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"Marcondes v. Fort 710 Assoc., L.P." (2022). *All Decisions*. 462.
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Marcondes v Fort 710 Assoc., L.P.
2022 NY Slip Op 50498(U)
Decided on June 14, 2022
Supreme Court, New York County
Kraus, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on June 14, 2022

Supreme Court, New York County

Alice Marcondes, Aimee Bellman, Kyle Dixon, Daniel Propati, Laura Salvatierra, P. Palmer, Christopher Williams, Plaintiff,

against

Fort 710 Associates, L.P., Defendant.

Index No. 160189/2017

Sabrina Kraus, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 41, 44, 45, 46, 48 were read on this motion to/for ORDER MAINTAIN CLASS ACTION.

BACKGROUND

This action was commenced as a putative class action against Fort 709 Associates, L.P., on or about November 15, 2017. Plaintiffs initiated this action, on behalf of themselves and on behalf of all other past, present and prospective tenants residing at 710 West 173rd Street in the County, City and State of New York (Subject Premises).

The Subject Premises is subject to rent regulation by virtue of defendant's receipt of J-

51 tax benefits. Defendant has continuously received J-51 tax benefits commencing in 1998 and expected to terminate in 2032. Plaintiffs allege defendant systematically schemed to remove tenants from the protections of Rent Stabilization by failing to properly register the units with DHCR, creating false records of inflated rents with DHCR and in the provision of leases to tenants, requiring tenants to sign riders waiving rent stabilization and removing units from rent regulation through fictious Individual Apartment Improvements (IAIs).

PENDING MOTION

On July 26, 2018, plaintiffs moved for an order pursuant to CPLR §901 et seq. certifying a class and subclass. The motion was initially briefed and submitted to the court on or about August 13, 2018.

On or about June 22, 2021, said court directed the parties to supplement their submissions to address how the Court of Appeals holding in *Regina Metro Co., LLC v. New York State Division of Housing and Community Renewal* 35 NY3d 332 applies to the pending motion. The supplemental papers were submitted by plaintiffs in July 2021, and by defendant in September 2021.

Subsequently, the action and pending motion were assigned to this Court for determination.

For the reasons stated below, the motion is granted.

ALLEGED FACTS

The Complaint was filed on behalf of current and former tenants who have resided in the Subject Premises during four years prior to commencement of this action, who have been treated as deregulated.

This action is one of several related actions:

• Morgan Gould et al v. Fort 250 Associates, Index No. 160190/2017

• Emma Griffith et al v. West 171 Associates, Index No. 159398/2017

• Brian Hoffman et al v. Fort 709 Associates, Index No. 160191 / 2017

• Alice Marcondes et al v. Fort 710 Assoc, Index No. 160189/2017

• Lietavova et al v. 127 East 101 LLC, Index No. 152075/2018

Each of these actions seeks virtually identical relief, based upon substantially the same fraudulent practice by the landlord being challenged herein.

The buildings in each of those related actions are multiple dwellings located in the Washington Heights section of Northern Manhattan. Despite being owned by various corporate entities, they are all owned by the same principal. The principal owner listed on the Multiple Dwelling Registrations with the Department of Housing Preservation and Development ("HPD") for the buildings in each case, is Mark Scharfman.

Plaintiffs allege that defendant has continuously received J-51 tax benefits, commencing in 1998, and expected to terminate in 2032. Plaintiffs allege that between 2010 and 2016, apartments in the Subject Premises were unlawfully deregulated, and that this pattern permeated not only the Subject Premises, but the buildings in the related cases as well.

In 2016, plaintiff Marcondes commenced her tenancy. Plaintiff Bellman commenced her tenancy in 2015. Plaintiffs Dixon, Propati, Salvatierra, and Palmer commenced their tenancies in 2014. Plaintiff Williams commenced his tenancy in 2009. Plaintiffs allege they were compelled to sign unlawful lease riders entitled "Notice of Unregulated Status," waiving their RSL rights, and that this was a fraudulent form rider, and it was defendant's practice to use it to deceive tenants. These riders were used throughout Mark Scharfman's J-51 buildings in the related cases.

Plaintiffs allege that between 2010 and 2016, defendant consistently and unlawfully deregulated the tenants' apartments. In 2016, the Attorney General circulated a letter to landlords, reminding them to [*2]obey the law as determined by *Roberts* some eight years before. Plaintiffs allege defendant used this as an opportunity not to correct a good faith error, but to lock in its ability to overcharge tenants by re-registering numerous apartments at an unlawfully high rent, having nothing to do with the last rent registered, and exceeding the rent actually paid by the tenants at that time.

Plaintiffs allege said registrations were a blatant violation of the RSC, RSL, *Roberts*, *Gersten*, and the attorney General's instruction.

With each lease renewal, defendant failed to provide Rent Stabilization riders, which are mandated by RSL §826-511(d). Defendant systematically failed to offer tenants the option of a one or two-year lease, when in fact tenants in a J-51 Building are entitled to continued

occupancy under the RSC and RSL. Arbitrary evictions, rent hikes, and refusal to renew leases were constant threats to the tenants of defendant's buildings, including the Subject Premises.

Further, none of the plaintiffs' leases contain the required J-51 notice, "informing such tenant that the unit shall become subject to deregulation upon the expiration of such [J-51] Tax benefit period," pursuant to RSL §826-504(c).

DISCUSSION

Class Certification

The State's rules on class actions, like their federal counterparts, "favor the maintenance of class actions" and support "a liberal interpretation" (*Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 20-21 [1st Dept 1991] [internal quotation marks and citation omitted]; *see City of New York v Maul*, 14 NY3d 499, 509 [2010] [*Maul*] [courts should broadly construe criteria set forth in CPLR 901 (a)]).

In the context of rent-stabilization challenges against landlords who allegedly violated J-51, "CPLR 901 (b) permits . . . plaintiffs to utilize the class action mechanism to recover compensatory overcharges . . . even though the Rent Stabilization Law of 1969 . . . does not specifically authorize class action recovery" (*Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 389-90 [2014]). Although damages may vary among the class members, this "does not per se foreclose class certification" (*Andryeyeva v New York Health Care, Inc.*, 33 NY3d 152, 185 [2019]). It is appropriate to bring a class action with one or more representative plaintiffs if 1) the size of the class is so large that it is impracticable to include them all as named plaintiffs, 2) common questions of law or fact predominate over questions which only impact one or more class members, 3) the named plaintiffs assert claims which are typical of the claims of the class, 4) the representative plaintiffs are appropriate individuals who will fairly, adequately protect the class' interests, and 5) a class action is the best and most efficient way to proceed (CPLR 901 [a]). The court considers these five factors in its evaluation of whether a class action is appropriate (*Rabouin v Metropolitan Life Ins. Co.*, 25 AD3d 349, 350 [1st Dept 2006]).

Courts liberally construe the criteria in part because "the Legislature intended article 9 to be a liberal substitute for the narrow class action legislation which preceded it" (*Maul*, 14 NY3d at 509 [citation and internal quotation marks omitted]). "The determination of whether . . . a matter qualifies as a class action . . . rests within the sound discretion of the motion

court" (*Rabouin*, 25 AD3d at 350). However, the class representatives must satisfy an evidentiary burden, absent which the court denies certification. For example, "general and conclusory allegations in the affirmation of . . . counsel and the exhibits attached thereto" will not suffice (*Rallis v City of New York*, 3 AD3d 525, 526 [2d Dept 2004]).

It is well settled that qualified plaintiffs may use the class action mechanism to recover rent overcharges against landlords who deregulated apartments in contravention of the Rent Stabilization Laws while accepting tax benefits under New York City's J-51 tax abatement program (*Hoffman v Fort 709 Associates LP* 204 AD3d 516).

There are five prerequisites for class certification: numerosity, common questions, typicality, adequacy of representation and superiority.

Numerosity

CPLR § 901(a)(1) requires that the individuals constituting the class be so numerous that joinder of all members is impossible. There is no mechanical test or set quantity of prospective class members which must exist to determine whether the class membership is so numerous as to make actual joinder impracticable. *Pajaczek v. Rema Construction Corp*., 18 Misc 2d 1140(A) (Sup. Ct. NY Co., 2005), *citing Pesantez v. Boyle Envtl. Servs*., 251 AD2d 11 (1st Dept. 1998). It has been held that the legislature contemplated classes involving as few as 18 members (*Borden v 400 E 55th St. Assoc. LP* 24 NY3d 382, 383).

In this case there are 47 units alleged to be involved and some of those units have had multiple tenants during the applicable period. Plaintiffs assert that accounting for co-tenancies and tenants who have lived in those apartments within the last four years and moved out, the number of affected members of the class is close to one hundred (100). Plaintiffs further allege that the class is easily defined because every unit in the Subject Premises is subject to rent stabilization, every deregulation was unlawful, every deregulated rent charged within the last four years prior to commencement of this action is an unlawful overcharge, and every "Notice of Deregulated Status" during the same period was a willful deception of the tenants.

Finally, plaintiffs argue that the precise number of unlawful leases provided to the scores of current and former tenants during the relevant period is information that is under the control and knowledge of the defendant and must be disclosed to accurately determine the size of the class. *See Gross v. Ticketmaster*, 5 Misc 3d 1005 (Sup. Ct. NY Co. 2004); *Smith v.*

Atlas International Tours, 89 AD2d 762, *Grumman Aerospace Corp. v. Rice*, 196 AD2d 572, 573 (2d Dept. 1993). *See also Berenstein v. Kelso & Company Inc*., 213 AD2d 314 (1st Dept. 1997).

Based on the foregoing analysis the court finds plaintiffs have established the element of numerosity.

Plaintiffs Have Established Commonality

Under *Borden*, commonality is satisfied. There, as here, "the predominant legal question involves one that applies to the entire class—whether the apartments were unlawfully deregulated" while the owner received J-51 benefits" (*Borden*, 24 NY3d at 399). The single legal question of violating the J-51 requirements, common to the entire class, is enough to warrant class certification. *See In re Coordinated Title Ins. Cases*, 2 Misc 3d 1007(A); *Akerman v. Price Waterhouse*, 252 AD2d 179, 201 (1st Dept. 1998).

Commonality does not mandate identical issues. It merely requires the predominance of the central question, which is whether, in this case, the defendant is in violation of its J-51 obligations. *See Weinberg v. Hertz Corp*., 116 AD2d 1 (1st Dept. 1986) *aff'd*, 69 NY2d 979 (1986), *Pludeman v. Northern Leasing Systems, Inc*., 74 AD3d 420 (1st Dept. 2010). The alleged fraudulent scheme perpetrated through unlawful leases, false notices, and unlawful, improper registrations, predominates in this action. The issue renders the class action appropriate to achieve the economies of time, effort and expense and promote uniformity of decision and to persons similarly situated. *Friar v. Vanguard Holding Corp*., 78 AD2d 83, 97 (2d Dept. 1980).

Based on the foregoing, the court finds plaintiffs have established the element of commonality.

Typicality

Typicality ensures similarity of the claims of the representative plaintiffs and the other class members. The requirement is satisfied if the "plaintiff's claim derives from the same practice or course of conduct that give rise to remaining claims of other class members and is based upon the same legal theory." *Friar, supra* at 99.

Plaintiffs allege that based on the unlawful riders, and illegal registrations a clear pattern of defendant's fraud is established not only as to the Subject Premises but also in the other

related actions and that the fraud is typical of that perpetrated by defendant against tenants in its J-51 buildings.

The paramount issue on typicality is defendant's conduct, and the fact that the extent of the damage may vary from apartment to apartment does not preclude class certification. *See Pludeman, supra* 424. The proposed class representatives and other class members therefore rely on a common course of conduct and a common legal theory for relief. Thus, typicality is satisfied. *See Roberts, supra*.

Plaintiffs Have Established Adequate Representation

Courts evaluate satisfaction of CPLR §901(a)(4)'s prerequisite by focusing on essentially three factors: potential conflicts of interest, personal characteristics of the proposed class representative, and the quality of class counsel. *Pruitt v. Rockefeller Center Properties, Inc.,* 1991, 167 AD2d 14, 24 (1st Dep't).

There is no conflict between the representatives and class members because the class representatives are experiencing the type of damages that are emblematic of the systematic deprivation of rent regulatory rights being perpetrated building wide. Plaintiffs further allege that the class representatives have met with counsel, are in frequent contact with counsel relating to the issues in this [*3]case, have thoroughly reviewed the lawsuit and have verified the Complaint on personal knowledge.

Defendant argues that the affidavits submitted by plaintiffs are insufficient. However the affidavits are submitted in connection with the complaint that was verified by plaintiffs and includes allegations that the representative plaintiffs will fairly and adequately represent and protect the interests of the class and that there are no conflicts between the members of the class and the plaintiffs. The verified complaint is properly treated as an affidavit in this circumstance [*Cupka v. Remik Holdings LLC*, 202 AD3d 473, 474 (2022)].

The named plaintiffs' financial circumstances are irrelevant because their attorneys represent them *pro bono* (citing *Wilder v May Dept. Stores Co.*, 23 AD3d 646, 648-649 [2d Dept 2005]; *see also Gudz v Jemrock Realty Co., LLC*, 105 AD3d 625, 626 [1st Dept 2013] [plaintiff's "financial ability to adequately represent the class . . . was adequately shown by counsel's assumption of the risk of costs and expenses in the litigation"], *aff'd sub nom Borden*, 24 NY3d 382).

Defendant does not challenge the competency of counsel in opposition.

As defendant has not argued that a conflict exists between the interests of plaintiffs and the other class members, that plaintiffs' financial resources are inadequate, or that counsel is inadequate, defendant essentially concedes plaintiffs' adequacy (*Pruitt v Rockefeller Ctr. Props.* 167 AD2d 14, 24).

Based on the foregoing, the court finds plaintiffs have established adequate representation.

The Waiver of Treble Damages Submitted by Plaintiffs is Sufficient

Each plaintiff herein has submitted an affidavit explicitly waiving any claim for treble damages pursuant to CPLR §901(b).

In *Yang v Creative Ind. Corp.* (2018 NY Slip Op. 33209 [U] [Sup Ct, NY County 2018]), the trial court found that a similar waiver was adequate to support certification. Specifically, the *Yang* Court stated the plaintiffs' affidavits "demonstrate[ed] their understanding that, while they otherwise may be entitled to treble damages, they are, for purposes of class certification, and in prosecuting a class action, agreeing to relinquish the right to treble damages" and that the waiver was effective and "in harmony with CPLR 901" (*id.* at *2).

The court makes the same finding in the case at bar.

Superiority — CPLR §901(a)(5)

"In determining superiority, courts consider a number of factors, including the possibility of excessive costs and delays resulting from multiple lawsuits seeking the same or similar relief, inconsistent rulings, and whether the aggregation of the claims will allow individuals with small claims judicial relief that would otherwise be impractical" (*Onadia v City of New York*, 56 Misc 3d 309, 321-322 [Sup Ct, Bronx County 2017] [citing *Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 146-147 [2d Dept 2008]). Courts especially stress that where "the relatively insignificant amount of damages suffered by many members of the class makes individual actions cost prohibitive, and the large number of class members renders consolidation unworkable, a class action [may be] not only superior but, indeed, the only practical method of adjudication" (*Pruitt*, 167 AD2d at 24). Further, courts acknowledge "the public benefit aspect of the class action," which can "induc[e] socially and ethically responsible behavior" in defendants who are wealthier and more powerful than the

plaintiffs who seek redress (*id.* at 23).

Defendant argues that a class action is not the best method of litigating the claims of the proposed class. Instead, it maintains that plaintiffs' cases are best suited to individual treatment before the HCR, which agency they also argue should be afforded primary jurisdiction over such disputes.

The court concludes that a class action is the superior method of adjudication of this matter. "Under the facts alleged, the alternatives to a class action would be individual [J-51 overcharge] actions by tenants or administrative proceedings. It is clear that this class action lawsuit conserves judicial resources by avoiding a multiplicity of lawsuits involving the same basic facts" (*Casey v Whitehouse Estates, Inc.*, 36 Misc 3d 1225 [A], 2012 NY Slip Op 51471 [U] at *6 [Sup Ct, NY County 2012]). As the Court of Appeals stated in *Pruitt*, where, as here, individual actions may be cost prohibitive to many of the class members, a class action is the most practical method of adjudication" (167 AD2d at 24; *see Jill & Phil's Family Pharm. v Aetna U.S. Healthcare*, 271 AD2d 281, 282 [1st Dept 2000]). As noted, there is also a public benefit to this class action in that it may induce more responsible behavior in landlords. The money it would cost to litigate the proceedings individually also militates in favor of moving forward as a class (*Dugan*, 45 Misc 3d at 380). In addition, as the court in *Dugan* stated, it is more efficient and apt to devise a uniform formula for calculating [*4]overcharges and determining other issues (*id.*). Furthermore, "[b]ecause these questions relating to liability are common and predominate for the entire class, a class action on liability conserves judicial resources even if . . . the use of subclasses or a special master" is necessary to make individualized assessments (*id.*).

Defendant's argument that a class action is an inferior method of adjudication ignores binding legal precedent. In *Borden*, the Court of Appeals held the opposite, stating that "permitting plaintiffs to bring [J-51] claims as a class accomplishes the purpose of CPLR 901 (b)" (*Borden*, 24 NY3d at 394). Further, the Court stated that "class certification is superior to having these claims adjudicated individually" from the standpoint of judicial economy (*id.* at 400). The Court also found that "the amount of damages suffered by each class member typically varies from individual to individual, but that fact will not prevent the suit from going forward as a class action if the important legal or factual issues involving liability are common to the class" (*Borden*, 24 NY3d at 399 [internal quotation marks and citation omitted]; *see also Hess v EDR Assets LLC*, 171 AD3d 498, 498 [1st Dept 2019] [citing *Borden*]).

More recently, in *Maddicks* (34 NY3d 116), the Court of Appeals denied a motion to dismiss under CPLR § 3211, reaffirming that J-51 cases are amenable to class actions.[FN1]

Defendant's position that these matters should be adjudicated before HCR also is inconsistent with the prevailing caselaw. In *Collazo v Netherland Prop. Assets LLC* (35 NY3d 987, 990 [2020]) the Court of Appeals found that, under the Housing Stability and Tenant Protection Act of 2019 (HSTPA), "'[t]he courts and [DHCR] shall have concurrent jurisdiction, subject to the tenant's choice of forum (L 2019, ch 36, Part F, §§ 1, 3).'" The Court concluded that "plaintiffs' choice of forum controls" (*Collazo*, 35 NY3d at 990).[FN2]

Additional Criteria

Plaintiffs contend that they have satisfied the factors set forth in CPLR 902, which a court considers if it determines that certification is appropriate under CPLR 901:

> 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;
>
> 5. The difficulties likely to be encountered in the management of a class action.

(CPLR §902). The court already has considered most of these factors, and for the reasons discussed above finds that [*5]plaintiffs have established that these factors support certification of the class.

The Decision in *Regina Metro Co., LLC v. New York State Division of Housing and Community Renewal* 3(5 NY3d 332) does not warrant a different outcome

Regina held *inter-alia*, that applying certain aspects of Part F of the Housing Stability and Tenant Protection Act of 2019 (HSTPA), which amended the RSL would be unconstitutional. The determination of unconstitutionality addressed due process concerns that the Court of Appeals had in relation to the HSTPA. Part F of the HSTPA mandated that

DHCR "consider all available rent history, which is reasonably necessary to investigate overcharge claims and determine legal regulated rent, regardless of the vintage of that history." Part F also increased the 4-year record retention period to 6 years. It further provided that where a landlord does not keep records beyond the 6-year period, the Courts and DHCR can still review the entire rental history, which could predate the 6-year period. The Court of Appeals struck the retroactive application of this statute as unconstitutional. There is no claim in this action that the HSTPA amendments are applicable to the pending class action motion.

Part F of the HSTPA amended the RSL, New York City Administrative Code §26-516 and CPLR §213-a, which governs claims for rent overcharges and the statute of limitations for those claims. The newly enacted legislation directed that the statutory amendments in Part F of the HSTPA "shall take effect immediately and shall apply to any claims pending or filed on or after such date."

Regina held that applying Part F's amendments retroactively to plaintiffs' claim would violate substantive due process.Therefore, the amendments to the RSL as set forth in the HSTPA would not affect this action. Instead, the pre-amendment version of the RSL's overcharge statute, New York City Administrative Code §26-516, and the decisions that interpret it, are controlling in this action. No damages for an overcharge may be awarded beginning more than 4 years from the filing of the action. *See Dugan v. London Terrace Gardens*, 177 AD3d 1 (1st Dept. 2019).

Defendant argues that *Regina* is relevant in that the decision addresses the proof necessary for a finding of fraud and the application of the default formula. While certainly said language is relevant to this action, the ruling in *Regina* does not impact plaintiffs' motion for class certification. The question of fraud is a factual determination to be resolved at trial and upon completion of discovery, but not one that bars certification of the class.

CONCLUSION

Wherefore, it is hereby:

ORDERED that the motion for class certification is granted; and it is further

ORDERED that the class shall consist of current, prospective and former tenants in apartments in the Subject Premises from November 15, 2013 forward where the apartments were deregulated by defendant (the "Class"); and it is further

ORDERED that Alice Marcondes, Aimee Bellman, Kyle Dixon, Daniel Propati, Laura Salvatierra, Phillip Palmer and Christopher Williams are the lead plaintiffs and class representatives; and it is further

ORDERED that Jack L. Lester, Esq and Grimble & LoGuidice, LLC are appointed as class co-counsel; and it is further

ORDERED that the parties are directed to meet and confer on the contents of the class-action notice and publication order; and the parties are directed to submit to this court within 30 days (by e-filing and email to tszap@nycourts.gov) either an agreed-upon joint proposed notice and publication order, or alternative proposed notices and publication orders for this court's selection; and it is further

ORDERED that, within 20 days from entry of this order, plaintiffs shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that this constitutes the decision and order of this court.

6/14/2022
SABRINA KRAUS, J.S.C.

Footnotes

Footnote 1: The dissenting justices in *Maddicks* did not dispute this issue. In *Maddicks*, the plaintiffs lived in 20 different apartment buildings, and the allegations were that the landlords in those buildings charged inflated rents through more than one scheme. Some landlords allegedly did not provide rent-stabilized leases to tenants while they accepted J-51 benefits. Other landlords allegedly lied about the expenses they incurred in individual apartment improvements (IAIs). Another group of landlords allegedly inadequately registered the apartments in their buildings. Finally, a fourth group of landlords purportedly inflated fair market rents on apartments that previously were subject to rent control (Maddicks, 34 NY3d at 130-131). Thus, according to the dissent, there was not a single predominant legal issue. Here, on the other hand, the complaint involves one building and alleges one scheme.

Footnote 2: Justice Rivera, who dissenting in part, agreed with the majority on this issue (*see*

Collazo, 35 NY3d at 991).

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