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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOUIS B. YORK Justice PART 2

060554612001

BENTLEY, ANTHONY M.
VS
JLT SERVICES C O W

INDEX NO. 605546/01

MOTION DATE 4/23/03

MOTION SEQ. NO. 004

SEQ 4

ORDER MAINTAIN CLASS ACTION

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

SCANNED JUL 18 2003

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 7/14/03

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

LOUIS B. YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No.: 0605546/01

Part 2

Anthony M. Bentley, Individually, and on behalf of Others similarly situated

Plaintiff,

-against-

JLT Services Corporation, a/k/a Jardine Group Services Corporation, a/k/a Jardines and AETNA US Healthcare

Defendant

DECISION/ORDER
Present:
Hon. Louis B. York
Justice, Supreme Court

In this wrongful termination of insurance action, plaintiff Bentley currently moves for an order to certify and maintain this action as a class action pursuant to CPLR § 901 and § 902. For the reasons below, the court denies these motions with leave to renew at a later date.

Plaintiff Bentley, an attorney and solo practitioner, was enrolled in defendant AETNA US Healthcare's insurance plan("Aetna") offered to New York County Lawyer Association ("NYCLA") members. Defendant JLT Services Corporation ("Jardines") acted as the third party administrator of this plan. On June 4,2001, Aetna gave Jardine 120 days notice that, effective October 1,2001, it was ceasing to provide healthcare to groups of one member, including the plaintiff. Aetna did not notify plaintiff of this fact. Instead plaintiff first received notice from Jardines on August 15,2001, approximately forty-eight days before the October termination date. Jardines offered plaintiff similar coverage through GHI. However, plaintiff has not accepted the alternate coverage, and contends that his coverage was not lawfully terminated based on the failure of Aetna and Jardines to comply with statutory notice requirements. Plaintiff brought this

action to reinstate his insurance retroactive to the alleged cancellation date, and to seek reimbursement on an outstanding insurance claim. Plaintiff has proposed a class action, with himself as class representative, on behalf of other "groups of one" similarly situated whose insurance through NYCLA was terminated at the same time without receiving at least ninety-days notice.

Plaintiff argues that relief is appropriate here because all of the requirements to certify a class under CPLR § 901 and § 902 have been met, Plaintiff contends that the alleged unlawful conduct of the defendants applies to all "groups of one" with similar coverage through the New York County Lawyer's Association ("NYCLA"), and he claims that certifying this group as a class would meet those statutory requirements.

The plaintiff is wrong because two of the requirements for class certification, numerosity and adequacy of representation, cannot be met by plaintiff at this time. However, the other requirements have been met, and plaintiff is permitted leave to renew after limited discovery to determine the approximate size of the class, and after new sufficient class counsel is appointed.

Plaintiff must satisfy the five requirements set forth in CPLR § 901 in order to obtain certification of the class. CPLR § 901(a); Small v. Lorillard Tobacco Co, Inc., 252 A.D.2d 1, 679 N.Y.S.2d 593 (1st Dep't 1998) (aff'd 94 N.Y.2d 43, 698 N.Y.S. 615 (1999). These are as follows:

1. The class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
2. There are questions of law or fact common to the class which predominate over any questions affecting only individual members;
3. The claims or defenses of the representative parties are typical of the claims or defenses of the class;
4. The representative parties will fairly and adequately protect the interests of the class; and
5. A class action is superior to other available methods for the fair and efficient adjudication of

the controversy.

CPLR § 901. The trial court has broad discretion with regard to class certification. Lauer v. New York Telephone Company, 231 A.D.2d 126, 659 N.Y.S.2d 359 (3rd Dep't 1997). "These criteria should be broadly construed not only because of the general command for liberal construction of all CPLR sections but also because it is apparent that the Legislature intended article 9 to be a liberal subsitute for the narrow class action legislation which preceeded it." Friar v. Vanward Holding Corp., 78 A.D.2d 83, 91, 434 N.Y.S.2d 698, 703 (2nd Dep't 1980)(*citing* Ray v. Marine Midland Grace Trust Co., 35 N.Y.2d 147, 359 N.Y.S.2d 28 (1974). However, the plaintiff has the burden to demonstrate that the requirements have been met for class certification. Small v. Lorillard Tobacco Co, Inc., 252 A.D.2d 1, 679 N.Y.S.2d 593 (1st Dep't 1998)(aff'd 94 N.Y.2d 43, 698 N.Y.S. 615 (1999).

First, the plaintiff must meet the numerosity requirement. CPLR 901 (a)(1). There is no 'mechanical test' to determine whether the first requirement [of] numerosity has been met, nor is there a set rule for the number of prospective class members which must exist before a class is certified . . . the court should consider the reasonable inferences and common sense assumptions from the facts before it." Friar v. Vanguard Holding Corp., 78 A.D.2d 83, 96, 434 N.Y.S.2d 698, 706 (2nd Dep't 1980). Here, defendant Aetna admits that it terminated "groups of one" by notifying Jardines 120 days in advance, rather than by notifying the individual group members directly. Defendant Jardines admits that after being notified by Aetna it searched throughout the spring and summer of 2001 for comparable health coverage, and thus it was delayed in notifying of the termination in coverage. Thus, it is reasonable to infer that the entire group of solo practitioners who obtained health coverage through NYCLA have the same unlawful termination

of insurance claim as the plaintiff. However, at this time, the number of people in this group is unknown, which makes this court presently unable to make a determination that the class is so numerous that joinder of all members is impracticable. CPLR § 901(a)(1). In Simon v. Cunard Line Limited, 75 A.D.2d 283,428 N.Y.S.2d 952 (1st Dep't 1980), the First Department held that the proposed class did not meet the numerosity requirement "in view of the insufficiency of the record to determine the nature and size of the purported class." The court denied the motion for class certification, but the plaintiff was given the opportunity for limited discovery to determine the approximate nature and size of the class, and to renew its motion after this information was collected. Id. Similarly, although this court finds that the numerosity requirement has not been met at this time, plaintiff Bentley is entitled to limited discovery to determine the approximate number of potential class members that are similarly situated to himself. Plaintiff could thereafter renew his motion with the additional factual information. See Gottlieb v. March Shipping Passenger Services, 67 A.D.2d 879,413 N.Y.S.2d 679 (1st Dep't 1979).

> In terms of adequacy of representation, the court must consider
>
> > whether a conflict of interest exists between the representative and the class members, the representative's background and personal character, as well as his familiarity with the lawsuit, [his ability] to act as a check on the attorneys and . . . the competence, experience and vigor of the representative attorneys . . . and the financial resources available to prosecute the action.

Pruitt v. Rockefeller Center Properties, 167 A.D.2d 14, 24, 574 N.Y.S.2d 672,678 (1st Dep't 1991). This court cannot discern any conflict between the proposed class representative Bentley, and his legal issues, with those of his fellow NYCLA members. Furthermore, Bentley is definitely familiar with this action, since he has been representing himself for the full term of this approximately two year long action. Additionally, as an attorney who has kept the lawsuit viable for all this time, he

has demonstrated his commitment and financial abilities to meet the standards of an adequate representative. However, Bentley would be an inadequate class representative if he also acts as class counsel because this would prevent him from adequately providing the necessary check on the class counsel. Id. In Tanzer v. Turbodyne, 68 A.D.2d 614,417 N.Y.S.2d 706 (1st Dep't 1979), the First Department denied class certification where class representatives were closely related to the lawyers, and could not provide the necessary check on the attorneys to be an adequate representative. The court reasoned,

> An obvious function of the class action representative is to act as check on the attorneys, as an additional assurance that in any settlement or other disposition the interests of the members of the class will take precedence over those of the attorneys. This would seem to require that the class representative shall have some measure of independence from the attorneys, or at least not be the alter ego of the attorneys.

Id. at 620,417 N.Y.S.2d at 709. In Meachum v. Outdoor World Corporation, 171 Misc.2d 354,654 N.Y.S.2d 240, the court denied certification because of the class representatives' status as employees of class counsel. In its discussion on adequacy of representation, the court explained:

> The most obvious example of a lack of independence between plaintiff and class counsel is when the two are one and the same. The conflict inherent in this "dual relationship" is obvious, since . . . plaintiff as a class member, stands little to gain in his representative capacity, but stands to gain a great deal as counsel. Inasmuch as due process ensures that the rights of potential class members be protected . . . a class representative should not be permitted to also act as counsel to the class.

Id. at 370-371,654 N.Y.S.2d at 252. Thus, Bentley cannot be an adequate class representative and also serve as counsel because of the inherent conflict, as well as the necessary independence between the class counsel and representative, which allows the representative to check the counsel's action for the best interests of the class. Id.

In Meachum, the court denied plaintiffs motion for class certification with leave to renew after the class obtained new counsel who was not a part of the class. Here, Bentley has affirmed that

once the case is certified "other counsel will be designated." (Plaintiffs Affirmation pg. 22). Thus, as long as other class counsel is designated the adequacy of representation requirement will be met. Accordingly, this court uses its broad discretionary powers, see Lauer v. New York Telephone Company, 231 A.D.2d 126, 659 N.Y.S.2d 359 (3rd Dep't 1997), to deny plaintiffs motion for class certification with leave to renew at such time when new class counsel has been designated. Most importantly, this new class counsel must be able to satisfactorily represent the interests of the class, see Pruitt v. Rockefeller Center Properties, 167 A.D.2d 14, 24, 574 N.Y.S.2d 672, 678 (1st Dep't 1991), and must be sufficiently independent from Bentley to allow him to provide a check on class counsel to serve as an adequate class representative. The court allows Bentley to continue as class counsel for pre-certification discovery proceedings; however, if Bentley renews his motion for class certification he must indicate in these papers who the new class counsel will be.

Beyond these reasons to deny class certification at this time, the other requirements for class certification have been met by the plaintiff. Plaintiff must show a predominance of common issues. CPLR § 901 (a)(2). "A common underlying question of law or fact could exist . . . if a single cause of conduct harmed a large number of people." Scott v. Prudential Insurance Company of America, 80 A.D.2d 746, 747, 437 N.Y.S.2d 180, 182 (4th Dep't 1981). The "groups of one" were targeted as a group that had similar insurance plans provided by Aetna, and the unlawful termination of this coverage, if proven, is a common question affecting all these "groups of one" as a class. Furthermore, the ". . . predominance requirement in CPLR § 901 requires that common issues predominate over individual ones, not that class members be identical or that individual issues be non-existent." Ackerman v. Price Waterhouse, 252 A.D.2d 179, 200, 683 N.Y.S.2d 179, 194 (1st Dep't 1998). Thus, although other plaintiffs in the class might not have the identical reimbursement

claims as plaintiff Bentley or other "groups of one," the common issue of improper notification is sufficient to meet the predominance requirement. Weinberg v. Hertz Corp, 116 A.D.2d 1, 499 N.Y.S.2d 693 (1st Dep't 1986).

Plaintiff must also demonstrate that the claims and defenses of the class representative are typical of those of the entire class. CPLR 901 (a)(3). The claims and defenses of plaintiff Bentley, the proposed representative, are typical of the other members of the class. Most, if not all, of the claims and defenses affect the entire class, and are based on the same legal theories of insurance law requirements. see Ackerman v. Price Waterhouse, 252 A.D.2d 179,202,683 N.Y.S.2d 179,194 (1st Dep't 1998j

Plaintiff must also establish that going forward as a class action is the superior method. CPLR § 901 (a) (5). Here, going forward as a class action would be superior to other available methods for the fair and efficient adjudication of the controversy. CPLR § 901. "Since adjudication of the common issues in this case [as a class action] . . . would dispose of most if not all of the issues in the case, it is clearly the superior method." Ackerman v. Price Waterhouse, 252 A.D.2d 179,202, 683 N.Y.S.2d 179, 194 (1st Dep't 1998). A class action made up of the "groups of one" whose insurance was terminated by Aetna would most efficiently deal with all of the issues in one litigation, since virtually all of the issues are common among the class members. Additionally, class actions have been adjudged superior when the case might not go forward otherwise because the amount of recovery may be too small. see, e.g., Weinberg v. Hertz Corp., 116 A.D.2d 1, 499 N.Y.S.2d 693 (1st Dep't 1986).

> The public benefit of the class action remedy has been described as inducing socially and ethically responsible behavior on the part of large and wealthy institutions which will be deterred from carrying out policies or engaging in activities harmful to large numbers of individuals,' people who 'frequently are damaged in a small sum . . .since, realistically

> speaking, our legal system inhibits the bringing of suits based upon small claims' . . . Plainly, individual actions are not preferable to or the equivalent of class actions in such context.

Id. at 5,499 N.Y.S.2d at **695.**

Similarly, although the individual class members are attorneys who could bring individual actions themselves, this would be difficult considering that the amount of recovery would probably be small. Additionally, a class action is superior because it is desirable and practical to concentrate the action, not only for efficiency reasons, but also to prevent against the incompatibility and inconsistency of judgments. CPLR § 902 ("Among the matter which the court shall consider in determining whether the action may proceed as a class action are . . . The impracticability or inefficiency of prosecuting or defending separate actions; . . . The desirability . . . of concentrating the litigation of the claim in the particular forum.").

Furthermore, despite the contentions of the defendants, the motion is timely pursuant to CPLR § 902, which provides that "within sixty days after the time to serve a responsive pleading has expired *for all persons* named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained."(emphasis added). Here, although defendant Jardines served its answer approximately a year and a half ago, defendant Aetna has yet to serve an answer in this litigation. Thereby, the motion was timely within the sixty day period after the time for all defendants to serve a responsive pleading, which has not passed. CPLR § 902.

Accordingly, it is

ORDERED that the motion for class certification is denied without prejudice to plaintiffs

right to renew after limited discovery, and after new class counsel is designated

[redacted]

ORDERED:

Dated July 14, 2003

LOUIS B. YORK, J.S.C.