

Diakonikolas v New Horizons Worldwide Inc.

2011 NY Slip Op 33098(U)

November 28, 2011

Sup Ct, NY County

Docket Number: 112565/09

Judge: Joan A. Madden

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

PRESENT: Hon Joan A. Madden
Judge

PART 11

Index Number : 112565/2009
DIAKONIKOLAS, ANTHONY
vs.
NEW HORIZONS WORLDWIDE INC
SEQUENCE NUMBER : 003
AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Memorandum Decision + Order.

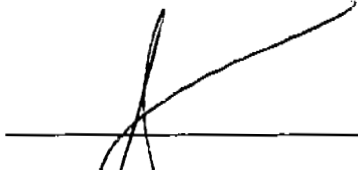
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

NOV 30 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: November 28, 2011



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

-----X

ANTHONY DIAKONIKOLAS, on behalf of
himself and all other consumers similarly situated
who opt-in to this civil action,

Plaintiff,

-against-

Index No. 112565/09

NEW HORIZONS WORLDWIDE INC., NEW
HORIZONS EDUCATION CORP., COMPUTER
LEARNING CENTER OF METROPOLITAN NEW
YORK INC., and MARK A. MILLER,

Defendants.

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JOAN A. MADDEN, J.:

Plaintiff Anthony Diakonikolas ("Diakonikolas") moves, pursuant to CPLR 3025(b), for an order granting him leave to amend the complaint to (i) discontinue class action allegations, (ii) name several new individuals as plaintiffs, and (iii) reflect that the sole remaining cause of action is for breach of contract against the remaining defendant in the action, Computer Learning Center of Metropolitan New York Inc. (Learning Center). Learning Center opposes the motion and asserts the plaintiffs must serve notice on the uncertified class members and must pay for such notice.

Background

This action arises out of allegations that defendants New Horizons Worldwide Inc. (New Horizons Worldwide), New Horizons Education Corp. (New Horizons Education), and Mark A. Miller (Miller) operated an unlicensed computer certification school. From March 2002 through

September 2004, Diakonikolas was a student at the school. Diakonikolas answered the defendants' advertisement for a job interview and, as found by the New York State Education Department Bureau of Proprietary School Supervision (BASS), instead of an interview, he was sold unapproved education and job placement services. The BASS oversees and monitors non-degree granting proprietary schools in New York State. Diakonikolas received loans totaling \$16,466.95 and was unable to obtain employment.

The three causes of action in the original complaint were against all of the defendants. The first cause of action alleged a breach of Education Law § 5004, the second cause of action was for breach of contract, and the third cause of action was for fraud in the inducement. The original complaint, pled as a class action, alleged that Diakonikolas was damaged in the amount of \$16,466.95, sought to recover tuition reimbursement for similar situated plaintiffs together with attorneys' fees, costs, disbursements and interest. Diakonikolas never sought class certification.

Defendants moved to dismiss the complaint. At oral argument, Diakonikolas conceded that the second cause of action only stated a claim against Learning Center and that the third cause of action was not viable. In a decision and order dated July 21, 2010, this court dismissed the first cause of action as against Mark A. Miller only, the second of action as against each of the defendants except the Learning Center, and the third cause of action.

Of relevance here, the court denied defendants' motion to dismiss the second cause of action against the Learning Center based on documentary evidence, finding that while paragraph

6 of the relevant contract¹ “does not guarantee [Diakonikolas’] employment with New Horizons or the Company to which the [Diakonikolas] was temporarily assigned, it does obligate the Learning Center to provide [Diakonikolas] with a 30-day temporary assignment and requires that the Learning Center use its best efforts to place [Diakonikolas] permanently” (July 21, 2010 Decision and Order at 8). The court then found that Diakonikolas had a viable claim for breach of contract based on the alleged failure of the Learning Center to fulfill these obligations.

Defendants then moved for reargument, asserting that the court erred in finding that the first cause of action was timely asserted. In its decision and order dated December 6, 2010, this court granted the defendants’ motion to reargue and dismissed the first cause of action as time-barred. Accordingly, the only remaining cause of action is the second cause of action against the Learning Center for breach of contract.

Diakonikolas argues that he should be permitted to amend the complaint to remove the causes of action previously dismissed by this court, add six plaintiffs who have requested to join in this lawsuit, and remove the class action allegations, as such amendments are sufficiently meritorious and will not result in prejudice or surprise to the Learning Center. Like Diakonikolas, the additional plaintiffs were enrolled as students at the Learning Center during the period between approximately March 2002 to September 2004.

¹Paragraph 6 of the contract, annexed to the complaint, provides that:

Your temporary assignment is for 30-days only. This contract does not guarantee employment with New Horizons, any of its affiliates, the Company where you are placed, or with any company at any time in the past, present or future. However, New Horizons onsite placement team will make every effort in assisting you in finding full time employment opportunities.

In its papers submitted in opposition, the Learning Center argues that the proposed amended complaint lacks merit in that the contract claims are contradicted by the terms of the underlying contract, and that the plaintiff should bear the costs of notifying the class members as required under CPLR 908, prior to dismissing the class action.

In reply, the Learning Center argues that no notice is required to class members, as the class was not certified. See Sheldon v Pago, Inc., 582 F2d 1298 (4th Cir 1978)(interpreting Federal Rule of Civil Procedure 23(e), which is substantially identical to CPLR 908, and finding that notice is not required to proposed class members prior to compromise or dismissal of action where the class has not yet been certified). In addition, Diakonikolas argues that all plaintiffs known to his counsel have been added or will be added to this action through amendment of the complaint.

Discussion

“Leave to amend a pleading should be ‘freely given’ (CPLR 3025[b]) as a matter of discretion in the absence of prejudice or surprise.” Zaid Theatre Corp. v. Sona Realty Co., 18 AD3d 352, 355-356 (1st Dept 2005)(internal citations and quotations omitted). That being said, however, “in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted.” Eighth Ave. Garage Corp. v. H.K.L Realty Corp., 60 AD3d 404, 405 (1st Dept), lv dismissed, 12 NY3d 880 (2009).

At the same time, leave to amend will be granted as long as the proponent submits sufficient support to show that proposed amendment is not “palpably insufficient or clearly devoid of merit.” MBIA Ins Corp. v. Greystone & Co., Inc., 74 AD3d 499 (1st Dept 2010)(citation omitted). In addition, “[o]nce a prima facie basis for the amendment has been

established, that should end the inquiry, even in the face of a rebuttal that might provide a subsequent basis for a motion for summary judgment” Pier 59 Studios, L.P. v. Chelsea Piers, L.P., 40 AD3d 363, 365 (1st Dept 2007).

Here, the proposed amended complaint, which is based on the similar allegations as the original pleading, will not result in any prejudice or surprise to the Learning Center. Moreover, contrary to the Learning Center’s position, it cannot be said that the contract claim is palpably insufficient as a matter of law or devoid of merit. In particular, the breach of contract claim in the proposed amended complaint is based on the Learning Center’s alleged failure to fulfill its obligations to provide temporary job placements after completion of certification courses and, as previously found by the court, such failure provides the basis for a potential breach of contract claim. Moreover, as the proposed additional plaintiffs are alleged to have the same agreement with Learning Center as Diakonikolas, the claim is also sufficiently stated by these newly added plaintiffs.

However, while the proposed amended complaint is legally sufficient, the motion for leave to serve an amended complaint is held in abeyance pending a determination of the motion to dismiss the class action allegations. With respect to this motion, the threshold issue is whether under CPLR 908 notice of the dismissal of the class action allegations must be given to the uncertified class. CPLR 908 provides, in relevant part, that “[n]otice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such a manner as the court directs.” While certain federal decisions are to the contrary (see e.g. Sheldon v Pago, Inc., 582 F2d at 1298), the Appellate Division, First Department, has held that the notice requirement of CPLR 908 applies even when, as here, the class has not been certified, and this holding is

binding on this court. See Avena v. Ford Motor Co., 85 AD2d 149, 152 (1st Dept 1982)(requiring that notice of settlement prior to class certification even though settlement was without prejudice to any claims of the putative members of the alleged class); but see, Ilnickij v. Grand Hotel, Inc., 2005 WL 4712292 (Sup Ct, NY Co. 2005)(declining to extend notice requirement to the proposed involuntary dismissal of proposed class action where there was “no dispute that the alleged illegal activity of defendant was discontinued in 1998 and since, despite making several efforts to do so, plaintiff’s counsel has been unable to identify any other individuals adversely affected by the [activity]”).

That being said, however, CPLR 908 gives the court discretion to determine the kind of notice which is necessary based on the circumstances before it. Id., at 153. Here, while the class action allegations are being removed from the complaint, the action continues and counsel for Diakonikolas has stated that “[a]ll persons known to the named Plaintiff and Plaintiff’s attorney who are similarly situated to the Plaintiff will be added to this action through amendment of the complaint.” (Reply Affirmation of Diane McFadin, Esq., ¶ 17).

Under these circumstances, the notice requirement may be potentially satisfied by plaintiffs’ service of a copy of this decision and order on potential plaintiffs, together with written notice that the class action allegations are being dismissed. To assist in identification of potential plaintiffs, the Learning Center shall provide counsel for plaintiffs with the names and addresses of students enrolled in the program between March 2002 and September 2004, and provide a copy of such list to the court. Plaintiffs shall thereafter submit to the court and provide to the Learning Center a copy of a proposed notice of dismissal of class action allegations, and an affirmation from their counsel explaining his or her efforts to identify and locate any potential

* 8]
plaintiffs in this action.

Conclusion

Accordingly, it is

ORDERED that on or before December 8¹², 2011, Learning Center shall provide to counsel for plaintiffs the names and addresses of students enrolled in the program between March 2002 and September 2004; and it is further

ORDERED that the status conference previously scheduled for November 3, 2011 is adjourned to December 22, 2011, at 9:30 am in Part 11, room 351, 60 Centre Street, New York, NY, and at that time plaintiffs shall submit to the court, and serve on counsel for the Learning Center, a proposed notice of dismissal of class action allegations, a list of potential plaintiffs and their addresses, which shall include those students identified by Learning Center as being enrolled in the program during the relevant period and those potential plaintiffs identified by plaintiffs' counsel, and an affirmation from plaintiffs' counsel setting forth counsel's efforts to identify and locate any potential plaintiffs in this action, and thereafter the court will issue an order regarding the appropriate notice under CPLR 908.

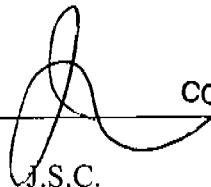
A copy of this decision and order is being mailed by my chambers to counsel for the parties.

Dated: November 28, 2011

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