Hoffman v Fort 709 Assoc., L.P.
2021 NY Slip Op 30999(U)
March 17, 2021
Supreme Court, New York County
Docket Number: 160191/2017
Judge: Francis A. Kahn III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III **PART** IAS MOTION 32

Justice

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BRIAN HOFFMAN, THADDEUS DUFFY

Plaintiff,

- v -

FORT 709 ASSOCIATES, L.P.,

Defendant.

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INDEX NO. 160191/2017

MOTION DATE

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114

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

Upon the foregoing documents, the motion is determined as follows:

The within matter is a putative class action based upon alleged rent overcharges at a 49-unit multiple dwelling located at 709 West 176th Street, New York, New York. Plaintiff commenced this action seeking, *inter alia*, declaratory relief determining the regulatory status of certain apartments and the appropriate rent, injunctive relief and an award of monetary damages based upon an alleged rent overcharge. In sum, Plaintiff asserts Defendant improperly and fraudulently removed the apartments from rent stabilization by claiming application of the "luxury deregulation" provisions of the Rent Regulation Reform Act of 1993 (*see* RSL §§26-504.1, 26-504.2) while receiving tax benefits under New York City's J-51 program (*see Roberts v Tishman Speyer Props., L.P.,* 13 NY3d 270 [2009]). In the proposed amended complaint, Plaintiffs seek to define the class as:

> "All tenants living, or who have lived at the Subject Building, in apartments that were deregulated during the period when the owner of the Subject Building received J-51 tax benefits, except that the class shall not include (1) any tenants who vacated prior to November 15, 2013, or (2) any tenants whose occupancy in any such apartment commenced after J51 tax benefits to the Subject Building ended"

In addition, Plaintiff's seek certification of sub-class defined as: "All class members who are current tenants at the Subject Building".

Now, Plaintiffs move to amend their complaint, for class certification pursuant to CPLR §901 and §902 and the appointment of class counsel. A prior motion for similar relief was denied. The prior proposed amended complaint included an expansion of the lookback period for rent overcharges from four to six years based upon the Housing Stability and Tenant

Protective Act ("HSTPA") enacted in June 2019. That branch of the motion was denied as that proposed amendment was without merit in light of the decision in *Regina Metropolitan Co. LLC., v New York State Division of Housing and Community Renewal,* 35 NY3d 332 [2020], wherein retroactive application of HSTPA was found unconstitutional. The remaining branches of the prior motion were denied without prejudice to permit Plaintiff to evaluate the other proposed amendments considering *Regina*.

Leave to amend a pleading under CPLR §3025[b] is to be freely given "absent prejudice or surprise resulting directly from the delay" (*see e.g. O'Halloran v Metropolitan Transp. Auth.*, 154 AD3d 83 [1st Dept 2017]; *Anoun v City of New York*, 85 AD3d 694 [1st Dept 2011]; *see also Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]). All that need be shown in that "the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]). To justify denial of such a motion, the opposing party "must overcome a heavy presumption of validity in favor of [allowing amendment] (*McGhee v Odell*, 96 AD3d 449, 450, [1st Dept 2012]).

Defendant's assertion that leave to amend the complaint should be denied entirely is misplaced. Only the proposed claims as to the application of HSTPA were found without merit and the other proposed amendments were denied with leave to a new motion. Except for the cause of action based upon General Business Law §349, which is devoid of merit as only a private dispute is presented (*see Aguaiza v Vantage Props., LLC*, 69 AD3d 422 [1st Dept 2010]), the remainder of the proposed amendments are sufficiently pled and no prejudice has been demonstrated.

Accordingly, Plaintiff may file and serve an amended complaint in the form annexed to the moving papers absent the claim under GBL §349.

Turning to the branches of the motion concerning class certification, Defendant posits three procedural arguments for denial of class certification in advance of its arguments on the requisites for class certification.

Defendant's assertion that the motion is premature as its time to serve a responsive pleading to the amended complaint has not expired while possibly a correct interpretation of the text of the statute, is ultimately unavailing. The court is authorized to disregard this irregularity pursuant to CPLR §2001 particularly where, as here, Defendant has addressed the branch of the motion for class certification on the merits on multiple occasions (*see David B. Lee & Co. v. Ryan*, 266 AD2d 811, 812 [4th Dept 1999]). Further, at least one court has found that CPLR §902 "does not bar pre-answer class certification" since it only "sets a limit as to the time within which a certification motion must be filed" (*Tribbs v 326-338 E 100 LLC*, ___Misc3d___, 2019 NY Slip Op 32048[U][Sup Ct NY Cty 2019]).

Defendant's claim that pursuant to CPLR §901[b] class certification is inappropriate since the proposed class representatives have not "unequivocally" waived treble damages available under RSL §26-516[a] by reserving their right to seek same if class certification is denied is without merit (*see Yang v Creative Indus. Corp.*, ___Misc3d___, 2018 NY Slip Op 33209[U][Sup Ct NY Cty 2018]). Here, both Plaintiffs have waived their right to receive treble

damages if the matter proceeds as a class action and in conjunction with all causes of action in the complaint. Contrary to Defendant's assertion, nothing in *Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 393 [2014] precludes a Plaintiff from preserving the opportunity to seek treble damages if class certification is denied (*Yang v Creative Indus. Corp.*, supra).

Lastly, Defendant's assertion that the defined class is overbroad, and certification requires reaching the merits of each underlying claim is without merit (*see eg Woodson v Convent 1 LLC*, ___Misc3d___, 2018 NY Slip Op 33209[U][Sup Ct NY Cty 2018]).

Turning to the merits of the branch of the motion for class certification, construction of the class statute under Article 9 of the Civil Practice Law and Rules is liberal and broad (*see City of New York v Maul*, 14 NY3d 499 [2010]; *Diamond v New York City Hous. Auth.*, 179 AD3d 525 [1st Dept 2020]). Plaintiffs bear the burden to prove that all the prerequisites under CPLR §901 can be met (*see eg Weinstein v Jenny Craig Operations, Inc.*, 138 AD3d 546 [1st Dept 2016]) and "[w]hether a particular lawsuit qualifies as a class action rests within the sound discretion of the trial court" (*Kudinov v Kel-Tech Constr. Inc.*, 65 AD3d 481 [1st Dept 2009]).

CPLR §901[a] establishes five prerequisites to class certification: [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. In addition, if the above factors are satisfied, the Court must also consider the additional factors in CPLR §902[1] – [5].

As to numerosity, no "mechanical test" exists to gage satisfaction nor is there a set rule for the number of prospective class members which must exist before a class is certified (*Friar v Vanguard Holding Corp.*, 78 AD2d 83, 96 [2d Dept 1980]). The court must evaluate a case on its presented circumstances and should contemplate "the reasonable inferences and commonsense assumptions from the facts before it" (*id.*). Nevertheless, certain benchmarks have been noted in case authority including that a presumption of numerosity can arise from the existence of 40 members and that the "legislature contemplated classes involving as few as 18 members" (*Borden v 400 E. 55th St. Assoc., L.P.*, supra at 399).

Although this action has been pending for over three years, Plaintiffs Brian Hoffman ("Hoffman") and Thaddeus Duffy ("Duffy") identify only themselves as known class members in their affidavits in support of the motion despite both having been residents of the subject building for the entire claims period and both purporting to "know many of [their] neighbors". As to prospective class size, they offer only their "belief" it is "at least 40". Even if that number is treated as an inference, it is based, at least in part, on flawed data. Plaintiffs' assertion that the records described in the complaint indicate 19 of the 49 apartments were treated as deregulated is incorrect. In paragraph 20 and 21 of the amended complaint, Plaintiffs aver that 33 of 49 units were reported by Defendant as rent stabilized which equates to only 16 identified deregulated apartments. Further, with respect to potential former tenants, Plaintiffs, long-time residents of

the building who purportedly know many of their neighbors, offer only that "[t]here has been at least some turnover in the building" which is nothing more than speculation.

Accordingly, at present, Plaintiffs have failed to adequately demonstrate the numerosity element and the branch of the motion for class certification is denied.

3/17/2021
DATE

FRANCIS A. KAHN, III, A.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