

Gomes v Vermyck LLC
2019 NY Slip Op 32578(U)
July 2, 2019
Supreme Court, Queens County
Docket Number: 713219/18
Judge: Richard G. Latin
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable RICHARD G. LATIN
Justice

IA PART 40

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JACOBUS GOMES and KATHRYN GOMES,
on behalf of themselves and all others similarly
situated,

Index No.: 713219/18
Motion Date: 5/16/19
Motion Cal. No.: 11
Motion Seq. No.: 3

Plaintiffs,

-against-

VERMYCK LLC,

Defendant.

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The following numbered papers read on this motion by plaintiffs for class certification, pursuant to CPLR 901 and 902.

PAPERS	NUMBERED
Notice of Motion-Affidavits-Exhibits-Memorandum of Law.....	1 - 6
Affirmation in Opposition-Exhibits-Memorandum of Law.....	7 - 9
Replying-Memorandum of Law.....	10 - 12

Upon the foregoing cited papers, it is ordered that plaintiffs’ motion for an order granting class certification, appointing Plaintiff Jacobus Gomes as the class representative, and appointing Newman Ferrara LLC as counsel for the class, pursuant to CPLR 901 and 902, is determined as follows:

Plaintiffs, Jacobus Gomes and Kathryn Gomes, commenced this putative action “on behalf of themselves and all others similarly situated,” to recover for, inter alia, rent overcharges allegedly collected by Defendant Vermyck LLC. Plaintiffs’ complaint alleged, inter alia, that they were members of a class of tenants in the subject building known as 28-30 34th Street, Astoria, NY (Premises), as Defendant fraudulently deregulated many or all the apartments in the Premises. Further, it alleged that while Defendant overcharged tenants free-market rent, Defendant was receiving J-51 benefits through June 2015.

Subsequently, Defendant moved to dismiss Plaintiffs’ complaint on the basis that the Division of Housing and Community Renewal (DHCR) has primary jurisdiction over the rent overcharge complaint and should decide the issue in the first instance, pursuant to CPLR 3211 (a)(2); additionally, Defendant sought a dismissal pursuant to CPLR 3211 (a)(7) on the basis that Plaintiffs failed to plead its fraud claim with sufficient particularity. This Court denied Defendant’s motion in an order dated January 9, 2019. This Court held that, inter alia, the instant action raises legal issues, e.g., class certification, which should be determined in the first instance by the courts. Hence, Plaintiffs now move for class certification.

The following facts are undisputed: (i) Defendant is the owner of the Premises; (ii) all the apartments in the Premises are rent-stabilized and have been registered as such since 2016—years

after the law required Defendant to register them as such; (iii) named-Plaintiffs are tenants of the Premises and have been since 2013; and (iv) Plaintiffs have not filed an administrative complaint with DHCR.

Plaintiffs have proposed the following class: All tenants at the Premises living, or who had lived, in apartments that were deregulated during the period when J-51 tax benefits were being received by the owner of the Premises, except that the class shall not include: (i) any tenants who vacated before August 27, 2014, or (ii) any tenants whose occupancy in any such apartment commenced after such J-51 tax benefits to the owner of the Premises ended.

A class may be certified provided the plaintiffs establish compliance with the five prerequisites to class certification enumerated in CPLR 901(a) (*see Borden v. 400 East 55th Street Associates, L.P.*, 24 NY3d 382, 398-99 [2014]; *Bartis v. Harbor Tech, LLC*, 147 AD3d 51, 63 [2d Dept 2016]). These statutory requirements are commonly referred to as (1) numerosity, (2) commonality, (3) typicality, (4) adequacy of representation, and (5) superiority (*id.*). Once those prerequisites are satisfied, the Court must consider the factors prescribed under CPLR 902 (*see Cooper v. Sleepy's, LLC*, 120 AD3d 742, 743 [2d Dept 2014]). Whether an action qualifies as a class action under the statutory criteria rests within the sound discretion of the trial court (*see City of New York v. Maul*, 14 NY3d 499, 509 [2010]).

Numerosity:

The first prerequisite of numerosity requires that a plaintiff must demonstrate that joinder of all members would be impracticable (*see CPLR 901[a][1]; Borden*, 24 NY3d at 399). While the statute does not specify a minimum number of members, “the legislature contemplated classes involving as few as 18 members where ‘barriers of distance, cost, language, income, education or lack of information prevent those who are aware of their rights from communicating with others similarly situated’” (*Borden*, 24 NY3d at 399, quoting Mem. of St. Consumer Protection Bd. at 3, Bill Jacket, L. 1975, ch. 207). Furthermore, numerosity is presumed where there are at least 40 members (*id.*).

Here, the parties dispute the number of identified members of the putative class; however, the papers show that there are more than 50 identified members. Thus, the Court finds that numerosity is presumed here, since there are more than 40 members (*id.*). Nevertheless, Defendant argues that the members of the putative class can easily organize together, as they have lived or live in the same building. Contrary to Defendant’s argument, the Court of Appeals of New York has held that the numerosity factor applies to cases like this one, where tenants have moved out of the building (*id.*).

Commonality and Typicality:

The commonality prerequisite may overlap with the typicality prerequisite (*see Globe Surgical Supply v. GEICO Ins. Co.*, 59 AD3d 129, 144 [2d Dept 2008]). The commonality prerequisite requires that a plaintiff must demonstrate that common questions of law or fact predominate over any issues affecting only individual members (CPLR 901[a][2]; *see City of New York*, 14 NY3d at 508). The prerequisite of typicality requires that the plaintiff’s claims and/or defenses be typical of those of the entire class (*see CPLR 901[a][3]*).

Here, like in *Borden*, the issues of when Defendant received J-51 benefits, whether Defendant wrongfully charged market rents while accepting J-51 benefits, and whether Defendant unlawfully

deregulated apartments while receiving J-51 benefits, which tenants resided in those apartments during those times, are common predominate issues, thereby satisfying the commonality requirement (*see Borden*, 24 NY3d at 399, citing *Borden v. 400 East 55th Street Associates, L.P.*, 105 AD3d 630 [1st Dept 2013]). Furthermore, the prerequisites of commonality and typicality merge here, as Plaintiffs' claims arise out of the same conduct as the other class members, thereby satisfying the typicality requirement (*see Globe Surgical Supply*, 59 AD3d at 143).

Adequacy of Representation

There are three crucial factors for the Court to consider in determining adequacy of representation, namely: (i) potential conflicts between the representative and the other class members; (ii) personal characteristics of the proposed class representative, such as familiarity with the lawsuit and his or her financial resources; and (iii) the quality of the class counsel (*id.* at 144).

Here, the Court finds that there are no substantiated conflicts between the class members and the proposed class representative, Plaintiff Jacobus Gomes, who has a sufficient understanding of the case, is an adequate representative of the class. Moreover, the Court finds that the class counsel, Newman Ferrara LLP, is competent, as the firm's attorneys have decades of experience prosecuting class actions and landlord-tenant actions (*id.*). Thus, Plaintiffs have established the adequacy prerequisite (*id.*).

Superiority

The prerequisite of superiority requires the plaintiff to demonstrate "a class action is superior to other available methods for the fair and efficient adjudication of the controversy" (CPLR 901[a][5]). Here, the Court finds that class certification is superior to having numerous claims individually adjudicated, as it would preserve judicial resources (*see Borden*, 24 NY3d at 400).

CPLR 901(b): Penalties/Treble Damages

CPLR 901(b) prohibits any claim for penalties, e.g., treble damages, to be brought as a class action (*id.*). Nevertheless, under these circumstances, CPLR 901(b) permits tenants to waive treble damages pursuant to Rent Stabilization Law of 1969 (RSL) § 26-516, when such waiver is done unilaterally and through counsel (*id.* at 389). Here, the Court finds that the waiver of treble damages by the proposed class representative, Plaintiff Jacobus Gomes, is valid (*id.* at 398). Thus, this action is not barred by CPLR 901(b), since any claim for treble damages is waived for class certification (*id.*).

The Court holds that under the circumstances, class certification is appropriate (*see* CPLR 901, 902).

Accordingly, Plaintiffs' motion for, inter alia, class certification, pursuant to CPLR 901 and 902, is granted; and it is further

ORDERED that this action is certified a class action, specifically, the class is the following: All tenants at the Premises living, or who had lived, in apartments that were deregulated during

the period when J-51 tax benefits were being received by the owner of the Premises, except that the class shall not include: (i) any tenants who vacated before August 27, 2014, or (ii) any tenants whose occupancy in any such apartment commenced after such J-51 tax benefits to the owner of the Premises ended.; and it is further

ORDERED that Plaintiff Jacobus Gomes is appointed class representative/lead plaintiff; and it is further

ORDERED that Newman Ferrara LLP is appointed class counsel; and it is further

ORDERED that Newman Ferrara LLP is directed to give notice of the action to the individual class members by certified mail and regular mail; and it is further

ORDERED that Newman Ferrara LLP is directed to submit a proposed notice, providing for an option for tenants to opt out of the class, to the Court on notice within 20 days from the date of entry of this order; and it is further

ORDERED that Plaintiff Jacobus Gomes through Newman Ferrara LLP shall serve a copy of this order upon Plaintiff Kathryn Gomez and Defendant, within thirty (30) days of the date of entry of this order, together with notice of entry.

This constitutes the decision and order of the Court.

Dated: July 2, 2019



RICHARD G. LATIN, J.S.C.

FILED
JUL 24 2019
COUNTY CLERK
QUEENS COUNTY