E-FILED; Baltimore City Circuit Court
Docket: 10/18/2024 3:04 PM; Submission: 10/18/2024 3:04 PM
Envelope: 18466596

Tenae Smith, *et al.*,	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
Westminster Management, LLC, *et al.*,	*	BALTIMORE CITY
Defendants.	*	Case No. 24-C-17-004797

* * * * * ooo0ooo * * * * *

TENANTS' SUPPLEMENTAL BRIEF IN SUPPORT
OF SECOND MOTION TO CERTIFY A CLASS

Over five years ago, in April 2019, this Court denied Plaintiff-Tenants' class-certification motion (Dkt. #58/8). In May 2019, Tenants filed a revised (second) motion to certify a class and third amended complaint (Dkt. # 85, 87) to address this Court's concerns and further explain why class certification is appropriate. This Court treated the revised motion as a motion for reconsideration and declined to reconsider its prior ruling. After further briefing, this Court granted summary judgment in Westminster's favor (Dkt. #97/6).

Years of appeals ensued. The appellate proceedings concluded in March 2024, when the Supreme Court of Maryland ruled in Tenants' favor on the merits, finding that Westminster's fees associated with the late payment of rent violate Md. Code Ann., Real Prop. ("RP") § 8-208(d)(3), the definition of "rent" in Westminster's form leases violates RP § 8-401, and the "allocation provision" in its standard leases violates RP § 8-208(d)(2). *Westminster Mgmt., LLC v. Smith*, 486 Md. 616, 625 (2024). As for class certification, the Supreme Court concluded that Tenants had "addressed all or nearly all of the grounds on which [this] court had rejected the prior motion," and that this Court had "erred in declining to review the merits" of Tenants' second class-certification motion. *Id.* at 625–26. The Supreme Court further instructed this Court to fully "address the merits" of Tenants' second class-certification motion. *Id.* at 672.

To assist this Court's analysis, and in accordance with this Court's September 16, 2024 Order, Tenants submit this supplemental brief to explain how the Appellate Court and Supreme Court decisions underscore why certification is appropriate in this case.

ARGUMENT

Now that the merits issues have been decided in Tenants' favor, the appropriateness of class certification is even more compelling than it was when Tenants filed the pending Second Motion to Certify a Class. Westminster's arguments that there would need to be individualized determinations of liability have been eviscerated by the appellate courts. Its arguments that determination of class membership, damages, or affirmative defenses would require "mini-trials" that preclude class certification were explicitly rejected by the Supreme Court, and its recoupment and limitations arguments were rejected by the Appellate Court. What remains is primarily a question of damages, *i.e.*, how much in illegal fees should be refunded to each class member based on Westminster's own tenant ledgers and whether any affirmative defenses apply to one or more class members. Such a scenario cries out for class certification, especially because Westminster's tenants lack the resources to pursue claims concerning $10–$30 fees for months in which rent was late. This Court should therefore certify the proposed class.

I. Tenants' success on the merits before the Appellate Court and Supreme Court underscores why class certification is appropriate.

The Supreme Court ruled in Tenants' favor in three key ways. First, the Supreme Court held that late fees are capped at 5% of monthly rent by RP § 8-208(d)(3), so no "additional fees triggered by late payment" may be charged "other than court costs when awarded by a court." *Westminster*, 486 Md. at 625, 661. Westminster previously argued class certification was inappropriate because "the nature of the fees" in excess of that 5% cap may vary somewhat among Westminster-managed properties, such fees may be charged "at varying times of the

month," and such fees are governed by different "local laws and judges." Opp'n to Second Mot. for Class Cert. 57–60 (Dkt. # 85/1). Never persuasive, those arguments are now moot. Because (pursuant to the Supreme Court's decision) all fees triggered by late payment in excess of the 5% cap are unlawful, Westminster's distinctions as to when, how, or where the fees were charged are irrelevant to the class-certification analysis. *See also Smith v. Westminster Mgmt., LLC*, 257 Md. App. 336, 398 (2023) ("That Westminster sometimes charged tenants $10 and sometimes $12 [for certain late fees] is irrelevant to everything but the calculation of damages."); *id.* ("The times of the month that Westminster entered these charges on its books is simply irrelevant.").

Second, the Supreme Court held that a uniform definition of "rent" applies to all residential leases in Maryland—including all Westminster leases. It concluded that "rent" always "means the fixed, periodic payments that a tenant makes for the use or occupancy of the premises." *Westminster*, 486 Md. at 651. Although Westminster's "form leases" attempted to "expand the definition of 'rent'" by including other fees within that definition, such provisions are unlawful, and all such lease provisions are "ineffective." *Id.* at 624–25. This ruling, too, changes the class-certification analysis. Previously, Westminster had argued Tenants' class definition was deficient because it referred to "rent" even though the parties contested the meaning of that term and because not all leases contain identical provisions. Opp'n to Second Mot. for Class Cert. 41–42. Those arguments were never persuasive. *See* Tenants' Reply in Support of Mot. to Certify 10–11 (Dkt. # 85/2). Because the Supreme Court has held that "rent" has a uniform definition, Westminster's arguments necessarily fail.

Third, the Supreme Court concluded "a provision in Westminster leases that permits Westminster to allocate all tenant payments . . . [first] to other, non-'rent' obligations" violates RP § 8-208(d)(2)) because it nullifies the limited definition of "rent" and allows Westminster to

"apply a tenant's payment of 'rent' to other obligations, claim that 'rent' remains unpaid, and file a summary ejectment action." *Westminster*, 486 Md. at 625, 652. Westminster previously argued that whether Westminster "misallocated rent payments" could not be determined absent individualized evidence. Opp'n to Second Mot. for Class Cert. 65. Because the allocation provisions are unlawful across-the-board, that argument is no longer viable. And Westminster's argument regarding alleged distinctions as to how these unlawful provisions have been applied at different properties (*see id.* at 17–22) is beside the point; all tenants were subjected to the same unlawful lease provisions and fees. *See Westminster*, 486 Md. at 653–54.[1]

Because, following the Appellate Court and Supreme Court rulings, the proposed class members have the same legal claims under the same statutes with the same type of damages, and because those courts also ruled across-the-board in Tenants' favor on the merits, what now binds the proposed class together—that proposed class members were all subjected to Westminster's unlawful fees, definition of "rent," and allocation provisions—underscores that the common issues far outweigh the hypothetical, individualized issues Westminster posits. *See Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (certification weighs "whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues") (quoting 2 William B. Rubenstein, *Newberg on Class Actions* § 4:49 (5th ed. 2012)).[2] Westminster's arguments to the contrary fail, as the appellate

---

[1] Westminster previously argued that although allocation of payments "ordinarily" occurs in a uniform manner, that may not be the case at two properties, which, it argued, "has a significant impact on whether or not" tenants at those properties were subject to unlawful fees. Opp'n to Second Mot. for Class Cert. 59. The Supreme Court, however, concluded that tenants were subject to unlawful fees independent of any application of the lease's separate allocation provision. 486 Md. at 654 (explaining that Tenants' "claim is that Westminster violated § 8-208(d)(2) by including an impermissible provision in their leases," and that Tenants are correct on the merits of that claim).

[2] The Appellate Court also ruled in Tenant's favor on other merits issues. For example, it confirmed that the Maryland Consumer Protection Act (MCPA) and Maryland Consumer Debt Collection Act

decisions made clear. *See Smith*, 257 Md. App. at 383 (rejecting Westminster's "twenty-seven contentions, sub-contentions, and variations on the same themes . . . in support of its summary judgment motion"); *id.* at 365, 370, 396, 404–05 (describing Westminster's arguments as "meritless," "unpersuasive," and "specious").

II. The Appellate Court and Supreme Court decisions underscore that Tenants' class definition is appropriate and "mini-trials" are not required.

When deciding Tenants' first class-certification motion, this Court concluded that Tenants' class definition was inappropriate, holding that, because determining class members' identities would require "mini-trials," the proposed class was not ascertainable. (Dkt. 58/8 at 7). Tenants revised the proposed class to address this Court's concerns. (Dkt. # 85, 87); *Westminster*, 486 Md. at 666–67. And the Appellate Court and Supreme Court decisions, which examined the revised definition, addressed any remaining concerns regarding the class definition and explicitly rejected this Court's reasoning regarding "mini-trials."

The proposed class now includes all persons who (1) are or were tenants at Westminster-managed properties in Maryland, (2) have been charged fees related to the alleged late payment of rent since September 27, 2014, and (3) have paid those fees. Second Mot. to Cert. Class at 14. Class members can be readily ascertained from Westminster's electronic ledgers. *Id.* at 14–18.

After examining the proposed class definition, the Supreme Court rejected Westminster's argument (Opp'n to Second Mot. for Class Cert. at 39–40) that the class was not ascertainable due to the need to examine individual tenant files to determine objective facts or conduct "mini-trials." By definition, the Supreme Court clarified, a "mini-trial" "involve[s] extensive and individualized fact-finding." *Westminster*, 486 Md. at 672. Here, however, "[t]he need to review

(MCDCA) apply to Westminster's actions. 257 Md. App. at 380. Similarly, the Appellate Court concluded that violation of the MCDCA is a *per se* violation of the MCPA. *Id.* at 380–82, 392–94.

Westminster's tenant ledgers to identify whether tenants were charged particular fees is not necessarily the same as requiring mini-trials," so long as "review of the corporate records would produce an objective answer concerning whether the tenants were charged those fees, without the need to test the evidence extensively or resolve complex disputes." *Id.* at 672–73.

That is the case here, because Westminster's records detail which tenants were charged the 5% late fee plus the illegal fees and which tenants paid these fees. These specific "agent fees" and "summons fees" (and whether tenants paid them) can be readily identified on each tenant's ledger through Westminster's "Yardi" accounting software, Second Mot. for Class Cert. 16-21—as the Appellate Court expressly recognized. *See* 257 Md. App. at 415 n.62 (concluding the late-fee charges as well as the agent fees, summons fees, and writ fees that Westminster charged when tenants were late paying rent "were fixed and Westminster certainly knew when a tenant paid them").[3] Indeed, Westminster routinely informed Tenants if they failed to pay fees and how much they owed, and, after Tenants filed suit, Westminster identified and refunded wrongful, non-incurred "agent fees" and "writ fees" it had charged in relation to the Tenants' purported failure to pay rent on time. Second Mot. to Cert. Class at 20–21; Reply in Supp. of Second Mot. to Cert. Class at 8–9. And Tenants can readily identify each illegal fee paid—in fact, Tenants already did so in their motion for summary judgment. *See* Aff. of S. Doyle (Dkt. 97/5).[4]

The cases on which the Supreme Court relied to determine if a class is ascertainable or whether "mini-trials" are required underscore the point. A class is ascertainable where, as here,

---

[3] Westminster similarly can readily identify the $30 excessive "writ fees" for the limited number of class members who were subjected to that variation of Westminster's illegal fee scheme.

[4] Although Westminster argues that whether tenants received a refund for some unlawful fees charged is another individualized issue, Opp'n to Second Mot. for Class Cert 43, the Appellate Court noted tenants who received refunds may still be entitled to damages in the form of pre-judgment interest, 257 Md. App. at 398, and in any case, the subtraction of refunds from damages is a straightforward calculation.

class members can be identified from a defendant's records. In *Kelly v. RealPage Inc.*, for example, the Third Circuit rejected the notion that a class definition was deficient merely because "identifying putative class members would require a review of [] individual file[s]." 47 F.4th 202, 222 (3d Cir. 2022) (internal quotations omitted). Rather, a class is ascertainable if plaintiffs "have [] identified the records they require, demonstrated they are in [the defendant's] possession, and explained how those records can be used to verify putative [class] members." *Id.* at 224. Similarly, the defendant in *City Select Auto Sales Inc. v. BMW Bank of North America Inc.* argued a class was not ascertainable because, although defendant's database contained all potential members, the database was overinclusive—only those members that received unlawful faxes on certain dates were class members. 867 F.3d 434, 440–41 (3d Cir. 2017). Although the trial court found ascertainability lacking, the Third Circuit reversed, because "[t]he only factual inquiry required . . . is whether a particular [entity] in the database received the [] fax on one of the dates in question"—a "factual question" that could be answered "through affidavits or other available records." *Id.* at 442. By contrast, in *Marcus v. BMW of North America, LLC* —another case on which the Supreme Court relied—"serious ascertainability issues" existed because "defendants' records would not indicate" who was in the class. 687 F.3d 583, 593–94 (3d Cir. 2012); *see Kelly*, 47 F.4th at 223–24 (a class is not ascertainable if "either a defendant's records do not contain the information needed to ascertain the class or the records do not exist at all").

Here, there is no dispute that Westminster's unlawful fees can be identified by reviewing Westminster's ledgers electronically. Westminster's argument that examining tenant ledgers would be time-consuming not only ignores the evidence but is beside the point. Even accepting Westminster's narrative, a tenant-by-tenant analysis poses far fewer administrative complexities than the cases on which the Supreme Court relied. In *Kelly*, for example, the Third Circuit found

a class may be ascertainable even if determining membership "requires review of individual records" to determine which files contained any "public record information" and also "cross-referencing of voluminous data from multiple sources," including affidavits and "thousands of pages of contracts, driver rosters, security gate logs, and pay statements." 47 F.4th at 224.

III. The Appellate Court and Supreme Court decisions confirm that the relevant fees and practices were uniform across Westminster properties.

The appellate decisions further undermine Westminster's attempts to concoct material differences among its properties. Although Westminster argued "that leases are different and can be individualized," the Supreme Court emphasized that Westminster bases this argument on "non-specific testimony" from its own representatives, who displayed an "inability to identify differences relevant to the Tenants' claims." 486 Md. at 666 n.30. Moreover, the Supreme Court noted, Westminster uses a "standard form lease" that includes the same unlawful definition of rent and provisions related to late fees, and Westminster offers tenants this form lease "on a take-it-or-leave-it basis at its Maryland properties." *Id.* at 631–32; *see id.* at 649 n.20.[5]

> Regarding fees associated with the late payment of rent, the Supreme Court wrote:
>
> > Whenever any of its tenants fail to pay monthly rent by the fifth day of the month, Westminster promptly: (1) charges a 5% late fee on or about the sixth day of the month; (2) submits information about the delinquent tenants to its agent, eWrit, which then files summary ejectment actions against those tenants; and (3) charges each tenant, sometimes before a complaint is filed, both a "summons fee" of at least $20 and an "agent fee" or "filing fee" of $10."

486 Md. at 632.

[5] The Appellate Court made similar findings. *See* 257 Md. App. at 362 ("Westminster relie[d] on the definition of 'rent' in its standard lease."); *id.* at 362–63 (Westminster conceding the allocation provision was the same across its "standard lease[s]"); *id.* (Westminster's "standard lease" includes common provisions on late charges, allocation of payments, and the definition of "rent" and such leases were non-negotiable).

As these undisputed material facts make clear, liability does not turn on a "case-by-case" analysis of each lease and each property's fee practices, and Westminster can no longer plausibly argue that "whether Westminster charged allegedly illegal fees, misallocated rent payments first to such fees, and improperly threatened tenants with eviction for failing to pay such fees . . . require individualized evidence [or] testimony." Opp'n to Second Mot. for Class Cert. 4.

IV. The Appellate Court and Supreme Court decisions confirm that Westminster's affirmative defenses are not viable and do not defeat certification.

The Supreme Court and Appellate Court decisions also further undermine Westminster's arguments that its affirmative defenses render class certification inappropriate.

For example, Westminster alleges that, because some tenants left Westminster-managed properties owing money, it has a recoupment defense and/or that Tenants' class definition is overbroad. Opp'n to Second Mot. for Class Cert. 45. Such a defense is not viable for at least two reasons. First, as the Appellate Court put it, although Westminster "bears the burden of establishing its entitlement" to recoupment, here "[t]he evidentiary basis for Westminster's recoupment argument is extremely meager." 257 Md. App. at 400, 402. This Court should not deny class certification based on "meager" evidence of an alleged defense.

Second, the Appellate Court confirmed that Westminster is not entitled to recoupment (an equitable remedy) if it lacks "clean hands," meaning its conduct "concerning the cause of action [] rightfully can be said to transgress equitable standards of conduct." *Id.* at 402. That is the case here, because Westminster charged tenants unlawful fees and violated state law. *See Thorpe v. Carte*, 252 Md. 523, 529 (1969) (a party who violates a statute has unclean hands and gets "no assistance"); *Emala v. Balt. Cnty.*, 223 Md. 371, 374 (1960) (a party who "violated [] the spirit and letter" of a statute has "unclean" hands); *see also Wells Fargo Home Mortg., Inc. v. Neal*, 398 Md. 705, 729–30 (2007); *Metro Motors v. Nissan Motor Corp. in U.S.A.,* 339 F.3d 746,

750–51 (8th Cir. 2003). And determining whether Westminster has "unclean hands" requires no fact-finding at all. *See Guardian Title Agency, LLC v. Matrix Cap. Bank*, 141 F. Supp. 2d 1277, 1282 (D. Colo. 2001) (concluding there was no "factual dispute" as to a party's unclean hands, because that party "did, in fact, violate Colorado statutes."). In short, Westminster's recoupment defense is inapplicable as a matter of law.[6]

Westminster's alleged statute-of-limitations defense fares no better. Westminster has argued typicality is lacking because three named representatives "may be subject to a statute of limitations defense" as their leases began more than three years before Plaintiffs filed suit. Opp'n to Second Mot. for Class Cert. 55. But the Appellate Court squarely rejected that argument, explaining that the claims were timely and that Westminster's argument "overlooks the fact that the parties entered into new lease agreements each year." 257 Md. App. at 392; *see also id.* at 361 ("[I]f a landlord includes any of the proscribed terms in a lease and then attempts to enforce them, tenants can sue their landlords and recover damages").[7]

CONCLUSION

Class certification is necessary to vindicate the rights of the class members—rights that, according to the Supreme Court, Westminster has violated. Although Westminster may continue to contest "damages or some affirmative defenses peculiar to some individual class members," that is not enough to defeat certification. *See* 7AA C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 1778, pp. 123–124 (3d ed. 2005). This Court should certify the class.

---

[6] Before the Supreme Court, Westminster also did not (because it cannot) dispute that a recoupment defense does not apply to Tenants' claims for declaratory and injunctive relief, Reply Brief of Petitioners/Cross-Respondents Westminster Management, LLC and JK2 Westminster, LLC 18–19; *see also In re Frescati Shipping Co., Ltd.*, 886 F.3d 291, 311 (3d Cir. 2018) (recoupment only applies if a defendant "seek[s] relief of the same kind as that sought by the plaintiff").

[7] Westminster's arguments that two other affirmative defenses raise individualized issues fail for reasons explained in Tenants' Reply in Supp. of Mot. for Class Cert. (Dkt. # 85/2) 11–15, 18–21.

Respectfully submitted,

Andrew D. Freeman, AIS No. 8612010166
Anisha S. Queen, AIS No. 1412180039
Jamie Strawbridge, AIS No. 1612140265
Lauren J. Kelleher, AIS No. 2008030009
Brown, Goldstein & Levy, LLP
120 E. Baltimore Street, Suite 2500
Baltimore, MD 21202
Phone: 410-962-1030
Fax: 410-385-0869
adf@browngold.com
aqueen@browngold.com
jstrawbridge@browngold.com
lkelleher@browngold.com

Jane Santoni, AIS No. 8612010447
Matthew T. Vocci, AIS No. 0612130424
Chelsea Ortega, AIS No. 1212120342
Santoni, Vocci & Ortega, LLC
201 W. Padonia Road, Suite 101
Lutherville-Timonium, MD 21093
Phone: 443-921-8161
jsantoni@svolaw.com
mvocci@svolaw.com
cortega@svolaw.com

C. Matthew Hill, AIS No. 0712110352
Public Justice Center
201 North Charles Street, Suite 1200
Baltimore, MD 21201
Phone: 410-625-9409
hillm@publicjustice.org

Attorneys for the Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2024, a copy of the foregoing Supplemental Filing in Support of Class Certification was sent electronically via MDEC to:

Michael E. Blumenfeld
Timothy M. Hurley
Nelson Mullins Riley & Scarborough LLP
100 S. Charles Street, Suite 1600
Baltimore, MD 21201
Michael.Blumenfeld@nelsonmullins.com
Tim.Hurley@nelsonmullins.com

and by email to:

Tonya Kelly Cronin
Christopher C. Dahl
Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.
100 Light Street, 19th Floor
Baltimore, Maryland 21202
tykelly@bakerdonelson.com
cdahl@bakerdonelson.com

Attorneys for Defendants

Andrew D. Freeman