

**LaMarca v Great Atlantic and Pacific Tea Company,
Inc.**

2008 NY Slip Op 32115(U)

July 15, 2008

Supreme Court, New York County

Docket Number: 0601973/2004

Judge: Herman Cahn

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

PRESENT: Cahn

PART 49

Index Number : 601973/2004

LAMARCA, BENEDETTO

vs

GREAT ATLANTIC & PACIFIC TEA

Sequence Number : 005

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED

JUL 29 2008

NEW YORK COUNTY CLERK'S OFFICE

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JUL 18 2008
IAS MOTION SUPPORT OFFICE

Dated: 7/15/08

Am Cahn

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

Check if appropriate: DO NOT POST REFERENCE

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

E 7/21/08

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

BENEDETTO LAMARCA, DOLORES GUIDDY, and
STEPHEN TEDESCO, individually, and on behalf of all
others similarly situated,

Plaintiffs,

-against-

THE GREAT ATLANTIC AND PACIFIC TEA COMPANY,
INC., d/b/a A&P, THE FOOD EMPORIUM, and
WALDBAUM'S,

Defendants.

Index No. 601973/04

Herman Cahn, J.

Defendants The Great Atlantic and Pacific Tea Company, Inc., The Food Emporium and
Waldbaum, Inc. (together, "A&P") move to renew or reargue the July 3, 2007 Decision and
Order of the Court that granted Plaintiffs' motion for class certification, and upon renewal or
reargument, for reversal of the Court's decision, CPLR 2221.

BACKGROUND

For a complete discussion of the underlying facts, see the Court's Decision and Order,
dated July 3, 2007 ("Class Certification Order"). The relevant facts to this motion are
summarized below.

Plaintiffs are current and former employees of A&P and commenced this action, on their
own behalf and all others similarly situated, seeking recovery under Labor Law § 650 *et seq.* for
unpaid overtime wages. They allege that A&P failed to pay overtime wages to full-time hourly
employees who worked more than 40 hours per week. Plaintiffs further allege that A&P engaged
in a regular practice of requiring or permitting employees to work "off-the-clock" without

compensation, and improperly made “meal deductions” from their paychecks. Plaintiffs contend that defendants engaged in such conduct in an attempt to reduce payroll expenditures by understaffing stores and encouraging managers to extract uncompensated work from employees.

In a prior motion, plaintiffs moved for class certification and for plaintiffs’ counsel to be appointed as class counsel. The Court granted the motion and designated the class as follows:

All full-time hourly employees of Defendants who were employed in Defendants’ supermarket stores located in the State of New York, for any of the period from June 24, 1998 through the date of the commencement of the action, whom Defendants required or permitted to perform work in excess of 40 hours per week without being paid overtime wages.

Class Certification Order at 9.

Defendants now move for reargument and renewal of plaintiffs’ motion for class certification.

DISCUSSION

A motion for leave to reargue may be granted on a showing that the court overlooked or misapprehended the facts or the law, CPLR 2221. *Williams P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1st Dep’t 1992). However, it is not an avenue to give an unsuccessful party the opportunity to reargue points already made and rejected by the court. *Id.* A motion for renewal, on the other hand, is appropriate when there are new facts not previously known or offered, or there has been a change or clarification in the law that will affect the court’s prior decision.

A&P argues that: (1) the Court overlooked or misapprehended facts relevant to whether or not the requirements of commonality and typicality were met; and (2) the Court overlooked or misapprehended recent law relevant to the certification issues.

Defendants contend that the Court overlooked defendants' submissions of over 200 affidavits in determining that commonality and typicality existed here. They assert that plaintiffs' job circumstances – as Bakery, Produce and Grocery Managers – make them anything but typical with regard to the other employees sought to be included in the class, especially concerning off-the-clock treatment. A&P argued that the named plaintiffs' jobs had different scheduling and overtime needs, unlike those for the majority of employees.

A&P also points to a New York Supreme Court case decided in Albany County shortly before the Class Certification Order was signed. In *Alix v Wal-Mart Stores, Inc.*, 16 Misc 3d 844 (NY Sup Ct, Albany County 2007), Justice Platkin denied class certification under circumstances that defendants contend are substantially similar, and held that the numerous submissions from defendants demonstrated that the named plaintiffs' claims are not typical of the proposed class and that individual questions of fact and law predominate.

The motion to renew and reargue is denied. Defendants have not met their burden of adequately showing that the Court overlooked any relevant facts or law. The Court considered both parties' arguments, and reviewed the documents presented, in deciding that class certification was appropriate here. The numerous submissions by defendants were not overlooked, but simply were not considered dispositive of the issues presented in the prior motion. Defendants, here, cannot show that the Court overlooked any of the facts presented, but are essentially using this motion to reiterate their prior, unsuccessful arguments, which is an improper use of a CPLR 2221 motion.

The Court takes no position on whether the case cited by defendants, *Alix v Wal-Mart Stores, Inc.*, 16 Misc 3d 844, was rightly or wrongly decided, but notes that it is not binding or

controlling law. While some factors may be similar between the two cases, the particular facts in this case were considered – and found to be adequate support – in granting the motion for class certification.

Accordingly, it is

ORDERED that defendants' motion for reargument and renewal is denied; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: July 15, 2008

ENTER:



J.S.C.

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JUL 29 2008
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