2023-08-17

Alexander v. 4469 Broadway LLC

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARY V. ROSADO** **PART** **33M**

Justice

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ASHLEIGH ALEXANDER, JAIRO T. GUERRA

Plaintiff,

- v -

4469 BROADWAY LLC,

Defendant.

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INDEX NO. 153828/2021

MOTION DATE 10/15/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76

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

Upon the foregoing documents, and after oral argument which took place on March 14, 2023, with Roger A. Sachar, Esq. appearing for Plaintiffs Ashleigh Alexander and Jairo T. Guerra ("Plaintiffs") and Paul N. Gruber, Esq. appearing for Defendant 4469 Broadway LLC ("Defendant"), Plaintiffs' motion for an order approving a class and sub-class in this matter is granted.

I. Factual and Procedural Background

Defendant is the owner of the multiple dwelling located at 4467-4469 Broadway a/k/a 700 W. 192 Street, New York, New York (the "Building"). Because the Building receives a tax benefit pursuant to RPTL 421-a, the Building is presently subject to the Rent Stabilization Law. Plaintiffs allege that Defendant inappropriately utilized preferential rents as part of their initial 421-a registration, impacting more than 40 of its tenants (NYSCEF Doc. 54 at 3). Plaintiffs, as current residents of separate apartments in the Building, commenced this class action on April 19, 2021, seeking rent-stabilized leases in the correct amount for the current tenants of the

building, and damages for rent overcharges for the Building's current and former tenants, in addition to other relief (NYSCEF Doc. 1). In the instant motion, commenced by notice of motion on October 15, 2021 (NYSCEF Doc. 24), Plaintiffs seeks certification of a class defined as "all tenants at the Building, who occupied their units between June 14, 2015 and the conclusion of this litigation" (the "Class") (NYSCEF Doc. 1 at ¶ 42), and of a sub-class defined as "all tenants at the Building, who currently reside in the Building" (NYSCEF Doc. 1 at ¶45).

Defendant filed an affirmation (NYSCEF doc. 56) and Memorandum of Law (NYSCEF Doc. 65) in opposition to Plaintiff's motion to approve a class and subclass in this matter. While Defendant takes no issue with the adequacy of class counsel or the ability of the named plaintiffs to represent the interests of the class (NYSCEF Doc. 65 at 7), Defendant argues (1) that because the Building remains subject to the Rent Stabilization Law, the proposed subclass with respect to injunctive relief is not necessary (NYSCEF Doc. 65 at 4, 9); (2) that Plaintiffs have not shown "the number of potential claimants is so numerous as to render a class action the most efficient way of maintaining a class" (NYSCEF Doc. 65 at 7); (3) that "the class proposed– based upon a six year lookback period – is overbroad as a four year lookback period is applicable under the facts alleged" (NYSCEF Doc. 65 at 4); (4) that "the facts alleged by Plaintiffs do not conclusively demonstrate that a class action is superior to any other method of asserting a claim" (NYSCEF Doc. 65 at 4); and (5) that the requirements of commonality and typicality are not met because "each apartment has a different rent history and a different progression of tenancies which may affect the nature of claims and defenses" (NYSCEF Doc. 65 at 8).

Plaintiffs filed an Affirmation (NYSCEF Doc. 66) and Memorandum of Law (NYSCEF Doc. 68) in reply on December 14, 2021. Plaintiffs contend that they have provided sufficient evidence of numerosity by, in addition to introducing a tax bill (NYSCEF Doc. 28), providing

lease documents (NYSCEF Docs. 31-47) and a DHCR rent roll (NYSCEF Doc. 48) to support their conclusion that Defendant inappropriately utilized preferential rents, impacting more than 40 of its tenants (NYSCEF Doc. 68 at 6). Plaintiffs' further argue that *Regina Metropolitan v DHCR* 35 NY3d 322 [2020], which Defendant contends bars Plaintiffs' use of the expanded statute of limitations provided by the Housing Stability and Tenant Protection Act of 2019 ("HSTPA"), is inapplicable as it only strikes HSTPA's retroactive application, and not its prospective application (NSYCEF Doc. 68 at 6-7). Replying to Defendant's argument that commonality and typicality are not satisfied because each apartment has a different rent history and progression of tenancies, Plaintiffs argue that commonality and typicality have been satisfied because "the important legal or factual issues involving liability are common to the class" (NSYCEF Doc. 68 at 7). Additionally, Plaintiffs contends that Defendant's argument that it is not "entirely impractical for there to be separate actions inasmuch as tenants who are paying a rent lower than a registered rent may have no interest in participating in this action" (NYSCEF Doc. 65 at 8) fails because "if the litigation is successful, every class member gets a rent reduction" (NYSCEF Doc. 68 at 10). Lastly, in support of their request that the Court create an injunctive subclass of current tenants who seek reformed leases, Plaintiffs contends that the DHCR is not a necessary party because the injunctive subclass seeks leases with properly calculated rents, and it is the landlord who is charged with correcting legal regulated rents, not the DHCR (NSYCEF Doc. 68 at 8-9).

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II. Discussion

A. Standard

CPLR §§901 and 902 set forth the prerequisites for a class action. CPLR §901(a) provides that a class action may be maintained where:

> "(1) the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
> (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
> (4) the representative parties will fairly and adequately protect the interests of the class; and
> (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

Plaintiffs bear the burden of establishing that the criteria in CPLR §901(a) have been met (*Kudinov v Kel-Tech Constr. Inc.,* 65 AD3d 481 [1st Dept 2009]). Once these criteria are met, the Court "should then consider the additional factors promulgated by CPLR §902 such as the interest of individual 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 form; and the difficulties likely to be encountered in managing the class action" (*Pludeman v Northern Leasing Sys., Inc.* 74 AD3d 420, 422 [1st Dept 2010]). "Whether a particular lawsuit qualifies as a class action rests within the sound discretion of the trial court. In exercising this discretion, a court must be mindful of [the] holding that the class certification statute should be liberally construed" (*Kudinov v Kel-Tech Constr. Inc.* 65 AD3d 481 [1st Dept 2009]).

B. Numerosity

With respect to the requirement of numerosity, the Court of Appeals has held that "the legislature contemplated classes involving as few as 18 members…where the members would

have difficulty communicating with each other, such as where barriers of distance, cost, language, income, education or lack of information prevent those who are aware of their rights from communicating with others similarly situated" (*Borden v 400 E. 55th St. Assoc., L.P.* 24 NY3d 382, 399 [2014]). Here, Defendant claims that, based on the tax bill provided (NYSCEF Doc. 28) Plaintiffs speculate that there are at least 86 possible claimants (NYSCEF Doc. 65 at 7). Defendant further claims that this number is exaggerated by Plaintiffs (NYSCEF Doc. 65). However, based on the tax bill (NYSCEF Doc. 28), lease documents (NYSCEF Docs. 31-47) and a DHCR rent roll (NYSCEF Doc. 48) provided, Plaintiffs contend that there are at least 45 class members (NYSCEF Doc. 27 at ¶20). Even assuming, *arguendo*, that there are 45 possible claimants as opposed to 86, such a number is still above the numerosity threshold contemplated by the legislature and that approved by the Appellate Division, First Department. *See Agolli v Zoria Hous., LLC* 188 A.D.3d 514 [1st Dept 2020] (holding that "40 [is] the presumed threshold of numerosity for class certification"). In light of the foregoing, the Court finds that Plaintiffs have satisfied the numerosity requirement under CPLR § 901(a).

C. Commonality and Typicality

Defendant argues that because Plaintiffs fail to establish the commonality and typicality requirements of CPLR §901(a) because "each apartment has a different rent history and a different progression of tenancies which may affect the nature of claims and defenses" (NYSCEF Doc. 65 at 8).

In relation to the commonality requirement for class certification, the Appellate Division, First Department has held that "the rule requires predominance not identity or unanimity among class members" (*Pludeman* at 423). The necessary inquiry is "whether the use of a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to

persons similarly situated" (*Pludeman* at 423). Thus, "[c]lass certification is appropriate even where there are questions of law or fact not common to the class" (*Pludeman* at 423). Referring to the typicality requirement, it has been held that "if it is shown that a plaintiff's claims derive from the same practice or course of conduct that gave rise to the remaining claims of other class members and is based upon the same legal theory the typicality requirement is satisfied" (*Pludeman* at 423).

Here, as Plaintiffs contend, "the same conduct applied to each of the initial rents - - wrongful use of a preferential rent" (NYSCEF Doc. 68 at 5). Thus, Plaintiffs have satisfied the requirements of CPLR §§901(a)(2)-(3) by sufficiently demonstrating the requisite predominance of common issues of law and fact, and that Plaintiffs' claims are derived from the same practice or course of conduct and are based upon the same legal theory.

D. Fair and Adequate Protection of the Class Interests

The Court finds that Plaintiffs' Affidavits (NYSCEF Docs. 25-26) are sufficient to demonstrate that they will fairly and adequately protect the interests of the class (*see Borden,* 24 NY3d 382; *see also Borden v 400 East 55th St. Assoc., L.P.,* 105 AD3d 630 [1st Dept 2013]). Plaintiffs' submissions further demonstrate that their attorneys are sufficiently experienced in both landlord-tenant and class action litigation (NYSCEF Doc. 50). Further, Defendant takes no issue with the adequacy of class counsel or the ability of the named plaintiffs to represent the interests of the class (NYSCEF Doc. 65 at 7).

E. Superiority

Defendant argues that Plaintiffs have failed to satisfy the superiority requirement imposed by CPLR §901(a)(5) because it is not "entirely impractical for there to be separate actions inasmuch as tenants who are paying a rent lower than a registered rent may have no

interest in participating in this action" (NYSCEF Doc. 65 at 8). Defendant's argument is not persuasive given that if Plaintiffs' litigation is successful, every class member will receive a rent reduction (NYSCEF Doc. 68 at 8). Further, because the requirements have been met with respect to numerosity, commonality, typicality, and adequacy of representation, "to preserve judicial resources, class certification is superior to having these claims adjudicated individually" (*Borden,* 24 NY3d 382, 400). Accordingly, the Court finds that Plaintiffs have satisfied the superiority requirement imposed by CPLR §901(a)(5).

F. CPLR §902 Considerations

After considering the factors set forth in CPLR §901, the Court "should then consider the additional factors promulgated by CPLR §902 such as the interest of individual 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 form; and the difficulties likely to be encountered in managing the class action" (*Pludeman* at 422).

The first two factors listed under CPLR §902, the putative class members' interest in maintaining separate actions and the feasibility thereof, weigh in favor of class certification. In this case, the class members' claims are likely outweighed by the costs of litigating those claims separately. The third and fourth considerations listed under CPLR §902 also weighs in favor of certification, as no other litigation involving this controversy exists (NYSCEF Doc. 54 at 19), and the class members are current or former residents of the Building whose claims arose out of their occupancy. Finally, the fifth consideration weighs in favor of certification as Defendant has raised no difficulties in managing the class.

G. Subclass for Injunctive Relief

Defendant argues that "inasmuch as there is no showing that injunctive relief is necessary for rents to be corrected, if needed, and DHCR is not a party to compel it to adjust rent registrations previously filed, such a class is not needed" (NYSCEF Doc. 65 at 9). However, Defendant misstates the remedy sought by the proposed subclass. The injunctive relief sought by the subclass is not the correction of the DHCR's records, but rather "reformation of their leases to represent the actual amount of rent Defendant is legally entitled to charge Plaintiffs and members of the Sub-Class" (NYSCEF Doc. 1 at ¶75). As such, the Court finds that the DHCR need not be a party to this action.

H. Plaintiff's Notice of Class Action

Pursuant to CPLR §904(b), in any class action, except those brought primarily for injunctive or declaratory relief, "reasonable notice of the commencement of a class action shall be given to the class in such manner as the court directs." CPLR §904(c) states that "[i]n determining the method by which notice is to be given, the court shall consider (1) the cost of giving notice by each method considered; (2) the resources of the parties; and (3) the state of each represented member of the class, and the likelihood that significant numbers of represented members would desire to exclude themselves from the class or to appear individually…" The Court has considered the factors set forth in CPLR §904(b) and finds that the proposed Notice of Class Action (NYSCEF Doc. 51) is appropriate.

I. Plaintiffs' Discovery Request

To facilitate dissemination of the Notice of Class Action, Plaintiffs request that the names and addresses of class members be produced by Defendants (NYSCEF Doc. 54 at 19). Pursuant to Part 33's Part Rules, leave from the Court is required to file a discovery related motion. As

Plaintiffs' request relates to discovery and no leave from the Court has been sought on this motion, the motion is denied without prejudice.

Accordingly, it is hereby

ORDERED that Plaintiffs' motion for an order approving a class and subclass in this matter is granted; and it is further

ORDERED that the branch of Plaintiffs' motion to appoint certain lead plaintiffs and class representatives is granted, and the Court hereby appoints Ashleigh Alexander and Jairo T. Guerra for the same; and it is further

ORDERED that the branch of Plaintiffs' motion to appoint Newman Ferrara LLP as class counsel is granted; and it is further

ORDERED that the branch of Plaintiffs' motion seeking approval of the class notice is granted; and it is further

ORDERED that the branch of Plaintiffs' motion seeking to compel Defendant to provide the names and addresses of class members is denied; and it is further

ORDERED that counsel are directed to appear for an in-person status conference on September 6, 2023 at 9:30 a.m. in Room 442, 60 Centre Street, New York, New York. If the parties submit a proposed status conference order prior to the date of the conference via e-mail to SFC-Part33-Clerk@nycourts.gov, there will be no need to appear at the September 6, 2023 conference.; and it is further

[*The remainder of this page is intentionally left blank*]

ORDERED that within ten days of entry, counsel for Plaintiffs shall serve a copy of this Decision and Order with notice of entry on Defendant; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

8/17/2023
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, 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