

Jenack v Goshen Operations LLC
2021 NY Slip Op 32528(U)
May 11, 2021
Supreme Court, Orange County
Docket Number: Index No. EF008129-2018
Judge: Sandra B. Sciortino
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To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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WILLIAM JENACK, as Administrator of the Estate of MARY RICE and WILLIAM RAMLOW, as Administrator of the Estate of ADELINE RAMLOW, individually and on behalf of all others similarly situated,
Plaintiffs,

-against-

GOSHEN OPERATIONS LLC d/b/a SAPPHIRE NURSING AND REHAB AT GOSHEN, RICHARD PLATSCHEK, ESTHER FARKOVITS, MACHLA AMRAMCZYK and ROBERT SHUCK,
Defendants.

DECISION AND ORDER
INDEX NO.: EF008129-2018
Motion Date: 4/2/2021
Sequence No. 9

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SCIORTINO, J.

The following papers numbered 1 to 16 were read on this motion by defendants for an order staying defendants' preparation and service of a final class list, and staying plaintiffs' service of the Notice of Class Action to members of the class pending determination of defendants' appeal of the Decision and Order of this Court:

<u>PAPERS</u>	<u>NUMBERED</u>
Order to Show Cause/Affirmation (Thompson-Tinsley)/Defendants' Memorandum of Law/Exhibits A-D	1 - 7
Affirmation in Opposition (Sardesai-Grant)/Plaintiffs' Memorandum of Law/Exhibits 1-7	8 - 16

Oral argument on the motion was held on April 2, 2021.

Background and Procedural History

This putative class action alleges that defendants provided unsafe and inadequate care in a nursing home facility in violation of Public Health Law § 2801-d. By Decision and Order dated

February 11, 2019, defendants' motions for an order dismissing the complaint (Seq. #1) and for an order striking the pleadings of class certification and severing the claims of the individual plaintiffs (Seq. #2) were denied. By Decision and Order dated August 21, 2019, plaintiffs' motion for an order directing the entry of plaintiffs' Proposed ESI Discovery and Production Protocol (ESI protocol) and plaintiffs' Proposed Order for the Production and Exchange of Confidential and Protected Health Information (PHI order) was granted. The PHI order and ESI protocol both were so ordered that date.

By Decision and Order (Seq. #4) dated September 10, 2019, this Court certified the class as "all persons who reside or resided at the subject facility from September 1, 2017 through the present." Plaintiffs' law firm was appointed class counsel. Defendants filed a Notice of Appeal of the Decision and Order on October 1, 2019. (NYSCEF Doc. 102) That appeal has since been perfected but is not yet scheduled for argument.

On January 19, 2021, this Court issued a Decision and Order granting plaintiffs' motion 7, limiting the class period and approving the content and method of the proposed class notice; and denying defendants' motion 8, seeking allocation of costs associated with electronic discovery. The decisions were served by plaintiffs, with notice of entry, on February 2, 2021. On February 25, 2021, defendants filed a Notice of Appeal of those portions of the January 19, 2021 Decision and Order which denied the allocation of costs of production of electronically-stored information.

Defendant's Motion for Stay

By Order to Show Cause signed March 10, 2021, defendants seek a stay of their obligation to prepare and serve a final class list and a stay of plaintiffs' service of the Notice of Class Action, pending hearing and determination of the appeal of the September 2019 Order certifying the class. Defendants assert that they are in the process of preparing a final class list, including names, addresses, phone numbers and email addresses for a class anticipated to be between 800 and 900

individuals. Review of the more than 550,000 pages of documents produced is still underway by plaintiffs, while defendants continue to collect, process and review documents from the individual defendants. Defendants are also processing authorizations and compiling medical records and discovery related to the two named plaintiffs' decedents.

Defendants argue that a discretionary stay, pursuant to CPLR 5519(c) is appropriate in this matter. Reasons given include (a) defendants' appeal is meritorious; (b) further proceedings prior to the disposition of the appeal would cause defendants irreparable injury; and c) a balancing of the equities lies in favor of defendants.

Defendants' first argument relies on a matter decided by the Second Department on August 26, 2020, *Olmann v. Willoughby Rehabilitation and Health Care Center, LLC*, 186 AD3d 837. The *Olmann* decision was the first opinion from the Second Department concerning certification of a nursing home class action. Defendants contend that this matter should be similarly determined; *Olmann* forms the basis for defendants' briefs on appeal. According to the defendants, the cases from the Third and Fourth Departments, upon which plaintiffs relied in their motion for certification, are readily distinguishable and should not be followed.

The defendants see no prejudice to plaintiffs by a stay because discovery is continuing and can continue. The defined class will not change, whether the Notice of Class Action is served now or after the Appellate Division's decision. Accordingly, the putative members of the class will not be prejudiced.

In contrast, defendants will suffer irreparable harm, both in expenditure of time and expense for verification of the final class list and the necessary disclosure of residents' sensitive personal information. More importantly, service of the Notice of Class Action will irreparably harm defendants' good will and reputation in the community. A corrective notice, should the Appellate

Division de-certify the class, will do little to cure this. Moreover, a corrective notice would undoubtedly confuse the class members, including many elderly and infirm persons, or their families.

Should the matter not be stayed, and is ultimately reversed, some plaintiffs may be barred by the Statute of Limitations, thus demonstrating that both public interest and the equities lie in defendants' favor. Defendants have timely perfected their appeal and should be entitled to wait for the dispositive determination of the Second Department before incurring the harm that will ensue by service of the Class List and Notice of Class Action.

Opposition

Plaintiffs assert that defendants have not made the extraordinary showing required to obtain a stay of an interlocutory appeal. First, defendants' appeal lacks merits and is unlikely to succeed. This Court's determination was based on an analysis of the statutory factors of CPLR 901 and 902, and a finding that the factors all weighed in favor of certification. There is no reason to anticipate the Second Department will disregard its own precedent that the determination to grant certification is vested in the discretion of the trial court.

The *Olmann* decision relied upon by defendants is easily distinguishable from the facts at bar. In *Olmann*, plaintiff proffered testimony from only one witness; in this matter, 13 witnesses attested to the claims. More importantly, the *Olmann* trial-level decision denied certification of the negligence claims asserted by plaintiffs, but the denial of certification of the PHL §2801-d claims was made without prejudice and with leave to renew after pre-certification discovery, compelled in the same order. The Second Department upheld that determination, finding that the class certification should await pre-certification discovery.

In this matter, there is no negligence claim. Further, plaintiffs point out, in 2014, the Fourth Department denied a motion to stay pending an appeal of class certification on facts essentially

identical to the facts at bar (claims based on understaffing at a nursing home). Even before that, in 2003, the Third Department reversed the denial of certification of a class of nursing home residents asserting PHL §2801-d claims; the First Department did the same in 2018. Understaffing claims require facility-wide, not individual, analysis. Plaintiffs conclude that defendants cannot show that they are likely to succeed on the merits of the appeal.

Moreover, plaintiffs and the Class would be irreparably harmed by a stay. Any stay this Court might issue would, of necessity, last for a year or more.¹ The Class members will not be alerted to their rights, including the right to opt out and pursue individual litigation, a right which has been recognized by the Court of Appeals as requiring timely action. Moreover, the simple passage of time will impair plaintiffs' and the Class' ability to discover relevant testimony, while service of the Class Notice will lead to the discovery of witnesses with relevant testimony.

In contrast, the harm defendants assert they would suffer, that is, the costs of producing the final Class List, does not constitute irreparable harm. In fact, defendants advised plaintiffs that the remaining work, the addition of phone numbers, could probably be completed within a week. The claim that defendants' good will and reputation would suffer is not only unsupported, but ignores the reality that their reputation has already been damaged.

The argument that certain plaintiffs may face statute of limitations issues is incorrect, as the commencement of a class action tolls the running of the statute for all purported members of the class. Nor is there any support for defendants' claims that confusion would ensue from a de-certification. Rather, the public interest lies in the speedy assertion of residents' rights against the facilities that control virtually their entire existence.

¹Plaintiffs suggest it is unlikely that the appeal will be heard until at least March 2022. The delay will mean that numerous members of the Class will pass away or become too ill to participate in discovery.

No reply submissions were filed.

The Court has considered the arguments of the parties.

DISCUSSION

For the reasons which follow, defendants' application for a stay pending appeal is denied.

CPLR 2201 authorizes the court to stay a matter "in a proper case, upon such terms as may be just." CPLR 5519(c) applies to stays of enforcement of orders pending appeal. In entertaining an application for a stay, the court must consider four factors: (1) the likelihood that the applicant would prevail on the merits of the appeal; (2) irreparable injury to the applicant unless the stay is granted; (3) no substantial harm to other interested persons; (4) no harm to the public interest. (*Matter of City of New York v. Public Serv. Comm. of State of N.Y.*, 12 NY 2d 786 [1962]) A stay is not a matter of right, but an exercise of judicial discretion. The party requesting a stay bears the burden of showing that the circumstances justify an exercise of the court's discretion. (*Nken v. Holder*, 556 US 418, 433-34 [2009], quoting, *Virginian Ry. Co. v. U.S.*, 272 US 658 [1926]) The moving party must make a demonstration upon clear and convincing evidence (*Family-Friendly Media, Inc. v. Recorder Tel. Network*, 74 AD3d 738, 739 [2d Dept 2010]) and must establish that the stay is necessary to prevent some serious harm, injustice, prejudice, loss, etc. (*Bovis Lend Lease LMB, Inc. v. Garito Contracting, Inc.*, 2008 WL 4685291 at hn 1 [NY Co. 2008])

In the matter at bar, defendants have not sustained their burden.

Likelihood of Success on the Merits

Section 901 of the CPLR governs the formation of a class, and requires a court considering an application to certify a class to consider whether, *inter alia*, (1) the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable; (2) there are questions of law or fact common to the class which predominate over any questions affecting only

individual class members; and (3) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The proponent of class certification bears the burden of establishing the criteria, but, whether the facts presented on a motion for class certification satisfy the statutory criteria, is within the sound discretion of the trial court. (*City of New York v. Maul*, 14 NY 3d 499 [2010]; *Pludeman v. Northern Leasing Systems, Inc.*, 74 AD3d 420, 422 [2d Dept 2010])

Defendants have taken and perfected an appeal to the Second Department of this Court's September 10, 2019 Order certifying the class in this action. The thrust of defendants' argument is the matter of *Olmann v. Willoughby Rehabilitation and Health Care Center LLC*, 186 AD3d 837 [2d Dept 2020]), decided subsequent to this Court's Order.

The Second Department in *Olmann* upheld the decision of the Kings County Supreme Court denying certification of a putative class of nursing home residents whose claims included Public Health Law §2801-d claims, also claimed by the plaintiffs in the matter at bar. The Appellate Division found that the Supreme Court "providently exercised its discretion in denying [plaintiff's] motion for class certification" in that common questions of law or fact do not predominate over questions involving members of the proposed class as to causation; nor had plaintiff demonstrated that a class action is superior to other available methods of adjudication. (*id.* at 839) Defendants argue here, and have argued to the Appellate Division, that the same result is warranted.

However, such a conclusion would take the *Olmann* determination somewhat out of context. Before the trial court, plaintiffs in *Olmann* asserted claims of common law negligence and violations of the Public Health Law. (See Exhibit 4 at 16) The trial court found that the negligence claim failed to satisfy the commonality requirement of CPLR 901(a) because of the necessity for particularized consideration of liability and damages. It dismissed the motion for class certification of the common

law negligence claim with prejudice.

However, the motion for certification of the PHL §2801-d claim was denied upon a finding that there was insufficient evidence that a class action was the superior method of adjudicating the claim. Leave to renew after pre-certification discovery was afforded. (Exhibit 4 at 17, 19) The balance of the trial court's determination and the portion that was modified by the Appellate Division was focused on discovery.

The Second Department did not disturb the trial court's findings on class certification. (186 AD3d at 839)

The Third Department underwent a similar analysis in *Fleming v. Barnwell Nursing Home & Health Facilities*, 309 AD2d 1132 [2003]. Plaintiffs again made claims for common law negligence and violations of the Public Health Law. As the Second Department did in *Olmann*, the Third Department found that questions of causation and damages demonstrated a lack of common question predominance and denied class certification of that claim. However, the PHL §2801-d claim, which focused on alleged inadequate heat and inedible food, was certified. Significantly, the *Fleming* Court found that "[t]he predominance requirement may be satisfied even if not all class members were subjected to the all the improper conduct." (*id.* at 1133-34) [citations omitted]

"Typicality and commonality require, at least, a comparison between the experiences and claims of the name plaintiff...and the experiences and claims of other putative members of the class." (*Pascucci v. Absolut Center for Nursing and Rehabilitation at Allegany, LLC*, 2014 WL 7912858 [Erie Co. 2014]) In *Pascucci*, plaintiffs sought to certify a class of residents of eleven facilities based on the experience of plaintiff's decedent at only one of the facilities. The Court declined to extend the class beyond the one facility where plaintiff's decedent had resided and limited the class to those residents of that facility during the same time frame as decedent. The Court did *not* decline

to certify the class, but rather tailored it, to protect the predominance of common questions.

In this matter, plaintiffs' claims are targeted at only one facility. This Court, in narrowing the time frame of the class from "the [ongoing] present" to a date certain, similarly protected the commonality of the claims. Thus, while defendants assert that the individual analysis necessary to establish the claims of the members of the class precludes certification, that has not been the position of the Courts.

On that basis, the Court cannot find that the likelihood of success on the appeal is high.

Finally, at least one trial court has found that a lower court should grant a stay pending appeal "only where the appellate court's decision is imminent." (*Maggio v. Town of Hempstead*, 2015 WL 13047744 [Nassau Co. 2015]) This decision does not in any way suggest that defendants' goal is delay (*Compare, Herbert v. City of New York*, 126 AD2d 404 [1st Dept 1987]) and notes that the appeal has been fully submitted by appellants. While the Court maintains optimism that the efforts to streamline the calendars at the Appellate Division will continue, it cannot be reasonably claimed that a decision is "imminent."

Irreparable Harm

Even if this Court were more convinced of the likelihood of a reversal, the Court cannot find irreparable harm to be suffered by defendants if a stay is not granted. Defendants assert first that the necessity of completing the final class list and continuing other discovery will be expensive; the Court has no doubt this is so. However, economic loss which is compensable by money damages does not constitute irreparable harm. (*Family-Friendly Media, Inc.*, 74 AD3d at 739) If defendants are ultimately successful, those costs will be reimbursable to them, and there is nothing in the submissions to establish that defendants will not have an adequate remedy in the form of monetary damages, even if that cost is capable of calculation only with difficulty. (*John G. Ullman & Assoc.*,

Inc. v. BCK Partners, Inc., 139 AD3d 1358 [4th Dept 2016])

Defendants additionally claim that the secure information of their residents will be subject to public exposure, and the defendants themselves will suffer the loss of goodwill and reputation. However, irreparable harm must be “imminent, not remote or speculative.” (*Family-Friendly Media, Inc.*, 74 AD3d at 739) Defendants’ conclusory affirmations do not point to any imminent or non-speculative harm that would occur in the absence of a stay. (*Id.* at 740)

This criterion, too, militates against a stay.

Public Policy

Defendants argue that the balance of the equities and public policy weigh in favor of a stay. However, a principal part of that argument centers on the claim that a subsequent de-certification and corrective notice may foreclose the claims of individual defendants by the expiration of the statute of limitations. The Court finds no merit in that argument. Rather, New York has adopted the federal class action rule which provides that the commencement of a class action tolls the running of the statute of limitations for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status. (*Osarczuk v. Associated Universities, Inc.*, 130 AD3d 592, 595 [2d Dept 2015]) As a matter of law, tolling ends only when there is a clear dismissal of a putative class action, including a denial of class certification for any reason. (*Bermudez Chavez v. Occidental Chem. Corp.*, 35 NY 3d 492, 508 [2020]) If defendants are successful in the Appellate Division, the residents’ rights will be protected.

Public Health Law section 2803-c, protecting the rights of patients in certain medical facilities, provides, in relevant part, that “every patient shall have the right to receive adequate and appropriate medical care...” PHL §2803-c(3)(e) The principles enunciated in that section “are declared to be the public policy of the state...” PHL §2803-c(1)

Public policy demands that these determinations be made as soon as possible.

On the basis of the foregoing, defendants' application for a stay pending appeal is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: May 11, 2021
Goshen, New York

ENTER:



HON. SANDRA B. SCIORTINO, J.S.C.

TO: *Counsel of Record via NYSCEF*