Hess v EDR Assets LLC
2021 NY Slip Op 30739(U)
March 10, 2021
Supreme Court, New York County
Docket Number: 160494/2017
Judge: Frank P. Nervo

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART IV

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MICHELE E. HESS, JILL GOLDRING, MATTHEW HEAP, RUZANDRA HEAP, CRAIG GIBSON JR. and ANNA MILLER, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

EDR ASSETS LLC and PARKOFF OPERATING CORP.,

Defendants.

EDR ASSETS LLC

Counterclaim-Plaintiff,

-against-

JILL GOLDRING, GLYN PARSLEY, SONDRA STAMEN, JOHN DOE, and JANE DOE

Counterclaim-Defendants,

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DECISION AND ORDER

Index Number 160494/2017

Mot. Seq. 004

NERVO, J.

Plaintiffs move to certify this matter as a class action, appoint Michele Hess as the lead plaintiff and class representative, appoint Newman Ferrara LLP as counsel for the class, approve the proposed class notice, and compel defendants to provide contact information for the class. Defendants oppose contending some of the named plaintiffs waived the instant action against EDR Assets (hereinafter "EDR") in exchange for a waiver of outstanding rent. Defendants further oppose, contending that Hess is an inappropriate class representative.

CPLR §§ 901 and 902 set forth the requirements and considerations for certification of class-actions, to wit: "(1) that the class is so numerous that joinder of all members is impracticable (numerosity); (2) questions of law or fact common to the class predominate over questions of law or fact affecting individual class members (commonality); (3) the claims or defenses of the class representatives are typical of those in the class (typicality); (4) the class representatives will fairly and adequately protect the interests of the class [(adequacy)]; and (5) a class action represents the superior method of adjudicating the controversy (superiority)" (*Pludeman v. Northern Leasing Sys., Inc.*, 74 AD3d 420 [1st Dept 2010]). The party seeking class certification bears the burden of establishing the CPLR 901 criteria through nonconclusory admissible evidence (*id.*; *Feder v. Staten Is. Hosp.*, 604 AD2d 470 [2003]; *Chimenti v. American Express Co.*, 97 AD2d 351 [1983]). When determining whether proceeding as a class action is appropriate, the Court considers whether the claim is meritorious (*Brandon v. Chefetz*, 106 AD2d 162, 168 [1st Dept 1985]). However, this inquiry is limited, and class certification is appropriate if "on the surface there appears to be a cause of action which is not a sham" (*id.*).

I. Merit of Claim

As an initial matter, the Court finds the claims asserted here meritorious, for the purposes of class certification. The plaintiffs claim, inter alia, that while defendants were receiving J-51 tax benefits they failed to offer plaintiffs the requisite rent-stabilized leases. This cause of action is well established (*see e.g. Roberts v. Tishman Speyer Properties, L.P.*, 13 NY3d 270 [2009]; *Rossman v. Windermere*, 187 AD3d 527 [1st Dept 2020]). To the extent defendants contend that the purported waiver of by certain

tenants of their claims in this lawsuit bars certification of the class such claim is unsupported by case law or statute, and is therefore rejected.

II. Class Action Requirements

A. Numerosity

Numerosity is presumed at 40 members, and the legislature contemplated classes involving as few as 18 members (*Borden v. 40 East 55th St. Assoc., LP*, 24 NY3d 382, 399 [2014]; *see also Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 783 [2d Cir. 1995]).

Here, as in Borden, class member tenants may have moved out of the building, and thus a lack of information may prevent those who are aware of their rights from communicating with those who are similarly situated (*Borden*, 24 NY3d at 399 citing Mem. Of St. Consumer Protection Bd. at 3, Bill Jacket, L. 1975, ch. 207). The subject building consists of 38 units, and defendants have treated 37 of the 38 units as market rate, non-rent-stabilized apartments. Consequently, even assuming a single tenant for each unit, numerosity has been established. The Court notes that defendants, via their own stipulation, have waived the right to challenge numerosity on this motion (February 4, 2019 Stipulation ¶ 3, NYSCEF Doc. No. 98 & 151).

B. Commonality

Defendants contend that plaintiffs can only prevail if they establish violations of the rent stabilization laws and J-51 benefits as applied to their individual leases. Thus, they contend, these individual inquiries are inappropriate in a class action. Stated

differently, defendants contend that each class member's claims will be unique, requiring separate actions.

CPLR 901(a)(2) requires the common questions of law or fact predominate over those of individual class members (*supra*). The rule, "requires predominance not identity or unanimity among class members" (*Pludeman*, 74 AD3d at 423; *see also Friar v. Vanguard Holding Corp.*, 78 AD2d 83 [2nd Dept 1980]). The plaintiffs' unique factual circumstances will not serve as a bar to certifying a class where common questions of law or fact predominate across all inquiries (*City of New York v. Maul*, 14 NY3d 499 [2010]). This commonality inquiry weighs whether a class action promotes uniform decisions for similarly situated persons as well as the economy of time, effort, and expense, as compared to individual actions (*id.*; *see also Kudinov v. Kel-Tech Constr. Inc.*, 65 AD3d 481 [1st Dept 2009]).

The common questions of law and fact of the putative class here predominate over any individual issues or circumstances. All members of the putative class allege violations of the Rent Stabilization Law related to J-51 tax benefits. Proceeding as a class promotes uniformity as the putative members are tenants in the same building, managed/owned/operated by the same defendants. "Specialized proof will be largely unnecessary to resolve these common allegations" (*Maul*, 14 NY3d at 513; *see also Pludeman*, 74 AD3d 420, rejecting a defendant's similar claim that commonality was lacking). Therefore, the Court finds plaintiffs have established the requisite commonality.

C. TYPICALITY

Defendants' claim that a lack of typicality prevents class certification is palpably devoid of merit. Where a plaintiff's claims arise "from the same practice or course of conduct that gave rise to the remaining claims of other class members and is based upon the same legal theory [the typicality] requirement is satisfied" (*Friar v. Vanguard Holding Corp.*, 78 AD2d 83, 98 [2nd Dept 1980]; *Pludeman*, 74 AD3d at 423; *see also* CPLR 901[a][3]).

Here, the Rent Stabilization Law claims of the purported class are based upon the same course of conduct, the execution of non-stabilized leases, and the same legal theory, violation of the stabilization laws while receiving J-51 tax benefits. Consequently, typicality is met.

D. REPRESENTATION ADEQUACY

The class representative must demonstrate he or she will "fairly and adequately protect the interests of the class" (CPLR § 901[a][4]). This requirement, while distinct, "tends to merge" with the requirements of typicality and commonality (*Amchem Products, Inc., v. Windsor*, 521 US 591 [1997] discussing Fed.R.Civ.P. 23[a], the federal analogue to CPL 901[a][4]). The Court's inquiry as to the adequacy of the class representative concentrates on conflicts of interest, personal characteristics of the representative, and quality of class counsel (*Pruitt v. Rockefeller Ctr Props., Inc.*, 167 AD2d 14 [1st Dept 1991]; *see also Globe Surgical Supply v. GEICO Ins. Co.*, 59 AD3d 129 [2d Dept 2008]).

Here, plaintiff's counsel has decades of class-action and landlord-tenant litigation experience. As plaintiffs' attorney has assumed the financial risk of this litigation, the personal finances of the plaintiffs are irrelevant (*Wilder v. May Dept. Stores Co.*, 23 AD3d 646, 648-49 [2d Dept 2005]; *see also Pruitt*, 167 AD2d 14). Plaintiff's counsel avers that Plaintiff Hess has reviewed the complaint and approved it before filing. That Hess stated at a deposition she relied on legal expertise of her counsel in certain respects or misstated her earlier waiver of treble damages does not disqualify her as a representative, contrary to defendants' position. Additionally, as found by the Court of Appeals in *Borden*, "allowing tenants to opt out of the class avoids any question of the adequacy of the class representation" (24 NY3d at 400). There is no evidence that the named plaintiff is conflicted or otherwise an inadequate representative for the class. Consequently, this requirement is met.

E. Superior Method

Similarly, the practical application of the requirement that a class action be "superior to other available methods for the fair and efficient adjudication of the controversy," overlaps with the Court's inquiry into the other factors enumerated in CPLR § 901.

Here, the Court finds a class action is the superior method to adjudicate the claims herein. Separate actions brought by individual tenants alleging substantially similar claims against the same defendants would be inefficient and would not serve to promote uniformity. Joinder of the individual potential plaintiffs is not feasible here, as

communication among the numerous plaintiffs would be ineffective (*see e.g. King v. Club Med, Inc.*, 76 AD2d 123 [1st Dept 1980]).

II. Prohibition of Penalties in Class Action

Generally, class actions are not available where the recovery sought is a penalty. "[U]nless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty or minimum measure of recovery created or imposed by statute may not be maintained as a class action" (CPLR § 901[b]). However, where the plaintiffs have waived their entitlement to statutory penalties, they may proceed via a class action (*Borden v. 400 East 55th St. Assoc., LP,* 24 NY3d 382, 393 [2014]). Treble damages under the Rent Stabilization Law are penalties and thus, treble damages must be waived by plaintiffs to proceed as a class action (*id.* at 395-97*; see also Sperry v. Crompton Corp.*, 8 NY3d 204 [2007]). Stated differently, a tenant class member is entitled to the first third of a treble damages award under the RSL and appropriate interest, as that merely compensates the tenant, but CPLR 907[b] prohibits seeking the remaining two-thirds of the treble damages, as that imposes a penalty (*Borden*, 24 NY3d at 397).

Here, on reply, the plaintiffs have waived their right to seek treble damages or other penalties. Consequently, certification of the class is not prohibited on this basis.

III. NOTICE TO CLASS MEMBERS

CPLR § 904 (c) governs class action notices. "In determining the method by which notice is to be given, the court shall consider (I.) the cost of giving notice by each method considered (II.) the resources of the parties and (III.) the stake of each represented member of the class, and the likelihood that significant numbers of represented members would desire to exclude themselves from the class or to appear individually, which may be determined, in the court's discretion, by sending notice to a random sample of the class" (*id.*).

Here, the building consists of 38 units and thus a random sampling of the class is unnecessary, as the number of members who may wish to exclude themselves is unlikely to be significant. It is reasonable to infer that plaintiffs intend to send the proposed notice by mail, as they have requested the names and addresses of tenants on defendants' "rent-roll." Serving the notices by mail is cost-effective and such method does not appear to unduly burden the parties here.

Notwithstanding, the proposed notice fails to provide the dates J-51 benefits were in effect. Thus, a potential class member receiving the notice cannot determine whether their period of tenancy makes them an eligible class member – i.e. whether their period of tenancy overlaps with defendants' receipt of J-51 benefits. Consequently, the notice is rejected.

IV. COMPEL DISCOVERY

Finally, plaintiffs seek to compel defendants provide the current rent-roll for the subject building. Defendants oppose, contending the rent-roll contains information beyond what is needed to send notices to the class and contains tenants who have move in after the expiration of J-51 benefits.

Article 31 of the CPLR provides for broad discovery of all matter which may be material and necessary to maintain or defend an action (CPLR § 3101). Discoverability of material is greater than admissibility (*see generally Wiseman v. American Motors Sales Corp.,* 103 AD2d 230 [2d Dept 1984]). Defendants have not raised privilege or established what additional irrelevant material is contained in the rent-roll and the basis for denying disclosure, contending only that "'a current rent roll ... seeks information far beyond what they [plaintiffs] would need in order to disseminate the notice to members of the putative class" (NYSCEF Doc. No. 220 at p. 34 [NSYCEF Numbering]). Consequently, the motion to compel is granted, as below.

V. CONCLUSION

Accordingly, it is

ORDERED that the branch of plaintiffs' motion to certify the class is granted; and it is further

ORDERED that Newman Ferrara LLP is appointed as counsel for the class; and it is further

ORDERED that to the extent plaintiffs seek approval of the proposed class notice affixed to their papers, that branch of the motion is denied without prejudice, and with leave to renew, upon the submission of a further proposed notice, within 60 days, including the dates J-51 benefits were in effect and the tenancy dates eligible for this class-action, or, alternatively, by stipulation to be so-ordered by the Court; and it is further

ORDERED that should defendants wish to submit a counter-notice, they may do so within 60 days; and it is further

ORDERED that defendants shall provide contact information for the class, via a copy of the rent roll, to counsel for the class within 60 days; and it is further

ORDERED that counsel shall appear for a status conference on July 29th, 2021 at 2:15pm via Microsoft Teams.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: March 10, 2021

ENTER:

J.S.C.
HON. FRANK P. NERVO
J.S.C.