

Blackerby v Concepts of Independence Inc.
2020 NY Slip Op 30673(U)
March 6, 2020
Supreme Court, New York County
Docket Number: 156571/2017
Judge: Barbara Jaffe
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

-----X

INDEX NO. 156571/2017

AMBER BLACKERBY, individually and on behalf of
all other persons similarly situated,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 004

- v -

CONCEPTS OF INDEPENDENCE INC., or any other
related entities,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

Plaintiff moves for an order approving a settlement agreement among the parties and awarding plaintiff's counsel attorney fees and costs. Defendant does not oppose.

By order dated July 26, 2019, the settlement agreement (NYSCEF 26) was preliminarily approved as it was found to be fair, adequate, and reasonable to all potential class members, and the proposed class was certified for settlement purposes only. It was further ordered that within 30 days, class counsel was to disseminate a notice to class members informing them of the settlement and their rights in it, and advising them of the deadline to file a claim or an objection and that they may appear in person for a fairness hearing scheduled for January 15, 2020. Class counsel was also directed to file and serve papers in support of final settlement approval on January 8, 2020. (NYSCEF 35).

After failing to file papers in support of the motion seeking final approval in accordance with the July 26, 2019 order, by email dated January 14, 2020, class counsel advised me that the class consisted of over 9,000 members with 2,500 members having filed opt-in forms electing to participate in the settlement, and that due to the size of the class, additional time was needed to

finalize the settlement's allocation. Thus, counsel sought leave to adjourn the fairness hearing to January 28, 2020.

On January 15, 2020, class counsel's request for an adjournment was granted and the fairness hearing was rescheduled for February 26, 2020. Counsel was also ordered to disseminate a notice to the class advising them of the adjournment.

By affirmation dated February 19, 2020, class counsel stated that the claims administrator had provided him with a list of 9,582 class members, and that 2,524 of those members filed claims forms. However, 1,110 of those who filed claims forms were later found to be not eligible to participate in the settlement, and after determining that the original class was too expansive, plaintiff's counsel advised me that the class actually comprises 4,148 members, of which 1,414 class members filed claims. Counsel also advised that the settlement provides for a distribution of \$720,305.24, divided as follows: \$315,288.18 for class members; \$300,000.00 for attorneys fees and costs; \$10,000.00 in a reserve fund; \$47,842.00 for the class administrator; \$37,175.06 for the employer's share of withholding taxes; and \$10,000.00 split evenly between plaintiff and a nonparty. Counsel stated that his firm had devoted 398.40 hours to this matter for a total of \$145,660 in billings and \$819.99 in costs. (NYSCEF 37).

By non-notarized declaration dated February 20, 2020, the settlement claims administrator reiterated counsel's affirmations. (NYSCEF 40).

A fairness hearing was held on February 26, 2020. While no objections were made by class members, it was ordered that before the settlement and class counsel's fee application could be approved, counsel was to provide evidence that it had disseminated notice of the adjournment of the fairness hearing to all class members, a notarized affidavit from the settlement claims administrator, counsel's and the claims administrator's billing statements and receipts, and

additional support for counsel's request for service awards.

By letter dated March 4, 2020, class counsel provides billing statements and receipts for itself and the claims administrator, a copy of a notice sent to class members reflecting the fairness hearing as having been held on January 15, 2020, and additional legal support for its request for a service award. Moreover, counsel advises that at the time of settlement, he was unaware that the majority of the class was predominantly monolingual Spanish speakers, and the notice disseminated was in English only. He seeks leave to publish a supplemental notice in Spanish to class members, which reflects that they have 30 days to file a claim, opt-out, or object to the settlement, and that a fairness hearing had already been held but that another one may be held in the event that a class member objects to the settlement or wishes to be heard. (NYSCEF 43-49).

Pursuant to CPLR 908, no class action settlement may be effectuated without court approval and notice of such settlement must be disseminated to all class members in the manner the court directs. Courts are given broad administrative and adjudicative power over class actions, as they are responsible for protecting the rights of absent class members. (*Wyly v Milberg Weiss Bershad & Schulman, LLP*, 12 NY3d 400, 413 [2009]; *Jiannaras v Alfant*, 124 AD3d 582, 590 [2d Dept 2015], *affd* 27 NY3d 349 [2016], quoting *Klein v Robert's Am. Gourmet Food, Inc.*, 28 AD3d 63, 70 [2d Dept 2006] ["Because the disposition of a class action binds class members who do not directly participate in the action, the trial court must act as the protector of the rights of the absent class members"] [internal marks and citations omitted]).

Class counsel fails to provide evidence that it disseminated a notice to class members advising them of the adjournment of the fairness hearing. Moreover, in light of the revelation

that a majority of the class consists of monolingual Spanish speakers, the original class notice, and presumably the adjournment notice, which was composed in English, did not provide adequate notice to class members of their rights. That only approximately 34 percent of over 4,000 class members filed claims demonstrates that the language barrier may have led to confusion and misinformation about absent class members' rights. This confusion is compounded by the fact that half of those who received the original settlement notice are not members of the class.

In addition, the settlement statistics counsel offers are derived from the non-notarized declaration of the claims administrator, and counsel has failed to provide a properly executed affidavit, as was ordered on February 26, 2020.

Class counsel's candor concerning the language barrier with class members is acknowledged. However, the issues in finalizing the settlement and disseminating notices is too pervasive to ensure that absent class members were given sufficient information and time to participate and object to the settlement and to be heard by the court at a fairness hearing. A limited supplemental notice to Spanish speakers giving them only 30 days from mailing of the notice to compile all necessary documentation and participate in or object to the settlement is inadequate to remedy these issues. Thus, final approval of the settlement is not appropriate at this time, and renewal of the final settlement approval process is warranted.

Accordingly, it is hereby

ORDERED, that plaintiff's motion for final approval of the settlement and class counsel's fee application is denied without prejudice; and it is further

ORDERED, that the July 26, 2019 order (NYSCEF 35) remains in effect, and the following dates shall govern the schedule in this action:

(1) On or before April 4, 2020: mailing of class notice, as approved by the order dated July 26, 2019, in English and in Spanish, reflecting the new schedule, via United States first-class mail, postage prepaid;

(2) May 4, 2020: last day for class members to submit written objections to settlement, to opt-out of the settlement, or to submit a claim form;

(3) May 19, 2020: last day for class members to submit bona fide late claims;

(4) June 10, 2020: last day for counsel to file and serve papers in support of final settlement approval; and

(5) June 17, 2020 at 11:00 A.M.: fairness hearing at 60 Centre Street, New York, NY, room 341.

20200306094515B/AFFED/EE917117347A581PB99FF9416CC5C

BARBARA JAFFE, J.S.C.

3/6/2020
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE