Yen Chang v Westside 309 LLC
2020 NY Slip Op 31995(U)
June 26, 2020
Supreme Court, New York County
Docket Number: 153031/2018
Judge: Robert D. Kalish

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT D. KALISH** **PART** **IAS MOTION 29EFM**

Justice

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INDEX NO. 153031/2018

MOTION DATE 03/09/2020

MOTION SEQ. NO. 006

YEN CHANG, KENNETH HICKS, RANDY GARCIA, TIFFANY LEE, STEPHEN BOTTA, TAILEEN JOA, SHIRLEY MITCHELL, CYNTHIA LOWE, DANIEL LORIA, NICOLE COCCHIARO, ANN VOTAW, SALVATORE RUSSO, ELIZABETH BOUK, NETANIA BUDOFSKY, JESSICA GOLDHIRSH, JOSEPH OSTWALD, ANDREW O'BRIEN, LAURA PIRAINO, MELODY MERKER, GARY TOPP, KRISTINA BONHORST, KENT HAINA, ANDREW KELTZ, DARRYL WASHINGTON, MEGAN HAGAR, MARISSA KOELLER, GABRIELLA GARCIA, TIMOTHY BARKER, ADEOLA ROLE, CAROLINA BOTERO, JOSEPH CRACCO, DAVID WALKER, FLORENCE LAGAMMA, MARY LEVITT, RYAN BALAS, DEIRDRE BALAS, JONATHAN LEUNG, LUKE VAN DEE VEER, JOSEPH RICCARDI, ADRIENNE RICCARDI, KAREN CLAMAN, PETER CERNAUSKAS, RYAN CLAPP, CLEMENT CHAN, MATTHEW HAENSLY, SCOTT CHAPMAN, MOHAMMAD ISLAM, STEPHANIE MOSHER, ALGERSON ANDRE, LUKASZ JANIK, YOLANDA NUNLEY, MICHAEL ALBERTSON, ADINA WOLF, JONATHAN O'GRADY, DAVID ISAACS, STEPHANIE MACIOCH, ISABELLA CARDONA, MICHAEL WILKE, SHUCHIN SHUKLA, MAMUA JEME, GLENN ENGLISH, ANA MARIE SANTOS, JEN WATSON, KERRY MCFATE, DESIREE GRENAY, JONATHAN GRENAY, TIMOTHY MORAN, LORNE HEILBRONN, J.L. DUFFY, PHYLLIS HIRSHORN, HANS KLUEFER and KATHERINE KLUEFER,

Plaintiffs,

- v -

WESTSIDE 309 LLC,THAYER 45 LLC,POST 118 LLC,SEAMAN 20 LLC,SEAMAN 30 LLC,SEAMAN 133 LLC,VERMILYEA 153 LLC,HEIGHTS 170 LLC,HEIGHTS 624 LLC,HEIGHTS 177 LLC,FT GEORGE 617 LLC,INWOOD 213 LLC,PAYSON 55 LLC,CROWN ASSOCIATES LLC,GEBS REALTY LLC,ALJO REALTY LLC,ABIII LLC,SKILLMAN 47 LLC,PAGE REALTY LLC,SUNNYSIDE 45-42 LLC,SYLVEEN REALTY LLC,SUNNYSIDE 47-21 LLC and SUNNYSIDE 42 LLC,

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 212, 213, 214, 215, 216, 217, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 230

were read on this motion to/for DISMISS .

Motion by Defendants[1] Westside 309 LLC, Thayer 45 LLC, Post 118 LLC, Seaman 20 LLC, Seaman 30 LLC, Seaman 133 LLC, Vermilyea 153 LLC, Heights 170 LLC, Heights 624 LLC, Heights 177 LLC, Ft. George 617 LLC, Inwood 213 LLC, Payson 55 LLC, Crown Associates LLC, Gebs Realty LLC, Aljo Realty LLC, ABIII LLC, Skillman 47 LLC, Page Realty, LLC (incorrectly sued herein as Page Realty LLC), Sunnyside 45-42 LLC, Sylveen Realty LLC and Sunnyside 47-21 LLC (collectively, "Moving Defendants"), pursuant to CPLR 3211(a)(1) and (7), to dismiss each of the 74 Plaintiffs' (collectively, "Plaintiffs") claims for, inter alia, rent overcharge damages asserted against the Moving Defendants that are not their respective landlord, each allegedly being an improper party and against which said plaintiffs cannot state a cause of action; and, upon dismissal, pursuant to CPLR 603, severing each plaintiff's claims against the one proper party (i.e., his or her respective defendant-landlord), or, alternatively, pursuant to the doctrine of primary jurisdiction, dismissing Plaintiffs' First Amended Class Action Complaint in its entirety without prejudice to plaintiffs' right to file their claims at the Division of Housing and Community Renewal ("DHCR"), is DENIED for the reasons stated herein.

BACKGROUND

In prior motions to dismiss, pursuant to CPLR 3211 (Seqs. 001-003), Moving Defendants raised a myriad of issues with Plaintiffs' theory of the case, inter alia, that Plaintiffs failed to allege sufficient facts to maintain the instant action as a class action, pursuant to Article 9 of the CPLR, and that the action should be dismissed as against then-Defendant Bronstein Properties LLC ("Bronstein Properties"), arguing that said party had no liability as a managing agent acting on behalf of disclosed principals, its landlord-clients.

On March 21, 2019, this Court granted in part and denied in part the aforesaid motions. (*See* NYSCEF Document Nos. 147.) Based upon the arguments made, this Court agreed that Bronstein Properties could not be found liable for the alleged rent overcharge claims, as it was a managing agent acting on behalf of disclosed principals (i.e. Moving Defendants), and as such the Court dismissed the action as against Bronstein Properties. However, this Court denied the branches of the motions seeking to dismiss the complaint "on the ground plaintiffs cannot maintain their claims as a class action" as such arguments were "premature." (*Chang v Bronstein Properties LLC*, 2019 N.Y. Slip Op. 30744[U], at *14 [N.Y. Sup Ct, NY County 2019].) Citing *Maddicks v Big City Properties, LLC*, (163 AD3d 501, 504 [1st Dept 2018]), this Court reasoned that such "a detailed analysis of class certification status is inappropriate at the pleading stage." (*Chang*, 2019 N.Y. Slip Op. 30744[U], at *14.)

Since that time, the First Department's decision in *Maddicks* has been affirmed by the Court of Appeals. (*Maddicks v Big City Properties, LLC*, 34 NY3d 116 [2019].)

Notwithstanding this Court's prior decision and the affirmance in *Maddicks*, Moving Defendants bring a second motion to dismiss the class action and reiterating some of the same arguments made on the prior motions to dismiss. Further, Moving Defendants make the

[1] The instant motion has been submitted by new counsel for Moving Defendants, Greenberg Traurig LLP.

additional argument that the motion should be dismissed pursuant to the doctrine of primary jurisdiction.

In addition, Moving Defendants also denominate the instant motion as a motion to sever, pursuant to CPLR 603, and argue that joinder of the claims is inappropriate and that the Court should sever the claims against each of the 23 single purpose owner entities into 23 separate actions. Moving Defendants further argue that *Maddicks* is not relevant here because they are moving to sever, pursuant to CPLR 603, and not simply moving to dismiss on the pleadings, pursuant to CPLR 3211 (a)—as they did before. Moving Defendants also argue that this Court's dismissal of Bronstein Properties further militates in favor of dismissing the instant putative class action and the severing of the underlying claims into 23 separate litigations.

Plaintiffs oppose the motion and argue that they should be awarded attorney fees and costs in defending said motion.

DISCUSSION

As established in *Maddicks*, on a motion pursuant to CPLR 3211, it is premature to dismiss "class claims based on allegations of a methodical attempt to illegally inflate rents." (34 NY3d at 123.) Rather, when a defendant challenges issues of commonality and typicality—as Moving Defendants do herein—such a challenge should be addressed on a motion for class certification, pursuant to CPLR article 9, after the plaintiffs have had the benefit of class certification discovery. (Id.) As long as the putative class complaint "addresses harm effectuated through a variety of approaches but within a common systematic plan" the motion to dismiss should be denied. (Id. at 125-26.)

In determining whether a complaint alleges sufficient facts, the Court must afford the complaint a "liberal construction . . . accept the facts as alleged as true, and accord plaintiffs the benefit of every possible favorable inference." (*Maddicks v Big City Properties, LLC*, 34 NY3d 116, 123 [2019] [emendation omitted], quoting *Leon v Martinez*, 84 NY2d 83, 87 [1994].)

The case before this Court is similar to *Maddicks*, but there are a few differences. Like *Maddicks*, the instant Plaintiffs assert claims for rent overcharges for apartments in multiple buildings owned by different landlords; and, like *Maddicks*, they allege that there was a systematic effort—orchestrated by the management company—to deprive Plaintiffs of the protections afforded by the rent regulation laws. Plaintiffs allege that this systematic effort was effectuated in multiple ways, including:

(a) rent overcharges based on rent increases allegedly not justified by individual apartment improvements ("IAIs");

(b) improper vacancy deregulations based on rent increases allegedly not justified by IAIs;

(c) rent overcharges due to alleged improper rents being charged after removal of apartments from rent control;

(d) failure to register apartments with the DHCR;

(e) failure to treat apartments in buildings allegedly receiving J-51 tax benefits as subject to rent stabilization;

(f) failure to treat apartments in buildings allegedly receiving J-51 tax benefits as subject to rent stabilization, plus rent overcharges based on rent increases allegedly not justified by IAIs; and

(g) rent overcharges due to allegedly improper rents being charged after removal of apartments from rent control, plus improper vacancy deregulations based on rent increases allegedly not justified by IAIs.

What makes the instant case somewhat different from *Maddicks*, is: 1) there is no allegation that any remaining defendant is an umbrella owner of all the Moving Defendants; and 2) the management company, Bronstein Properties, has been dismissed from the instant case—again, per this Court's decision on the prior motions to dismiss—on the grounds that it was an agent acting on behalf of disclosed principals.

This Court finds that these two differences do not provide a basis to distinguish the instant case from *Maddicks* and its application. With regard to the first distinction, there has never been a requirement that defendants in a class action have a formal corporate relationship.

With regard to the second distinction, it matters not that the management company Bronstein Properties cannot be held directly liable for the illegal actions it allegedly orchestrated as a "systematic effort" or "methodical attempt" for the benefit of its client landlords. What matters is that sufficient factual allegations of a "systematic effort" by Bronstein Properties ***exist***. The alleged systematic effort orchestrated by Bronstein Properties (on behalf of Moving Defendants) is the proverbial glue that—for the moment—holds this class action together, regardless of whether Bronstein Properties can be found liable for said "systematic effort." (*See generally Quinn v Parkoff Operating Corp.*, 178 AD3d 450, 450 [1st Dept 2019] [reversing dismissal of very similar class action claims].)

To the extent that Moving Defendants argue that the action should be dismissed because the complaint asserts causes of action by individual plaintiffs against certain Moving Defendants that are not their respective landlord, the Court rejects that argument. Giving the complaint a liberal construction, the Court finds that the complaint only asserts claims by each plaintiff against his or her respective landlord. Moreover, Plaintiffs' counsel has clarified that each individual plaintiff's claims relate solely to his or her respective landlord and do not seek to hold any of the other defendant landlords liable. Again, Plaintiffs bring the instant action as a class action based upon allegations of a systematic effort—on behalf of Moving Defendants—by Bronstein Properties to deprive Plaintiffs of the protections afforded by the rent regulation laws.

Whether a class action is the appropriate vehicle for prosecuting the aforesaid allegations "can be fleshed out once plaintiffs make a motion for class certification and defendants oppose

it." (*Maddicks v Big City Properties, LLC*, 163 AD3d 501, 503 [1st Dept 2018], *affd*, 34 NY3d 116 [2019].)

Regarding Moving Defendants' argument that the action should be dismissed pursuant to the doctrine of primary jurisdiction—without prejudice to Plaintiffs pursuing their claims before the DHCR—the Court also rejects this argument. It has long been settled law that a class action may not be dismissed, pursuant to the doctrine of primary jurisdiction, prior to the Supreme Court ruling upon the issue of class certification. (*See e.g. Dugan v London Terrace Gardens, L.P.*, 101 AD3d 648, 648 [1st Dept 2012]; *Hess v EDR Assets LLC*, 171 AD3d 498 [1st Dept 2019].) Moreover, the doctrine of primary jurisdiction was recently abrogated by the Housing Stability and Tenant Protection Act of 2019 (HSTPA). (*Collazo v Netherland Prop. Assets LLC*, 2020 NY Slip Op 02128 [Ct App Apr. 2, 2020].)

Lastly, to the extent that Moving Defendants seek to differentiate the instant motion from the prior motions to dismiss (Seq. 001-003) by denominating the instant motion as also being a motion to sever, pursuant to CPLR 603—as opposed to purely a motion to dismiss, pursuant to CPLR 3211—this Court finds that to be a distinction without a difference and rejects Moving Defendants' arguments.

CPLR 603 states: "In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others." It bears noting that CPLR 603's related consolidation and joinder statutes, CPLR 602 and 1002, employ the same "common questions of law or fact" language as CPLR 901(a)(2). That is to say, any severance analysis, pursuant to CPLR 603, inherently requires a court to analyze whether there are "common questions of law or fact," just as it would do on a motion for class certification. Again, *Maddicks* holds that the time for such analysis is on a motion for class certification.

Further, Moving Defendants argue that it is more efficient to sever the instant action into 23 separate actions and litigate them separately. Again, this is, in sum and substance, the same argument that was made on the prior motions to dismiss, based on CPLR 3211, and the same arguments will likely be made by Moving Defendants in opposition to a future motion for class certification.

Were the court to view this motion, as argued by Moving Defendants, as solely one under CPLR 603, the Court would be ignoring CPLR 602, 901 (a)(2) and 1002. Further, and to repeat, *Maddicks* establishes the rule that when putative class plaintiffs allege facts to support a systematic effort to illegally inflate rents they are entitled to discovery on the issue of class certification. Were this Court to create a CPLR 603 exception to that rule, that exception would effectively swallow the rule established by *Maddicks*.[2] The Court declines to create such an exception.

With regard to Plaintiffs' request for costs and attorney fees, that request is denied.

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[2] It perhaps also bears noting that because there has been no discovery yet, any decision to grant dismissal and severance would be one based on the pleadings.

The Court has considered all the arguments raised—even if not specifically addressed herein—and finds them to be unavailing.

One argument not raised, however, is that the instant motion is barred by the single motion rule as per CPLR 3211 (e). (*See generally Bailey v Peerstate Equity Fund, L.P.*, 126 AD3d 738, 739 [2d Dept 2015].) Every argument raised on this motion was either raised in the prior motions or could have been raised on those motions.

Nonetheless, this Court is encouraged by the parties recently stipulating to amend the complaint to conform to *Regina Metro. Co., LLC v DHCR*, (2020 NY Slip Op 02127, 21 [Ct App Apr. 2, 2020]). (NYSCEF Doc. No. 236.) As such, the Court expects that the parties will work cooperatively and expeditiously in completing class certification discovery.

CONCLUSION

Accordingly, it is hereby

ORDERED that the instant motion by Defendants Westside 309 LLC, Thayer 45 LLC, Post 118 LLC, Seaman 20 LLC, Seaman 30 LLC, Seaman 133 LLC, Vermilyea 153 LLC, Heights 170 LLC, Heights 624 LLC, Heights 177 LLC, Ft. George 617 LLC, Inwood 213 LLC, Payson 55 LLC, Crown Associates LLC, Gebs Realty LLC, Aljo Realty LLC, ABIII LLC, Skillman 47 LLC, Page Realty, LLC (incorrectly sued herein as Page Realty LLC), Sunnyside 45-42 LLC, Sylveen Realty LLC and Sunnyside 47-21 LLC (collectively, "Moving Defendants"), pursuant to CPLR 3211(a)(1) and (7), to dismiss each of the 74 Plaintiffs' (collectively, "Plaintiffs") claims for, inter alia, rent overcharge damages asserted against the Moving Defendants that are not their respective landlord, each allegedly being an improper party and against which said plaintiffs cannot state a cause of action; and, upon dismissal, pursuant to CPLR 603, severing each plaintiff's claims against the one proper party (i.e., his or her respective defendant-landlord), or, alternatively, pursuant to the doctrine of primary jurisdiction, dismissing Plaintiffs' First Amended Class Action Complaint in its entirety without prejudice to plaintiffs' right to file their claims at the Division of Housing and Community Renewal ("DHCR"), is DENIED; and it is further

ORDERED that Plaintiffs' request for an award of attorney fees and costs in defending the instant motion is denied; and it is further

ORDERED that the parties are directed to appear before this Court for a conference on Wednesday, July 1 at 11 AM using the following Skype for Business Link:

https://meet.lync.com/nycourts/jmahony/7VB7B3PI

And it is further

ORDERED that within ten (10) business days of the filing date on the instant decision and order, counsel shall serve a copy of said decision and order with notice of entry.

The foregoing constitutes the decision and order of this Court.

6/26/2020
DATE

ROBERT DAVID KALISH, J.S.C.

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