2022-12-06

Wise v. 1614 Madison Partners, LLC

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

----------X

Wise, Brett

Plaintiff,

- v -

1614 Madison Partners, LLC

Defendant.

INDEX NO. 154592/2022

MOTION DATE 11/30/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

----------X

HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 112, 113, 114, 115, 116, 117, 118, 119, 120

were read on this motion to/for CLASS CERTIFICATION.

Plaintiff's motion for class certification is granted as described below.

Background

This putative class action involves the state tax abatement program available for new housing developments commonly known as the 421-a Program. The issue in this case is the initial rent set by the landlord once these new developments are ready for occupancy. Plaintiff contends that defendant intentionally registered rents with the applicable governmental agency that were higher than permissible as part of an effort to extract higher rents under the applicable statutory scheme. According to plaintiff, defendant would offer rent concessions (such as a free month) but did not register the actual net amount paid by the tenants as required under law.

As an example, only: the landlord would register an initial monthly rent of $3,000, which would make an annual rent of $36,000. But this amount was not the market rent – if it was, there would be no need to give any concession – and so the landlord would give, say, a month free.

After giving a month free, the tenant was actually paying $33,000 per year, or $2,750 per month. The issue is that all registered rent increases were based on the official $3,000, not the actual $2,750, and one day, if market conditions changed, the landlord could charge the official registered rent. According to plaintiff, the landlord's scheme bypassed its obligations under 421-a and cheated the tenants because the increase was above the allowable percentage under the applicable laws.

In this motion, plaintiff moves to certify a class to include all current and former tenants of the building at issue who resided in the apartments after May 27, 2016. He claims that the proposed class meets all of the statutory requirements under CPLR § 901 and § 902 to certify a class action.

In opposition, defendant argues that class certification is inappropriate because plaintiff did not offer sufficient evidence to show defendant was misrepresenting that a construction project, which was used to grant concessions, was ongoing. Additionally, defendant argues plaintiff was not harmed by the rent charges because plaintiff received rent credits for the specified 2017-2018 rental year, which continued through the COVID-19 pandemic. Defendant argues that plaintiff cannot meet any of the factors a Court considers when evaluating whether class certification is appropriate, namely that the class requires individual analyses of the concessions offered and the rental amounts paid. Furthermore, defendant argues this matter is better suited for the Division of Housing and Community Renewal (DHCR) instead of this Court, as an administrative proceeding is cost-free and would be better equipped to handle the issues stated herein. Additionally, defendant contends the six-year statute of limitations does not apply because the claims accrued prior to 2019, the year the HSTPA expanded the statute of limitations from four years to six years.

In reply, plaintiff insists that it need not prove the merits of its case to prevail on this motion. Plaintiff claims that it has satisfied the factors required to certify a class and that defendant wishes to move the forum to DHCR so no members of the class would be notified. Additionally, plaintiff asserts that defendant's contention that the class members require individualized analyses of the facts is misguided, as many rent-stabilization matters have similar facts and are routinely certified as a class. Finally, plaintiff maintains that the six-year statute of limitations applies because the claim was ripe when the HSTPA was passed in 2019, making the prospective application of a six-year statute of limitations appropriate.

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 observes that the building has over 40 residential units and there

has undoubtedly been some turnover thereby increasing the total members of the purported class. Defendant's claim that plaintiff must establish that each rental concession was improper, requiring an individualized analysis, is misguided. Defendant did not provide any evidence that the rent concessions themselves were given based on particular circumstances of each individual apartment, which would render a class action as inappropriate. And it is true that plaintiff need not prove its case in connection with this motion.

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 residential units in the same residential building. Defendant's insistence that individual issues predominate is unavailing. That the exact rent charged to current tenants versus former tenants might be different does not bar the certification of the class. That might (if plaintiff is successful) affect the calculation of damages. But it does not compel the Court to deny the instant motion.

Typicality

The Court finds that this factor is also satisfied. Plaintiff's allegations are likely to be identical for all class members: that defendant allegedly registered an initial rent higher than what was permissible under the 421-a program. Defendant's claim that there will be factual

disparities about whether the same concessions were given to all tenants or the specific amounts charged to former and current tenants is not a basis to find that this factor is not satisfied. Moreover, defendant did not submit any documentation to substantiate this hypothetical assertion. As plaintiff points out, these facts would be true for every rent-overcharge class action, even those in which a class is certified. Ultimately, the same basic factual scenario will be present for 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. Nos. 73) demonstrates that his claims fall within those claimed by the class, he is competent and understands the issues in this case. Defendant's contention that plaintiff's affidavit is insufficient is once again misguided. Plaintiff signed a lease for an apartment in the building—that is sufficient. The Court also finds that class counsel is competent and experienced.

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

Once the prerequisites of CPLR 901 are satisfied, a plaintiff must satisfy the factors in CPLR 902, including "the possible interest of class members in maintaining separate actions and the feasibility thereof, the existence of pending litigation regarding the same controversy, the desirability of the proposed class forum and the difficulties likely to be encountered in the management of a class action" (*Ackerman v Price Waterhouse*, 252 AD2d 179, 191, 683 NYS2d 179 [1st Dept 1998]).

Defendant contends the CPLR 902 factors are not satisfied because DHCR is the proper forum for individual complaints of this nature, it is more feasible to bring a matter before DHCR as it is a no cost administrative proceeding well-equipped to handle this issue, and that the individual facts of each tenant's case would be better suited for separate cases. This Court cannot direct plaintiff where to bring his claims. While a proceeding before DHCR might have some advantages, defendant did not cite binding law that prohibits plaintiff from seeking relief before this Court. Maintaining this matter as a class action is in the best interest of the plaintiffs, many of whom may not be aware this action is pending. Therefore, the 902 factors are satisfied.

Other Issues

The parties devote significant time to the applicable statute of limitations for this claim. Specifically, they disagree about when the class period should commence. Defendant claims that the class period should commence on May 27, 2018 instead of May 27, 2016, noting that the HSTPA statute of limitations of six years does not apply retroactively. Plaintiff argues the statute

of limitations applies prospectively because the case was ripe when the HSTPA revised the statute of limitations in 2019, thus the new statute of limitations applies.

The Court agrees with defendant that the applicable statute of limitations is four years and that the class period should commence on May 27, 2018. The First Department and New York courts have held that a four-year lookback period is appropriate in matters where the overcharges occurred *before* passage of the HSTPA even though the case itself may have been filed after the HSTPA was enacted (*see Austin v 25 Grove St. LLC*, 202 AD3d 429, 162 NYS3d 342 [st Dept 2022] [finding that the alleged fraudulent conduct pre-dated the HSTPA, therefore requiring a four-year lookback period]; *Burris v 100 John Mazal SPE Owner LLC*, 2022 N.Y. Slip Op. 33321[U] [Sup Ct, New York County 2022] [finding a four-year limitation appropriate where the alleged fraudulent conduct occurred prior to passage of the HSTPA]). Here, plaintiff alleges defendant's overcharging conduct occurred at or around 2016 and was evident when plaintiff first signed a lease in October 2017. Because the HSTPA was passed in 2019, well after certain overcharges in this case, the revised six-year statute of limitations is inapplicable to the class period. Therefore, the class is limited to those who were tenants on or after May 27, 2018.

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 and the proposed class and subclass is certified with the class to compose of tenants who reside in or formerly resided in the subject premises on or after May 27, 2018, plaintiff Brett Wise is appointed as lead plaintiff, Newman Ferrara LLP is appointed as class counsel and the Court approves the proposed notice to class members (NYSCEF Doc. No. 119). Defendant shall provide plaintiff with a list of current tenants on or before January 6, 2023. Defendant shall also provide the last known contact information for former tenants on or before January 6, 2023.

Conference: January 18, 2023 at 11:30 a.m. By January 11, 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 January 11, 2022 will result in an adjournment of the conference.

12/6/2022
DATE

ARLENE P. BLUTH, 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