

Rutella v National Sec. Corp.
2016 NY Slip Op 33072(U)
June 23, 2016
Supreme Court, Nassau County
Docket Number: 601067-16
Judge: Timothy S. Driscoll
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ORIGINAL

SUPREME COURT-STATE OF NEW YORK

Present:

HON. TIMOTHY S. DRISCOLL

Justice Supreme Court

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NICO RUTELLA, individually and on behalf of other
persons similarly situated who were employed by
NATIONAL SECURITIES CORPORATION,
NATIONAL HOLDINGS CORPORATION and/or
any other entities affiliated with or controlled by
NATIONAL SECURITIES CORPORATION and/or
NATIONAL HOLDINGS CORPORATION,

Plaintiffs,

-against-

NATIONAL SECURITIES CORPORATION,
NATIONAL HOLDINGS CORPORATION and/or
any other entities affiliated with or controlled by
NATIONAL SECURITIES CORPORATION and/or
NATIONAL HOLDINGS CORPORATION,

Defendants.

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**TRIAL/IAS PART: 12
NASSAU COUNTY**

Index No: 601067-16

Papers Read on these Motions:

Notice of Motion, Affirmation in Support and Exhibits.....X
Memorandum of Law in Support.....X
Notice of Cross Motion, Affirmation in Support and Exhibits.....X
Affirmation in Opposition and Exhibits.....X
Memorandum of Law in Opposition.....X
Reply Affirmation in Further Support and Exhibit.....X
Reply Memorandum in Further Support/Opposition.....X

This matter is before the court on 1) the motion by Defendants National Securities Corporation ("National Securities") and National Holdings Corporation ("National Holdings") ("Defendants") filed on April 11, 2016 (motion sequence number 1), and 2) the cross motion by Plaintiff Nico Rutella ("Plaintiff"), individually and on behalf of other persons similarly situated who were employed by National Securities, National Holdings and/or any other entities affiliated

with or controlled by National Securities and/or National Holdings filed on May 11, 2016 (motion sequence number 2), both of which were submitted on May 23, 2016. The Court directs that these motions will be the subject of oral argument before the Court on July 15, 2016 at 10:30 a.m.

BACKGROUND

A. Relief Sought

Defendants move for an Order 1) pursuant to CPLR §§ 3211(a)(1) and (7), dismissing the Complaint against National Securities and/or compelling arbitration pursuant to CPLR §§ 2201 and 7503(a); and 2) pursuant to CPLR § 3211(a)(7), dismissing the Complaint against National Holdings with prejudice.

Plaintiff cross moves for an Order, pursuant to CPLR § 2004, granting Plaintiff's application to extend the date to file a motion for class certification until such time that a Preliminary Conference has been held, Defendants have filed their answer, and the Court has set dates 1) to complete pre-class certification discovery; and 2) for Plaintiffs to move for class certification.

B. The Parties' History

The Class Action Complaint ("Complaint") (Ex. A to Buzzetta Aff. in Supp.) describes this action as follows:

This action is brought pursuant to New York Labor Law Article 19 §§ 652, 653 and 12 New York Codes, Rules and Regulations (hereinafter referred to as "NYCRR") §§ 142-2.1 and 142-2.2 to recover unpaid minimum wages and overtime compensation owed to Plaintiff and all similarly situated persons who are presently or were formerly employed by [National Securities], [National Holdings] and/or any other entities affiliated with or controlled by [National Securities] and/or [National Holdings] ["Defendants"].

Comp. at ¶ 1.

The Complaint alleges as follows:

Plaintiff Nico Rutella ("Rutella") was employed by Defendant ¹ from approximately August of 2013 through February of 2016. Plaintiff alleges, upon information and belief, that National Securities and National Holdings are a "single integrated enterprise" (Comp. at ¶ 9) under New York Labor Law that employed and/or jointly employed Plaintiff and those similarly situated. National Securities is allegedly a wholly owned subsidiary of National Holdings and

¹ The Complaint does not specify which Defendant employed Rutella (*see* Comp. at ¶ 6).

Defendants “share a common business purpose[], ownership, corporate officers, offices, and maintain common control, oversight and direction over the work performed by Plaintiff” (Comp. at ¶ 10).

The Class Allegations are that 1) this action is brought on behalf of Plaintiff and a putative class consisting of every other person who worked for Defendants selling or marketing financial products in any capacity within the State of New York at any time between February 2010 and the present; 2) the putative class is so numerous that joinder of all members is impracticable, the size of the putative class is believed to be in excess of 50 individuals, and the names of all potential members of the putative class are not known; 3) the questions of law and fact common to the putative class predominate over any questions affecting only individual members; 4) the claims of Plaintiff are typical of the claims of the putative class; 5) Plaintiff and his counsel will fairly and adequately protect the interests of the putative class; and 6) a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

Plaintiff alleges that, beginning in or around February 2010, Defendants employed numerous individuals to perform tasks related to selling and/or marketing financial products. Plaintiff and, upon information and belief members of the putative class (“Putative Plaintiffs”) were regularly required to perform work for Defendants without receiving minimum wages or overtime compensation for all hours worked. Rutella worked for Defendants [sic] from approximately August of 2013 to February of 2016. While working for Defendants, Rutella primarily made telephone calls to individuals in an attempt to sell financial services and products. Rutella typically worked approximately 55 hours per week consisting of work 1) from Monday through Friday, 8:00 a.m. to 6:00 p.m., and 2) on Saturday from 9:00 a.m. to 2:00 p.m.

During his employment, Rutella was not paid an hourly wage. Instead, Rutella was paid on commission. Rutella received a monthly payment of \$1,800.00 from Defendants, but this monthly payment was deducted from any commissions that he earned. As a result, Rutella routinely worked more than 40 hours each week, but did not receive overtime wages at time and one-half his regular rate of pay for hours in excess of 40 that he worked. In addition, Rutella did not receive minimum wages for all of the hours that he worked. While employed by Defendants, Rutella 1) “did not have any meaningful duties” (Comp. at ¶ 27), and was not responsible for decisions regarding the hiring, firing, demotion or promotion of employees; 2) did not exercise independent judgment and discretion on matters of significance; and 3) was subject to control by

Defendants with respect to the means used to complete the tasks that he performed for Defendants. Plaintiff alleges, upon information and belief, that Defendants wilfully disregarded and purposefully evaded record keeping requirements or applicable New York law by failing to maintain proper and complete time sheets or payroll records. The Complaint contains two (2) causes of action: 1) Defendants violated New York Labor Law (“Labor Law”) Article 19 § 663 and 12 NYCRR § 142-2.1 by wilfully failing to pay Plaintiff and other Putative Plaintiffs minimum wages for all hours worked; and 2) Defendants violated Labor Law Article 19 § 663 and 12 NYCRR § 142-2.2 by wilfully failing to pay overtime compensation to Plaintiff and other Putative Plaintiffs.

In support of Defendants’ motion, Defendants provide a copy of the Registered Representative Independent Contractor Agreement (“Agreement”) between Rutella and National Securities (Ex. B to Buzzetta Aff. in Supp.). The first paragraph of the Agreement states that it is entered into by and between National Securities, referred to as the “Company,” and Rutella, referred to as the “Contractor.” Section XXVI of the Agreement, titled “Arbitration” (“Arbitration Provision”) provides as follows:

Any controversy between the Company and the Contractor arising out of or relating to this Agreement or the breach thereof, shall be settled by FINRA arbitration. The award of the arbitrators shall be final, and judgment upon the award may be entered in any court, state or federal, having jurisdiction. All statutes of limitation that would apply if the controversy were resolved in court shall be applied and enforced by the arbitrators.

In opposition, Plaintiff provides the following exhibits (Exs. A-F to Newhouse Aff. in Opp.): 1) select relevant pages from a generic Form U-4, 2) a copy of Financial Industry Regulatory Authority (“FINRA”) Rule 13204, 3) a copy of regulatory guidance from November 4, 1992, 57 FR 52659, Release No. 34-31371, 4) a copy of regulatory guidance from April 28, 1994, Release No. 34-33939, 59 FR 22032, 5) a copy of an October 22, 2012 decision by the Honorable Charles E. Ramos, Supreme Court, New York County in the matter titled *Tareq Abed on behalf of himself and all others similarly situated v. John Thomas Financial, Inc., d/b/a John Thomas Financial, and Anastasios Belesis*, New York County Index Number 650341-11, and 6) a copy of FINRA’s Regulatory Notice 12-28 from June 2012.

In reply, Defendants provide a copy of Rutella’s Form U-4, dated August 20, 2013 with confidential personal information redacted pursuant to 22 NYCRR § 202.5(e) (Ex. A to Buzzetta Reply Aff.). Paragraph 5 on page 13 of that document reads as follows:

I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the SROs [Self-Regulatory Organizations] indicated in Section 4 (SRO REGISTRATION) as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent jurisdiction.

C. The Parties' Positions

Defendants submit that it is undisputed that Rutella and National Securities entered into the Agreement in which, pursuant to the Arbitration Provision, the parties agreed that any controversy between them arising out of or relating to the Agreement shall be settled by FINRA arbitration. In light of the Arbitration Provision, the parties must be compelled to litigate this case in an arbitration before FINRA. In addition, any objection to arbitration on the basis that this is a putative class action suit must be heard by FINRA. Defendants contend that Rutella is not permitted to circumvent the Agreement, which he signed, by filing a putative class action lawsuit. Defendants also argue that, to the extent that the Appellate Division, First Department has ruled differently (*see Abed v. John Thomas Financial Inc.*, 107 A.D.3d 578 (1st Dept. 2013); *Gomez v. Brill Sec.*, 95 A.D.3d 32 (1st Dept. 2012)), the Court should not be bound by those cases, both because they are not controlling and because the reasoning in those cases is flawed.

Defendants also contend that the Court should dismiss the Complaint as asserted against National Holdings because the allegations in the Complaint do not provide any basis for naming National Holdings as a defendant. The allegation that National Holdings is a holding company is insufficient to establish a basis for holding National Holdings liable. Moreover, because Plaintiff cannot allege that there was an employment relationship between Plaintiff and National Holdings, the Court should not grant Plaintiff leave to amend his allegations against National Holdings.

In opposition, Plaintiff submits that 1) in light of the fact that the FINRA rules, which are incorporated into the Agreement, include a FINRA rule stating that class action claims may not be arbitrated under the FINRA Code, class action claims are not arbitrable under FINRA's rules and the Court should not compel arbitration of Plaintiff's class action claims; and 2) as Plaintiff never agreed to arbitrate class action claims, he cannot be compelled to do so.

In reply, Defendants submit that 1) the Agreement "clearly, explicitly, and unequivocally" provides that any controversy between Rutella and NSC must be arbitrated (Ds' Reply Memo. of Law at p. 3) and that Rutella, a "sophisticated stockbroker duly qualified and registered by FINRA" (*id.*; emphasis in original) is now attempting to circumvent the Agreement

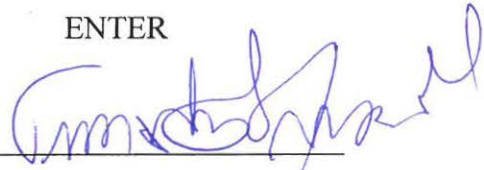
that he executed; 2) a class action is a procedure, not a cause of action, and Rutella has no substantive right to bring a class action; and 3) the Complaint is a “ruse” to avoid arbitration (Ds’ Reply Memo. of Law at p. 6), as evidenced by Rutella’s concession, in his cross motion, that he “lacks sufficient facts to determine precisely the nature of the class, commonality, typicality, and other questions necessary to a motion for class certification (Newhouse Aff. in Supp. at ¶ 11).

Plaintiff cross moves for an Order extending the time to move for class certification to allow time for the Court to render a decision on Defendants’ motion to dismiss and compel arbitration, and to allow time for Plaintiff to conduct pre-class certification discovery. Defendants oppose the cross motion submitting that Rutella has no good faith basis for filing the Complaint as a class action, and did so in an effort to evade the arbitration to which he agreed.

The Court directs that these motions will be the subject of oral argument before the Court on July 15, 2016 at 10:30 a.m.

DATED: Mineola, NY
June 23, 2016

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

AUG 16 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE