Dank v Sears Holding Mgt. Corp.
2008 NY Slip Op 31484(U)
May 15, 2008
Supreme Court, Nassau County
Docket Number: 6263-07/
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA
Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

WARREN S. DANK, and members of a class of similarly situated customers and former customers of defendants,

Plaintiff,

INDEX No. 006263/07

MOTION DATE: March 10, 2008
Motion Sequence # 002, 003

-against-

SEARS HOLDING MANAGEMENT CORPORATION and SEARS, ROEBUCK AND CO.,

Defendants.

The following papers read on this motion:

Notice of Motion.. X
Cross-Motion... X
Sur-Reply Affirmation X
Memorandum of Law............................... XX
Reply Memorandum of Law...................... X
Sur-Reply Memorandum of Law.............. X

This motion, by plaintiff, for an order

1) Pursuant to CPLR §901(a) granting plaintiff's motion for Class Certification of the following class:

All similarly situated customers and former customers of the Defendants throughout the United States, who were deceived and injured by Defendants' arbitrary and subjective implementation and interpretation of their published Price Match Policy, during the period commencing with the date of the applicable statute of limitations and terminating with entry of Judgment herein;

2) The Court appoint Warren S. Dank as interim class representative until another similarly situated plaintiff is appointed; and

3) The Court appoint Warren S. Dank, Esq. and Stephen I. Feder, Esq. as class counsel, together with such other and further relief this Court deems just, proper and equitable;

and a cross-motion, by defendants, for an order in the alternative, in the event this Court does not deny plaintiff's motion for Class Certification dated October 11, 2007 (the "Motion"), for an order: (i) granting Sears discovery limited to class certification issues; (ii) granting an adjournment of Sears' time to respond to the Motion until after such - discovery has been completed; and (iii) granting Sears such other and further relief as the Court may deem just and proper, are **both** determined as hereinafter set forth.

The facts and circumstances herein have previously been set forth in an order of this Court dated August 23, 2007, and will not be repeated herein.

The plaintiff's attorney (the affirmant being the plaintiff himself) avers that the defendants Price Match Policy sets forth a scheme which intentionally defrauds that portion of the shopping public which patronizes Sears stores. He further avers that they are injured prior to their arrival at the store because of the time and expense expended in traveling to the store in a fruitless attempt to obtain the price match; and when they do not obtain the price match, they pay more for their purchase then they are led to believe it would cost. He argues that the Price Match Policy does not state a disclaimer that the implementation of the Policy is an arbitrary one, and as such, is deceptive. He asserts that several similar complaints from different States have been made regarding the Sears online Policy; that the new Policy is being published, and is being offered at the same time as the old Policy and constitutes a deceptive practice; and that such modification is

significant in that the class remains open until full adjudication and judgment. He further argues that all the requirements of a class action are met herein, in that it can be inferred that the members of the class are too numerous that joinder is impractical and that at least one question of law and fact exists that is common to all members of the class. He contends that this plaintiff will fairly and adequately protect the interests of the class and his law firm has complex civil litigation experience in Federal and State courts.

The defendants' counsel argues that the plaintiff has failed in his burden of proving that all of the statutory requirements for a class action suit have been met. Counsel asserts that the bare allegations made in the affirmation (which is not sworn to as an affidavit and is not competent evidence of anything pertinent to class certification) cannot meet the statutory requirements because no discovery has taken place and the plaintiff has presented no facts to substantiate class certification. Counsel also asserts that there are reasons as set forth in controlling case law that demonstrate that the plaintiff cannot serve as a fiduciary representative of an entire national class of absent members. Counsel for the defendants contends that the plaintiff has presented no demonstrable evidence that the numerosity prerequisite has been met, as he has no factual record to substantiate that requirement; nor does the plaintiff/plaintiff's attorney demonstrate the existence of a putative class as the online "documents" he demonstrates do not state a common question of law or fact and may be time-barred. Defendants' attorney also contends that, without proof of numerosity the plaintiff cannot prove that joinder is impractical, and that the mere fact that Sears is a national retailer does not prove that joinder is impractical. Counsel avers that discovery is necessary as an alternative to denial of plaintiff's motion for Class Certification.

In reply, the plaintiff/plaintiff's attorney argues that he can satisfy all the statutory elements for class action certification. He avers that he has evidentiary proof, by audiotape, of conversations with employees and managers of Sears' Hicksville store, that proves that the Policy is a scheme to defraud the public; that Sears has an internal database of competitors to which Sears will match the price. Counsel reiterates his legal arguments and case law citations that he avers supports his application for Class Certification, and argues that numerosity has been proven by his taped conversation with a Sears employee that says "a lot of people" have been affected by the Policy. He argues that the commonality element has been satisfied because all class members were subjected to the same statements by the defendants' employees; that the Policy of defendants is inherently flawed in its formulation and its implementation and the defendants are in violation of false advertising law; and that he (plaintiff/plaintiff's

attorney) satisfies all the statutory prerequisites for class certification.

The defendants' counsel has submitted a sur-reply which is limited to the issue of submission of the audiotape and transcript. Counsel contends that, contrary to the plaintiff/plaintiff's counsel assertion, the audio recording does not support class certification because of the localization of the implementation of the Policy, which requires different proofs for different plaintiffs in different locales, defeating the requirement of commonality and the implementation of the policy, which requires a comparison of a local retailer to a particular Sears store, not, for example, (as stated by a Hicksville store employee in the transcript), the Hicksville store to a store located in New York. Counsel argues that the audio recording does not provide factual support for the requirement that the plaintiff's claims must be typical, in that each putative plaintiff's claim would be different because there would be different factual circumstances for each plaintiff's basis of liability. Counsel further argues that plaintiff/plaintiff's counsel's search for a lawsuit, as evidenced by the surreptitious recording prior to the commencement of this action, demonstrates a quality of trickery and ethically impermissible behavior which is incompatible with the statutory requirement of the adequacy of a class representative, part of which the courts have considered the representative's background and personal character. With respect to the requirement of the superiority of the class action method, counsel asserts that the multitude of individualize/issues herein would require a multitude of "mini-trials" which defeats the purpose of a class action. With respect to the cross-motion for class discovery, counsel asserts that the existence of the audio recording further supports that defendants' application.

DECISION

The requirements for class action certification are specified in Article 9, Section 901 of the Civil Practice Law and Rules. For class action certification to be granted, the movant, by competent evidence in admissible form, must satisfy five prerequisites (**CPLR 901; Canavan v Chase Manhattan Bank, N.A.,** 234 AD2d 493, 2nd Dept., 1996; **Feder v Staten Island Hosp.** 304 AD2d 470, 1st Dept., 2003).

The plaintiff-movant, in support of this motion for class action certification, proffered the following evidence: (1) an affidavit by plaintiff detailing a series of events and conversations he had with Sears employees; (2) an audio-tape recording of a conversation between plaintiff and two unidentified Sears employees; (3) a printout of an

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online advertisement from Price-Mad featuring the subject television set and its price; (4) a printout of Sears' "Price Matching Plus" policy from Sears.com; (5) a printout from Epinions.com in which an unidentified individual from Arizona posted a complaint in February 2002 that Sears refused to honor its online "matching price deal" with regards to a digital camcorder; (5) another printout from Epinions.com in which an unidentified individual posted a complaint in October of 2002 that Sears refused to honor "on-line price matching" in regards to two Goodyear tires; (6) a printout from Complaints.com in which Michael B. from Texas posted a complaint in September of 2005 that Sears refused to refund him $22.00 under its "Price Match Plus" guarantee for a Nintendo DS he had purchased earlier; and (7) a Sears advertisement from July 2007 which states the "Price Match Plus" policy.

It is with this limited evidentiary presentation that the plaintiff seeks a finding that he has met the burden of proof necessary to establish compliance with the requirements for class action certification.

The five prerequisites for class action certification under CPLR 901 are that (1) the class is so numerous that joinder of all members, 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 or 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 and efficient adjudication of the controversy. Additionally, it is generally acknowledged that the criteria set forth in CPLR §901(a) tracks the standards set forth in Federal Rule 23(a) (**Pruitt v Rockefeller Center Properties, Inc.,** 167 AD2d 14, 1st Dept., 1991), and thus federal authorities are useful guides in applying the prerequisites of CPLR §901(a) (**Friar v. Vanguard Holding Corp.,** 78 AD2d 83, 2nd Dept., 1980).

The first statutory prerequisite to class action certification is that the class be "so numerous that joinder of all members . . . is impracticable" (**CPLR 901 (a)(1)**). In this action, plaintiff-movant has defined the proposed class as consisting of all similarly situated customers and former customers of the defendants' arbitrary and subjective implementation and interpretation of their published Price Match policy, during the period commencing with the date of application of the statute of limitations and terminating with entry of judgment herein. The plaintiff estimates that this proposed class could include tens of thousands of members.

It is settled law in New York that the numerosity requirement can only be met by a proposed class of individuals who have been aggrieved by the conduct forming the basis of the complaint (**Batas v Prudential Ins. Co. of Am.,** 37 AD3d 320, 1st Dept., 2007; citing **Maio v Aetna, Inc.,** 221 F3d 472, 3d Cir 2000). It is obvious from the record developed to this point in the litigation that plaintiff's argument, that there must be a class of persons offended and harmed by Sears' policy ostensibly because Sears is a national retail store with online exposure, can only be speculative. Indeed, the record contains only three unsubstantiated complaints by unidentified individuals from without the state, together with the plaintiff's complaint. The plaintiff's estimation of the size of the proposed class is unsupported by the evidence submitted.

The second prerequisite to class certification is 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)**). This requirement of "predominance" has not been demonstrated by plaintiff. The very nature of the claim bespeaks a need for individual treatment of the allegations of the proposed class members. While the applicable law may well be the same for all litigants, there are as many separate fact patterns and idiosyncratic circumstances as there are present and former customers of defendant.

The third prerequisite to class certification, that "the claims or defenses of the representative parties are typical of the claims or defenses of the class" (**CPLR 901 (a)(3)**), is not supported by demonstrable evidence. Plaintiff does not contend, as indeed he cannot, that every similarly situated customer and former customer of defendant have been aggrieved by the conduct forming the basis of the complaint in precisely the same manner or to the same extent. What the plaintiff alleges is that the defendant's business policies, practices and objectives allowed for (and indeed may have encouraged) systematic abuses of customer and former customer in order to maximize the profits of the company. While there may indeed be general facts common to all customer and former customer , establishing defendant's liability and determining damages will nonetheless inevitably require a specific analysis conducted on a customer-by-customer basis.

The fourth prerequisite, that "the representative parties will fairly and adequately protect the interests of the class" (**CPLR 901(a)(4)**), is equally lacking. It is significant to

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note that the plaintiff-movant, an attorney, went to the first Sears store, in Hicksville, armed with an audio recorder and questioned the personnel in depth. This was done even though plaintiff was informed that the store did not even carry the TV that he sought to "purchase". It is equally important that the plaintiff and the attorney are one and the same person. It is not curative that the plaintiff seeks installation as "interim class representative", a "dual personality" as litigant and counsel cannot be permitted. In **Hale v Citibank, N.A.**, (198 FRD 606 USDCT SDNY 2001), the court ruled:

> "Class certification must be denied because, among other reasons, plaintiff cannot fairly and adequately represent the interests of the putative class (see Fed.R.Civ.P. 23(a)(4)). Most prominently this is because there is a potential conflict of interest between her duties to the prospective class and her husband's contingent financial interest in the fees".

Such duality cannot be permitted due to the inherit conflict of interest between litigant and counsel (**Lowenschuss v Bluhdorn**, 613 F2d 18, 2nd Cir. 1980) and this court notes the request made by the **Hale** court to the Pennsylvania Bar Association (see also, **Wexler v Equitable Capital Mgt. Corp.**, 1994 WL 48807, SDNY 1994). Moreover, the plaintiff/plaintiff's attorney and his proposed "co-counsel" have not factually demonstrated that both have sufficient experience in complex commercial class action litigation to properly represent the proposed class.

Finally, the plaintiff must prove that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy" (**CPLR 901 (a)(5)**). With respect to this prerequisite, "where the principal, if not the only, beneficiaries to a class action are to be the attorneys for the plaintiff, and not the individual class members, a costly and time consuming class action is not the superior method for resolving the dispute" (**Goldman v Garofalo**, 409 N.Y.S.2d 684, NY Sup. Ct. 1978; modified 71 A.D.2d 650, 2nd Dept., 1979; affirmed 50 NY2d 851, 1980). Moreover, the individuality of the varied claims appear to require "mini-trials" on factual issues unique to each individual plaintiff, and a trial would be unmanageable and inappropriate (**Johnston v HBO Film Mgt., Inc.**, 265 F3d 178, 3d Cir. 2001).

Accordingly, for all the above reasons, the plaintiff motion for class action certification is denied. The defendants cross-motion for discovery limited to class certification is **denied** as **moot** and the remainder of the cross-motion is **denied**.

Dated MAY 15 2008

ENTERED
MAY 19 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE

J.S.C.