SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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REGINA ALSTON, SANDRA VAUGHN-COOKE,
and FAIR HOUSING JUSTICE CENTER,

Plaintiffs,

SOPHIA JOHNSON, ALAIRE CHAPPELL,
CHRISTINE MCCALL and, NATALIE SAMMY EVE
on behalf of themselves and all others similarly situated, **INDEX NO. 452674/2015**

Proposed Plaintiff Intervenors,

- against -

STARRETT CITY, INC. and GRENADIER REALTY CORP.,
Defendants.

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PLAINTIFFS' MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION AND IN OPPOSITION TO DEFENDANTS' CROSS MOTION

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PRELIMINARY STATEMENT

Proposed Plaintiff-Intervenors Sophia Johnson, Alaire Chappell, Christine McCall and Natalie Sammy Eve (collectively "Intervenors"), respectfully submit this Memorandum of Law and the accompanying affidavits and exhibits attached thereto in further support of their motion to intervene, to amend the complaint to a class action and to certify a class of LINC voucher holders seeking rental housing with Defendants. They also submit this memorandum of law in opposition to Defendants' cross motion for an order denying class certification and in opposition to Defendants' motion to stay all proceedings pending its appeal. As described below, this Court should grant Plaintiffs' motion and deny Defendants' cross-motion.

Plaintiffs' motion is timely. The time limit for moving to certify a class pursuant to CPLR §902 has not yet begun to run and, in any event, Plaintiffs have already so moved.

Plaintiffs' motion does not run afoul of the limitation on relief to be sought in a class action pursuant to CPLR §901(b) merely because the Local Law establishing liability, NYC Administrative Code §8-502(a), allows for punitive damages. While punitive damages are available to persons aggrieved under the Local Law, such damages are not a mandatory component of sustaining a claim under the statute. Accordingly, Plaintiffs individually have waived any claim to seek punitive damages as a class.

The City's shelter system is currently dealing with the burdens of record census levels, at taxpayer expense. Currently, there are over 7,000 individuals and families in shelter seeking to move into permanent homes with the City's LINC housing vouchers. Defendants control thousands of apartments and could fill vacancies within their

buildings with applicants holding those vouchers, but continue to refuse to accept them, in blatant violation of the law, brazenly informing applicants of this fact through a form letter. Homeless New Yorkers holding LINC vouchers who have faced unlawful discrimination by the defendants should be made aware of their rights and obligations in a comprehensive manner. Thus, the class action is the superior method for enforcing their rights to have their applications considered by Starrett.

Plaintiffs' adequacy as class representatives is beyond reproach. They all want to apply for apartments in Defendants' Spring Creek development, without facing Defendants' blatant and admitted unlawful discrimination on the basis of their source of income and to ensure that Defendants cease their prohibited conduct and compensate Plaintiffs for the harm they have suffered as a result. It is inconsequential that Defendants' unlawful conduct may have harmed Plaintiffs to different degrees. A class action is still the best vehicle for resolving the common claims of class members even where there are distinctions between them. In this case, the Court does not have to look at any individual Plaintiff characteristics to determine that Defendants' practices are illegal and discriminatory.

ARGUMENT

I. INTERVENORS MOTION FOR CLASS CERTIFICATION IS TIMELY

There can be no issue with the timeliness of Plaintiffs' motion for class certification. Defendants' assertion that plaintiffs' motion to amend is untimely relies on an inapplicable provision of law, as Defendants themselves note. Under the plain language of the statute, as quoted by the Defendants, the 60-day time limitation on motions for

class certification in CPLR 902 applies to actions "brought as a class action." If Plaintiffs had brought this case as a class action, they would not now be seeking pursuant to CPLR 3025(b) to amend it to add class allegations. The 60-day limitation invoked by Defendants would have begun to run after Defendants answered the proposed Amended Complaint filed with Plaintiffs' motion, but here the issue is moot because Plaintiffs moved for class certification at the same time they filed the proposed Amended Complaint. Thus, there has been no delay in seeking the relief requested. It was only after this Court found for Plaintiff Vaughn-Cooke in its Decision of June 30, 2016 that attorneys for the Plaintiffs and Intervenors learned that Defendants had instituted a practice of notifying applicants with LINC vouchers, in writing, that despite this Court's ruling their applications would not be processed and making it necessary to amend the complaint.

II. PLAINTIFFS WAIVE THEIR CLAIMS TO PUNITIVE DAMAGES UNDER ADMINISTRATIVE CODE 8-502 PENALTY PROVISIONS

Plaintiffs' punitive damages claim made in the original complaint does not bar maintenance of this action as a class action. While CPLR 901(b) would bar such claims from being brought as a class action, given that the Human Rights Law does not specifically authorize such recovery, Plaintiffs are nonetheless free to proceed as a class by waiving their claim to punitive damages through class-wide relief. The courts have long allowed Plaintiffs to waive such penalties to maintain a class action. Cox v. Microsoft Corp., 8 A.D.3d 39, 40, 778 N.Y.S.2d 147 (1st Dep't 2004); Downing v. First Lenox Terrace Assoc., 107 A.D.3d 86, 91, 965 N.Y.S.2d 9 (1st Dep't 2013); Pesantez v. Boyle Envtl. Servs., 251 A.D.2d 11, 12, 673 N.Y.S.2d 659 (1st Dep't 1998) (certain

individuals may opt out should they decide to pursue claims which cannot be maintained as a class action). As averred in the attached attorney affirmation, Plaintiffs herein waive any claim to punitive damages through class-wide relief. *See, e.g*, Borden v. 400 East 55th St. Assoc L.P., 23 N.Y.3d 382 (claim for otherwise barred treble damages waived via attorney affirmation).

Plaintiffs are not barred from maintaining this action as a class action to the extent that CPLR 901(b) bars action under a statute that authorizes a minimum amount of recovery. The Human Rights Law does not impose a minimum amount of recovery for its violation. The contemplated "minimum measure of recovery" referred to in the statute is typically a set fine for its violation. *See, e.g.* Pruit v. Rockefeller Properties, Inc., 167 A.D.2d 14 (1st Dep't 1991) (punishment for violation of statute is a fixed amount without regard to damages suffered); Pires v. The Bowery Presents, LLC, 44 Misc.3d 704 (Sup Ct. NY 2014).

Plaintiffs' claim for punitive damages is thus not a mandatory component of asserting a claim under the Human Rights Law and so can be waived. A finding that the Defendants violated the Human Rights Law is distinct from a finding the Plaintiffs are entitled to punitive damages. Unlike the General Business Law provision at issue in Asher v. Abbott Labs., 290 AD2d 208(1st Dep't 2014), which required treble damages for its violation, Plaintiffs herein will not automatically be awarded punitive damages if the Defendants are found in violation of the Human Rights Law. Plaintiffs' claim for compensatory damages only contemplates recovering the additional rent burden they have suffered due to Defendants' illegal conduct. *See, e.g.*, Gudz v. Gemrock Realty Co. LLC., 105 A.D.3d 625 (App. Div. 1st Dep't 2013) (rent overcharge claim).

III. PLAINTIFFS HAVE SATISFIED THE PREREQUISITES FOR CLASS CERTIFICATION

A. The class action mechanism is the superior method for providing relief from Defendants' discriminatory policies

The class action is the superior mechanism for deciding the legal question of whether the Human Rights Law prohibition of source of income based discrimination requires Defendants to accept LINC vouchers. Plaintiffs meet the requirements set forth in CPLR §901(a)(5). As noted in Friar v. Vanguard Holding Corp., 78 A.D.2d 83, 94, the class action induces "socially and ethically responsible behavior on the part of large and wealthy institutions which will be deterred from carrying out policies or engaging in activities harmful to large numbers of individuals."

Defendants' policy is to flatly refuse LINC vouchers from all applicants. As noted in Plaintiffs' supporting affirmation, beyond Plaintiffs, there are 7,315 families or individuals with active LINC certifications that are currrently in shelter. A single ruling from this Court would resolve this question for all of them and eliminate the burden on them and the courts of multiple individual suits or administratve procedures to address each instance of Defendants' ongoing illegal conduct.

In this respect, Defendants' citation of Alix v. Walmart Stores, Inc., 57 A.D.3d 1044, 868 N.Y.S.2d 372 (3rd Dep't 2008) is inapposite. The Alix court denied class certification because the Plaintiffs' claims alleging various illegal labor practices were markedly different from those of the proposed class claims and, in some instances, other class members. Id. at 1046. The Alix court found that proving Plaintiffs' allegations would involve individual fact-specific inquiries that would undermine consideration of

the issues raises by the class. Id. at 1047. Thus, the court surmised that the issues raised would be best adjudicated via the available administrative remedy. Id. at 1048.

By contrast, the Plaintiffs herein have identical factual claims relating to liability: each of them applied for tenancy at Spring Creek using a LINC voucher and was denied, in violation of the law, because of their source of income. Certification of a class would therefore "reduce multiplicity of lawsuits by disposing of common questions of fact and law in one action … and will avoid different results in the determination of essentially the same issues." Bay State Heating and Air Conditioning Co. v. American Insurance, 78 A.D.2d 147,149 (4th Dep't 1980). *See also* Lamboy v. Gross, 129 Misc.2d 564, 576, 493 N.Y.S.2d 709 (Sup. Ct. N.Y. Co. 1985) (interests of judicial economy are served by intervention of parties with common legal issues).

Further, Defendants cannot claim that proceeding as a class action causes any economic impracticality that renders it a less desirable method of adjudication. In Weinberg v. Hertz Corp., 116 A.D.2d 1 (1st Dep't 1986), where the potential class consisted of defendant's customers, potentially millions of people, the Court found unavailing defendant's assertion that it would be unduly burdensome to identify a class of persons that were potentially aggreived by its practices. Id. at 4.

In the instant case, a class action would consist of persons whose names were presumably in Defendants' database. Defendants presumably know how many applicants they sent this rejection letter to and can easily identify them. In its letter refusing to accept LINC, Spring Creek claimed that in the event of a final court decision that required it to accept LINC, each application would be "processed and treated as if it had been received on on the original submission date." Also, unlike the defendant in

Weinberg, Defendants here have, according to their rejection letter, already identified the class members.

B. There are no differences between the individual members that predominate the common harm they all suffer from Defendants' blanket discriminatory policy against LINC vouchers

The maintenance of a class action does not require a showing that there are no distinctions between class members. In the instant case, the Court can answer the common question of whether Defendants' practices are illegal without delving into the extent of the harm Defendants inflicted upon each of the individual Plaintiffs. Plaintiffs' claims regarding liability are identical and can be decided without this Court reviewing the circumstances of each rejection.

Unlike in Small v. Lorillard Tobacco Co., Inc, 94 N.Y.2d 43, 55 (1999), individualized inquiry is not required to determine whether Defendants' professed policy of refusing LINC vouchers violates the Human Rights Law. The instant inquiry goes no further than discovering whether Defendants informed LINC applicants that Spring Creek would not accept their voucher. In City of New York v. Maul, 14 N.Y.3d 499 (2010), the court found common allegations could establish that defendant State's failure to meet its statutory and regulatory obligations harmed children requiring special services. *See also* Baby Neal for & by Ranter v. Casey, 43 F.3d 48, 61 (3rd Cir. 1994) (systematic deficiencies presented a sufficiently common legal basis to support class certification). While each proposed class members admittedly possessed unique characteristics, the Baby Neal court found the members' common allegations dominated any differences and that specialized proof was not needed to determine whether defendant engaged in the practices that harmed the Plaintiffs. Maul, 14 N.Y.3d at 513.

By contrast, in Small, 94 N.Y.2d at 57, a hearing was necessary to determine whether the defendant tobacco manufacturer engaged in fraudulent practices and the success of plaintiffs' claim depended on individualized proof of addiction. The instant case is chiefly concerned with whether the Defendants' practice of refusing LINC vouchers runs afoul of the Human Rights Law. The proposed class consist solely of prospective tenants with LINC vouchers who applied for apartments at Spring Creek. Contrary to Defendants' assertions, the Court will not be required to determine which particular LINC program each prospective class member relied on in seeking an apartment. The various LINC programs operate identically and are distinguished only by their beneficiaries.[1] Defendants fail to identify any distinctions that would require further inquiry by this Court. Further, Defendants' contention that the Court will have to determine whether each and every class member "otherwise satisfies tenancy requirements" misunderstands the very nature of this action. By the pleadings and all of the proceedings had herein, Plaintiffs do not contend they are entitled to tenancy with Defendants, only to consideration as potential tenants. They object to Defendants' rejection of their application on the basis of their source of income prior to any determination of their suitability as tenants.

[1] LINC I is for households in shelter that work a combined total of at least 35 hours per week in unsubsidized employment and have been employed at least 90 days before certification, LINC IV is for individual adults or adult families in shelter who are, or include someone who is, age 60 and LINC V covers eligible individual adults or adult families that have at least one working household member. In all cases total household income cannot exceed 200% of the federal poverty level.

C. **Joinder of all prospective renters with LINC vouchers who applied or will apply for tenancy with Defendants is impractical**

As the largest federally subsidized housing complex in the United States, Spring Creek has 5,881 units that "provide affordable housing to thousands of low income persons and/or families." (Jean Lerman affidavit ¶2 10/13/2015). There are currently 58,793 people in the shelter system, over 22,000 of which are children who are part of the 12,000 plus homeless families residing in either traditional of scatter site shelter.[2] At last count, there were 7,315 active LINC vouchers held by shelter residents searching for housing. All of these voucher holders could presumably seek tenancy with Defendants and, because of Defendants' blanket refusal policy, would be rejected. Defendants continue to advertise apartments for rent. Further, only Defendants know how many prospective tenants they rejected because of LINC.

D. **Plaintiffs are adequate class representatives**

Defendants' allegations regarding the ability of the proposed intervenors to fairly and adequately serve as class representatives pursuant to CPLR 901(a)(4) are specious. The interests of Plaintiffs here are simple: they are or were homeless shelter residents who sought to apply for apartments in Defendants' Spring Creek development and were denied because of Defendants' blatant and admitted unlawful discrimination on the basis of their source of income, a LINC voucher. They seek to ensure that Defendants cease

[2] https://www1.nyc.gov/assets/dhs/downloads/pdf/dailyreport.pdf. Last accessed April 11, 2017

their prohibited conduct and compensate them for the harm they have suffered as a result. In this respect, Plaintiffs' interests are virtually identical.

Courts have looked to three factors to determine whether proposed class representatives satisfy the requirements of CPLR 901(a)(4): potential conflicts of interest, personal characteristics of the proposed class representative, and the quality of class counsel. *See generally* Pruitt v. Rockefeller Center Properties, Inc., 167 A.D.2d 14, 24, 574 N.Y.S.2d 672, 678 (1st Dep't 1991). Here, there are no potential conflicts between the proposed representatives or their counsel since all parties seek the same categories of relief, and counsel have no financial interest in the outcome of the case beyond recovery of fees and costs. Second, plaintiffs themselves are or were bona fide applicants for the apartments, but in any event they seek only an opportunity to apply for the apartments, subject to the same screening and review process Defendants would use for any other applicants, so Defendants will have ample opportunity to identify any characteristics that would mitigate against accepting them as tenants. Indeed, Plaintiff Vaughn-Cooke, when granted an opportunity to apply for an apartment at Spring Creek, was accepted by Defendants and is now their tenant. Finally, there can be no dispute that The Legal Aid Society, the country's oldest and largest law firm providing free legal services to needy people, will provide quality representation to the proposed class, as it has done before so many times in its distinguished history of class action representation. Lamboy v. Gross, 129 Misc.2d at 572.

CONCLUSION

For the foregoing reasons, the motion of Intervenors to intervene in this action, to certify Plaintiffs as a class, and for leave to amend the complaint, should be granted in its entirety.

Dated: April 12, 2017
New York, New York

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