

Frederick v Inphonic, Inc.

2007 NY Slip Op 32976(U)

August 27, 2007

Supreme Court, Queens County

Docket Number: 0006543/2007

Judge: Augustus C. Agate

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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 24

KEITH A. FREDERICK X

INDEX NO. 6543/2007

MOTION DATE: JUNE 5, 2007

- against -

MOTION SEQ NO.

MOTION CAL. NO. 7

INPHONIC, INC.
X

BY: AGATE, J.

Defendant Inphonic, Inc. has moved for an order dismissing the complaint against it pursuant to CPLR 3211(a)(4) or staying this action.

Defendant Inphonic, a Delaware corporation, sells wireless services and devices. On or about June 21, 2005, plaintiff Keith A. Frederick, who resides at 67-38 108th Street, Forest Hills, New York, made an online purchase from defendant Inphonic of two Motorola A630 cell phones at a price of \$250 each. The website allegedly represented that the phones would actually be "free after rebate" and that the company would pay rebates in about 60 to 90 days after the receipt of an application and required documentation. The plaintiff allegedly failed to receive the rebate after the submission to the company of applications and documentation complying with the terms and conditions of the rebate program.

On or about March 14, 2007, plaintiff Frederick brought the instant action, which he seeks to prosecute as a class action on behalf of New York customers of defendant Inphonic, alleging that the company wrongfully failed to pay the rebate offered to customers. The complaint's sole cause of action charges that the defendant violated New York General Business Law § 349, "Deceptive acts and practices unlawful," which states in relevant part: "(a) Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful."

Prior to the commencement of the instant action, there were two federal actions pending in the District of Columbia against Inphonic based on the rebate program, a third federal action pending in the Northern District of Illinois, and a fourth federal action pending in the District of New Jersey. Pursuant to an order filed on October 25, 2006, the federal Judicial Panel on Multidistrict Litigation granted Inphonic's motion made pursuant to 28 USC § 1407 for an order centralizing the litigation in the federal court for the District of Columbia ("the MDL court") and transferred the actions pending in Illinois and New Jersey to the District of Columbia for coordinated or consolidated pretrial proceedings. The federal panel found: "These actions are putative class actions that share factual questions concerning whether Inphonic failed to adequately disclose the terms of its rebates

..., failed to honor valid rebate claims filed by customers, and unreasonably delayed in the processing of rebate claims. Plaintiffs allege various state common law claims such as fraud ... as well as violations of state consumer protection statutes. ... Centralization under Section 1407 is necessary in order to eliminate duplicate discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary." (In re InPhonic, Inc., Wireless Phone Rebate Litigation, 460 F Supp 2d 1380.) The Judicial Panel on Multidistrict Litigation subsequently issued other orders of centralization concerning Inphonic, and at present the MDL court is conducting consolidated pre-trial proceedings for fifteen federal cases (some removed from state courts) in which consumer protection and other causes of action have been asserted against Inphonic arising from rebates offered by the company for internet purchases of wireless telephones. (See, In re InPhonic, Inc Wireless Phone Rebate Litigation, MDL Docket No. 1792.) Pursuant to an order of the MDL court, the plaintiffs in the centralized actions filed a consolidated amended nationwide class action complaint in February 2007. The second cause of action in the fifty-four page consolidated class action complaint is for "violations of state consumer protection statutes," and the complaint specifically alleges, inter alia, that "Defendant has engaged in unfair competition or unfair or deceptive acts or practices in violation

of N.Y. Gen Bus. Law § 349 et seq.” (Complaint, ¶ 70 ff.) The parties have been conducting discovery relevant to class action certification.

CPLR 3211 provides in relevant part: “(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: ... 4. there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires;” (See, Mann v Malasky, 41 AD3d 1136; Montalvo v Air Dock Systems, 37 AD3d 567.)

A court may dismiss an action pursuant to CPLR 3211(a) (4) where (1) there is a “substantial identity of the parties” (see, Montalvo v Air Dock Systems, 37 AD3d 567; Schaller v Vacco, 241 AD2d 663; JC Mfg., Inc. v NPI Elec., Inc., 178 AD2d 505), (2) the two actions are “sufficiently similar” (Montalvo v Air Dock Systems, supra; White Light Prods. v On The Scene Prods., 231 AD2d 90), and (3) the relief sought is “the same or substantially the same.” (See, Montalvo v Air Dock Systems, supra; White Light Prods. v On The Scene Prods., supra; Schaller v Vacco, supra; JC Mfg., Inc. v NPI Elec., Inc., supra.)

In the event that the MDL court grants the pretrial motion for nationwide class action certification, the case at bar will meet all three of the criteria. First, the prospective class

of New York consumers in the instant action is part of the prospective class of nationwide consumers in the MDL action. Although the prospective class in the federal action is broader than the prospective class in the New York action, the presence of additional parties is permissible under CPLR 3211(a)(4) where both actions arise out of the same wrong. (See, White Light Productions, Inc. v On the Scene Productions, Inc., supra.) Second, the only cause of action asserted in the instant action is based on GBL § 349, and the complaint in the MDL action also asserts a cause of action based on GBL § 349. Moreover, both suits arise out of the same actionable wrong or series of wrongs. (See, Schaller v Vacco, supra; JC Mfg., Inc. v NPI Elec., Inc., supra.) Third, both actions seek to recover money damages on a classwide basis.

When a CPLR 3211(a)(4) motion has merit, a court need not dismiss the second action but "may make such order as justice requires." (CPLR 3211[a][4].) As an alternative to dismissal pursuant to CPLR 3211(a)(4), the court may stay the second action. (See, Lawler v TropWorld Casino and Entertainment Resort, 238 AD2d 383; SafeCard Services, Inc. v American Exp. Travel Related Services Co., Inc., 203 AD2d 65; see also, Asher v Abbott Laboratories, 307 AD2d 211 [stay warranted where the Donnelly Act claims of the state plaintiffs were encompassed within the federal class action].) In the case at bar, a stay is warranted pending

the determination of the motion for class action certification to be made in the MDL action, and, in the event that the MDL court grants nationwide class action certification, a dismissal of this action is warranted.

Accordingly, the defendant's motion is granted to the extent that (1) this action is stayed until the determination of the motion for class action certification to be made in the MDL action and (2) this action is dismissed in the event that the MDL Court grants the motion for nationwide class action certification.

Short form order signed herewith.

DATED: AUGUST 27, 2007

AUGUSTUS C. AGATE, J.S.C.