2022-09-19

Grey v. LIC Dev. Owner, L.P.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 14

----------X

WILLIAM GREY, on behalf of himself and all other similarly situated,

Plaintiff,

- v -

LIC DEVELOPMENT OWNER, L.P.,

Defendant.

INDEX NO. 151699/2022

MOTION DATE 09/16/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

----------X

HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

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

The motion by plaintiff for class certification is granted.

Background

This putative class action involves the state tax abatement program available for new housing developments commonly known as the 421-a Program. The central issue in this case is the initial rent set by the landlord once these new developments start leasing apartments. Plaintiffs contend that defendant intentionally registered rents with the applicable governmental agency that were higher than permissible as part of an effort to extract higher rents while simultaneously receiving tax breaks.

According to plaintiff, he and others similarly situated actually initially paid less than the amount registered, but the defendant registered the higher amount so that it could charge more when the lease came up for renewal. The defendant accomplished this scheme, effectively

lowering the overall rent, by offering rent concessions (such as a free month) but the defendant did not register the actual amount paid by the tenants. In exchange for these concessions, plaintiff alleges it was instructed to agree that the residential unit was exempt from Rent Stabilization Law. Plaintiff further alleges that the defendant offered plaintiff an Early Occupancy Rider in lieu of a lease, and then initially listed plaintiff as a licensee, not as a tenant.

Plaintiff moves to certify a class to include all current and former tenants of the building at issue who resided in the building after February 25, 2016. Plaintiff claims that the proposed class meets all of the statutory requirements under the CPLR to certify a class action.

In opposition, defendant argues that class certification is inappropriate because plaintiff bypassed pre-certification disclosures and has no proof of the number of members of the class, commonality of their claims, or that plaintiff's case meets any of the factors a Court considers when evaluating whether class certification is appropriate. Defendant contends that had plaintiff engaged in discovery, it would find that defendant committed no wrongdoing of any kind. Defendant further asserts that plaintiff suffered no actual harm because plaintiff received rent concessions and accommodations in plaintiff's favor.

In reply, plaintiff argues it need not prove the merits of its case to prevail on this motion. It claims that it has satisfied the factors required to certify a class and points out that defendant did not timely seek pre-certification discovery. Additionally, plaintiff argues the harm is self-evident as the rent increase spiked over 58% at renewal, from 2021 to 2022, far beyond the legal limit (NYSCEF Doc. No. 19 at 6).

Discussion

"The determination whether plaintiffs have a cause that may be asserted as a class action turns on the application of CPLR 901. That section provides that one or more members of a class

may sue or be sued as representative parties on behalf of all where five factors – sometimes characterized as numerosity, commonality, typicality, adequacy of representation and superiority are met" (*Maddicks v Big City Props., LLC*, 34 NY3d 116, 123, 114 NYS3d 1 [2019] [internal quotations and citation omitted]).

"Courts have recognized that the criteria set forth in CPLR 901(a) should be broadly construed not only because of the general command for liberal construction of all CPLR sections, but also because it is apparent that the Legislature intended article 9 to be a liberal substitute for the narrow class action legislation which preceded it" (*City of New York v Maul*, 14 NY3d 499, 509, 903 NYS2d 304 [2010]).

Numerosity

The Court finds that plaintiff has satisfied the numerosity factor. Although plaintiff does not state a specific number, it demonstrated that there are at least 40 residential units in which defendant allegedly received rental payments below the amount it registered with DHCR. Additionally, there has undoubtedly been some turnover thereby increasing the total members of the purported class. As new tenants have moved into the building, the rents charged for their apartments are affected by defendant's purported overcharging. Defendant's contentions that without discovery plaintiff's numerosity arguments are mere speculation is without merit. At this stage of the litigation, plaintiffs need not state the exact number of members in the class.

Commonality

"[C]ommonality cannot be determined by any 'mechanical test' and that the fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action. Rather, it is predominance, not identity or unanimity, that is the linchpin of commonality" (*id*. at 514). In considering a motion for class certification, a Court is "not

expressing an opinion on the merits of plaintiffs' causes of action. Their resolution must await further proceedings" (*id*.).

The Court finds that there is the requisite commonality between the class members. The issues in this case relate to the concessions offered as part of leases for units in the same residential building. Defendant's insistence that individual issues predominate is misguided. That the exact rent charged to each unit might be different does not bar the certification of the class. That might (if plaintiffs are successful) affect the amount of damages. But it does not compel the Court to deny the instant motion especially where it appears that defendant made repeated and similar concessions in the unit listings. Dealing with the same concession methods for tenants at the same building satisfies this factor.

Typicality

The Court finds that this factor is also satisfied. Plaintiff's allegations are likely to be identical for all class members: that defendant registered an initial rent higher than what was permissible under the 421-a program. Factual disparities about the lease date, rent paid and riders among the various class members are not so pervasive that it compels the Court to find that plaintiff did not meet his burden on this factor. The fact is that the same basic factual scenario applies to every proposed class member.

Adequacy of Representation

"The factors to be considered in determining adequacy of representation are whether any conflict exists between the representative and the class members, the representative's familiarity with the lawsuit and his or her financial resources, and the competence and experience of class counsel" (*Ackerman v Price Waterhouse*, 252 AD2d 179, 202, 683 NYS2d 179 [1st Dept 1998] [citation omitted]).

The named plaintiff here is an adequate representative as his affidavit (NYSCEF Doc. No. 7) demonstrates that he is competent and understands the issues in this case. Defendant's argument, that adequacy cannot be determined because it does not know who the members of the class are, is without merit. Counsel for plaintiff addressed who would comprise the class (the current and former tenants who resided in the subject building since February 2016) and defendant had the opportunity to seek out further information in pre-certification depositions. The Court observes this amount of identification of the class is appropriate for purposes of determining adequacy of representation.

Superiority

The Court finds that a class action is the superior method of adjudicating this dispute rather than forcing every individual tenant (or former tenant) to bring an individual case about the permissible rent. Given the potential number of tenants and the risk of inconsistent rulings, the Court finds that a class action is appropriate under the instant circumstances. Of course, class actions by tenants are not uncommon (*see e.g., Gudz v Jemrock Realty Co. LLC*, 105 AD3d 625, 964 NYS2d 118 [1st Dept 2013]).

CPLR 902 Factors

Defendant offered no opposition to plaintiff's arguments about how it satisfies the CPLR 902 factors. The Court is satisfied plaintiff successfully demonstrated these factors for purposes of class certification.

Summary

The Court observes that in a similar situation, the First Department upheld a decision granting class certification (*Chernett v Spruce*, 1209, 200 AD3d 596, 161 NYS3d 48 [1st Dept 2021]). This Court sees no reason to depart from that binding precedent here.

Accordingly, it is hereby

ORDERED that the motion for class certification by plaintiff is granted the proposed class and subclass is certified, plaintiff William Grey is appointed as lead plaintiff, Newman Ferrara LLP is appointed as class counsel and the Court approves the proposed notice to class members. Defendant shall provide plaintiff with a list of current tenants on or before November 1, 2022. Defendant shall also provide the last known contact information for former tenants on or before December 1, 2022.

Conference: November 9, 2022 at 10:30 a.m. By November 2, 2022, the parties are directed to upload 1) a stipulation about discovery signed by all parties, 2) a stipulation of partial agreement or 3) letters explaining why no agreement about discovery could be reached. The Court will then assess whether the conference is necessary. The failure to upload anything by November 2, 2022 will result in an adjournment of the conference.

9/19/2022
DATE

ARLENE P. BLUTH, 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