Todorovich v 63 Wall St. Owner, L.L.C.
2022 NY Slip Op 33196(U)
September 21, 2022
Supreme Court, New York County
Docket Number: Index No. 161441/2019
Judge: Lori Sattler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LORI SATTLER** **PART** **02TR**

Justice

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TALLEN TODOROVICH,

Plaintiff,

- v -

63 WALL STREET OWNER, L.L.C., 67 WALL STREET OWNER, L.L.C.,

Defendant.

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INDEX NO. 161441/2019

MOTION DATE 06/14/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for MISCELLANEOUS.

In this class action for rent overcharges stemming from alleged unlawful deregulation of residential apartments, class members Regine Legrand, Emily Lipa, Hee Yoon Nahm, Stephen Messere, Laura Seone, and William Bailey (collectively "Movants") move, pursuant to CPLR 907, 2004, and 2005, for an order excluding them from the class settlement approved by the Court on September 28, 2021. Defendants 63 Wall Street Owner, LLC ("63 Wall Street") and 67 Wall Street Owner, LLC ("67 Wall Street") (collectively "Defendants") oppose the motion.

Defendants are the owners of the building located at 63 Wall Street and 67 Wall Street ("Building") in New York County. Class members are a class comprised of tenants currently residing at the Building, or who resided at the Building after November 24, 2013, while Defendants received certain statutory tax benefits. Movants are class members who, subsequent to the commencement of this action, filed a separate, individual action as individuals ("the Subsequent Litigation") against 67 Wall Street (*Legrand et al v 67 Wall Street Owner, LLC* [Sup Ct, NY County 2019], Index No. 162102/2019).

BACKGROUND

This action arises out of Defendants' purported failure to provide class members with rent-stabilized leases as required by the Building's receipt of tax exemptions under Real Property Tax Law ("RPTL") § 421-g tax benefits program ("421-g Program"). Benefits for property owners under the 421-g Program are conditioned upon owners providing tenants with rent-stabilized leases and riders detailing the tax credit ("421-g Rider") and disclosure as to when the tax credit expires (RPTL § 421-g[6]). RPTL § 421-g(6) further provides for the deregulation of rents in properties receiving benefits under the 421-g Program where the landlord includes written notice of deregulation in each lease and renewal informing the tenant that the unit will be deregulated upon the expiration of 421-g Program benefits.

The class members allege that Defendants failed to provide them with 421-g Riders and that Defendants did not register the apartments in the Building with the Division of Housing and Community Renewal ("DHCR") as required by the 421-g Program. They further asserted that Defendants' failure to follow the applicable rent regulations entitled them to correct legal rent as calculated by Rent Stabilization Code ("RSC") § 2522.6(b)(3) default formula.

Named plaintiff Tallen Todorovich commenced this action on November 24, 2019 on behalf of himself and those similarly situated. The Class Action Complaint proposed, and the Court later certified for settlement purposes, a Class and a Sub-Class. The Class consists of all tenants at the Building who currently or who previously resided, after November 24, 2013, in Units that were treated as deregulated during the period when 421-g tax benefits were being received by Defendants. The Sub-Class is comprised of the Class members who are current tenants at the Building. The Class Complaint sought monetary damages for alleged violations of Rent Stabilization Law ("RSL") § 26-512 on behalf of both the Class and Sub-Class and for a

declaratory judgment on behalf of the Sub-Class determining that the apartments of the Sub-Class are subject to the RSL and RSC.

Movants commenced the Subsequent Litigation on December 12, 2019. The Verified Complaint asserted individual claims against 67 Wall Street mirroring those asserted by the class members in the present litigation as well as two additional causes of action for treble damages for the alleged rent overcharge and for injunctive relief and monetary damages pursuant to General Business Law ("GBL") § 349(h). On March 13, 2020, 67 Wall Street moved to stay the Subsequent Litigation pending the determination of the present action and for partial dismissal of the Movants' Verified Complaint. In a Decision and Order dated June 30, 2021, the Court granted the stay and denied the branch of the motion seeking dismissal, with leave to renew the motion to dismiss upon the lifting of the stay (*Legrand v 67 Wall St. Owner, LLC*, 162102/2019, Doc. No. 18 [Kelly, J.]).

Following settlement negotiations in this action, the Court preliminarily approved a stipulation of settlement on April 14, 2021 ("Settlement") (NYSCEF Doc. No. 49). In relevant part, the Settlement provides for certification of both the Class and the Sub-Class, calculation of past rent overcharges for eligible class members, and a declaration that each unit would become deregulated at the end of the lease term in effect at the conclusion of each Building's participation in the 421-g Program[1] (*id*. ¶¶ 2-16; 21-23). The Settlement further permitted class members to request exclusion from the settlement by July 14, 2021 ("Bar Date"). Specifically, the Settlement provides:

> Each Class Member will be bound by all provisions of the Stipulation and Settlement, whether favorable or unfavorable, unless such person mails, by first class mail, a written request for exclusion from the Class, postmarked no later than [the Bar Date], addressed to the Claims Administrator, which shall provide daily

[1] June 30, 2020 for 63 Wall Street and June 30, 2023 for 67 Wall Street, or earlier if permitted by law.

> reports of such requests to each of the parties' attorneys. No Class Member may exclude himself, herself or itself from the Class after the Bar Date. . . .

(*id.*, ¶ 28).

Notice to the class members was provided by mailing a form to their known or possible addresses, publication in a local Manhattan newspaper, and by email (*id.* ¶ 32). A website detailing the settlement and the exclusion procedure was also created. On September 7, 2021, the Claims Administrator submitted a declaration indicating that notice had been effectuated upon class members via USPS First-Class Mail, email, and publication (NYSCEF Doc. No. 27, Miller Declaration). According to the Claims Administrator, the notices were sent to class members on or about May 11, 2021 (*id.*). The notices indicated the July 14, 2021 Bar Date as the deadline for submitting requests for exclusion (*id.*). The Claims Administrator further stated that only one class member sought exclusion by the Bar Date (*id.*). A hearing was subsequently held by the Court on September 22, 2021 to hear objections to the Settlement and determine whether to give final approval to the Settlement.

In its Final Order and Judgment Approving Class Action Settlement ("Final Order and Judgment") dated September 28, 2021, the Court found that "[d]ue and adequate notice" of the proceedings and a full opportunity to object were provided to the class members (NYSCEF Doc. No 42, Final Order and Judgment ¶ 3 [Hom, J.]), and that no objections were raised (*id.* ¶ 7). In approving the Settlement, the Court decreed:

> All Class Members who have not requested exclusion and all Plaintiffs are barred and enjoined from commencing, prosecuting, instigating or in any way participating in the commencement or prosecution of any action asserting any claims asserted in this Action, either directly, representatively, derivatively, or in any other capacity, against Defendants or any of the parties released in the Stipulation.

(*id.* ¶ 11).

67 Wall Street renewed its motion in the Subsequent Litigation to dismiss that action on March 23, 2022. On April 20, 2022, Movants simultaneously filed the instant application and a motion to stay the Subsequent Litigation pending the resolution of this motion. The Court in the Subsequent Litigation denied both the motion and cross-motion on May 5, 2022 and ordered that the stay of the Subsequent Litigation remain in full effect (*Legrand v 67 Wall St. Owner, LLC*, 2022 NY Slip Op 31461[U] [Sup Ct, NY County 2022] [Kraus, J.]).

DISCUSSION

In support of their motion to be excluded from the Settlement, Movants contend that they effectively opted out of the Settlement by pursuing and continuing to maintain the Subsequent Litigation. In the alternative, Movants argue that the Court should extend their time to opt out under the doctrine of excusable neglect. Finally, they assert that due process and fairness considerations warrant granting their request to be excluded from the Settlement.

It is undisputed that Movants did not request exclusion by following the prescribed opt-out method provided for in the Settlement. Nevertheless, Movants argue that by continuing to participate in the Subsequent Litigation they have effectively communicated their intent to be excluded and have effectively excluded themselves from the Settlement (NYSCEF Doc. No. 45, Joseph aff, ¶ 32, citing *McCubbrey v Boise Cascade Home & Land Corp.*, 71 FRD 62, 71 [ND Cal 1976]). They maintain that their "request to be excluded from a settlement or litigation class need not satisfy the specific procedures described in the notice, nor need such a request even be explicit" and that "any written evidence" of such intent should suffice (Joseph aff. ¶ 31, citing *In Re Four Seasons Sec. Laws Litig.*, 493 F2d 1288, 1291 [10th Cir 1974] [internal quotation marks omitted]). Movants insist that they are not relying upon the "mere pendency" of the Subsequent Litigation, but rather that they took "active steps to pursue their individual claims" during the

opt-out period such that they provided "reasonable indication and effective expression" to continue the Subsequent Litigation and forego the Settlement (*id*. ¶ 33 [internal citations and quotation marks omitted]).

CPLR 903 permits the Court to "limit the class to those members who do not request exclusion from the class within a specified time after notice." Here, the Court prescribed a method for class members to request exclusion that Movants failed to follow. Movants' failure to adhere to the approved opt-out procedure is fatal to their motion (*see Matter of Silvar v Commissioner of Labor of the State of N.Y.*, 175 AD3d 95, 102 [1st Dept 2019] [finding that claimants were barred from brining individual wage claims where claimants did not opt out of class settlement]; *see also Williams v Marvin Windows & Doors*, 15 AD3d 393, 396 [2d Dept 2005]). It cannot be said that Movants lacked knowledge of the present action, as they commenced the Subsequent Litigation three weeks after this action began and were stayed from prosecuting the Subsequent Litigation at the time the exclusion notices were sent to class members.

Movants further argue that, even if they did not effectively opt out of the Settlement, their failure to opt out by the Bar Date constituted excusable neglect and they should now be able to seek exclusion from the Settlement at this time under CPLR 907, 2004, and 2005 and principles of federal class action doctrine. Defendants counter that Movants fail to demonstrate any justification for their failure to opt out and present no evidence of their good faith in belatedly moving for exclusion. They further maintain that Movants fail to show that Defendants did not exercise reasonable diligence in providing notice to the class and that they would be prejudiced by reopening the Court's final settlement order after the Settlement has been fully funded.

CPLR 907 empowers the Court to "make appropriate orders" for class actions, including orders for "determining the course of proceedings" and for directing the manner of notice to class members and the proposed extent of the judgment (CPLR 907[1], [2]). CPLR 2004 provides, in relevant part, that "the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed." CPLR 2005 permits a court to exercise "its discretion in the interests of justice to excuse delay or default resulting from law office failure" following an application under CPLR 3012(d) or 5015(a).

Movants do not set forth any reason why the Court should grant an order under CPLR 2004 and 2005 and do not show any nexus between these provisions and their argument for "excusable neglect." Nor do they show good cause as to why the deadline for exclusion should be extended pursuant to CPLR 2004 (*Grandinetti v Metropolitan Transp. Authority*, 74 NY2d 785, 787 [1989] [finding no error where Appellate Division determined extension was unwarranted when claimant did not furnish affidavit of merit or reasonable excuse for failure to meet deadline fixed by court]). Here, the Court preliminarily approved the Settlement on April 14, 2021 and the Subsequent Litigation was stayed on June 30, 2021, two weeks before the bar date. Movants do not provide any rationale as to why they made no effort to seek exclusion from the class settlement after being made aware of the settlement process as a result of the stay. Furthermore, Movants cannot be granted relief under CPLR 2005 as they do not seek to extend their time to serve pleadings under CPLR 3012(d) or for relief from a default judgment under 5015(a) (*see Weissblum v Mostafzafan Foundation of New York*, 60 NY2d 637, 639 [1983]; *see also Hunter v Enquirer/Star, Inc.*, 210 AD2d 32, 33 [1st Dept 1994]).

Movants' argument that they should be belatedly excluded from the Settlement based on the federal doctrine of "excusable neglect" is likewise unavailing. Movants fail to make any argument as to why the Court should apply federal doctrine in a class action brought solely under New York state law (*see, e.g., Cox v Microsoft Corp.*, 290 AD3d 206, 207 [1st Dept 2002] ["Federal case law is at best persuasive in the absence of state authority"]). Even so, the Court finds that Defendants would be manifestly prejudiced by Movants' belated exclusion because the finality of the Settlement would be undermined and Defendants would be exposed to liability that they believed the Settlement foreclosed. Movants not only fail to present a good reason for their delay, they essentially admit that the cause of the delay was entirely within their control (*see* Joseph aff. ¶ 41 ["[a]lthough Movants' counsel could have actively sought Notice of the Settlement via the Court's electronic docket"]).

Movants argue that due process and fairness considerations entitle them to exclusion from the Settlement because certain Movants did not receive notice of the Settlement and nonetheless believed that they had effectively opted out by continuing the Subsequent Litigation. An absent class plaintiff will be subject to the preclusive effect of a class settlement even if they do not receive actual notice, so long as the notice was sufficient (*see Matter of Silvar*, 175 AD3d at 102 [1st Dept 2019] ["individual notice of class proceedings is not meant to guarantee that every member entitled to individual notice receives such notice"], quoting *Williams*, 15 AD3d 396 [internal quotation marks omitted]). The Court finds that the notice in the form of regular mail, electronic mail, and by publication in a local newspaper and on the Internet, was sufficient.

Finally, Movants fail to demonstrate a right to exclusion from the Settlement on the basis that the Settlement violated the "no-waiver" provision of RSC § 2520.13. The statute provides that "[a]n agreement by the tenant to waive the benefit of any provision of the RSL or this Code

is void" (9 NYCRR § 2520.13). However, the statute specifically provides for waiver where there is "a negotiated settlement between the parties and with the approval of the DHCR, or a court of competent jurisdiction, or where a tenant is represented by counsel" and that "[s]uch settlement shall be binding upon subsequent tenants" (*id.*; *see also Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 397 [2014]). "Where courts have denied a tenant's waiver, the evidence demonstrated that the landlord and tenant were either colluding to deregulate apartments or that the tenants were being manipulated by contracts of adhesion" (*id.* at 397-398).

Class members, including Movants, have effectively and unilaterally waived their benefits under the RSL and RSC via the Settlement negotiated with Defendants, an agreement that was approved by this Court and in which the class members were represented by counsel. Movants do not allege and present no facts suggesting that the Settlement was the product of collusion between or that the class members were presented with an adhesion contract. For these reasons, the Court finds that the Settlement does not violate the RLS and RSC.

Accordingly, it is hereby:

ORDERED that the motion to exclude class members Regine Legrand, Emily Lipa, Hee Yoon Nahm, Stephen Messere, Laura Stone, and William Bailey from the class settlement is denied.

9/21/2022
DATE

LORI SATTLER, 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