the complaint. On February 4, 2016, Gateway again moved to dismiss the unjust enrichment claims. The court granted the motion, and dismissed the remaining claims against Gateway.

On August 15, 206, Stoebel and Spencer moved to withdraw as plaintiffs, and sought the substitution of Ninfa Segarra ("Segarra") and Pauline Wolf ("Wolf") as proposed class representatives. Then, on August 18, 2016, Wolf decided she did not want to act as class representative. On December 9, 2016, the court rendered an Order that permitted Segarra to intervene as the representative plaintiff. The case then proceeded under a Second Amended Consolidated Class Action complaint.

On January 23, 2017, Segarra moved to certify the class. Subsequently, on July 13, 2017, pursuant to a stipulation, Segarra withdrew as plaintiff and withdrew the certification motion. The stipulation provided that Maureen Koetz ("Koetz") would substitute in as the named plaintiff. On July 17, 2017, Koetz filed a Third Amended Class Action Complaint. On July 20, 2017, Koetz moved for class certification.

On August 3, 2017, Marina Towers moved to dismiss the claim for injunctive relief, claiming that Koetz lacked standing as a former tenant. Then, on August 28, 2017, Marina Towers moved to dismiss the complaint in its entirety, arguing that Koetz executed a written release, thus barring her from pursuing any claims. On December 11, 2017, the court dismissed Koetz from the action, denied the class certification motion, and gave leave to name two new class representatives.

On April 6, 2018, Kelley Crosson, a current tenant, and Kathy Fernando, a former tenant, filed a Consolidated Fourth Amended Class Action Complaint claiming breach of lease agreements and implied warranty of habitability. On May 15, 2018, plaintiffs moved for

declaratory relief, asking the court to decide whether tenants who entered into early lease termination agreements are barred from asserting RPL 235-b, or precluded as class members. On August 10, 2018, Marina Towers moved for summary judgment. The parties never completed this motion.

The parties first engaged in settlement discussions in the summer of 2015. Counsel continued to hold phone calls and meetings through 2015, the first half of 2016, and March 2017 in an effort to settle the case. Negotiations ran parallel to motion practice and extensive discovery. Finally, in October 2019, after months of arm's length negotiations, the parties reached a settlement agreement. On October 30, 2019, the parties signed the agreement. On November 13, 2019, the court granted preliminary approval of the parties' Settlement and authorized Notice to the Class. In its preliminary approval order, the Court certified the Class, and found that CPLR 901 requisites were satisfied for settlement purposes. The court also set down a Fairness Hearing date for March 2, 2020.

II. THE PROPOSED SETTLEMENT

The Settlement consists of cash and non-cash components. Marina Towers agreed to provide a $10 million, non-reversionary, cash recovery. Class members who submit claim forms will receive a *pro rata* share of the recovery based on the total rent they paid during the class period, either in cash for former tenants, or in rent abatements for current tenants. The $10 million recovery represents 1.95% of the gross rent that tenants paid from April 1, 2008 through final judgment.

The Settlement also includes non-monetary relief. Marina Towers has made $18 to $20 million in capital improvements. The improvements included a complete replacement of all PTAC units, electrical submeters, and window systems in the tenants' apartments. It also

included replacement of roof air units. This helped regulate the flow and temperature of air in the buildings. Marina Towers completed the majority of capital improvements before the end of August 2017. The improvements targeted habitability issues the Class had. Tenants' complaints decreased significantly after 2017. Further, the benefit to Class members in upcoming years is not yet realized. It is hard to quantify what it means to a tenant to have adequate heat in the winter.

Finally, the Settlement provides for a two-year contractual limitation on future rent increases for all Gateway tenants. Existing Qualified Rent Stabilization ("QRS") protections will expire at the end of June 2020. Under the Settlement, rent increases are capped at 5% per year. Data of prior rent increases for market-rate tenants indicates that this rent increase limitation has a monetary value to the Class of up to $13 million. It also prevents Marina Towers from raising QRS tenants to market rates if the program expires.

III. NOTICE AND JURISDICTION

The court has subject matter jurisdiction over this action pursuant to CPLR Article 9 and the grant of general, original jurisdiction in law and equity provided in the Constitution of New York State.

On December 18, 2019, Class members began to receive Notice of the Settlement (the "Notice"). The notice administrator mailed Notice via first-class mail to all non-current residents of Gateway Plaza. All current Gateway Plaza residents received direct, under-door, delivery of the Notice to their apartments. Marina Towers sent the Notice via email to those Class members that had an email address on file. Defendant emailed a large percentage of the Class because Gateway's tenant portal system had access to emails. The notice administrator also put the Notice in a popular downtown publication, the Downtown Express. Defendant established a

designated settlement website where it posted the Notice, posted on the Gateway Plaza Tenant Association website, and posted the Notice on the websites of each of the Class Counsel law firms. Finally, numerous publications, like the Real Deal and the Broadsheet, have run articles detailing the Settlement.

On January 8, 2020, the parties advised the court that the Notice had a minor typographical error. The Notice stated that "Gateway Plaza is a residential apartment complex that contains six buildings located at 345, 355, 365, 376, 385, and 395 South End Avenue, New York, New York." "376" should have been "375." There is no 375 South End Avenue (Norton Supp App dated Feb 21, 2020, p.3, para 7, NYSCEF no 294). Although the parties did not think the typographical error would confuse Class members, the parties proposed a supplemental notice program. The parties advised current and former tenants of 375 South End Avenue of the error. Tenants of 375 received a postcard addendum to the Notice; the Settlement Website, websites of Class Counsel, and the Gateway Plaza website posted the addendum; and the parties updated the online version of the Notice to reflect the correction.

In response to the Notice of the Settlement, over five hundred tenants have already filed Proof of Claim prior to the deadline. Not a single Class member objected or opted out of the Class. The time do so was before January 31, 2020. The Claims Administrator has received many phone calls and emails, but no complaints about the Settlement.

The court finds that the combination of individual mailing, e-mail, website and publication notice is the most effective and best notice practicable under the circumstances, and that it constitutes due, adequate, and reasonable notice to all class members, and otherwise satisfies the requirements of CPLR 904, 908, and other applicable rules. The parties' supplemental notice effort to remedy the typographical error sufficiently alerted Class members

of the error. The Settlement meets the due process requirements for class actions by providing Class members an opportunity to be heard and participate in the litigation or remove themselves from the Class (*Philips Petroleum Co., v Shutts,* 472 US 797, 812). Accordingly, the court has personal jurisdiction over the class members consistent with the requirements of CPLR Article 9 and due process.

IV. FINAL CLASS CERTIFICATION

The Settlement Agreement defines the class as:

> All persons who (i) reside at Gateway Plaza as of the Final Settlement (the "Current Tenants"); or (ii) do not reside at Gateway Plaza as of the Final Settlement Dates but resided at Gateway Plaza for any period of time between April 1, 2008, and the Final Settlement Date (the "Former Tenants").
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> (Settlement Agreement, Ex. A to Norton Aff dated Oct 30, 2019, p.11, para [F][1][j], NYSCEF doc 278).

Pursuant to CPLR 902, the court must determine whether the action may be maintained as a class action under CPLR 901 (*In the Matter of Colt Industries Shareholder Litig.,* 155 AD2d 154, 159 [1st Dept 1990], *modified on other grounds,* 77 NY2d 185 [1991]). The court has considered the class prerequisites set forth in CPLR 901 (numerosity, typicality, commonality, adequacy of representation, and superiority), and holds that this action may be maintained as a class action.

(a) The Class is so Numerous that Joinder of All Members would be Impractical

Courts have found that plaintiffs satisfy the numerosity requirement where the proposed class consists of at least 40 members (*Galdamez v Biordi Contr. Corp.,* 13 Misc3d 2224A (Sup Ct NY Co, 2006), *aff'd* 50 AD3d 357 [1st Dept 2008] [class between 30 and 70 satisfied numerosity]). Here, there are 1,712 apartments in the Gateway Plaza complex. Multiple tenants occupied some of these apartments. Thus, there are approximately 6,046 Class members.

Accordingly, plaintiffs satisfy the numerosity requirement as the large number of tenants makes joinder impractical.

(b) Plaintiffs' Claims are Typical of Those of the Class

Plaintiffs' claims arise from common structure conditions and defects found throughout Gateway Plaza's residential buildings. The tenants endured widespread defects in their apartments' windows, insulation, and PTAC units that resulted in allegedly unbearable temperatures. They also all incurred excessive electricity costs from a faulty electrical submetering system. These claims raise issues of fact applicable to current and former tenants, and would impact the consideration that all Class members would ultimately receive. There is no indication that the claims of the lead plaintiffs differ from the claims of the remaining putative Class members. Therefore, the typicality requirement is met.

(c) Predominance of Common Issues

Plaintiffs satisfy the commonality requirement, if common questions of law and fact apply to each class member (*In re Playmobil Antitrust Litig.,* 35 FSupp2d 231, 240 [EDNY 1998]). Here, plaintiffs satisfy the commonality prerequisite because there are common factual and legal questions including: (i) the extent of the alleged defects during the Class period; (ii) Marina Towers' course of conduct in response to these alleged defects; (iii) whether Marina Towers systematically breached the warranty of habitability; (iv) whether Marina Towers systematically breached its standard, uniform lease agreement when it failed to provide heat and cool air to tenants; (v) the appropriate measure of compensatory damages; and (vi) whether Marina Towers is liable to the Class for punitive damages. Further, the common defects that pervaded the Gateway Plaza buildings put the class in a nearly identical factual situation.

Finally, adjudication of these claims as a class action serves the interests of judicial economy and uniformity. The commonality requirement is therefore satisfied.

(d) Plaintiffs and their Attorneys are Adequate Class Representatives

Plaintiffs, Crosson, a current tenant, and Fernando, a former tenant, represent the Class. Neither of these plaintiffs' claims conflict in any way with the claims of other Class members. Class Counsel has extensive experience litigating complex class actions. Together, they have spent significant time and effort investigating the claims in this case (*see* Aff of Jeffrey M. Norton, sworn to on January 13, 2020; Aff of Peter Safirstein, sworn to on January 13, 2020; and Aff of Jeremy Heisler, sworn to on January 13, 2020). Accordingly, counsel are adequate representatives for the class.

(e) A Class Action is the Superior Method for Adjudicating this Dispute

This case involves 1,712 apartments and Class members that comprise of 6,046 current and former tenants. 6,046 separate individual actions would overwhelm the courts, lead to duplicative litigation, and risk inconsistent outcomes. Clearly, a class action is the superior method to resolving this dispute than the possibility of individual claims brought by 6,000 tenants (*Richards v 2 Gold, LLC,* 2014 WL 3543541 [Sup Ct NY Co, 2014]).

V. THE FAIRNESS, REASONABLENESS, AND ADEQUACY OF THE PROPOSED SETTLEMENT

In order to approve the settlement of a class action, a court must find that the settlement is fair, reasonable, and in the best interests of the class (*Rosenfeld v Bear Stearns & Co., Inc.,* 237 AD2d 199, 199 [1st Dept 1997]; *Wainbergar v Kandrick,* 698 F2d 61 73 [2d Circ 1982]). The following factors are relevant to the court's determination: (a) the likelihood that plaintiff would succeed on the merits or an assessment of the litigation risks; (b) the extent of support from the parties; (c) the judgment of counsel; (d) the presence of good faith bargaining; and (e) the

complexity and nature of the legal and factual issues (*Cox v Microsoft Corp.,* 2006 WL 6554176 [Sup Ct, NY Co 2006]).

(a) Likelihood of Plaintiffs' Success

Plaintiffs do not allege a complete lack of heat for each and every apartment at any given time. Rather, plaintiffs allege that Gateway Plaza's heating units functioned inefficiently. In addition, structural issues with windows and insulation often neutralized or overpowered their ability to work. Marina Towers contends that Class members were able to achieve habitable, although not ideal, temperatures and that any temperature deviations were a result of a tenant's personal choice.

Given the varying levels of heat in each apartment, it would have been complicated for plaintiffs to prove their case, especially when considering some years were colder than others. It is difficult to predict damages for rent abatements. Each Class member might need to come forward and provide evidence that their individual actions did not aggravate the heating and cooling issues. Taking this into account, the replacement of defective windows and PTAC units, in addition to a 2% year-round abatement for all 1,712 apartment units for a twelve-year period, and a two-year contractual limitation on future rent increases, represents a favorable outcome for the Class. The Settlement also provides class members with a certainty that further litigation could not provide. Thus, a trial of this case poses a high risk for plaintiffs. This dictates in favor of settlement.

(b) Extent of Support from the Parties

The parties sent over 7,000 Notices to potential Class members and not one has objected or opted out. There is overwhelming support in favor of the Settlement. Over five hundred Class members have already submitted claim forms to participate in the Settlement recovery.

The administrator has not received any exclusion requests. The absence of Class member objections evidences the fairness of the settlement.

(c) Judgment of Counsel

New York courts give significant weight to the judgment of experienced counsel in determining the fairness of a class action settlement (*NAACP v Philips Electronics North America Corp.,* 2018 WL 2436579 at *2 [NY Sup Ct, 2018]). Here, several law firms acted as lead Class Counsel (1) Newman Ferrarra LLP; (2) Safirstein Metcalf LLP; and (3) Sanford Heisler Sharp, LLP. These firms have significant expertise in both landlord-tenant disputes and complex class litigation (*see* Aff of Jeffrey M. Norton, sworn to on January 13, 2020; Aff of Peter Safirstein, sworn to on January 13, 2020; and Aff of Jeremy Heisler, sworn to on January 13, 2020). Thus, the Class received representation from not one, but several, highly qualified law firms. In addition, class counsel reached an informed judgment about the settlement based on a comprehensive assessment of the case, weighing the benefits and risks of settlement.

(d) The Presence of Good Faith Bargaining

The negotiations leading up to the Settlement spanned over the course of this years long litigation. It took three years from initial settlement talks to reach a resolution. While settlement negotiations were ongoing, the parties engaged in extensive motion practice and discovery. Plaintiffs and Marina Towers first discussed settlement in the summer of 2015. Settlement negotiations continued through the second half of 2015, the first half of 2016, and March 2017, and in late 2018. The parties had frequent telephone calls and meetings where the parties exchanged documents, made proposals, and counter-proposals. The parties discussed the completion of capital improvements and the appropriate level of rent abatements. Plaintiffs worked hard to implement a contractual rent increase limitation to stop QRS. Several

consultants and experts advised plaintiffs. Nothing suggests that the parties did not negotiate with independent and informed views. That the parties bitterly contested this lawsuit over so many years and were able to reach this comprise is indicative of good faith bargaining.

(e) Complexity and Nature of the Factual and Legal Issues

As addressed earlier, this litigation is complicated for plaintiffs. It is also difficult to predict damages for rent abatements. Marina Towers was prepared to litigate this case vigorously. Pre-trial proceedings would not only have prolonged the litigation, but would also have increased the costs to the parties with no guarantee of relief to the class members. Given the circumstances, this settlement, that includes both monetary and non-monetary components, provides significant benefits to the Class members.

VI. ATTORNEYS' FEES

Class Counsel request an award of attorneys' fees in the amount of $3,500,00.00, that is 8% of the overall value of the Settlement or 35% of the Cash Settlement Fund. Counsel also seeks reimbursement of $112,584.45 in out-of-pocket litigation costs. Costs do not include settlement administration expenses that Marina Towers will pay separately in an amount not exceeding $100,000.

New York courts recognize that when an attorney creates and preserves a common fund to distribute to class members, the attorney may receive a fee that is payable out of this fund (*Loretto v Group W Cable,* 135 AD2d 444, 448 [1st Dept 1987]). A court may calculate attorneys' fees in one of two ways. The "lodestar" method calculates the attorneys' fee award "by multiplying the number of hours reasonable expended on the litigation by a reasonable hourly rate" (*McGrath v Toys "R" Us, Inc,* 3 NY3d 421, 427 [2004]). The percentage of fund method is a calculation where the award is based on a percentage of the fund created for the

benefit of the class. Using the percentage of recovery method, the court may consider the risk involved in the litigation, the novelty and difficulty of the issues, and the skill of counsel in performing the services required (*Lasker v Kanas,* 2007 WL 3142959 [Sup Ct NY Co, 2007]).

Here, those factors warrant an attorneys' fee award of $3,500,00.00. Counsel is seeking less than its full lodestar ($3,730,996.50). Counsel spent more than 5,195 hours, including extensive investigation, discovery, motion practice, and settlement negotiations, over the course of this five-year litigation. There are thousands of Class members - tenants of 1,712 apartments over a 12-year period. When considering the value of non-monetary relief realized through this litigation and Settlement, the requested percentage fee would decrease. In addition, no Class members have objected to, or had an issue with the requested fee. Clearly, in this case, reducing the requested award would fail to compensate adequately Class Counsel for its extensive efforts to reach the Settlement.

VII. REPRESENTATIVE PLAINTIFFS CONTRIBUTION AWARD

Service awards are common in class actions (*Mills v Capital One, N.A.,* 2015 WL 573008 at *17 [SDNY 2015]). Here, plaintiffs Crosson and Fernando seek $5,000 case contribution awards. Without Crosson and Fernando's willingness to step forward and prosecute the action on behalf of the Class, Settlement would not have been possible. Crosson and Fernando not only assumed risks inherent to class leadership, but also did so after many other plaintiffs withdrew from the case. Thus, case contribution awards are appropriate to recognize their efforts on behalf of their Class, and to encourage similar tenants to play an active role in the private enforcement of public rights.

Conclusion

Based on the submissions of the parties referenced above and upon the court's findings of fact and conclusions of law as set forth above.

Accordingly, it is,

ORDERED, ADJUDGED, AND DECREED THAT:

1. This Final Order and Judgment incorporates herein and makes a part of the Settlement Agreement, dated October 30, 2019.

2. The court finds that the various forms of notice of the Proposed Settlement distributed to the members of the Class fully and accurately represented all material elements of the proposed Settlement, constituted the best notice practicable under the circumstances, was valid, was sufficient notice to all Class members, and complied fully with the requirements of all applicable laws.

3. The court finds that the prerequisites set forth in CPLR 901 for the maintenance of this action as a class action have been met for the purposes of this settlement.

4. All class members who have not opted out or been otherwise excluded from the class are forever enjoined and barred from commencing, prosecuting, or participating in any action or proceeding based on or relating to the claims and causes of action, or the facts and circumstances relating thereto, in this action.

5. Counsel for plaintiffs are hereby awarded attorneys fees of $3,500.000, which sum the court finds to be fair and reasonable, to be paid from the Cash Settlement Fund. Counsel for plaintiffs are also entitled to reimbursement of $112,584.45 in out-of-pocket litigation costs.

6. The representative plaintiffs are hereby each awarded a $5,000 contribution award.

7. The terms and provisions of the Settlement Agreement are hereby fully and finally approved as fair, reasonable and adequate as to, and in the best interests of, each of the settling parties and the class members.

8. This action is dismissed: (1) with prejudice and without costs as to the class members who have not opted out or been otherwise excluded from the class, and (2) otherwise without prejudice and without costs; provided that this court shall, without affecting the finality of this judgment, reserve exclusive and continuing jurisdiction over this action for the purpose of, among other things, supervising the implementation, interpretation, and enforcement of the Settlement Agreement and this judgment.

9. The parties shall carry out the settlement in accordance with the terms of the Settlement Agreement.

The foregoing is the final Order and Judgment of the court. The clerk is directed to enter judgment accordingly. The parties are directed to publish this order and judgment appropriately.

Dated: March 29, 2020

ENTER:

HON. MELISSA A. CRANE, J.S.C.