

Cruz v Town Sports Intl.
2013 NY Slip Op 30233(U)
January 29, 2013
Sup Ct, New York County
Docket Number: 600695/05
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN

PART 7

SARAH CRUZ, JESSIE MARTINEZ, ANGELA ROSINSKI, ANGEL AULET, SCOTT ALLEN, NICOLE SASSO, ROBERT LOPRESTI and PATRICK MAURICE on behalf of themselves and all others similarly situated,

INDEX NO. 600695/05

MOTION SEQ. NO. 003

Plaintiffs,

-against-

TOWN SPORTS INTERNATIONAL, d/b/a NEW YORK SPORTS CLUB,

Defendant.

FILED

FEB 04 2013

NEW YORK COUNTY CLERK'S OFFICE

SARAH CRUZ, ANGELA ROSINSKI, SCOTT ALLEN, NICOLE SASSO, ROBERT LOPRESTI, and PATRICK MAURICE, on behalf of themselves and all others similarly situated,

INDEX NO. 602024/07

Plaintiffs,

-against-

TOWN SPORTS INTERNATIONAL, d/b/a NEW YORK SPORTS CLUB,

Defendant.

The following papers, numbered 1 to were read on this motion by plaintiffs to compel.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits (Memo) _____
Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

Cross-Motion: Yes No

Motion sequence numbers 003 and 004 in the herein action (the 2005 action) and motion sequence numbers 002 and 003 in the action with index number 602024/2007 (the 2007 action) are hereby consolidated for purposes of disposition.

Motion sequence 003 in the 2005 action and motion sequence number 002 in the 2007 action are identical, and both seek to compel defendant Town Sports International d/b/a New York Sports Club (NYSC) to provide additional discovery. Motion sequence 004 in the 2005 action and motion sequence 003 in the 2007 action are also identical, with NYSC moving to dismiss the class claims for failure to file a class certification motion in a timely manner. Since the motions to dismiss could render the discovery motions moot, the motions to dismiss will be addressed first.

BACKGROUND

Plaintiffs commenced the 2005 action claiming that NYSC failed to pay its personal fitness trainers and its assistant fitness managers at the overtime rate for hours that they worked in excess of 40 hours per week. Plaintiffs sought to amend the complaint in the 2005 action to add class-wide time shaving claims, and to expand the class to include all hourly NYSC employees in New York State. Instead of amending the complaint, the court suggested that plaintiffs file a separate action, which resulted in plaintiffs commencing the 2007 action. That action alleges that NYSC engaged in a practice of "time shaving," i.e., NYSC permitted its staff to regularly delete or edit hours actually worked by NYSC hourly employees from its time and payroll systems, resulting in paying the workers for fewer hours than they actually worked. Plaintiffs further claim that NYSC has a pattern of requiring employees to work "off-the-clock," without pay.

During the course of discovery, the parties have had a number of discovery disputes, and in the course of resolving them, agreed that the discovery that they engaged in was directed toward obtaining information relevant to class certification. In the discovery motions

currently before the Court, plaintiffs contend that NYSC has failed to provide requested relevant information. NYSC asserts that most of the information that plaintiffs seek has already been provided, and that what has not been provided is not discoverable at this juncture.

The date by which the plaintiffs' motion for class certification was to be filed was extended several times, both by stipulation and by court order. On January 14, 2010, oral argument was held on the discovery motions which are currently pending before the court. On January 15, 2010, NYSC presented the court with a stipulation, signed by both parties, to extend the deadline for class certification until April 28, 2010. The court so-ordered the stipulation on January 27, 2010. Plaintiffs maintain that they did not receive a copy of the signed order, and were unaware that the stipulation had been so-ordered. Plaintiffs aver that they believed that no new class certification deadline had been scheduled. In September 2010, NYSC informed plaintiffs' counsel that defendant was moving to dismiss the class claims based on plaintiffs' failure to meet the class certification deadline. The dismissal motions currently before the court ensued.

In the intervening time, the parties have been engaged in settlement negotiations, which have proven unsuccessful, and the motions are now ripe for disposition.

DISCUSSION

NYSC contends that plaintiffs failed to move for class certification before the expiration of the April 28, 2010 deadline, and plaintiffs also failed to move to extend the time within which to move. Consequently, NYSC maintains that so much of the actions that purport to be on behalf of the class of people similarly situated must be dismissed. Plaintiffs contend that they were unaware that the deadline for class certification was set at April 28, 2010, and that defendant never informed them of the so-ordered deadline. Plaintiffs' assert that NYSC should have alerted them regarding the so-ordered stipulation, and that, in any event, the Court has discretion to waive the deadline in the interests of justice. Plaintiffs' only explanation for why

they were unaware of the so-ordered stipulation, when plaintiffs' counsel had signed that stipulation, amounts to law office failure. They do not offer any basis for their suggestion that NYSC had an obligation to inform them that the court so-ordered the signed stipulation.

Plaintiffs also maintain that the delay was in part because they were waiting for a decision on the discovery motions, which decision was necessary before they could move for class certification. The Court notes that the stipulation to extend the time within which to file the motion for class certification was signed while the discovery motions were pending. The early deadline to file the motion for class certification had expired.

CPLR 902 provides that "[w]ithin sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained." The parties may stipulate to extend that time period, or the court may order such extension. However, in the absence of an extension, the deadline set forth is mandatory (*O'Hara v Del Bello*, 47 NY2d 363, 368-369 [1979]; *Shah v Wilco Sys., Inc.*, 27 AD3d 169, 173 [1st Dept 2005]). While it is true that the court has discretion to deem a class certification motion timely, or to grant a motion to extend the time within which to file a certification motion even after the deadline has passed, the plaintiff must show good cause for such relief (see *Argento v Wal-Mart Stores, Inc.*, 66 AD3d 930, 932 [2d Dept 2009]; *Matros Automated Elec. Const. Corp. v Libman*, 37 AD3d 313 [1st Dept 2007]; *Shah*, 27 AD3d at 173).

Here, plaintiffs have not only failed to timely bring a motion for class certification, but they have not yet brought one at all. While it is true that they claim that they need further discovery in order to obtain the information they need to adequately respond to the expected opposition from defendant, they have also failed to move to extend the time within which to bring the class certification motion, which is required when the discovery obtained is inadequate to bring a class certification motion (see *Meraner v Albany Med. Ctr.*, 211 AD2d 867, 868 [3d

Dept 1995]). In fact, in pointing out that the court has discretion to extend the time within which to move for class certification, plaintiffs discuss this discretion with reference to an application for extension of time. Here, there has been no such application. Thus, plaintiffs ask the Court to deny NYSC's motion to dismiss without seeking an extension of the deadline to move for class certification. In all the cases cited to by plaintiffs in support of their position, the parties who sought a waiver of the deadline for class certification had already brought a class certification motion, which was untimely in the absence of a waiver (see *Argento*, 66 AD3d at 932; *Galdamez v Biordi Constr. Corp.*, 50 AD3d 357, 358 [1st Dept 2008]; *Matros Automated Elec. Const. Corp.*, 37 AD3d at 313; *Shah*, 27 AD3d at 173). Since there is no motion or cross-motion currently pending before the Court for class certification, which would give the Court the option to grant plaintiffs a waiver, defendant's motion to dismiss must be granted. Consequently, defendant's motion to dismiss the class claims is granted. In view of this conclusion, plaintiffs' motions seeking further discovery with respect to class certification is denied as moot.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant's motions (motion sequence number 003 in the action with index number 602024/07 and motion sequence number 004 in the action with index number 600695/05) are granted and the class claims of those actions are dismissed; and it is further;

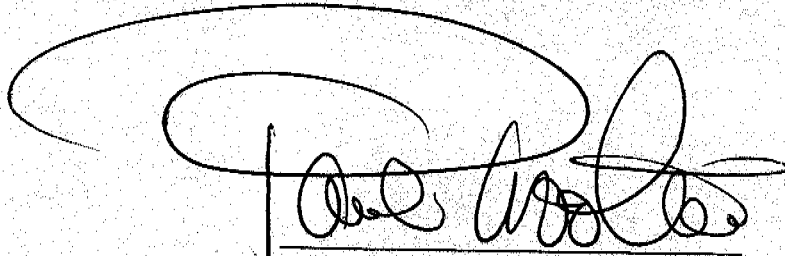
ORDERED that plaintiffs' motions (motion sequence number 002 in action 602024/07 and motion sequence number 003 in action 600695/05) are denied as moot; and it is further;

ORDERED that defendant is directed to serve a copy of this Order with Notice of Entry upon all parties; and it is further,

ORDERED that the remainder of the actions shall continue, and all remaining parties

are directed to appear for a Status Conference on March 20, 2013 at 11:00 a.m. at 60 Centre Street, Room 341, Part 7.

This Constitutes the Decision and Order of the Court.



PAUL WOOTEN J.S.C.

Dated: 1/29/13

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

FILED
FEB 04 2013
NEW YORK
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