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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Saliann Scarpulla Justice

PART 19

David Rebibo

-v-

Axton Owners, Inc.

INDEX NO. 105995/12

MOTION DATE 7/25/12

MOTION SEQ. NO. 003

The following papers, numbered 1 to ____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

decided in accordance with the accompanying Memorandum decision.

FILED
OCT 17 2012
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/11/12

Saliann Scarpulla, J.S.C.
SALIANN SCARPULLA

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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DAVID REBIBO, AVNER NEBEL, and CHRISTINE HEALEY, on behalf of themselves and all others similarly situated,

Plaintiffs,

Index No.: 105995/2010
Submission Date: 7/25/12

-against-

AXTON OWNERS, INC.,

DECISION AND ORDER

Defendant.

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For Plaintiffs:
Bernstein Liebhard LLP
10 East 40th Street
New York, NY 10016

For Defendant:
Borah, Goldstein, Altschuler, Nahins & Goidel, P.C.
377 Broadway
New York, NY 10013

Papers considered in review of this motion to dismiss:

Notice of Motion	1
Aff in Support	2
Mem of Law in Support	3
Affs in Support	4
Aff in Opposition	5
Mem of Law in Opposition	6
Reply Mem of Law	7

HON. SALIANN SCARPULLA, J.:

In this rent overcharge action, plaintiffs Davis Rebibo ("Rebibo"), Avner Nebel ("Nebel"), Christine Healey ("Healey") (collectively "plaintiffs"), on behalf of themselves and all others similarly situated, move for class certification pursuant to CPLR §§ 901 and 902.

Plaintiffs allege that defendant Axton Owners, Inc. ("Axton") illegally charged them market rate rents for their apartments located at 733 Amsterdam Avenue, New York, New York. Axton receives real estate tax benefits under New York City's J-51 (now Administrative Code of the City of New York § 11-243) program, which grants property owners tax abatements and exemptions for rehabilitative work done to their buildings. Plaintiffs allege that as a J-51 recipient, Axton was required to keep the 733 Amsterdam Avenue apartments rent-stabilized pursuant to the October 2009 Court of Appeals decision, *Roberts v. Tishman Speyer Properties, L.P.*, 13 N.Y.3d 270 (2009). Plaintiffs are suing under the Rent Stabilization Law ("RSL") for reimbursement of the excess rent amounts they allegedly paid while Axton was participating in the J-51 tax benefit program.

Axton previously moved to dismiss the complaint, arguing that *Roberts* applied prospectively only and that immediately after the *Roberts* decision, Axton reduced where necessary plaintiffs' rent to the legal regulated rent. Plaintiffs cross-moved to certify as a class all 733 Amsterdam Avenue tenants "who were or continue to be charged market rents during the period in which [Axton] participated in the J-51 program."

On January 18, 2012, this Court denied Axton's motion to dismiss, noting that the First Department in *Gersten v. 56 7th Ave. LLC*, 88 A.D.3d 189 (1st Dept. 2011) held that *Roberts* applies retroactively, and that there were issues of fact as to whether Axton reduced plaintiffs' rent to the appropriate amount after the *Roberts* decision. *See Rebibo*

v. Axton Owners, Inc., 2012 N.Y. Misc. LEXIS 198 (Sup. Ct. NY Co. 2012). The Court also denied, without prejudice to renew, plaintiffs' motion for class certification because plaintiffs failed to provide affidavits or verify the complaint to establish their adequacy as class representatives.[1]

Plaintiffs now make a renewed motion for class certification, presenting affidavits from Rebibo, Nebel and Healey in which they attest to their adequacy as class representatives. Plaintiffs contend that they also meet the remaining CPLR § 901(a) requirements for class certification, and that they may waive their right to treble damages under RSL § 26-516(a) to obtain class certification.

In opposition, Axton argues that class certification is improper here because CPLR § 901(b) bars recovery of treble damages through class actions, and plaintiffs may not waive their right to treble damages to proceed as a class action. Axton maintains that, in any event, the proposed class does not satisfy the CPLR § 901(a) requirements for class certification.

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[1]Because the Court found that plaintiffs failed to establish their adequacy as class representatives, it declined to address at that time whether plaintiffs could waive their right to treble damages under the Rest Stabilization Law of 1969 ("RSL") to pursue class certification, or whether the proposed class met the CPLR § 901(a) requirements for class certification.

Discussion

Waiver of Treble Damages

CPLR 901(b) provides that, unless specifically authorized by statute, "an action to recover a penalty . . . may not be imposed as a class action." Pursuant to RSL § 26-516(a), an owner that overcharges rent "shall be liable" for treble damages unless the landlord "establishes by a preponderance of the evidence that the overcharge was not willful." *See Draper v. Georgia Props.*, 230 A.D.2d 455, 460-61 (1st Dept. 1997).

Axton argues that CPLR 901(b) bars class certification for actions brought under RSL § 26-516(a) because treble damages constitute a penalty. *See Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 213 (2007). Citing *Asher v. Abbott Laboratories*, 290 A.D.2d 208 (1st Dept. 2002), Axton further argue that plaintiffs may not waive their right to treble damages here to obtain class certification.

In *Asher*, the First Department held that class representatives could not waive their right to treble damages under the Donnelly Act to obtain class certification. *Asher*, 290 A.D.2d at 209. In actions brought under the Donnelly Act, treble damages are awarded upon a finding of liability, *see* General Business Law § 340(5), and are not contingent upon a finding of bad faith or willful misconduct. *Asher*, 290 A.D.2d at 209.

However, the First Department previously held in *Pesantez v. Boyle Envtl. Servs., Inc.*, 251 A.D.2d 11, 12 (1st Dept. 1998) that plaintiffs seeking class certification could waive their right to treble damages under Labor Law § 198 (1-a), which mandates that

courts assess treble damages "unless the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law." Likewise, RSL § 26-516(a), allows for either penalty or compensatory damages depending on whether the owner's overcharge was willful or not. *See Borden v. 400 E. 55th St. Assoc. L.P.*, 2011 N.Y. Misc. LEXIS 6141, at *5 (Sup. Ct., N.Y. Co. 2011). Given the similarity of the treble damages provision in Labor Law § 198 (1-a), and the public policy favoring a liberal interpretation of the class action statute, *see Pruitt v. Rockefeller Center Properties, Inc.*, 167 A.D.2d 14, 21 (1st Dept. 1991), plaintiffs may waive their claim to treble damages to obtain class certification.[2]

CPLR 901(a) Requirements

Though the Court holds that plaintiffs may waive their right to treble damages under RSL § 26-516(a), plaintiffs must still show that the proposed class meet the CPLR § 901(a) requirements for certification. Pursuant to CPLR § 901(a), a court may certify a proposed class only if:

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[2]The Court also rejects Axton's argument that Rent Stabilization Code ("RSC") § 2520.13 bars class certification here. Rent Stabilization Code ("RSC") § 2520.13 states that "[a]n agreement by the tenant to waive the benefit of any provision of the RSL or this Code is void." However, plaintiffs are seeking to waive their entitlement to treble damages unilaterally, not through agreement. *See Livbros, LLC v. Vandenburgh*, 179 Misc.2d 736, 738-39 (Civ Ct., Kings Co. 1999). Thus, allowing the class action to proceed would not frustrate the RSC's purpose of "[avoiding] situations whereby the landlord attempts to circumvent the [RSC's] benefits . . . ." *Livbros, LLC*, 179 Misc.2d at 738-39.

1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
2. there are questions or law or fact common to the class which predominate over any questions affecting only individual members;
3. the claims or defense 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.

The proponent of class certification bears the burden of tendering admissible evidence to establish the above criteria. *See Pludeman v. Northern Leasing Sys., Inc.*, 74 A.D.3d 420, 422 (1st Dept. 2010).

Here, plaintiffs have tendered sufficient evidence to meet the CPLR § 901(a) requirements for class certification. The proposed class consists of all tenants currently residing in 733 Amsterdam's approximately forty-five deregulated units, a number which Axton does not contest, as well as numerous former tenants. This is sufficient to satisfy the numerosity requirement.[3] *See Pajaczek v. CEMA Constr. Corp.*, 18 Misc. 3d 1140(A) (Sup. Ct. NY Co. 2008) (holding that forty class members satisfied the numerosity requirement); *Caesar v. Chemical Bank*, 118 Misc. 2d 118, 120-21 (Sup. Ct. NY Co. 1983) (holding that thirty-eight members satisfied the numerosity requirement).

There are also sufficient common issues of law and fact among class members. Commonality "requires predominance, not identity or unanimity, among class members."

[3]Axton argues that the difficulty in ascertaining the appropriate rent to be charged precludes a holding that numerosity has been satisfied. This argument, however, is relevant to the commonality, not numerosity, requirement.

Friar v. Vanguard Holding Corp., 78 A.D.2d 83, 98 (2d Dept. 1980). The primary legal issue in this action is whether the class of tenants paid market rate rent while Axton collected J-51 benefits. If they did, then Axton is liable for the overpayment. Any further inquiry related to individual tenants' actions, such as when each apartment was deregulated or the last legal rent charged, is relevant to damages, and "the complexity of the damage issue is not a bar to class action certification." *Pruitt*, 167 A.D.2d at 23; *see also Weinberg v. Hertz Corp.*, 116 A.D.2d 1, 6-7 (1st Dept. 1986); *Godwin Realty Associates v. CATV Enterprises, Inc.*, 275 A.D.2d 269, 270 (1st Dept. 2000).

The class representatives also satisfy the typicality requirement. To meet the typicality requirement, the representative's claims must "[derive] from the same practice or course of conduct that gave rise to the remaining claims of other class members and [are] based upon the same legal theory." *Friar*, 78 A.D.2d at 99. Here, the claims derive from the same course of conduct, namely Axton's deregulating the apartments of class representatives and class members while receiving J-51 benefits. Thus, plaintiffs' claims arise from the same facts and course of conduct as those of the class. *See Gudz v. Jemrock Realty Company, LLC*, 2011 WL 2516324 (Sup. Ct. N.Y. Co. 2011)

Further, the class representatives satisfy the adequacy requirement. "The factors to be considered in determining adequacy of representation are whether any conflict exists between the representatives 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 A.D.2d 179, 202 (1st Dept. 1998).

Though plaintiffs are waiving their and the class members' right to treble damages, members who do not wish to waive this right may opt out of the class, thus avoiding any conflict of interest. *See Super Glue Corp. v. Avis Rent A Car Sys., Inc.*, 132 A.D.2d 604, 606 (2d Dept. 1987). Further, the affidavits of Rebibo, Nebel and Healey , in which they attest that they are familiar with the litigation, that they are willing to play an active role in its prosecution, and that they understand they are waiving their right to treble damages, are sufficient to establish plaintiffs' adequacy as class representatives. *See Ackerman*, 252 A.D.2d at 194-95.

Lastly, the class satisfies the superiority requirement, as forcing the tenants to pursue their claims individually would be a waste of resources and could result in inconsistent decisions. *See Gudz*, 2011 WL 2516324.

In accordance with the foregoing, it is

ORDERED that the motion for class certification by plaintiffs David Rebibo, Avner Nebel, and Christine Healey, on behalf of themselves and all others similarly situated, is granted; and it is further

ORDERED that this action is certified as a class action on behalf of all persons who are or were residential tenants at 733 Amsterdam Avenue, New York, NY, and were charged, and/or continue to be charged, market-rate rents during the period in which the

owner of 733 Amsterdam Avenue, defendant Axton owner LLC, was participating in the J-51 tax benefit program; and it is further

ORDERED that plaintiffs David Rebibo, Avner Nebel, and Christine Healey are appointed as class representatives; and it is further

ORDERED that and plaintiffs' counsel Bernstein Liebhard LLP is appointed as class counsel.

This constitutes the decision and order of the Court.

Dated: New York, New York
October 11, 2012

ENTER:

Saliann Scarpulla, J.S.C.