§APL-2018-00183
New York County Clerk's Index No. 656345/16

Court of Appeals
of the
State of New York

THERESA MADDICKS, JOHN AMBROSIO, PAUL WILDER, SAMUEL WILDER, ALYSSA O'CONNELL, JOHANNA S. KARLIN, BRIAN WAGNER, TYLER STRICKLAND, DANIEL ROBLES, ELENA RICARDO, LIAM CUDMORE, JENIFER MAK, JOSHUA BERG, ANISH JAIN, JOHN CURTIN, JONATHAN FIEWEGER, MARIA FUNCHEON, JORDANI SANCHEZ, MELLISA MICKENS, M.D. IVEY, DEVIN ELTING, SEMI PAK, KAITLIN CAMPBELL, SARAH NORRIS, MIKIALA JAMISON, SHERESA JENKINS-RISTEKI, YANIRA GOMEZ and KRISTEN PIRO, on behalf of themselves and all others similarly situated,

Plaintiffs-Respondents,

– against –

BIG CITY PROPERTIES, LLC and XYZ CORPORATIONS 1-99,

Defendants,

(For Continuation of Caption See Inside Cover)

BRIEF FOR *AMICI CURIAE*
LOWER SEAMAN TENANTS ASSOCIATION
and MET COUNCIL, INC.
IN SUPPORT OF PLAINTIFFS-RESPONDENTS

Dated: August 2, 2019

CORPORATE DISCLOSURE STATEMENT

Pursuant to New York Court of Appeals Rule of Practice 500.1(f), the Lower Seaman Tenants Association and Met Council, Inc. state that neither has any parents, subsidiaries, or affiliates.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Lower Seaman Tenants Association ("LSTA") and Met Council, Inc. ("MC") submit this brief as *amicus curiae* in support of Plaintiffs-Respondents ("Plaintiffs").[1] LSTA is an organization that represents tenants of 1-19 Seaman Avenue in the Inwood neighborhood of upper Manhattan. MC is a tenants' rights membership organization serving, particularly, working class and low-income New York City residents who lease rent stabilized or regulated apartments.

LSTA and MC have an interest in this action because an adverse precedent could affect the procedural remedies available to their member-tenants in litigation under CPLR Article 9.

For the reasons detailed below and in Plaintiffs' own brief, the Order of the Appellate Division, First Department (R. 301-307[2]) should be affirmed.[3]

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[1] Plaintiffs are: Theresa Maddicks, John Ambrosio, Paul Wilder, Samuel Wilder, Alyssa O'Connell, Johanna S. Karlin, Brian Wagner, Tyler Strickland, Daniel Robles, Elena Ricardo, Liam Cudmore, Jenifer Mak, Joshua Berg, Anish Jain, John Curtin, Jonathan Fieweger, Maria Funcheon, Jordani Sanchez, Mellisa Mickens, M.D. Ivey, Devin Elting, Semi Pak, Kaitlin Campbell, Sarah Norris, Mikiala Jamison, Sheresa Jenkins-Risteki, Yanira Gomez and Kristen Piro.

[2] References to "R.__" are to the printed Record on Appeal. References to "App. Br." are to the Brief for Defendants-Appellants, dated November 28, 2019.

[3] We take no position on the merits of class certification, specifically whether (1) typicality, predominance and superiority under CPLR 901(a) are satisfied; (2) whether certification for some, but not all, issues may be appropriate; and (3) whether subclasses should be certified.

were not supported by the Individual Apartment Improvements ("IAIs") required to justify the increases (R. 33-40).

On defendants' CPLR 3211 motion to dismiss, the Motion Court not only dismissed the claims against eight single-purpose LLC defendants, but also dismissed the claims against Big City Acquisitions, Big City Realty Management, and the remaining LLC defendants.[4] The Motion Court noted that Plaintiffs "failed to properly assert how Defendants are factually or legally related or bound in this action" (R. 12). The Motion Court further held, at the motion-to-dismiss stage, that Plaintiffs could not establish the class action prerequisites of commonality, typicality, and superiority—all in a ruling made before Defendants answered, before discovery, and before plaintiffs moved for class certification. Thus, the Court dismissed the entire case (R. 13-14).[5]

The Appellate Division, First Department, reversed the Motion Court's dismissal based on Plaintiffs' class action allegations, with two Justices dissenting. (R. 301-321; 163 AD3d 501 [1st Dept 2018]). The majority wrote:

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[4] Plaintiffs' complaint named as defendants each building (single-purpose LLC) in the real estate portfolio managed by Big City Realty Management. However, defendants moved to dismiss only eight LLCs that owned the buildings for which there was no representative plaintiff tenant. Big City Acquisitions, Big City Realty Management, and the remaining LLCs did not seek dismissal (R. 223).

[5] Defendants' class action argument on its Rule 3211 motion was the last point in its brief (R. 231) and, for the claims still in the case, consisted of a single paragraph, which argued that "each claim requires a separate and distinct analysis" (R. 232).

> The possibility that the alleged overcharges resulted from a portfolio-wide "systematic effort . . . to avoid compliance with the rent-stabilization laws," while troubling (and perhaps of interest to the housing authorities), is irrelevant to the merits of any individual class member's overcharge claim: the class member either was or was not overcharged, regardless of any overcharges (or lack thereof) to other units, and regardless of the existence (or nonexistence) of any portfolio-wide scheme. That similar claims and defenses may be raised with regard to different units does not create a common question, either of law or fact, with respect to the different units.

(R. 320-21).

Defendants contend that Plaintiffs' claims, based on Defendants' allegedly systematic violations of the rent regulations, fail as a matter of law because "by their very nature, the class action allegations require fact-specific analyses and do not present common questions of fact or law" (App. Br. at 14). This determination, Defendants maintain, can be made on a CPLR 3211 motion testing the legal sufficiency of Plaintiffs' complaint; it need not await Plaintiffs' motion for class certification under CPLR 902.

Defendants' position is unsound for at least two reasons. First, as the First Department majority held, prior to an answer, discovery, and a certification motion, any determination whether this case meets the prerequisites for class treatment is premature. To dismiss a class action on a motion to dismiss is highly irregular.

Second, enacted in 1975, Article 9 is intended to liberalize class action practice in New York by providing the courts with a clear procedural structure for

substantive claim the sufficiency of which may be tested by a CPLR 3211 motion to dismiss. Rather, class allegations invoke the procedural mechanism embodied in CPLR Article 9, which itself provides for resolving the appropriateness of class treatment on a motion for class certification (*see* CPLR §902). Whether the case may properly proceed on a class-wide basis is a determination made *after* the complaint is upheld as legally sufficient.

Plaintiffs' complaint here pleads an overall scheme, implemented through three forms of misconduct. Nothing about the nature of the claim precludes certification as a matter of law—the test where a motion to dismiss ruling is sought.

For example, in *Weinberg v. Hertz Corp.* (116 AD2d 1 [1st Dept 1986], *affd* 69 NY2d 979 [1987]), the plaintiff pleaded a scheme involving Hertz's car rental business, which consisted of acts that allegedly were "unfair, deceptive and in breach of contract" (*Id.* at 2). The alleged scheme related to charges for: (1) refueling returned rental cars; (2) collision damage waiver and personal accident insurance; and (3) vehicles returned after the contractual return date (*Id.* at 2-3).

The plaintiff sought to certify a class of persons who rented cars from Hertz and paid the illegal charges within the State of New York (*Id.* at 3). ***After*** sustaining 6 of the 10 causes of action and ***after*** permitting class-related discovery,

But the "[e]vidence submitted by Verizon in opposition to the class certification motion . . . told a different story" (*Id.* at 791-92). That factual evidence strongly suggested that Verizon may have treated the plaintiffs' own building differently from other buildings. Accordingly, the *Corsello* Court denied certification (*Id.* at 793). The decision, which turned on the fact record made on the plaintiffs' motion for class certification, illustrates the irregularity of the Motion Court's dismissal here under Rule 3211.

Both *Hertz* and *Corsello* arose from alleged schemes, implemented through multiple means, that injured many individuals. Both decisions also arose from class certification motions, which included a factual record bearing on the appropriateness of class treatment. Indeed, in *Hertz*, this Court wrote:

> The Appellate Division weighed all of the relevant factors (CPLR 901, 902) and . . . found that prosecution of the claims in class action form was "superior to other available methods for the fair and efficient adjudication of the controversy" (CPLR 901 [a] [5]). We see no reason to disturb that inherently discretionary determination.

(69 NY2d at 981-82). The Motion Court's approach here would preclude this very sort of "inherently discretionary determination," informed by each side's factual and legal submissions on the motion for class certification.

Unlike a motion for class certification, a defense motion to dismiss under CPLR 3211 tests the sufficiency of a complaint as a matter of law. The dismissal motion is not an opportunity for the court to weigh or resolve factual matters. Yet

- Section 906(2) empowers the court to divide a pleaded class into smaller subclasses if the facts warrant this approach to adjudicating the litigation.
- Section 902's language—providing that certification "may be conditional, and may be altered or amended . . . on the court's own motion or on motion of the parties"—likewise demonstrates case management flexibility.

The availability of these provisions highlights the irregularity of the Motion Court's procedure. A dismissal on a Rule 3211 motion simply ignores the case management feature built into Article 9's class action mechanism.

Accordingly, only in the rarest of circumstances, if at all, might it be appropriate to resolve issues of class certification on a CPLR 3211 motion to dismiss. In *Downing v. First Lenox* (107 AD3d 86 [1st Dept 2013], *affd sub nom. Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382 [2014]) the First Department posited dismissing a class action at the motion-to-dismiss stage if CPLR 901(b)'s prohibition against actions to recover a penalty applied. The First Department, however, held that §901(b) did not apply, and, therefore, reversed the Motion Court's dismissal.

Wojciechowski v. Republic Steel Corp. (67 AD2d 830, 831 [4th Dept 1979]), which the *Downing* court cited, upheld a dismissal where the complaint itself did not permit the class members (residential homeowners whose homes were

The Court of Appeals itself acknowledged the need to replace the State's existing class action device with a new statute better-suited to modern needs: "The restrictive interpretation in the past of [our class action] statutes no longer has the viability it may once have had .... The court is also aware that there was pending before the Legislature last year and will be again this year a comprehensive proposal to provide a broadened scope and a more liberal procedure for class actions, an objective shared by members of this court ..." (*Moore v. Metro. Life Ins. Co.*, 33 N.Y.2d 304, 313 [N.Y. 1973]) (*See also* Special Committee on Consumer Affairs of the Association of the Bar of the City of New York, Proposed Class Action Legislation in New York, 28 Record 481, 485 [1973] (a legislative remedy "is appropriate both to broaden the scope of the class action remedy and to wipe clean the slate of precedent which is both confused and confusing").

Commenters on the 1975 class action bill recognized that the then-existing law was ill-equipped to handle cases with the judicial efficiency that was apparent on the federal side. As Stanley Fink, then the Speaker of the New York State Assembly and a sponsor of the bill, wrote at the time, "[t]he present law in New York is overly restrictive and, unfortunately plagued with inconsistency" (Sponsor's Mem., Bill Jacket, L 1975, ch 207 at 1) ("Sponsor's Mem."). Accordingly, the bill's proponents intended the new law to "eliminate [] the ambiguous judicial interpretation of section 1005 of the CPLR and its identical

Speaker Fink described the proposed law as "the most significant advance in consumer legislation in the history of New York State" (Sponsor's Cover Letter, Bill Jacket, L 1975, ch 207 at 1) ("Sponsor's Ltr."). It responded to the absence of any "workable remedy when neither relief on an individual basis nor actual joinder of the class is economically or administratively feasible" (Sponsor's Mem. at 1). Attorney General Louis Lefkowitz emphasized that the law would make the class action device "an accessible and useful tool for the citizen of New York," thereby "enabl[ing] people with small individual damages and poor financial resources ... to redress common class injuries" (DOL Mem. at 2, 3; *see also* Sponsor's Ltr. at 1). At the same time, the bill's sponsors sought to enact sufficient safeguards to allow the courts to maintain control over class actions and to prevent abuse (Sponsor's Mem. at 3).

Accordingly, as Governor Hugh Carey wrote in approving the measure:

> While this bill adds a major weapon to the consumer protection arsenal, it also provides legitimate enterprises with a shield against its abuse. The bill promulgates detailed guidelines and prerequisites to the maintenance of a class action suit. It vests great discretion in the court in fashioning the class, in providing for notice to its members and in controlling the course of proceedings. In short, it empowers the court to prevent abuse of the class action device and provides a controlling remedy which recognizes and respects the rights of the class as well as those of its opponent.

(Governor's Approval Mem., Bill Jacket, L 1975, ch 207 at 1) ("Governor's Mem.").

whether to certify a class: the plaintiff moves for class certification under CPLR *after* issue is joined and appropriate discovery is conducted, and the defendant may then oppose the motion based on the facts and the law. Shoe-horning the class action determination into a CPLR 3211 ruling is not what the New York Legislature intended. To the contrary, it would set the courts on a path backwards—to a time when restrictions on class action practice produced "unpredictable and erratic results under which 'class actions were not permitted where they should have been and were allowed where they should not have been'" (Sponsor's Mem. at 1, quoting Weinstein-Korn-Miller, NY CIV. PRAC. § 1005.02).

CONCLUSION

CPLR Article 9 enables individuals to redress systemic and persistent wrongdoing on a class-wide basis, whether the claims are for unlawful discrimination, environmental pollution, commercial misconduct, or rent overcharges such as those Plaintiffs assert. The law details the express criteria required for class certification as well as the procedure for determining class certification and for the course of proceedings generally in class actions.

The First Department majority correctly recognized that class action treatment is properly resolved under the procedure prescribed in Article 9, and that a CPLR 3211 motion to dismiss should not be used to bypass the explicit statutory scheme that the Legislature adopted.

CERTIFICATION OF COMPLIANCE

I, Jay L. Himes, a member of Labaton Sucharow LLP and counsel to the Proposed *Amicus Curiae*, do hereby certify pursuant to 22 NYCRR § 500.13(c)(1) that the foregoing brief was prepared on a computer using Microsoft Word 2010.

Type: A monospaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14

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Jay L. Himes

AFFIRMATION OF SERVICE

The undersigned, as attorney for proposed *amici curiae* Lower Seaman Tenants Association and Met Council, Inc., does herewith affirm under the penalties of perjury that on September 6, 2019, I served the attached Brief for *Amici Curiae* Lower Seaman Tenants Association and Met Council, Inc. in Support of Plaintiffs-Respondents on the following named individuals:

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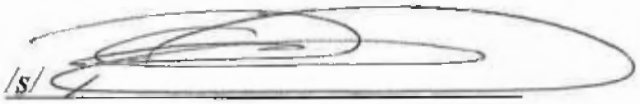

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