

**Pustilnik v Sincere Care Agency, Inc.**

2020 NY Slip Op 33101(U)

September 21, 2020

Supreme Court, New York County

Docket Number: 154444/2018

Judge: Frank P. Nervo

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. FRANK P. NERVO**

**PART IAS MOTION 4**

*Justice*

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**INDEX NO. 154444/2018**

BORIS PUSTILNIK, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED WHO WERE EMPLOYED BY SINCERE CARE AGENCY, INC. AND ADVANCE HOME CARE, LLC D/B/A SINCERE CARE, ALONG WITH OTHER AFFILIATED ENTITIES,

**MOTION DATE 02/07/2020**

**MOTION SEQ. NO. 001**

Plaintiff,

- v -

**DECISION + ORDER ON MOTION**

SINCERE CARE AGENCY, INC, ADVANCE HOME CARE, LLC, AND/OR ANY OTHER RELATED ENTITIES

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

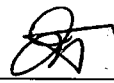
were read on this motion to/for DISCOVERY

Upon the foregoing documents, the motion is decided in accordance with the annexed decision and order of even date.

Any requested relief not addressed therein has nevertheless been considered and is hereby denied.

The parties are reminded that requests for further conferences must comply with Court Notice – Requesting a Remote/Virtual Conference (NYSCEF Doc. 47).

9/21/2020  
DATE

  
FRANK P. NERVO, J.S.C.

CHECK ONE:

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

APPLICATION:

CHECK IF APPROPRIATE:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, PART IV

-----X  
BORIS PUSTILNIK individually and on behalf of all  
other persons, similarly situated who were employed  
by SINCERE CARE AGENCY, INC. and ADVANCE  
HOME CARE d/b/a SINCERE CARE, along with  
other affiliated entities

DECISION AND ORDER  
Index No.  
154444/2018

Plaintiffs,

-against-

SINCERE CARE AGENCY, INC. and ADVANCE  
HOME CARE d/b/a SINCERE CARE, and/or any  
other related entities

Defendants.

-----X  
FRANK P. NERVO, J.S.C.

Plaintiffs move to compel defendants to provide pre-class discovery. Defendants  
oppose contending that the discovery sought is burdensome, the named plaintiff does  
not adequately represent the class, and the named plaintiff's brief employment prior to  
an arbitration agreement precludes discovery for putative class members who are  
parties to the agreement.

CPLR § 3124 provides that a party seeking disclosure may move to compel  
compliance or a response if the responding party fails to respond or comply with a  
request, notice, interrogatory demand or question pursuant to Article 31 of the CPLR.  
CPLR § 3101(a) directs that there "shall be full disclosure of all matter material and  
necessary to the prosecution or defense of an action, regardless of the burden of proof"  
(*Forman v. Henkin*, 30 NY3d 656, 661 [2018]). The test utilized is "one of usefulness  
and reason" (*id.*).

Here, as an initial matter, defendants were ordered to respond to plaintiffs' February 7, 2019 pre-class certification demands by October 18, 2019 (*see* Compliance Conference Order September 20, 2019 NYSCEF Doc. No. 13). It is undisputed that defendants failed to timely answer (*see* Plaintiffs' Deficiency Letter of October 22, 2019 NYSCEF Doc. No. 31). However, this motion to compel compliance was not filed until four months after defendants' response was due and after the deadline for pre-class discovery, as ordered by the Court (*id.*). As the Court of Appeals has repeatedly underscored, "our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice. The failure to comply with deadlines not only impairs the efficient functioning of the courts and adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conducts of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice law and Rules and a culture in which cases can linger for years without resolution" (*Gibbs v. St. Barnabas Hosp.*, 16 NY3d 74 [2010]).

Plaintiffs seek to compel defendants provide pre-class discovery, including wage and time/payroll records for a 10% sample of employees during the relevant time. Plaintiffs contend that defendants have been previously ordered to provide such discovery in various conference orders, yet have failed to do so (*see* Compliance Conference Order May 28, 2019, NYSCEF Doc. 10; Compliance Conference Order September 20, 2019, NYSCEF Doc. No. 13). Defendants oppose contending that the named plaintiff does not adequately represent the class because he worked for defendants for a three-week period, discovery of putative class members outside of this

period is therefore improper, the discovery sought amounts to thousands of pages and is burdensome, and putative class members are bound by a 2017 arbitration agreement and discovery after 2017 is consequently improper.

Defendants contend that the question raised by this motion, in part, is “whether a former employee who worked for an employer for only three weeks is entitled to the time and payroll records for hundreds of employees of six years” (Affirmation in Opposition ¶ 11, NYSCEF Doc. No. 37). This is not a question of first impression; the Appellate Division, First Department has held a named plaintiff’s comparatively shorter employment does not preclude the named plaintiff from serving as the proposed representative of the class (*Nawrocki v. Proto Constr. & Dec. Corp.*, 82 AD3d 534, 535 [1st Dept 2011]). Stated differently, the commonality and typicality requirements of CPLR §§ 901(a)(2) and (3), respectively, are not vitiated by a named plaintiff’s brief employment with defendant(s), nor is the class limited to the period in which a named plaintiff was employed by a defendant(s) (*id.*; see also *Williams v. Air Serve Corp.*, 2013 NY Slip Op. 31134(U) [Sup. Ct. Billings, J.] *aff’d* 121 AD3d 441 [1st Dept 2014]; *Mohamed v. Global Sec. Assoc., LLC*, 2016 NY Slip Op 30763(U) [Sup. Ct. Kern, J.]). Consequently, defendant’s contention that they need not produce discovery on this ground is error.

Defendants further contend that discovery of payroll records should occur after the named plaintiff’s deposition (Affirmation in Opposition ¶ 16, NYSCEF Doc. No. 37). Defendants argue that this is necessary to “ensure that the action has properly been commenced by the named plaintiff on behalf of other employees and that this is not a

naked attempt by Plaintiffs' counsel to utilize the class action process to find additional clients..." (*id.*). Defendants' position places a plaintiff in the impossible position of proving that which he or she cannot access. As applied here, defendants' position fails to consider that the named plaintiff does not have access to the defendants' payroll records for putative class members and *essentia* would require the named plaintiff meet the certification requirement of his claim prior to moving for class certification and without the benefit of discovery into the putative class' claim. This perverse outcome cannot stand. That the discovery sought may yield additional class members, as defendants suggest, is of no moment.

Finally, defendants contend that the discovery sought must be limited to prior to April 2017, as the Employee Handbook was modified at that time to include an arbitration agreement for all wage and hour claims. Notably, defendants have not cross-moved to compel arbitration and as such, this contention warrants no further discussion. The Court will not limit discovery on this basis under these circumstances.

Compliance with discovery deadlines requires a timely response and good faith effort to provide a meaningful response (*Kihl v. Pfeffer*, 94 NY2d 118, 123 [1999]). Disregard of discovery deadlines will not be tolerated (*Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C.*, 5 NY3d 514, 521 [2005]; *see also Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, 208 [2d Dept 2012]). Here it is uncontroverted that defendants have failed to provide the material sought for putative class members, limiting their production to the named plaintiff. This is improper, for the reasons stated above, and the material sought by plaintiffs is

relevant and necessary to their prosecution of this action and anticipated application to certify the class. As such, defendants shall provide the discovery sought by plaintiffs on this motion. Failure to comply with this decision and order may result in sanctions pursuant to CPLR § 3126, including but not limited to the striking of pleadings, in the Court's discretion upon further application.

Given the delay caused by defendants' failure to timely provide the above discovery, as well as the myriad impacts of COVID-19, the pre-certification discovery deadline is extended to January 29, 2021. Likewise, the deadline to file the Note of Issue is extended to April 30, 2021.

Accordingly, it is

ORDERED that the motion is granted, and defendants shall provide the discovery sought in plaintiffs' February 7, 2019 pre-class certification demands for the relevant time period, as defined therein, within 20 days of notice of entry of this decision and order; and it is further

ORDERED that failure to provide the discovery as ordered herein may result in sanctions, including, but not limited to, the striking of pleadings, in the Court's discretion upon further motion; and it is further

ORDERED that the pre-certification discovery deadline is extended to January 29, 2021, and the deadline to file the Note of Issue is extended to April 30, 2021; and it is further

ORDERED that further requests for conferences comply with the Court's Notice –  
*Requesting a Remote/Virtual Conference* (NYSCEF Doc. No. 47).

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: September 21, 2020

ENTER:



Hon. Frank P. Nervo, J.S.C.