SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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WILLIAM DUGAN, MARSHA D'YANS, GEORGETTE GAGNON, LOWELL D. KERN, MICHAEL MCCURDY, JOSE PELAEZ, TRACY SNYDER, MICHAEL J. WALSH, LESLIE M. MACK, ANITA ZITIS, and JAMES DOERR, on Behalf of Themselves and All Other Persons Similarly Situated,

Index No. 603468/2009

Plaintiffs

- against -

DECISION AND ORDER

LONDON TERRACE GARDENS, L.P.,

Defendant

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APPEARANCES:

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LUCY BILLINGS, J.S.C.:

In this class action seeking recovery of rent overcharges from defendant owner of London Terrace Gardens, a housing complex in the Chelsea neighborhood of New York County, plaintiffs' motion for partial summary judgment claims that plaintiffs will seek prejudgment interest on any retroactive overcharges. C.P.L.R. § 5001(a); N.Y.C. Admin. Code § 26-516(a); 9 N.Y.C.R.R. § 2526.1(a); Borden v. 400 55th St. Assoc., L.P., 24 N.Y.3d 382, 392 (2014); Mohassel v. Fenwick, 5 N.Y.3d 44, 51-52 (2005). Therefore defendant moves for permission to refund to plaintiff class members defendant's calculation of the overcharges defendant owes to mitigate the potential prejudgment interest that the court ultimately may award. Plaintiffs do not oppose such refunds, but do oppose the condition defendant seeks to impose on the refunds: that they be without prejudice to defendant's right to recover all or part of the refunds if the court ultimately determines that class members are not entitled to the amounts defendant calculated. Since defendant continues to challenge whether it is liable for overcharges retroactively, its proposed retroactive payments conditioned on its right to recover them if its defense is successful expose plaintiffs to considerable risk. The only way for them to avert that risk would be to keep the refunds available for repayment and thus deprive themselves of the very use of the funds for which interest is intended to compensate and which plaintiffs would have retained had defendant not overcharged them. J. D'Addario & Co., Inc. v. Embassy Indus., Inc., 20 N.Y.3d 113, 118 (2012);

Mohassel v. Fenwick, 5 N.Y.3d at 52; St. Stephen Community A.M.E. Church v. 2131 8th Ave., LLC, 123 A.D.3d 642, 642-43 (1st Dep't 2014); Kassis v. Teachers' Ins. & Annuity Assn., 13 A.D.3d 165, 165 (1st Dep't 2004).

To stop the accrual of prejudgment interest, C.P.L.R. §§ 3219-21 provide defendant three alternatives. Since defendant concedes that it overcharged plaintiffs, albeit contesting the amount of damages owed, as defendant acknowledges it may deposit into the court the amounts defendant considers adequate to satisfy any potential judgment, which plaintiffs may withdraw only if they stipulate that the amounts do satisfy plaintiffs' claims. C.P.L.R. § 3219. For this reason, defendant insists that C.P.L.R. § 3219's procedure is less favorable to plaintiffs than defendant's proposal, but defendant's proposal surely is less favorable to plaintiffs if they must repay the amounts accepted after continued litigation in which defendant succeeds in its defense to retroactivity. Moreover, to be effective, a tender of funds under C.P.L.R. § 3219 "must be unconditional," without a "reservation of rights" seeking to allow defendant's "defenses to survive." Tanger v. Ferrer, 49 A.D.3d 2286, 286 (1st Dep't 2008).

If, however, defendant believes C.P.L.R. § 3219's procedure is less favorable to plaintiffs, then such a position is no reason for defendant not to use the procedure. If plaintiffs do not withdraw the deposited funds, defendant may reclaim them. Then, if plaintiffs do not obtain a judgment more favorable to

them than the amounts deposited, plaintiffs may not recover interest from the time of the deposit and must compensate defendant for its defense expenses from that time. C.P.L.R. § 3219.

Similarly, defendant may serve plaintiff with a written offer to allow a judgment against defendant on specified terms, which if accepted by plaintiffs will fully satisfy their claims. C.P.L.R. § 3221. If plaintiffs do not accept the terms, the ensuing procedure tracks the procedure under C.P.L.R. § 3219.

Defendant may offer a judgment conditionally only if defendant concedes the amount of damages owed if found liable. Then, only if defendant is found liable, may plaintiffs enter that judgment. C.P.L.R. § 3220. This alternative, however, is directly contrary to defendant's position here, where defendant concedes liability for overcharging plaintiffs, but not the damages owed.

Finally, defendant simply may calculate the minimum amounts defendant believes it unquestionably owes to plaintiffs and pay those amounts to plaintiffs unconditionally, minimizing the risk that defendant will be determined to owe less, and stopping the accrual of interest on those amounts. If defendant seeks to avoid an impermissible communication directly to plaintiff class members, defendant may make the payments to the plaintiff class' attorneys with an explanation of how defendant calculated the amounts so that the class' attorneys may distribute the payments to the class members with an adequate explanation.

Since these permissible remedies to stop the accrual of prejudgment interest always have been and remain available to defendant, the court denies defendant's motion to employ a method to mitigate prejudgment interest that is not recognized by New York's civil procedure, is potentially prejudicial to plaintiffs, and is without their consent.

DATED: August 17, 2017

LUCY BILLINGS, J.S.C.