

Wilder v The May Department Stores Co.

2004 NY Slip Op 30101(U)

July 14, 2004

Supreme Court, Queens County

Docket Number: 0000857/2002

Judge: Marguerite A. Grays

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA PART 4
Justice

-----x

BEN WILDER, individually for
himself and on behalf of all
others similarly situated,

Plaintiffs,

-against-

Index
Number 8577 2002

Motion
Date May 18, 2004

Motion
Cal. Number 17

THE MAY DEPARTMENT STORES
COMPANY doing business as
LORD & TAYLOR,

Defendant.

-----x

The following papers numbered 1 to 4 read on this motion by
plaintiff Ben Wilder for an order permitting him to reargue or to
renew his prior motion for class action certification.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2
Reply Affidavits	3
Other (Memorandum of Law)	4

Upon the foregoing papers it is ordered that:

That branch of the motion which is for an order permitting
reargument is granted. Upon reargument, this court adheres to its
previous decision and order.

That branch of the motion which is for an order permitting the
plaintiff to renew his previous motion for class certification is
denied.

(See the accompanying memorandum.)

Dated: **JUL 14 2004**



J.S.C.

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 4

BEN WILDER, individually for
himself and on behalf of all others
similarly situated,

Plaintiffs,

-against-

THE MAY DEPARTMENT STORES COMPANY
doing business as Lord & Taylor,

Defendant.

x

INDEX NO. 8577/02

BY: GRAYS, J.

DATED:

x

Plaintiff Ben Wilder has moved for an order permitting him to reargue or to renew his prior motion for class action certification.

Defendant Lord & Taylor employed Ben Wilder for less than three months at one of its stores over eight years ago. In 1996, Wilder and several other individuals began an action pursuant to Labor Law § 193 to recover wages allegedly wrongfully withheld by Lord & Taylor and other department stores. (Jacobs v. Macy's East, Inc. [Index No. 17283/96].) On or about March 13, 2002, his causes of action were severed, and on or about March 29, 2002 he began the instant action. On September 23, 2003, plaintiff Wilder submitted a motion for an order permitting this action to be maintained as a class action on behalf of commissioned employees employed in Lord & Taylor's New York stores for a period of more than 13 years. By

decision and order dated November 21, 2003 (one paper), this court denied the motion, stating in relevant part: "Under the class certification requirement of fair and adequate representation of the class, factors to be considered by the court in determining adequacy of class representation are the representative's familiarity with the lawsuit and his financial resources available to prosecute the case (Stern v Carter, 82 AD2d 321). Plaintiff's failure to disclose his current employment and/or financial status, and his general unawareness of the claims and general facts of the litigation, as demonstrated at his deposition, raises a substantial doubt as to plaintiff's ability to fairly and adequately represent the interest of the class."

That branch of the motion which is for an order permitting reargument is granted. Upon reargument, this court adheres to its previous decision and order. A motion to reargue may be brought for the purpose of demonstrating that "the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." (Schneider v Solowey, 141 AD2d 813; see, CPLR 2221[d]; Grassel v Albany Med. Ctr. Hosp., 223 AD2d 803; William P. Pahl Equipment Corp. v Kassis, 182 AD2d 22.) This court adheres to its view that the plaintiff did not demonstrate that as the class representative he would "fairly and adequately protect the interests of the class***." (See, CPLR 901(a)(4); Tanzer v Turbodyne Corp., 68 AD2d 614.) The

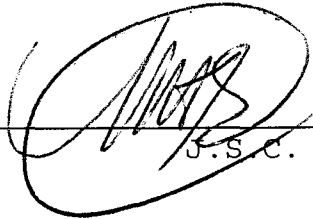
plaintiff did not demonstrate that he has sufficient financial resources to prosecute this case. (See, Stern v Carter, 82 AD2d 321.) The plaintiff testified at his deposition as follows: He had approximately \$700 in his checking account and "may be 100, 150 in the savings account." (EBT, 144.) His wife had \$100 in her savings account. (EBT, 145.) He thought that he would be able to borrow funds from his father. (EBT, 144.) He also thought that his attorney would "share some of the expenses," but the plaintiff had "no idea" about which expenses would be shared. (EBT, 143.) Such testimony supports the conclusion reached by this court that the plaintiff does not have the financial ability to vigorously prosecute this case on behalf of a class. (See, Stern v Cater, supra.) On this motion to reargue, the plaintiff's attorney points out that he asked of the defendants' attorney at a deposition of a plaintiff in the earlier class action: "Would it be acceptable to you if we agree to provide that [financial information] or, in the alternative, indicate to you that the attorneys are covering the expenses of the case?" However, the plaintiff's attorney admits that he did not present this excerpt from the deposition to the court at the time of the original motion (see, Welsh reply affirmation, p. 3), and he may not present it to the court for the first time on a motion to reargue. In any event, Welsh may have been expressing only the future possibility of assuming the expenses, and there is no document in the record

showing that attorney Welsh has an agreement with his client whereby the former has assumed all of the expenses of this action. This omission is particularly glaring because the plaintiff testified at his deposition that he thought his attorney would only share the expenses. This court also notes that plaintiff Wilder, who worked at the defendant company for less than three months over eight years ago, originally asserted his claims against the defendant in 1996, but he did not move for class action certification until 2003. The dilatory pace at which he has advanced this case also prevents the court from concluding that he will "fairly and adequately protect the interests of the class***." (See, CPLR 901(a)(4); Tanzer v Turbodyne Corp., supra.)

That branch of the motion which is for an order permitting the plaintiff to renew his previous motion for class certification is denied. A party who seeks leave to renew must demonstrate both new facts to support the motion and a justifiable excuse for not initially placing such facts before the court. (See, CPLR 2221[e]; N.A.S. Partnership v Kligerman, 271 AD2d 922; Wagman v Village of Catskill, 213 AD2d 775.) Where a party does not offer a valid excuse for failing to submit new material on the original motion, his motion to renew may not be entertained. (See, CPLR 2221[e][3]; Linden v Moskowitz, 294 AD2d 114; Delvecchio v Bayside Chrysler Plymouth Jeep Eagle, Inc., 271 AD2d 636.) Plaintiff Wilder does not have a valid excuse for seeking to place

allegedly new evidence before the court concerning his ability to adequately represent the class. The memorandum of law submitted by the defendant in opposition to the original motion placed into issue whether plaintiff Wilder would adequately represent the class.

Short form order signed herewith.



J.S.C.