Robinson v Big City Yonkers, Inc.
2018 NY Slip Op 33695(U)
August 3, 2018
Supreme Court, Nassau County
Docket Number: 600159/16
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 32
NASSAU COUNTY

FRANK ROBINSON, on behalf of himself and all others similarly situated, and HENRY ALCANTARA, BARRY ALKINS, RAFAEL BOITER, MAURICE DESRIVIERES, JAY GILBERT, ROGER JONES, ROUSSO MEDE, JOSE PERALTA, NIEVE QUEZADA, MAXIMINO ROSA and TYRELL STEWART, individually,

Plaintiffs,

Index No.: 600159/16
Motion Seq. Nos.: 07, 08
Motion Dates: 05/04/18
05/21/18
XXX

- against -

BIG CITY YONKERS, INC. d/b/a BIG CITY AUTOMOTIVE WAREHOUSES, KKLDS, INC. d/b/a BIG CITY AUTOMOTIVE WAREHOUSES, 20-15 ATLANTIC CORP. d/b/a BIG CITY AUTOMOTIVE WAREHOUSES, 450 CONCORD AVENUE CORP, ALL PARTS, INC. d/b/a BIG CITY AUTOMOTIVE WAREHOUSES, AUTOSTAR AUTOMOTIVE WAREHOUSE, INC. d/b/a BIG CITY AUTOMOTIVE WAREHOUSES, D A L HOLDING CO., INC. d/b/a BIG CITY AUTOMOTIVE WAREHOUSES, GLENWOOD AUTOPARTS, CORP. d/b/a BIG CITY AUTOMOTIVE WAREHOUSES and QPBC INC. d/b/a BIG CITY AUTOMOTIVE WAREHOUSES,

Defendants.

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 07), Affirmation and Exhibits	**1**
Affirmation in Opposition to Motion (Seq. No. 07) and Exhibits	**2**
Affirmation in Opposition to Motion (Seq. No. 07) and Exhibits	**3**
Reply Memorandum of Law to Motion (Seq. No. 07)	**4**

Order to Show Cause (Seq. No. 08), Affirmation and Exhibits and Memorandum of Law	5
Affirmation in Opposition to Order to Show Cause (Seq. No. 08) and Exhibits	6
Affirmation in Opposition to Order to Show Cause (Seq. No. 08)	7

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Non-party movant "opt-outs" move (Seq. No. 07), pursuant to CPLR § 2221(d), for leave to re-argue plaintiffs' prior motion (Seq. No. 06) for final preliminary approval of class settlement, upon which the Court rendered its Decision and Order on February 13, 2018, and, upon re-argument, for the Court to deny plaintiffs' motion (Seq. No. 06) with respect to the opt-out provision; and move pursuant to CPLR § 2221(e), to renew plaintiffs' prior motion (Seq. No. 06) for final preliminary approval of class settlement, upon which the Court rendered its Decision and Order on February 13, 2018, and, upon re-argument, for the Court to deny plaintiffs' motion (Seq. No. 06)with respect to the opt-out provision. Plaintiffs and defendants oppose the motion.

Plaintiffs move (Seq. No. 08), pursuant to CPLR § 907, for an order amending the Court's Decision and Order of February 13, 2018 to direct the Settlement Administrator to distribute the first installment as set forth in Section 3.3 of the Settlement Agreement, within ten (10) days of the Court's entry of this Order, except that the Lee Litigation Group, PLLC's proportional share of the approved Attorneys' Fees as provided in Section 3.3(A) and the Settlement Checks to the Participating Class Members who filed an appeal, listed in NYSCEF No. 340, shall be held in escrow by the Settlement Administrator until certain events have occurred. Defendants and the non-party movant opt-outs oppose the motion.

It is settled that "[m]otions for re-argument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon showing that the court overlooked or misapprehended the facts or law for some [other] reason mistakenly arrived at earlier." *See Carrillo v. PM Realty Group*, 16 A.D.3d 611, 793 N.Y.S.2d 69 (2d Dept. 2005). *See*

also CPLR § 2221(d)(2); *Barnett v. Smith*, 64 A.D.3d 669, 883 N.Y.S.2d 573 (2d Dept. 2009); *Frisenda v. X Large Enterprises Inc.*, 280 A.D.2d 514, 720 N.Y.S.2d 187 (2d Dept. 2001); *William P. Pahl Equipment Corp. v. Kassis*, 182 A.D.2d 22, 588 N.Y.S.2d 8 (1st Dept. 1992); *Foley v. Roche*, 68 A.D.2d 558, 418 N.Y.S.2d 588 (1st Dept. 1979), *appeal after remand*, 86 A.D.2d 887, *app den.* 56 N.Y.2d 507.

Notably, the remedy "is not designed to provide an unsuccessful party with successive opportunities" to make repetitious applications, "rehash questions already decided" or "*present arguments different from those originally presented* (emphasis added)." *See McGill v. Goldman*, 261 A.D.2d 593, 691 N.Y.S.2d 75 (2d Dept. 1999); *William P. Pahl Equipment Corp. v. Kassis, supra. See also Gellert & Rodner v. Gem Community Management Inc.*, 20 A.D.3d 388, 797 N.Y.S.2d 316 (2d Dept. 2005); *Pryor v. Commonwealth Land Title Ins. Co.*, 17 A.D.3d 434, 793 N.Y.S.2d 452 (2d Dept. 2005); *Amato v. Lord & Taylor, Inc.*, 10 A.D.3d 374, 781 N.Y.S.2d 125 (2d Dept. 2004).

The non-party movant opt-outs have not demonstrated that the Court overlooked or misapprehended the facts (and viable issues thereto) or law relative to its analysis and subsequent granting of plaintiffs' unopposed motion (Seq. No. 06).

Having reviewed its prior determination and the papers submitted herein, this Court concludes that it has not overlooked or misapplied any controlling principles of law. *See William P. Pahl Equipment Corp. v. Kassis, supra*; *Foley v. Roche, supra.* Nor can the Court glean from the record herein where it had, for some other reason, mistakenly arrived at its earlier decision. *See Long v. Long*, 251 A.D.2d 631, 675 N.Y.S.2d 557 (2d Dept. 1998).

Re-argument is therefore **DENIED** as the non-party movant opt-outs have failed to demonstrate that the Court misapprehended the facts or misapplied the law. *See* CPLR § 2221(d)(2).

CPLR § 2221(e) states, "[a] motion for leave to renew: 1. shall be identified specifically as such; 2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and 3. shall contain reasonable justification for the failure to present such facts on the prior motion." "A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation." *See Rowe v. NYCPD*, 85 A.D.3d 1001, 926 N.Y.S.2d 121 (2d Dept. 2011) *quoting Elder v. Elder*, 21 A.D.3d 1055, 802 N.Y.S.2d 457 (2d. Dept 2005).

The Court finds that the non-party movant opt-outs' instant motion (Seq. No. 07) fails to contain "new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination." The instant motion also does not "contain reasonable justification for the failure to present such facts on the prior motion."

Therefore, the branch of non-party movant opt-outs' motion (Seq. No. 07) based upon renewal is also hereby **DENIED**.

Accordingly, the Court adheres to its original determination and decision and non-party movant opt-outs' instant motion (Seq. No. 07) is hereby **DENIED in its entirety**.

The Court will now address plaintiffs' Order to Show Cause (Seq. No. 08). Counsel for plaintiffs submits, in pertinent part, that, "[o]n February 13, 2018, the Court granted Final Approval [of Class Action Settlement] and rejected the Opt-Out Statements as untimely and deficient.... Plaintiffs filed the Order with Notice of Entry on February 16, 2018, thereby setting the expected distribution date of the Settlement Funds to March 30, 2018.... On March 13, 2018, LLG [counsel for non-party movant opt-outs] filed its Notice of Appeal (the 'Appeal') on behalf of the 47 purported opt-outs, asking that the Second Department exclude those individuals from the Settlement.... Because the Settlement Distribution is contingent on all appeals being resolved, the Appeal, despite its limited nature, is currently preventing the remaining class members from

receiving their settlement proceeds, with no end in sight.... This relief is required to prevent prejudice to the Class.... Given the prejudice facing the Class Members, Class Counsel has attempted to negotiate a resolution of this problem with Defendants. Class Counsel proposed amending the Agreement by stipulation, pursuant to Sections 6.1 and 6.3 of the Agreement, to allow the Class Members to receive their settlement payments despite the pending Appeal. The Parties, however, could not reach an agreement in this regard and Class Counsel has been left without any other option but to file this motion." *See* Plaintiffs' Affirmation in Support Exhibits A and B.

In opposition to the motion (Seq. No. 08), counsel for defendants argues, in pertinent part, that, "[t]o the extent that Class Counsel [counsel for plaintiffs] and Lee Litigation Group [counsel for non-party movant opt-outs] seek to begin payments under the Settlement Agreement, these motions (*sic*) are improper because the Effective Date under the Agreement has not occurred. The terms of the Settlement Agreement explicitly contemplate a possible appeals process before the Effective Date and distribution of payments:... As noted in 2.8, the parties have the ability to modify the Settlement Agreement. The Court's continuing jurisdiction is over interpretation and implementation under the agreement:... Here, the Parties have not agreed to modify the Settlement Agreement. Class Counsel's unilateral request, and LLG's opposition seeking their own attorneys' fees, are attempts to circumvent the appeals process contemplated by the plain language of the Agreement.... Here, LLG's appeal of the Final Order and Motion to Renew/Reargue the Final Order are all pending issues that preclude payments under the express terms of the Settlement Agreement, which does not become effective until *after* any appeals have concluded. Just as payments to class members before the appeals process has concluded would violate the express terms of the Settlement Agreement, so too would payments of attorneys' fees to LLG. It is a clear conflict of interest for LLG to appeal the Final Order, and demand attorneys' fees under the terms of the Settlement Agreement."

In partial opposition to the motion (Seq. No. 08), counsel for non-party movant opt-outs submits, in pertinent part that, "[n]on-parties do not oppose Plaintiffs' Motion to Modify the final Approval Order ... to the extent that Plaintiffs seek from the Court authorization for the Settlement Administrator to distribute the Settlement Funds. As argued by Plaintiffs, Non-Parties' Notice of Appeal and Motion to Reargue and Motion to Renew ... seek a narrow relief to opt-out forty-five (45) of the Non-Party Individuals from the class action settlement.... Non-Parties are not appealing the *merits* of the class action settlement, merely the *validity* of the Non-Parties' Opt-Out forms. As the settlement amount to be dispersed per class member of already determined, and any unclaimed funds would revert to Defendants, Non-Parties' appeal does not and would not undermine the class action settlement. Notwithstanding the foregoing, Non-Parties oppose Plaintiffs' request that Lee Litigation Group's ('LLG') portion of attorneys' fees and costs should be held in escrow. Plaintiffs' counsel provides no basis as to why LLG's portion should be withheld. Moreover, the Settlement Agreement sets forth no condition for LLG in order to receive their portion of fees once the class settlement is approved.... The Settlement Agreement does not contemplate any withholding of LLG's portion of attorneys' fees as specified in Section 3.2(G) of the Settlement Agreement or for them to be treated any differently from any of the Plaintiffs' counsel for services already provided on behalf of the Class.... As Plaintiffs have argued and acknowledged that Non-Parties seek a narrow relief to opt-out of the class action settlement, there is no basis to withhold LLG's portion of fees as any additional fees incurred is separate from the class action settlement. For the avoidance of doubt, Non-Parties proportional share of the Settlement Fund, representing the allocation of forty-five (45) Opt-Outs, should be held in escrow by the Settlement Administrator as their right to opt-out of the class action settlement to pursue their own lawsuit is at issue for appeal."

Based upon the arguments made in the papers before it, the Court finds that the subject Settlement Agreement did indeed explicitly contemplate a possible appeals process before the Effective Date and distribution of payments. *See* Plaintiffs' Affirmation in Support Exhibit A.

Therefore, plaintiffs' request to Amend the Court's Decision and Order of February 13, 2018, is not proper at this time.

Consequently, plaintiffs' motion (Seq. No. 08), pursuant to CPLR § 907, for an order amending the Court's Decision and Order of February 13, 2018 to direct the Settlement Administrator to distribute the first installment as set forth in Section 3.3 of the Settlement Agreement, within ten (10) days of the Court's entry of this Order, except that the Lee Litigation Group, PLLC's proportional share of the approved Attorneys' Fees as provided in Section 3.3(A) and the Settlement Checks to the Participating Class Members who filed an appeal, listed in NYSCEF No. 340, shall be held in escrow by the Settlement Administrator until certain events have occurred, is hereby **DENIED**.

This constitutes the Decision and Order of this Court.

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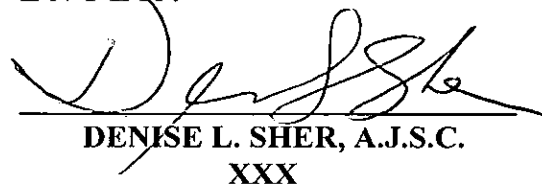

DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
August 3, 2018

ENTERED
AUG 08 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE