SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH, ***Justice*** **PART** **IAS MOTION 14**

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ELIZABETH CHERNETT, MICHAEL RAPIN, on behalf of themselves and all others similarly situated,

Plaintiff,

- v -

SPRUCE 1209, LLC,

Defendant.

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INDEX NO. 159188/2020

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 78, 79, 80, 81, 82, 83, 84, 85, 86

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

The motion by plaintiffs 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 issue in this case is the initial rent set by the landlord once these new developments are ready for occupancy. 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 than permissible under the applicable statutory scheme. According to plaintiffs, defendant would offer rent concessions (such as a free month) but did not register the actual amount paid by the tenants.

In this motion, plaintiffs move to certify a class to include all current and former tenants of the building at issue who resided in the apartments after June 14, 2015. They claim 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 plaintiffs have not presented a single lease with the rent concession that could have reduced the legal regulated rent nor have the two named plaintiffs in this case had any rent concessions in their leases. Defendant argues that plaintiffs cannot meet any of the factors a Court considers when evaluating whether class certification is appropriate. Defendant also argues that CPLR 901(b) expressly bars this action from being certified as a class action. It argues that there is no statutory authorization for the default formula favored by plaintiffs in this case.

In reply, plaintiffs insist that they need not prove the merits of their case to prevail on this motion. They claim that they have satisfied the factors required to certify a class and point out that defendant did not timely seek pre-certification discovery. Plaintiffs note that the motion to dismiss was denied on April 5, 2021 and the deadline to make the instant motion was June 15, 2021 but defendant did not do so.

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 plaintiffs have satisfied the numerosity factor. Although plaintiffs do not state a specific number, they observe that the building has 127 residential units and there has undoubtedly been some turnover thereby increasing the total members of the purported class. Defendant's attempt to characterize plaintiffs' numerosity arguments as mere speculation is without merit. At this stage of the litigation, plaintiffs need not state the exact number of members in the class. Moreover, as plaintiffs point out, defendant has not denied that all of the initial occupants received rent concessions and plaintiffs allege that the initial rent registrations failed to incorporate these concessions.

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 the different units 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 used the same standard form lease for the two named plaintiffs (NYSCEF Doc. Nos. 80 and 81) and the same rent concession form (NYSCEF Doc. Nos. 82, 83). Clearly, this case, dealing with the same form leases and tenants at the same building concerning the same exact issue, satisfies this factor.

Typicality

The Court finds that this factor is also satisfied. Plaintiffs' 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. Defendant's claim that there will be factual disparities about the lease date, rent paid and riders among the various class members does not compel a different outcome. 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 plaintiffs here are adequate representatives as their affidavits (NYSCEF Doc. Nos. 64, 65) demonstrate that they are competent and understand the issues in this case. Although defendant points out that they were not initial tenants at the building, the Court does not view that fact as dispositive. Both named plaintiffs started living at the building in 2017—

that is sufficient. The Court also observes that counsel for plaintiffs contends that the firm has assumed the full financial risk of the litigation so the finances of the lead plaintiffs are irrelevant. And the Court has no doubt that counsel for plaintiffs is more than qualified to handle this case given their vast experience in this area of law.

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]).

Other Issues

Defendant devotes substantial time to arguing that the instant class action is not permissible under CPLR 901(b) because plaintiffs seek to recover a penalty. It argues that the application of a default formula in order to set new legal rents for apartments is a punitive measure and therefore not permitted under the CPLR. However, as plaintiffs point out, the First Department has found that "the default formula is not 'punishing conduct.' Nor can a case in which it is applied be reasonably deemed 'an action to recover a penalty' under CPLR 901(b)" (*Simpson v 16-26 E. 105, LLC*, 176 AD3d 418, 419, 110 NYS3d 404 [1st Dept 2019]).

The Court finds that the CPLR 902 factors are also satisfied. "Once these prerequisites [under CPLR 901] are satisfied, the court must consider the factors set out in CPLR 902, to wit, 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 did not specifically address these issues; it merely argued that because plaintiff could not satisfy the requirements under CPLR 901, the CPLR 902 factors need not be addressed. In any event, the Court finds that these factors are easily met. There is a limited possible interest in class members maintaining separate actions as these cases would be more efficiently handled (and cheaper) in one litigation. Plaintiffs contend that there is no other pending litigation about this controversy. While the Court finds that the instant forum is appropriate, it observes that plaintiffs argue that this case arose out of a building in New York County but the underlying papers (including the affidavits) suggest the subject building is located in Brooklyn (specifically in Bushwick). Finally, the Court does not foresee any significant difficulties with managing a class action involving tenants and former tenants in the same building.

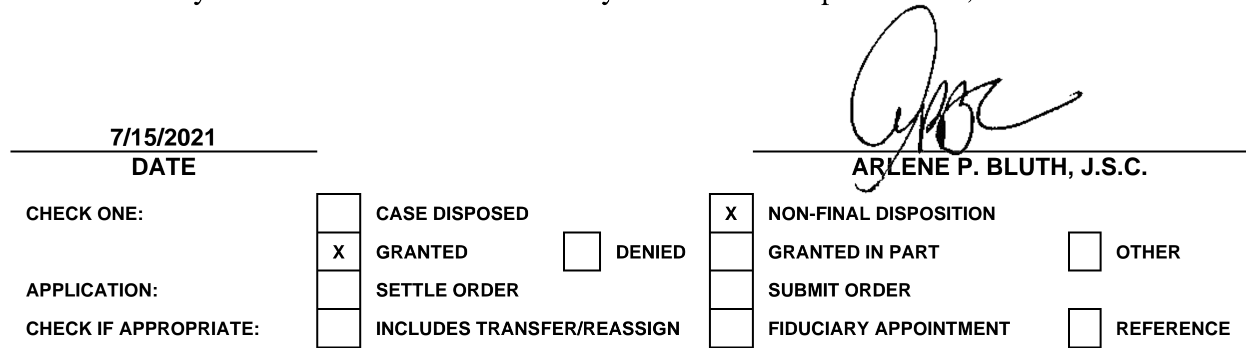
Summary

The Court recognizes that most of defendant's opposition focuses on the merits of the case. While that is understandable, plaintiffs did not have to prove their case as a matter of law on this motion. In the Court's view, the instant matter is a strong candidate for class certification because it involves tenants at the same building all complaining about exactly the same issue. It is not a situation where there is likely to be any confusion about who belongs in the class or what a class member might assert. Of course, as this Court noted in denying the motion to dismiss there are many issues to explore in discovery including the justification for the rent concessions and the extent to which they were offered to subsequent tenants. But determinations about the merits of this case does not prevent the Court from granting the instant motion.

Accordingly, it is hereby

ORDERED that the motion for class certification by plaintiffs is granted and the proposed class and subclass (as defined in the moving papers) is certified, plaintiffs Chernett and Rapin are appointed as lead plaintiffs, Newman Ferrara LLP is appointed as class counsel and the Court approves the proposed notice to class members. Defendant shall provide plaintiffs with a list of current tenants on or before August 3, 2021. Defendant shall also provide the last known contact information for former tenants on or before September 2, 2021.

Already Scheduled Remote Preliminary Conference: September 23, 2021



7/15/2021
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	