

Pludeman v Northern Leasing Sys., Inc.

2007 NY Slip Op 33289(U)

October 3, 2007

Supreme Court, New York County

Docket Number: 0101059/2004

Judge: Martin Shulman

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

PRESENT: MARTIN SHULMAN
J.S.C Justice

PART 1

Kevin Plueman, Et Al.

INDEX NO. 101059/04

Northern Leasing Systems
Inc., Et Al.

MOTION DATE _____

MOTION SEQ. NO. 10

MOTION CAL. NO. _____

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

1

2

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the attached decision and order.

FILED
OCT 15 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: October 3, 2007


MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 1

-----X
 KEVIN PLUDEMANN, et al.,

Plaintiffs,

Index No.: 101059/04

-against-

DECISION/ORDER

NORTHERN LEASING SYSTEMS, INC., et al.,

Defendants.

-----X

The amended complaint in this action alleges a purported class action against defendants Northern Leasing Systems, Inc. ("NLS"), Jay Cohen, Steve Bernadone, Rich Hahn and Sara Krieger (collectively "defendants") based upon defendants' alleged scheme to defraud plaintiffs, generally small businesses, which entered into finance lease agreements with NLS for credit card point of sale terminals, and principals of those businesses, who personally guaranteed the lease agreements, by concealing material terms of the agreements unfavorable to the putative class. Plaintiffs move by order to show cause (the "OSC") for an order: 1) reopening discovery based upon the Appellate Division, First Department's May 15, 2007 decision on appeal in this action; and 2) directing defendants to comply with plaintiffs' May 17, 2007 and May 29, 2007 discovery demands (collectively the "May 2007 demands"). Defendants oppose the motion.

Relevant Procedural History

By decision and order dated April 7, 2005 (the "dismissal order"), the court (Heitler, J.) granted defendants' motion to dismiss in part, thereby dismissing all causes of action with the exception of those alleging claims for fraud, unjust enrichment, money

had and received and punitive damages. On May 10, 2005 the parties appeared for a preliminary conference at which time the court issued a preliminary conference order *inter alia* directing that depositions of all parties be held "on or before 9/30/05 on the issues relating to class certification." Cozier Aff. in Opp. at Exh. B.

As can be gleaned from the OSC and defendants' opposition,¹ between May 19, 2005 and at least September 2005, the parties engaged in discovery limited to the surviving causes of action enumerated above for both the individual plaintiffs and the class. During this period, plaintiffs timely served and filed their motion seeking class certification pursuant to CPLR §902, which was submitted on November 14, 2005. By decision and order dated August 29, 2006 (Cozier Opp. Aff. at Exh. C), the court (Heitler, J.) *inter alia* denied class certification. At a pre-trial conference held on September 18, 2006, the parties entered into a so-ordered stipulation (Cozier Opp. Aff. at Exh. D) which provides that all parties were to complete discovery by December 15, 2006. In the interim, both parties appealed the dismissal order to the Appellate Division, First Department, which issued its decision dated May 15, 2007 (Cozier Opp. Aff. at Exh. F) modifying the dismissal order by reinstating plaintiffs' breach of contract cause of action against NLS, and otherwise affirmed same.

The Instant Motion

It is undisputed that discovery has not been conducted with respect to the reinstated breach of contract cause of action. Discovery should thus be reopened to the extent of permitting the parties to conduct disclosure regarding the individual

¹ Chittur Aff. in Supp. of OSC at fn.1; Cozier Aff. in Opp. at Exhs. J and K.

plaintiffs' breach of contract claims. At issue is the extent to which discovery should now proceed with respect to the class and whether plaintiffs have waived the right to seek certain items sought in the May 2007 demands.

Defendants argue that the disclosure plaintiffs seek in their May 2007 demands (OSC at Exhs. A and B) is beyond the scope of the reinstated breach of contract cause of action. Specifically, defendants contend that plaintiffs' demand dated May 17, 2007 (Exh. A to OSC) seeks "personal, financial information with respect to the corporate and individual defendants, including the individual corporate officers, including but not limited to their respective salary, tax, and financial asset and liability information" (Cozier Aff. in Opp. at ¶9), and the request dated May 29, 2007 (Exh. B to OSC) improperly seeks "information and documents pertaining to non-party individuals and entities, certain information previously requested in plaintiffs' first two series of discovery requests regarding the all [sic] lease agreements entered into by defendant NLS, as well as certain corporate procedures regarding the execution and enforcement of the lease agreements" (Cozier Aff. in Opp. at ¶12).

Defendants' counsel responded to plaintiffs' demands by e-mail stating that the demands would be disregarded absent court order because discovery ended on December 15, 2006 pursuant to the September 18, 2006 stipulation. Cozier Aff. in Opp. at Exh. H. Defendants have not cross-moved for a protective order, nor do defendants specify the particular numbered requests claimed to be improper.

As previously stated, plaintiffs are entitled to proceed with disclosure on the individual plaintiffs' breach of contract claims. The court will also permit limited

disclosure relevant to the reinstated breach of contract claim² as it relates to the class, solely to the extent that plaintiffs seek information which would permit plaintiffs "to determine whether the prerequisites to class certification listed in CPLR 901 are present, and to assess the feasibility considerations listed in CPLR 902 . . ." *Chimenti v. American Express Co.*, 97 A.D.2d 351, 352, 467 N.Y.S.2d 357 (1st Dept., 1983), *app. dismissed*. 61 N.Y.2d 669 (1983).

The court agrees that discovery regarding the causes of action for fraud, unjust enrichment, money had and received and punitive damages ended on December 15, 2006 in accordance with the so-ordered stipulation dated September 18, 2006. As to the individual plaintiffs, plaintiffs concede that such discovery was "minimal" and that the end date for such discovery was December 15, 2006. *Chittur Aff. in Supp. of OSC* at ¶5. Thus, it appears that discovery regarding these causes of action is complete.

As to the class, discovery on these causes of action is no longer relevant inasmuch as Justice Heitler denied class certification based upon "well settled law that class action certification is not available in common-law fraud cases where class members have been exposed to differing misrepresentations or omissions as necessarily individual issues will predominate over common ones, because of the diversity of representations made to the putative class members (citations omitted)." *Cozier Aff. in Opp. at Exh. C*, p.7. Although plaintiffs' counsel stated at oral argument

² The record on this round of motion practice does not include a copy of the amended complaint and as such, the court is unaware of the specific allegations upon which the breach of contract cause of action is predicated. However, the Appellate Division, First Department's decision on appeal found that the cause of action was sufficiently stated based upon allegations of overcharges and it appears that relevant discovery will be limited accordingly.

* 6]
that he intends to move for renewal of the class certification denial and requires the disclosure sought herein in order to do so, it is unlikely that additional discovery will enable plaintiffs to overcome this general principle of law.

Unfortunately, as plaintiffs' specific requests have not been briefed, the court is not in a position to rule on the propriety of plaintiffs' May 2007 demands and whether defendants should be compelled to comply with same. Accordingly, the court directs defendants to respond to the May 2007 demands by detailing any specific objections and responding to those demands which are tailored to the reinstated breach of contract cause of action. In this regard, the parties must bear in mind that the reinstated breach of contract claim also encompasses the punitive damages claim. As the Appellate Division stated in its May 15, 2007 decision on appeal upholding the punitive damages claim, this cause of action is predicated upon "conduct aimed at the public generally . . ." It is conceivable that the same materials responsive to the contract based punitive damages claim may also be responsive to class related claims.

Accordingly, it is hereby

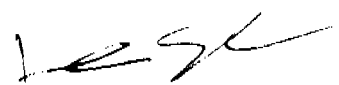
ORDERED that plaintiffs' OSC is granted to the extent that discovery shall proceed with respect to the newly reinstated cause of action for breach of contract in accordance with the terms set forth above; and it is further

ORDERED that defendants shall serve responses to plaintiffs' May 2007 demands on or before October 22, 2007.

The parties are directed to appear for a status conference on October 30, 2007 at 9:30 a.m. at 111 Centre Street, Room 1127B, New York, New York.

The foregoing constitutes this court's Decision and Order. Copies of this Decision and Order have been faxed to counsel for the parties.

Dated: New York, New York
October 3, 2007



Hon. Martin Shulman, J.S.C.

FILED
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