

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 07-80009-CIV-HURLEY/HOPKINS

**JOSEPH J. FRIEDMAN and IRMA J.
FRIEDMAN,**

Plaintiffs,

v.

**THE BENENSON CAPITAL COMPANY and
W.P.R.F., INC.,**

Defendants.

**MYRON SOLOMAN and OLGA
WOLKENSTEIN,**

Plaintiffs,

v.

**W.P.R.F., INC. and BENENSON CAPITAL
COMPANY,**

Defendants.

**ORDER GRANTING-IN-PART AND DENYING-IN-PART DEFENDANTS' MOTION
TO DISMISS SOLOMAN COMPLAINT AND ALTERNATIVE MOTION TO
DISALLOW COURT REGISTRY PAYMENTS; DIRECTING CLERK OF THE COURT
TO RETURN ALL MONIES DEPOSITED INTO THE COURT REGISTRY WITH THE
EXCEPTION OF MONIES DEPOSITED BY MYRON SOLOMAN AND OLGA
WOLKENSTEIN**

THIS CAUSE is before the court upon the defendants' motion to dismiss the Soloman complaint and alternative motion to disallow court registry payments. For the reasons expressed herein, the court will grant-in-part and deny-in-part the instant motion.

BACKGROUND

These are putative class actions seeking damages and equitable relief related to recreational rents paid by the residents of the condominium community known as Century Village of West Palm Beach (“Century Village”). The residents of Century Village are required to pay monthly rent to defendants W.P.R.F., Inc. and Benenson Capital Company for the use of and access to Century Village’s recreational facilities.

The lead case (the “Friedman” action) was originally filed in federal court. The complaint in that case alleges that the defendants have breached the terms of the parties’ lease agreement, in that the defendants have failed to proportionally reduce the plaintiffs’ monthly recreational rental payments based upon hurricane damages sustained to Century Village’s recreational facilities.

A separate action (the “Soloman” action) was originally filed in the Fifteenth Judicial Circuit in and for Palm Beach County. The complaint in the Soloman action makes similar factual allegations, but seeks to have the Soloman plaintiffs and other residents of Century Village pay the disputed rents into the state court registry pending an arbitration of this matter. The Soloman action was removed to this court. This court then entered an order enjoining the state court from collecting any further rental payments and established a federal court registry in which individuals could pay the disputed rents. The court also consolidated the cases for all pretrial purposes, including discovery.

JURISDICTION

This court has jurisdiction over this action pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d). There is the requisite diversity of citizenship between the plaintiffs (and/or at least one member of the plaintiff class) and the defendants. Moreover, the aggregate amount in controversy exceeds \$5 million.

Venue is proper in this district pursuant to 28 U.S.C. § 1391(a) because a substantial part of the events or omissions giving rise to the claim occurred in the Southern District of Florida.

DISCUSSION

The defendants contest the ability of the court to accept the disputed rent payments, arguing that the *Erie* doctrine requires federal courts sitting in diversity to apply state substantive law and federal procedural law. As the court previously noted in its order establishing the federal court registry for the deposit of the disputed rents, the Florida Condominium Act mandates that condominium unit owners that initiate an action contesting obligations under a lease are required to pay disputed rents into a court registry or risk waiver of all defenses other than payment. *See Fla. Stat. § 718.401(d)(1); see also Florida Discount Properties, Inc. v. Windermere Condominium*, 763 So.2d 1085, 1085 (Fla. 4th DCA 2000). The defendants contend that this statutory provision is merely a state procedural rule. Under the principles announced in *Erie* and its progeny, however, the potential waiver of all defenses other than payment makes this a substantive rule of law, and not procedural. *See Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938) (federal courts sitting in diversity apply state substantive law and federal procedural law); *Hannah v. Plumer*, 380 U.S. 460, 465-66 (1965) (if there is a valid federal statute or Federal Rule on point, the federal rule is to be applied in spite of a conflicting state law); *Guaranty Trust Co. v. York*, 326 U.S. 99, 109-10 (1945) (if no federal statute or Federal Rule on point, the court will apply state law if state law is outcome-determinative). Therefore, the court concludes that Fla. Stat. § 718.401(d) is applicable in federal court.

The defendants also contest the ability of Century Village residents other than the named plaintiffs to deposit monies into the court registry. Again, the Florida Condominium Act provides

that if a unit owner initiates any action, then that unit owner shall pay the disputed rent into the court registry or risk waiver of certain defenses. *See* Fla. Stat. § 718.401(d)(1). The defendants argue that because a class has yet to be certified in this case, only the named plaintiffs, Mr. Myron Soloman and Ms. Olga Wolkenstein, have standing to deposit monies into the court registry. The statute itself does not speak directly to class actions, but it clearly indicates that the only unit owners required to pay disputed rents into the court registry or risk waiver of defenses are the unit owners that have “initiated an action.” *See* Fla. Stat. § 718.401(d)(1). At this stage in the litigation, the proposed class has yet to be certified, and the only parties who have “initiated an action” are the named plaintiffs in the case. *See* Fed. R. Civ. P. 23(c)(3) (class representatives and class counsel do not bind absent class members to their conduct and the resolution of the class lawsuit unless and until the putative class is certified); *cf. Schwarzschild v. Tse*, 69 F.3d 293, 297 n.5 (9th Cir. 1995) (“[A] decision rendered by the district court before a class has been properly certified and notified is not binding upon anyone but the named plaintiffs.”); *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1304 (4th Cir. 1978) (“It is the actual certification of an action as a class action . . . which alone gives birth to ‘class as jurisprudential entity,’ changes the action from a mere individual suit with class allegations into a true class action . . . and provides that sharp line of demarcation between an individual action seeking to become a class action and an actual class action.”). Because the putative class has yet to be certified, the court will direct the Clerk of the Court to return all monies deposited in the court registry to the individuals who deposited such funds, with the exception of any monies deposited by the named plaintiffs in the Soloman action, Mr. Myron Soloman and Ms. Olga Wolkenstein. Until further order of the court, the Clerk of the Court is authorized and directed to accept monies into the court registry only from Mr. Myron Soloman and Ms. Olga Wolkenstein.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that:

1. The defendants' motion to dismiss the Soloman complaint and alternative motion to disallow court registry payments is **GRANTED-IN-PART** and **DENIED-IN-PART**.
2. The Clerk of the Court is directed to return all monies deposited in the court registry to the individuals who deposited such funds, with the exception of the monies deposited into the court registry by Mr. Myron Soloman and Ms. Olga Wolkenstein.
3. The Clerk of the Court is directed to accompany any monies returned with the following explanatory note:

Dear Unit Owner,

You monies are being returned because the court has determined that your money should not be held in the registry of the court. It is your responsibility to make your recreational rent payments to the appropriate entity. Further, you should be advised that the court has concluded that the arbitration provision in the agreement between United Civic Organization, W.P.R.F., Inc., and Benenson Capital Company is binding. This litigation has been stayed pending arbitration, and hopefully this matter will be resolved through those proceedings. Please direct any further inquiries or concerns to your individual condominium association or to a representative from United Civic Organization.

4. Until further order of the court, the Clerk of the Court is authorized and directed to accept monies into the court registry only from Mr. Myron Soloman and Ms. Olga Wolkenstein.

Order Granting In-Part Defendants' Motion to Dismiss the Soloman Complaint and Alternative Motion to Disallow Court Registry Payments...
Friedman, et al. v. The Benenson Capital Co., et al.
Case No. 07-80009-CIV-HURLEY/HOPKINS

DONE and **SIGNED** in chambers at West Palm Beach, Florida this 27th day of April, 2007.



Daniel T. K. Hurley
United States District Judge

Copies furnished to counsel of record