SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ELLEN M. COIN Justice

PART 63

Index Number : 158155/2012
CASHWELL, MICHAEL
vs
2 GOLD, LLC
Sequence Number : 004
ORDER MAINTAIN CLASS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Cross motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

This constitutes the decision and order of the Court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/17/14

_____, J.S.C.
HON. ELLEN M. COIN

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: HON. ELLEN M. COIN **PART 63**

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EVAN RICHARDS, JOSE HERNANDEZ-ORTIZ, and KEVIN SARDELLI, individually and on behalf of all others similarly situated,

Plaintiffs,

INDEX NO. 158155/2012
MOTION DATE April 9, 2014
MOTION SEQ. NO. 004
E-FILED

-against-

2 GOLD, L.L.C., 201 PEARL, L.L.C., TF CORNERSTONE, INC., GOLD/PEARL PARKING CORP., IMPERIAL PARKING SYSTEMS, INC.,

Defendants.

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Appearances:

For Plaintiffs:

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(212) 736-5588
-and-
Napoli Bern Ripka Shkolnik, LLP
By Hunter J. Shkolnik, Esq.
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For Defendants 2 Gold, L.L.C., 201 Pearl, L.L.C., and TF Cornerstone, Inc.:

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By Steve Lavietes, Esq. and
John Lyddane, Esq.
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For Defendants Gold/Pearl Parking Corp. and Imperial Parking Systems, Inc.:
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By Garry Rome, Esq.
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Papers	Papers Numbered
Notice of Motion-Affidavits-Exhibits	1
Cross-Motion & Memorandum of Law in Support	2
Reply Affidavits & Memorandum of Law in Opposition	3

ELLEN M. COIN, J.:

Proposed class representatives Evan Richards, Jose Hernandez-Ortiz, and Kevin Sardelli (collectively "plaintiffs") brought this

action against 2 Gold, L.L.C., 201 Pearl, L.L.C., TF Cornerstone, Inc., Gold/Pearl Parking Corp., and Imperial Parking Systems, Inc. (collectively "defendants") to recover damages after the alleged negligence of defendants resulted in an oil spill that made two apartment buildings uninhabitable.

Plaintiffs move for class certification, to appoint class representatives and to appoint class counsel. Defendants Gold/Pearl Parking Corp. and Imperial Parking Systems (collectively "parking corporations") cross-move to dismiss the complaint for failure to state a cause of action.

The oil spill occurred in the wake of Hurricane Sandy, which made landfall in lower Manhattan on October 29, 2012. New York City had issued a mandatory evacuation warning the previous night for all residents of Zone A, which encompassed the apartment buildings at 2 Gold Street and 201 Pearl Street (owned by 2 Gold, L.L.C. and 201 Pearl, L.L.C. respectively). TF Cornerstone was the managing agent for both properties, and the parking corporations were the owners and operators of the common parking garage shared by the buildings in their basement. Water rushed in and flooded the basements of both buildings, damaging the buildings' mechanical and electrical systems. The water reached the underground oil tank in 2 Gold Street, causing it to rupture and release oil into the floodwaters. As a result, the smell of diesel fuel filled the buildings.

Due to the oil spill, both buildings were uninhabitable from October 30, 2012 to February 15, 2013. When plaintiffs, tenants of the buildings, returned after the evacuation to retrieve their belongings, their apartment doors were allegedly unlocked, with personal property missing. Plaintiffs argue that defendants should have placed sandbags and taken other precautions to prevent the damage caused by the water and should have taken action to better secure the premises. Plaintiffs assert claims for negligence, gross negligence, and breach of implied warranty of habitability, and are claiming damages for loss and diminution in value of personal property, loss of income, costs of relocation, loss of business opportunities and business interruption, evacuation expense, and cost of maintaining monthly utilities for months without use. Parking corporations deny owing a duty of care to plaintiffs.

Motion for Class Certification, to Appoint Class Representatives and to Appoint Class Counsel

Pursuant to CPLR §901, members of a class may sue as representative parties on behalf of all if: 1) the class is so numerous that joinder of all members is impracticable; 2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members; 3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; 4) the representative parties will fairly and

adequately protect the interests of the class; and 5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

CPLR §901 should be liberally construed (*Englade v HarperCollins Publs., Inc.*, 289 AD2d 159, 159-60 [1st Dept 2001]) and should "favor the maintenance of class actions" (*Pruitt v Rockefeller Ctr. Props., Inc.*, 167 AD2d 14, 20-21 [1st Dept 1991]; *Brandon v Chefetz*, 106 AD2d 162, 168 [1st Dept 1985]). On a motion for class certification, the inquiry into the merits should be "limited to a determination as to whether on the surface there appears to be a cause of action which is not a sham" (*Id.*).

After the party seeking certification satisfies the CPLR §901 criteria, the court must also consider the factors listed in CPLR §902: 1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; 2) the impracticability or inefficiency of prosecuting or defending separate actions; 3) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; 4) the desirability or undesirability of concentrating the litigation of the claim in the particular forum; and 5) the difficulties likely to be encountered in the management of a class action.

CPLR §901

1. Numerosity

The class must be so numerous that joinder of all members is impracticable (CPLR §901(a)(1)). No "mechanical test" exists to determine whether the numerosity requirement has been met (*Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 137 [2d Dept 2008]; *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 96 [2d Dept 1980]). With respect to the numerosity requirement, "the court should consider the reasonable inferences and common sense assumptions from the facts before it" (*Globe Surgical Supply,* 59 AD3d at 138 [citing *Friar*, 78 AD2d at 96]). Thus, the numerosity requirement has been satisfied by 40 class members because such a class is "narrowly defined to avoid being over inclusive, but large enough that joinder is not practicable" (*Pajaczek v CEMA Const. Corp.,* 18 Misc 3d 1140(A) *3 [Sup Ct, NY County 2008]). In *Globe Surgical Supply,* between 10 and 100 Durable Medical Equipment providers were found to meet the numerosity requirement.

Here, the number of class members could be at least 839, because 839 apartments were allegedly affected and each contained at least one tenant. Such a high number of potential litigants would render joinder of over 839 parties impracticable; therefore, the numerosity requirement has been met.

2. Common Questions of Law or Fact that Predominate

Questions of law or fact common to the class must predominate over any questions affecting only individual members (CPLR §901[a][2]). "[C]ommonality is not merely an inquiry into whether common issues outnumber individual issues but rather 'whether the use of a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated'" (*Pludeman v N. Leasing Sys., Inc.*, 74 AD3d 420, 423 [1st Dept 2010], quoting *Friar*, 78 AD2d at 97)).

Class actions are authorized even where the common overarching legal and factual dispute breeds certain subsidiary questions of law or fact not common to the class (*King v Club Med, Inc.*, 76 AD2d 123, 126 [1st Dept 1980]). "The need to conduct individualized damages inquires does not obviate the utility of the class mechanism for this action, given the predominant common issues of liability" (*Borden v 400 E. 55th St. Assoc., L.P.*, 105 AD3d 630, 631 [1st Dept 2013]). For example, when litigation involves a single building and a single landlord, "[t]he question of individual damages are dominated by common issues" (*Casey v Whitehouse Estates, Inc.*, 36 Misc3d 1225[A] *5 [Sup Ct, NY County 2012]). On the other hand, when conditions in three buildings "var[y] drastically" and the damages turn on the mitigations efforts in each apartment in each building, the case is not dominated by common issues (*Adler v Ogden CAP Props., LLC,* 42

Misc3d 613, 626 [Sup Ct, NY County 2013]). "[A]t most, the court will consider a plaintiff class limited to specific buildings where it can be demonstrated that the tenants of such buildings endured similar conditions and received similar mitigation" (*Id.* at 627).

Here, unlike in *Adler*, the conditions in the two buildings were essentially identical in that the oil spill allegedly affected both buildings in the same manner. With the managing agent common to all tenants, the question of defendants' mitigation efforts does not involve individual actions of tenants. While there may be varying issues with respect to individual damages, including the allegedly stolen property, the common denominator in this case is whether defendants were negligent and whether such negligence was the proximate cause of the buildings' uninhabitability. Therefore, the requirement that common questions of law or fact predominate has been met.

3. Typicality

The claims or defenses of the representative parties must be typical of the claims or defenses of the class (CPLR §901[a][3]). "Typical claims are those that arise from the same facts and circumstances as the claims of the class members" (*Globe Surgical Supply*, 59 AD3d at 143). Class actions are allowed even though each member might not be able to assert all of the claims asserted by the

class, provided that all class members share a predominant claim (*Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 22 [1st Dept 1991]). "That the underlying facts of each individual plaintiff's claim vary . . . does not preclude class certification" (*Borden v 400 E. 55th St. Assoc., L.P.*, 105 AD3d 630, 631 [1st Dept 1991], citing *Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 424 [1st Dept 2010]).

Here, the claims and defenses of the representative parties are typical of the claims or defenses of the class because the proposed class representatives were tenants who resided in the same buildings as the rest of the putative class; therefore, they were affected primarily in the same way as the rest of the class. All proposed class members, including the proposed representatives, were forced to evacuate and are alleging that defendants' negligence led to their apartments' uninhabitability. Therefore, their theory of liability is the same.

Although the question of damages may be specific to each tenant, particularly with respect to the alleged stolen property, the amount of damages need not be the same for each tenant in order for the typicality requirement to be satisfied, as the "typicality requirement relates to the nature of the claims and the underlying transaction, not the amount or measure of damages" (*Pruitt*, 167 AD2d at 22).

4. Fair and Adequate Representation

Class Representatives

Plaintiffs are required to demonstrate that the proposed class representatives will fairly and adequately protect the interests of the class (CPLR §901[a][4]). Two essential factors in determining the adequacy of representation with respect to class representatives are: 1) whether any conflict of interest exists between the representatives and the class members; 2) personal characteristics of the representatives, including the representatives' familiarity with the lawsuit and their financial resources (*Globe Surgical Supply*, 59 AD3d at 144; *Ackerman v Price Waterhouse*, 252 AD2d 179, 202 [1st Dept 1998]; *Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 24 [1st Dept 1991]).

Here, no conflict of interest exists between the representatives and the class members. Plaintiffs' interests are aligned because defendants' alleged negligence affected them similarly. If one tenant is awarded economic damages caused by the defendants' negligence, all tenants will likely be awarded damages. Further, the representatives stated that they would not compromise the interests of the class members for their own personal gain (Affirmation of Kevin Sardelli, dated December 23, 2013, ¶¶10-12; Affirmation of Jose Hernandez-Ortize, dated December 19, 2013, ¶¶10-12).

The proposed representatives are also sufficiently familiar with the lawsuit: they were immediately affected by the conduct of defendants and have produced documents and attended depositions. The proposed representatives are also aware of the costs of the litigation (Sardelli Affirm., ¶12; Hernandez-Ortize Affirm., ¶12).

Class Counsel

Proposed class counsel must also fairly and adequately protect the interests of the class (CPLR §901[a][4]). "In order to be found adequate in representing the interests of the class, class counsel should have some experience in prosecuting class actions" (*Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 137 [2d Dept 2008]). Proposed class counsel are adequate representatives if they have "each demonstrated that they are competent, skilled, and experienced in class action litigation" (*Fiala v Metropolitan Life Ins. Co.*, 2006 NY Slip Op 30068[U] [Sup Ct, NY County 2006]; *see also Fiala v Metropolitan Life Ins. Co.*, 52 AD3d 251 [1st Dept 2008]; *Galdamez v Biordi Const. Corp.*, 13 Misc 3d 1224(A) *3 [Sup Ct, NY County 2006]).

Here, plaintiffs' proposed class counsel have substantial experience in complex class action litigation (Affirmation of Jeanne Christensen, dated December 23, 2013, ¶10-11; Affirmation of Hunter Shkolnik, dated December 23, 2013, ¶6-8). Defendants have not put forth any evidence to the contrary. Therefore, plaintiffs' proposed class counsel has met the necessary requirements for appointment.

5. Superiority

In an action brought by multiple tenants, a class action is superior to individual actions as it "conserves judicial resources by avoiding a multiplicity of lawsuits involving the same basic facts" (*Casey v Whitehouse Estates, Inc.*, 36 Misc 3d 1225(A) *6 [Sup Ct, NY County 2012]). "The very core of the class-action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights" (*Globe Surgical Supply,* 59 AD3d at 146). The limited damages sustained by individual plaintiffs can discourage them from pursuing their claims individually; therefore, bringing the claims as a class is a superior solution (*see Super Glue Corp. v. Avis Rent A Car Sys., Inc.*, 132 AD2d 604, 607-08 [2d Dept 1987]).

Here, proceeding as a class action is superior to each tenant bringing an individual claim. Over 839 claims would otherwise be litigated individually, and the claims may be small enough that there would be no incentive to bring a solo action. The liability determinations are the same for all of the proposed class members; thus, adjudicating the claims individually would be inefficient. The class could be later divided depending on the circumstances; for example, if the issues of liability are different for 2 Gold, L.L.C. and 201 Pearl, L.L.C., then the class could be subdivided to decide the varying issues (*Id.*).

CPLR §902

For the aforementioned reasons, the additional considerations enumerated in CPLR §902 also support granting class certification. The tenants' interest in individually controlling the prosecution of separate actions would be minimal if existent because the tenants all have the same underlying claim of negligence. Prosecuting separate actions would be inefficient, and concentrating the litigation in one forum is desirable, especially as the difficulty of managing the class action is moderate. Furthermore, to date, members of the class have not separately commenced litigation. Therefore, pursuant to CPLR §902, the motion for class certification is justified.

Cross-Motion to Dismiss for Failure to State a Cause of Action

On a motion to dismiss for failure to state a cause of action, the complaint must be liberally construed in the light most favorable to the plaintiff, and all allegations must be accepted as true (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "Initially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail." (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Thus, "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I*,

Inc. v Goldman Sachs & Co., 5 NY3d 11, 19 [2005]).

Plaintiffs' claims against the parking corporations allege negligence (Counts I, II) and gross negligence (Count IV). "To establish a prima facie case of negligence under New York law, a plaintiff must demonstrate that the defendant owed him or her a duty of reasonable care, a breach of that duty, and a resulting injury proximately caused by the breach" (*Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 199 [1st Dept 2013]; *see also Hyatt v Metro-North Commuter RR*, 16 AD3d 218, 218 [1st Dept 2005] ["traditional common-law elements of negligence: duty, breach, damages, causation and foreseeability"]).

Regardless of whether plaintiffs have sufficiently alleged the existence of a duty owed to them by parking corporations and the resulting breach of that duty, the pure economic nature of the damages sought vitiates the negligence and gross negligence causes of action. A party cannot recover for economic loss arising out of negligence in the absence of a contractual relationship (*Residential Bd. of Mgrs. of Zeckendorf Towers v. Union Sq.-14th St. Assoc.*, 190 AD2d 636, 637 [1st Dept 1993]; *Hurwitz v Extell West 57th St.*, 2013 NY Slip Op 31711[U], *6 [Sup Ct, NY County 2013]). An economic loss is a "purely monetary loss—as opposed to physical injury or property damage" (Black's Law Dictionary [9th ed 2009], economic-loss rule), such as "lost wages or lost profits" (*Id.*, economic loss).

Here, the pleading does not state a valid cause of action against the parking corporations. There is no privity of contract between the tenants and the parking corporations as concerns maintenance of the basement area and safeguard of the buildings' utilities from weather related conditions. Plaintiffs are not parties to the contracts between the owners of the buildings and the parking corporations, nor do they assert that they are third-party beneficiaries thereof.[1] In the absence of privity, the damages plaintiffs are seeking from the parking corporations (loss and diminution in value of personal property, loss of income, costs of relocation, loss of business opportunities and business interruption, evacuation expense, and cost of maintaining monthly utilities) are not available as they entail recoupment of financial expenses, and as such are purely economic.[2] That is, plaintiffs seek only to be returned to the point at which they were financially before the hurricane and to be placed in as good a position as they would have been had there been no hurricane (*cf. Children's Corner Learning Ctr.*

[1] For a party to establish its status as a third-party beneficiary, it must prove "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost" (*Castorino v Unifast Bldg. Products Corp.*, 161 AD2d 421, 422 [1st Dept 1990], quoting *Burns Jackson Miller Summit & Spitzer v Linder*, 59 NY2d 314, 336 [1983]).

[2] If plaintiffs wish to claim damage to their cars, a subclass of plaintiffs that owned cars in the parking garages may renew their claim against parking corporations.

v A. Miranda Contr. Corp., 64 AD3d 318, 324 [1st Dept 2009][rejecting a claim of contribution, as a claim of purely economic damages does not meet the requirement of "injury to property" in CPLR §1401]). With respect to plaintiffs' claim of stolen property, plaintiffs have not sufficiently established a chain of causation to tie the parking corporations to the alleged thefts, as petroleum odors, while quite capable of going through doors, are not adept at unlocking them.

In accordance with the foregoing, it is therefore

ORDERED that plaintiffs' motion pursuant to CPLR §§901 and 902 for class certification and for plaintiffs to prosecute their action on behalf of a class consisting of the tenants of 2 Gold Street and 201 Pearl Street and other individuals residing in the apartments with tenants' permission as of the time of evacuation is granted; and it is further

ORDERED that the named plaintiffs are appointed as class representatives; and it is further

ORDERED that the Imbesi Christensen and Napoli Bern Ripka Shkolnik, LLP are appointed as counsel for the class; and it is further

ORDERED that, within thirty (30) days of the date of this order, defendants shall furnish to plaintiffs' counsel a list of the names and last known addresses of the tenants of 2 Gold Street and 201 Pearl Street as of the time of evacuation; and it is further

ORDERED that plaintiffs shall send a notice to all of the tenants identified by defendants and individuals residing at 2 Gold Street and 201 Pearl Street with tenants' permission, within sixty (60) days from the date of this order, and such notice shall include a provision that each individual may "opt-out" of the class action, by sending a signed form to plaintiffs' counsel; the form of said notice shall be approved by this Court; such proposed notice shall be sent to counsel for defendants and the Court within thirty (30) days from the date of this order for comment, which shall be submitted in writing to opposing counsel and the Court within seven (7) days thereafter, and plaintiffs may submit a written reply to defendants' comments within five (5) days thereafter; and it is further

ORDERED that the cross-motion of defendants Gold/Pearl Parking Corp. and Imperial Parking Systems, Inc. to dismiss for failure to state a cause of action is granted, and it is further

ORDERED that the Clerk of Court shall sever and dismiss the above-captioned matter as against defendants Gold/Pearl Parking Corp. and Imperial Parking Systems, Inc., and the remainder of the action shall continue.

This constitutes the decision and order of the Court.

Dated: July 17, 2014

Ellen M. Coin, A.J.S.C.

NON-FINAL DISPOSITION