

MEMORANDUM

SUPREME COURT : STATE OF NEW YORK
COUNTY OF QUEENS : IAS PART 15

-----x BY: **HON. JANICE A. TAYLOR**
ANDREA JACOBS , MURANZO KOPANO,
BEN WILDER

Plaintiffs,

-against-

BLOOMINGDALE'S, INC., et. al.,

Defendants.
-----x

Index No. 017283/1996

Motion Date: 03/11/03

Motion No. 6

Dated: May 6, 2003

By this Motion, the plaintiffs in this action brought for alleged violations of Labor Law §193, seeks, *inter alia*, an Order pursuant to C.P.L.R. 901 and 902 determining that the above-captioned action may be maintained as a class action, imposing discovery sanctions pursuant to C.P.L.R. §3126 against the defendants, appointing a special master to oversee the remainder of discovery in this matter, as well as hear and report on several spoliation issues. Defendants cross-move to strike the plaintiff's motion for class certification as untimely.

From on or about September 11, 1989 to December 16, 1994, defendant Bloomingdale's, Inc. (hereinafter "Bloomingdale's") employed plaintiff Andrea Jacobs as a salesperson who worked on

commission at its store in White Plains, New York. From on or about August 20, 1990 to January 10, 1996, defendant Bloomingdale's employed plaintiff Ben Wilder as a salesperson who worked on commission at its store on 59th Street in Manhattan. From January 22, 1996 to April 5, 1996, defendant May Department Stores, Inc. (hereinafter "May") employed plaintiff Ben Wilder as a salesperson who worked on commission in a store operated under the Lord & Taylor name. From around 1989 to around April, 1995, Abraham & Strauss (hereinafter "A&S"), acquired by defendant Macy's, employed plaintiff Muranza Kopano as a salesperson who worked on commission at its store on 23rd Street in Manhattan. During this period of time, the defendants had the practice of making deductions from the commissions credited to a salesperson for merchandise returned by customers. The plaintiffs concede that the practice of making deductions from commissions for returned items accompanied by a receipt identifying the salesperson who made the sale is proper. The plaintiffs object, however, to the defendants' practice of making deductions from credited commissions for "unidentified returns," i.e., returned merchandise for which the store could not identify the salesperson involved in the transaction. The defendants would compute the amount of commissions due on an unidentified return and deduct a pro rata share from all the commissions which would have been paid to all sales personnel in the department from

which the product was sold.

The complaint alleges two causes of action against the defendants: (1) a common law claim for unpaid wages and, (2) a claim for unlawful deductions from wages in violation of §193 of the Labor Law. Section 193 of the Labor Law prohibits employers from making deductions from the wages of their employees unless, *inter alia*, the deductions are made for the benefit of the employees. (Labor Law § 193 [1][b].) The plaintiffs seek to maintain this lawsuit as a class action on behalf of approximately 15,000 members.

Initially, the defendants' cross-motion is denied as procedurally improper. The Court is unaware of any authority for a "cross-motion to strike a motion". Defendants' motion, couched in improper procedural semantics, is nothing more than opposition to plaintiffs' motion on timeliness grounds. As to the timeliness issue, the Court determines that plaintiffs' application is timely, and invokes its discretion in considering it as such.

The plaintiffs' motion for discovery sanctions is denied in all respects. The Court fails to find that the conduct of the defendants' herein was wilful, contumacious, or undertaken in an attempt to frustrate the discovery mandates of the C.P.L.R. or the Court. (*Cf.*, *Nicoletti v. Ozram Transportation, Inc.*, 286 A.D.2d 719 [2d Dept. 2001]; *Emmanuel v. Broadway Mall Properties, Inc.*, 293 A.D.2d [2d Dept. 2002]; *Jaffe v. Hubbard*, 299 A.D.2d

395 [2d Dept. 2002]).

The plaintiffs' motion for an order pursuant to C.P.L.R. §901 and §902 certifying this action as a class action is granted. (*See, Ortiz v. J.P. Jack. Corp.*, 286 A.D.2d 671 [2d Dept. 2001]). There is ample precedent for certifying a case involving a wage dispute as a class action, so long as the dispute concerns remuneration which properly falls within the definition of "wages" contained in Labor Law §190(1) as is the case in the instant matter. (*Cf., Dean Witter Reynolds, Inc. V. Phillip Ross*, 75 A.D.2d 373 [1st Dept. 1980]; *Truelove v. Northeast Capital & Advisory, Inc.*, 268 A.D.2d 648 [3d Dept. 2000] [*the term 'wages' does not encompass an incentive compensation plan*]). The class shall be comprised of all past or present commission sales employees of the defendants in New York State whose commission wages have been reduced and/or affected because of unidentified returns. If subsequent events so warrant, the class may later be divided into subclasses or decertified. (*See, C.P.L.R. §§906, 907; Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 99 [2d Dept. 1980]; *Super Glue Corp. v. Avis Rent A Car System, Inc.*, 132 A.D.2d 604, 607 [2d Dept. 1987]).

The prerequisites to the filing of a New York class action (*see, C.P.L.R. §§901-909*) are: first, that the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable; second, that common questions of

law or fact predominate over individual claims; third, that the claims of the representative parties are typical of those of the class as a whole; fourth, that the representatives fairly and adequately represent the class; and fifth, that the class action is superior to other methods of settling the controversy. (See, *Matter of Colt Indus. Shareholder Litig.*, 77 N.Y.2d 185 [1991]). The Court finds that the above-referenced prerequisites for class-action certification set forth in C.P.L.R. §901 have been met in the case at bar. Appellate courts in this State have repeatedly held that the class action statute should be liberally construed. (See, *Pruit v. Rockefeller Center Properties, Inc.*, 167 A.D.2d 14 [1st Dept. 1991]; *Matter of Colt Indus. Shareholder Litig.*, 155 A.D.2d 154, 158-159 [1st Dept. 1990], *mod on other grounds* 77 N.Y.2d 185 [1991]; *Lauer v. New York Tel. Co.*, 231 A.D.2d 126 [3d Dept. 1997]; *Liechtung v. Tower Air, Inc.*, 269 A.D.2d 363 [2d Dept. 2000]; *Friar v. Vanguard Holding Corp.*, *supra*; *Dagnoli v. Spring Valley Mobile Village*, 165 A.D.2d 859 [2d Dept. 1990]). Any error, if there is to be one, should be made in favor of allowing the class action, (see, *Lauer v. New York Tel. Co.*, *supra*; *Friar v. Vanguard Holding Corp.*, *supra*), since a class action may, as a practical matter, be the only available method for the determination of the issues raised, where, as here, class members have allegedly sustained damages in amounts insufficient to justify individual actions. (See, *Kidd v.*

Delta Funding Corp., 289 A.D.2d 203 [2d Dept. 2001])). Inasmuch as the proposed class is extremely large in the instant matter (allegedly 15,000), and each class member's stake in the litigation is relatively small, it would be impractical and inefficient for individual class members to prosecute separate actions. This action, involving thousands of class members, clearly meets the statute's numerosity requirement. (See, *Super Glue Corp. v. Avis Rent A Car System, Inc.*, *supra*). Common questions of law or fact, as delineated by the Appellate Division, Second Department, to wit, "whether the parties entered into contracts which altered the common law rule that commissions are earned upon the sale", and whether, as stated in the plaintiff's complaint, the reduction of these purportedly earned commissions by deducting "unidentified returns" from them constituted a deduction from their wages, in violation of Labor Law §193, predominate over individual issues. (See, *Jacobs v. Macy's East, Inc.*, 262 A.D.2d 607 [2d Dept. 1999]). Plaintiffs' claims are typical of the claims of other members of the class since they arise out of the same course of conduct as the class members' claims and are based upon the exact same case of action. (See, *Friar v. Vanguard Holding Corp.*, *supra*). To be typical, "it is not necessary that the claims of the named plaintiff be identical to those of the class". (*Super Glue Corp. v. Avis Rent A Car System, Inc.*, *supra* at 607; *Branch v. Crabtree*, 197 A.D.2d

557 [2d Dept. 1993].) The defendants' argument that typicality has not been established, to wit, that the proposed certified class involves different categories of workers, i.e., those that worked in different stores, with different salary and commission structures, at different times, was rejected by the Second Department in *Ortiz v. J.P. Jack. Corp.*, *supra*. Slight differences in class members' positions do not defeat class certification. Courts have consistently held that if there are common issues of law or fact with respect to liability, predominance exists even if there are individual questions relevant to damages. (See, *Pesantez v. Boyle Environmental Services*, 251 A.D.2d 11,12 [1st Dept. 1998]). However, if there are individual issues as to liability, as is often the case involving tort claims, predominance will not be found. (See, e.g., *Morgan v. A.O. Smith Corp.*, 233 A.D.2d 375 [2d Dept. 1996]; *Karlin v. IVF America, Inc.*, 239 A.D.2d 562 [2d Dept. 1997]; *Apra v. Hazeltine Corp.*, 247 A.D.2d 564 [2d Dept. 1998]; *Geiger v. American Tobacco Co.*, 277 A.D.2d 420 [2d Dept. 2000]). The fact that some of the employees were entitled to different rates of wages is inappropriate to defeat class certification, since the common issue is one of whether the defendants made deductions from their pay, in violation of Labor Law §193. The requirement is satisfied even if the class representative cannot personally assert all the claims made on behalf of the class. (See, *Weinberg*

v. Hertz Corp., 116 A.D.2d 1,7 [1st Dept. 1986].) Here, however, plaintiffs' claims are identical to those of the other members of the class insofar as they allege, as would any class member, that their commission wages have been reduced and/or affected because of unidentified returns. The typicality requirement relates to the nature of the claims and the underlying transaction, not to the amount and measure of damages; the fact that plaintiff's damages may differ from those of other members of the class is not a proper basis to deny class certification. The Court also rejects defendants' blunderbuss statement that each class member would require different and complex calculations of damages. In the event that commissions which were properly earned were reduced by "unidentified returns", the Court opines that the dollar amount of those returns, once identified, could be multiplied by the employee's commission rate in order to easily calculate the amount of the damages to the employee. However, in any event, even assuming that the Court has oversimplified the methodology involved in computing damages of individual class members, the complexity of the damage issue is not a bar to class-action certification. (See, *Super Glue Corp. v Avis Rent A Car System, Inc.*, *supra*). Moreover, the Court cannot ignore the public benefit aspect of the class action. Without the benefit of the class action, these retailing conglomerates could act with impunity in such matters "since, realistically speaking, our

legal system inhibits the bringing of suits based upon small claims". (*Friar v. Vanguard Holding Corp.*, *supra* at 94). Similarly, in this case, since the relatively insignificant amount of damages suffered by many members of the class makes individual actions cost prohibitive, and the large number of class members renders consolidation unworkable, a class action is not only superior but, indeed, the only practical method of adjudication. (*See, Super Glue Corp. v. Avis Rent A Car System, Inc.*, *supra* at 607-608.) The Court also finds that the plaintiffs are suitable class representatives, to wit, that they will fairly and adequately protect the interests of the class. (C.P.L.R. §901[a][4]). The Court rejects the defendants' contentions that the plaintiffs' desire to waive the punitive remedies available under Labor Law §198, which cannot be maintained in a class action, demonstrates that they will not "fairly and adequately protect the interests of the class". (*Cf., Woods v. Champion Courier, Inc.*, N.Y.L.J., 10/9/98 at p. 25 [Sup Ct. N.Y. Co., DeGrasse, J.]). This Court is not bound by the decision of a court of coordinate jurisdiction in *Woods*, which did not address the First Department's decision of a few month's prior in *Pesantez v. Boyle Environmental Services*, *supra*, in which the First Department held that "to the extent certain individuals may wish to pursue punitive claims pursuant to Labor Law § 198 (1-a), which cannot be maintained in a class action (CPLR 901 [b]),

they may opt out of the class action." (citations omitted). Moreover, the *Woods* decision blinds itself to the practical reality attested to by plaintiffs, to wit, that pursuing violations of the Labor Law through the Commissioner of Labor may, at least in the minds of class members, expose them to retaliatory action by their employers. The fact that there have never been any claims of a similar nature by any employee of the defendants tends to substantiate this claim. Accordingly, this Court opines that individuals who wish to pursue punitive claims pursuant to the Labor Law, if any, are free to opt-out of the class action. (See, *Pesantez v. Boyle Environmental Services, supra*). Finally, the Court finds that, while the evident pre-certification discovery delay, at least partly occasioned by the defendants, does cast a shadow upon the quality of plaintiffs' representation, the representatives' attorneys are minimally experienced and competent to maintain this action as a class action, and to adequately protect the interests of the class.

Plaintiffs' motion for the appointment of a special master at the defendants' expense is denied. The Court lacks the authority to appoint a private attorney to serve as a special master or referee to oversee discovery, and to be compensated by the parties, without their consent. (See, CPLR 3104; *Csanko v. County of Westchester*, 273 A.D.2d 434 [2d Dept. 2000]; *Ploski v. Riverwood Owners Corp.*, 255 A.D.2d 24 [2d Dept. 1999]; *Liu v.*

Liu, 218 A.D.2d 532 [1st Dept. 1995]). However, the Court will appoint a special master from within those so designated and employed within the Unified Court System.

Settle order.

JANICE A. TAYLOR, J.S.C.