SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY **PART** IAS MOTION 23EFM

Justice

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INDEX NO. 159398/2017

EMMA GRIFFITH and MERISSA MEYERS, on behalf of themselves and all others similarly situated,

MOTION DATE N/A

Plaintiffs,

MOTION SEQ. NO. 001

- v -

WEST 171 ASSOCIATES, LP,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 28, 34

were read on this motion to/for ORDER MAINTAIN CLASS ACTION

Plaintiffs Emma Griffith and Merissa Meyers (plaintiffs) are current residents of 651 W. 171st Street located in New York, New York. In motion sequence no. 001, plaintiffs are seeking an order pursuant to CPLR §901 et seq. certifying this action as a class action. Defendant, West 171 Associates, LP, opposes the motion.

BACKGROUND

This action was commenced as a putative class action by plaintiffs on behalf of themselves and on behalf of all other past, present and prospective tenants residing at 651 West 171st Street, City and State of New York (hereinafter "Building"). (NYSCEF Doc. Nos. 1 and 2). Plaintiffs allege that the building is regulated by the Rent Stabilization Code ("RSC") by defendant's receipt of J-51 tax benefits since 2008 and that defendant's participation in the J-51 tax reduction program will terminate in 2042. (NYSCEF Doc. No. 2, ¶3). Plaintiffs allege that defendant engaged in a fraudulent scheme intending to overcharge its past, current and prospective tenants with rents that have exceeded or will exceed Rent Stabilization levels during

the J-51 tax benefit period. Plaintiffs further allege that defendant has unlawfully removed apartments from the protection of Rent Stabilization both during and upon expiration of its participation in the J-51 tax reduction program. (NYSCEF Doc. No. 2, ¶¶4-11).

The proposed class consists of current and former tenants who reside or have lived in the building during the relevant statutory time period which is alleged to be 2008 to 2042. (NYSCEF Doc. No. 2, ¶¶3 and 20; Transcript p. 6, l. 22-24). Plaintiffs allege that they have paid rent in excess of the permissible rent as a result of defendant's alleged fraudulent scheme to deregulate apartments in the building and overcharge the rent. (NYSCEF Doc. No. 2, ¶¶ 20-22, 62-88). Plaintiffs are seeking class certification to litigate their damage claims. In support of the motion, plaintiffs have submitted affidavits indicating that any claim to treble damages, as to any causes of action, within this case are waived. (NYSCEF Doc. No. 25).

Plaintiffs contend that class action lawsuits are ideally suited for cases involving alleged violations of applicable Rent Stabilization Laws in J-51 buildings because resolution of these building-wide common issues, will be determinative of defendant's liability. Plaintiffs further assert that each class member's damages can be determined by litigating these common issues and by resolving common legal questions, related to determining base rent, how to account for lawful increases, and to establish a formula to determine the overcharge, if any, owed to each class member.

Defendant opposes the motion for class certification claiming HCR has primary jurisdiction over the claims asserted herein. Defendant also claims that plaintiffs have failed to unequivocally waive treble damages, and that the proposed class is overbroad and incapable of being ascertained. Defendants argue that plaintiffs have failed to satisfy the requirements for class certification set forth in CPLR 901 and 902.

STANDARD OF REVIEW/ANALYSIS

Whether a particular lawsuit qualifies as a class action rests within the sound discretion of the trial court. (*Askey v Occidental Chem. Corp.*, 102 A.D.2d 130, 477 N.Y.S.2d 242 [4th Dept. 1984].) The movant bears the burden of proving that the prerequisites set forth in CPLR 901 (a) have been met. (*Kudinov v. Kel-Tech Constr. Inc.*, 65 A.D.3d 48, 884 N.Y.S.2d 413 [1st Dept. 2009].) It is well settled that CPLR 901 (a) "should be broadly construed" and that "the Legislature intended article 9 to be a liberal substitute for the narrow class action legislation which preceded it" (*City of New York v Maul*, 14 NY3d 499, 509, 929 NE2d 366, 903 NYS2d 304 [2010]); see also, (*Brandon v Chefetz*, 106 A.D.2d 162, 168, 485 N.Y.S.2d 55 [1st Dept. 1985].) (Where the court held that the prerequisites of CPLR 901 (a) are to be liberally construed, since the State's policy favors the maintenance of class actions.)

The court must also consider the five factors enumerated in CPLR 902, but consideration of those factors is not triggered until the prerequisites of CPLR 901 (a) have been met. (2 Weinstein-Korn-Miller, NY Civ Prac P 902.06.) If there is any doubt in deciding whether to certify a class, the court should err in favor of allowing the class action. (*Super Glue Corp. v Avis Rent A Car Sys.*, 132 A.D.2d 604, 517 N.Y.S.2d 764 [2d Dept. 1987]; *Brandon v Chefetz*, 106 A.D.2d 162 [1st Dept. 1985], supra.) The court may consider the merits of plaintiffs' claims only to the extent of ensuring those claims are not a sham, *Pludeman v. Northern Leasing Sys., Inc.*, 74 A.D.3d 420, 422, 904 N.Y.S.2d 372 (1st Dep't 2010); *Kudinov v. Kel-Tech Constr. Inc.*, 65 A.D.3d at 482; *Jim & Phil's Family Pharm. v. Aetna U.S. Healthcare*, 271 A.D.2d 281, 282, 707 N.Y.S.2d 58 (1st Dep't 2000), as C.P.L.R. § 902 contemplates a determination of class certification "early in the litigation . . . well before any determination on the merits." *O'Hara v. Del Bello,* 47 N.Y.2d 363, 369, 391 N.E.2d 1311, 418 N.Y.S.2d 334 (1979).

CPLR § 901[a] sets forth five threshold requirements that must be satisfied before a class action may be maintained:

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.

Plaintiffs argue that they have satisfied each of the five prerequisites for class certification. Plaintiffs contend that given the issues alleged in the complaint, litigating these claims as a class action is the superior method to resolve the allegations due to defendant's alleged practice of circumventing the Rent Stabilization Laws while receiving J-51 tax benefits.

As the Court of Appeals has noted, "the City's J-51 program, authorized by Real Property Tax Law § 489, allows property owners who complete eligible projects to receive tax exemptions and/or abatements that continue for a period of years. . . . Rental units in buildings receiving these exemptions and/or abatements must be registered with the State Division of Housing and Community Renewal (DHCR), and are generally subject to rent stabilization for at least as long as the J-51 benefits are in force (see 28 RCNY at 5-03 [f])." *Roberts v Tishman Speyer Props., L.P.,* 13 NY3d 270, 279, 918 NE2d 900, 902 NYS2d 388 [2009]).

Subsequently, in *Gersten v. 567th Avenue LLC*, 88 AD3d 189, 928 N.Y.S.2d 515 [1st Dept. 2011], the First Department held that *Roberts* should be applied retroactively, as it did not establish a new principle of law.

Following the *Roberts* decision, the Appellate Division decided a series of cases, which plaintiffs rely on to support their contention that a class action is the superior procedural mechanism to combat the alleged systemic denial of rent regulatory rights in buildings receiving the financial benefits of the J-51 tax subsidy, as is alleged in the complaint herein. See, *Borden v. 400 East 55th Street Associates, LP*, 24 NY3d 382 (2014); *Downing v. First Lenox*, 107 AD2d 86 (1st Dept. 2013); *Gudz v. Jemrock*, 105 AD3d 625 (1st Dept. 2013); *Dugan v. London Terrace*, 101 AD3d 648 (1st Dept. 2012) (collectively hereafter, "the *Roberts* Progeny").

Defendant argues that plaintiffs' motion should be denied because HCR, and not this Court, has original jurisdiction over the rent overcharge claims alleged in the complaint. This argument was rejected by the Court in *Downing v First Lenox Terrace Assoc.*, 107 AD3d 86, 91, 965 NYS2d 9 [2013], and is similarly rejected here. The Supreme Court has concurrent jurisdiction with HCR to entertain an action to recover rent overcharges. *Downing v First Lenox Terrace Assoc.*, 107 AD3d 86, 91, 965 NYS2d 9 [2013] citing, *Wolfisch v Mailman*, 196 AD2d 466, 601 NYS2d 300 [1st Dept. 1993], lv denied 82 NY2d 661, 627 NE2d 518, 606 NYS2d 596 [1993]; see also *Nezry v Haven Ave. Owner LLC*, 28 Misc 3d 1226[A], 958 NYS2d 62, 2010 NY Slip Op 51506[U] [Sup Ct, NY County 2010]. Additionally, HCR is not authorized to decide whether to certify a class, determine its parameters, adjudicate plaintiffs' class-wide claims, or grant the class-wide relief that plaintiffs seek here. C.P.L.R. § 905; see *Dugan v London Terrace Gardens, L.P.*, 101 AD3d 648, 648, 955 N.Y.S.2d 873 (1st Dept. 2012); see also *Gerard v Clermont York Assoc*, LLC, 81 AD3d 497, 916 N.Y.S.2d 502 (1st Dept. 2011). Accordingly, plaintiffs are justified in litigating their claims in this court and not HCR.

In the verified complaint, plaintiff Griffith alleges that she has been a tenant in the Building since 2015 and plaintiff Meyers commenced her tenancy in 2014. (NYSCEF Doc. No. 2, ¶¶ 62, 75). Plaintiffs allege that each tenant was compelled to sign unlawful lease riders entitled "Notice of Unregulated Status," waiving their RSL rights. (NYSCEF Doc. No. 22). In support of their motion, plaintiffs also submit the Rent Registration Histories filed with the New York State Homes and Community Renewal ("HCR") for the tenants in the instant action. (NYSCEF Doc. No. 23).

In addition, plaintiffs allege that defendants engaged in a distinct pattern of fraud, noting that the fraudulent "Notice of Deregulated Status" is the same form notice given to numerous tenants across several of defendant's J-51 buildings. (NYSCEF Doc. No. 21). Plaintiffs contend that these documents demonstrate that between 2010 and 2016, defendant engaged in a fraudulent pattern to unlawfully deregulate the tenants' apartments in the Building. (NYSCEF Doc. No. 2, ¶¶ 89-108).

As to numerosity, plaintiffs have established that there are forty-eight residential units in the Building that are alleged to be slated for unlawful deregulation. Based on the documents submitted in support of this motion, it is safe to assume that the class may exceed that number, taking into account turnover and co-tenancies. (NYSCEF Doc. Nos. 2, 19, 21, 22, and 23). Moreover, the class is easily defined because every unit in the Building is subject to rent stabilization and the number of unlawful leases provided to the current and former tenants, during the relevant period, is information that is within the control and knowledge of the defendant and can be exchanged through the discovery process. (NYSCEF Doc. Nos. 19, 20,21 and 30). Accordingly, the court rejects defendant's argument that the class is overbroad and

cannot be defined and finds that plaintiffs have met their burden to establish the threshold requirement of numerousity.

Next, defendant argues that plaintiffs have not adequately established the requirement that common issues "predominate" over what they allege to be inherently individualized issues presented by each putative class member's individual claims for rent-overcharge. Defendant similarly asserts that plaintiffs have not established typicality because plaintiffs have failed to present sufficient proof demonstrating that their claims are typical of those of the proposed class.

The court rejects this argument noting that plaintiffs have demonstrated that the common issue of whether the defendant unlawfully deregulated the apartments while receiving J-51 benefits predominates any individual issues and is common to the entire class, thus justifying class certification as a means to prevent inconsistent rulings and conserve judicial resources. (NYSCEF Doc. Nos. 20, 21, 22 and 23). (*see generally* CPLR 901 [a] [2]; *Ackerman v Price Waterhouse*, 252 AD2d 179, 201, 683 NYS2d 179 [1998]).

Finally, defendant's contention that plaintiffs have not established adequacy because there are no affidavits submitted by the proposed class representatives evidencing their understanding of the action or familiarity with the pleadings or other documents, is unavailing. The detailed allegations set forth in the complaint are verified on the basis of plaintiffs' personal knowledge and demonstrate familiarity with the basic elements of the claims, to satisfy the prerequisite set forth in CPLR §901(a)(4). (NYSCEF Doc. No. 2, ¶¶75-108); (*see generally Pruitt v. Rockefeller Ctr- Props Inc.*, 167 AD2d 14 (1st Dept. 1991). Moreover, named plaintiffs have demonstrated that their claims are typical of the claims of the putative class members in that each arises out of defendant's alleged unlawful deregulation of apartments while receiving J-51 benefits and as such there are no conflicts presented between the named plaintiffs and the

putative class members who share a common goal, specifically, ensuring that the landlord charges tenants of the apartment building no more than the maximum legal rent; that they be afforded the protections of the RSL and RSC; and that they receive compensation for past overcharges. (*Borden v 400 E. 55th St. Associates, LP,* 105 AD3d 630, 631, 964 NYS2d 115 [1st Dept. 2013]); (*Casey v Whitehouse Estates, Inc.,* 36 Misc. 3d 1225[A], 959 N.Y.S.2d 88, 2012 NY Slip Op 51471[U], [Sup Ct, NY County 2012]).

Likewise, plaintiffs have demonstrated that the proposed class counsel is experienced in landlord/tenant law, and in particular has years of experience in J-51 rent status cases. (NYSCEF Doc. Nos. 10 and 16). Accordingly, the Law Offices of Jack Lester and Grimble & LoGuidice, LLC, possess the requisite "competence, experience and vigor" to serve as class counsel (see *Fiala v Metropolitan Life Ins. Co.,* 52 AD3d 251, 251, 859 NYS2d 426 [1st Dept. 2008]).

Finally, CPLR 901(a)(5) requires that a class action be "superior to other available methods for the fair and efficient adjudication of the controversy." Based on the detailed allegations set forth in the complaint, the alternative to a class action to resolve the issues alleged, would be individual actions by tenants or administrative proceedings commenced before HCR. The liability determinations are the same for all of the proposed class members; thus, adjudicating the claims individually would be inefficient. Litigating plaintiffs' claims as a class action lawsuit will conserve judicial resources by avoiding a multiplicity of lawsuits involving the same basic facts. Accordingly, plaintiffs have satisfied the final requirement of CPLR 901(a).

Plaintiffs have also adequately established the requirements of CPLR 902. In addition to the prerequisites of CPLR 901, other factors that a court may consider under CPLR 902 in deciding whether to certify a class action are: (1) the interest of the class members in individually

controlling the prosecution of separate actions; (2) the impracticality of prosecuting separate actions; (3) the extent of any litigation already commenced by members of the class; (4) the desirability of concentrating the litigation in a particular forum; and (5) the difficulties likely encountered in the management of a class action. CPLR §902. "Most of these considerations [in CPLR 902] are implicit in CPLR 901" and the court's analysis as set forth above, demonstrates that plaintiffs have met their burden for class certification. *Gilman v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 93 Misc. 2d 941, 948, 404 N.Y.S.2d 258 (Sup Ct, NY County 1978).

Among the factors for the court to consider in determining whether the action may proceed as a class action under CPLR 902 are the inefficiency of prosecuting separate actions. As noted, this class action will avoid a multiplicity of lawsuits by individual tenants, conserving scarce judicial resources. Contrary to defendant's contention, any issues that may arise in managing the proposed class, can be resolved by properly defining the class, determining the form of notice and content thereof, and by determining whether any members of the class should be permitted to opt out.

Given the flurry of letters that the parties submitted to the court following the oral argument of this motion, the court directs the the issues of class definition and the form of the class notice to be distributed, will be addressed at the compliance conference scheduled before the court on February 26, 2019. In accordance with the foregoing, it is therefore

ORDERED that plaintiffs' motion pursuant to CPLR §§901 and 902 for class certification is granted; and it is further

ORDERED that the named plaintiffs are appointed as class representatives; and it is further

ORDERED that the Law Offices of Jack Lester and Grimble & LoGuidice, LLC,are appointed as counsel for the class; and it is further

ORDERED that the parties are directed to appear in Part 23, Room 307, at 80 Centre Street, on February 26, 2019 at 9:30 a.m. for a conference to discuss the proposed class definition and to identify the form of the class notice to be distributed.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court

2/11/2019
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE