

**Smith v ZocDoc, Inc.**

2023 NY Slip Op 33587(U)

October 12, 2023

Supreme Court, New York County

Docket Number: Index No. 158451/2021

Judge: Leslie A. Stroth

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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. LESLIE A. STROTH PART 12**

*Justice*

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ROLLAND SMITH INDIVIDUALLY AND ON BEHALF OF  
ALL OTHER PERSONS SIMILARLY SITUATED WHO  
WERE EMPLOYED BY ZOCDOC, INC., AND RELATED  
OTHER AFFILIATED ENTITIES,

Plaintiff,

- v -

ZOCDOC INC., AND RELATED OR AFFILIATED ENTITIES,

Defendant.

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INDEX NO. 158451/2021  
MOTION DATE 06/27/2023  
MOTION SEQ. NO. 004

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81

were read on this motion to/for DISCOVERY.

In this action, plaintiff Rolland Smith (plaintiff), along with putative class members, sue ZocDoc, Inc., and related entities (collectively, defendants or ZocDoc) for unpaid wages based on allegations that ZocDoc improperly classified plaintiff, and others similarly situated, as independent contractors instead of employees and that it failed to pay overtime wages pursuant to New York Labor Law.

**I. Background**

On December 8, 2020, the Department of Labor found that defendants had improperly classified plaintiff as independent contractor, and, for purposes of unemployment insurance, he should have been classified an employee. *See* NYSCEF doc. no. 69. This action for unpaid wages and overtime compensation ensued by plaintiff's filing of the summons and complaint on September 12, 2021.

On January 22, 2022, plaintiff Rolland Smith moved to certify this action as a class action. By decision and order dated July 21, 2022, Justice Barbara Jaffe stayed plaintiff's motion pending pre-certification discovery. *See* NYSCEF doc. No. 90. Specifically, Justice Jaffe noted that pre-certification discovery was necessary as to determine the potential size of the class. She held that, "[a]s discovery will reveal the number of employees that may constitute the class and whether they performed work similar to plaintiff's work, which bears directly on whether plaintiff satisfies the numerosity and commonality requirements for class certification, pre-certification discovery is warranted." *Id.* (citations omitted).

## II. Motions for Protective Orders and to Compel

By notice of motion, defendant ZocDoc moves for a protective order against plaintiff's demand for documents and answers to interrogatories requesting a potential class list identifying the full names of putative class members and their contact information (Plaintiff's Request for Document Production Nos. 1-11, 17 and Interrogatories Nos. 4, 5, 6, 10, 11, 13, 17). As such, ZocDoc seeks a protective order against the additional information sought as to these potential class members, including individualized information and documentation relating to all their engagements, assignment histories, hours worked, compensation structure and rate, deductions from pay assignments requested, and benefits received, among other things. ZocDoc argues that providing confidential information about potential class members would be inappropriate and premature.

ZocDoc also moves to compel production of certain documents and answers to interrogatories related to plaintiff's individual claims that he was misclassified as an independent contractor. Specifically, ZocDoc seeks responses for the following:

- **Interrogatory No. 9** asks Plaintiff to state “all jobs, including but not limited to any photography jobs, that Plaintiff worked from October 5, 2016 through present” and provide the name and address of each client or employer, date(s) of job or employment, and amount of compensation.

Plaintiff objects to Interrogatory No. 9 arguing that it is vague, ambiguous, overly broad, unduly burdensome, and not reasonably tailored to lead to the discovery of information that is material and necessary to the claims and defenses of this action.

- **Document Request No. 6** asks for “[a]ll documents relating to or reflecting any expenses that Plaintiff incurred as a photographer during the period October 5, 2016 through present.”
- **Document Request No. 7** asks for “[a]ll documents relating to or reflecting any photography equipment purchases or rentals that Plaintiff incurred during the period October 5, 2016 through present.”
- **Document Request No. 8** asks for “[a]ll documents relating to or reflecting any photography jobs or sessions that Plaintiff completed as a photographer for any client during the period October 5, 2016 through present.”
- **Document Request No. 9** asks for “[a]ll documents relating to or reflecting any promotional, marketing or advertising efforts undertaken for the benefit of Plaintiff’s photography business during the period October 5, 2016 through present.”
- **Document Request No. 10** asks for “[a]ll plaintiff’s federal state and local tax records, filings and submissions during the period October 5, 2016 through present.”
- **Document Request No. 12** asks for “[a]ll documents containing, describing, referring to, or relating to the compensation paid to Plaintiff by any client, entity or person other than ZocDoc during the period October 5, 2016 through the present.”

Plaintiff objects to Document Requests Nos. 6-10 and 12 arguing that they are overbroad and seek documents not material or necessary to the claims and defenses in this action, and declined to produce information or documents in response.

Plaintiff further objected to ZocDocs’ Document Requests Nos. 1, 5, 2-4, 6-11, 12-30, on to the extent that it is overbroad and seeks documents not material or necessary to the claims and defenses in this action. Nevertheless, in his response to these document requests, plaintiff also states that subject to his objections, he will produce non-privileged documents in its possession in response that are relevant to the claims and defenses in this action. ZocDoc argues that plaintiff’s response, which both objects to providing the documents and also agrees to produce certain documents on a qualified basis, is contradictory and unclear. Accordingly, defendants now seek to

strike plaintiff's responses to these document requests and to compel plaintiff to serve new responses which clarify the documents that are objected to, and upon what basis, and the documents that are not provided because they do not exist.

Plaintiff opposes ZocDoc's motion, arguing, in addition to the objections outlined above, that defendant demands information that indicates an attempt to re-litigate plaintiff's employment status with defendant, which it maintains was already determined by the Department of Labor. *See* NYSCEF doc. no. 69. Plaintiff argues that the Department of Labor deemed plaintiff an independent contractor, and, therefore, no discovery on this issue needs to be exchanged given the previous adjudication. As such, plaintiff seeks a protective order in its favor to prevent further discovery on plaintiff's employment status, which it argues has been determined. Plaintiff also cross-moves to compel the information demanded regarding the putative class members, which is relevant to the class certification and with which defendant take issue.

### III. Analysis

CPLR 3101 (a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." However, "...unlimited disclosure is not mandated, and the rules provide that the court may issue a protective order 'denying, limiting, conditioning or regulating the use of any disclosure device' to 'prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts'." *Suchorzepka v Mukhtarzad*, 103 AD3d 878, 879 (2d Dept 2013), quoting *County of Suffolk v Long Is. Power Auth.*, 100 AD3d 944, 946 (2012), citing CPLR 3103. "The delicate balance between allowing liberal disclosure and protecting the parties from unnecessary intrusions, is left to the sound discretion of the lower courts." *Sgambelluri v Recinos*, 192 Misc 2d 777, 779

(Sup Ct, Nassau County 2002), citing *Andon ex rel. Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745 (2000).

CPLR 3103 (a) provides: “The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or any other prejudice to any person or the courts.” *See also Bassett v Bando Sangsa Co., Ltd.*, 94 AD2d 358, 360 (1st Dept 1983) (stating that “the dispositive criteria is dependent upon the particular facts and circumstances involved and whether the disclosure sought is abusive, i.e., whether it results in unnecessary expense, annoyance, embarrassment or prejudice so as to justify court intervention.”).

#### **A. Plaintiff's Demands**

ZocDoc argues that plaintiff's demands are overbroad and burdensome and that tailored discovery demands would be more appropriate for pre-certification discovery. ZocDoc also emphasizes its concern with the potential solicitation of clients and stirring of litigation by providing plaintiff's counsel with a list of the full names and contact information for all potential class members. ZocDoc suggests that plaintiff should first serve interrogatories concerning defendant's policies and practices regarding its independent contractor photographers and/or conduct a corporate representative deposition, which would more appropriately tailor the scope of the pre-certification discovery by less burdensome means. *See e.g. Beaton v Verizon New York, Inc.*, 20-CV-672 (BMC), 2020 WL 6449235, at \*3 (ED NY 2020).

Plaintiff argues that, as already held by Justice Jaffe, he is entitled to pre-certification discovery with respect to the issue of numerosity and commonality, which may lead to the use of further discovery mechanisms such as pre-certification depositions. Plaintiff correctly notes that

pre-certification discovery is permissible and has been directed here. However, Justice Jaffe did not direct the method or means of the discovery.

The Court finds that a more tailored means of discovery is appropriate, at least for the early stages of the pre-certification discovery. Although the documents and information demanded by plaintiff may be relevant, they are overbroad in scope and would result in the unnecessary exchange of potentially prejudicial information. Therefore, the Court adheres to the line of cases which decline to direct identifying information of putative class members prior to class certification. *See Chimenti v Am. Express Co.*, 97 AD2d 351, 352, (1st Dept 1983) (reversing lower court's order directing defendant to produce names and addresses of all potential class members prior to class certification); *Nichols v Noom Inc.*, 2021 WL 4150184, at \*2 (SD NY 2021) (“[C]ourts often refuse to allow discovery of class members' identities and contact information at the pre-certification stage of a litigation”).

Accordingly, ZocDoc's motion for a protective order is granted, and ZocDoc need not respond to plaintiff's Request for Production Nos. 1-11, 17 and Interrogatories Nos. 4, 5, 6, 10, 11, 13, 17. For the same reasons, plaintiff's cross-motion to compel these responses is denied. However, the protective order is without prejudice to plaintiff's right to serve interrogatories concerning defendant's policies and practices regarding its independent contractor photographers and/or to conduct a corporate representative deposition. Following the receipt of defendant's responses to these demands, should further pre-certification discovery be required, the parties may contact the Court to schedule a conference, per the Part Rules, to explain in detail why additional information is required at the class certification stage.

## B. Defendant's Demands

ZocDoc also seeks to compel responses to document requests and interrogatories related to plaintiff's individual claims that he was misclassified as an independent contractor (Defendant Document Requests Nos. 6-10 and 12 and Interrogatory 9). ZocDoc argues that the responses would, for example, reveal the extent to which plaintiff was providing services or working for other clients as an independent contractor or employee. This information bears directly on whether plaintiff worked at his own convenience, was free to work for other clients and whether he was on a fixed schedule, all critical inquiries for determining whether he is an independent contractor or not. *See Franze v Bimbo Bakeries USA, Inc.*, 826 Fed Appx 74, 76 (2d Cir 2020).

Plaintiff objects to providing this information, as he argues that a determination has already been made by the Department of Labor on this issue, and that additional discovery is merely an attempt to re-litigate the issue of plaintiff's employment status. This Court finds otherwise. The Department of Labor decision relates to the issuance of unemployment insurance benefits, not unpaid wages and overtime compensation pursuant to the Labor Law. Further, whether the Department of Labor decision estops defendant's argument as to the classification of plaintiff's employment is a separate issue to be briefed regarding the issues of a collateral estoppel and res judicata. Similarly, the Court declines to grant a protective order on the basis of the Department of Labor's decision, as same would be premature given that no ruling has been made that collateral estoppel or res judicata applies here.

With respect to the discovery motion herein, which requires full disclosure of all matter material and necessary to maintain an action, ZocDoc is entitled to responses to Defendant Document Requests Nos. 6-10 and 12 and Interrogatory 9. Plainly, these responses are relevant

to plaintiff's individual claim and to whether he will "fairly and adequately protect the interests of the class," as required for class certification. CPLR 901 (4).

Finally, with respect to plaintiff's objections to ZocDoc's Document Requests Nos. 1, 5, 2-4, 6-11, 12-30, the Court finds them to be vague and unclear, as they are internally inconsistent and are unclear as to unclear what will be provided, the objections to the that will documents not provided, and whether certain documents exist but are not being provided. As such, the Court strikes plaintiff's objections to ZocDocs' Document Requests Nos. 1, 5, 2-4, 6-11, 12-30, and compels plaintiff to revise his responses to provide further clarity and comport with the holding and spirit of this decision and order.

**IV. Conclusion**

Accordingly, it is

ORDERED that defendant ZocDoc, Inc.'s motion to compel and for a protective order is granted, as detailed above; and it is further

ORDERED that plaintiff Rolland Smith's cross-motion to compel and for a protective order is denied; and it is further

ORDERED that the matter shall be scheduled by the Part Clerk for a discovery conference on the next available date in Room 308, 80 Centre Street, New York, New York.

The foregoing constitutes the decision and order of the Court.

10/12/2023

DATE

  
LESLIE A. STROTH, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: