

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

D36075
N/hu

_____AD3d_____

Argued - September 7, 2012

DANIEL D. ANGIOLILLO, J.P.
ANITA R. FLORIO
ARIEL E. BELEN
SHERI S. ROMAN, JJ.

2011-05055
2011-07845

DECISION & ORDER

Edward O'Brien, as assignee of Tara Singh, etc.,
respondent, v GEICO Insurance Company, appellant.

(Index No. 9808/04)

Rivkin Radler LLP, Uniondale, N.Y. (Michael A. Sirignano, Evan H. Krinick, Harris J. Zakarin, Merril Biscone, Paul Majkowski, and Barry I. Levy of counsel), for appellant.

Locks Law Firm PLLC, New York, N.Y. (Andrew P. Bell of counsel), Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Einiger, LLP, Lake Success, N.Y. (John M. Belesi and Thomas W. Alfano of counsel), and Klafter, Olsen & Lesser LLP, Rye Brook, N.Y. (Seth R. Lesser of counsel), for respondent (one brief filed).

In an action to recover damages for breach of contract, the defendant appeals, as limited by its brief, from so much of (1) an order of the Supreme Court, Nassau County (Phelan, J.), dated March 31, 2011, as, upon reargument, in effect, vacated the determination in an order of the same court dated November 10, 2010, denying the plaintiff's cross motion, in effect, to vacate the dismissal of the action pursuant to CPLR 3216, for leave to intervene in the action, substitute himself as the plaintiff in the place of Amer-A-Med Health Products, Inc., as assignee of Heather Goldberg, Annette Guerro, and Sarah Johnson, amend the caption accordingly, and serve a second amended complaint, and for an extension of time to file a note of issue, and thereupon granted the cross motion, and (2) an order of the same court dated July 19, 2011, as denied that branch of its motion which was to dismiss the class action allegations set forth in the second amended complaint, sua sponte certified the class, and, upon reargument, adhered to the determination in the order dated March 31, 2011.

October 3, 2012

O'BRIEN, as assignee of SINGH v GEICO INSURANCE COMPANY

Page 1.

ORDERED that the appeal from the order dated March 31, 2011, is dismissed, as that order was superseded by so much of the order dated July 19, 2011, as was made upon reargument; and it is further,

ORDERED that on the Court's own motion, the notice of appeal from so much of the order dated July 19, 2011, as sua sponte certified the class is deemed an application for leave to appeal from that portion of the order, and leave to appeal is granted (*see* CPLR 5701[c]); and it is further,

ORDERED that the order dated July 19, 2011, is affirmed insofar as appealed from; and it is further,

ORDERED that the matter is remitted to the Supreme Court, Nassau County, for the entry of an order pursuant to CPLR 903 describing the certified class; and it is further,

ORDERED that one bill of costs is awarded to the plaintiff.

The Supreme Court did not improvidently exercise its discretion in, upon reargument, granting that branch of the plaintiff's cross motion which was to vacate the dismissal of the action pursuant to CPLR 3216, and granting that branch of the cross motion which was for leave to intervene in the action, and in denying that branch of the defendant's motion which was to dismiss the class action allegations set forth in the second amended complaint. The time limit for moving for class certification, set forth in CPLR 902, applies only to a motion for the initial certification of the class, which, in this case, was timely made (*see Louisiana Mun. Employees' Retirement Sys. v Cablevision Sys. Corp.*, 74 AD3d 1291, 1293). Furthermore, the Supreme Court did not improvidently exercise its discretion in sua sponte certifying the class (*see* CPLR 902; Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C902:1). However, pursuant to CPLR 903, in permitting the class action, the Supreme Court should have described the class. Accordingly, the matter must be remitted to the Supreme Court, Nassau County, for the entry of an order pursuant to CPLR 903 describing the certified class.

The defendant's remaining contentions are without merit.

ANGIOLILLO, J.P., FLORIO, BELEN and ROMAN, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court