

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

D30205
O/prt

_____AD3d_____

Argued - February 2, 2011

PETER B. SKELOS, J.P.
RANDALL T. ENG
ARIEL E. BELEN
PLUMMER E. LOTT, JJ.

2010-00758

DECISION & ORDER

Barbara Smilewicz, etc., appellant, v Sears
Roebuck and Co., respondent.

(Index No. 17525/07)

Meiselman, Denlea, Packman, Carton & Eberz P.C., White Plains, N.Y. (Jeffrey I. Carton and Michael Berg of counsel), for appellant.

Greenberg Traurig, LLP, New York, N.Y. (Stephen L. Saxl of counsel), for respondent.

In an action to recover damages for violation of General Business Law § 349, unjust enrichment, and breach of contract, the plaintiff appeals from an order of the Supreme Court, Kings County (Pfau, J.), dated November 24, 2009, which denied her motion for class action certification pursuant to CPLR article 9.

ORDERED that the order is affirmed, without costs or disbursements.

CPLR article 9, which authorizes class actions and sets forth the criteria to be considered in granting class action certification, is to be liberally construed (*see Dank v Sears Holding Mgt. Corp.*, 59 AD3d 584; *Kidd v Delta Funding Corp.*, 289 AD2d 203; *Liechtung v Tower Air*, 269 AD2d 363; *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 91). “The determination to grant class action certification rests in the sound discretion of the Supreme Court, ‘and any error should be resolved in favor of allowing the class action’” (*Kidd v Delta Funding Corp.*, 289 AD2d at 203, quoting *Liechtung v Tower Air*, 269 AD2d at 364).

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Contrary to the plaintiff's contention, the Supreme Court providently exercised its discretion in denying her motion to certify a class action. The plaintiff failed to sustain her burden of demonstrating that questions of law or fact common to the class predominate over any question affecting only individual members (*see* CPLR 901[a][2]; *Morrissey v Nextel Partners, Inc.*, 72 AD3d 209, 212-215; *CLC/CFI Liquidating Trust v Bloomingdale's, Inc.*, 50 AD3d 446; *Solomon v Bell Atl. Corp.*, 9 AD3d 49, 54), and that her claims were typical of those of the class (*see* CPLR 901[a][3]; *Hazelhurst v Brita Prods. Co.*, 295 AD2d 240, 242-243; *Zehnder v Ginsburg & Ginsburg Architects*, 254 AD2d 284; *Ross v Amrep Corp.*, 57 AD2d 99, 101-102).

SKELOS, J.P., ENG, BELEN and LOTT, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive, slightly slanted style.

Matthew G. Kiernan
Clerk of the Court