SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ARLENA CHANEY, et al.,	)	
Plaintiffs	)	**Case No. 12 CA 5582**
	)	
v.	)	**Calendar 13 - Judge Kravitz**
	)	
CAPITOL PARK ASSOCIATES, LP, et al.,	)	
Defendants	)	

ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

This class action has been brought by three residents of the Capitol Park Towers apartment building (the "Towers") on behalf of all others similarly situated, against the owners of the building, defendants Capitol Park Associates, Capitol Park Land Corporation, and A.I.M. Partnership, No. 1, and the two companies retained by the owners to manage the building's parking facilities, defendants EJF Real Estate Services and American Rental Management Company. The plaintiffs allege that the defendants have violated District of Columbia law by charging Towers residents monthly parking fees and allowing non-residents to park in the Towers parking lot for a monthly fee without first obtaining proper zoning licenses. The plaintiffs' third amended class action complaint contains three counts: violation of the District of Columbia Consumer Protection and Procedures Act (CPPA) (Count I); violation of zoning regulations (Count II); and unjust enrichment (Count III). The plaintiffs seek both damages and injunctive relief.

The case is now before the court on the plaintiffs' motion for class certification. The plaintiffs ask the court to certify a damages class and an injunctive class. The damages class would be composed of all current and former Towers residents who paid monthly parking fees to the defendants; the claims on behalf of the damages class would be divided into a "licensing class period," from July 10, 2009 through December 31, 2011, and a "zoning class period," from

July 10, 2009 through the end of the litigation. The injunctive class would be composed of all current Towers residents who pay monthly parking fees to the defendants. The defendants have filed an opposition to the motion, and the plaintiffs have filed a reply.

The court has carefully considered the briefs and exhibits presented by the parties, as well as the entire record of the case. For the reasons stated below, the court concludes that the motion for class certification should be granted.

DISCUSSION

Under Rule 23 of the Superior Court Rules of Civil Procedure, a proposed class may be certified only if it satisfies all four of the prerequisites of Rule 23(a) plus the requirements of either Rule 23(b)(1), Rule 23(b)(2), or Rule 23(b)(3).

I. Rule 23(a) prerequisites

Numerosity

Rule 23(a)(1) requires that a proposed class be "so numerous that joinder of all members is impracticable." Although there is no fixed minimum number that always renders such joinder impracticable, courts have generally found that a proposed class of forty members or more satisfies the numerosity requirement. *See Bynum v. District of Columbia*, 214 F.R.D. 27, 32-33 (D.D.C. 2003) (citing *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1993); *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986)). The plaintiffs here are unable to estimate the potential size of the classes they propose because the defendants produced 545 individual licensing contracts[1] for parking spaces in discovery but withheld the addresses of the licensees, making it impossible for the plaintiffs to determine which licensees are Towers residents. The court nevertheless finds that the numerosity requirement has been satisfied. The proposed classes would reach forty members each as long as at least slightly more

[1] The defendants refer to their parking contracts as "licensing contracts."

than seven percent of the 545 license holders are current Towers residents, a strong likelihood given the fact that the building has nearly 300 units.

Commonality

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." To satisfy this commonality requirement, "it is not necessary that every issue of law or fact be the same for each class member. Factual variations among the class members will not defeat the commonality requirement, so long as a single aspect or feature of the claim is common to all proposed class members. The members of a proposed class of plaintiffs raise a common question of law or fact where the same evidence will suffice for each member to make a prima facie showing of the defendant's liability. If, however, proving a defendant's liability requires the members of a proposed class . . . to present evidence that varies from member to member, then it is an individual question." *Ford v. ChartOne, Inc.*, 908 A.2d 72, 85-86 (D.C. 2006) (internal quotations and citations omitted).

The plaintiffs contend that their claims present several common questions of law and fact, including:

1) Whether the defendants violated District of Columbia licensing regulations by operating a parking establishment business without a parking establishment license;

2) Whether the defendants violated District of Columbia zoning regulations by charging monthly parking fees to Towers residents;

3) Whether the defendants violated District of Columbia zoning regulations by licensing parking spaces to non-residents;

4) Whether the defendants' practices violated the CPPA;

5) Whether the defendants were unjustly enriched; and

6) Whether the plaintiffs and proposed classes are entitled to the monetary and/or injunctive relief they are seeking.

The defendants concede that "the claims involving whether Defendants charged Plaintiffs in violation of licensing and zoning regulations can be resolved by looking at a common act performed by Defendants." They argue, however, that the harms alleged by the plaintiffs, such as increased congestion, noise, danger, and lack of access to desirable parking spaces, are "very fact specific to each plaintiff" and that the proposed class therefore does not satisfy the commonality requirement.

The defendants' argument is foreclosed by *Ford*. As quoted above, the Court of Appeals made clear in *Ford* that the commonality requirement is satisfied when the same evidence will establish the defendant's liability as to all members of the class; it is not necessary that common evidence establish all of the class members' damages. Given the defendants' concession that liability issues for all class members will be determined by common evidence, the court thus finds, consistent with *Ford*, that the plaintiffs have satisfied the commonality requirement.

Typicality

Rule 23(a)(3) requires that "the claims and defenses of the representative parties [be] typical of the claims or defenses of the class." The typicality requirement "focuses on whether the representatives of the class suffered a similar injury from the same course of conduct. Essentially, the class representative's claim is typical of the claims of the class if his or her claim and those of the class arise from the same event or pattern or practice and are based on the same legal theory. The purpose of typicality is to ensure that the claims of the representative[s] and absent class members are sufficiently similar so that the representatives' acts are also acts on behalf of, and safeguard the interests of, the class. If that purpose is achieved, then as with commonality, factual variations between the claims of class representatives and the claims of

other class members . . . do not negate typicality." *Ford*, 908 A.2d at 86 (internal quotations and citations omitted).

Here, the injuries alleged by the named plaintiffs arise from the same conduct – the defendants' charging of fees for parking – as the alleged injuries of the absent members of the proposed class. The differences in damages suffered by the plaintiffs and the absent class members do not negate the plaintiffs' satisfaction of the typicality requirement, as "differences in the amount of damages claimed, or even the availability of certain defenses against a class representative, may not render his or her claims atypical." *Ford*, 908 A.2d at 86. The plaintiffs have thus satisfied the typicality requirement.

Adequacy

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Courts generally recognize two criteria for determining the adequacy of representation. *Ford*, 908 A.2d at 86. First, the named representative must not have "antagonistic or conflicting interests" with the unnamed members of the class; and second, the representative must appear "able to vigorously prosecute the interests of the class through qualified counsel." *Id*. Representativeness is satisfied "[w]here the court can fairly conclude that by pursuing their own interests vigorously the named representatives will necessarily raise all claims or defenses common to the class." *Id.*

The defendants argue that the plaintiffs fail the adequacy of representation requirement because they "possess a clear animus towards the Defendants that the unnamed members do not share." To support this argument, the defendants state that the plaintiffs are engaged in "serial litigation," and they cite six cases in which the plaintiffs have been parties since 2006. Four of those cases are tenant petitions challenging rent increases and/or reductions in services provided

by the defendants; the fifth is a small claims action (now settled) filed by one of the plaintiffs against some of the defendants; and the sixth is a civil action in which two of the named plaintiffs are defendants.[2] The defendants also cite a note produced by plaintiff John Bou-Sliman in discovery. The note reads: "Just because you have a parking space does not make you 'parking patrol'… try getting a life. Please don't put anymore [sic] notes on my car or I will report your ass to security/mgmt." The defendants surmise that the note was directed towards Bou-Sliman by another resident of the building, but they do not appear to know who sent the note or even that the note was, in fact, directed towards Bou-Sliman. Finally, the defendants cite an email from plaintiff Arlena Chaney, president of the tenants' association, to other board members, in which she stated:

> [Defendants] have not accepted NCPTTA [New Capital Park Towers Tenants' Association] and it appear they may never will [sic]. I am forced to repeat, their mantra must be that the DC laws are not for them. Or perhaps, we have not been "fighting" them back "right." Perhaps, we need to really focus on the D.C. Superior Court and a major financial dent in their wallets.

The defendants rely on *Kamerman v. Ockap Corp.*, 112 F.R.D. 195 (S.D.N.Y. 1986), in support of their argument that the plaintiffs have antagonistic interests from the classes that should disqualify them as representative parties. In *Kamerman*, the court found that the plaintiff, who was the executor of his father's estate, was not qualified to represent the class because his father had borne a grudge against the defendants for at least a decade and had sworn his sons on his deathbed that they would continue the litigation against the defendants. 112 F.R.D. at 197. The court concluded that "it was conceivable that [the plaintiff's] long family history of prosecution of these defendants would override his amenability to negotiating with [the]

[2] The cases are Chaney v. American Rental Management Co., RH-TP-06-28366; Chaney v. American Rental Management Co., RH-TP-06-28577; Chaney v. American Rental Management, RH-TP-08-29302; New Capitol Park Towers Tenants Assoc. v. Capitol Park Assocs., RH-TP-09-29560; Bou-Sliman v. AIM Partnership #1, 2008 SC3 7993; and Nodland v. Bou-Sliman, 2013 CA 2641.

defendants, although beneficial to the class. This Court cannot find that a plaintiff motivated by spite, or a grudge, will fairly and adequately protect the interests of the class." *Id.*

The actions of the plaintiffs in the case before this court do not rise to the level of the plaintiff in *Kamerman*. There is no evidence that the plaintiffs here have sued the defendants because of a grudge or personal animus; rather, the named plaintiffs are on the board of the tenants' association and are responsible for advocating for the rights of all Towers residents. They are therefore more likely than other tenants to be involved in litigation against the defendants. Furthermore, the note produced by Bou-Sliman does not establish that the plaintiffs' views are at odds with the other potential class members; it likely indicates no more than that the note-writer wanted people to stop placing notes on his or her car. Finally, Chaney's email does not establish an impermissible motive for prosecuting this case; rather, it demonstrates her frustration with the defendants and her belief that litigation is the most appropriate tactic for resolving the dispute. The court is not persuaded that the named plaintiffs have antagonistic or conflicting interests with other class members sufficient to prevent them from acting in the best interests of the classes.

Further on the subject of representative adequacy, the defendants argue that the lawyers for the named plaintiffs are not adequate because they failed to timely file their motion for class certification. A party's delay in moving for class certification is generally "analyzed with reference to the adequacy-of-representation requirement." *McCarthy v. Kleindienst*, 741 F.2d 1406, 1411 (D.C. Cir. 1984). As discussed in greater detail below, however, the court finds that the motion for class certification was timely filed. The timeliness of the filing of the motion for class certification thus gives the court no concern about the ability and motivation of the

plaintiffs and their lawyers to prosecute this case vigorously on behalf of all members of the proposed classes.

II. Rule 23(b) requirements

In addition to the four prerequisites of Rule 23(a), the plaintiffs must satisfy the requirements of Rule 23(b)(1), (2), or (3). The three subsections Rule 23(b) are not mutually exclusive, and a class can be certified under more than one subsection. *See Ford*, 908 A.2d at 86. Here, the plaintiffs contend that certification is proper under Rules 23(b)(2) and (3).

Rule 23(b)(2)

The plaintiffs seek certification of the injunctive class under Rule 23(b)(2). Rule 23(b)(2) allows an action to be maintained as a class action when "[t]he party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." The Court of Appeals has explained that "[t]he (b)(2) class action is intended for cases where broad, class-wide injunctive or declaratory relief is necessary to redress a group-wide injury . . . Ancillary monetary relief also may be granted in a (b)(2) action . . . [but] (b)(2) does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." *Ford*, 908 A.2d at 87 (internal quotations and citations omitted).

The court finds that the injunctive class is entitled to certification under Rule 23(b)(2). The defendants are alleged to have acted in a manner generally applicable to all current Towers residents who park in the building's parking lot, and broad injunctive and/or declaratory relief therefore may be necessary to redress the injuries of the named plaintiffs and the absent members of the injunctive class.

Rule 23(b)(3)

The plaintiffs seek certification of the damages class under Rule 23(b)(3). Rule 23(b)(3) provides that a case may be maintained as a class action if "[t]he court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

Predominance is established "when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position." *Ford*, 908 A.2d at 88 (citing *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 262 (D.D.C. 2002) (internal quotation marks and citation omitted)). On the other hand, a (b)(3) action is inappropriate "if the main issues in a case require the separate adjudication of each class member's individual claim or defense…" *Ford*, 908 A.2d at 88 (citing 7AA CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL, § 1778 at p. 134 (3d. ed. 2005)). However, if the defendant's activities "present a common course of conduct so that the issue of statutory liability is common to the class, the fact that damages . . . may vary for each party does not require that the class be terminated as being beyond the scope of Rule 23 (b)(3)." *Ford*, 908 A.2d at 88.

The court concludes that the plaintiffs have established the existence of several common questions of law and fact that are susceptible to class-wide proof. These questions include the following:

1) Whether the defendants charged class members monthly parking fees;

2) Whether, prior to January 1, 2012, any defendant had a parking establishment license;

3) Whether the defendants failed to disclose to class members that they did not have a parking establishment license endorsement, and whether such failure constitutes an actionable omission under D.C. Code § 28-3904(f);

4) Whether the defendants' charging of parking fees constitutes an actionable misrepresentation that they had approval or certification to do so;

5) Whether the defendants' charging of parking fees to class members prior to January 1, 2012 constitutes a violation of 16 D.C.M.R. § 3301.1(o) and therefore a predicate violation of D.C. Code § 28-3904(dd);

6) Whether the defendants leased parking spaces to non-residents;

7) If so, whether such leasing of parking spaces to non-residents constitutes a violation of zoning regulations and therefore a predicate violation of D.C. Code § 28 - 3905(k)(1);

8) Whether the defendants' charging of parking fees to residents constitutes a violation of zoning regulations and therefore a predicate violation of D.C. Code § 28-3905(k)(1); and

9) Whether the defendants were unjustly enriched when they charged and received parking fees contrary to licensing and zoning regulations.

The plaintiffs also have established that a class action is superior to other available methods of adjudicating this controversy. "Rule 23 (b)(3) favors class actions where common questions of law or fact permit the court to consolidate otherwise identical actions into a single efficient unit." *Wells v. Allstate Ins. Co.*, 210 F.R.D. 1, 12 (D.D.C. 2002). Moreover, a class action is superior where the "typical claims of class members are far too small for individual class members to maintain individual actions." *Id.* Here, the court concludes that it will be more

efficient for the claims against the defendants to be litigated as a class action than as a large number of individual actions. The court is also concerned that many class members would not find it financially worthwhile to maintain a suit on their own. The court therefore finds that the damages class should be certified under Rule 23(b)(3).

III. Timeliness

The defendants contend that the plaintiffs' motion should be denied as untimely. The court disagrees.

Rule 23-I(b)(1) provides that "[w]ithin 90 days after the filing of a complaint in a case sought to be maintained as a class action, the plaintiff shall move for a certification under Rule 23(c)(1) that the case be maintained as a class action." The plaintiffs filed their original class action complaint on July 10, 2012. At the initial scheduling conference on November 2, 2012, the plaintiffs requested a deadline of April 12, 2013 for their filing of a motion for class certification. Without waiving the right to argue later that such a motion was untimely, the defendants agreed to the plaintiffs' request, and Judge Johnson, who was then presiding over the case, set a deadline of April 12, 2013. Subsequently, on June 18, 2013, the undersigned judge entered a scheduling order proposed jointly by the parties; the scheduling order extended the deadline for the plaintiffs to file their motion for class certification to September 13, 2013. The plaintiffs then filed their motion on September 13, 2013, in accordance with the scheduling order entered on June 18, 2013.

The court finds that the plaintiffs' motion was timely filed. The plaintiffs filed their motion in compliance with the scheduling orders issued by the court. Rule 6(b)(1) provides that when an act is to be done at or within a specified time, the court "for cause shown may at any time in its discretion with or without motion or notice order the period enlarged if request

therefor is made before the expiration of the period originally prescribed or as extended by a previous order." The record reflects that Judge Johnson extended the time for the plaintiffs to file their motion for class certification to allow the plaintiffs time to conduct discovery of information necessary to file such a motion and that the undersigned judge then extended the time again for good cause, in a modified scheduling order proposed jointly by the parties.

Rules establishing a time period for the filing of motions for class certification have two primary purposes: first, to allow the defendants to ascertain at the earliest possible moment whether they will be facing a limited number of known, identifiable plaintiffs or a much larger group of unknown plaintiffs; and second, to foster judicial efficiency by encouraging courts to proceed to the merits of the case as soon as practicable. *McCarthy v. Kleindienst*, 741 F.2d 1406, 1411 (D.C. Cir. 1984). Any delay in the filing of the plaintiffs' motion for class certification here has had no negative impact on the policies underlying the rules regarding the time for filing. The defendants have known since the initial scheduling conference that the plaintiffs intended to seek class certification, and indeed, as discussed above, the defendants are in sole possession of the information the plaintiffs need to determine which current and former residents of the Towers should be members of the classes. And the delay in filing the motion has not caused any inefficiencies for the court; the parties proceeded with discovery before and after the class certification motion was filed and have now filed cross-motions for summary judgment. The court will be able to proceed with the merits of the case in a timely fashion.

IV. Standing

The defendants' final argument is that the plaintiffs lack standing. The defendants contend that they have not violated any regulations or statutes and that the plaintiffs therefore have not suffered any injury.

The defendants appear to be incorrectly conflating the concept of standing with the merits of the plaintiffs' claims. As the Court of Appeals has explained:

> Standing is a threshold jurisdictional question which must be addressed prior to and independent of the merits of a party's claims. This is a longstanding principle emphasized in federal case law since *Warth v. Seldin*, 422 U.S. 490 (1975), where the Court unequivocally stated that Article III standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal. If a plaintiff's factual allegations are sufficient to require a court to consider whether the plaintiff has a statutory (or otherwise legally protected right), then the Article III standing requirement has served its purpose; and the correctness of the plaintiff's legal theory — his understanding of the statute on which he relies — is a question that goes to the merits of the plaintiff's claim, not the plaintiff's standing to present it.

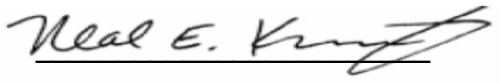
Grayson v. AT&T Corp., 15 A.3d 219, 229 (D.C. 2013). Therefore, "as a general matter, a court should decide the class certification question before deciding the merits of the case." *Jones v. District of Columbia*, 996 A.2d 834, 846 (D.C. 2010); *see also Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194-1195 (2013) ("Although a court's class-certification analysis must be rigorous and may entail some overlap with the merits of the plaintiff's underlying claim… Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent -- but only to the extent -- that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied…"). In this case, a determination of whether the Rule 23 requirements are satisfied does not require a finding of whether the actions of the defendants violated the law or governing regulations; those questions are to be addressed at the summary judgment stage and, possibly, at trial.

Accordingly, it is this 19th day of February 2014

ORDERED that the plaintiffs' motion for class certification is **granted**. It is further

ORDERED that the injunctive class proffered by the plaintiffs is certified under Rule 23(b)(2). It is further

ORDERED that the damages class proffered by the plaintiffs is certified under Rule 23(b)(3).



Neal E. Kravitz, Associate Judge
(Signed in Chambers)

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