Kolb v Bankers Conseco Life Ins. Co.
2014 NY Slip Op 33984(U)
June 27, 2014
Supreme Court, Nassau County
Docket Number: 5116/13
Judge: Thomas Feinman

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present:
Hon. Thomas Feinman
Justice

ADAM KOLB, individually and on behalf of all other persons similarly situated, Plaintiff, - against - BANKERS CONSECO LIFE INSURANCE COMPANY, Defendant.	TRIAL/IAS PART 9 NASSAU COUNTY INDEX NO. 5116/13 MOTION SUBMISSION DATE: 5/9/14 MOTION SEQUENCE NO. 3

The following papers read on this motion:

Notice of Motion and Affidavits.....	X
Memorandum of Law in Support of Motion.....	X
Affirmation in Opposition.....	X
Memorandum of Law in Support of Opposition.....	X
Reply Affirmation.....	X
Memorandum of Law in Support of Reply.....	X

RELIEF REQUESTED

The plaintiff, Adam Kolb, (hereinafter referred to as "Kolb"), moves for an order pursuant to CPLR §§901 and 902, to certify this action as a class action. The plaintiff submits a Memorandum of Law in support of the motion. The defendant, Bankers Conseco Life Insurance Company, (hereinafter referred to as "Bankers"), submits a Memorandum of Law in support of defendant's opposition. The plaintiff submits a reply affirmation and Memorandum of Law in support of plaintiff's reply.

The plaintiff initiated this action on behalf of Kolb and a putative class of individuals, (hereinafter collectively referred to as "plaintiffs"), to recover for alleged wages earned but not paid for work performed for Bankers. The motion seeks certification for the following putative class:

> All commission-based individuals, other than managers, corporate officers, directors, clerical and office workers, who performed work for Bankers between April 2007 and the present selling and marketing insurance and/or financial products, in positions including "Agent" and "Financial Sales Representative" (the "Class").

The plaintiff, Kolb, alleges that he and other members of the putative class were subjected to Bankers' alleged policy and practice of misclassifying them as contractors, or otherwise exempt from minimum wage and overtime payments. The plaintiffs provide that Bankers sells and markets a variety of insurance and financial products including long term care, life, annuities and Medicare supplement. The plaintiffs submit affidavits and/or deposition transcripts of three former Bankers Agents, a former Bankers' Branch Manager and a former Bankers' Supervisor from various locations, claiming that Bankers typically interviews or meets with all applicants prior to hiring. Once hired, agents are required to complete certain Contracts and Agreements, to obtain the requisite license to sell insurance, and are then designated as "independent contractors" and work only on a commission basis. The plaintiffs submit that Bankers' agents are required to attend mandatory training, maintain certain hours and are prohibited from selling insurance products on behalf of any other company. The plaintiffs contend that the agents were improperly classified by Bankers as exempt from payment of minimum wage and overtime allowing Bankers to withhold payment of wages and taxes. The plaintiffs allege that Bankers violated New York Labor Law §650 *et seq* as it knowingly paid the plaintiffs less than wages required under the New York State Minimum Wage Act, and did not pay plaintiffs for all hours worked, including overtime. The plaintiffs seek to recover unpaid minimum wages and overtime.

In order to acquire class action status five prerequisites must be satisfied: numerosity; common questions of law and fact; typicality of named petitioner's claim; fair and adequate representation by petitioner; and the superiority of the class action format. *(Evans v. City of Johntown*, 97 AD2d 1).

The criteria in CPLR §901 for a class action should be broadly construed because the legislature intended CPLR Article 9 to be a liberal substitute for the narrow class action legislation which preceded it. (*Ray v. Marine Midland Grace Trust*, 35 NY2d 147). CPLR §901 should be broadly construed not only because of the general command for liberal construction of all CPLR Sections (see CPLR 104), but also because it is apparent that the Legislature intended Article 9 to be a liberal substitute for the narrow class action legislation which preceded it." (*City of New York v. Maul*, 14 NY3d 499, citing *Friar v. Vanguard Holding Corp.*, 78 AD2d 83).

CPLR §901(a) provides that one or more members of a class may sue as representative parties on behalf of a class if:

1. the class is so numerous that joinder of all members whether otherwise required or permitted is impracticable ["numerosity"];

2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members ["predominance"];

3. the claims or defenses of the representative parties are typical of the claims or defenses of the class ["typicality"];

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 ["superiority"].

Assuming all five prerequisites are satisfied, the Court's certification inquiry turns to the discretionary considerations listed in CPLR §902. A plaintiff is required to move for an order allowing class certification within sixty (60) days after the time in which to serve a responsive pleading. (*Id*). CPLR §902 provides, in pertinent part, as follows:

Among the matters which the court shall consider in determining whether the action may proceed as a class action are:

1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;

2. The impracticability or inefficiency of prosecuting or defending separate actions;

3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum;

5. The difficulties likely to be encountered in the management of a class action.

The representative for the proposed class has the burden of demonstrating that all five prerequisites have been met. (*Askey v. Occidental Chemical Corp.*, 102 AD2d 130). The showing must be made with competent evidence, not mere conclusory statements, whereby class certification based solely upon pleadings and affidavits of counsel is insufficient. (*Katz v. NVF Co.*, 100 AD2d 470). The determination to certify a class action rests in the sound discretion of the trial court. (*Jacobs v. Macy's East, Inc.*, 17 AD3d 318, *Tosner v. Town of Hempstead*, 12 AD3d 589). CPLR §903 requires the court to include a description of the class in the order of certification. CPLR §904 provides the requisite for notice of a class action. It has been held that in a class action for damages, notice must describe the class "so that an individual may determine whether he is actually a member" and "present a balanced statement of the potential class member's rights and liabilities." (*Vickers v. Home Federal Savings & Loan Ass'n of East Rochester*, 56 AD2d 62).

DISCUSSION

Numerosity

There is no mechanical test to determine whether the first requirement of class action, numerosity, has been met, nor is there a set rule for the number of prospective class members which must exist before a class action is certified. (*Friar v. Vanguard Holding Corp., supra*). Each case depends upon particular circumstances surrounding the proposed class and the court should consider the resemblances and common sense assumptions from the facts before it. (*Id*). The numerosity requirement for class action was met in allegations of a prospective class of 300 or more, despite the fact that the information as to size of class was within the defendant's control. (*Id*). Where the proposed plaintiff class consisted of approximately 400 persons, size of proposed class rendered joinder of all members impracticable. (*Guadagno v. Diamond Tours & Travel, Inc.*, 89 Misc2d 697). Where there was common and general interest of inmates of New York State correctional institutions who had obtained federal eligibility, those persons were so numerous that it would be impractical and cumbersome to bring them all before the court. (*Cummings v. Regan*, 76 Misc2d 137).

Here, the plaintiffs have satisfied the first requirement of class certification, numerosity. The plaintiffs have a putative class of approximately 2,259 agents employed by Bankers during the relevant time period, whereby joinder of all members would be impracticable. (*Pesantez v. Boyle Environmental Services, Inc.*, 251 AD2d 11).

Predominance

The court, in applying the second requirement of class action, of common issues of law or fact predominate over any questions affecting only individual members, should focus on whether class treatment will "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated." (*Friar v. Vanguard Holding Corp., supra*). The test is one of predominance of common issues "not identity or unanimity" among the class. (*Id*). "[T]he fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action." (*Id*). Predominance can be satisfied even if some members of the plaintiffs' class were subjected to less than all of the defendant's wrongful conduct. (*Weinberg v. Hertz, Corp.*, 116 AD2d 1). The need for individualized proof solely on damages issues will not defeat a finding of predominance. (*Broder v. MBNA Corp.*, 281 AD2d 369, *Murray v. Allied-Signal, Inc.*, 177 AD2d 984).

Here, the plaintiffs have demonstrated that the following questions of law and fact are common to the class: (1) did Bankers improperly classify its entire agent workforce as independent contractors, and (2) did Bankers improperly classify its entire agent workforce as exempt because they were involved in outside sales. The common issues herein predominate or outweigh the subordinate issues that pertain to individual members of the class. (*Geiger v. Amer. Tobacco Co.*, 181 Misc2d 875), and arise from a common wrong. (*Senter v. General Motors Corp.*, 532 F2d 511).

The plaintiffs have set forth the following common factual questions: (a) did the named plaintiff and other members of the putative class perform work as non-exempt employees rather than as independent contractors, thereby entitling them to payment of minimum wages and overtime compensation; (b) did the named plaintiff and other putative class members devote the majority of their time working at Banker's offices or from their homes, rather than meeting with clients and potential clients at their homes or place of business; (c) did Bankers recruit, hire, manage and compensate the named plaintiff and other putative class members according to the same policies and procedures at every branch office in New York; (d) did the work performed by the named plaintiff and other putative class members inure to the ultimate benefit of Bankers? The plaintiffs have set forth the following common legal questions: (a) did Bankers' pattern and practice of misclassifying employees as independent contractors violate the New York Labor Law; (b) did Bankers generate and maintain payroll and time records in compliance with the laws of New York; (c) would Bankers' have any new affirmative defenses or exemptions to the extent that the Court finds that the proposed members of the Class were unlawfully classified as independent contractors? The affidavits and/or deposition testimony submitted in support of the motion for class certification allege that Bankers imposes universal procedures and policies for hiring, training, supervising and compensating all agents, *to wit*, improperly classifying agents as exempt from minimum wage and/or overtime. The submitted affidavits and/or deposition testimony sufficiently sets forth plaintiffs' allegations as class members who (i) worked in the same capacity at Bankers' New York branches, (ii) were subject to identical policies set forth in employment agreements, (iii) and were allegedly deprived of compensation in the same way.

The inquiry at this stage of class action is limited to whether the claims have merit, and is not intended to be a substitute for summary judgment or trial, whereby class action is appropriate if on the surface there appears to be a cause of action which is not a sham. (*Pludeman v. Northern Leasing Sys. Inc.*, 74 AD3d 420). The "inquiry on a motion for class certification via-a'-vis the merits is limited to a determination as to wether on the surface there appears to be a cause of action which is not a sham." (*Brandon v. Chafetz*, 106 AD2d 162). The arguments set forth by Bankers, in opposition to the motion, concerning inconsistent testimony and unreliable testimony, is inappropriate at this stage of certification of class action. Additionally, Bankers' claim that the record concerning plaintiffs' hours and schedules will vary from individual to individual, requiring individual inquiries and an examination of each agent's day-to-day activities, does not warrant denial of class certification. Not only have the plaintiffs sufficiently set forth a claim of the uniform nature of Bankers' policy of alleged underpayment, as already provided, "the fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action." (*Friar v. Vanguard Holding Corp., supra*).

Typicality

The third requirement for class certification imposes a requirement that a member's claim be typical to those of the rest of the class to advance the goal of judicial economy underlying class actions to secure that the interests of the class will be fairly and adequately represented. (*General Telephone Company of the Southwest v. Falcon*, 457 US 147). "Typical" does not mean "identical", (*Super Glue Corp. v. Avis Rent A Car System, Inc.*, 132 AD2d 604). The typicality requirement will be satisfied if the class representative's claims are based on the same event or course of conduct and assert the same legal theory. (*Ackerman v. Price Waterhouse,* 252 AD2d 179; *Friar v. Vanguard Holding Corp., supra*). However, despite the essential sameness of event and legal theory, a number of cases have denied certification where significant factual variations existed between the class representative's situation and that of other *class* members. *(Hazelhurst v. Brita Products Co.,* 295 AD2d 240, *Zehnder v. Ginsburg & Ginsburgh,* 254 AD2d 284, *Ross v. Amrep Corp.*, 57 AD2d 99). On the other hand, the fact that the amount of damages suffered by a class representative differs from another class member does not, alone, render the claims atypical. (*Pruitt v. Rockefeller Center Properties, Inc.*, 167 AD2d 14).

Here, the plaintiffs have demonstrated that Kolb's claims are typical of the plaintiffs' claims as he was employed by Bankers as an agent to sell and market insurance products according to the same policies and procedures subjected to the other class members. The plaintiffs' claims are based on the same theory, essentially that Bankers' classification of its agents as independent contractors violated Labor Law as they were not paid minimum wage and overtime. Bankers' claim that certain members admitted to not working overtime, reflected by inconsistent testimony and/or averments, does not undermine class certification at this juncture.

Representation

As to the fourth requirement of class certification , courts generally evaluate satisfaction of the adequacy of representation of a party by focusing essentially on three factors, *to wit,* potential conflicts of interest, personal characteristics of the proposed class representative, and the quality of class counsel. (*Pruitt v. Rockefeller Center Properties, Inc., supra*). Adequacy of representation requires that "counsel for the named plaintiffs be competent and that the interests of the named plaintiffs and the members of the class not be adverse." *(Pajaczek v. Cema Const. Corp.,* 859 NYS2d 897, citing *Pruitt, supra*). Here, counsel for the plaintiffs has agreed to advance the cost of

this litigation and has sufficiently represented plaintiffs in actions seeking to recover unpaid wages demonstrating a level of competence to fairly and adequately represent the plaintiffs. Additionally, it appears that there are no conflicts between the class members and the class representatives.

Superiority

The fifth prime requisite of a class action is that it be superior to all other available methods for the fair and efficient adjudication of the controversy. *(Cannon v. Equitable Life Assur. Soc. of US*, 87 AD2d 403). The class certification requirement of superiority of class action vests in the trial court's discretion to make a determination of feasibility and desirability of permitting the action to proceed as a class action. (*Gilman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 93 Misc2d 941). When a class members' claims are small in value, individual litigation simply is not a realistic prospect. (*Drizin v. Sprint Corp.*, 12 AD3d 245, *Super Glue Corp. v. Avis Rent A Car System, Inc.*, *supra*; *Weinberg v. Hertz Corp.*, 116 AD2d 1). A class action has been found superior to the prosecution of individualized claims for resolving plaintiffs' underpayment of wage claims. (*Dabrowski v. Abax Incorporated*, 84 AD3d 633, *Nawrocki v. Proto Const.*, 82 AD3d 534, *Smellie v. Mount Sinai Hospital*, 2004 WL 2725124).

Here, the plaintiffs have sufficiently demonstrated that a class action is the superior method of adjudication plaintiffs' wage and hour action. (*Dabrowski v. Abax Incorporated*, *supra*; *Nawrocki v. Proto Const.*, 82 AD3d 534).

CPLR §902 Factors

As the plaintiffs have satisfied the prerequisites under §901 of the CPLR, this Court shall take into consideration the factors listed under §902 to determine whether the action may proceed as a class action. Here, in addition to what has been established, no other individual has maintained a similar action, the putative class members have shown a desire to go forward with the class action, the numerosity of class members indicates the impracticality of prosecuting separate actions, and the forum, New York, is proper as many of the class members appear to reside in New York. Accordingly, this Court finds that the plaintiffs have met the requirements for class certification under §§901 and 902.

Conclusion

In light of the foregoing, it is hereby

ORDERED that the plaintiff's motion for class certification is granted, and it is hereby further

ORDERED that this Court hereby appoints Lloyd R. Ambinder, Esq., Virginia & Ambinder, LLP, 111 Broadway, Suite 1403, New York, New York, 10006, and Jeffrey Brown, Esq., Leeds Brown Law, P.C., One Old Country Road, Suite 347, Carle Place, New York, 11514, and Steven Cohn, Esq., the Law Offices of Steven Cohn, P.C., One Old Country Road, Suite 420, Carle Place, New York, 11514, as Class Counsel, and it is hereby further

ORDERED that the proposed Publication Order and proposed Notice of Pendency are approved and submitted to the County Clerk for entry, and directs its distribution to the class.

ENTER:

J.S.C.

Dated: June 27, 2014