Salva v Levine

2014 NY Slip Op 33182(U)

December 4, 2014

Supreme Court, New York County

Docket Number: 150144/08

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

GLADYS SALVA, VICKIE VARNUSKA, FERNANDO ROQUE, ZENAIDA ROQUE, ROSALBA ALMANZAR, YOLANDA KAMINSKY, LILLIAN DEL RIO, GLENDA SWANSON-MASSA, JEFFREY DODSON, AIDA WENZELL, ENRIQUE TRIANA, KAREN BECK, JOHN GALLAGHER, ANA MORALES and DIGNA WENZELL,	Index No. 150144/08
Plaintiffs,	Mot. seq. no. 005
- against -	**DECISION AND ORDER**
PHILIP LEVINE, as independent executor of the estate of DOROTHEA LEVINE, GREG HEALY, TYVAN HILL PROPERTIES, INC., and TYVAN HILL COMPANY,	
Defendants.	

BARBARA JAFFE, J.:

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This action arises from allegedly unsafe and unhabitable conditions that have existed for roughly a decade at a residential building located at 452 Fort Washington Avenue in Manhattan. Until her death on September 13, 2013, Dorothea Levine and her companies, defendants Tyvan Hill Properties, Inc., and Tyvan Hill Company owned the building, and from 2006 to 2010, defendant Greg Healy was the building's managing agent. By notice of motion, plaintiffs, tenants of the building, move for leave to amend their complaint. Defendants oppose.

I. BACKGROUND

On February 2, 2000, the Division of Housing and Community Renewal (DHCR) issued a rent reduction order, which it mailed to defendants and the building's tenants. In pertinent part, DHCR found decreases in the building's services, and as a result, it reduced the maximum legal collectible rent by $30 for rent-controlled tenants, and froze the rent for rent-stabilized tenants to the amounts set forth in their 1999 lease renewals. The order was effective, retroactively, as of September 1, 1999, and prohibited defendants from collecting rent increases until DHCR issued an order restoring them. (NYSCEF 41).

In September 2005, plaintiffs began withholding rent from defendants, depositing it into their attorney's escrow account and claiming that defendants' alleged failure to correct conditions in the building constituted rent-impairing violations, as defined by Multiple Dwelling Law (MDL) § 302(a), thereby entitling them to an abatement. (NYSCEF 23, 44).

In 2006, and again in 2008, plaintiffs and the New York City Department of Housing Preservation and Development (HPD) each commenced summary proceedings in New York City Civil Court, Housing Part, to compel defendants to remedy alleged building and housing code violations; defendants sought back rent and access to the leased premises. (NYSCEF 3).

On or about July 19, 2008, plaintiffs commenced this action, alleging defendants' failure to maintain the building properly, asserting causes of action for intentional infliction of emotional distress, breach of the warranty of habitability, attorney fees, and a declaration that plaintiffs are not obligated to pay rent until defendants correct the rent-impairing violations. Plaintiffs seek $6 million in actual damages and $12 million in punitive damages. (NYSCEF 1). Defendants thereafter moved to compel plaintiffs to pay use and occupancy and/or rent, and to

provide them with access to their apartments for repairs. (NYSCEF 3).

On or about September 23, 2008, pursuant to Real Property Actions and Proceedings Law § 769 *et seq*., HPD commenced a summary proceeding in the housing part to appoint an Article 7-A Administrator to manage the building, alleging that defendants failed to remedy violations and poor conditions in it. (NYSCEF 31).

In or about January 2009, defendants commenced four summary nonpayment proceedings against several plaintiffs, as well as proposed plaintiff, tenant Maria Soberats-Rodriguez. (NYSCEF 29). Soberats-Rodriguez answered, asserting affirmative defenses and counterclaims for breach of warranty of habitability and rent-impairing violations under MDL § 302-a. (NYSCEF 47).

By decision and order dated February 9, 2009, the justice previously presiding in this part denied defendants' motion for an order compelling plaintiffs to pay use and occupancy and/or rent, and to provide them with access to their apartments for repairs without prejudice to renewing it in the housing part. He observed that in the housing part, the parties had recently entered into a stipulation to schedule the repair work, pay rent, and provide access to the premises, and thus he found it inappropriate to intervene in those pending proceedings given that part's familiarity with the parties, their arguments, and the history of compliance with its prior orders. (NYSCEF 34).

At a compliance conference held in this part on June 10, 2009, the parties stipulated to waive depositions. (NYSCEF 35).

Between June and August of 2009, and in response to plaintiffs' complaints of decreased services and requests for additional rent reductions, DHCR issued several orders referencing the

February 2000 rent order. (NYSCEF 42).

By decision and order dated March 11, 2010, and judgment and order dated April 22, 2010, the housing part, following a trial, ordered the appointment of a 7-A administrator. (NYSCEF 31). By stipulation dated April 29, 2010, the parties agreed to mark defendants' nonpayment proceedings off-calendar in light of the appointment. (NYSCEF 60). Since May 2010, plaintiffs have been paying rent to the 7-A administrator. (NYSCEF 25).

On October 7, 2013, Philip Levine was appointed independent executor of his mother Dorothea's estate. (NYSCEF 54). By so-ordered stipulation dated January 7, 2014, Levine, as executor, was substituted as a defendant, and the caption was amended accordingly. (NYSCEF 40).

In their proposed amended complaint, as pertinent here, plaintiffs include Soberats-Rodriguez as a plaintiff, and allege 13 additional rent-impairing violations, which were either omitted from the original complaint or arose following its filing. It is alleged that one of the plaintiffs resides in a rent-controlled unit, 11 reside in rent-stabilized units, and that defendants, in violation of the Rent Stabilization Law, collected rents in excess of that allowed in the February 2000 rent order. Plaintiffs thus assert two new causes of action, one for an overcharge for excess rents paid during the four years preceding the commencement of this action in 2008, and the other for treble damages for defendants' alleged willful and knowing rent overcharge for the two years preceding the commencement of the action. The amount of damages sought remains unchanged. (NYSCEF 28).

II. CONTENTIONS

Plaintiffs claim that some of the additional rent-impairing violations were mistakenly

omitted from the original complaint, and some were issued by HPD after its filing, but that they are all similar in nature to those already pleaded. They deny that defendants are prejudiced or surprised by the proposed amended pleading as HPD served them with notices of violations of rent-impairing conditions. They also observe that this action is in the preliminary stages of discovery, with no motion practice since 2009. (NYSCEF 24, 25).

Plaintiffs also maintain that their causes of action relating to rent overcharges are timely advanced, alleging that defendants concealed the February 2000 rent order from them, and that they only become aware of it upon receipt of the 2009 orders. And, as the conditions leading to the February 2000 rent order are alleged to have never been cured, and as DHCR has never restored the increased rents, plaintiffs claim they may seek rent reductions based on the February 2000 order for the four years preceding the filing of their original complaint, and may seek treble damages for the preceding two years. In support thereof, plaintiffs offer the affidavit dated May 7, 2014 of plaintiff, tenants' association president Gladys Salva, who states that many plaintiffs overpaid defendants before the escrow account was opened in 2005, and that even after that, plaintiffs' rents increased with every renewal until 2010, when the 7A administrator assumed management of the building and restored rents to those allowable by the order. (NYSCEF 23).

According to plaintiffs, they erred in not including Soberats-Rodriguez as a plaintiff in the original complaint, but assert that defendants were on notice of her claims given the deposit of her rent into the attorney's escrow account and her counterclaims in the housing part for breach of warranty of habitability and rent-impairing violations. And, as plaintiffs have not increased their *ad damnum* clause, there is no prejudice. They also maintain that Soberats-Rodriguez is united in interest with them, and may now be joined, relying on her affidavit, dated

May 7, 2014, in which she claims she thought she was a plaintiff, and always intended to be one. (NYSCEF 30).

Defendants, in opposition, maintain that Dorothea was their principal witness and the repository of most, if not all, of the knowledge about the building, and that plaintiffs' renewed interest in this case following her death prejudices them, as Levine, who is committed to mending relationships with plaintiffs, had no role in, and knows nothing of, the activities underlying their proposed amended complaint. Thus, they claim that the proposed amendment is barred by laches. They also assert that plaintiffs' new claims arise from new transactions of which they have no notice, that the new transactions do not relate back to the original complaint and are thus time-barred. They rely on the prior justice's holding, which they argue constitutes the law of the case, that this dispute should be adjudicated in the housing part. Defendants observe that plaintiffs timely received the February 2000 rent order, and they deny having concealed anything. In any event, they assert that plaintiffs admit having learned of the February 2000 order in 2009 and nonetheless failing to seek to amend for years thereafter. The addition of Soberats-Rodriguez as a new plaintiff, defendants argue, will increase their overall liability, and is thus prejudicial. They maintain that it could not have taken plaintiffs six years to realize that Soberats-Rodriguez and numerous rent-impairing violations were missing from their complaint. And, as most of the plaintiffs failed to pay rent from 2005 through 2010, and no one paid rent from 2008 through 2010, defendants argue that they are ineligible for a rent overcharge recovery, thereby raising doubts as to the merits of their proposed causes of action. (NYSCEF 51).

In reply, plaintiffs dispute that defendants are prejudiced by the delay, observing that Dorothea waived her right to a deposition, Healy possesses knowledge about the building's

history, and the case is based on documentary evidence. They argue that defendants' allegation that Levine has no knowledge of defendants' activities is unsupported and that defendants set forth no facts that would have been peculiarly within Dorothea's knowledge. They allege that their new claims are not substantially different from the original claims, and that defendants' claim of prejudice suggests they have no defense to those claims as well. (NYSCEF 57).

Plaintiffs deny that the addition of Soberats-Rodriguez as a plaintiff prejudices defendants as the same elements as to the rent-impairing violations, which existed in the common areas of the building, pertain to her case. They insist that in the proposed amended complaint, they allege only the originally pleaded rent-impairing violations with greater specificity, and that the new rent overcharge claims relate back to the original complaint as they are premised on the same set of facts, namely, breach of the warranty of habitability based on defendants' failure to provide essential services. Plaintiffs also maintain that the prior justice's denial of defendants' motion was based on the pending proceedings in the housing part, which have since been marked off-calendar, and as Levine has not been substituted as executor in those proceedings, this court may entertain their motion. They claim that paying rent into their attorney's escrow account is proper, and does not foreclose their rent overcharge claims. (*Id.*).

At oral argument, defendants claimed that Dorothea was the building's record keeper, and that before her death, she assisted counsel in locating and identifying documents relevant to the original claims. (NYSCEF 62).

III. DISCUSSION

A. Law of the case

When parties have had a full and fair opportunity to litigate, a legal determination

resolved on the merits in a prior order in the same action constitutes the law of the case, and bars courts of coordinate jurisdiction from revisiting it. (*People v Evans,* 94 NY2d 499, 502 [2000]; (*Gliklad v Cherney,* 1 13 AD3d 505 [1st Dept 2014]; *Antonetti v City of New York,* 111 AD3d 558 [1st Dept 2013]; *Thompson v Cooper,* 24 AD3d 203 [1st Dept 2005]; *Holloway v Cha Cha Laundry, Inc.*, 97 AD2d 385 [1st Dept 1983]). The bar of a prior legal determination applies only when the same question is in issue. (*Erickson v Cross Ready Mix, Inc.*, 98 AD3d 717 [2d Dept 2012]).

Here, the prior justice, in 2009, denied defendants' motion to compel plaintiffs to pay use and occupancy and/or rent and to allow defendants access to their apartments, recognizing that the parties were litigating these issues in the housing part, and therefore found it inappropriate to intervene. Here, by contrast, plaintiffs do not move to compel but seek leave to amend a pleading, which is freely granted absent prejudice, surprise, or a clear demonstration that the amendment is patently without merit (*infra* III.B.). Absent any allegation that the parties are now litigating in the housing part the substance of the relief sought by plaintiffs here, the prior justice's order does not constitute a determination on the merits of their motion. Consequently, I am not barred from deciding it. (*See Hollis v Charlew Const. Co., Inc.*, 302 AD2d 700, 701 [3d Dept 2003] [law of the case inapplicable to reasoning from prior determination]).

B. Motion to amend complaint

A motion for leave to amend pleadings pursuant to CPLR 3025(b) is left to the sound discretion of the trial court, and should be freely granted, at any time, absent prejudice or surprise. (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]).

Delay in moving to amend pleadings coupled with significant prejudice to an opponent

constitutes laches and justifies denial of the motion; delay alone does not. (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]; *Tri-Tec Design, Inc. v Zatek* Corp., __ AD3d __, 2014 NY Slip Op 08381 [1st Dept 2014]; *Abdelnabi v New York City Tr. Auth.*, 273 AD2d 114, 115 [1st Dept 2000]). A party is prejudiced when it is "hindered in the preparation of [its]case or . . . prevented from taking some measure in support of its position" (*Kimso Apts., LLC v Gandhi*, __ NY3d __, 2014 NY Slip Op 08219, *4 [2014], *citing Loomis v Civetta Corinno Const. Corp.*, 54 NY2d 18, 23 [1981]), or upon losing a special right that could have been avoided (*Barbour v Hosp. for Special Surgery*, 169 AD2d 385, 386 [1st Dept 1991]). The party opposing the amendment bears the burden of demonstrating prejudice. (*Kimso Apts., supra*, at *4).

A court should deny leave to amend when the proposed amendment cannot withstand a motion to dismiss (*Scott v Bell Atl. Corp.*, 282 AD2d 180, 185 [1st Dept 2001], *affd as mod sub nom. Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314 [2002]), or if the amendment is patently without merit or palpably insufficient (*Mishal v Fiduciary Holdings, LLC*, 109 AD3d 885, 886 [2d Dept 2013]; *Bryndle v Safety Kleen Sys., Inc.*, 66 AD3d 1396, 1396 [4th Dept 2009]; *Zaid Theatre Corp v. Sona Realty Co.*, 18 AD3d 352, 354-55 [1st Dept 2005]).

1. Merit of the proposed amendment

Defendants' unsupported doubt as to the merit of the proposed rent overcharge causes of action falls short of demonstrating that they are patently without merit. (*See Detrinca v De Fillippo*, 165 AD2d 505, 509 [1st Dept 1991] [opponent's burden to establish that amendment's lack of merit is "clear and free from doubt"]). At any rate, defendants cite no authority to support their position.

2. Prejudice and laches

There is no indication, apart from counsel's unsupported assertions, that Dorothea was the main repository of information concerning the building. Defendants, in any event, waived the right to take depositions, thereby indicating that Dorothea's knowledge is not as significant as they now claim. Nor do they offer affidavits from Healy or Levine denying knowledge of the events raised in the proposed amended pleading. Likewise, defendants' contention that Dorothea's death has hampered counsel's ability to locate relevant documents is unsupported, and was, in any event, raised for the first time at oral argument. (*Schultz v 400 Co-op. Corp.*, 292 AD2d 16, 21-22 [1st Dept 2002] [arguments advanced when opposing party has no opportunity to respond to be ignored]; *Hopper v Lockey*, 241 AD2d 892, 893-94 [3d Dept 1997] [raising issue for first time at oral argument improper]; *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 39 Misc 3d 1220[A], 2013 NY Slip Op 50677[U] [Sup Ct, New York County 2013] [court should not look favorably on issues raised at oral argument when they could have been raised in first instance]). Defendants have thus failed to establish prejudice.

Absent a demonstration of prejudice, plaintiffs' delay in moving to amend is inconsequential. (*See Knobel v Shaw*, 90 AD3d 493, 496 [1st Dept 2011] [no laches in light of defendants' failure to demonstrate that delay hampered ability to defend]; *Sirico v F.G.G. Productions, Inc.*, 71 AD3d 429, 434 [1st Dept 2010] [same]; *Lanpont v Savas Cab Corp., Inc.*, 244 AD2d 208, 210-211 [1st Dept 1997] [lateness of motion no bar; conclusory allegations of prejudice insufficient to defeat amendment]).

Defendants rely on several cases in support of their claim of prejudice. However, in those cases, the parties sought leave to amend on the eve of trial. (*Jablonski v County of Erie*, 286

AD2d 927, 928 [4th Dept 2001], *Smith v Hercules Constr. Corp.*, 274 AD2d 467 [2d Dept 2000], *Gallo v Aiello*, 139 AD2d 490 [2d Dept 1988], and *Folsom Corp. v Korvettes Div. of Spartans Indus.*, 52 AD2d 574 [2d Dept 1976]). And in *Chemicraft Corp. v Honeywell Protection Servs.*, the plaintiff moved to amend the complaint to substitute a different corporation as the sole plaintiff eight years after filing, a delay which the court found had substantially prejudiced defendants "as witnesses had died, employees could no longer be located or identified, and records and other documents were now lost or missing." (161 AD2d 250 [1st Dept 1990]). Here, by contrast, defendants have failed to demonstrate how they are prejudiced, or that their documentation is missing. *Slavet v Horton Mem. Hosp.* is also distinguishable as there, the court denied the plaintiff-executor's motion to amend with leave to renew. The plaintiff waited three years to renew the motion, and again failed to sustain his burden. Over the years, his key witness, decedent's husband had died. Consequently, the Court found the trial court's denial of the motion to renew his motion for leave to amend to be a provident exercise of discretion. (227 AD2d 465 [2d Dept 1996]).

3. Statute of limitations

A party may not amend a time-barred cause of action (*Shefa Unlimited, Inc. v Amsterdam & Lewinter*, 49 AD3d 521 [2d Dept 2008]), and courts have no discretion to overlook a statute of limitation (*Arnold v Mayal Realty Co.*, 299 NY 57, 60 [1949]; *Liberty Mut. Ins. Co. v Mohabir*, 115 AD3d 413 [1st Dept 2014]). However, pursuant to CPLR 203(f):

> a claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences to be proved pursuant to the amended pleading.

Thus, a party, in an amended pleading, may correct errors or omissions in the complaint and add a new claim or new party, provided that the original complaint affords notice of the transactions and occurrences alleged in the amendment. (*Buran v Coupal*, 87 NY2d 173 [1995]). Notice of the actual claim is not required. (*Giambrone v Kings Harbor Multicare Ctr.*, 104 AD3d 546 [1st Dept 2013]). It is the movant's burden to establish that its claims relate back to the original complaint. (*Rivera v Fishkin*, 48 AD3d 663, 664 [2d Dept 2008]).

i. Rent overcharges

A rent overcharge claim must be brought within four years of the first month for which damages are sought. (CPLR 213-a; Rent Stabilization Law of 1969 [Administrative Code of City of NY] § 26-516 [a][2]; *Crimmins v Handler & Co.*, 249 AD2d 89, 91 [1st Dept 1998]). The limitations period ensures that the rental history that reaches back beyond four years preceding the overcharge complaint will not be examined, thereby alleviating landlords of the burden of retaining records indefinitely. (*Thornton v Baron*, 5 NY3d 175, 180-181 [2005]).

A rent reduction order issued due to a landlord's failure to maintain services imposes on the landlord a continuing obligation to reduce rent. The order remains in effect until services are restored. (*See* RSL § 26-514; *Matter of Cintron v Calogero*, 15 NY3d 347, 354-355 [2010]). However, and regardless of this continuing obligation, a tenant has a valid claim for an overcharge only for the four years preceding the commencement of the action. (*See Crimmins*, 249 AD2d at 91). Thus, in *Matter of Cintron v Calogero*, the Appellate Division rejected the tenant's claim that the landlord's failure to reduce the rent entitled him to a recovery for overcharges from more than four years before the filing of his claim (59 AD3d 345, 346 [1st Dept 2009], *revd on other grounds* 15 NY3d 347 [2010]).

Here, plaintiffs, in the proposed amended complaint, seek recovery for rents collected from July 19, 2004 through July 19, 2008, which is not within the four years preceding May 9, 2014, when they filed this motion. Consequently, plaintiffs' rent overcharge claim is viable only if it relates back to the original complaint, interposed on July 19, 2008.

In the proposed amended complaint, plaintiffs allege that defendants failed to comply with the February 2000 rent order, with the resulting overcharge. However, they did not set forth these allegations in the original complaint and, thus, defendants had no notice of them. Consequently, the rent overcharge cause of action does not relate back to the original complaint, and is time-barred. Plaintiffs' contention that their overcharge cause of action is premised on defendants' failure to provide services, as pleaded in their original complaint, is immaterial. In order for an amended pleading to relate back, the original complaint must contain facts from which the new cause of action arises. Here, however, the original complaint contains no allegation that defendants overcharged plaintiffs in violation of a rent order. As plaintiffs fail to allege such conduct, they cannot now seek relief based on it. (*See Serradilla v Lords Corp.*, 117 AD3d 648, 648-649 [1st Dept 2014] [plaintiffs' causes of actions for fraud and malicious conduct by their architect could not relate back to their original claims for malpractice and breach of contract as original pleadings lacked facts indicating intentionally misleading or malicious conduct]; *Wright v Emigrant Sav. Bank*, 112 AD3d 401 [1st Dept 2013] [assertion of claims for common law indemnification and contribution in original pleading did not notify defendant of claim based on failure to procure insurance]; *Raymond v Ryken*, 98 AD3d 1265, 1266 [4th Dept 2012] [original cause of action for negligent performance of surgery did not notify defendant of cause of action for lack of informed consent for same surgery]).

In addition, Plaintiffs' allegation that defendants concealed the February 2000 rent order is unsupported, and they all received copies of it from DHCR. In any event, plaintiffs cite no authority allowing them to circumvent the limitation period based on a conclusory allegation of concealment.

ii. Treble damages

Plaintiffs' claim for treble damages arising from defendants' alleged willful rent overcharge is recoverable only for the two years preceding the filing of the complaint (*See* RSL § 26-516 [a][2]). Here, as this cause of action arises from the same occurrences or transactions underlying the newly pleaded cause of action for the rent overcharge (III.B.3.i.), it too does not relate back to the original complaint for the reasons set forth above (*see Cintron*, 59 AD3d at 346 [limiting recovery of overcharge to four years, and recovery of treble damages to two years preceding complaint]), and is time-barred.

iii. Soberats-Rodriguez as plaintiff

A new party may be added to a complaint if his or her claims arise from the same transaction or occurrence and the new party and original parties "are so closely related or united interest that the original claim would have given the defendant notice of the potential liability for the subsequent claim." (*Key Intl. Mfg., Inc v Morse/Diesel, Inc.*, 142 AD2d 448, 459 [2d Dept 1988]; *see also* CPLR 1003 [parties may be added at any stage of action by leave of court]). The substance of the claims must be the same as that set forth in the original complaint, the *ad damnum* clause may not be increased (*Fazio Masonry, Inc. v Barry, Bette & Led Duke, Inc.*, 23 AD3d 748, 750 [3d Dept 2005]), and the measure of liability to which the defendant is exposed may not be altered (*id.*; *see also Key Intl. Mfg.*, 142 AD2d at 459).

In this judicial department, even where the statute of limitations is expired, the addition or substitution of new parties is liberally granted absent any new causes of action. (*Schleidt v Stamler*, 106 AD2d 264, 266 [1st Dept 1984], *citing Van der Stegen v Neuss, Hesslein & Co.*, 243 AD 122, 131 [1st Dept 1934], *affd* 270 NY 55 [1936]).

Here, Soberats-Rodriguez, along with the other plaintiffs, deposited her rent checks into the escrow account, was sued by defendants in a nonpayment proceeding, and asserted counterclaims and defenses that are substantially similar to those asserted in the original complaint. Thus, her relationship with defendants is identical to that between defendants and the other plaintiffs. Consequently, her claims relate back to their original complaint. (*See Giambrone*, 104 AD3d at 547-548 [derivative claim of medical malpractice plaintiff's wife for loss of services related back to original complaint; while complaint did not notify defendant of wife's claim, it was notified of underlying transaction, and thus, from outset of litigation, had sufficient knowledge to prepare a defense to wife's claim]; *Mark G. v Sabol*, 247 AD2d 15, 20 [1st Dept 1998] *affd as mod on other grounds*, 93 NY2d 710 [1999] [deceased infant's estate's personal injury claims related back to his siblings' actions, as they arose from same transaction or occurrence and were sufficiently similar to place defendants on notice of existence of subsequent claims]; *Golub v Baer, Marks & Upham*, 172 AD2d 489, 490 [2d Dept 1991] [amended complaint related back as newly joined plaintiff was closely related to original plaintiffs and no new causes of action were added]; *Manti v New York City Tr. Auth.*, 146 AD2d 551, 552 [1st Dept 1989] [father of plaintiff was united in interest with him, and could be added as plaintiff as claims arose from same transaction alleged in original pleading]; *Key Intl. Mfg.*, 142 AD2d at 457-459 [subsidiary's claims related back to owner's claims; original pleading notified

[* 16]

defendants of underlying transaction complained of in amendment]; *Schleidt*, 106 AD2d at 265 [joining plaintiff's closely held corporation as a plaintiff in attorney malpractice action and deeming corporation's claim interposed at time plaintiff asserted same cause of action]).

There is also no evidence that the omission of Soberats-Rodriguez's name from the original complaint was intentional. (*Cf. Buran*, 87 NY2d at 181 [claim omitted to obtain tactical advantage should not relate back]).

In *Greater New York Health Care Facilities Ass'n v DeBuono,* the Court held that a nursing home's motion to intervene in a proceeding challenging a Medicaid reimbursement regulation did not relate back to a different nursing home's challenge to the same regulation. The Court found the two entities not closely related and that their claims were based on different transactions, as each entity had an individualized reimbursement rate and the injury claimed varied from facility to facility and from year to year. (91 NY2d 716 [1998]). Here, by contrast, Soberats-Rodriguez, who has been sued by defendants and deposited her rent check into the escrow account, is no stranger to the litigation. *Fazio Masonry, Inc.* is also distinguishable. There, the plaintiff's contract and trade defamation claims could not have reasonably notified defendants of the plaintiff-owner's claims for intentional infliction of emotional distress, negligent hiring and prima facie tort, as the new claims gave rise to a different measure of liability, such as medical expenses and reparations for mental injuries. (23 AD3d at 750).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion is granted, in part, to the extent that leave to amend is denied with respect to the proposed fifth and sixth causes of action in the amended complaint,

and granted in all other respects; it is further

ORDERED, that plaintiffs file and serve an amended complaint in accordance with this order; it is further

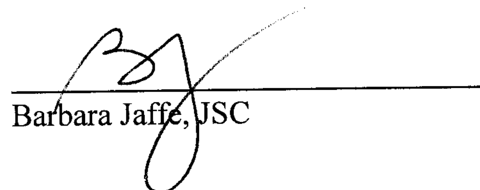
ORDERED, that the caption be amended to include Maria Soberats-Rodriguez as a plaintiff; it is further

ORDERED, that plaintiffs serve a copy of this order with notice of entry upon the County clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the amended caption; it is further

ORDERED, that defendants shall answer the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED, that the parties are directed to appear for a status conference in Room 279, 80 Centre Street, on Wednesday, January 7, 2015, at 2:15 pm.

ENTER:



Barbara Jaffe, JSC

DATED: December 4, 2014
New York, New York