Gould v Fort 250 Assoc., LLC
2018 NY Slip Op 33248(U)
December 14, 2018
Supreme Court, New York County
Docket Number: 160190/17
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29
--X
MORGAN GOULD, STEVEN ESTEVEZ and ANNE DOHERTY, on behalf of themselves and all others similarly situated,

Plaintiffs,

Index No.: 160190/17
DECISION/ORDER

-against-

FORT 250 ASSOCIATES, LLC,

Defendant.
--X

KALISH, J.:

In this proposed class action, plaintiffs Morgan Gould, Steven Estevez and Anne Doherty (plaintiffs) move for class certification pursuant to CPLR 901 (motion sequence number 001). For the following reasons, this motion is denied with leave to renew.

BACKGROUND

Plaintiffs, and the proposed class members herein, are all tenants in a rent-regulated residential apartment building (the building) located at 250 Fort Washington Avenue in the County, City and State of New York. *See* notice of motion, Lester affirmation, ¶ 4. Defendant Fort 250 Associates, LLC (Fort 250) is the building's owner. *Id.*, ¶ 3.

Plaintiffs allege that the building is rent-stabilized by virtue of having been enrolled in the J-51 real estate tax abatement program through at least 2011. *See* notice of motion, Lester affirmation, ¶ 5. Plaintiffs also allege that Fort 250 nevertheless engaged in a fraudulent scheme to evade the Rent Stabilization Law (RSL) by illicitly cancelling the rent-regulated status of the building's apartments via the filing of fraudulent and incorrect rent registration statements and the issuance of fraudulent and incorrect leases to the building's tenants. *Id.*, ¶¶ 6-9.

Fort 250 does not specifically dispute plaintiffs' factual allegations regarding improper rent registrations or rent overcharges. *See* Ansell affirmation in opposition, ¶¶ 1-3. Instead Fort 250 opposes plaintiffs' class certification request on the ground that it is legally deficient. *Id.* For the purposes of this motion, it is relevant to note plaintiffs' claim that:

> "Pursuant to [CPLR 901], the proposed class consists of current, former and prospective tenants who reside, will reside or have lived in the building during the statutorily relevant and applicable period. Plaintiffs and the proposed class have paid rent in excess of the permissible legal rent as a result of [Fort 250's] or any predecessor in interests' fraudulent scheme to deregulate apartments and overcharge for rents in the building."

Id.; exhibit A (complaint), ¶ 16.

Plaintiffs commenced this action on November 15, 2017 by filing a summons and complaint that sets forth causes of action for: 1) a declaratory judgment; 2) reformation (of leases); 3) money damages (for rent overcharge and attorney's fees); and 4) violation of General Business Law (GBL) § 349 (h). *See* Ansell affirmation in opposition, exhibit A (complaint). On March 30, 2018, Fort 250 filed an answer which contained one counterclaim for attorney's fees. *See* Weissman reply affirmation, exhibit B (answer). Now before the court is plaintiffs' motion for class certification (motion sequence number 001).

DISCUSSION

CPLR 901, which governs "prerequisites to a class action," provides as follows:

> "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."

CPLR 901. In their motion, plaintiffs argue that their proposed class is proper because they have satisfied each of these statutory criteria. *See* notice of motion, Lester affirmation, ¶¶ 10-31. Defendants disagree, and assert several arguments in opposition to plaintiffs' request for class certification. *See* Ansell affirmation in opposition, ¶¶ 4-40. This decision will address as many of those arguments as the court believes may be providently disposed of at this juncture of the litigation.

First, Fort 250 argues that "plaintiffs' motion should be denied because DHCR [i.e., the New York State Division of Housing and Community Renewal] has primary jurisdiction." *See* defendants mem of law at 1-3. Fort 250 is incorrect. This action is a proposed class action. The Appellate Division, First Department, has squarely held that the doctrine of primary jurisdiction may not be invoked as a ground for transferring class actions to the DHCR because "legal issues, including class certification . . . should be addressed in the first instance by the courts." *See* *Dugan v London Terrace Gardens, L.P.*, 101 AD3d 648, 648 (1st Dept 2012); *see also Gerard v Clermont York Assoc., LLC*, 81 AD3d 497 (1st Dept 2011). Here, as will be discussed, there is

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insufficient evidence for the court to rule on the propriety of plaintiffs' class certification request at this juncture. Therefore, the court rejects Fort 250's first opposition argument as premature.

Next, Fort 250 argues that "class certification is inappropriate because plaintiffs have not unequivocally waived treble damages claims." *See* defendants mem of law at 3-5. On this point, too, Fort 250 appears to be mistaken. In their reply papers, plaintiffs assert that they "have submitted affidavits waiving any right to treble or punitive damages in accordance with [CPLR 901 (b)], which have been e-filed as part of this motion, and are hereby incorporated." *See* Weissman reply affirmation, ¶ 11. Therefore, the court rejects Fort 250's second opposition argument as unfounded.

Next, Fort 250 argues that "the proposed class is overbroad and cannot be determined without reaching the merits." *See* defendants mem of law at 5-6. Later, Fort 250 adds to this assertion by arguing that CPLR 903 requires that "any viable class definition should be precisely tailored."[1] *Id.*, at 15. Plaintiffs do not address either of these points in their reply papers, but focus instead on their argument that they have satisfied the criteria for class certification that are set forth in CPLR 901. *See* plaintiffs' reply mem at 6-9. The court believes that this omission on plaintiffs' part cannot be excused, however. As was previously observed, plaintiffs' proposed class herein consists of "current, former and prospective tenants who reside, will reside or have lived in the building during the statutorily relevant and applicable period." *See* Ansell affirmation in opposition, exhibit A (complaint), ¶ 16. However, plaintiffs have not identified when that "statutorily relevant and applicable period" fell. The only evidence that plaintiffs have

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[1] The statute actually provides that "[t]he order permitting a class action shall describe the class." CPLR 903.

offered on this point is a copy of a web page maintained by the New York City Department of Taxation and Finance that shows that the building received a $6,629.12 J-51 real estate tax abatement during the tax year 2010-2011. *See* Weissman reply affirmation, exhibit D. This is obviously insufficient to establish the duration of the entire period during which the building was, or still is, registered in the J-51 program. That time period must be fixed in order to determine for how long the building's apartment units were entitled to rent stabilization protection. After this, separate inquiries will need to be made into which of the building's apartment units may have continued to be entitled to rent stabilization protection after the building exited the J-51 program, and for how long. Only after these inquiries are satisfied, and the "statutorily relevant and applicable period" during which rent overcharges may have been imposed in the building is established, can plaintiffs make a generally accurate allegation as to what tenants their proposed class may consist of. Plaintiffs will then need to support such an allegation with sufficient evidence to satisfy the CPLR 901 class certification requirements of numerosity, commonality, typicality, adequacy of representation and superiority. At this juncture, however, plaintiffs' allegation regarding their proposed class is much too open ended, and their supporting evidence is clearly inadequate. Therefore, the court agrees with Fort 250's contentions that the proposed class of plaintiffs herein is "overbroad" and "undefined." However, the court does not agree that these findings are sufficient to warrant the outright denial of plaintiffs' motion.

CPLR 907 provides, in part, that "[i]n the conduct of class actions the court may make appropriate orders . . . determining the course of proceedings or prescribing measures to prevent undue . . . complication in the presentation of evidence or argument." Here, as was discussed

above, the proposed class of plaintiff/tenants is overly broad and imprecisely defined. However, the court believes that it would be a provident exercise of discretion to afford plaintiffs the opportunity to cure these deficiencies. Therefore, the court grants leave to plaintiffs to produce evidence of the exact time period during which the building was subject to rent stabilization protection, and further grants leave to plaintiffs to amend their pleadings to reflect a proposed class of plaintiff/tenants who may have been subjected to rent overcharges by Fort 250 during that period. Accordingly, the court finds that plaintiffs' motion should be denied with leave to renew, as set forth above.

CONCLUSION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 901 and 902, of plaintiffs Morgan Gould, Steven Estevez and Anne Doherty (motion sequence number 001) is denied without prejudice to renewal, in accordance with the terms of this order.

Dated: New York, New York
December 14, 2018

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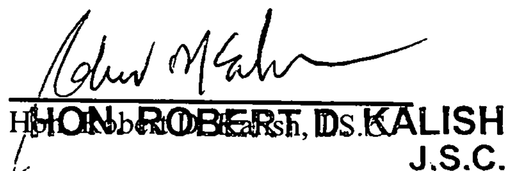

HON. ROBERT D. KALISH
J.S.C.