

Yeger v E*Trade Sec., LLC

2007 NY Slip Op 32365(U)

July 25, 2007

Supreme Court, New York County

Docket Number: 0602589/2004

Judge: Herman Cahn

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

PRESENT: **HERMAN CAHN**
J.S.C. Justice

PART 49

Yeager, Kalman

INDEX NO. 602589/2004

MOTION DATE 6-18-07

MOTION SEQ. NO. 5

MOTION CAL. NO. 16

- v -

C- Trade Securities, LLC

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE

FILED
JUL 30 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/1/07

Herman Cahn

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----x
 KALMAN YEGER and CINDY YEGER, individually :
 and on behalf of all others similarly situated, :
 :
 Plaintiffs, :
 :
 -against- :
 :
 E*TRADE SECURITIES, LLC, :
 :
 Defendant. :
 -----x

Index No. 602589/04

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CAHN, J.:

Plaintiffs move for reargument of the Court's Decision, dated February 26, 2007 (the Decision), CPLR § 2221, which denied their motion to file an amended class action complaint.

Background:

Plaintiffs in this action allege that they are or were customers of defendant E*Trade, a securities brokerage firm. Familiarity with the case is presumed and the facts are repeated here only in pertinent part.

In the Decision, the Court determined that the proposed amended complaint would improperly add a new theory of recovery to the action, as well as restore a theory and cause of action that the Court had stricken on a previous motion.

Specifically, Plaintiffs sought to add a claim that Defendant wrongfully took money from Plaintiffs' accounts, through incorrect charges of account maintenance fees. However, when Plaintiffs examined the details of the fees imposed and found that no charges should have been imposed and brought this to defendant's attention, Defendant returned the charges deducted from Plaintiffs' accounts. As such, the Court found that Plaintiffs were not damaged on those

occasions, except possibly for the amount of interest on those charges, which were probably a de minimis amount.

Plaintiffs further sought to use an amended complaint to restore causes of action which had previously been dismissed. The claim was based on General Business Law § 349, which deals with deceptive acts or practices. That portion of Plaintiffs motion was, again, denied in the Court's Decision.

Discussion:

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." CPLR § 2221 (d) (2). A motion for reargument fails to comply with the requirements when "the motion has been made simply because the unsuccessful counsel has thought that he would like to again argue the very questions he has already submitted to, and which had been expressly decided by, the court." *Fosdick v Town of Hempstead*, 126 NY 651, 652 (1891); see also *Beiny v Wynyard*, 132 AD2d 190 (1st Dep't 1987).

Defendant opposes the motion, arguing that Plaintiffs are merely making the same arguments again, improperly, through their reargument motions. Defendant correctly emphasizes that reargument "is permitted under CPLR 2221 only where 'the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision.'" Opp Br at 5 (citing *Scheider v Solowey*, 141 AD2d 813 (2d Dep't 1988)).

The Interest for the Refunded Fees:

De Minimis Amounts and Waiver:

Plaintiffs claim that the damages they seek, approximately \$0.44, which is the interest for the refunded account maintenance fees, are not de minimis. They contend that there is no “legal basis to conclude that a claim cannot be asserted because it is measured in dimes rather than dollars.” Reply Br at 2.

Defendant argues that Plaintiffs may not seek this amount, not only because the amount is de minimis, but because they had accepted the refund of the 2001 fees without making any demands for interest, thereby waiving any interest claims they might otherwise have had. Plaintiffs reply that Defendant’s waiver argument was not a part of the Court’s Decision, is the “new” argument and not properly raised or considered on a motion to reargue.

However, the Court clearly described the amount of interest as “de minimis” and found that “[i]n view of their acceptance of the return of the money taken,” Plaintiffs could not effectively claim damage. 2/26/07 Decision at 2. As such, the Court did not overlook either the de minimis or waiver issues in the Decision. Plaintiffs have not now brought any new aspect of this argument to the Court’s attention. As Plaintiffs point “neither to a fact overlooked nor a principle of law misapplied by this Court,” the motion is denied. *Beiny*, 132 Ad2d 190.

Timing:

In the Decision, the Court found that the account maintenance charges at issue occurred in 2001, but were only sought to be added to the action, via an amended complaint, in 2007. The Court further determined that Plaintiffs had not submitted any good reason why the amendment should be permitted at such late date.

Plaintiffs argue that the critical issue is when they discovered they were wrongly assessed maintenance fees, and not when they knew they were assessed these fees in general. Plaintiffs assert that it was only through discovery that they learned the basis of Defendant's maintenance fee assessment policy and practice. They further argue that Defendant's "irregular discovery conduct" and lateness in producing documents and information contributed to the delay in asserting this claim. Reply Br at 4. Plaintiffs now claim that Defendant's role in this delay was overlooked by the Court.

Plaintiffs have failed to point to fact or law overlooked or misapprehended in the Decision. Indeed, their contention in reargument that the Court should have focused on when they knew they were wrongly assessed fees is unpersuasive, as the Court explicitly addressed when Plaintiffs called the matter to Defendant's attention - - which was years before Plaintiffs' proposed amended complaint. Accordingly, their motion to reargue is denied.

Class Action:

The Court further denied the amending of the complaint to include claims regarding the interest from the account maintenance fees because, in view of Plaintiffs' acceptance of the returned money, Plaintiffs would not be proper class representatives for those claims, CPLR 901 (a)(3). Further, since common questions of law or fact do not predominate over the individual questions, the Court determined that Plaintiffs' theory is not appropriate for class action treatment, CPLR 901 (a)(2).

Plaintiffs contend that they can identify each E*Trade customer assessed these fees, as easily as they are able to identify any other fees - - that the "only difference is in the precise computer commands implemented to extract the required information." Reply Br at 5. They

aver that Defendant has conceded its ability to produce information identifying customers assessed these fees. As such, Plaintiffs argue that the Court's conclusion that such a class would not be certifiable is erroneous.

Defendant argues that damage in the amount of \$0.44 in interest would not be a claim that could be maintained for the class. It contends that the assessment of the fees to hundreds of thousands of people would turn on hundreds of thousands of individualized facts that cannot be litigated on a class-wide basis.

Again, Plaintiffs have failed to point to fact or law overlooked or misapprehended in the Decision. As such, in this argument, too, Plaintiffs have not met their burden for a motion to reargue.

The GBL Claim:

In the Decision, the Court determined that Plaintiffs' argument that its GBL § 349 claim should not have been dismissed, was improper. The Court held that this argument should have either been made to the Appellate Division on appeal, or have been made to this Court on a motion to reargue and/or renew after the claim was first dismissed. The Court found that Plaintiff's attempt to simply add this theory back into the action through an amended complaint was improper.

Plaintiffs now argue that they were, and continue to be, entitled to appeal the Court's dismissal of the GBL § 349 claim, after a final judgment in the action. They further contend that Defendant does not assert that the dismissal of their GBL § 349 claim was legally correct, only that the Court is not legally obligated to use its discretion to correct its dismissal of this claim.

At bottom, Plaintiffs' reargument "papers do not identify anything that I overlooked or

misapprehended that justifies granting leave to reargue. Rather, plaintiffs' papers merely restate the same arguments that I already rejected in the Decision." *North American Van Lines, Inc. v American Int'l Cos.*, 819 NYS2d 849, 2006 WL 908653 at *2 (Sup. Ct. NY County April 10, 2006) (Fried, J.) (Cited in Opp Br at 6).

Accordingly, it is

ORDERED that the motion to reargue is denied; and it is further

ORDERED that the clerk shall enter judgment accordingly.

Dated: July 25, 2007

ENTER:



J.S.C.

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