| **Yang v Creative Indus. Corp.** |
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| 2018 NY Slip Op 33209(U) |
| December 14, 2018 |
| Supreme Court, New York County |
| Docket Number: 155681/17 |
| Judge: Robert D. Kalish |
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SUPREME COURT FOR THE STATE OF NEW YORK
NEW YORK COUNTY: PART 29

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A. YANG, JACQUELINE SUBRAMANIAM, MORGAN CASTILLA, E. STEEL, DAWN FADELY and P. SHARMA, on behalf of themselves and all others similarly situated,

Plaintiffs,

-v- Index No.: 155681/17

CREATIVE INDUSTRIES CORPORATION and RUDD REALTY MANAGEMENT CORPORATION,

Defendants.

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KALISH, J.:

Plaintiffs, current and former tenants of an apartment building located at 28 Bedford Street in Manhattan, seek damages for rent overcharges and injunctive relief, alleging that their apartments (units) were improperly removed from the protection of the rent stabilization law even though their landlord accepted tax benefits pursuant to New York City's J–51 tax abatement program (Administrative Code of the City of NY § 11–243).

In this renewal motion, sequence number 005, plaintiffs seek an order: (a) certifying this action as a class action pursuant to CPLR Article 9; (b) appointing plaintiffs Yang and Fadely as lead plaintiffs and class representatives; (c) appointing the law firm of Newman Ferrara as counsel for the class; (d) approving a class notice that plaintiffs have appended; and (e) granting plaintiffs such other and further relief as this Court deems just and proper. Plaintiffs seek certification for a class defined as:

> "All tenants at 28 Bedford living, or who had lived, in apartments that were deregulated during the period when J-51 tax benefits

> were being received by owner of 28 Bedford, except that the class shall not include any tenants who vacated such apartment prior to June 22, 2013"

(plaintiffs' moving memorandum of law at 3). Plaintiffs seek as a subclass the current tenants of 28 Bedford Street.

*The Class Action Motion*

Plaintiffs' original motion to certify this action (sequence number 004) was denied with leave to renew upon the presentation of affidavits executed by all current plaintiffs concerning the waiver of treble damages. In the original motion, defendants argued that plaintiffs' certification motion should be denied because: (1) the motion was untimely; (2) the court lacked subject matter jurisdiction; (3) the New York State Division of Housing and Community Renewal (DHCR) has primary jurisdiction of this matter; (4) plaintiffs have not unequivocally waived treble damages; (5) there is no justiciable controversy, as defendants have refunded all rent overcharges, with interest, to tenants and have acknowledged that the units are rent stabilized; and (6) plaintiffs failed to meet the requirements of CPLR 901, 902 and 904. As the court instructed the parties, on the record, during the original motion argument, defendants' arguments about the motion's timeliness and this court's lack of subject matter jurisdiction were not persuasive. That determination carries here.

CPLR 901 is to be liberally construed (*Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 393, 394 [2014]; *Beller v William Penn Life Ins. Co. of N.Y.*, 37 AD3d 747, 748 [2d Dept 2007]).

CPLR 901 and 902 provide the prerequisites for a class action. Specifically, CPLR 901 provides that:

> "Prerequisites to a class action
>
> a. One or more members of a class may sue or be sued as representative parties on behalf of all if:
>
> 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.
>
> b. Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action."

"The party seeking class certification bears the burden of establishing the criteria prescribed in CPLR 901 (a)" (*Kudinov v Kel-Tech Constr. Inc.*, 65 AD3d 481, 481 [1st Dept 2009] [internal citations omitted]). In addition,

> "[i]f the prerequisites set out in CPLR 901 (a) are met, the court, in deciding whether to grant class action certification should then consider the additional factors promulgated by CPLR 902 such as the interest of individual class members in maintaining separate actions and the feasability 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 managing the class action"

(*Pludeman v N. Leasing Sys., Inc.*, 74 AD3d 420, 422 [1st Dept 2010]).

As a threshold matter, defendants argue that plaintiffs are required to, but have not unequivocally waived treble damages, which, defendants contend, is a prerequisite to granting class action certification (CPLR 901 [b]). "[W]aiver 'is an intentional relinquishment of a known right'" (*Matthew Adam Props., Inc. v United House of Prayer for All People of the Church on the Rock of the Apostolic Faith*, 126 AD3d 599, 600-601 [1st Dept 2015] [citation omitted]). Although a person's waiver of his or her rights is not lightly presumed (*id.*), the two lead plaintiffs each state that they are agreeing to waive treble damages (affs of Yang and Fadely, NYSCEF Doc Nos. 98 and 103). The other four plaintiffs, who submit individual affidavits, all aver that they know that they may be able to recover treble damages, but only if they proceed on an individual basis, and also know that treble damages are not available in a class action, but agree to participate in this action to recover on a class-wide basis (affs of Sharma, Steel, Castilla, and Subramaniam, NYSCEF Doc Nos. 106-109). These plaintiffs go on to state that they recognize, that is, that they are aware that, because they seek class action status, treble damages are unavailable if the class is certified.

It is axiomatic that CPLR 901 (b) concerns class actions only, and not actions or proceedings in which a class has not been certified. Plaintiffs' affidavits read as demonstrating their understanding that, while they otherwise may be entitled to treble damages, they are, for purposes of class certification, and in prosecuting a class action, agreeing to relinquish the right to treble damages. This is an effective waiver, and is in harmony with CPLR 901, as the Court of Appeals has stated that the statute permits waiver (*Borden*, 24 NY3d at 390), and there is nothing in CPLR 901 suggesting that, outside of a class action, plaintiffs are required to waive anything.

The Court of Appeals has noted that the legislative intent in not permitting the recovery of penalty damages, was based upon the concern "that recoveries beyond actual damages could lead to excessively harsh results, particularly where large numbers of plaintiffs were involved" (*Sperry v Crompton Corp.*, 8 NY3d 204, 211 [2007]); this is specific to class actions. Defendants do not demonstrate otherwise, or that plaintiffs must waive punitive damages in the event that an action is not certified as a class action.

In addition, plaintiffs do not seek treble damages in their complaint. In *Cox v Microsoft Corp.* (8 AD3d 39, 40 [1st Dept 2004]), where plaintiffs expressly sought only actual damages, "the motion court correctly found CPLR 901(b), which prohibits class actions for recovery of minimum or punitive damages, inapplicable." The complaint in this action states that plaintiffs are seeking compensatory damages of the difference between what the alleged legally regulated rent should have been and what they were charged, plus interest and attorneys' fees. The complaint states nothing about treble damages. That plaintiffs are not unconditionally waiving treble damages outside of a class action does not mean that they are actually seeking such damages in a class action. Bolstering plaintiffs' argument, plaintiffs' counsel, in court, on the record, represented that plaintiffs are not seeking treble damages (*see* Kingsley affirmation, exhibit B, tr [April 10, 2018] at 33, 35, 37; *see also* NYSCEF Doc No. 169, tr [November 27, 2018] at 33, 34). In addition, plaintiffs' notice states that:

> "[p]laintiffs are not seeking on behalf of themselves, or the members of the Class, the treble damages penalty provided for in the rent stabilization laws and regulations for willful rent overcharges. In seeking class certification, Plaintiffs have agreed to waive that penalty on behalf of themselves and the Class, seeking only injunctive relief and compensatory relief for the actual amounts of the overcharges, plus interest"

(Sacher moving affirmation, exhibit E).

That, as defendants contend, some of the words of the complaint seem to track the language of Rent Stabilization Law 26-516 (a), is not dispositive under the circumstances described here. As plaintiffs present no serious indication that, within the confines of a class action, they are attempting to preserve the ability to seek treble damages, their submissions are interpreted as their intentional relinquishment of the right to seek such relief therein. Moreover, at the November 27, 2018 oral argument on the motion, the Court finds that plaintiffs' counsel satisfactorily indicated plaintiffs' waiver of treble damages in the class action in a manner that is in complete accord with what the Court of Appeals deemed proper in *Borden*, irrespective of whether Plaintiffs had even submitted affidavits (*see* tr [November 27, 2018] at 33, 34). Furthermore, the determination made on this motion is predicated on the determination that plaintiffs are not seeking treble damages.

Finally, defendants' position is untenable because the waiver for which they advocate, while resulting in a potential windfall for them, could result in the loss of what may be valuable rights for certain plaintiffs simply because the court denies class action status, a determination which rests on many factors unrelated to CPLR 901 (b). Plaintiffs' waiver is unilateral (*see Borden*, 24 NY3d at 389) and it is partial only in that, outside of the confines of a class action, plaintiffs are not agreeing to waive the right to treble damages. The Court of Appeals, in *Borden*, stated that "[t]he language of CPLR 901(b) itself says that it is not dispositive that a statute imposes a penalty so long as the action *brought pursuant to that statute* does not seek to recover the penalty" (*id.* at 393-395 [emphasis added] ["drafters . . . intended to enable plaintiffs to waive penalties to *recover through a class action* [emphasis added]).

As another threshold issue, defendants argue that DHCR has primary jurisdiction of this case. "[I]t is reasonably inferred from the applicable provisions of the Rent Stabilization Law that the doctrine of primary jurisdiction enjoins courts sharing concurrent jurisdiction to refrain from adjudicating disputes within an administrative agency's authority, particularly where the agency's specialized experience and technical expertise is involved" (*Katz 737 Corp. v Cohen*, 104 AD3d 144, 150 [1st Dept 2012] [internal quotation marks and citation omitted]). However, before the Court may consider defendants' argument of primary jurisdiction, the Court must first address the legal issue of class certification; if class certification is granted here, defendants' primary jurisdiction argument is unavailing (*Dugan v London Terrace Gardens, L.P.*, 101 AD3d 648, 649 [1st Dept 2011]). As defendants note, this court, in *Davidson v 730 Riverside Dr., LLC* (2015 NY Slip Op 31714[U] [Sup Ct, NY County 2015]), determined that a rent overcharge matter was within DHCR's primary jurisdiction, but that case involved one tenant, as do some of the other cases upon which defendants rely, and was not a class action (*see also Payton v First Lenox Terrace Assocs. LLC*, 2018 NY Slip Op 31442 [U] [Sup Ct, NY County, June 29, 2018, Kalish, J.]). Other cases to which defendants cite either do not involve class actions or are motions to dismiss (*see e.g. Quinn v Parkoff Operating Corp.*, 2018 NY Slip Op 50349(U) [Sup Ct, NY County 2018] [motion to dismiss involving four different properties in which court determined that plaintiffs did not satisfy requirements of commonality and typicality for a class action necessarily to avoid dismissal and that plaintiffs had not demonstrated why primary jurisdiction should be invoked]; *Chester v Cleo Realty Assoc.*, L.P., 2017 NY Slip Op 31673(U) [Sup Ct, NY County 2017] [motion to dismiss granted in non-class action]; *Collazo v Netherland Prop. Assets LLC* , 2017 NY Slip Op 31709(U) , *affd* 155 AD3d 538, 538 [1st Dept 2017], *lv*

*granted* 31 NY3d 910 [2018] [stating that the case was not brought as a putative class action]).

Defendants' argument, that the action is moot, because there is no longer a justiciable controversy, because the landlord has acknowledged that the apartments are subject to rent stabilization and refunded overcharges with interest, also is not dispositive of the class action motion. Defendants ignore that plaintiffs seek to use a different, default method of calculating overcharges, which defendants have not demonstrated is an improper manner in which to calculate rent overcharges as a matter of law.

*Numerosity*

As to the CPLR 901 class action factors, plaintiffs have adequately demonstrated that they meet the numerosity prong of the CPLR 901 (a) analysis. When the legislature adopted CPLR 901(a), it "contemplated classes involving as few as 18 members" (*Borden*, 24 NY3d at 399 ). In *Borden (id.*), the Court of Appeals, in a parenthetical, quoted from *Consolidated Rail Corp. v Town of Hyde Park* (47 F3d 473, 483 [2d Cir 1995]), that "'numerosity is presumed at a level of 40 members.'" Plaintiffs assert that it is highly likely that there are more than 40 members, based upon the number of units affected, over 20 units, and that more than one tenant is likely to occupy, or to have occupied, some units. Plaintiffs further assert that there are also a number of former tenants, who, like plaintiffs Fadely and Sharma, were forced to move when defendants increased their rent over what was permitted under the rent-stabilization law, and were overcharged because defendants did not treat their apartments as rent-stabilized.

In opposition, defendants argue that plaintiffs have not established that joining other tenants in the small building is impracticable, and that the case is moot as to the tenants living in the building, because they have been refunded rent overcharges and provided with the

appropriate rent-stabilized leases. In reply, plaintiffs disagree, stating that the rent has not properly been calculated, because base date rents have not been determined. While no adjudication is made here as to the appropriate method of calculating any plaintiff's, or putative plaintiff's, rent overcharges, if any, for the purposes of this motion, the current tenants will not be presumed to have conceded that they were made whole by the landlord's prior rent refunds.

Defendants also argue that plaintiffs already have been able to reach former tenants through neighborhood campaigns. However, defendants have not demonstrated, as a matter of law, that plaintiffs were able to reach all of the former tenants, and, viewed liberally, as is required here, the numerosity element has been established.

*Commonality*

Concerning the issue of common questions of law or fact, and similarity of claims, plaintiffs have demonstrated that there are central common questions of law and fact as to how the legal regulated rents for the putative class members are to be determined and damages, if any, are to be calculated, as well as factual questions as to which tenants resided in the apartments during the relevant time period, that predominate here. That the amount of damages and facts of individual claims may vary from individual to individual is not dispositive (*Borden*, 24 NY3d at 399; *Borden*, 105 AD3d at 631).

*Typicality*

Plaintiffs allege that the same conduct by defendants has injured them and putative class members, which satisfies the typicality requirement of CPLR 901 (a) (3) (*Super Glue Corp. v Avis Rent A Car Sys.*, 132 AD2d 604, 607 [2d Dept 1987] ["it is not necessary that the claims of the named plaintiff be identical to those of the class"]). The proposed putative class clearly

describes tenants and former tenants, who, like plaintiffs, may have been illegally denied rent-stabilized leases or may have had their rents increased in violation of the rent stabilization law.

*Adequacy*

The lead plaintiffs' affidavits and plaintiffs' submissions concerning their law firm, are sufficient to demonstrate that these plaintiffs and their counsel will fairly and adequately protect the interests of the class (*see Borden*, 105 AD3d at 631), and do not reveal a conflict that might arise. The lead plaintiffs' affidavits also adequately demonstrate their ability and willingness to take on the lead position. Plaintiffs have demonstrated that their attorneys are sufficiently experienced in landlord-tenant law and class-action litigation to represent plaintiffs.

Because Newman Ferrarra LLP is assuming the cost of litigation, defendants challenge the validity of plaintiffs' argument that members have minimal interest in controlling the litigation on an individual basis because the cost of it will likely exceed the recovery. However, Newman Ferrara LLP asserts that it has only agreed to assume the cost of litigation for its own clients, and for any class members, so that other individuals that have an interest in controlling the litigation would have to bear their own costs in individual actions, which would be likely to outweigh recovery.

*Superiority*

"[T]o preserve judicial resources, class certification is superior to having these claims adjudicated individually" (*Borden*, 24 NY3d at 400). Prosecution of separate actions for the tenants and former tenants would unnecessarily consume judicial resources and the possibility of inconsistent rulings is reduced by making the class action available.

As such, the court finds that the plaintiffs have met the requirements set forth in CPLR

901. Further, the Court finds that plaintiffs have met the criteria set forth in CPLR 902. Plaintiffs represent that there is no other litigation involving this controversy, which is not disputed. The forum is appropriate because the class members are all current or former New York County residents, and their claims arise out of their occupancy of a building in New York County with the same landlord.

*The Class Notice*

Defendants argue that plaintiffs have not demonstrated compliance with CPLR 904 (c), which governs class action notices and their costs. However, plaintiffs submitted a copy of a proposed class action notice with their motion and requested that the court compel defendants to provide the names of current tenants and the names and last known address of former tenants to facilitate notice through the mail. From this, drawing the inference that plaintiffs seek to distribute the notice by mail is reasonable. In reply, plaintiffs' counsel states that they are bearing the initial cost of notice by mail. In light of the number of tenants and former tenants involved, presumably not in the hundreds, as defendants describe the building as small, and the relatively inexpensive cost of mail, there is no suggestion that the cost of distribution will be prohibitively expensive. Under these circumstances, there is no need for the sampling discussed in CPLR 904 (c) (iii). Based on the foregoing, the motion for class certification shall be granted, with the putative class requested by plaintiffs, described above.

To the extent that the plaintiffs seek approval of the notice they submit (CPLR 904 [c]), their motion is denied, without prejudice to submit another notice, that comports with this decision, by motion, on notice to defendants. Even if, as plaintiffs contend, the registered rent amounts are incorrect, if the apartments are registered with DHCR as rent stabilized now, and

defendants are acknowledging that they are rent stabilized, the notice should not appear to suggest or indicate otherwise. In addition, the language that plaintiffs use in the notice, that they "state claims" under General Business Law (GBL) § 349, is inappropriate, as plaintiffs merely assert a claim under that provision (*see Collazo*,155 AD3d at 538] [affirming dismissal of GBL 349 claim in which motion court noted that the First Department has held that private disputes between landlords and tenants do not come within the reach of the statute]; *see also Collazo*, 2017 NY Slip Op 31709[U]). The assertion likely fails to state a cause of action, although that issue is not currently before the Court on this motion for class certification, as "Plaintiff's allegations of unlawfully deceptive acts and practices under General Business Law § 349 present[] only private disputes between landlords and tenants, and not consumer-oriented conduct aimed at the public at large, as required by the statute." (*Aguaiza v Vantage Props., LLC*, 69 AD3d 422, 423 [1st Dept 2010].)

*Plaintiff's Motion to Compel Names and Addresses*

Plaintiffs seek an order compelling the names of the current residents at 28 Bedford, stating that a rent roll would suffice to allow plaintiffs to disseminate notice through a mailing and that defendants should also provide to plaintiffs the names and last known addresses of former residents. Defendants argue that plaintiffs request a mandatory injunction ordering defendants to provide names and addresses, for which plaintiffs have not provided legal support. Plaintiffs are not precluded from obtaining discovery from defendants by utilizing the devices of CPLR article 31. As such, this branch of the motion is resolved to the extent Plaintiff may send a proper discovery notice to defendants now, which may be addressed further at the next discovery conference in the event that the parties still have a dispute concerning this issue.

## CONCLUSION

Accordingly, it is

ORDERED that the branch of the Plaintiffs A. Yang, et al.'s motion to certify the class is granted; and it is further

ORDERED that the branch of the motion to appoint certain lead plaintiffs and class representatives is granted; and it is further

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

ORDERED that the branch of the motion to approve the class notice is denied, with leave to renew; and it is further

ORDERED that the branch of the motion which is to compel is resolved as indicated; and it is further

ORDERED that all parties are directed to appear in Part 29, located at 71 Thomas Street Room 104, New York, New York 10013-3821, on Tuesday, January 8, 2019, at 9:30 a.m., for a preliminary conference.

The foregoing constitutes the decision and order of the Court.

ENTER

Hon. Robert D. Kalish, J.S.C.

HON. ROBERT D. KALISH
J.S.C.