

Vladimir v Cowperthwait

2006 NY Slip Op 30511(U)

May 1, 2006

Supreme Court, New York County

Docket Number: 603019/2004

Judge: Richard B. Lowe

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SCANNED ON 5/6/2006
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

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BERT VLADIMIR, individually and on behalf of all others
similarly situated,

Plaintiff,

Index No. 603019/2004

- against -

CAMPBELL COWPERTHWAIT and U.S. TRUST
COMPANY,

Defendants.

**DECISION
AND ORDER**

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RICHARD B. LOWE, III, J.:

Before the court is a motion by plaintiff Bert Vladimir (Vladimir), individually and on behalf of all others similarly situated, to maintain a class action pursuant CPLR 901 and 902 against defendants Campbell Cowperthwait (Campbell) and U.S. Trust Company (US Trust) for alleged breaches of fiduciary duty against Vladimir and others who had investment accounts in the Campbell's Large Cap Growth Portfolio from January 29, 2000 to September 30, 2001 through Campbell's Managed Assets Consulting Services program.

BACKGROUND

Vladimir, a practicing attorney living in Florida, entered into an agreement by which he became an investment management client of Campbell, a division of US Trust, after having conducted a telephonic interview of Campbell regarding its services and investment advice. According to Vladimir, Campbell was a fiduciary with full investment discretion and authority over the control of the assets within Vladimir's account.

On September 8, 2005, Vladimir filed this class action suit on behalf of himself and all other persons similarly situated. He alleges that Campbell breached its fiduciary duty to Vladimir and the

other class members by investing their money in the Campbell Large Cap Growth Portfolio in the same manner, without differentiation as to the nature of their accounts and despite written declarations that Campbell would invest Vladimir and the class members' assets prudently and in accordance with such representations. Documents including an "Investment Policy Statement" provided that Campbell would "manage the Portfolio in a prudent manner" and would be "well-diversified among economic sectors, industry groups, and individual securities to avoid any undue exposure to any part of the U.S. equity market" (*see Squitieri Aff, Ex. B*). Instead, Vladimir argues, the defendants managed every single account in exactly the same manner. Vladimir claims that as a result of Campbell's alleged breach, he lost \$247,000 or 39% of his assets (*see Memo of Law at 7*). Vladimir does not know the extent of damages as to the proposed class.

Vladimir, individually and on behalf of other similarly situated, brought four causes of action against the defendants: breach of fiduciary duty; negligence, and breach of contract on behalf of himself and the prospective class (the first, second, and third causes of action), and fraud (fourth cause of action), alleged solely on behalf of the plaintiff. The court, in its decision dated April 20, 2005, dismissed the causes of action for negligence, breach of contract, and fraud, but allowed the breach of fiduciary duty claim to remain.

Vladimir now moves this court to certify a class action against the defendants, wherein his counsel would serve as the attorneys for the purported class and Vladimir will serve as the named class representative.

DISCUSSION

The plaintiff argues that, because he has satisfied the prerequisites to maintain a class action

* 3]
pursuant to CPLR 901, the court should certify a class pursuant to CPLR 902 against the defendants for alleged breaches of fiduciary duty. The court appraises each prerequisite in CPLR 901 before dealing with the provisions of CPLR 902.

I. CPLR 901

CPLR 901 (a) provides that:

One or more members of a class may sue or be sued as representative parties on behalf of all if: 1) the class is so numerous that joinder of parties, 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 and 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 adjudication of the controversy.

This court is reminded that the class action statute is liberally construed and read to favor the maintenance of class actions (*see Englade v HarperCollins Publishers, Inc.*, 289 AD2d 159 [1st Dept 2001]).

A. Numerosity

The plaintiff must first demonstrate that the members of the class are “so numerous that joinder of all members, whether or otherwise required or permitted, is impracticable” (CPLR 901 [a] [1]). Here, the plaintiff avers that at least 547 individuals are potential members of this class. Nor does Campbell dispute that the first element of numerosity has been fulfilled. Accordingly, the first requirement is met.

B. Commonality

The second prerequisite the plaintiff must satisfy is to show that there “are questions of law

or fact common to the class which predominate over any questions affecting only individual members” (CPLR 901 [a] [2]). In determining whether the plaintiff has satisfied this requirement, the court looks at the plaintiff’s cause of action and determines whether a common question of law or fact predominates over individual issues.

Vladimir claims that the members of the class have a question of law common to the class, namely, whether the defendants breached their fiduciary duty to the class, since the defendants managed every account in exactly the same manner, without differentiation as to each individual’s preference or financial circumstances. Campbell contends that common questions of law or fact do not predominate because each investor’s circumstances - including his or her investment goals, needs, and expectations - must be analyzed to determine whether there was an actual breach of fiduciary duty. The court agrees with the plaintiff.

As the court noted in its April 20, 2005 decision, “[a] fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation’ (Restatement [Second] of Torts, § 874, comment a)” (*Mandelblatt v Devon Stores*, 132 AD2d 162, 168 [1st Dept 1987]). “[I]t is elemental that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect [citations omitted]. This is a sensitive and ‘inflexible’ rule of fidelity...” (*Birnbaum v Birnbaum*, 73 NY2d 461, 465 [1989]).

The court, in its April 20, 2005 decision, found that the “defendants subjected themselves to the fiduciary duties incumbent upon entities which exercise discretionary trading authority over a client’s account” (*id.* at 4). Basically, the plaintiff alleges that the defendants managed all accounts in the Large Cap Growth Portfolio in the same manner, without distinguishing among individual

preferences and predispositions. As such, if there was any breach of fiduciary duty, it would be to all individuals who had funds in that particular portfolio. That the claim derives from the same practice or conduct by the defendants is a common question of law and fact applicable to all member of the purported class and, as such, suitable for class certification (*see Jim & Phil's Family Pharm., Ltd. v Aetna U.S. Healthcare, Inc.*, 271 AD2d 281, 282 [1st Dept 2000]).

While the defendants argue that each investor's circumstances differ, such questions of "time, interest, and inclination" are immaterial where this cause of action is for a breach of fiduciary duty (*see Gilman v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 93 Misc 2d 941, 945 [Sup Ct, NY County 1978]). After all, "once [Campbell] has received [its] customer's funds, [Campbell] is a fiduciary with respect to those funds" (*id.*), both to each customer as well as to their money. The pertinent inquiry is whether the defendants breached their fiduciary duties to the purported class, especially where all individuals in this class were treated in the same manner and without even distinguishing each investor's circumstances. Since the plaintiff avers a question of law common to the class, the commonality requirement has been fulfilled.

Campbell tries to equate Vladimir's claim to a securities action for unsuitable trading which was rejected for class certification by a Federal District Court of New Jersey (*see e.g. Rowe v Morgan Stanley Dean Witter*, 191 FRD 398, 413 [DNJ 1999]).¹ In *Rowe*, the plaintiffs alleged an unsuitability claim pursuant to Section 10 (b) of the Securities and Exchange Act of 1934 (*see* 15

¹ An allegation of a claim for unsuitability pursuant to Section 10 (b) requires the establishment of five elements: "(1) the securities purchased were not suited to the buyer's needs; (2) the defendant knew or reasonably believed the securities were not suited to the buyer's needs; (3) the defendant recommended or purchased the unsuitable securities for the buyer anyway; (4) the defendant made material misrepresentations with scienter (or, owing a duty to the buyer, failed to disclose material information) relating to the suitability of the securities; and (5) the buyer justifiably relied to his or her detriment on the defendant's fraudulent conduct [citations omitted]" (*Rowe*, 191 FRD at 414). Accordingly, this cannot be a claim for trading suitability because the underlying action in this litigation is based upon the defendants' fiduciary duties to the plaintiff and proposed class members.

USC § 78j [b]), which the court rejected because the court was required to look into each buyer's need and whether or not the defendant purchased securities not suited to those needs. However, that claim is inapposite here. Unlike the suitability cause of action alleged in *Rowe*, the alleged breach in this case is based on Campbell's *failure to differentiate* among the various interests. Indeed, it is alleged that Campbell took all the moneys of all its Large Cap Growth Portfolio clients and bought and sold securities without taking into consideration each individual's predisposition, whether or not the securities were suitable to each buyer's needs.

For reasons stated above, the court finds that the commonality requirement satisfied.

C. *Typicality*

Vladimir claims that what makes his claims typical of the purposed class is that all of the accounts involved were managed by the same group of individuals at Campbell and in the same way, that the purchases and sales were made during the same time period, and that the defendants breached their fiduciary duty to those account holders. Typicality requires that the parties' interests be consistent and that the same practice or course of conduct by which the claims arose be based on the same legal theory (*Pruitt v Rockefeller Center Properties, Inc.*, 167 AD2d 14, 22 [1st Dept 1991]).

Campbell argues that Vladimir's communication with one of the members of the Campbell's group renders Vladimir's claim atypical because Vladimir's claim is based on that said communication. That Vladimir's communication with a Campbell team member may have made him aware of the possibility of a breach of fiduciary duty does not make Vladimir's claim atypical from the class. As the defendants themselves point out, Vladimir only "conducted a telephonic 'interview' of Campbell in which the Campbell representative led him to believe that Defendants

would provide him with comprehensive investment advice and management services” (*see* Memo in Opp at 5). For one thing, the defendants only point to one such communication, but do not dispute that there was no further communication between the plaintiff and the defendants.

Furthermore, Vladimir’s claim of a breach of fiduciary duty is not founded on this oral communication with Campbell. Instead, it is based on a particular course of conduct the company engaged in, namely, its failure to provide “undivided and undiluted loyalty” to not only him, but also to all individuals paying into the Large Cap Growth Portfolio (*Birnbaum*, 73 NY2d at 465). While Vladimir may have spoken to Campbell regarding its services, such an “interview” in and of itself is not a sufficient basis to deny class certification. After all, the plaintiff alleges that all members of the proposed class received the same treatment, regardless of whether they spoke with Campbell involving its services or not. Because the members of the class allege that the same practice or course of conduct gave rise to their claims, the court finds that the plaintiff’s claim is typical of the purported class’ claims and that the typicality requirement is fulfilled.

D. *Adequacy of Representation*

To determine whether a class representative and his or her counsel are adequate to represent the proposed class, the courts mainly look at three factors: 1) whether a conflict exists between the representative and the class members, 2) the representative’s personal characteristics, and 3) the competence and experience of counsel (*Pruitt*, 167 AD2d at 24). As to this requirement, the court finds that Mr. Vladimir, the proposed class representative, will adequately represent the interests of the other class members.

Campbell first claims that Vladimir is ignorant about key aspects of the case, including the definition of the class. As such, Campbell would make an inadequate class representative. While

it is problematic that Vladimir, an attorney and purported class representative, is unaware of the proposed class composition for this action, nonetheless the court does not find unreasonable his averment that his status as an attorney would aid in his ability to adequately represent the interests of the other class members (*see Vladimir Aff* ¶ 5). Further, it is only necessary that the class representative understand the issue and have a “general awareness of the claims” (*Brandon v Chefetz*, 106 AD2d 162, 170 [1st Dept 1985]). Vladimir’s inability to articulate a specific definition of the class does not provide an sufficient basis to disqualify him as the lead class representative.

Campbell also argues that Vladimir has been, is, and continues to be “cavalier” about his responsibilities to the class because he has not sufficiently responded to all discovery and has refused to come to New York for depositions during the winter months due to alleged pain caused by the cold weather. Here, the court focuses on the zeal and vigor with which the class representative will prosecute the cause of action (CPLR C 901:7). While Vladimir has declined to travel to New York during the winter months for depositions due to pain, Vladimir has nonetheless proclaimed his commitment to the full adjudication of this matter (*see Vladimir Aff*). Indeed, Vladimir has noted that he would come to New York for trial if it were scheduled for the winter months (*Vladimir Dep*, at 194:14-195:3). Furthermore, while Vladimir declined to be deposed in New York due to alleged pain, he has even gone so far as to accommodate the defendants by paying for their airfare and hotel in Florida for his deposition (*see Squitieri Aff* ¶ 27). The court does not doubt that the plaintiff would be available when any action is scheduled.

However, the court does have some questions as to the ability of the representative plaintiff to be independent from counsel (*Tanzer v Turbodyne Corp.*, 68 AD2d 614, 620 [1st Dept 1979]), as it is undisputed that the plaintiff has not done some of his duties as the potential class

representative. Indeed, Vladimir hardly reviewed the complaint in this matter or his affirmation (*see* Vladimir Dep, at 64:21-25), has only spoken to counsel approximately once a month for at most fifteen minutes (*id.* at 38:22-39:2), and has not even seen the responses to interrogatories and was unaware of requests to sign the responses, though his attorney has signed those responses in his stead (*id.* at 20:9-22:24). Nonetheless, “it is the lawyer who really protects the interests of the class” (*Tanzer*, 68 AD2d at 619). Given the circumstances, the court is not convinced that there would be a lack of independence between counsel and the lead plaintiff. Further, because CPLR 901 is construed in favor of class actions, the defendants have not sufficiently demonstrated that the lead plaintiff is an inadequate class representative.

Accordingly, this court finds that the adequacy of representation requirement has been met.

E. *Superiority of Action*

The fifth and final prerequisite to certification of a class action is the demonstration that the “class action is superior to other available methods for the fair and efficient adjudication of the controversy” (CPLR 901 [a] [5]).

The superiority requirement for a class action, similar to the commonality prerequisite, allows access to the courts for a group of plaintiffs who individually have claims and injuries common to the group, and the class provides equitable and effective determination of the controversy. “The essence of [the superiority] requirement . . . is that in every instance where class treatment is sought, the proponent of the class must persuade the court that the provisions of Article 9 will serve their appropriate function in the particular situation and that the class suit is the best method of vindicating the rights of the members of the class” (2 Weinstein-Korn-Miller, NY Civ Prac § 901.19, 9-67). After all, the class action is “a means of 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” (*Friar v Vanguard Holding Corp.*, 78 AD2d 83, 94 [2d Dept 1980]). Without the benefit of the class action, these institutions could act with impunity in such matters “since, realistically speaking, our legal system inhibits the bringing of suits based upon small claims” (*id.*).

Here, the defendants raise an issue in this case regarding the calculation of damages, considering the different amounts of money that each class member would have invested and may have lost. Generally however, “while the amounts recovered by each individual may differ, such circumstances does not warrant denial of class status” (*see Gilman*, 93 Misc 2d 941, 945). The critical inquiry with respect to this requirement is whether other plaintiffs would be able to adjudicate the matter on their own (*id.*). Because of the small amount of damages that some of the members of the class could potentially be claiming, it is unlikely that a lawyer would take on their case. Nor would it be economical for the proposed members of this class to make a claim where the amount of damages is so small. Finally, there is the fact that it would be more efficient to bring this claim as a class action instead of in individual litigations.

“To the extent that there may be differences among the class members as to the degree in which they were damaged, the court may try the class aspects first and have the individual damage claims heard by a special master or create subclasses” (*Godwin Realty Assocs. v CATV Enters.*, 275 AD2d 269, 270 [1st Dept 2000], citing *Weinberg v Hertz Corp.*, 116 AD2d 1, 6-7 [1st Dept 1986], *affd* 69 NY2d 979 [1987]).² Here, considering the potential claim and the fact that there are common

² Because the plaintiff is alleging that all individuals were harmed similarly because their funds were all utilized in the same manner, regardless of each claimant’s interest or circumstances, it may actually be easier to calculate damages since the court would calculate damages on the basis of the amount invested and its percentage in the portfolio.

issues of law and fact, the court finds that the superiority requirement has been fulfilled.

II. CPLR 902

Pursuant to CPLR 902:

Among the matters which the court shall consider in determining whether the action may proceed as a class action are: (1) The interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) The impracticability or inefficiency of prosecuting or defending separate actions; (3) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (4) The desirability or undesirability of concentrating the litigation of the claim in the particular forum; (5) The difficulties likely to be encountered in the management of a class action.

As noted above, it would be inefficient, given the number of potential claimants, to have separate actions. As well, it would be impractical and a waste of judicial resources to separate such actions. In addition, because the plaintiff and the defendants are New York residents, this forum is plainly adequate to adjudicate this cause of action. Accordingly, the court finds that, pursuant to CPLR 902, the action may proceed as a class action.

CONCLUSION

For the reasons stated herein, it is hereby

ORDERED that the plaintiff's motion for class certification is granted.

SETTLE ORDER.

Dated: May 1, 2006

ENTER:


RICHARD B. LOWE, III, J.S.C.