

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PICARO, ET AL.,

Plaintiffs,

v.

14-CV-7398 (DAB)
MEMORANDUM & ORDER

PELHAM 1135 LLC, ET AL.,

Defendants.

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DEBORAH A. BATTIS, United States District Judge.

Before the Court are Plaintiffs' Motion for Leave to Amend the Complaint ("Motion to Amend") and a Cross Motion to Sever, Dismiss or for Separate Trials ("Cross Motion") by Defendants Pelham 1135 LLC, Pelham 1130, LLC, Matthews 2160, LLC, Joshua Goldfarb, Philip Goldfarb, Marc Goldfarb, Thomas Frye, Goldfarb Properties, Inc., and Pelican Management Inc. (collectively, "Landlord Defendants"). Also before the Court is Plaintiffs' request for a pre-motion discovery conference. For the reasons outlined below, Plaintiffs' Motion to Amend is GRANTED, Landlord Defendants' Cross Motion is DENIED, and Plaintiffs' request for a pre-motion discovery conference is DENIED.

I. BACKGROUND

On September 12, 2014, Plaintiffs Pasquale Picaro, Prudencio Valle, Judith Bratnick, Sandy Cause, individually and as next friend to minor child S.C., and Letitia James, the

Public Advocate of the City of New York (collectively, "Original Plaintiffs") brought this action against Landlord Defendants, and the New York City Department of Buildings and its Commissioner Rick D. Chandler ("Government Defendants").

Original Plaintiffs' claims arise out of elevator repairs and construction in three apartment buildings, 1135 Pelham Parkway North, 1130 Pelham Parkway South, and 2160 Matthews Street, which are owned and/or operated by the Landlord Defendants.

Original Plaintiffs alleged that the repairs restricted or would restrict the mobility-impaired Plaintiffs' access to and from their apartments, common areas, and other facilities on the premises. Original Plaintiffs claimed that in conducting protracted repairs and construction to the elevators, Landlord Defendants violated the Fair Housing Act ("FHA") and Fair Housing Amendments Act of 1988 ("FHAA"), and their underlying regulations, as well as New York State Human Rights Law ("NYSHRL") and New York City Human Rights Law ("NYCHRL").

Plaintiffs also allege that Landlord Defendants failed to secure the proper permit to conduct elevator work pursuant to the New York City Building Code at 1135 Pelham Parkway North.

In addition, Original Plaintiffs brought claims against Government Defendants alleging that they either do not have or do not follow properly a protocol for issuing permits for such elevator repairs and construction that ensures compliance with

New York City accessibility laws, which they claimed violates Title II of the Americans with Disabilities Act ("ADA").

Plaintiffs Picaro and Valle also made a Motion for Preliminary Injunction, which was heard before Judge J. Paul Oetken on September 18, 2014, seeking to enjoin the Landlord Defendants from shutting down the elevator at 1135 Pelham Parkway North for planned repairs for up to five months. On September 19, 2014, Judge Oetken denied Plaintiffs' Motion without prejudice premised on Landlord Defendants' providing reasonable accommodations to Plaintiffs as offered at the hearing on the Motion.

On December 10, 2014, Original Plaintiffs filed the instant motion seeking leave to amend the Complaint.¹ Original Plaintiffs seek to amend the Complaint to add additional Plaintiffs who are disabled individuals as well as caregivers to such individuals -- Lillian Anthony, Amoghene Umude, Domingo Osorio, Olga Ortiz, Sharyan Vasquez, Melissa Vanderhorst, individually and as next friend to minor child A.V., Shakei Gadson -- and an organizational plaintiff, the Center for Independence of the

¹ Original Plaintiffs allege that they conferred telephonically with both Landlord Defendants and Government Defendants in late October 2014 and received oral consent to file an Amended Complaint by December 2, 2014. Plaintiffs assert that when they sought written confirmation of the agreement on December 1, 2014, Government Defendants gave consent, but Landlord Defendants denied consent, resulting in the instant motion. (Pl. Mem. in Supp. of Mot. to Amend 3-4.)

Disabled, New York ("CIDNY"), (collectively, "Proposed Plaintiffs"), as well as factual allegations related to the Proposed Plaintiffs. Additionally, Plaintiffs seek to add a new Defendant, Pelham 1540 LLC, the owner of one the buildings in which one of the Proposed Plaintiffs resides. Finally, Plaintiffs seek to add two new claims against the Government Defendants, one for aiding and abetting violation of NYCHRL, and a claim on behalf of Plaintiff James for declaratory relief that the Government Defendants violated New York City Construction and Building Codes.

On January 14, 2015, Landlord Defendants opposed Plaintiffs' Motion and cross-moved to dismiss the claims against the Government Defendants or, in the alternative, to sever the claims or for separate trials. Specifically, Landlord Defendants oppose the addition of Proposed Plaintiff Umude. Landlord Defendants also seek to dismiss in their entirety or sever the claims against the Government Defendants.

Government Defendants do not oppose Plaintiffs' Motion to Amend and oppose Landlord Defendants' Cross Motion. The two pending Motions were fully submitted on February 2, 2015.

On March 31, 2015, Plaintiffs made a request to the Court seeking a pre-motion discovery conference or an Order of the Court directing Landlord Defendants to confer pursuant to Fed. R. Civ. Pro. 26(f) pending disposition of the outstanding

Motions. Landlord Defendants opposed by letter dated April 7, 2015. Plaintiffs replied by letter dated April 9, 2015.

II. DISCUSSION

A. Legal Standard for Motion to Amend

Leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). A court may deny leave to amend on grounds of bad faith, undue prejudice to the opposing party, repeated failures to cure deficiencies in amendments previously allowed, or futility of amendment. Foman v. Davis, 371 U.S. 178, 182 (1962). An amendment is futile where it fails to state a claim under Federal Rule of Civil Procedure 12(b)(6). Panther Partners Inc. v. Ikanos Commc'ns, Inc., 681 F.3d 114, 119 (2d Cir. 2012).

B. Plaintiffs' Proposed Amendments

Plaintiffs' Motion to Amend is timely, coming early in the proceedings and before any significant motion practice. There is no indication that Plaintiffs' Motion to Amend was made in bad faith. In fact, Plaintiffs consulted with both sets of Defendants and allegedly obtained consent to amend their Complaint, which Landlord Defendants subsequently withdrew. If anything, it is the Landlord Defendants that have acted in bad

faith in refusing to consent to amendment at this early stage of the proceeding.

Because Landlord Defendants oppose only the amendments concerning Proposed Plaintiff Umude and the claims against the Government Defendants, the Court analyzes only those proposed amendments. Landlord Defendants assert that the addition of Proposed Plaintiff Umude should be denied because it is futile because Proposed Plaintiff Udude's alleged anxiety is not a recognized disability under the relevant laws. Landlord Defendants also argue that the claims against the Government Defendants are futile or, in the alternative, Landlord Defendants would be unduly prejudiced by having to engage in extended discovery and trial over issues allegedly unrelated to the Landlord Defendants and that a potential jury might link improperly the acts of the two sets of Defendants. The Court rejects all of Landlord Defendants' arguments.

1. Proposed Plaintiff Umude

Amendment of the Complaint to add Proposed Plaintiff Umude would not be futile because Plaintiff Umude may state a claim for relief as a caregiver associated with a disabled individual. The Second Circuit has held that "to gain entry to the courts, non-disabled parties bringing associational discrimination claims need only prove an independent injury causally related to

the denial of federally required services to the disabled persons with whom the non-disabled plaintiffs are associated.” Loeffler v. Staten Island Univ. Hosp., 582 F.3d 268, 279 (2d Cir. 2009)(children of deaf patient who were compelled to provide sign language translation services for father when defendant hospital failed to provide interpretation services have standing under Rehabilitation Act of 1973 because they suffered independent injuries that were causally related to hospital’s denial of services); see also Eskenazi-McGibney v. Connetquot Cent. Sch. Dist., No. 14-CV-1591 ADSGRB, 2015 WL 500871, at *6 (E.D.N.Y. Feb. 6, 2015) (noting that the Second Circuit “has not had occasion to construe the associational discrimination provision of the ADA,” but holding that parents of disabled child who were denied access to their child’s teacher and school grounds sufficiently stated a claim under the ADA and the Rehabilitation Act, and reserving judgment on the factual issue of causality)(citing Loeffler).

Additionally, NYCHRL explicitly prohibits discrimination based on association with a person in a protected class, including association with a person with a disability. N.Y. Admin. Code § 8-107(20); Loeffler, 582 F.3d at 277; Bartman v. Shenker, 786 N.Y.S.2d 696, 699-700 (Sup. Ct. 2004).

In the Amended Complaint, Proposed Plaintiff Umude alleges that he performed additional caretaking tasks and suffered

significant anxiety as a result Defendants' alleged failure to accommodate the disabilities of his mother, Proposed Plaintiff Anthony. (Am. Compl. ¶¶ 17, 115-26.) Landlord Defendants' argument that anxiety is not a recognized disability is a red herring. Proposed Plaintiff Umude's anxiety constituted part of the alleged injury he suffered as a result of Defendants' failure to provide reasonable accommodations to his mother; Plaintiffs do not contend that his anxiety was itself a disability warranting protection. (Pl. Reply & Mem. in Opp. to Cross Motion 3.) Although the scope of Mr. Umude's injuries and causation are factual issues he would need to prove to succeed on his claim, it cannot be said that amendment to add Proposed Plaintiff Umude's claims would be futile.

2. New Claims Against Government Defendants

The new claims against the Government Defendants appear in Plaintiff's proposed Sixth and Seventh Causes of Action (Am. Compl. ¶¶ 223-231.) The Sixth Cause of Action is brought on behalf of all Plaintiffs against Government Defendants for violation of NYCHRL's provision against aiding and abetting discrimination. N.Y. Admin. Code § 8-107(6). The Seventh Cause of Action is brought on behalf of Plaintiff Public Advocate James against Government Defendants for declaratory relief that they are violating New York City accessibility laws.

Landlord Defendants argue that the Motion to Amend should be denied as futile because "the issuance of a certificate of occupancy and/or building permit is a governmental function for which a municipality may not be held responsible for damages." (Def. Mem. of Law 3 (citing Okie v. Village of Hamburg, 196 A.D.2d 228, 231 (4th Dept. 1994)).) For the same reasons, Landlord Defendants also ask that the Fourth Cause of Action against Government Defendants be dismissed pursuant to Rule 12.²

The Court declines to analyze these arguments on the merits because Landlord Defendants have cited no authority to establish that they have standing to challenge the claims against Government Defendants at this stage of the proceeding. Rule 12(b) motions provide an avenue for defendants to raise defenses to the claims against them; similarly, the corresponding principle prohibiting futile amendments protects defendants from having to litigate baseless claims against them. Rule 12 does not contemplate defendants' bringing motions to dismiss claims against other co-

² At various times, Landlord Defendants argue that all claims against Government Defendants should be dismissed, or that the Fourth, Sixth, and Seventh Causes of Action (but not the Fifth) are without merit. (Def. Mem. of Law 2-3) ("All claims against the City Defendants should be dismissed. To the extent that the original complaint included claims against the City Defendants in the Fourth Cause of Action on the same basis the Court is respectfully requested to dismiss that claim.") Because the Court finds Landlord Defendants' arguments unpersuasive, the Court declines to attempt to discern the exact nature of Landlord Defendants' arguments as they relate to each of Plaintiff's Causes of Action.

defendants in the absence of cross-claims. In this case, other than their challenge to the addition of Proposed Plaintiff Umude, Landlord Defendants do not raise defenses on their own behalf; instead, they challenge the claims against the other set of Defendants.

Moreover, Government Defendants oppose Landlord Defendants' Cross Motion. In their Opposition, Government Defendants represent that should the Court grant Plaintiffs' Motion to Amend, they plan to move to dismiss the Amended Complaint. (Gov. Def. Opp. to Mot. to Sever 4.) If and when Government Defendants make such motion and the Parties fully brief the issues, the Court will determine the merits of any claims against and defenses of the Government Defendants.

As to Landlord Defendants' argument that amendment should be denied because it would unduly prejudice them, the Court incorporates the prejudice analysis as it relates to the Cross Motion to Sever, infra at 12. Landlord Defendants have not demonstrated that denial of leave to amend is appropriate on this ground.

Accordingly, Plaintiffs' Motion to Amend is GRANTED. Insofar as Landlord Defendants' Cross Motion included a motion

to dismiss Count Four for failure to state a claim pursuant to Rule 12, that motion is DENIED.³

C. Legal Standard for Motion to Sever Claims or for Separate Trials

Rule 21 permits the Court upon motion or on its own to drop a party from a case, or to sever claims against a party. Fed. R. Civ. P. 21. Rule 42 permits the Court to order separate trials for issues, claims, crossclaims and counterclaims. Fed. R. Civ. P. 42(b). "The decision whether to grant a severance motion is committed to the sound discretion of the trial court." New York v. Hendrickson Bros., Inc., 840 F.2d 1065, 1082 (2d Cir. 1988).

In making this determination, courts generally consider:

- (1) whether the claims arise out of the same transaction or occurrence;
- (2) whether the claims present some common questions of law or fact;
- (3) whether settlement of the claims or judicial economy would be facilitated;
- (4) whether prejudice would be avoided if severance were granted;
- and (5) whether different witnesses and documentary proof are required for the separate claims.

Crown Cork & Seal Co. Master Ret. Trust v. Credit Suisse First Boston Corp., 288 F.R.D. 331, 333 (S.D.N.Y. 2013).

³ Plaintiffs contend that having fashioned their Cross Motion as a motion to sever or dismiss pursuant to Rule 12, Landlord Defendants have waived their rights to raise the defenses listed in Rule 12(b)(2)-(5). (Pl. Reply & Mem. in Opp. to Cross Motion 5, n.5 (citing Fed. R. Civ. Pro. 12(h)(1)).) Having found that Landlord Defendants lacked standing to seek dismissal of the claims against Government Defendants, the Court declines to make a ruling on this issue at this time.

1. Severance of Government Defendants

In arguing against the Motion to Amend and in favor of the Cross Motion, Landlord Defendants argue that they will face undue prejudice if Plaintiffs are permitted to amend and to proceed with their claims against the Government Defendants. Plaintiffs' claims against both sets of Defendants arise out of the same elevator repairs and construction, and present common questions of fact and law, including determination of the nature of Plaintiffs' disabilities and whether they qualify for protection under the laws at issue, as well as the nature and scope of Plaintiffs' injuries. Settlement prospects will not be hurt if the parties continue with one action; the Court sees no reason why one set of Defendants could not settle while the claims proceed against the other. While there may be some different witnesses and proof required to adjudicate the claims against the two sets of Defendants, such as information about the permitting decision-making process generally, so will there be overlap of witnesses and evidence, including depositions of the numerous Plaintiffs, that warrants keeping the parties joined in this one action. Thus, considerations of judicial economy also support continuing with one action.

As to Landlord Defendants' claim of prejudice, the potential burden of additional discovery related to Government Defendants' policies and procedures, the scope of which is still

unknown, is not a reason to sever the claims at this time. The burden to Landlord Defendants is purely speculative, and such discovery may be relevant to the claims against the Landlord Defendants. See Tolliver v. Malin, No. 12 CIV. 971 (DAB)(KNF), 2014 WL 1378447, at *12 (S.D.N.Y. Apr. 4, 2014); Oram v. SoulCycle LLC, 979 F. Supp. 2d 498, 505 (S.D.N.Y. 2013) (citing Martinez v. Robinson, No. 99 CIV. 11911(DAB)(JCF), 2002 WL 424680, at *2 (S.D.N.Y. Mar. 19, 2002) ("Discovery has barely begun, and, as a consequence, information necessary to evaluate the relevant factors [governing severance] is not yet available"))).

Additionally, although discovery may uncover evidence against the Government Defendants that could confuse a jury or otherwise prejudice Landlord Defendants at trial, at this early stage, Landlord Defendants' conclusory statements about jury confusion are not sufficient to warrant severance. Tolliver, 2014 WL 1378447, at *12 ("[M]ere conclusory assertion that a jury may confuse the actions of the new defendants with those of the original defendants is not sufficient to convince the Court that the defendants would be prejudiced by allowing the plaintiff to add the proposed new claims to this action"). Thus, Landlord Defendants' have not made out a showing of prejudice or any other reason that severance is warranted at this time.

Accordingly, Landlord Defendants' Cross Motion to Sever is DENIED without prejudice.

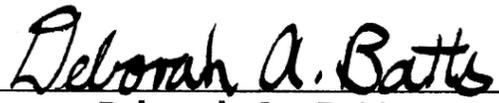
III. CONCLUSION

For the reasons stated above, Plaintiffs' Motion to Amend is GRANTED, and Defendants' Cross Motion is DENIED without prejudice. Plaintiffs shall file their Amended Complaint within 30 days of this Order. Government Defendants shall move or answer within 30 days of service of the Amended Complaint. Landlord Defendants shall move or file an amended answer within 30 days of service of the Amended Complaint.

Because it is the Court's practice not to hold discovery conferences until all Parties have been joined and responsive pleadings filed, Plaintiffs' request for a pre-motion discovery conference is DENIED.

SO ORDERED.

Dated: New York, New York
April 21, 2015


Deborah A. Batts
United States District Judge