

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D22121
O/nl

_____AD3d_____

Argued - December 5, 2008

ROBERT A. SPOLZINO, J.P.
JOSEPH COVELLO
RUTH C. BALKIN
ARIEL E. BELEN, JJ.

2008-04785

DECISION & ORDER

Warren S. Dank, etc., appellant, v Sears Holding
Management Corporation, et al., respondents.

(Index No. 6263/07)

Stephen I. Feder, Syosset, N.Y. (Warren S. Dank, pro se, of counsel), for appellant.

Greenberg Traurig, LLP, New York, N.Y. (Loring I. Fenton of counsel), for
respondents.

In an action to recover damages for violation of General Business Law §§ 349 and 350
and fraud, the plaintiff appeals from an order of the Supreme Court, Nassau County (Bucaria, J.),
entered May 19, 2008, which denied his motion for class action certification pursuant to CPLR article
9.

ORDERED that the order is affirmed, with costs.

CPLR article 9 authorizes class action suits, and sets forth the criteria to be considered
in granting class action certification, which are to be liberally construed (*see Kidd v Delta Funding
Corp.*, 289 AD2d 203; *Liechtung v Tower Air*, 269 AD2d 363; *Lauer v New York Tel. Co.*, 231
AD2d 126, 130; *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 91). The determination to certify
a class action rests in the sound discretion of the trial court (*see Tosner v Town of Hempstead*, 12
AD3d 589; *Liechtung v Tower Air*, 269 AD2d at 364; *Lauer v New York Tel. Co.*, 231 AD2d at 130).
Contrary to the plaintiff's contentions, the Supreme Court properly denied his motion for class action
certification. The plaintiff failed to establish the number of potential class members and thus that the
class is so numerous that joinder of all members is impracticable (*see CPLR 901[a][1]*; *Friar v*

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Vanguard Holding Corp., 78 AD2d 83). The plaintiff also failed to establish that he will fairly and adequately protect the interests of the class (see CPLR 901[a][4]; *Friar v Vanguard Holding Corp.*, 78 AD2d 83). As both the class representative and class counsel, he has an inherent conflict of interest (see *Tanzer v Turbodyne Corp.*, 68 AD2d 614, 620). Moreover, he failed to show that he has either the financial resources or the professional qualifications to undertake a class action (see *Pruitt v Rockefeller Ctr. Prop.*, 167 AD2d 14, 24).

SPOLZINO, J.P., COVELLO, BALKIN and BELEN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court