2017 IL App (1st) 162979-U

FOURTH DIVISION
May 18, 2017

No. 1-16-2979

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MICHAEL ROBERTS, individually and on behalf of all others similarly-situated,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 14 CH 15239
WILLIAM COVACI and 6830 N. SHERIDAN, LLC,	)	Honorable Rodolfo Garcia,
Defendants-Appellants.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices McBride and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County granting plaintiff's motion for class certification is reversed; plaintiff failed to produce facts estimating the size of the proposed class and therefore failed to satisfy the numerosity requirement for class certification; the trial court limited discovery prior to the hearing to the issue of whether plaintiff was an adequate class representative; therefore this cause is remanded to permit additional discovery on the motion for class certification and reconsideration of plaintiff's motion based thereon.

¶ 2 Plaintiff, Michael Roberts, filed an amended class-action complaint against defendants, William Covaci and 6830 N. Sheridan, LLC, alleging defendant violated section 5-12-080(c) of the Chicago Residential Landlord and Tenant Ordinance (RLTO) by failing to pay plaintiff and others similarly situated interest on security deposits on residential leases as required by the ordinance. Plaintiff also filed a motion for certification of a class action. Following a hearing, the trial court granted plaintiff's motion for certification of a class action. Defendants filed a petition for leave to appeal pursuant to Illinois Supreme Court Rule 306(a)(8) (eff. Mar. 8, 2016). This court granted defendants' petition for leave to appeal, and for the following reasons, we reverse.

¶ 3 BACKGROUND

¶ 4 This is an interlocutory appeal from the trial court's order granting certification of a class action under section 2-802 of the Code of Civil Procedure (Code) (735 ILCS 5/2-802 (West 2014)). The prerequisites for the maintenance of a class action are found in section 801 of the Code (735 ILCS 5/2-801 (West 2014)) which reads as follows:

> "An action may be maintained as a class action in any court of this State and a party may sue or be sued as a representative party of the class only if the court finds:
>
> (1) The class is so numerous that joinder of all members is impracticable.
>
> (2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.
>
> (3) The representative parties will fairly and adequately protect the interest of the class.

(4) The class action is an appropriate method for the fair and efficient adjudication of the controversy." 735 ILCS 5/2-801 (West 2014).

¶ 5 Plaintiff filed his amended class action complaint based on the RLTO on September 22, 2014.

"The relevant subsections of the RLTO provide, in part:

'(c) A landlord who holds a security deposit or prepaid rent pursuant to this section for more than six months shall pay interest to the tenant accruing from the beginning date of the rental term specified in the rental agreement at the rate determined in accordance with Section 5-12-081. The landlord shall, within 30 days after the end of each 12-month rental period, pay to the tenant any interest, by cash or credit to be applied to the rent due.

(d) The landlord shall, within 45 days after the date that the tenant vacates the dwelling unit or within seven days after the date that the tenant provides notice of termination of the rental agreement pursuant to Section 5-12-11(g), return to the tenant the security deposit or any balance thereof and the required interest thereon ***.

* * *

(f) If the landlord or landlord's agent fails to comply with any provision of Section[s] 5-12-080(a)-(e), the tenant shall be awarded damages in an amount equal to two times the security deposit plus interest at a rate determined in accordance with Section 5-12-081. This subsection does not preclude the tenant from recovering other damages to which he may be entitled under this chapter.'

> Chicago Municipal Code §§ 5-12-080(c), (d), (f) (amended May 14, 1997)."
>
> *Landis v. Marc Realty, LLC*, 235 Ill. 2d 1, 5 (2009).

¶ 6 Plaintiff's class action complaint alleges that from approximately 2002 until 2014 he leased a residential dwelling unit in a building owned and managed by 6830 N. Sheridan, LLC. (Covaci testified in a deposition that he is a member of 6830 N. Sheridan, LLC, which owns the property containing plaintiff's former dwelling unit.) The complaint further alleges that from at least September 1, 2011, defendants held a security deposit of $700 that plaintiff paid pursuant to the lease for the dwelling unit. The lease term for which plaintiff paid that security deposit was from September 1, 2011 to August 31, 2012 (Lease 1). Plaintiff alleges that on or about July 31, 2012, plaintiff and defendants entered into a lease for the unit for a term of September 1, 2012 through August 31, 2013 (Lease 2). Lease 2 stated plaintiff's security deposit would be $700. However, plaintiff alleges, the rent for the unit increased to $725. Therefore, plaintiff alleges, he paid defendants an additional $25 toward his security deposit "to make his security deposit amount match his monthly rent amount." Plaintiff alleges he made timely rent payments every month from August 2011 to July 2012 under Lease 1. He also alleged he made timely rent payments "every month from August 2012 to October 2013 for the monthly rent required for September 1, 2012 to November 30, 2013."

¶ 7 Plaintiff alleged, on information and belief, that other tenants' security deposits are held in the same account as monthly rental payments, and that the lease plaintiff signed was a standard form document that defendants used for all of their tenants. Plaintiff also alleged on information and belief that defendants "are landlords for dozens, possibly hundreds, of residential dwelling units in Chicago." The allegations as to the class state that plaintiff's

proposed class, which he designated the "Security Deposit Interest Class," consists of all persons who satisfy the following criteria:

a. They were a tenant of defendants;

b. They tendered a security deposit to defendants;

c. Their security deposit was held by defendants for more than six months during their tenancy; and

d. They were not paid interest due on their security deposits in the manner and timeframe provided by the RLTO.

Plaintiff's complaint alleges the prerequisites for the maintenance of a class action. The complaint alleges that the common questions of law and fact that are common to the proposed class include (1) whether defendants received security deposits from tenants and (2) whether defendants "had a practice of not paying interest on security deposits it held for more than six months, by cash or applied credit to the rent due, within 30 days after the end of each 12-month period as required by the RLTO."

¶ 8 Plaintiff alleges that "[a]t no time during his tenancy and through the date of this lawsuit was [he] paid interest on his security deposit." He alleged defendants held his security deposit for more than six months. The complaint alleges defendants did not pay plaintiff any interest between September 1, 2012 and September 30, 2012 for the 12-month lease period ending August 31, 2012; and defendants did not pay plaintiff any interest between September 1, 2013 and September 30, 2013 for the 12-month lease period ending August 31, 2013, as required by the RLTO. Plaintiff alleged on information and belief that defendants' failure to pay interest on a tenant's security deposit represents a policy and practice of defendants. The complaint states that section 5-12-080(f) of the RLTO provides for statutory damages for a violation of the

ordinance. The complaint asks the trial court to certify the class and appoint plaintiff as class representative, enter judgment in favor of plaintiff and the class and against defendants for the amounts specified in section 5-12-080(f) of the RLTO, and for attorney fees. The trial court entered an order limiting discovery to whether the named plaintiff is an appropriate class representative.

¶ 9 In a deposition, Covaci testified plaintiff's former building has 104 units. Covaci is the property manager, and his wife is the one other member of the LLC. Covaci testified that he manages approximately 15 to 18 other buildings under a different LLC "and under my name as well." Covaci and his wife are the two members of this other LLC. All but two of the buildings they own are residential buildings containing approximately 1000 dwelling units. Covaci initially stated he has owned all of the buildings for the last three years then stated that some were purchased "after three years." He most recently purchased a building in December 2012. Covaci keeps all of his records by hand. Covaci stated that he holds security deposits in a separate account from rents. Covaci estimated that he stopped taking security deposits approximately three years prior (he was deposed on August 20, 2015). In an affidavit, Covaci averred that after his deposition he reviewed certain records and determined that no security deposits were paid as of December 2011. He stated he did not have an idea of how many or the dollar amount of security deposits he had on hand at the beginning of 2013.

¶ 10 Covaci was asked what his process was for paying interest to tenants he holds security deposits for, and he answered as follows:

> "A. If they have a security deposit, then we—after they move out, we look at the apartment. And then sometimes even prior to them moving out, once the apartment is vacant, we point out, whatever problems there might have existed as

> a result of their living there. And then we will tell them that there will be deductions. And then we ask them for their forwarding mail address, and then we would mail them their deposit plus interest. But there are others that just tell us that they're moving the following month, and they're going to use their security deposit as last month's rent."

Covaci testified that in those situations where a tenant uses their security deposit as their last month's rent, he stated that typically their rent would have increased but the tenant did not increase their security deposit, so the interest would be applied to cover the difference between the security deposit and the current rent amount for the last month. Plaintiff's attorney asked if Covaci, where someone has been in a unit for more than one year, waits until the tenant moves out to pay them interest on a security deposit, and Covaci responded "Yes." Plaintiff's counsel clarified:

> "Q. So you never give any interest on security deposits while the tenant is a tenant—
>
> A. Yes.
>
> Q. —is that correct? And is that the same process that you followed with [plaintiff]?
>
> A. Yes."

¶ 11 During the deposition plaintiff's counsel showed Covaci his answers to plaintiff's requests to admit, in which Covaci admitted: "Within 30 days after the end of plaintiff's 12-month rental period ending August 31, 2012, you did not pay plaintiff interest on his security deposit by cash or credit applied to rent due." He later agreed that he also admitted that plaintiff was entitled to interest on his security deposit for that period. The requests to admit also asked

about the rental period ending August 31, 2013. Covaci admitted interest was not paid within 30 days of August 31, 2013, but added that plaintiff was not entitled to statutory interest on his security deposit. Covaci testified the cost to repair the damage to plaintiff's unit was more than his security deposit plus interest. Covaci estimated the cost to repair the damages and that after applying the security deposit and interest plaintiff owed an additional $72.82 to pay for the cost. Covaci stated that he only deducted from security deposits to pay for damage after a tenant moved out. Covaci testified that he calculated all of the interest that had accrued on plaintiff's security deposit during his tenancy after plaintiff moved out. Plaintiff's counsel asked Covaci if he was aware of the RLTO that requires interest to be paid each year and Covaci said that he was aware of it. When asked if there was a reason he does not pay the interest each year, Covaci responded: "For the number of units it's just—we have a small operation. So it's really difficult to pay everyone." Covaci also stated that he does not notify tenants at any time during their tenancy regarding the interest that has accrued on their security deposits.

¶ 12 Later in the deposition, while being questioned by his attorney, Covaci stated: "as far as the security deposit is concerned, everyone receives their deposit and interest who have security deposits at the end of their—at the end of their occupancy at the building." He stated that to determine whether any particular tenant is entitled to interest on their security deposit, he would first have to determine whether the tenant actually had a security deposit on file and whether the amount of the deposit reflected the current rent (if not any interest would be applied to make up the difference). Covaci testified in his deposition that to determine if a tenant was entitled to interest on their security deposit, upon a tenant's departure he would have to determine whether there was any damage to the unit and the cost to repair that damage. If the cost of repairs did not exceed the deposit plus any interest due he would issue the tenant a check.

¶ 13 Following discovery by the parties, defendants filed a memorandum of law in opposition to plaintiff's motion for certification of a class action. Defendants' memorandum argued plaintiff cannot meet the requirements for class certification and that plaintiff is not an adequate class representative because he does not have a valid cause of action against defendants. The factual background of defendants' memorandum states that during the term of the lease, plaintiff's son caused "considerable damage to the building." Defendants attached to the memorandum a letter dated October 1, 2012 (during the Lease 2 period) from Covaci to plaintiff telling plaintiff that because of plaintiff's son's conduct plaintiff had to move. On November 6, 2012, defendants served plaintiff with a "Notice of Termination of Tenancy For Chicago" informing plaintiff that he had breached the terms of the lease because of the damage his son caused. The notice directed plaintiff to deliver possession of the unit within 10 days of service of the notice unless the breach is remedied within the 10-day period. Plaintiff agreed to pay for the damages and defendants withdrew the notice.

¶ 14 Defendants' memorandum of law further states that on August 30, 2013, defendants served plaintiff with another "Notice of Termination of Tenancy for Chicago" informing plaintiff that defendants elected to terminate his lease effective September 30, 2013. Although not stated in the second notice, defendants' memorandum states the decision not to renew plaintiff's lease was made because plaintiff's son "continued to cause problems in the building." Plaintiff failed to vacate the premises and defendants filed a complaint for eviction. Plaintiff vacated the premises on April 11, 2014. Defendants' memorandum (to which defendants attached photographs purportedly of plaintiff's former apartment) states that after plaintiff vacated the premises, defendants discovered that plaintiff had caused "significant damage to the apartment." Defendants state the cost to repair and/or replace the damage and clean the apartment was $837.

(Defendants attached a hand-written, unsigned statement of those costs to their memorandum. Covaci testified in his deposition that he itemized the damages to plaintiff's former unit.) The memorandum then asserts as follows: "Because that amount exceeded [plaintiff's] security deposit of $725.00 and any interest otherwise due under the RLTO, Defendants did not return [plaintiff's] security deposit or pay him any interest."

¶ 15 Plaintiff filed a reply to defendants' memorandum of law in opposition to class certification with a supporting affidavit. In plaintiff's affidavit, he notes Covaci's affidavit stating that Covaci had reviewed "certain documents" and learned that no security deposits were taken since December 2011. Plaintiff asserts that the purpose of Covaci's affidavit "is to oppose the numerosity prong of class certification analysis, by suggesting that the complained of RLTO violation could not have happened to a large number of tenants because Defendants did not hold security deposits of other tenants during the applicable timeframe." Plaintiff averred that to properly reply to defendant's memorandum it would be necessary for plaintiff to be given access to the records Covaci relied upon to make the averments in his affidavit. Plaintiff also averred it was necessary for defendants to respond to discovery requests related to defendants' actions with regard to security deposits after December 2011. (Plaintiff averred that defendants refused to answer discovery requests pertaining to the proposed class as beyond the scope of the trial court's May 5, 2015 order limiting the scope of discovery to whether plaintiff is an appropriate class representative.) Plaintiff's affidavit states that pursuant to Illinois Supreme Court Rule 191(b) (eff. Jan. 4, 2013), he is entitled to conduct discovery on the following issues:

(i) whether defendants did in fact cease taking security deposits from its tenants in 2011;

(ii) whether defendants returned all security deposits it was holding for existing tenants as of December 2011, or if they just stopped taking them from new tenants;

(iii) the number of tenant security deposits defendants held as of August 23, 2012;

(iv) if defendants returned security deposits to their tenants prior to August 23, 2012, did they pay the statutory interest that was due pursuant to the RLTO after August 23, 2012; and

(v) if defendants returned security deposits to their tenants prior to August 23, 2012, why did they not return plaintiff's security deposit to him when they returned them to their other tenants.

¶ 16 The trial court held a hearing on plaintiff's motion for class certification. At the hearing, defendants' attorney argued the court should rule on plaintiff's Rule 191(b) request for discovery prior to ruling on the petition for class certification. Defendants' attorney argued plaintiff has sufficient evidence but was still unable to establish the numerosity requirement for class certification. The defense argued that because defendants stopped taking security deposits a short time after the class period began in August 2011[1], the court would have to speculate as to the number of potential members of the proposed class. Plaintiff argued alternatively, a tenant who was already in a lease as of December 2011 and renewed would be in the proposed class. The court stated that it would not deny plaintiff the opportunity to demonstrate numerosity "simply because I foreclosed any discovery on class action." The court stated that if it found plaintiff had not demonstrated numerosity it would not deny the petition for class certification with prejudice because of the order limiting discovery. The court acknowledged that plaintiff argued he had demonstrated numerosity, and found in plaintiff's favor on that issue. The court ruled: "[A]s to numerosity, I think it's a reasonable conclusion to draw that there are a sufficient

[1] Plaintiff's complaint is subject to a two-year statute of limitations. 735 ILCS 5/13-202 (West 2014); *Landis*, 235 Ill. 2d at 15. Plaintiff filed the amended class action complaint on September 22, 2014; therefore, any claims must have accrued by September 22, 2012. In this case, the statutory claim under the RLTO would have accrued 30 days after the end of the lease period if the claimant did not receive payment or a credit for interest on a security deposit. Accordingly, the earliest a 12-month lease period could have ended and be included in the putative class is August 22, 2012, which means the earliest a lease term could have begun and be included in the class is August 22, 2011.

number of similarly situated tenants and former tenants to establish—to make out a sufficient showing by the plaintiffs [*sic*] that a class action is warranted as to numerosity."

¶ 17 The parties went on to argue the other elements that must be shown for class certification. Defendants' attorney argued plaintiff cannot show that the successful adjudication of his claim would establish a common right of recovery for all class members because landlords have the right to deduct the cost of repairs from the security deposit and accrued interest. The trial court questioned defense counsel as to plaintiff's claim that he did not receive his accrued interest at the end of the first 12-month period (Lease 1) and asked if that was "a clear showing of a violation of the [RLTO]." Defendants' attorney said that she did not disagree as to plaintiff's individual claim; however, counsel argued that individual issues as to whether defendants wrongfully withheld interest from other tenants predominate. The trial court disagreed and found that to the extent the individual questions "lend some sort of variation on the common question, it's still the common question." The trial court held that "[h]ere, we're only talking about whether interest was paid on the security deposit being held by the management company and when it was required to be paid." Defense counsel also stated that defendants' position was that plaintiff "is subject to defenses that perhaps the class members may not be."

¶ 18 The trial court also rejected defendants' argument that the efficiencies that are afforded by a class would not be served in this case. The court found that defendants' concern over mini-trials as to which members of the class were entitled to interest because of the potential that the cost to repair damage to their units exceeded their deposits plus interest was "a matter of evidence." The court also noted that for some members of the proposed class, that issued had already been resolved and would not likely be challenged.

¶ 19 The trial court granted plaintiff's motion to certify a class action. This appeal followed.

¶ 20 ANALYSIS

¶ 21 The party seeking class certification bears the burden of demonstrating that the maintenance of a class action is appropriate. *Barbara's Sales, Inc. v. Intel Corp., et al.*, 227 Ill. 2d 45, 72 (2007). Thus, plaintiff had the burden to establish the following:

(1) the class is so numerous that joinder of all members is impractical (numerosity);

(2) there are questions of fact or law common to the class, and those common questions predominate over any questions affecting only individual members (typicality);

(3) plaintiff will fairly and adequately protect the interest of the class (adequacy of representation); and

(4) the class action is an appropriate method for the fair and efficient adjudication of the controversy (appropriateness). *Smith v. Illinois Central R.R. Co.*, 223 Ill. 2d 441, 447 (2006); *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 125 (2005). Class certification in Illinois "is patterned after Rule 23 of the Federal Rules of Civil Procedure. [Citations.] Given the relationship between these two provisions, federal decisions interpreting Rule 23 are persuasive authority with regard to questions of class certification in Illinois." *Avery*, 216 Ill. 2d at 125. Federal decisions have held that in deciding the issue of class certification, the court "is obliged to measure the allegations of fact and material adduced during the discovery against the [class certification] criteria." *Garcia v. Rush-Presbyterian-St. Luke's Medical Center*, 80 F.R.D. 254, 267 (N.D. Ill. 1978). "Decisions regarding class certification are within the sound discretion of the trial court and should be overturned only where the court clearly abused its discretion or applied impermissible legal criteria. [Citations.] However, '[a] trial court's discretion in deciding whether to certify a class action is not unlimited and is

bounded by and must be exercised within the framework of the civil procedure rule governing class actions.' [Citations.]" *Avery*, 216 Ill. 2d at 125-26.

> "The scope of appellate review is limited. [Citation.] The appellate court is limited to an assessment of the trial court's exercise of discretion; the appellate court cannot indulge in an independent, *de novo* evaluation of the facts alleged and the facts of record to justify class certification. [Citation.] In reviewing the trial court's decision on the question of class certification, the appellate court 'is only to assess the discretion exercised by the trial court and may not instead assess the facts of the case and conclude for itself that a case is well-suited for a class action.' [Citation.]" *Cruz v. Unilock Chicago*, 383 Ill. App. 3d 752, 761 (2008).

Defendants argue (1) the evidence is devoid of evidence of numerosity; (2) individual issues predominate over the one common question presented by plaintiff; (3) plaintiff is not an adequate class representative; and (4) class action is not a fair and efficient method of resolving this case.

¶ 22 (1) Numerosity

¶ 23 Defendants argue the trial court's ruling on numerosity was based on conjecture and speculation. Defendants assert that plaintiff's "sole piece of evidence to establish numerosity was based on the testimony of Defendant Covaci that he currently has 1000 apartments." (Emphasis omitted.) Defendants argue there is no evidentiary basis on which the trial court could have concluded that the number of tenants who paid a security deposit was at least 40[2]

[2] Under Rule 23 of the Federal Rules of Civil Procedure a class consisting of more than 40 members generally satisfies the numerosity requirement. *Gomez v. PNC Bank, National Association*, 306 F.R.D. 156, 171 (N.D. Ill. 2014) (citing *Costello v. BeavEx Inc.*, 2014 WL 1289612, at *8 (N.D. Ill. Mar. 31, 2014)). See also *Swanson v. American Consumer Industries, Inc.*, 415 F.2d 1326, 1333 n 9 ("Even if the class were limited to 40 stockholders, *** that is a

when the evidence establishes that Covaci acquired the "vast majority of the approximate 1000 apartments he currently manages in December 2012—one year after Defendants stopped accepting security deposits." Defendants also note the absence of evidence that any tenant renewed their lease or paid a security deposit.

¶ 24 Based on defendants' citation to the supporting record, defendants rely on the following testimony for their assertion that Covaci acquired the "vast majority" of his dwelling units in December 2012, one year after he stopped accepting security deposits:

> "Q. And how long have your—have you owned all the buildings for the last three years?
>
> A. Yes. Well, some were purchased after three years, so.
>
> Q. What was the most recently purchased building, what year?
>
> A. I think 2012.
>
> Q. Do you know about what month?
>
> A. December 24th."

The questions and answers are vague and do not establish that Covaci purchased the "vast majority" of his dwelling units in December 2012. He testified he owned "all the buildings for the last three years" with the exception of "some." His deposition does not establish that he owned all 15-18 buildings (excluding the 6830 N. Sheridan, LLC property) for *only* the last three years, which is how the question and answer would have to be interpreted to accept defendants' assertion that Covaci acquired the "vast majority" of his dwelling units in December 2012. In Covaci's affidavit submitted after his deposition, in which he averred that upon examination of

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sufficiently large group to satisfy Rule 23(a) where the individual members of the class are widely scattered and their holdings are generally too small to warrant undertaking individual actions."). "[F]ederal decisions interpreting Rule 23 are persuasive authority with regard to questions of class certification in Illinois." *Avery*, 216 Ill. 2d at 125.

certain documents he learned that he stopped requiring security deposits in December 2011, Covaci averred as follows: "I manage other residential buildings [(other than 6830 N. Sheridan)] in Chicago. Those buildings likewise discontinued the practice of requiring security deposits on new tenants' leases as of December 2011." It is clear that if those other buildings (plural) "discontinued the practice of requiring security deposits *** as of December 2011," those "other" buildings (in addition to 6830 N. Sheridan) previously did require security deposits. The evidence in the record is insufficient to establish that Covaci acquired the "vast majority" of his dwelling units in December 2012; therefore, we reject defendants' argument on that basis that the trial court lacked an evidentiary basis for its ruling.

¶ 25 The evidence does establish that Covaci managed multiple buildings that did require security deposits prior to December 2011, including 6830 N. Sheridan. Further, Covaci testified that there are 104 dwelling units in 6830 N. Sheridan. If any of those buildings had tenants who entered into 12-month leases between August 22, 2011 and December 2011[3], paid a security deposit, renewed those leases or moved out at the end of the lease term, and were either (1) not paid interest on their security deposit, (2) did not have the interest on their security deposit applied to either past-due rent or to an increased security deposit, or (3) did not have damages the cost of which to repair did not exceed their security deposit and were not paid interest, those individuals would be in the proposed class. Defendants' attorney argued at the hearing on plaintiff's motion that there was "a 4-month period *** that's the duration of your class period." The trial court found that it was "a reasonable conclusion to draw that there are a sufficient

[3] We assume, *arguendo*, for purposes of this appeal, that Covaci did in fact stop taking security deposits in 2011. Later discovery may reveal that some tenants did pay security deposits after December 2011, and those tenants are not precluded from becoming members of the class if they satisfy the other criteria for inclusion in the class.

number of similarly situated tenants and former tenants to *** make out a sufficient showing by the plaintiffs [*sic*] that a class action is warranted as to numerosity."

¶ 26 The evidence establishes an initial pool of at least more (and probably significantly more) than 100 dwelling units. Under Rule 23 of the Federal Rules of Civil Procedure a class consisting of more than 40 members generally satisfies the numerosity requirement. The trial court ruled that it is reasonable to *assume* that at least 40 of those tenants renewed their leases within the time frame stated above. Defendants' arguments raise the question of whether plaintiff must adduce direct facts demonstrating numerosity. Plaintiff cites *Evans v. U.S. Pipe & Foundry*, 696 F.2d 925, 930 (11th Cir. 1983), for the proposition that a court may make "common sense assumptions" in order to find support for numerosity. The *Evans* court held that while mere allegations of numerosity are insufficient to meet the requirements of Rule 23, a plaintiff need not show the precise number of members in the class. *Evans*, 696 F.2d at 930. In that case, the plaintiff sought to represent both a very broad class of employees of his former employer (all Black employees of the defendant company for a certain period who may have been discriminated against in various employment decisions) and a narrower class (employees who were discriminated against specifically by employment practices involving subjective decision making). *Id.* at 927-28. There, the "plaintiff attempted to establish the necessary requirements for class certification by proffering certain statistical evidence, defendant's answers and exhibits to plaintiff's interrogatories, the collective bargaining agreements and the deposition testimony of [the plaintiff]." *Id.* at 929. The court discussed several facts about the proposed class that the evidence revealed[4], and held that "the evidence was sufficient to at least

[4] "The evidence before the court at the 1978 hearing revealed that of the substantial number of employees of U.S. Pipe, blacks occupied a disproportionate number of lower level, lower paying positions. The evidence further revealed that the average salary of black

conditionally certify the smaller class of employees who had been discriminated against." See *id.* at 929-30.

¶ 27 We do not discern what "common sense assumptions" in *Evans* plaintiff refers to; rather, *Evans* actually supports finding that plaintiff must present factual evidence of the number of proposed class members. But see *Scholes v. Stone, McGuire & Benjamin*, 143 F.R.D. 181, 184 (1992) ("A finding of numerosity may be supported by 'common sense assumptions.' [Citation.]" (quoting *Grossman v. Waste Management, Inc.*, 100 F.R.D. 781, 785 (N.D. Ill. 1984))). We find *Scholes*, 143 F.R.D. at 184, and *Grossman*, 100 F.R.D. at 785 distinguishable.

¶ 28 In *Scholes*, the plaintiffs' complaint alleged that over 300 individuals lost in excess of 24 million dollars as a result of fraudulent conduct. *Scholes*, 143 F.R.D. at 183. *Scholes* was a civil action against the attorneys who allegedly assisted in carrying out the fraudulent conduct, while separately, there was in place an SEC Plan of Distribution related to the fraud. *Id.* at 182-83. The court found the numerosity element "easily satisfied based on common sense assumptions and public documents." *Id.* at 184. The court found that the plaintiffs sought to represent a class "based largely on the SEC's modified Plan of Distribution" which identified "more than 100 injured account holders by name." *Id.* Similarly, in *Grossman*, the plaintiffs submitted some

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employees was less than that of white employees in identical positions. There was evidence that a disproportionately small number of black employees were successful in obtaining promotion to the supervisory staff, which positions were ordinarily filled by the hourly work force. The collective bargaining agreements presented to the court supported Evans' claims that he and members of the promotion class were the victims of subjective evaluation of the type upon which this court has previously frowned. [Citation.] The agreements and defendant's interrogatory answers identified skill, knowledge, ability and efficiency as factors controlling the promotion decision. There was no evidence, however, identifying objective criteria for judging such skills, knowledge or abilities. Furthermore, job descriptions and duties were generally vague and uninformative. Uncontroverted assertions of the proposed class representative, Evans, further substantiated his claims that he and the promotion class were similarly the victims of discrimination resulting from U.S. Pipe's subjective evaluation process." *Evans*, 696 F.2d at 929-30.

factual evidence of the size of the actual class. In *Grossman*, the plaintiffs alleged that because of the defendants' conduct, the price of its stock was inflated and therefore the plaintiffs acquired the stock at a price higher than it would have been absent the defendants' conduct. *Grossman*, 100 F.R.D. at 783. The proposed class consisted of all persons who purchased the stock during a given time period. *Id.* at 783-84. The plaintiff submitted evidence of the number of shares traded during the time period (27 million). *Id.* at 785. The court held that although it did not have before it "information as to the number of persons who bought [the] stock during the class period, as opposed to the number of shares traded during that period, we are entitled to make 'common sense assumptions' in order to support a finding of numerosity." *Id.* In that case, the court found that "an assumption that the class members are *not* so numerous as to make joinder impracticable would be, in light of the number of shares traded during the class period, ridiculous." (Emphasis in original.) *Id.* The court held that the proposed class met the numerosity test. The plaintiffs in *Grossman* established that 27 million shares of the stock were traded (*Grossman*, 100 F.R.D. at 785); therefore, some reasonable quotient of 27 million represented the number of people who purchased the stock.

¶ 29 In this case, there is only an estimate of the total number of units involved but nothing from which to estimate the number of tenants in those units who might fit within the proposed class. Unlike in this case, the finding of numerosity in *Scholes* and *Grossman* did not rely on an assumption about the number of persons affected by the conduct forming the basis of the cause of action. Rather, the plaintiffs in those cases presented evidence of the number of affected persons, which provided a general picture of the possible number of proposed class members, from which it could make common sense assumptions about the size of the class.

¶ 30 We also find instructive *Cruz*, 383 Ill. App. 3d 752, where the court held that "plaintiffs need not demonstrate a precise figure for the class size, because a good-faith, nonspeculative estimate will suffice [citation]; rather, plaintiffs need demonstrate only that the class is sufficiently numerous to make joinder of all of the members impracticable [citation]." *Id.* at 771. In *Cruz*, the plaintiff sought to represent "a class of former and current hourly wage employees who have worked for defendant in production and maintenance positions since June 1999." *Id.* at 754. The plaintiff initiated suit to "recover wages allegedly not paid for time worked and to recover overtime wages allegedly not paid for work in excess of 40 hours a week." *Id.* at 758. The trial court denied the plaintiff's motion for class certification, but the appellate court reversed. *Id.* at 753. The plaintiff in that case produced "time sheet evidence *** to demonstrate that upwards of 90 employees were denied correct overtime pay." *Id.* at 767. The record also contained evidence of a policy applicable to all employees requiring them to arrive at their workstations 10 to 15 minutes before the beginning of their shift without compensating them for that time. *Id.* at 754-55, 769. The court held that the defendant's policy "raises the likelihood that all members were required to work off the clock;" and the fact the plaintiffs "specifically point to a pay period in which 80 to 90 workers were shorted overtime compensation" "is illustrative of the existence of a sufficient number of individuals who have been harmed by [the] defendant's conduct and policies." *Id.* at 770 (citing *Marcial v. Coronet Insurance Co.*, 880 F.2d 954, 957 (7th Cir. 1989)). Notably, the *Cruz* court distinguished the case before it from, *inter alia*, *Jackson v. Wal-Mart Stores, Inc.*, No. 258498, 2005 WL 3191394 (Mich. App. November 29, 2005), finding that in *Jackson*, "[t]he plaintiff offered no allegations or evidence regarding the number of persons who actually experienced the harm of working off the clock, and the trial court could not ascertain whether the numerosity requirement had been met." *Id.* (citing

Jackson, No. 258498, 2005 WL 3191394, *4 ("to meet their burden of establishing numerosity, *i.e.*, that joinder of all class members is impracticable, plaintiffs were required to provide some evidence reasonably estimating or otherwise showing the number of proposed class members who suffered actual injury")).

¶ 31 In *Marcial*, 880 F.2d 954, the Seventh Circuit affirmed the district court's order finding that the plaintiffs in that case failed to prove numerosity. *Marcial*, 880 F.2d at 957. The *Marcial* court wrote that "plaintiffs are not required to specify the exact number of persons in the class, [citation], but cannot rely on *** speculation as to the size of the class in order to prove numerosity." *Id.* There, the plaintiffs asserted that the class consisted of 400 to 600 customers of an insurance company that required insureds to take a polygraph examination as a precondition to payment for their loss. *Id.* at 956-57. The court found that the plaintiffs assumed that a representative from the insurer's claim service told all policyholders that they must take the polygraph examination to receive payment, and that every person who failed the test and had their claim denied was rejected solely on the basis of the test results. *Id.* at 957. The court could not "tell from the record whether those assumptions are correct." *Id.* The court concluded that in short, "plaintiffs have only speculated as to the number of persons who may have legitimate claims against Coronet" and therefore the "district court did not abuse its discretion in finding that [the] plaintiffs failed to prove numerosity." *Id.*

¶ 32 In this case, we find that any attempt at a "good faith estimate" of the size of the class in this case would have to rely on speculation as to the number of tenants in Covaci's buildings who entered into 12-month leases between August 22, 2011 and December 2011, paid a security deposit, renewed those leases or moved out at the end of the lease term, and were either (1) not paid interest on their security deposit, (2) did not have the interest on their security deposit

applied to either past-due rent or to an increased security deposit, or (3) did not have damages the cost of which to repair did not exceed their security deposit and were not paid interest. Here, it cannot fairly be said that plaintiff has presented evidence providing an estimate of the size of the proposed class. At best, the evidence provides only an estimate of the size of the pool from which the class may be drawn. Therefore, we hold the trial court abused its discretion in holding that plaintiff satisfied the numerosity requirement.

¶ 33 Plaintiff argues that the proper result in this instance would be for this court to remand to the trial court to permit the parties to engage in class discovery and amend their pleadings, then for the trial court to reconsider the class certification issue. In reply, defendants argue they abided by the trial court's discovery order, "and nothing prevented Plaintiff from seeking additional discovery." We note that on August 3, 2015, prior to Covaci's deposition, defendants' attorney served plaintiff with answers to interrogatories. Interrogatory #1 asked "Identify by name, address and telephone number each person, including Plaintiff, for whom you held a security deposit for more than six months since September 22, 2011, the date the security deposit was paid and the rental timeframe for each person." Defendant objected to the interrogatory "because it exceeds the scope of permissible discovery as ordered by the Court on May 5, 2015." Interrogatory # 5 asked "Separately identify with specificity each premise *** for which you are or were an owner *** during which you were a Landlord since September 22, 2012." Defendant responded with the same objection. At the hearing, when the trial court and defense counsel were discussing plaintiff's Rule 191(a) request for the documents Covaci referred to purporting to establish that Covaci stopped taking security deposits in December 2011, the following exchange occurred:

"THE COURT: Except it does make reference to additional material that wasn't tendered.

MS. ENERSON [defense counsel]: That is correct.

THE COURT: Okay. And you didn't tender it pursuant to the limited discovery order that I entered previously that said that the plaintiff first must make out his case before we get into class discovery.

MS. ENERSON: That is correct, your honor."

¶ 34 Later during the hearing on plaintiff's motion for class certification, when defendants' attorney argued that the size of the proposed class was speculative, the following colloquy occurred:

"THE COURT: But we're going back to the order that I entered previously that said, first, [plaintiff] would have to make his showing that he's a proper plaintiff in this action. And now he's contending, without the benefit of the discovery that was limited previously by that order that he can make out his class action requirements.

At most, what we're dealing with here is—you know, I wouldn't foreclose that to the plaintiff if he's being constrained by the previous order that was entered and hasn't been allowed to engage in discovery to demonstrate those requirements.

So what are we doing here?

MS. ENERSON: Well, your honor, if I could—well, there's a lot of reasons why we're here.

> THE COURT: In other words, you're not going to get a final decision from me today. You couldn't. I wouldn't do that to the plaintiff and say, you're out of the box, in terms of a class action, simply because I foreclosed any discovery on class action and, yet, he contends that he's demonstrated enough. And even if I were to accept that he didn't, I wouldn't do it with prejudice. I wouldn't foreclose it."

¶ 35 The trial court went on to find that plaintiff had demonstrated enough to satisfy the prerequisites for maintaining a class action. However, because there were no facts demonstrating a reasonable estimate of the size of the proposed class, we hold that ruling was an abuse of discretion. Nonetheless, we agree with the trial court that plaintiff must be allowed to engage in discovery to have the opportunity to prove the prerequisites for maintaining a class action. In *Ballard RN Center Inc. v. Kohll's Pharmacy and Homecare, Inc.*, 2015 IL 118644, the issue was whether a motion for class certification was required "to contain sufficient factual allegations and 'evidentiary materials adduced through discovery' to avoid mootness when a defendant tenders relief to the named class representative." *Ballard RN Center, Inc.*, 2015 IL 118644, ¶ 25. To answer that question, the court had to review its earlier decision in *Barber v. American Airlines, Inc.*, 241 Ill. 2d 450 (2011), which held that dismissal of the plaintiff's class action complaint was proper where the defendant tendered the plaintiff the relief requested before the plaintiff filed a motion to certify a class action. *Id.* ¶ 34. The *Ballard* court held that *Barber* "does not impose any sort of threshold evidentiary or factual basis for the class certification motion." *Id.* ¶ 36.

¶ 36 Although tender of relief rendering the plaintiff's claim moot is not at issue in this case, *Ballard* is instructive because in that decision, our supreme court recognized the need for discovery to allow a plaintiff "to fully develop the facts needed for certification." (Internal

quotation marks omitted.) *Id.* ¶ 42 (quoting *Damasco v. Clearwire Corp.*, 662 F.3d 891, 896-97 (7th Cir. 2011)). The *Damasco* court found that the solution to the mootness issue created by tender of full relief was that "[c]lass-action plaintiffs can move to certify the class at the same time that they file their complaint." *Damasco*, 662 F.3d at 896. The *Damasco* court then wrote as follows:

> "If the parties have yet to fully develop the facts needed for certification, then they can also ask the district court to delay its ruling to provide time for additional discovery or investigation. In a variety of other contexts, we have allowed plaintiffs to request stays after filing suit in order to allow them to complete essential activities. [Citations.] *** We remind district courts that they must engage in a 'rigorous analysis'—sometimes probing behind the pleadings—before ruling on certification. [Citation.] Although discovery may in some cases be unnecessary to resolve class issues [citation], in other cases a court may abuse its discretion by not allowing for appropriate discovery before deciding whether to certify a class [citations]." (Internal quotation marks omitted.) *Ballard RN Center, Inc.*, 2015 IL 118644, ¶ 42 (quoting *Damasco*, 662 F.3d at 896–97).

Our supreme court agreed. *Id.* The court also stated this approach "correctly affords the trial court discretion to manage the development of the putative class action on a case-by-case basis." *Id.* The court held that "[i]n cases when additional discovery or further development of the factual basis is necessary, as occurred here, those matters will be left to the discretion of the trial court." *Id.* ¶ 43.

¶ 37 Plaintiff failed to prove that there are in fact sufficiently numerous parties. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). Illinois contemplates that discovery on the

issue of class certification will take place, but plaintiff was denied a fair opportunity to present evidence to establish the prerequisites for maintenance of a class action because of the trial court's order limiting the scope of discovery. We agree with plaintiff that the proper remedy in this case is to remand to the trial court for additional discovery on the issue of class certification. See *Evans*, 696 F.2d at 930 ("In light of the principles we have set forth and the confusion in the record, we believe Evans is entitled to the opportunity to bring forth more specific evidence on the question of numerosity to permit the trial court to determine whether this requirement has been met."). The control of that discovery will be left to the sound discretion of the trial court. See *Ballard RN Center, Inc.*, 2015 IL 118644, ¶ 42. "All of these elements are prerequisites to certification; failure to meet any one of them precludes certification as a class." *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 596 (7th Cir. 1993). Our holding thus obviates the need to address the requirements of commonality, typicality, and adequacy of representation at this time. The judgment of the trial court granting plaintiff's motion for class certification is reversed, and the cause remanded to allow discovery on all class issues and reconsideration of plaintiff's motion based on any additional evidence plaintiff may adduce.

¶ 38 CONCLUSION

¶ 39 For the foregoing reasons, the circuit court of Cook County is reversed and the cause remanded for further proceedings consistent with this order.

¶ 40 Reversed and remanded.