2020-05-07

Alvarez v EQR-71 Broadway A, L.L.C.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART IAS MOTION 12EFM**

Justice

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JULI ALVAREZ, MOISES ALVAREZ, BARBARA KALISH, DONGHOON LEE, ROBERT LYNDE, MAYA MAINI, JOHN CARTER, WILLIAM CHEN, STEPHANIE PARK, KAJSA HUTTON, and RODNEY HUTTON,

Plaintiffs,

- v -

EQR - 71 BROADWAY A, L.L.C.,

Defendant.

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INDEX NO. 155275/2016

MOTION DATE _____

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 82-105 were read on this motion to consolidate/join for trial.

By notice of motion, defendant moves pursuant to CPLR 602 for an order consolidating this action with *Franklin v Equity Residential*, pending in this court under index number 651360/2016. Plaintiffs oppose.

By summons and complaint dated March 15, 2016, non-party John Franklin commenced an action in another part of this court under index number 651360/2016, and by amended summons and complaint, he alleges that he is a resident of 71 Broadway, and that the defendant in his action, along with other related entities, illegally charged residents excessive rent in violation of Real Property Tax Law § 421-g. Franklin seeks to represent a class of current and former tenants of the building, an order declaring that their apartments are rent-stabilized, and an award of money damages. (NYSCEF 86). Franklin efiled his request for judicial intervention on September 29, 2017 (NYSCEF 96).

By summons and complaint dated June 22, 2016, plaintiffs commenced the instant action, and by second amended complaint, they allege that they are residents of 71 Broadway in Manhattan, and that despite not being treated as such, their apartments are subject to the Rent Stabilization Law due to defendant's receipt of tax benefits pursuant to Real Property Tax Law § 421-g. Plaintiffs thus seek an order declaring that their apartments are subject to the Rent Stabilization Law (RSL) and Code (RSC), an order enjoining defendants from offering lease renewals in violation of the RSC and RSL, treble money damages for rent overcharges, relief under General Business Law § 349, and an order enjoining the commencement of eviction proceedings. (NYSCEF 85). Plaintiffs efiled their request for judicial intervention on October 13, 2016 (NYSCEF 95).

Defendant contends that the two actions share common questions of law and fact, and thus, consolidation is warranted. It also argues that plaintiffs will suffer no prejudice if the actions are consolidated, as neither action has progressed far in discovery, and that it would be prejudiced absent consolidation by having to defend two separate actions and by a risk of inconsistent verdicts. (NYSCEF 83).

Plaintiffs deny that consolidation is warranted, arguing that as leave to file a second amended complaint has been granted in the other action, it is unknown whether there are common issues of fact and law. They observe that in its requests for judicial intervention in both actions, defendant does not indicate as related the earlier case. (NYSCEF 95, 96). Plaintiffs maintain that individual issues, such as whether the leases are proper and the rent overcharges due to each plaintiff, predominate over common ones. They note that the preliminary conference order in this matter provides that plaintiffs are to file their note of issue on February 5, 2020, and that discovery has not yet commenced in the other action. Should the cases be consolidated,

plaintiffs contend, there would be delay in certifying the class in the other action and in scheduling a trial for both. Plaintiffs also observe that they seek treble damages, but in the other, purportedly class, action treble damages are prohibited. They also allege that the plaintiff in the other action has an action pending against one of the plaintiffs in the instant action, and thus, a conflict may arise when appointing lead counsel in the class action. (NYSCEF 93).

In reply, defendant reiterates that the actions share common questions of fact and law, observing that each relies on defendant's alleged receipt of tax benefits under Real Property Tax Law § 421-g and allegedly unlawful deregulation of apartments at 71 Broadway. In support, it submits the second amended complaint from the other action, which it asserts, reflects causes of action shared with the instant case, and although not identical, it maintains that they need not be identical. Moreover, it argues, in their additional causes of action, plaintiffs allege what the Rent Stabilization Law requires and in advancing a cause of action pursuant to General Business Law § 349, they advance the same issues of fact and law advanced in the other action.

Defendant denies that a request for judicial intervention in a related case is relevant here and that there will be a resulting delay if the actions are consolidated. In any event, it asserts, a brief delay constitutes an insufficient basis for denying consolidation.

Defendant also observes that to the extent plaintiffs seek treble damages, they may opt out of the class action and pursue their own relief, and that the actions may nevertheless be consolidated for pre-trial proceedings and joint trial, and that it is premature to address any potential conflicts of interest among counsel, which will necessarily be resolved on a motion for class certification. (NYSCEF 103).

When multiple actions raise common questions of law or fact, they may be consolidated or joined for trial to avoid unnecessary costs or delay, absent a showing of prejudice. (CPLR

602[a]; *Progressive Ins. Co. v Vasquez*, 10 AD3d 518, 519 [1st Dept 2004]). Commonality between cases is established the claims of each have "more facts and issues in common than unique to each." (*In re New York City Asbestos Litig.*, 121 AD3d 230, 245 [1st Dept 2014], *affd* 27 NY3d 1172 [2016], and *affd* 27 NY3d 765 [2016]).

Here, the central issue to both actions, as demonstrated by the second amended complaint in *Franklin*, is defendant's allegedly unlawful overcharge of rent while receiving section 421-g tax benefits. Plaintiffs' additional claims under GBL § 349 and for other declaratory relief all relate to the same fact pattern of rent overcharges, and thus, while the claims in both actions may not be identical, they are sufficiently similar to warrant consolidation or a joint trial.

A review of the records of both actions reflect that discovery in this action recently commenced with a preliminary conference, and in *Franklin*, a preliminary conference has not yet been held. Consequently, there is no discernible prejudice with respect to the relative progress made in these actions. In addition, plaintiffs cite no authority for the proposition that an attorney's potential conflict of interest or failure to mark a case as related in a request for judicial intervention precludes consolidation or joint trial.

Nevertheless, despite their similarities, these actions differ substantially in that *Franklin* is a purported class action, whereas here, plaintiffs do not seek class certification but seek treble damages. The possibility that plaintiffs may ultimately opt-out if *Franklin* is certified as a class action, they ought not be forced into having their action converted into a purported class action (*see Shaid v Consol. Edison Co. of New York*, 95 AD2d 610, 621–622 [2d Dept 1983]) ["[o]nly a plaintiff can request that an action be prosecuted as a class action"]).

Consequently, discovery proceedings and a joint trial, rather than consolidation, is the more appropriate remedy which incidentally advances the interests of judicial economy. (*See*

Whiteman v Parsons Transp. Grp. of New York, Inc., 72 AD3d 677, 678 [2d Dept 2010] [ordering joint trial, rather than consolidation, where actions involve different plaintiffs]).

Accordingly, it is hereby

ORDERED, that the motion to consolidate is granted to the extent of permitting joint discovery and trial in the two actions; it is further

ORDERED, that the above-captioned action is consolidated in this court for discovery with the action captioned *Franklin v Equity Residential, et al.*, Index no. 651360/2016; it is further

ORDERED, that within 30 days from entry of this order, counsel for the movant shall serve a copy of the order with notice of entry upon the Clerk of the Trial Support Office, who is hereby directed to transfer the other action to this part and to mark the court's records to reflect the consolidation for purposes of discovery and trial; it is further

ORDERED, that upon payment of the appropriate calendar fees and the filing of notes of issue and statements of readiness in each of the above actions, the Clerk of the Trial Support Office shall place the aforesaid actions upon the trial calendar for a joint trial; it is further

ORDERED, that at said joint trial plaintiffs in this action shall have the right to open and close before the jury; and it is further

ORDERED, that the parties in both actions appear for a conference at 2:15 pm on August 19, 2020 in Part 12, room 341 at 60 Centre Street, New York, New York, if the court is reopened.

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5/7/2020
DATE

BARBARA JAFFE, J.S.C.

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