SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

----------x

WILLIE JOHNSON, individually and on behalf of all other persons similarly situated,

Plaintiff,

Index No.
151654/13

SR NEW YORK INC. and JOHN DOES #1-10,

Defendants.

----------x

HON. ANIL C. SINGH, J. :

Plaintiff seeks an order, pursuant to CPLR 901 through 909, granting class certification of his state law claims, certifying a class of certain persons who were employed as newspaper distributor field supervisor employees by defendant SR New York Inc. (SR) from February 22, 2007, to March 1, 2013; and, if such class is certified, an order directing that notice of certification of the class be provided to the class members by first-class mail addressed to their last known addresses; and an order appointing plaintiff as lead plaintiff representing the class and appointing his counsel as class counsel.

Plaintiff, in his amended complaint, is suing defendants for violations of sections 2 and 651 of the New York Labor Law (Labor Law), breach of contract and unjust enrichment. He is suing as an individual and as a member of a class. In addition to seeking class certification, plaintiff seeks a declaratory judgment, injunctive relief, compensatory and punitive damages, and reasonable attorneys' fees.

Plaintiff alleges the following: plaintiff was a newspaper distributor field supervisor employee employed by SR, which operates a newspaper distribution center. He used his personal automobile to supervise the distribution of newspapers in New York City at various

locations. He claims that in violation of his oral contract with SR, he was not reimbursed for his automobile expenses. Plaintiff commenced this suit to recover these sums, which cover the period of February 22, 2007, to March 1, 2013. Moreover, he contends that many other individuals who were employed by SR to do similar work were never reimbursed for their automobile expenses during the same time period.

Plaintiff claims that he meets all of the requirements for class certification. He argues that the class involved is so numerous that the joinder of all members would not be practicable; questions of law and fact common to this class predominate over questions affecting only individual class members; his claims are typical of this class; he will fairly and adequately protect the interests of the class; and this type of procedure is superior in fairness and efficiency to alternative procedures. Plaintiff also claims that this type of procedure presents fewer management difficulties, conserves the resources of the parties and the court system, and protects the rights of each class member.

In opposition, SR questions the validity of class certification. First, it argues that plaintiff was employed by SR on July 26, 2010. Prior to that time, another entity, New & Comics, Inc., employed people, including plaintiff, in the capacity of field supervisors. SR states that the majority of these employees traveled around their respective territories by public transportation, rather than by use of their own vehicles. According to SR, only a minority used their own vehicles, while the majority were provided with metro cards to pay for their travel expenses. SR denies that these employees executed employment contracts, oral or written, with respect to vehicle expense reimbursements.

SR contends that a class action would not be valid, as there are probably few individuals

who would represent those seeking reimbursement for vehicle expenses. SR assumes that no more than four employees have similar alleged grievances as plaintiff. In addition, SR states that each individual was subject to different agreements and conditions upon his or her hiring. There are allegedly few common legal or factual issues which would predominate the individual claims.

SR also argues that plaintiff has pleaded punitive damages as part of his relief in this action, and that a penalty cannot be sought by a class-action plaintiff. SR submits a copy of *Cushnie v B & H Foto & Electronics Corp.*, Index No. 309380/09, a Supreme Court, Bronx County decision, which held that New York law requires plaintiffs to waive their rights to recover punitive damages if they wish to maintain a class action. SR claims that if plaintiff persists in seeking such damages, then class certification must be denied.

SR states that there is insufficient proof that plaintiff's claims are typical of the purported class of employees and that he can adequately protect the class's interests. Moreover, SR avers that a class action is not the superior form of adjudication.

In his reply, plaintiff states that he has withdrawn his request for punitive damages and is seeking only appropriate relief in this case. Where a plaintiff withdraws a claim of punitive damages, a class action may be maintained. *See Ridge Meadows Homeowners Assn. v Tara Dev. Co., Inc.*, 242 AD2d 947, 947 (4th Dept 1997). He contends that there is an adequate numerosity for such a procedure, that the grievances asserted share a common legal and factual basis, and that in a class action, he can adequately represent those employees seeking the reimbursement allegedly denied them by SR.

Pursuant to New York law, the class-action statute "is to be liberally construed to accommodate claims that would not be economically litigable except by means of a class action."

See Godwin Realty Assoc. v CATV Enterprs.,275 AD2d 269, 269 (1st Dept 2000). "Whether the facts presented on a motion for class certification satisfy the statutory criteria is within the sound discretion of the trial court." *Pludeman v Northern Leasing Systems, Inc.*, 74 AD3d 420, 422 (1st Dept 2010).

"A class action may be maintained in New York only after the following five prerequisites of CPLR 901 (a) have been met: (1) the class is so numerous that joinder of all members is impracticable; (2) common questions of law and fact predominate over any questions affecting only individual members; (3) the claims of the representative parties are typical of the class as a whole; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) the class action is superior to other available methods for the fair and efficient adjudication of the controversy (citations omitted)." *Ackerman v Price Waterhouse*, 252 AD2d 179, 191 (1st Dept 1998).

As the *Ackerman* court explained:

"Once these prerequisites are satisfied, the court must consider the factors set out in CPLR 902, to wit, the possible interest of class members in maintaining separate actions and the feasibility thereof, the existence of pending litigation regarding the same controversy, the desirability of the proposed class forum and the difficulties likely to be encountered in the management of a class action." *Id.*

CPLR 901 (b) provides that: "Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action." Since plaintiff asserts that he is not seeking punitive damages or any penalty in this suit, he is not precluded from moving for class certification on this ground.

Plaintiff argues that there are at least 30 other employees of SR who entered into a contract similar to his, who were to be reimbursed by SR for vehicle expenses, and who were not

reimbursed during the same period as plaintiff. SR challenges the numerosity issue, claiming that far fewer employees would be in a similar position as plaintiff. SR also disputes the existence of an oral contract which provided reimbursement. Finally, SR states that plaintiff has not substantiated his argument as to whether the circumstances he alleges meet the requirements of a class action. In reply, plaintiff refers specifically to five individuals whom he asserts were in similar positions as he and who had not been reimbursed by SR.

Plaintiff also asserts that he was never employed by News & Comics, Inc., although he states that this entity paid his weekly payroll checks up until mid-2010.

The court finds that plaintiff has not provided a sufficient argument for class certification. Plaintiff has failed to show that there was as many as 30 employees who were not reimbursed, so as to constitute an adequate class for litigation purposes. Plaintiff has only identified about five such employees, though he is not able to totally identify most of them by their full names. For the most part, plaintiff has resorted to speculation that a class exists. Plaintiff has not submitted enough information to support a finding of numerosity pursuant to CPLR 901.

"'If the class has more than forty people in it, numerosity is satisfied; if the class has less than twenty-five people in it, numerosity is probably lacking; if the class has between twenty-five and forty, there is no automatic rule and other factors ... become relevant (citation omitted).'" *Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 137-138 (2d Dept 2008). In rare cases, such as *Gilbert v Hamilton,* 35 AD2d 715 (1st Dept 1970), *aff'd* 29 NY2d 842 (1971), class certification was permitted for a class which consisted of five individuals, but that involved owners of a close corporation. This action does not fit in such a category.

The courts are usually liberal in determining whether a case is qualified for a class-action

status. However, plaintiff's motion for class certification is founded on too much conclusory proof and shall not be granted.

Accordingly, it is

ORDERED that plaintiff Willie Johnson's motion for class certification is denied.

Dated: 4/15/14

ENTER:

HON. ANIL C. SINGH
SUPREME COURT JUSTICE J.S.C.