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[*1]

Magzamen v UWS Ventures III LLC
2021 NY Slip Op 21151
Decided on June 1, 2021
Civil Court Of The City Of New York, New York County
Ortiz, J.
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Decided on June 1, 2021

Civil Court of the City of New York, New York County

**Sol Magzamen, Isanec Hanley, Niki Matsoukas, Sandra Valles,
David Greenstein, and Sonia Garcia in Her Capacity as Vice
President of Westgate Tenants Association, Petitioners,**

against

**UWS Ventures III LLC et. al., Respondent(s)-Owner(s), The
Department of Housing Preservation and Development, Co-
Respondent.**

**Sol Magzamen, Isanec Hanley, Niki Matsoukas, Sandra Valles,
David Greenstein, and Sonia Garcia in Her Capacity as Vice
President of Westgate Tenants Association, Petitioners,**

against

**UWS Ventures III LLC et. al., Respondent(s)-Owner(s), The
Department of Housing Preservation and Development, Co-
Respondent.**

L & T 6128/19 and 6129/19

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Frances A. Ortiz, J.

Recitation as required by CPLR 2219(a), of the papers considered in the review of the respondent's motion to dismiss and/or summary judgment or discovery and petitioners' cross motion to amend the petitions.

Papers Numbered

Order to Show Cause, Affirmation & Exhibits 1

Notice of Cross Motion, Affirmation, Affidavits in Opposition to Petitioner's Order to Show Cause 2 & NYSCEF 3

Petitioners' Memorandum of Law 3/NYSCEF 4

Affirmation in Opposition to Cross Motion 4/NYSCEF 5

Reply by Petitioners 5/NYSCEF 6

Exhibits (A & B) 6/NYSCEF 7 & 8

Upon the foregoing cited papers, the Decision/Order of this Court on respondent's motion to dismiss and/or summary judgment against certain parties and/or discovery and petitioner's cross motion to amend the petitions is as follows:

These are two HP Actions brought by petitioners/tenants. The subject premises consists of separate buildings, located at 120 160 West 97th Street^[FN1] and 135 West 96 Street^[FN2], New York New York 10025. Petitioners seek a finding that conditions described in the petitions constitute violations. After such finding, petitioners seek an order directing respondent/owners to correct the violations at the subject premises as prescribed in the *NYC Adm. Code §27-2115 (c)*.

According to the petitions, all of the petitioners except for one are individual tenants^[FN3] of the subject buildings. The other petitioner is "The Westgate Tenants Association" appearing by [*2]Sonia Garcia in her capacity as Vice President of Westgate Tenants Association. Specifically, paragraph one (1) of the petition states that The Westgate Tenants Association is a voluntary association of rent regulated tenants living at Westgate. Westgate is an apartment complex of various buildings. The petitions seek to correct violations relating to building maintenance, noise and health codes arising out of extensive façade and balcony work done to the buildings in compliance with Local Law 11.^[FN4] According to respondent/owner, Local Law 11 required them " to perform Cycle 8 building inspections " and after such inspections it was determined that the buildings' balconies required replacement due to water infiltration, corroded reinforcing bars with spalling

deteriorated edges at some locations, replacement of lintels and other masonry work. (*Yokos Affir'm* ¶ 9 & 10). As a result of this work, petitioners have faced sealed balcony doors, windows, and air conditioning sleeves, denial to the buildings' courtyards, excessive noise and vibrations from jackhammers and other construction equipment. (Memorandum of Law pg. 2, NYSCEF 4).

Respondent/owners appeared and answered the petitions in August 2019. (Exhibits C & D). Subsequently, respondents moved to dismiss the petitions based on documentary evidence and *res judicata*. The motion to dismiss was denied by Judge Jack Stoller in a decision dated December 23, 2019. Upon restoration during the COVID-19 pandemic, this Court conferenced the matter on November 20, 2020 and wrote a decision adjourning the matter for pre-trial conference and trial.

RESPONDENT'S MOTION

Now, respondents/owners move to dismiss the petition against Westgate Tenants Association for lack of standing to maintain this HP Action. In lieu of dismissal, owners seek summary judgment against petitioner, Westgate Tenants Association, also based on lack of standing. In sum, respondents/owners assert that petitioner, Westgate Tenants Association, lacks standing because it has no stake in the outcome of the proceeding and that the claims sought are individual in nature. Upon such dismissal, respondents seek to limit the issues of fact and law and trial evidence regarding the remaining petitioners, Sol Magzamen, Isanec Hanleym, Niki Matsoukas, Sandra Valles, David Greenstein and Sonia Garcia, as it relates only to conditions in their individual apartments and building wide issues raised in their respective petitions. Additionally, they ask to limit how those petitioners are directly impacted by those individual and building-wide conditions. Alternatively, respondents seek an order directing pre-class discovery as to the issue of whether petitioners meet the threshold for class certification and pre-trial discovery of petitioners' expert Arthur Atlas in the form of interrogatories.

DISCUSSION

According to *CPLR §3211 (e)*, a party may move to dismiss a cause of action on one or more grounds set forth in *CPLR §3211 (a)* at any time before a responsive pleading is served and *no more than one such motion shall be permitted*. This single motion rule prohibits parties from making successive motions to dismiss a pleading. [*Bailey v. Peerstate Equity Fund, L.P.*, 126 AD3d 738](#) (2d Dept 2015).

Here, respondents on November 19, 2019 moved to dismiss the petitions based on documentary evidence and *res judicata*. *CPLR §3211 (a) (1) and (5)*. The motion was denied [*3] by Judge Jack Stoller in a decision dated December 23, 2019. Now, eighteen (18) months later, respondents move for a second time to dismiss the petition. The single motion rule prohibits respondents from making such a second motion to dismiss. As such, respondents' *CPLR §3211* motion to dismiss is denied in violation of *CPLR §3211 (e)*. *Bailey v. Peerstate Equity Fund, supra*.

When the issue of standing is raised by a defendant, the plaintiff must prove its standing in order to be entitled to relief. However, if a defendant in a motion for summary judgment raises standing, then the burden is on the defendant to establish, *prima facie*, the plaintiff's lack of standing as a matter of law. The *prima facie* showing is governed by the plaintiff's allegations made in the pleadings. [*LGF Holdings, LLC v. Skydel*, 139 AD3d 814](#) (2d Dept 2016); [*Cenlar FSB v. Lanzbom*, 168 AD3d 670, 671](#) (2d Dept 2019). Here, respondents have failed to demonstrate their *prima facie* entitlement to judgment as a matter of law dismissing the petition for lack of standing against Westgate Tenants Association based on the multiple reasoning discussed below.

Under NYC Adm. Code § 27-2115 (h)(1) and (i), any tenant or *group of tenants* may request issuance of housing maintenance code violations against an owner and may *apply individually or jointly*, to the housing part for an order directing the owner and the Department of Housing Preservation and Development ("HPD") to appear before the court. Accordingly, Westgate Tenants Association has standing [FN5] to bring this action under NYC Adm. Code § 27-2115 (h) (1) and (i).

There are many public policy benefits to tenants commencing an HP Action jointly as a tenants association. First, violations may affect multiple apartments and tenants in the same building. Second, forming a tenants association consolidates potential building wide issues, unites the individuals' resources, promotes judicial economy, and can designate a single

member of the association to speak on behalf of the others. Third, a tenant's association does not need to be incorporated to proceed in an HP Action.

Additionally, actions may be brought by the president or treasurer of an unincorporated association on behalf of the association in accordance with the provisions of the general associations law. CPLR§ 1025. Specifically, NY Gen. Ass'ns Law §12 indicates,

An action or special proceeding may be maintained, by the president or treasurer of an unincorporated association to recover any property, or upon any cause of action, for or upon which all the associates may maintain such an action or special proceeding, by reason of their interest or ownership therein, either jointly or in common.

If an association has no officer who is denominated "president" or "treasurer," the most closely analogous officer (e.g., "chairman") will suffice. *See Pasch v. Chemoleum Corp.*, 26 Misc 2d 918, 920 (Sup.Ct.N.Y.Co.1960), affirmed, 13 AD2d 470, (1st Dept 1961).

Here, Westgate Tenants Association is a voluntary association of tenants in a residential complex of 417 apartments in separate buildings that was formed to enforce the statutory rights of tenants. They formed to collectively address their concerns. (*Clark Aff'd* ¶ 4). Currently, Jane Clark is the newly elected President and Chair of the Westgate Tenants Association. (*Id.* ¶ 1). [*4]As such, Westgate Tenants Association by its treasurer or president/chair has standing to maintain this HP Action based on *CPLR 1025* and *NY Gen. Ass'ns Law* § 12.

Lastly, the Court of Appeals has addressed the issue of an association's standing with the following three prong requirements:

First, if an association or organization is the petitioner, the key determination to be made is whether one or more of its members would have standing to sue; *Second*, an association must demonstrate that the interests it asserts are germane to its purposes so as to satisfy the court that it is an appropriate representative of those interests. *Third*, it must be evident that neither the asserted claim nor the appropriate relief requires the participation of the individual members. These requirements ensure that the requisite injury is established and that the organization is the proper party to seek redress for that injury. *Soc'y of Plastics Indus., Inc. v. Cty. of Suffolk*, 77 NY2d 761, 775 (1991).

Additionally in the first prong, petitioners must show that one or more of its members has suffered an the injury that falls within the zone of interests protected by the legal authority being invoked. [*Citizens Emergency Comm. to Pres. Pres. v. Tierney*, 70 AD3d 576](#) (1st Dept; 2010). Here, the statutory legal authority being invoked is the HP Action created by NYC Adm. Code § 27-2115 (h)(1) and (i) and the Civil Court Act §110 (a). An HP

" proceeding transcends an individual landlord-tenant dispute, and is part of a broad statutory enforcement mechanism charged with the responsibility of enforcing the broad public interest in maintaining housing standards HPD discharges its duty by investigating building conditions, issuing violations and levying civil penalties Although the tenant in an HP proceeding benefits directly by an order to correct violations, the public also benefits through the preservation of scarce housing stock. To be sure, HPD's participation in the process assures that important building-wide problems, not merely issues relating to a single unit, will be examined and remedied." [*D'Agostino v. Forty-Three E. Equities Corp.*, 16 Misc 3d 59](#), 60—61 (AT 1st Dep't 2007).

First, applying the standards raised in *Soc'y of Plastics Indus., Inc. v. Cty. of Suffolk*, *supra.*, Westgate Tenants Association has standing to sue in these HP Actions pursuant to NYC Adm. Code § 27-2115 (h)(1) and (i), CPLR§ 1025 and NY Gen. Ass'ns Law §12 for the reasons discussed above. Second, Westgate Tenants Association has demonstrated that its interest in these HP Actions is germane to its purpose which is to address building-wide maintenance, noise and health codes arising out of extensive façade and balcony work done to the buildings in compliance with Local Law 11 on behalf of its association members. A single member like Jane Clarke (the President/ Chairperson) of the association can speak on behalf of the others to address building wide housing maintenance code violations in the buildings. Third, it is evident that the relief sought in these HP Action for an order to correct does not require the participation of individual tenants or members. There is no need for individualized proof of each cause of action and the Westgate Tenants Association is a proper party that can seek redress for the asserted injuries described in the petitions.

Accordingly, respondent's motion for summary judgment is denied.

Alternatively, respondents seek an order directing pre-class discovery as to the issue of whether petitioners meet the threshold for class certification and pre-trial discovery of petitioners' expert Arthur Atlas in the form of interrogatories and demand for expert witness information. CPLR §901

CPLR §901(b) states that an action is expressly barred from class formation unless the [*5] statute imposing a penalty specifically states otherwise. Here, this HP Action may impose civil penalties and is authorized under NYC Adm. Code § 27-2115 (h)(1) and (i) and Civil Court Act §110 (a), and neither statute provides for class formation. Accordingly, these HP Actions can not be maintained as class actions in the housing court. Therefore, respondents' motion seeking pre-class discovery as to the issue of class certification is denied, since, here, as a matter of law there is no basis for class action relief.

In summary proceedings leave to conduct discovery may be granted where the movant demonstrates a meritorious claim, ample need, that the discovery sought is tailored to the facts of the case, and no prejudice to the opposing party. *New York University v. Farkas*, 121 Misc 2d 643 (Civ. Ct. NY Cty 1983). Here, respondents have not shown ample need to inquire about petitioner's expert witness Arthur Atlas. Actually, respondents have already been provided with the name of petitioners' expert. The proposed questions in the interrogatories are appropriate for cross examination at trial. This trial has been delayed enough and such further delay will prejudice the petitioners who are seeking an order to correct.

PETITIONERS' CROSS MOTION

Petitioners cross move pursuant to CPLR §3025 (b) for leave to serve and file the proposed amended petitions. Under CPLR §3025 (b), a party may amend its pleading or supplement it by setting forth additional or subsequent occurrences at any time by leave of court. Leave shall be freely provided upon such terms as may be just, when there is no significant prejudice or surprise to the opposing party and where the evidence submitted in support of the motion indicates that the proposed amendment may have merit, *Hothan v. Mercy Med. Ctr.*, 105 AD3d 905, 906 (2nd Dep't 2013); *Jacobson v. McNeil Consumer & Specialty Pharms.*, 68 AD3d 652, 653 (1st Dep't 2009). Additionally, 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.

Here, petitioners submit proposed "Amended Petitions" for HP 6128/19 and HP 6129/19 (Exhibit 8). Essentially, the main changes from the original petitions involve the amendment of the named parties. Now, the amended petitions seek to have "Jane Clark" as a petitioner

individually and in her capacity as Chair of the Westgate Tenants Association. Also, the amended petitions seek to have Pat Keeton as a petitioner individually and in her capacity as Treasurer of the Westgate Tenants Association. The amended petitions seek to add Vennette Rondeau as another petitioner who is a tenant and legal liason for Westgate Tenants Association. Lastly, petitioners seek to amend the petitions to reflect "Brian Garland" as co-respondent and managing agent.

Jane Clark in her affidavit in support of the cross motion to amend the petitions states that on April 21, 2020 she was elected President of Westgate Tenants Association, that Pat Keeton is the new treasurer, that Sonia Garcia is no longer the Vice President, that Sol Magzamen previously the legal liason was replaced with Vennette Rondeau, and that the current HPD multiple dwelling registration reflects Brian Garland as managing agent and not Donald Hastings. (Clarke Aff'd ¶ 33).

Here, granting the cross motion to amend the petitions does not pose a significant prejudice or surprise to the respondent/owners and the evidence submitted in the affidavit of Jane Clark supports that the proposed amendment has merit. *Hothan v. Mercy Med. Ctr.*, 105 AD3d 905, *supra*. Accordingly, the petitioners' cross motion to amend the petitions is granted. The proposed amended petitions in *Exhibit 8* to the cross motion are deemed forthwith served [*6] and filed. Respondents/owners may file and serve an amended answer in (30) thirty days of the date of this decision.

The matter is referred to Trial Part S for pre-trial conference and trial. The Part S court attorney will contact the parties with a pre-trial conference date and time.

ORDERED: Respondents motion to dismiss the matter against Westgate Tenants Association is denied.

ORDERED: Respondents motion for summary judgment against Westgate Tenants Association is denied.

ORDERED: Respondents motion for pre-class discovery and interrogatories of the expert witness is denied.

ORDERED: Petitioners cross motion to amend the petitions is granted.

ORDERED: The clerk will amend the caption of both petitions herein to reflect the following: "Jane Clark as a petitioner individually and in her capacity as Chair of the Westgate Tenants Association," "Pat Keeton as a petitioner individually and in her capacity as Treasurer of the Westgate Tenants Association," add Vennette Rondeau as another petitioner and amend the caption to reflect "Brian Garland" as co-respondent and managing agent.

This is the decision and order of the Court, copies of which are being emailed to those indicated below.

Dated: June 1, 2021

Judge, Frances A. Ortiz

Footnotes

Footnote 1: This building is the subject premises for Index Number 6128/19.

Footnote 2: This building is the subject premises for Index Number 6129/19.

Footnote 3: Sol Magzamen, Isanec Hanley Niki Matsoukas, Sandra Valles and David Greenstein

Footnote 4: Local Law 11 addresses pedestrian safety by preventing bricks, concrete and other façade work from falling onto pedestrians.

Footnote 5: An appellate court has concluded that a petitioner/tenants' association has standing in an Article 78 proceeding to challenge an agency's issuance of a Certificate of No Harassment to a hotel owner. *Martha Washington Tenants Ass'n v. Roberts*, 292 AD2d 225, 226 (1st Dep't 2002)

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