State of New York
Court of Appeals

OPINION

No. 67
Theresa Maddicks, et al.,
Respondents,
v.
Big City Properties, LLC et al.,
Defendants,
Big City Realty Management, LLC, et al.,
Appellants.

Simcha D. Schonfeld, for appellants.
Roger Sachar, for respondents.
Rent Stabilization Association of NYC, Inc. et al.; Lower Seaman Tenants Association et al., amici curiae.

FAHEY, J.:

Nothing in the CPLR prevents a defendant from moving to dismiss a class action claim pursuant to CPLR 3211. However, a motion to dismiss should not be equated to a motion for class certification. Nothing in the record supports the conclusion of the trial

court that the claims for class relief should have been dismissed short of a judicial determination as to whether the prerequisites of CPLR 902 have been satisfied. We affirm the Appellate Division order insofar as appealed from.

I.

At issue here is what plaintiffs characterize as the Big City Portfolio, which consists of multiple apartment buildings located primarily in the Harlem neighborhood in Manhattan. The portfolio is managed by defendant Big City Realty Management, LLC. Individual corporate defendants own various buildings in the portfolio, and plaintiffs – who are current and former tenants in various buildings within the portfolio – suggest that those corporate entities are owned or controlled by a single holding company, defendant Big City Acquisitions, LLC.

Plaintiffs also allege that defendants,[1] in an effort to extract additional value from those properties, have engaged in what plaintiffs characterize as "a clear pattern and practice of improper and illegal conduct."[2] The allegations of the operative complaint – designated as the first amended class action complaint (hereafter, complaint)[3] – state that

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[1] The first amended class action complaint was dismissed by the motion court as against nine named defendants on the ground that plaintiffs had not alleged wrongdoing against those defendants. That complaint has not been reinstated with respect to those defendants, meaning that the reference to defendants herein pertains only to the defendants against which that pleading survives.

[2] The dissent ignores this point in concluding that there are no questions of law or fact common to the class here (cf. dissenting op at 2).

[3] Inasmuch as this appeal arises from a motion to dismiss a complaint, we are bound to, among other things, accept as true the facts alleged in that pleading (see Lohan v Take-Two Interactive Software, Inc., 31 NY3d 111, 117 n 1 [2018]).

this action was commenced "to end the illegal and fraudulent practices employed by [d]efendants over the course of [their] ownership and operation" of the buildings within the portfolio. That claim of illegality and fraud, plaintiffs maintain, addresses a scheme to inflate rents over and above the amounts defendants were legally permitted to charge. This was accomplished in four ways. Plaintiffs allege that defendants executed their overcharge plan by:

(a) falsely reporting to the Division of Housing and Community Renewal (DHCR) that leases were rent-controlled pursuant to the J-51 program,[4] when in fact those contracts were free-market compacts;

(b) misrepresenting and inflating the costs of individual apartment improvements (IAIs)[5];

(c) repeatedly failing to register rental information as required by state and city law, thereby rendering it impossible to calculate the correct legal regulated rent; and

(d) inflating the fair market rent on apartments that exit rent-controlled status, by recording a rent price significantly higher than the preferential rent actually charged with respect to certain units.

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[4] "In New York City, multiple dwellings may qualify for tax incentives designed to encourage rehabilitation and improvements" pursuant to a program that originally was embodied in the now-former section J51-2.5 of the Administrative Code of the City of New York (see Roberts v Tishman Speyer Props., L.P., 13 NY3d 270, 280 [2009]). That program, as "authorized by Real Property Tax Law § 489, allows property owners who complete eligible projects to receive tax exemptions and/or abatements that continue for a period of years" (Roberts, 13 NY3d at 280). "Eligible projects include moderate and gut rehabilitations; major capital improvements . . .; and conversions of lofts and other nonresidential buildings into multiple dwellings" (id., citing, inter alia, Administrative Code § 11-243 [b] [2], [3], and [8]).

[5] Depending on the number of apartments in a building in which an IAI is performed, the landlord is entitled to a rent increase of between 1.67% and 2.5% of the cost of the improvement.

Given their belief that nearly all factual and legal issues raised in the first amended class action complaint are common to each other and to members of the proposed class and sub-class,[6] and that the statutory prerequisites to class certification would be satisfied (see CPLR 901), plaintiffs alleged that this lawsuit may be properly maintained as a class action. Plaintiffs asserted six causes of action to be pursued by the proposed class and sub-class, sounding principally in the alleged violation of the Rent Stabilization Law and General Business Law § 349. Plaintiffs seek, among other things, reformation of illegal leases to provide that the units subject to those agreements are subject to rent stabilization.

In lieu of answering, and before the appropriateness of the claims for class action could be tested through the mechanisms fixed in article 9 of the CPLR, defendants moved to dismiss the amended class action complaint. Defendants argued that plaintiffs failed to state a cause of action for violation of General Business Law § 349, and that the class allegations fail as a matter of law. With respect to the latter contention, defendants maintained that plaintiffs' claim of illegality and fraud is not a single instance of wrongdoing, and improperly attempts to bind together four disconnected theories of malfeasance.

[6] The proposed class consists of current and former tenants of a portfolio building who, between December 6, 2012 and the date of the filing of the first amended class action complaint, resided in rent-stabilized or unlawfully-deregulated apartments, and who paid rent in excess of the legal limit based on a misrepresentation made by or attributable to defendants. The proposed sub-class consists of all current tenants of a portfolio building who currently reside in a rent-stabilized apartment or unlawfully deregulated apartment.

Supreme Court granted the motion and dismissed the complaint. The court "determine[d] conclusively from the facts alleged [therein] that, as a matter of law, there is no basis for class relief" based on its belief that plaintiffs rely "on several different theories of the manner in which [d]efendants inflated the rent" that each "require[] a fact-specific analysis [that] precludes class certification" (see CPLR 901 [a] [2]).

On appeal, a divided Appellate Division modified Supreme Court's order by denying the part of the motion seeking dismissal of the class action claims against defendants, except to the extent those allegations addressed the cause of action for violation of General Business Law § 349 (see 163 AD3d 501 [1st Dept 2018]).[7] The Appellate Division concluded that the dismissal of the "remaining class allegations . . . at this early stage, before an answer was filed and before any discovery occurred, was premature" (163 AD3d at 502). The Court added that "[i]t does not appear conclusively from the [operative] complaint that, as a matter of law, there is no basis for class action relief" (id.) before rejecting the contention of the dissenters (see id. at 505-506) that the claims here are fact-intensive and can only be determined through an examination of the evidence pertinent to each individual unit allegedly affected by defendants' misconduct (see id. at 502; see also CPLR 901 [a] [2]). The conclusion that plaintiffs' class action claim should not be dismissed at this juncture was based on the Appellate Division's analysis of the complaint. It speaks to "the setting of . . . improper rents [in the affected] apartments [as] part of a

[7] Plaintiffs have not appealed the dismissal of the cause of action alleging violation of General Business Law § 349 to this Court.

systematic effort by [defendant Big City Acquisitions, LLC] to avoid compliance with the rent stabilization laws" (id. at 503).

We share the view that dismissal of class claims based on allegations of a methodical attempt to illegally inflate rents was premature. We now affirm the order insofar as appealed from and answer the question certified to us by the Appellate Division, namely, "whether [the] order [of that Court] was properly made," in the affirmative.

II.

Initially, we agree with defendants and the amici curiae who submitted a brief in support of defendants' position that there is no per se bar to a pre-answer motion pursuant to CPLR 3211 (a) seeking an order dismissing a class action allegation. Nothing in the CPLR provides that a class claim cannot be dismissed, even at the pre-answer stage, for failure to state a cause of action (see generally Downing v First Lenox Terrace Assoc., 107 AD3d 86, 91 [1st Dept 2013], affd sub nom Borden v 400 E. 55th St. Assoc., L.P., 24 NY3d 382 [2014]; Wojciechowski v Republic Steel Corp., 67 AD2d 830 [4th Dept 1979], lv dismissed 47 NY2d 802 [1979]).

As for whether the complaint here was properly dismissed, certain basic principles of procedural law apply. Where an appeal arises from a motion to dismiss, the complaint "is to be afforded a liberal construction" (Leon v Martinez, 84 NY2d 83, 87 [1994]). We must "accept the facts as alleged as true, [and] accord plaintiffs the benefit of every possible favorable inference" (id.). We are also bound to "determine only whether the facts as alleged fit within any cognizable legal theory" (id. at 87-88); "the criterion is whether the

proponent of the pleading *has* a cause of action, not whether [it] has *stated* one" (id. at 88 [emphases added]).

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 "[o]ne 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" (City of New York v Maul, 14 NY3d 499, 508 [2010]) – are met (CPLR 901 [a] [1]-[5]). Of principal concern on this appeal is the "commonality" element, which, as set forth in CPLR 901 (a) (2), inquires whether "there are questions of law or fact common to the class which predominate over any questions affecting only individual members."

With respect to the commonality question, defendants note that, where damages among class members may differ, a class action may proceed only "if the important legal or factual issues involving liability are common to the class" (Borden, 24 NY3d at 399). That point is logical; perhaps the most generally known type of class claims involve a defect in a mass-produced product, such as an automobile, that has a common flaw that impacts consumers in disparate ways and yields disparate damages (see e.g. Belville v Ford Motor Co., 919 F3d 224 [4th Cir 2019]; Samuel-Bassett v KIA Motors Am., Inc., 357 F3d 392 [3d Cir 2004]; Matter of General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F3d 768 [3d Cir 1995], cert denied 516 US 824 [1995]; Estruch v Volkswagen AG, 177 AD2d 943 [4th Dept 1991], lv denied 79 NY2d 759 [1992]).

Here, of course, there is an element of truth to defendants' suggestion that the class claims – particularly those based on the alleged misrepresentation and inflation of the costs of IAIs – may require separate proof with respect to each plaintiff. Along those lines, defendants note that the operative complaint "alleges overcharges for inflated IAI increases of [various] amounts" – 136%, 97%, 82%, 104%, 113%, 33%, or 254% for various apartments – which they contend supports the idea that the alleged overcharges are separate wrongs to separate persons that do not form the basis for a class action (see Ray v Marine Midland Grace Trust Co., 35 NY2d 147, 151 [1974]; Gaynor v Rockefeller, 15 NY2d 120, 129 [1965]; cf. Bolanos v Norwegian Cruise Lines Ltd., 212 FRD 144, 148 [SD NY 2002]).[8]

That leads to the friction point on this appeal: are we to look at the common basis for a damages claim or the degree of damage alleged? On the one hand, if, as defendants suggest, the differences in the specific means of harm is considered – that is, if at this stage the Court contemplates nuances of *how* those overcharges allegedly were accomplished – then plaintiffs may struggle to satisfy the factual component of CPLR 901 (a) (2). On the other hand, as plaintiffs note, to focus on potential idiosyncrasies within the class claims – distinctions that speak to damages, not to liability – at this juncture would potentially be to reward bad actors who execute a common method to damage in slightly different ways.

[8] Perhaps Ray (35 NY2d 147) and Gaynor (15 NY2d 120), which addressed the application of CPLR former 1005, are of limited value here. That statute was succeeded by CPLR 901, and the legislature intended for CPLR "article 9 to be a liberal substitute for the narrow class action legislation which preceded it" (Maul, 14 NY3d at 509 [internal quotation marks omitted]).

City of New York v Maul (14 NY3d 499 [2010]) is instructive in that respect. There, the plaintiffs generally alleged that the social services agencies in question failed in various training and identification tasks that injured "at least 150 youngsters with developmental disabilities" (id. at 506). Although each one of the class members possessed their "own unique factual circumstances and special needs," and although "a determination regarding appropriate placements [would have] required a particularized inquiry of each [of the] plaintiff's requirements" (id. at 512), we refused to conclude that the class could not be certified as a matter of law. That determination was driven at least in part by our recognition of the legislative desire for CPLR article 9 to be construed so as to provide a flexible, functional scheme wider and more welcoming than "the narrow class action legislation which preceded it" (id. at 509).

Maul's circumstances undoubtedly were "close to the outer boundary of the concept of commonality" (id. at 512), but the instances of "recurring, and interrelated harms" (id. at 513) that supported class certification there are not meaningfully removed from those of this case. Affording the first amended class action complaint the "liberal construction" required in these circumstances (see Leon, 84 NY2d at 87), and allowing plaintiffs the benefit of every possible favorable inference (see id.), we conclude that the allegations of misconduct here are of the same character as those at issue in Maul.

Commonality is not to be confused with unanimity (see Maul, 14 NY3d at 514). In deciding Maul, we "recognize[ed] that commonality 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' " (Maul, 14 NY3d

at 514, quoting Friar v Vanguard Holding Corp., 78 AD2d 83, 97-98 [2d Dept 1980]). "Rather," we added, "it is 'predominance, not identity or unanimity,' that is the linchpin of commonality" (Maul, 14 NY3d at 514, quoting Friar, 78 AD2d at 98).[9] Those observations apply to this case. Here the complaint addresses harm effectuated through a variety of approaches but within a common systematic plan (see generally Freeman v Great Lakes Energy Partners, LLC, 12 AD3d 1170, 1171 [4th Dept 2004]), and its class claims should not be dismissed at this juncture.

III.

Five additional points complete our analysis.

First, it bears noting that our approach – allowing the action to proceed to the CPLR article 9 stage – is the moderate one in these circumstances.[10] Through CPLR 902 the legislature established a procedure for immediate threshold review of the question whether an action may proceed as a class action. Under that section, a plaintiff must move within 60 days after the window for responsive pleadings has closed for an order to determine whether an action brought as a class action may be so maintained. That motion practice allows a would-be class representative to demonstrate satisfaction of the CPLR 901 (a)

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[9] Indeed, a determination with respect to predominance should focus on whether class treatment will realize "economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated" (Friar, 78 AD2d at 97 [drawing on federal jurisprudence]).

[10] The dissent's concerns with respect to potential costs of pre-certification discovery in this case (see dissenting op at 3-4) are based on sheer speculation. Moreover, potential litigation costs alone do not justify the premature determination of an action or a cause of action.

prerequisites with evidence – as opposed to mere allegations – tested at a hearing. The prudent course charted here, namely, viewing the allegations of the complaint through the lens required by Leon (84 NY2d 83) and leaving the class allegations for evaluation at the hearing stage envisioned by the legislature, leaves open the possibility that defendants will obtain the same result – termination of the class claims – at the appropriate time.

Second, we agree with plaintiffs that to dismiss these class claims at this juncture would be to effectively nullify CPLR 906.[11] That section "makes clear that the certification of a class action need not be an all-or-nothing proposition" and permits the certification of subclasses or the isolation of specific issues for class treatment (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR 906). To dismiss the entirety of the class claims at this time would be to prematurely dispose of causes that could be severed into individual claims through the procedures established in CPLR article 9.

Third, it is a long-held principle "that the individualized proof required on issues such as damages . . . of each class member does not preclude a finding that common questions of law or fact predominate over individual questions" (Sanders v Farady Labs., Inc., 82 FRD 99, 101 [ED NY 1979], citing Green v Wolf Corp., 406 F2d 291, 300-301 [2d Cir 1968], cert denied 395 US 977 [1969], Herbst v International Tel. & Tel. Corp., 495 F2d 1308, 1314-1314 [2d Cir 1974], and Fischer v Kletz, 41 FRD 377, 382-383 [SD NY 1966]; see Borden, 24 NY3d at 399 ["(i)t should be noted that the legislature enacted

[11] CPLR 906 provides that, "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues," or "a class may be divided into subclasses and each subclass treated as a class" (CPLR 906 [1]-[2]).

CPLR 901 (a) with a specific allowance for class actions in cases where damages differed among the plaintiffs"]).[12] It is equally well-established "that such issues may, if necessary, be tried separately" (Sanders, 82 FRD at 101).

The possibility that individual damages determinations may become complicated to the extent the class allegations survive a CPLR article 9 test does not suggest that the commonality element cannot be satisfied. Consistent with the legislative desire that CPLR article 9 be construed liberally (see Maul, 14 NY3d at 509), courts have – properly – shown a willingness to order class litigation on liability issues and allow individual damages issues to be handled separately by a special master (see Godwin Realty Assoc. v CATV Enters., 275 AD2d 269, 270 [1st Dept 2000], citing Weinberg v Hertz Corp., 116 AD2d 1, 6-7 [1st Dept 1986], affd 69 NY2d 979 [1987]).

Fourth, defendants contend that the complaint fails to state a claim with respect to IAIs because plaintiffs "do not affirmatively allege wrongdoing with respect to [those improvements]." Rather, defendants contend, plaintiffs "allege that unspecified inspections of the apartments merely *suggest* that IAIs may not . . . have been completed." We agree with plaintiffs, however, that they adequately stated IAI claims. In the absence of the pre-certification discovery contemplated by CPLR 902, information with respect to those improvements is not readily available to them (cf. CPLR 3102 [c]).

[12] New York courts have found those and other federal authorities " 'helpful' in analyzing CPLR 901 issues . . . because CPLR article 9 'has much in common with' . . . the federal class action provision" (Maul, 14 NY3d at 510, quoting Matter of Colt Indus. Shareholder Litig., 77 NY2d 185, 194 [1991]).

Fifth, and finally, "[t]he existence of a [potential] statute of limitations issue does not compel a finding that individual issues predominate over common ones" (Williams v Sinclair, 529 F2d 1383, 1388 [9th Cir 1975]). Although "individual class members whose claims are shown to fall outside the relevant statute of limitations are barred from recovery," a timeliness problem with respect to some class members "does not establish that individual issues predominate," particularly where, as here, there are allegations of a nucleus of a common scheme of fraud (Matter of Monumental Life Ins. Co., 365 F3d 408, 421 [5th Cir 2004]). It would be antithetical to CPLR 901 to conclude that a statute of limitations defense applicable to some, but not all, members of a class of plaintiffs would insulate defendants from class liability.

Accordingly, the Appellate Division order insofar as appealed from should be affirmed, with costs, and the certified question answered in the affirmative.

Maddicks v Big City Properties, LLC
No. 67

GARCIA, J. (dissenting):

The complaint in this case was originally brought on behalf of all current and former rent-stabilized tenants in "over 20 apartment buildings" in New York City, alleging "a scheme designed to inflate rents." In upholding reinstatement of the class allegations in

that complaint, the majority fails to identify any possible "question[s] of law or fact common to the class which [could] predominate over any questions affecting only individual members" (CPLR 901 [a] [2]). Understandably: there are none. For that reason, the trial court properly granted the motion to dismiss the class allegations. Accordingly, I dissent.

I

I agree with the majority that, when it is clear from the face of a pleading and any supporting affidavits that a class cannot be certified, the class allegations in that pleading must be dismissed upon a motion made pursuant to Civil Practice Law and Rule 3211 (a) (7) (see majority op at 6). A class action complaint and supporting affidavits must satisfy the plaintiff-friendly standards New York courts apply in the motion to dismiss context (see Leon v Martinez, 84 NY2d 83, 87-88 [1994]; see also Chanko v American Broad. Companies Inc., 27 NY3d 46, 52 [2016]). Thus, they must allege facts that, when accepted as true and "accord[ed] . . . the benefit of every possible favorable inference" (Leon, 84 NY2d at 87-88), indicate that class certification would be within the discretion of the trial court as a matter of law and there is a possible "basis for class action relief" (Wojciechowski v Republic Steel Corp., 67 AD2d 830, 831 [4th Dept 1979]). Put another way, the complaint and supporting affidavits must allege facts showing that a plaintiff could meet each of the CPLR 901 (a) prerequisites following class discovery. If the

complaint and any supporting affidavits do not allege such facts and a defendant files a motion to dismiss pursuant to CPLR 3211 (a) (7), the class allegations must be dismissed.[1]

Permitting the dismissal of class allegations without prejudice at this stage of the proceedings serves the general goals of CPLR 3211 (a), preventing courts and litigants from needless costs – particularly those resulting from discovery – associated with class certification proceedings that have no chance of success. A contrary rule would instead tie the hands of the trial court in a way that undermines, rather than promotes, those objectives and frustrates the goal of efficiency central to class actions (see e.g. CPLR 901 [a] [5] [requiring that for a class action to be maintained, it "(must be) superior to other available methods for the fair and efficient adjudication of the controversy"]; Governor's Mem approving L 1975, ch 207, 1975 McKinney's Session Laws of NY at 1748 [explaining that the class action regime set forth in Article 9 "w(ill) result in greater conservation of judicial effort"]). An overly restrictive interpretation of trial court authority in this area would also impose class discovery on the party opposed to certification which, while often not as expensive or time-consuming as merits discovery,[2] may nonetheless lead to significant

[1] The prevailing view in federal court is to allow trial courts to dispose of class allegations prior to a motion for class certification (see e.g. Vinole v Countrywide Home Loans, Inc., 571 F3d 935, 940 [9th Cir 2009] ["(D)istrict courts throughout the nation have considered defendants' 'preemptive' motions to deny certification"]; Joseph M. McLaughlin, 1 McLaughlin on Class Actions § 3:4 [15th ed. 2018] ["(M)otions to strike should not be the norm, but are appropriate where the unsuitability of class treatment is evident on the face of the complaint and incontrovertible facts"]).

[2] While trial courts may try to bifurcate discovery into a class phase and a merits phase, they may nevertheless permit some degree of merits discovery during the precertification phase due to difficulty drawing a hard line between class discovery and merits discovery

costs (see CPLR 3102 [a] [cataloging the many discovery devices available to parties in civil litigation, including interrogatories, depositions, and document requests]; cf. Brief for respondents in Wal-Mart Stores, Inc. v Dukes, 564 US 338 [2011], available at 2011 WL 686407, *10-11 [noting that precertification discovery in a federal class action included "over 200 depositions, production of more than a million pages of documents, and electronic personnel data"]).[3]

Accordingly, when it is readily apparent from the face of a pleading and any supporting affidavits that the claims are not appropriate for class relief, trial courts should have the freedom to grant motions to dismiss the class allegations.

II

While we agree with the rule the majority appears to embrace, the incorrect application of that rule in this case will in effect preclude trial courts from granting motions to dismiss even the most insufficient of class allegations.

(see David F. Herr, Ann Manual Complex Lit § 21.14 [4th ed 2019]; William B. Rubenstein, 3 Newberg on Class Actions § 7.17 [5th ed 2011]).

[3] These concerns are not merely academic. For example, in Adler v Ogden Cap Properties, LLC (42 Misc 3d 613 [Sup Ct, New York County, 2013], affd sub nom Adler v Ogden CAP Properties, 126 AD3d 544 [1st Dept 2015]), the plaintiffs brought a bilateral class action, on behalf of all renters in the State of New York against all landlords in the State of New York (id. at 615). Such classes obviously could not be certified. Nevertheless, the trial court permitted class discovery (id. at 619), during which the plaintiffs "sought broad and expensive electronic discovery to which defendants objected" (id. at 619). The court eventually stayed class discovery pending decision on a summary judgment motion (id. at 615).

A

As the dissent below pointed out, the deficiency in this complaint is not based on whether common questions of law or fact would *predominate*; it is that questions common to the class, predominant or otherwise, simply do not exist (Maddicks v Big City Properties, LLC, 163 AD3d 501, 506 [1st Dept 2018] [Friedman, J.P., dissenting]). The bare allegation that the defendants have overcharged rent to the plaintiffs, without a common theory of how they did so, is legally insufficient to find that common issues predominate.

Recognizing that deficiency, the majority justifies the denial of relief by relying on an alleged "scheme" or a "pattern and practice" by the defendants in overcharging rent (majority op at 2-3). The example given by the majority is a case involving a defect in a mass-produced product "such as an automobile" which damages consumers in different ways (majority op at 7). There is no common "defect" alleged here that produces disparate harms. The allegation is only that the plaintiffs have been harmed – by paying inflated rents – but the cause of that harm is not a "common flaw" (majority op at 7). Rather, it is different for at least four different classes of plaintiffs (see majority op at 3). For some plaintiffs, there are allegations of violations of the J-51 tax program. For most, there are not. For some, there are allegations of insufficient Individual Apartment Improvements ("IAIs") to justify any imposed rent increases. For others, there are not. For some, there are allegations of inadequate registration. For others, there are not. For some, there are allegations that defendants inflated fair market rents on previously rent-controlled apartments. For others, there are not.

There is some sleight of hand in the majority's approach, which emphasizes that even though each claim may require separate proof, for example with respect to damages, that fact cannot in itself defeat class certification (see majority op at 11-12). True, of course, and well established in our caselaw. But in beginning the analysis there, the majority directs attention away from the requirement of a predominant issue of law or fact creating the need to calculate those individual damages. "[T]he fact that questions peculiar to each individual may remain *after* resolution of the common questions is not fatal to the class action" (majority op at 9-10 [emphasis added], quoting City of New York v Maul, 14 NY3d 499, 514 [2010]). Lack of any common question is fatal here.

The majority further asserts that it is a mistake to focus on mere "nuances of *how* th[e] overcharges allegedly were accomplished" (majority op at 8). Instead, according to the majority, commonality is somehow satisfied by allegations of "a common method to damage in slightly different ways" (majority op at 8), although the method itself is never articulated. That is not only incorrect, but inaccurate in describing the theories of harm upon which the plaintiffs rely. As the Appellate Division dissent correctly noted, the existence or nonexistence of a "systematic" effort by the defendants to overcharge rent is irrelevant to the merits of each individual plaintiff's overcharge claim (see Maddicks, 163 AD3d at 511 [Friedman, J.P., dissenting]). While it might lead to the possibility of treble damages in individual or joined actions, such damages are not permissible in a class action

(see CPLR 901 [b]; Borden v 400 E. 55th St. Assocs., L.P., 24 NY3d 382, 398 [2014]).[4] In this case, the existence of a "common systematic plan" (majority op at 10) would be the legal equivalent of arguing that there are common issues of fact because all of the dwellings at issue are apartments in Manhattan or every member of the class was a renter. Holding that such generalized and immaterial facts may serve as potential predicates for class certification risks turning the commonality and predominance requirements into a nullity (see Gaston v Exelon Corp., 247 FRD 75, 82 [ED Pa 2007] [denying class certification on commonality grounds because, "although some of the() (asserted common) questions may be relevant to the claims of all class members, they are not suitable for class resolution" and "(t)hose questions that would potentially be amenable to resolution on a class-wide basis are not applicable to all class members"]). That risk has been realized here.

The majority trivializes the questions that must be answered for each plaintiff's claims, describing them as "potential idiosyncrasies . . . that speak to damages, not to liability" (majority op at 8). For most of the claims, however, the particularized "idiosyncrasies" will determine both damages *and* liability. For example, each claim based upon misrepresentation of IAIs will require independent analyses of each apartment on the issue of liability, to determine whether the IAIs were sufficient to justify an associated rent

[4] The majority contends that we "ignore[]" plaintiff's allegation that defendants have engaged in a "a clear pattern and practice of improper and illegal conduct" (majority op at 2 and n 2). On the contrary, we acknowledge that plaintiffs allege the existence of a "pattern and practice" or "scheme" in their complaint. Under the theories of harm alleged, however, those allegations – even if they prove true – are simply immaterial; they are not "question[s] of law or fact" to be argued or proved (CPLR 901 [a] [2]).

increase. If the IAIs for a particular apartment were not sufficient, defendants would be liable. If the IAIs for a particular apartment were sufficient, defendants would not be liable. A determination for each apartment is entirely independent of the determination for any other apartment — with no overlapping factual question — and there is no way to decide the issue for each plaintiff without looking at the individual apartments and IAIs. Similarly discrete analyses would be required for each allegation that the defendants failed to adequately register a specific apartment, made misrepresentations to a specific plaintiff, or inflated the fair market rent on a specific apartment that had exited rent-controlled status.[5] These legal and factual "idiosyncrasies," rather than *any* common question, would necessarily predominate.[6]

B

The majority relies heavily on City of New York v Maul to justify reinstatement of the class allegations (see majority op at 9-10). However, unlike the present case, the plaintiffs in Maul presented several "common allegations that transcend[ed] and

[5] We agree with the majority that the J-51 claims may be amenable to class resolution. However, only four of the 11 buildings were part of the J-51 Program, and any commonality as to those claims certainly would not predominate.

[6] The majority views its approach as "the moderate one" under the circumstances (majority op at 10). However, given the ostensibly "common" facts alleged here – a "scheme" entered into by 11 different defendants involving several buildings with different owners over a relatively lengthy period of time – it seems reasonable to believe that class discovery will be neither efficient nor straightforward in this case. Moreover, as discussed previously, trial courts may have difficulty limiting class discovery during the precertification phase (see n 2, supra) and preventing lengthy proceedings associated with class discovery requests even when it is clear that class certification will be denied (see n 3, supra).

predominate[d] over any individual matters" for all or virtually all of the plaintiffs (14 NY3d at 512). For example, "all but one of the plaintiffs alleged that [the New York City Administration for Children's Services ("ACS")] had failed to timely make a referral to [the New York State Office of Mental Retardation and Developmental Disabilities ("OMRDD")]," leading to harm for the affected plaintiffs (id.). In addition, "*each* of the plaintiffs asserted that, when they were referred to OMRDD, that agency failed to provide timely services, often placing them on open-ended waiting lists" (id. [emphasis added]). No such common allegations are found in this complaint.

We emphasized that the plaintiffs in Maul sought relief to address "interrelated harms" (id. at 513). Here, as discussed previously, the claims are not "interrelated" but will instead require largely discrete and independent analyses. The plaintiffs' claims relate to 11 different buildings, with several different owners over different periods of time, and with at least four different theories of harm that have little-to-no overlap on an apartment-by-apartment basis. Unlike Maul, involving failures by government agencies to provide services, there are no specific facts common to all or virtually all of the named plaintiffs. While Maul approached the "outer boundary" of commonality (id. at 512), class certification given the facts alleged in the complaint would go well beyond any reasonable limitation. The majority is in effect saying that a bald assertion of commonality – "a pattern or practice of overcharging rent" – is enough to survive a motion to dismiss.

C

The majority appears to give trial courts theoretical permission to grant CPLR 3211 (a) (7) motions prior to a motion for certification. Yet, the majority also asserts that it would be improper to allow courts to grant such motions for complaints that fail to plead the CPLR 901 (a) prerequisites on their face because it would "nullify" the provisions in CPLR 906 that allow for the creation of "issue classes" (CPLR 906 [1]) and "subclasses" (CPLR 906 [2]) (see majority op at 11). That is incorrect. CPLR 906's provisions are essentially "management devices" that allow the trial court to more effectively organize class disputes. CPLR 906 (1) allows a court to create classes based on common issues, even if a particular matter still requires adjudication of several individualized questions. CPLR 906 (2) permits a court to create subclasses when, even though the entire class meets the CPLR 901 (a) prerequisites, the class may be further subdivided for efficiency or organizational reasons in the court's discretion. In either case, however, the antecedent question remains whether there exists an overarching *class* that can meet the CPLR 901 (a) prerequisites. Dismissing class allegations from a complaint that cannot meet each of the necessary CPLR 901 (a) prerequisites does not nullify the provisions of CPLR 906 for appropriate cases.

III

The discretion and flexibility of trial courts in overseeing class actions is vital to the design of Article 9 (see Governor's Mem approving L 1975, ch 207, 1975 McKinney's Session Laws of NY at 1748 [explaining that Article 9 "empowers the court to prevent

abuse of the class action device and provides a controlled remedy which recognizes and respects the rights of the class as well as those of its opponent"]). If, as the majority holds, it is not appropriate to dismiss the class allegations in this case, it is difficult to foresee a case in which the majority's rule will have any practical effect: Motions to dismiss even the most inadequate of class allegations must be denied. That outcome invites parties to file class allegations – even if a class could never be certified – knowing that they can force opposing parties to bear the costs of class discovery and certification proceedings (see e.g. Adler, 42 Misc 3d at 619, 629-630). The effect will be to diminish the power of the court to prevent abuse of the class action process.

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Order insofar as appealed from affirmed, with costs, and certified question answered in the affirmative. Opinion by Judge Fahey. Judges Rivera, Stein and Wilson concur. Judge Garcia dissents in an opinion in which Chief Judge DiFiore and Judge Feinman concur.

Decided October 22, 2019