

**Colbert v Rank Am., Inc.**

2007 NY Slip Op 33941(U)

November 14, 2007

Supreme Court, Queens County

Docket Number: 0011140/1998

Judge: David Elliot

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addresses of class members, as previously determined for notice purposes, and to resend the checks to any new address obtained if checks were returned and defendants received a change of address or forwarding address notification. In the event payments mailed to class members were returned as undeliverable and re mailing was unsuccessful, and/or mailed checks were not cashed within eight weeks of mailing, the agreement provided that defendants would receive a reverter of up to \$2.4 million of the undistributed funds under a formula set forth in the agreement.

The settlement checks were mailed on November 20, 2006, and bore a legend stating that the checks were void after 60 days. On December 4, 2006, after being advised by plaintiffs' counsel and Strategic Claims Services (SCS), the independent settlement monitor appointed by the court, that certain check recipients had contacted them claiming to have lost or damaged their checks or advising of the death of a class member, defendants agreed to a procedure whereby calls on such matters would be referred to defendants and, if the claim was verified, defendants would reissue the check in these limited circumstances. Subsequently, on or about February 12, 2007, in accordance with the provision in the agreement that checks not cashed within eight weeks of mailing would be treated as undistributed funds and be paid to defendants under the agreement's formula, defendants instructed their bank not to honor settlement checks which had not yet been cashed, with the exception of the checks that had been reissued under the December 4 procedure. On or about the same date, defendants also ceased the reissuance process. Plaintiffs now seek to compel defendants to reissue checks for 14 class members.

There is no claim here that defendants failed to comply with the terms of the settlement agreement and court orders with regard to giving notice, establishing addresses and mailing settlement checks. In fact, SCS advised counsel for both sides by letter dated July 3, 2007, of its opinion that defendants had complied with the settlement agreement and the final order and judgment. Plaintiffs urge that the covenant of good faith and fair dealing implicit in all contracts requires the reissuance of 14 checks due to changes of address, divorce, death of a class member or receipt of the checks subsequent to the closing date for cashing them, without regard to whether the class members presented their requests before or after the end of the eight-week time frame for cashing checks that triggered the reverter to defendants. However, the duty of good faith and fair dealing exists in furtherance of other terms of the parties' agreement and cannot be used to imply an obligation that would be inconsistent with other terms of a contract. (See, [Murphy v American Home Prods. Corp.](#),

58 NY2d 293, 304 [1983]; Fitzgerald v Hudson Natl. Golf Club, 11 AD3d 426, 428 [2004].) Granting the full relief sought by plaintiffs would be inconsistent with defendants' rights and obligations under the settlement agreement. Nor should the court grant that relief in the exercise of its equitable powers.

Since a settlement agreement is a contract to be construed according to general principles of contract law and represents a compromise between parties who, to avoid the risk and expense of litigation, have given up something they might have won had they proceeded with the suit, the court is not entitled to expand or reduce the agreement of the parties. (See, Dahingo v Royal Caribbean Cruises, Ltd., 312 F Supp 2d 440 [SD NY 2004].) This principle extends to applications made in class actions where the relief requested would exceed that which the parties had bargained for. (Id.) While a court may exercise its equitable powers to permit a change in the allocation of a settlement fund that affects only the distribution among class members and not the obligations of the defendant (see, e.g., Zients v La Morte, 459 F2d 628 [2d Cir 1972]; Matter of Agent Orange Prod. Liab. Litig., 689 F Supp 1250, 1261-1263 [ED NY 1988]), a court will not grant relief, such as permitting late-filed claims, where the consequence is to increase the obligation of the defendant or make a change in the agreement detrimental to the defendant (see, Dahingo v Royal Caribbean Cruises, Ltd., supra; see, e.g., Matter of ML-Lee Acquisition Fund II, L.P. v Lee, 1999 US Dist LEXIS 4084 [D Del 1999]; Grace v City of Detroit, 145 FRD 413, 417 [ED Mich 1992]), unless the term of the agreement being modified was established in the first instance by the court and was not subject to negotiation between the parties. (See, Dahingo v Royal Caribbean Cruises, Ltd., supra; see, e.g., Matter of Crazy Eddie Securities Litigation, 906 F Supp 840 [ED NY 1995].)

In this case, as represented in the settlement agreement, counsel "engaged in lengthy, arm's-length discussions and negotiations" regarding the resolution of the action and the substantive provisions of the agreement, and concluded that the terms of the agreement were "fair, reasonable and adequate and in the best interests of all parties including members of the class" after taking into account the risks of litigation and the benefits to be obtained from the settlement. In view of the bargained for term providing for a reverter to defendants from undeliverable and uncashed checks, compelling the reissuance of all such checks would amount to a loss for defendants. The eight-week time frame was not selected by the court but was subject to negotiation and compromise and agreed upon by the parties. Even assuming that justifiable excuses existed for the failure of some class members

to cash the checks or request reissuance before the deadline, class counsel would have been aware of potential problems during negotiations and presumably determined that the time bar agreed upon took reasonable account of these concerns. (See, Dahingo v Royal Caribbean Cruises, Ltd., supra.) Thus, the court will not compel defendants to reissue checks to any class members who did not act before February 12, 2007 to either cash the settlement check or request that the settlement check be reissued.

As to the class members who took action prior to the deadline date, a reasonable person in plaintiffs' position would be justified in understanding that a promise to attempt to correct technical problems experienced by class members and reported prior to the bar date was included within the obligations assumed by defendants in the settlement agreement. (See, Dalton v Educational Testing Serv., 87 NY2d 384, 389 [1995].) Finding that this implied promise was encompassed within the obligation of each party to the agreement to exercise good faith in its performance (id.) is consistent with the review process voluntarily created by defendants in December 2006. Therefore, to avoid injuring the right of plaintiffs to receive the benefits of the settlement agreement, defendants should reissue checks to those class members who made their requests prior to the time fixed in the settlement agreement for reverter to defendants and who otherwise qualify under the terms of the December 4, 2006 procedure. (See, Dahingo v Royal Caribbean Cruises, Ltd., supra.)

With regard to the specific class members for whom relief has been sought on this motion, neither plaintiffs nor defendants have provided evidence in admissible form to support the factual assertions made. Plaintiffs did not submit affidavits from the class members themselves, and while the declarations submitted by defendants are accepted in place of affidavits in the federal courts under 28 USC § 1746, there is no comparable CPLR provision for allowing their use in litigation in this court. However, the facsimile transmission relied upon by plaintiffs may be viewed as an admission to the extent it establishes that the requests by class members Theresa Delevan, Esther Pulliam, Eric Wong, Carmen Ciccone and Earl Singer were made after the deadline for cashing the checks. Accordingly, the motion is denied as to these class members. With regard to the remaining class members at issue, evidence is required to allow a determination as to when defendants were contacted by particular class members, whether defendants' counsel received a timely request on behalf of defendants from certain members and whether the class members who concededly made a timely request provided the necessary documentation to warrant reissuing the checks. As to these class

members, the motion is denied without prejudice and with leave to renew upon proper proof, including affidavits of the subject class members, or any other party with personal knowledge of the facts, or business records in admissible form.

Dated: November 14, 2007

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J.S.C.