Hess v EDR Assets LLC
2020 NY Slip Op 32079(U)
June 26, 2020
Supreme Court, New York County
Docket Number: 160494/2017
Judge: Frank P. Nervo

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART IV

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MICHELE E. HESS, JILL GOLDRING, MATTHEW HEAP, RUXANDRA HEAP, CRAIG GIBSON, JR., and ANNA MILLER, on behalf of themselves and and all others similarly situated,

Plaintiffs,

-against-

EDR ASSETS LLC, and PARKOFF OPERATING CORP.,

Defendants.

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DECISION AND ORDER
Index Number
160494/2017

FRANK P. NERVO, J.S.C.:

Plaintiffs seek an order amending their complaint to comport with the proper statute of limitations following the Court of Appeals decision *in Regina Metro Co. LLC v. New York State Div. of Hous. And Community Renewal* (2020 NY Slip Op 02127 [2020]). Defendants oppose and, alternatively, seek to impose costs for the instant motion on plaintiffs.

CPLR § 3025(b) governs permissive leave to amend a pleading upon terms which are just, absent a showing that amendment would cause surprise or prejudice (*170 W. Vil. Assoc. v. G & E Realty, Inc.*, 56 AD3d 372 [1st Dept 2008]). Leave to amend pleadings is to be freely given in the absence of prejudice (CPLR § 3025[b]; *Rivera v. New York City Dept. of Sanitation*, 183 AD3d 545 [1st Dept 2020]).

Here, plaintiffs seek to amend their complaint to comport with the proper statute of limitations following statutory changes and judicial interpretation of those changes.

Plaintiffs' action alleges, inter alia, rent overcharges in contravention of the J-51 tax benefit program,[1] stemming from the deregulation of apartments from rent stabilization. This area of law has evolved following the Court of Appeals decision in *Roberts v. Tishman Speyer Properties, L.P.*, holding that landlords could not deregulate rent stabilized apartments while simultaneously receiving tax incentives under New York City's J-51 tax program (13 NY3d 270 [2009]). Prior to *Roberts*, landlords relied on opinions from the Division of Housing and Community Renewal (DHCR) allowing, under certain circumstances, the removal of an apartment from rent stabilization while the landlord received J-51 benefits (*id.*; *see generally* 9 NYCRR 2520.11[r][5] and 28 RCNY 5-03[f]).

It is beyond cavil that *Roberts* is to be applied retroactively (*see e.g. Taylor v. 72A Realty Assoc., L.P.*, 151 AD3d 95 [1st Dept 2017], *mod. on other grounds*; *Gersten v. 56 7th Ave. LLC.*, 88 AD3d 189 [1st Dept 2011]). Thus, a tenant may bring a valid rent overcharge claim against a landlord who improperly removed an apartment from rent stabilization, notwithstanding that the landlord had followed DHCR's earlier guidance (*id.*; *see Regina Metro Co. LLC*, 2020 NY Slip Op 02127 [2020] amount recoverable by overcharged tenant determined by lookback period and when apartment was moved to free market rent under standard methodology; *see also Raden v. W 7879, LLC*, 164 AD3d 440 [1st Dept 2018]). The First Department found such claims, however, must be made within the four-year statute of limitations perscribed by CPLR § 213-a (*Taylor*, 151 AD3d 95, *mod. on other grounds*; *Gersten,* 88 AD3d 189). Thereafter, the legislature

[1] The J-51 tax program allows property owners to complete certain renovation or construction projects to receive tax abatements or exceptions (*see generally*, Administrative Code § 11-243[b][2]).

amended the rent stabilization law, extending the statute of limitations for rent overcharge claims to six years (*see* Housing Stability and tenant Protection Act of 2019 [HSTPA] - Part F).

Plaintiffs amended their complaint following this legislative change, expanding their claim to include overcharges for a six-year period, in accordance with the expanded statute of limitations of the HSTPA. Subsequently, the Court of Appeals found, inter alia, the extension of this statute of limitations did not apply retroactively and rent overcharge claims filed prior to the legislative change were governed by the prior four-year statute of limitations (*Regina Metro. Co., LLC v. New York State Div. of Hous. and Community Renewal*, 2020 NY Slip Op 02127 at 9-10 [2020]). Plaintiffs now seek leave to amend their complaint a second time so as to comport with the four-year statute of limitations in effect prior to the enactment of the HSTPA.

Defendants urge that amendment is improper because, inter alia, plaintiffs amended their complaint while *Regina*, and its companion cases, were pending in the Court of Appeals. Defendants contend that plaintiffs knew it was possible the Court of Appeals would find the HSTPA expanded statute of limitations did not apply retroactively, but nevertheless amended their complaint in bad faith. There is no evidence the first amendment was done in bad faith or to prejudice defendants, and thus it is not a basis to deny amendment, nor does it form a basis to impose costs of this motion on plaintiffs, as defendants urge. Defendants also contend that because plaintiffs have failed to annex an affidavit of merit with the proposed amended

complaint, defendants' costs and fees in opposing this motion should be imposed. The Court declines to impose costs and will not deny amendment on this basis.

The proposed second amended complaint, inter alia, removes those portions of the first amended complaint that refer to the HSTPA. The remainder of the proposed changes to the amended complaint can be broadly categorized as referring to: the J-51 program, defendants alleged failure to properly register rents with DCHR, and defendants alleged improper removal of the apartments from rent stabilization. It is beyond argument that these proposed amendments do not prejudice or surprise defendants in this rent overcharge action, which, from its inception, claimed defendants received J-51 tax benefits while improperly removing apartments from rent stabilization.

Finally, defendants request that the Court bar plaintiffs from recovering fees or costs associated with this motion, should they prevail and be awarded attorneys' fees at the conclusion of this matter. This matter has not yet been determined on the merits; as such, defendants request is premature. Should plaintiffs prevail and seek attorneys' fees, defendants may bring a proper application to limit attorneys' fees at that time.

Accordingly, it is

ORDERED that plaintiffs' motion to amend their complaint is granted. Plaintiffs shall file and serve their amended complaint on defendants, and it is further

ORDERED that defendants shall answer the amended complaint or otherwise respond thereto within 20 days from the date of said service.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: June 26, 2020

ENTER:

Hon. Frank P. Nervo, J.S.C.