

Lavrenyuk v Life Care Servs., Inc.

2025 NY Slip Op 33154(U)

August 22, 2025

Supreme Court, New York County

Docket Number: Index No. 156393/2017

Judge: David B. Cohen

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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: _____ PART 58

Justice

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OLENA LAVRENYUK, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED

Plaintiff,

- v -

LIFE CARE SERVICES, INC.,

Defendant.

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INDEX NO. 156393/2017

MOTION DATE 11/07/2023

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 242, 248

were read on this motion to/for MISCELLANEOUS

In this post-class certification wage-and-hour action, defendant moves to modify the certified class definition to exclude individuals who signed arbitration agreements in 2016 and 2020 containing class and collective action waivers. Plaintiff opposes, asserting waiver and prejudice, and further moves to strike a new argument first raised in defendant's reply papers.

I. PROCEDURAL BACKGROUND AND FACTS

Plaintiff commenced this action on July 17, 2017, on behalf of herself and similarly situated home health aides, alleging violations of the New York Labor Law and related statutes (NYSCEF 1). During pre-certification discovery, plaintiffs requested documents signed by putative class members relating to any waiver of rights; defendant did not produce or identify the arbitration agreements now at issue in response (NYSCEF 207, 225).

On September 21, 2020, plaintiffs moved for class certification (NYSCEF 83-99). Defendant opposed, referencing arbitration in a single paragraph and submitting four redacted agreements, but did not move to compel arbitration (NYSCEF 103-131). By Decision and Order

dated June 28, 2021, the court granted certification of a class of approximately 1,961 members and directed notice (NYSCEF 170), which was issued to class members on August 30, 2021 (*id.*).

The First Department affirmed the certification order (198 AD3d 569 [1st Dept 2021]), and the Court of Appeals denied leave to appeal (38 NY3d 1021 [2022]).

Following certification, the parties conducted post-certification discovery and mediation. Defendant did not raise arbitration until filing this motion on November 7, 2023, when it produced agreements dated 2016 and 2020 and moved to exclude all signatories from the certified class (NYSCEF 191).

II. DISCUSSION

A. Party Contentions

Defendant contends that individuals who signed arbitration agreements containing class and collective action waivers cannot remain in the certified class. Defendant argues that enforcement of the agreements is required, and that exclusion does not compel arbitration but merely recognizes the binding effect of those contracts.

Plaintiffs oppose, arguing that defendant waived reliance on the agreements by litigating for over six years without raising arbitration, despite multiple opportunities to do so in its pleadings, discovery responses, and appeals. Plaintiffs emphasize that defendant failed to produce the agreements in discovery despite specific requests for waivers or releases, and that exclusion now would prejudice class members who already received notice and relied on certification as affirmed on appeal.

In reply, defendant for the first time cites CPLR 902 as an independent statutory basis for modification, asserting that no decision on the merits has yet been rendered and therefore

alteration of the certification order is proper. Defendant further asserts that plaintiffs cannot show prejudice because they did not challenge the validity of the agreements in their opposition.

B. Applicable Law and Analysis

As an initial matter, it is well settled that a movant may not raise a new argument in reply, as doing so deprives the opposing party of the opportunity to respond (*Sabine v State*, 43 NY3d 1015 [2024]; *Sherman v Zampella*, 213 AD3d 545, 546 [1st Dept 2023]; *Simon v FrancInvest, S.A.*, 192 AD3d 565, 569 [1st Dept 2021]). Accordingly, defendant's CPLR 902 argument is not considered.

Turning to the arbitration agreements, “[l]ike contract rights generally, a right to arbitration may be modified, waived or abandoned” (*Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66 [2007]). Waiver occurs when a party's litigation conduct is clearly inconsistent with later reliance on arbitration (*id.*). In assessing waiver, courts consider the amount of litigation, the length of delay, and the resulting prejudice, the latter being the critical element (*Cusimano v Schnurr*, 26 NY3d 391, 400 [2015]). Prejudice may arise from the costs and delay associated with litigating in court for years before arbitration is raised (*id.*), as well as from undermining prior proceedings through belated reliance on arbitration, such as class certification and completed notice (*Weinstein v Jenny Craig Operations, Inc.*, 132 AD3d 446 [1st Dept 2015]).

The First Department has accordingly found waiver where defendants engaged in motion practice and discovery for extended periods before raising arbitration (*Black Rhino Invs. LLC v Wilson*, 160 AD3d 531 [1st Dept 2018]; *JSBarkats PLLC v Response Scientific Inc.*, 149 AD3d 652 [1st Dept 2017]), and has declined to enforce arbitration agreements executed after litigation commenced where enforcement would prejudice class members (*Weinstein*, 132 AD3d at 446).

Defendant's characterization of its request as class modification rather than a motion to compel arbitration does not alter the analysis, as exclusion of class members based on arbitration agreements is a form of enforcing those agreements and remains subject to waiver principles (*Weinstein*, 132 AD3d at 446; *Stark*, 9 NY3d at 66).

Here, defendant did not produce or rely on arbitration agreements until November 2023, more than six years after this action commenced. During that time, defendant answered, engaged in pre- and post-certification discovery, opposed and appealed certification, petitioned for leave to appeal, and participated in settlement conferences, all without raising the arbitration issue. Although plaintiffs' discovery requests specifically sought any documents referring to waivers or releases, defendant did not produce the agreements. By the time arbitration was raised, certification had been affirmed by the First Department and notice had been sent to approximately 2,000 class members.

Modification at this stage would therefore undermine those proceedings and prejudice plaintiffs, who litigated for years without notice that arbitration would be asserted. The fact that some agreements were executed after the lawsuit began further raises enforceability concerns in the class context (*see Weinstein*, 132 AD3d at 446 [declining to enforce arbitration agreements executed after litigation commenced where enforcement would prejudice class members]).

Considering the totality of circumstances, defendant's prolonged litigation conduct, the delay, and the prejudice to plaintiffs, defendant has waived its reliance on the arbitration agreements, and the motion to modify the class definition is denied.

Even if defendant's CPLR 902 argument was considered, it would not provide a basis for modification, as modification of a certification order is warranted only upon a change of circumstances or newly discovered facts (*see Pruitt v Rockefeller Ctr. Props., Inc.*, 167 AD2d

14, 21 [1st Dept 1991]; *Weinberg v Hertz Corp.*, 116 AD2d 1, 7 [1st Dept 1986]), which are not present here.

III. CONCLUSION

Accordingly, it is hereby

ORDERED that defendant’s motion to modify the class definition is denied in its entirety; and it is further

ORDERED that plaintiffs’ request to strike the CPLR 902 argument first raised in defendant’s reply papers is denied as academic; and it is further

ORDERED that the parties appear for a status conference on October 14, 2025 at 9:30 a.m.

HON. DAVID B. COHEN
J.S.C.

S/

8/22/2025
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE