Bykovtseva v DTH Capital, Inc.

2024 NY Slip Op 33692(U)

October 18, 2024

Supreme Court, New York County

Docket Number: Index No. 151838/2022

Judge: Paul A. Goetz

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **47**

Justice

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ALINA BYKOVTSEVA, JAMES LUKEZIC, HENRY PHAN, YUSHUYAN HAO

Plaintiffs,

- v -

DTH CAPITAL, INC, DTH PARTNERS, LLC, RBNB 20 OWNER, LLC,

Defendants.

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INDEX NO. 151838/2022

MOTION DATE 03/14/2024

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156

were read on this motion to/for ORDER MAINTAIN CLASS ACTION.

In this putative class action arising from disruptions in elevator service in the high-rise residential building located at 20 Exchange Place, New York NY 10005 (the building), plaintiffs move pursuant to CPLR §§ 901 and 902 to certify this case as a class action on behalf of "all persons who owed rent to Defendants for apartments between the 16th and 55th floors [of the building] between November 2021 and May 2022" (the class). Defendants oppose the motion on the grounds that: (i) plaintiffs lack proper standing against defendants DTH Capital Inc. (DTH Capital) and DTH Partners LLC (DTH Partners) (collectively, the DTH defendants); (ii) plaintiffs fail to satisfy the elements of CPLR § 901; (iii) the putative class representatives are incapable of serving as adequate class representatives; (iv) plaintiffs fail to satisfy the elements of CPLR § 902; (v) plaintiffs' counsel should not be appointed as class counsel; and (vi) plaintiffs' proposed class notice is improper.

Background

Defendant RBNB is the landlord and owner of the building (NYSCEF Doc No 81 ¶ 1), and the DTH defendants indirectly own a 75% interest in RBNB (*id.* ¶ 13).

The building is a 55-story high-rise with twelve elevators (NYSCEF Doc No 49 ¶ 18). Four elevators service floors 1-15; four elevators service floors 16-26; three elevators service floors of 27-55; and one additional elevator services floors 19-55 (*id.*). Plaintiff Bykovtseva resides in an apartment on the 45th floor of the building; plaintiff Lukezic resided in an apartment on the 51st floor from October 2020 to October 2021; plaintiff Phan resides in an apartment on the 18th floor[1]; and plaintiff Hao resided in an apartment on the 44th floor of the building from November 2021 to March 2022 (*id.* ¶¶ 6-9).

Plaintiffs allege that beginning in November 2021, there was very limited and unreliable elevator service, which led to many issues for the class including, *inter alia*, getting to work on time, taking dogs out for walks, receiving deliveries, refuse build-up in common areas, exhaustion from taking the stairs, overcrowding on elevators, and getting stuck on elevators (*id.* ¶¶ 19, 22-33). Plaintiff Lukezic, for example, moved out largely because his wife was pregnant at the time; she could not risk the strain of taking the stairs to their apartment, or being out of reach of medical personnel in case of emergency (*id.* ¶ 7).

Plaintiffs assert causes of action for: (1) breach of the implied warranty of habitability pursuant to New York Real Property Law (RPL) § 235-b; (2) deceptive and unfair trade practices in violation of New York General Business Law (GBL) § 349; (3) false advertising in violation of GBL § 350; and (4) negligent infliction of emotional distress[2] (*id.*).

[1] Plaintiff Phan's claims have been voluntarily discontinued.
[2] This final cause of action was dismissed by decision and order dated February 3, 2023 (NYSCEF Doc No 78).

The original complaint was served on DTH Capital on March 10, 2022 (NYSCEF Doc No 5). Around two weeks later, defendants began reaching out to residents to negotiate "rent concession[s] . . . in full satisfaction of any claims [they] may have related to the reduction in elevator service through March 31" of 2022, without apprising them of the pending action (e.g., NYSCEF Doc Nos 134, 136). By decision and order dated May 17, 2022, defendants were directed to send a notice of proposed class action lawsuit to any tenants who had been offered rent concessions, though some had already executed release agreements (NYSCEF Doc No 39).

A. Preliminary Issue: Standing

Defendants first argue that plaintiffs lack standing against the DTH defendants since RPL § 235-b only applies to the parties to a lease agreement, and RBNB is the only counterparty to the lease agreements entered into by the class. However, as noted in the decision and order of this court dated February 3, 2023, the "evidence is insufficient to conclusively establish under CPLR 3211(a)(1) that the named defendants are not owners or landlords under RPL" (NYSCEF Doc No 78). Thus, plaintiffs have standing against all defendants.

B. Class Certification Pursuant to CPLR §§ 901 and 902

The class action statute should be liberally construed (*Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 21 [1st Dept 1991]; *see also Stecko v RLI Ins. Co.*, 121 AD3d 542 [1st Dept 2014]) and provides that a class action may be maintained 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)). Once these prerequisites are satisfied, the factors in CPLR § 902 must be considered (*Ackerman v Price Waterhouse*, 252 AD2d 179, 191 [1st Dept 1998]):

> (1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) the impracticability or inefficiency of prosecuting or defending separate actions; (3) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (4) the desirability or undesirability of concentrating the litigation of the claim in the particular forum; [and] (5) the difficulties likely to be encountered in the management of a class action."

(CPLR § 902).

The plaintiff must establish by competent evidence the requirements set forth in CPLR §§ 901 and 902 for obtaining class certification (see *Ackerman*, 252 AD2d at 191) but a trial court has broad discretion in determining whether a matter qualifies as a class action (*Rabouin v Metro. Life Ins. Co.*, 25 AD3d 349, 350 [1st Dept 2006]).

"In determining whether an action should proceed as a class action, it is appropriate to consider whether the claims have merit" (*Pludeman v N. Leasing Sys., Inc.*, 74 AD3d 420, 422 [1st Dept 2010]). However, "inquiry on a motion for class action certification vis-à-vis the merits is limited to a determination as to whether on the surface there appears to be a cause of action which is not a sham" (*Brandon v Chefetz*, 106 AD2d 162, 168 [1st Dept 1985]; *see also Weinstein v Jenny Craig Operations, Inc.*, 138 AD3d 545 [1st Dept 2016]).

1. CPLR § 901(a)(1) – Numerosity

CPLR § 901(a) first requires numerosity such that joinder of all class members is impracticable. "There is no 'mechanical test' to determine whether . . . numerosity has been met 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 [2nd Dept 1980] [internal citations omitted]). "Each case depends upon the particular circumstances surrounding the proposed class and the court should consider the reasonable inferences and commonsense

assumptions from the facts before it" (*id.* [internal citations omitted]; see also *Globe Surgical Supply v Geico Ins. Co.*, 59 AD3d 129, 138 [2nd Dept 2008]).

Here, plaintiffs argue that this case meets the numerosity requirement because there are, in total, 316 potential class members who are eligible for some form or relief. Defendants argue that the class size is significantly smaller because 129 individuals do not have legally cognizable claims against RBNB (including 96 who executed a full release of their claims after receiving notice of this lawsuit), and 182 are subject to one or more unique defenses (e.g., those relocated to temporary accommodations, those granted rent concessions, and those who executed surrender and release agreements dated after March of 2022). However, as plaintiffs note, defendants have not submitted evidence sufficient to support these claims. For example, while plaintiffs identified which apartments they believe fall under each category of potential class members (NYSCEF Doc No 111), defendants have not submitted the releases that purportedly bar those residences' participation in this suit (NYSCEF Doc No 133 [showing certificates of completion for only 15 release agreements]). Therefore, the numerosity requirement has been satisfied.

2. CPLR § 901(a)(2) – Commonality

CPLR § 901(a)(2) requires commonality such that common questions of law or fact predominate over any questions affecting individual members. "[C]ommonality cannot be determined by any mechanical test and . . . the fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action" (*City of New York v Maul*, 14 NY3d 499, 514 [2010] [internal quotation marks and citation omitted]). Instead, the court should focus on whether class treatment will "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated" (*Friar*, 78 AD2d at

97 [internal quotation marks and citation omitted]). "[T]he rule requires predominance not identity or unanimity among class members" (*Pludeman*, 74 AD3d at 423).

Here, the principal issue is whether defendants, by failing to remedy the disruptions in elevator service, breached the warranty of habitability for those residents living in high-rise apartments. Defendants argue that the plaintiffs raise issues that require individualized inquiry into, *inter alia*, what time period each class member lived in the building, what floor they lived on, whether they signed a release or were relocated, and whether they were in compliance with their lease. Defendants also assert that plaintiffs cannot establish commonality with respect to damages, as this will require individual calculations and assessments of the facts. However, plaintiffs are correct that the common issues predominate over the individual issues. Plaintiffs' cause of action for violation of the warranty of habitability will involve the same analysis across all class members, which include residents of the 16th floor and above. The "individual" issues defendants raise will only impact the calculation of damages as to that individual class member, and "the need for an individualized determination of damages suffered by each class member generally does not defeat the requirement" of commonality (*Whitehorn v Wolfgangs Steakhouse, Inc.*, 275 FRD 193, 199 [SDNY 2011] [citation omitted]). Therefore, the commonality requirement has been satisfied.

3. CPLR § 901(a)(3) – Typicality

The typicality prerequisite is met where "plaintiff's claim derives 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" (*Friar*, 78 AD2d at 99; see also *Pludeman*, 74 AD3d at 420). "Typicality does not require identity of issues and the typicality requirement is met even if the

claims asserted by class members differ from those asserted by other class members." (*Pludeman*, 74 AD3d at 423).

Here, plaintiffs' claim and the proposed class members' claims all arise from the same alleged failure of defendants to remedy elevator disruptions in the building. While defendants argue that plaintiffs Lukezic and Hao are subject to unique defenses such as standing (since Lukezic moved out), offset (since Lukezic owed overdue rent), and credibility (since Hao made conflicting statements under oath), this does not detract from the fact that plaintiffs' claims are the same as those of the class. Therefore, the typicality requirement has been satisfied.

4. CPLR § 901(a)(4) – Adequacy of Representation

"Whether the representative party will fairly and adequately protect the interest of the class involves a number of considerations–whether a conflict of interest exists between the representative and the class members, the representative's background and personal character, as well as his familiarity with the lawsuit, to determine his ability to assist counsel in its prosecution and, if necessary, to act as a check on the attorneys, and, significantly, the competence, experience and vigor of the representative's attorneys and the financial resources available to prosecute the action" (*Pruitt*, 167 AD2d at 24 [internal quotation marks and citations omitted]).

Here, plaintiffs note that they "have submitted affidavits stating their willingness and ability to act as Class Representatives and demonstrating their familiarity with the lawsuit and the claims of those they seek to represent," and that plaintiffs' counsel, Lee Litigation Group (Lee), "is likewise adequate, as they have extensive experience with class action litigation" (NYSCEF Doc No 101).

Defendants argue that the putative class representatives are incapable of serving as such. They assert that plaintiffs have conflicts with the proposed class, noting that plaintiffs' affidavits

only give a boilerplate statement that no conflict exists, plaintiffs Lukezic and Hao's claims raise unique defenses, and plaintiff Lukezic authorized his personal attorney to try and negotiate an individual settlement. Defendants also assert the putative class representatives are unfit due to certain personal characteristics, citing their alleged unfamiliarity with the underlying facts of the case, questionable credibility, and plaintiff Lukezic's involvement as a defendant in a separate civil litigation. As plaintiffs note, however, these reasons are either trivial or unsupported and thus do not warrant disqualifying plaintiffs as class representatives.

Defendants also argue that Lee should not be appointed as counsel for the class because it "appears [they] have failed to inform their clients about recent settlement discussions and a settlement offer Defendants made on March 8, 2024" (NYSCEF Doc No 151). However, plaintiffs assert that the amount offered "was not a serious offer" and was below the amount they had already advised Lee would be acceptable (NYSCEF Doc Nos 152, 156). Thus, Lee did not breach its duty by failing to communicate the offer with plaintiffs and may serve as counsel for the class. Therefore, the adequacy of representation requirement is satisfied.

5. CPLR § 901(a)(5) – Superiority

A class action is the superior vehicle for resolving disputes where "damages that may have been sustained by any single [class member] will almost certainly be insufficient to justify the expenses inherent in any individual action, and the number of individuals involved is too large, and the possibility of effective communication between them too remote, to make practicable the traditional joinder of action" (*King v Club Med, Inc.*, 76 AD2d 123, 128 [1st Dept 1980]; see also *Alcantara v CNA Mgmt.*, 264 FRD 61, 66 [SDNY 2009]).

Given the expense and burden of litigating individually coupled with the potential for the imposition of different and perhaps, incompatible standards, a class action is the superior method of litigating this matter. Therefore, the superiority requirement has been satisfied.

6. CPLR § 902

Having met all the prerequisites for CPLR § 901(a), the CPLR § 902 factors also weigh in favor of class certification. Plaintiffs assert that there is a high volume of potential class members, and this court is appropriate forum because a majority of them live in New York City (CPLR § 902(4)). Defendants object, mainly because 17 other actions have been commenced against defendants relating to the disruptions in elevator service, which also suggests that it is not impractical or inefficient for class members to maintain separate actions. As plaintiffs note, however, those 17 actions represent a small portion of the total number of affected units. While it may be possible for residents to bring individual actions, it still appears that a class action is the superior vehicle for resolving the dispute.

C. CPLR § 903 – Class Description

CPLR § 903 provides that "[t]he order permitting a class action shall describe the class. When appropriate the court may limit the class to those members who do not request exclusion from the class within a specified time after notice."

Plaintiffs' description of the class, which will be adopted, is as follows:

> All persons who owed rent to Defendants for apartments between the 16th and 55th floors at 20 Exchange Place anytime between November 2021 and May 2022, excluding persons who (a) signed rent abatement agreements (accompanied by a waiver) covering the entire duration of their tenancy at 20 Exchange Place between November 2021 and May 2022 *and* (b) were apprised by Defendants of the instant action before signing each legal releases for each rent abatement.

D. CPLR § 904 – Notice of Class Action

CPLR § 904 (b) provides that "reasonable notice of the commencement of a class action shall be given to the class in such manner as the court directs." In addition, CPLR § 904(c) states that "[t]he content of the notice shall be subject to court approval."

Plaintiffs submitted a proposed notice of class action in support of this motion (NYSCEF Doc No 102). Defendants first object on the grounds that the notice assumes an opt-out process, rather than an opt-in. However, defendants provide no basis for seeking an opt-in process (NYSCEF Doc No 151, citing *Jiannaras v Alfant*, 27 NY3d 349 [2016] [court held that "the omission of an *opt-out* right deprived [potential class members] of their ability to pursue claims arising from the merger" and did not discuss opt-in procedure at all] [emphasis added]). Defendants also "request that the Court direct the parties to meet and confer regarding distribution of the proposed class notice" (*id.*) but fail to identify what issues it has with plaintiffs' distribution plan (NYSCEF Doc No 101 [proposing distribution via first class mail or, where an address is unknown, via email and/or text]). Therefore, plaintiffs' proposed notice of class action will be approved.

Conclusion

Accordingly, it is hereby

ORDERED that plaintiff's motion to certify a class consisting of all persons who owed rent to Defendants for apartments between the 16th and 55th floors at 20 Exchange Place anytime between November 2021 and May 2022, excluding persons who (a) signed rent abatement agreements (accompanied by a waiver) covering the entire duration of their tenancy at 20 Exchange Place between November 2021 and May 2022 *and* (b) were apprised by defendants of

the instant action before signing each legal releases for each rent abatement is granted; and it is further

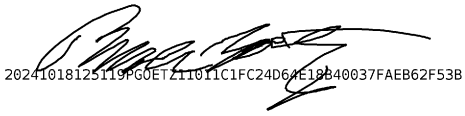
ORDERED that plaintiffs Alina Bykovtseva, James Lukezic, and Yushuyan Hao are appointed representatives of the class; and it is further

ORDERED that Lee Litigation Group is appointed as class counsel; and it is further

ORDERED that plaintiffs' proposed notice of class action (NYSCEF Doc No 102) is approved for distribution to the class via first class mail or, where an address is unknown, via email and/or text; and it is further

ORDERED that within 45 days of entry of this order, defendants shall produce to plaintiffs a list of all potential class members (as outlined in NYSCEF Doc No 111), identifying each member's name, apartment number, last known mailing address, phone numbers and e-mail addresses, and whether the member presently resides in the building; and it is further

ORDERED that plaintiffs' counsel shall distribute the notice of class action to potential class members within 10 days of receipt of the class list from defendants.



10/18/2024
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE