Menna v Maiden Lane Props., LLC
2018 NY Slip Op 30721(U)
April 23, 2018
Supreme Court, New York County
Docket Number: 157710/15
Judge: Tanya R. Kennedy

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

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JERRY MENNA, individually and on behalf of all others similarly situated,

Index No. 157710/15

Plaintiff,

- against -

MAIDEN LANE PROPERTIES, LLC and A.D. REAL ESTATE MANAGEMENT, INC.,

Defendants.

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TANYA R. KENNEDY, J.:

Plaintiff Jerry Menna moves for an order: (1) pursuant to CPLR Article 9, certifying this action as a class action; (2) appointing him as class representative; and (3) appointing Imbesi Law PC (Imbesi) and Napoli Shkolnik PLLC (Napoli) as class counsel.

Plaintiff commenced this action as a purported class action on behalf of himself and all other similarly situated residents (Residents) of 100 Maiden Lane, New York, New York 10038 (Premises). The proposed class includes all individuals who resided at the Premises on October 29, 2012.[1] The complaint identifies defendant A.D. Real Estate Management, Inc. (A.D. Real Estate) as the managing agent for the Premises responsible for assisting in protecting the Prem-

[1] Excluded from the class are defendants and their affiliates, parents, subsidiaries, employees, officers, agents, and directors; government entities or agencies, their affiliates, employees, officers, agents, and directors in their governmental capacities; any judicial officer presiding over this matter and the members of their immediate families and judicial staff; and class counsel.

ises regarding "Superstorm Sandy" (Sandy) (complaint, ¶ 21). Defendant Maiden Lane Properties, LLC (Maiden Lane) is the owner of the Premises.[2] Plaintiff claims that defendants failed to exercise due care to adequately safeguard the Premises from damage by Sandy.

According to the complaint, Sandy made landfall in lower Manhattan on Monday, October 29, 2012, at approximately 7:00 p.m. (*id.*, ¶ 15). Prior thereto, on October 22, 2012, the National Hurricane Center issued multiple advisories regarding Sandy and its strength and predicted path (*id.*, ¶ 8). The Premises is in lower Manhattan in Zone B, an area designated as prone to flooding during Category 2 hurricanes (*id.*, ¶ 16).

The complaint alleges that Residents received their first communication from A.D. Real Estate regarding Sandy on October 26, 2012 in a memorandum, addressed to all Residents, which stated:

> "As you may already be aware, the weather forecast for our area this weekend includes possible hurricane conditions with heavy rain and strong winds. To prepare for this storm, please be sure to remove all furniture, plants, or any other items you may have on your balcony or setback and bring it inside your apartment. This will prevent damage to the building and your apartment, as well as prevent injury to others. Windows should also remain closed during the storm to avoid flooding. Also, be advised that for all residents' safety, the sundeck will remain closed during the storm"

(*id.*, ¶ 22). Allegedly, the Residents did not receive any other instructions, information, or notices from defendants until immediately prior to Sandy's landfall on October 29, 2012, at 6:12 p.m. and 6:54 p.m. The Consolidated Edison Company of New York, Inc. turned off power to the Premises at 7:00 p.m. (*id.*, ¶ 24).

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[2] Neither the complaint nor the answer expressly identify Maiden Lane as such.

Plaintiff alleges that defendants were negligent in failing to: (1) construct adequate water barriers around the Premises' perimeter; (2) lock or secure the revolving door before the storm; (3) lock or secure the revolving door during the storm, which allowed the flow of additional water after it started entering; and (4) secure or close the stairwell door that led to the basement. Allegedly, these acts caused damage to the mechanical equipment located in the basement, which ultimately rendered the building uninhabitable (*id.*, ¶ 38).

The complaint further alleges that because of extensive damage to the operational systems, including heat, hot water, electric, ventilation, water filtration, and sprinkler systems, on October 31, 2012, the New York City Department of Buildings (DOB) declared the Premises unsafe and uninhabitable (*id.*, ¶ 40). DOB thereafter informed the Residents that they must evacuate the building (*id.*, ¶ 41). By that time, all transportation was shut down; the bridges and tunnels leading to Manhattan were closed; and virtually all hotel rooms in New York City were completely booked by the Zone A residents who evacuated on October 28, 2012 (*id.*, ¶ 42).

Residents received their first communication from defendants after the storm on November 5, 2012, a week after Sandy hit the area, urging Residents to make alternate arrangements (*id.*, ¶¶ 43-45). On November 7, 2012, defendants advised "all tenants not to reside in the building until further notice. However, you may access the building to gather necessary belongings. If you do so please bring a flashlight and ask our staff for permission to go through the building" (*id.*, ¶ 46). The Premises was re-opened to Residents on November 19, 2012 (*id.*, ¶ 50). Nevertheless, continuing until January 21, 2013, Residents were subjected to power outages, elevator malfunctioning, lack of heat and hot water, food spoilage from the power outages and brown water (*id.*, ¶¶ 52, 55).

The complaint contains three causes of action (denominated as Counts) for: (1) negligence, prior to Sandy's landfall (against both defendants); (2) negligence, after Sandy's landfall (against both defendants); and (3) breach of the implied warranty of habitability (against Maiden Lane). Alleged damages include loss of personal property; diminution of personal property value; loss of income; costs of relocation; loss of business opportunities and business interruption; and evacuation expenses.

The answers of both defendants contain the same three set-offs and counterclaims: The first alleges that to the extent tenants vacated their apartments prior to the conclusion of their lease terms, and without observing the requirements of their leases, there remains rent due. The second alleges that to the extent tenants did not have in place the insurance required by their leases, and sustained losses which would have been covered losses under said insurance policies, the tenants have violated their leases. The third alleges that under the terms of their leases, tenants agreed to pay as additional rent all attorneys' fees and disbursements regarding any action or proceeding brought by a tenant against the owner where the tenant fails to obtain a final unappealable judgment against the owner.

In support of his motion, plaintiff argues that the complaint satisfies all prerequisites for class action certification, because the number of likely class members is greater than 500, thereby satisfying a presumption of numerosity.

Secondly, he contends that the question of defendants' liability raises issues that are identical for all class members, namely, whether defendants negligently failed to: (1) maintain the Premises in a reasonably safe condition given their actual or constructive notice of potential

flooding from Sandy; (2) adequately evaluate the potential flood damage exposure given the historical information about the location of the Premises; (3) design and construct the Premises based upon the assessment of potential flood exposure; (4) implement flood preventive measures prior to Sandy; (5) use sandbags or other flooding barriers; (6) create an effective storm preparedness plan; (7) properly secure the operational, mechanical, and electrical equipment located in the basement of the Premises; and (8) mitigate damages immediately after Sandy. Moreover, plaintiff contends, all class members were prevented from residing in their apartments for the same time period; all suffered from the breach of the warranty of habitability; and all suffered the same loss of building services.

Plaintiff also asserts that he is an adequate class representative, in that his claims are typical of class members' claims, because they are based upon the same conduct, events, and legal theories. Moreover, he asserts that he has no interests antagonistic to the class members. As for plaintiff's counsel, he notes that they have represented plaintiffs in numerous class actions and have substantial experience in complex litigation.

Plaintiff also asserts that the class members do not have a strong interest in proceeding individually against defendants given the high cost of this particular litigation relative to the value of individual damages. Because the class includes tenants who resided at the Premises on October 29, 2012, defendants are already in possession of the contact information for class members, which makes issues relating to the identification of potential class members and class notice manageable. Moreover, the action has already proceeded through significant discovery without any problems managing this litigation.

In opposing certification, defendants argue that the Residents incurred vastly differing losses and expenses because of the flooding. Moreover, defendants contend that the Residents may assert different theories of liability or may raise different affirmative defenses which may include the failure to purchase renter's or flood insurance to insure against personal property loss as required by the leases; the violation of the Mayor's evacuation order; and the failure to mitigate claimed personal property damage and culpable conduct. Defendants also argue that a class action is not appropriate where, as here, divergent facts and issues would require individual inquiries that would become the predominant focus of the litigation.

Defendants also contend that plaintiff, the proposed class representative, has not demonstrated that his claims are typical or that he can adequately represent the proposed class, in that he lacks knowledge regarding the situation of the other Residents.

Defendants further contend that Napoli is not qualified to serve as class counsel because some of its members were recently involved in an acrimonious breakup with their former firm, Napoli Bern Ripka Shkolnik, LLP. Thus, it may not be in the best interests of the plaintiff for Napoli to be appointed as class counsel.

Lastly defendants assert that joinder or consolidation of individual claims, as opposed to a class action, would be an efficient method of fairly adjudicating the claims of the Residents. They claim that deposition testimony suggests, at most, that only a small group of Residents complained of the conditions alleged in the complaint. According to defendants, because of the alleged value of certain claims, the individual class members may have an interest in controlling their own litigation destiny based upon the alleged value of certain claims.

Discussion

For the reasons discussed below, the motion for class certification is granted.

Pursuant to CPLR 901(a),

> [o]ne or more members of a class may sue . . . as representative parties on behalf of all if: (1) the class is so numerous that joinder of all members 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.

"These factors are commonly referred to as the requirements of numerosity, commonality, typicality, adequacy of representation and superiority" (*City of New York v Maul*, 14 NY3d 499, 508 [2010]).

"If 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 ..." (*Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 422 [1st Dept 2010]). These include "the interest of individual class members in maintaining separate actions and the feasibility 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" (*id.*, citing CPLR 902; *Ackerman v Price Waterhouse*, 252 AD2d 179, 191 [1st Dept 1998]).

It is undisputed that there are 340 residential apartments at the Premises, including studios, one, two, and three bedroom apartments. Defendants do not challenge the assertion that the class members are likely to number greater than 500, thereby satisfying the numerosity requirement (*see Roberts v Ocean Prime, LLC*, 148 AD3d 525, 525 [1st Dept 2017] ["undisputed that

the building has more than 400 residential apartments above 15 floors of commercial space. Thus, the numerosity requirement is met and joinder of all class members is impracticable"]).

In *Roberts v Ocean Prime, LLC*, which also involved a class action pertaining to Sandy, the First Department found that the "commonality requirement is also satisfied in that the proof at trial will consist of evidence of defendants' efforts to prevent damage in advance of the storm and to repair damage after the storm" (*id.*). The Court in *Roberts v Ocean Prime, LLC* found that because "the class consists of tenants of the building, common questions predominate over individual questions concerning the amount and type of damages sustained by each class member" (*id.*).

Here, defendants argue that there is a lack of commonality because the Premises incurred differing losses and expenses. According to defendants, some tenants failed to mitigate their claimed personal property damage. Defendants contend that numerous individual inquiries would be necessary to determine the extent and nature of the damages sustained by each Resident, and the Residents would be required to prove the nature and extent of the damages incurred, necessitating individual trials. Defendants further contend that damages (including legal costs governed by a prevailing party clause) may vary depending upon whether the tenant has a regulated rent or market lease, or is without a lease.

These contentions are unconvincing. In *Roberts v Ocean Prime, LLC*, the Court recognized that the trial court "may, in its discretion, establish subclasses" (*id.*, citing *City of New York v Maul*, *supra* at 513). "The need to conduct individualized damages inquiries does not obviate

the utility of the class mechanism for this action, given the predominant common issues of liability" (*Borden v 400 E. 55th St. Assoc., L.P.*, 105 AD3d 630, 631 [1st Dept 2013], *affd* 24 NY3d 382 [2014]).

Moreover, "[t]ypical claims are those that arise from the same facts and circumstances as the claims of the class members" (*Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 143 [2d Dept 2008]). The court's findings in *Roberts v Ocean Prime, LLC*, that the "claims of the putative class representatives are typical of the class's claims since each resides or leases space in the building and their injuries, if any, derive from the same course of conduct by defendants" (*supra* at 525-526, citing *Stecko v RLI Ins. Co.*, 121 AD3d 542, 543 [1st Dept 2014]) is applicable in this matter currently before the Court.

Plaintiff's situation is typical of the claims or defenses of the class, because he was a tenant residing in the Premises, and alleges that he was adversely affected by the defendant's alleged wrongdoing as the other members of the proposed class. All proposed class members, including plaintiff, were forced to evacuate, and allegedly, defendants' negligence led to the apartments' uninhabitability. "Since the typicality requirement relates to the nature of the claims and the underlying transaction, not the amount or measure of damages, that plaintiff's damages may differ from those of other members of the class is not a proper basis to deny class certification" (*Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 22 [1st Dept 1991]).

The record reflects that plaintiff is sufficiently informed about the underlying facts (*see* Exhibit F to affirmation of Brittany Weiner, Esq. [Menna aff]). Defendants have not identified any conflict of interest between plaintiff and the class that he seeks to represent (*see Borden v 400 E. 55th St. Assoc., L.P.*, *supra* at 399-400] ["Having found no substantiated conflicts between

the tenants and a representative with 'adequate understanding of the case,' and competent attorneys," the court's evaluation of adequacy of each representative was sufficient]). Plaintiff states that he has participated in discovery by providing relevant facts and collecting documents in response to defendants' requests.

Plaintiff's proposed class counsel have substantial experience in complex class action litigation. Imbesi and Napoli are jointly representing class members in several class action cases, including *Roberts v Ocean Prime, LLC*, 2016 NY Slip Op 30102[U] [Sup Ct, NY County, 2016, Mendez, J.]) and *Jose Hernandez-Ortiz v 2 Gold, LLC, et al.*, (Sup Ct, NY County, July 17, 2014, Coin, J., index No. 158155/2012). Both actions involve a class of tenants who resided in commercial space in lower Manhattan during the time of Sandy. These class actions, which have been certified, involve substantially similar allegations to those made by plaintiff. Although defendants cite the law firm dispute, the contention does not implicate the specific attorneys seeking to be appointed class counsel (*Roberts v Ocean Prime, LLC*, *supra* at 526).

In an action brought by multiple tenants, a class action is superior to individual actions as it "conserves judicial resources by avoiding a multiplicity of lawsuits involving the same basic facts" (*Casey v Whitehouse Estates, Inc.*, 36 Misc3d 1225[A], 2012 NY Slip Op 51471[U], *7 [Sup Ct, NY County 2012, Singh, J.]). The Residents' interest in individually controlling separate actions would be minimal because they all have the same underlying claim of negligence. Defendants argue that because of the value of certain claims, the individual class members may have an interest in controlling their own litigation destiny. But defendants have not cited the existence of other litigation involving the Residents.

Finally, defendants argue that many Residents are not likely to be in favor of this action, and that many expressed satisfaction with defendants' handling of the situation. As stated above, defendants aver that some Residents may wish to control their own litigation if plaintiff's estimates are accurate as to the extent of their damages. "[A]llowing tenants to opt out of the class avoids any question of the adequacy of the class representation" (*Borden v 400 E. 55th St. Assoc., L.P.*, *supra* at 400).

Accordingly, it is

ORDERED that plaintiff's motion for class certification and for plaintiff to prosecute the action on behalf of a class consisting of all individuals who resided at 100 Maiden Lane, New York, New York 10038 on October 29, 2012, excluding defendants and their affiliates, parents, subsidiaries, employees, officers, agents, and directors; government entities or agencies, their affiliates, employees, officers, agents, and directors in their governmental capacities; any judicial officer presiding over this matter and the members of their immediate families and judicial staff; and class counsel, is granted; and it is further

ORDERED that the named plaintiff, Jerry Menna, is appointed as class representative; and it is further

ORDERED that Imbesi Law PC and Napoli Shkolnik PLLC are appointed as counsel for the class; and it is further

ORDERED that, within thirty (30) days of the date of this order, defendants shall furnish to plaintiff's counsel a list of the names and last known addresses of the residents of 100 Maiden Lane, New York, New York 10038 as of October 29, 2012; and it is further

ORDERED that plaintiff shall send a notice to all of the persons identified by defendants as residing at 100 Maiden Lane, New York, New York 10038 on October 29, 2012, within sixty (60) days from the date of this order, and such notice shall include a provision that each individual may "opt out" of the class action, by sending a signed form to plaintiff's counsel; the form of said notice shall be approved by this Court; such proposed notice shall be sent to counsel for defendants and the Court within thirty (30) days from the date of this order for comment, which shall be submitted in writing to opposing counsel and the Court within seven (7) days thereafter, and plaintiff may submit a written reply to defendants' comments within five (5) days thereafter.

Dated: April 23, 2018

ENTER:

Hon. Tanya R. Kennedy
J.S.C.

TANYA R. KENNEDY
J.S.C.