

Cumbo v Shubert Org., Inc.

2023 NY Slip Op 33456(U)

October 5, 2023

Supreme Court, New York County

Docket Number: Index No. 151028/2023

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 04

Justice

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RASHAMELLA CUMBO

Plaintiff,

- v -

THE SHUBERT ORGANIZATION, INC.,

Defendant.

-----X

INDEX NO. 151028/2023

MOTION DATE 06/27/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 13, 15, 16, 17, 18, 19

were read on this motion to/for ORDER MAINTAIN CLASS ACTION.

Plaintiff seeks this Court to certify the following class: “All disabled individuals who are presently or were formerly employed as ushers by The Shubert Organization, Inc. from October 1, 2021 to November 30, 2022 that Defendant failed to accommodate and/or subjected to adverse employment action for their inability to take the Covid-19 vaccine due to their disability”. Defendant opposes and has requested oral argument on the motion. The Court finds oral argument is unnecessary on this application.

CPLR §§ 901 and 902 set forth the requirements and considerations for certification of class-actions, to wit: “(1) that the class is so numerous that joinder of all members is impracticable (numerosity); (2) questions of law or fact common to the class predominate over questions of law or fact affecting individual class members (commonality); (3) the claims or defenses of the class representatives are typical of those in the class (typicality); (4) the class representatives will fairly and adequately protect the interests of the class

[(adequacy)]; and (5) a class action represents the superior method of adjudicating the controversy (superiority)” (*Pludeman v. Northern Leasing Sys., Inc.*, 74 AD3d 420 [1st Dept 2010]). The party seeking class certification bears the burden of establishing the CPLR 901 criteria through nonconclusory admissible evidence (*id.*; *Feder v. Staten Is. Hosp.*, 604 AD2d 470 [2003]; *Chimenti v. American Express Co.*, 97 AD2d 351 [1983]). When determining whether proceeding as a class action is appropriate, the Court considers whether the claim is meritorious (*Brandon v. Chefetz*, 106 AD2d 162, 168 [1st Dept 1985]). However, this inquiry is limited, and class certification is appropriate if “on the surface there appears to be a cause of action which is not a sham” (*id.*).

The motion is denied as plaintiff has failed to establish the CPLR 901 criteria by nonconclusory evidence. Notably, this class certification motion was filed approximately four months after the summons and complaint (see NYSCEF Doc. Nos. 1 and 6), and the parties requested a preliminary conference – ostensibly due to outstanding discovery – during the briefing schedule of this motion (NYSCEF Doc. No. 14).

Turning to the CPLR 901 criteria, first, the class is not so numerous that joinder of all members is impracticable. Plaintiff has not provided any nonconclusory evidentiary support for her claim that the class comprises 40 individuals. Indeed, although defendant does not bear the burden of establishing the numerosity of the class, defendant has submitted evidence that only three ushers employed by defendant sought vaccination accommodation for medical reasons, i.e. disability.

Second, the circumstances surrounding each employee's accommodation request differ and named plaintiff has asserted claims sounding in racial discrimination, claims absent from the purported class. Thus, the claims of the class representative are not representative of the purported class. Relatedly, it, therefore, cannot be said that questions of law or fact common to the class predominate over questions of law or fact affecting individual class members.

Accordingly, it is

ORDERED that the motion is denied; and it is further

ORDERED that the request for preliminary conference does not comport with the Part Rules, which require the submission of a joint proposed discovery order when requesting a conference; and it is further

ORDERED that counsel shall confer and shall, in accordance with the Part Rules, file a single joint proposed discovery order addressing all known outstanding discovery via NYSCEF with courtesy copy to chambers, within 20 days of this order; and it is further

ORDERED that to the extent the parties cannot reach agreement on outstanding discovery, they shall file, contemporaneously with the proposed discovery order above, a single joint letter addressing the disputed discovery and the parties' positions thereto; and it is further

ORDERED that the failure to timely file, with courtesy copy, the above joint proposed discovery order and/or letter shall constitute waiver of any objection

to the Court issuing a discovery order sua sponte, the discovery ordered therein, and waiver of discovery sanctions.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT

10/05/2023
DATE


HON. FRANK P. NERVO

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

J.S.C.

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE