SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

- X

AVRAHAM GOLD, BRIAN CHENENSKY, and SHEREE N. JOHNSON, individually, and on behalf of all others similarly situated,

Plaintiffs,

-against-

NEW YORK LIFE INSURANCE CO., NEW YORK LIFE INSURANCE AND ANNUITY CORP., NYLIFE INSURANCE CO. OF ARIZONA, NYLIFE SECURITIES LLC (f/k/a NYLIFE SECURITIES INC.), JOHN DOES 1-50 (said names being fictitious individuals), and ABC CORPORATIONS 1-50 (said names being fictitious companies, partnerships, joint ventures and/or corporations),

Defendants.

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DECISION AND ORDER
Index No.: 653923/2012

Motion Seq. No.: 005

O. PETER SHERWOOD, J.:

This action was commenced as a putative class action brought on behalf of plaintiff and similarly situated employees who claim wage deductions in the form of business expense debits owed by defendants New York Life Insurance Co., New York Life Insurance and Annuity Corp., NYLIFE Securities LLC, and NYLIFE Insurance Co. of Arizona (collectively, NYL), in violation of Labor Law § 193. Plaintiffs move, pursuant to CPLR 901, to certify two classes defined as follows:

> "(1) The 'TAS Class' comprises every person who worked for Defendants in the State of New York at any time since December 21, 2001 as a TAS Agent, i.e., under an Agent's Contract modified by a Training Allowance Subsidy Plan Agreement; and
>
> (2) The 'EA Class' comprises every person who worked for Defendants in the State of New York at any time since December 21, 2001 as an Established Agent, i.e., under an Agent's Contract unmodified by a Training Allowance Subsidy Plan Agreement;
>
> Provided that any periods of work as Defendants' retired agent, corporate agent or sub-agent, partner, senior partner, or managing partner, are excluded from either Class defined above"

(plaintiffs' memorandum of law in support, New York State Courts Electronic Filing System [NYSCEF] Doc. No. 160 at 3).

BACKGROUND

In a prior decision in this case, familiarity with which is presumed, *Gold v New York Life Ins. Co.* (2015 NY Slip Op 31699 [U] at *1 [Sup Ct, NY County 2015], *mod* 153 AD3d 216 [1st Dept 2017, *revd* 32 NY3d 1009 [2018]), this court stated:

> "NY Life is a mutual insurance company that sells life insurance, annuities, and other financial products. Plaintiffs were formerly employed by NY Life as insurance agents. They purport to bring this suit on their own behalf, and on behalf of a class that consists of all insurance agents employed by NY Life in the State of New York at any time between December 21, 2001, and the date when judgment is entered in this action."

Every NYL agent signed an Agent's Contract upon employment. Those who began employment with NYL with little to no prior experience in the insurance industry also signed NYL's Training Allowance Subsidy Plan Agreement (hereinafter, TAS agreement). The TAS agreement amended the Agent's Contract to provide for training allowances. It is undisputed that TAS Agents are employees of NYL. After the TAS agreement expired, the agent would become an Established Agent, who was classified as an independent contractor.

> "For each agent, NY Life maintained an internal company account called the 'agent's ledger.' On this ledger NY Life credited each commission and training allowance that became payable to the agent, doing so on a rolling basis as individual commissions and training allowances were earned. The company routinely offset two types of charges against the agent's earnings . . . [F]rom time to time, it required each agent to enter into other separate agreements relating to the agent's use of work-related services and facilities that NY Life provided. Such agreements were required for (among other things) the agent's use of cubicle space in a NY Life office, office telephone service, internet and computer support, and mandatory professional liability insurance. These agreements purported to authorize NY Life to charge an agent for each of these facilities, by periodically debiting the cost to the agent's ledger (the 'Business Expense Debits')"

(*id.*).

DISCUSSION

On this motion, plaintiffs seek class certification on count 1 of the amended complaint which alleges unlawful wage deductions based on illegal "Business Expense Debits" (amended complaint, NYSCEF Doc. No. 141 ¶¶ 92- 111).

> CPLR 901 (a) sets forth prerequisites for class action certification as follows:
>
> "(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 members;
>
> (3) the claims or defenses of the representative parties are typical of the class;
>
> (4) the representative parties will fairly and adequately protect the interests of the class; and
>
> (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

These factors should be broadly and liberally construed in favor of granting class certification (*see Friar v Vanguard Holding Corp.*, 78 AD2d 83, 91 [2d Dept 1980]). "Whether the facts presented satisfy the statutory criteria is within the sound discretion of the trial court" (*Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 422 [1st Dept 2010]). "Class action certification is thus appropriate if on the surface there appears to be a cause of action which is not a sham" (*id.*; *see also Bloom v Cunard Line*, 76 AD2d 237, 240 [1st Dept 1980]).

The threshold question is whether Established Agents are employees or independent contractors. Plaintiffs who allege violation of Labor Law § 193, must first demonstrate that they are employees and thereby are entitled to the protections of the statute (*see Bhanti v Brookhaven Mem. Hosp. Med. Ctr.*, 260 AD2d 334, 335 [2d Dept 1999]). The inquiry is fact sensitive and often presents a question for the trier of fact (*see Lazo v Mak's Trading Co.*, 199 AD2d 165, 166 [1st Dept 1993], *affd* 84 NY2d 896, 896 [1994]; *see Malamood v Kiamesha Concord*, 210 AD2d 26, 26 [1st Dept 1994]).

"[T]he critical inquiry in determining whether an employment relationship exists pertains to the degree of control exercised by the purported employer over the results produced or the means used to achieve the results . . . . Factors relevant to assessing control include whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule" (*Bynog v Cipriani Group*, 1 NY3d 193, 198 [2003], *rearg denied* 2 NY3d 794 [2004] [citations omitted]). "Under New York law, an employee undertakes to achieve an agreed result and to accept the directions of his employer as to the manner in which the result shall be

accomplished, while [an independent contractor] agrees to achieve a certain result but is not subject to the orders of the employer as to the means which are to be used" (*Chaiken v VV Publishing Corp.*, 119 F3d 1018, 1033 [2d Cir 1997], *cert denied* 522 US 1149, 1149 [1998], quoting *Matter of Morton*, 284 NY 167, 172 [1940] [internal quotation marks omitted]).

Plaintiffs argue that Established Agents were misclassified as independent contractors. They point to instances where: (1) Established Agents were permitted to engage in outside employment only if NYL gave written approval; (2) agents were assigned to, and required to, conduct business from a specific location that could not be changed without NYL's approval; and (3) agents were subject to regular training requirements and could be required to undergo training for disciplinary reasons (NYSCEF Doc. No. 160 at 11-13). Furthermore, plaintiffs allege that NYL withheld federal income taxes from Established Agents' compensation as employees rather than independent contractors by furnishing Established Agents with W-2 forms instead of 1099 forms used for independent contractors (*id*. at 13).

NYL counters that the instances and examples cited by plaintiffs are merely designed to ensure compliance with regulatory requirements, such as attendance at required training and regulation of advertising and sales literature (defendants' memorandum of law in opposition, NYSCEF Doc. No. 180 at 25-26). Furthermore, it argues that NYL exercises no control over Established Agents, in that they set their own schedules and hours, can hire their own staff at their own expense, determine where and what sales pitch they employ to perspective clients, control their own operating costs, such as leases, furniture and equipment, and can work for other companies (*id*. at 6). Moreover, NYL asserts that plaintiffs have misconstrued the filing status of Established Agents. While Established Agents are listed as "statutory employees," defendants explain that IRC 3121(d) (3) (B) defines a "statutory employee" as an individual "other than an individual who is an employee," such as a full-time insurance salesperson (*id*. at 35).

Plaintiffs have presented evidence "sufficient to satisfy the minimal threshold of establishing that their claim [is] not a sham" (*Weinstein v Jenny Craig Operations, Inc.*, 138 AD3d 546, 547 [1st Dept 2016]; *see Kudinov v Kel-Tech Const. Inc.*, 65 AD3d 481, 482 [1st Dept 2009] ["While it is appropriate in determining whether an action should proceed as a class action to consider whether a claim has merit, this inquiry is limited, and such threshold determination is not intended to be a substitute for summary judgment or trial"] [internal quotation

marks and citation omitted]). The court proceeds to examine whether plaintiffs have satisfied the criteria for class certification.

CLASS ACTION CERTIFICATION

1. Numerosity

"There is no 'mechanical test' to determine whether . . . numerosity … has been met, nor is there a set rule for the number of prospective class members which must exist before a class is certified" (*Friar*, 78 AD2d at 96 [internal citation omitted]). "Each case depends upon the particular circumstances surrounding the proposed class and the court should consider the reasonable inferences and common sense assumptions from the facts before it" (*id.* [internal citations omitted]). However, it has been held that "the threshold for impracticability of joinder seems to be around forty" (*Dornberger v Metropolitan Life Ins. Co.*, 182 FRD 72, 77 [SD NY 1998, as amended 1999]; *see also Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 138 [2d Dept 2008]).

Plaintiffs estimate that there are 4,000 potential TAS class members and 1,800 potential EA class members, based on discovery in the prior federal proceedings (Mayes aff., NYSCEF Doc. No. 161 at ¶ 4). Defendants do not dispute that the numerosity requirement has been met, nor do they argue that the estimated purported number of TAS and EA class members is incorrect. The court finds that the number of purported class members is so numerous that joinder of all members would be impracticable.

2. Common Questions of Law or Fact

Commonality "'requires predominance, not identity or unanimity, among class members'" (*Cherry v Resource Am., Inc.*, 15 AD3d 1013, 1013 [4th Dept 2005], quoting *Friar*, 78 AD2d at 98). "[T]he decision as to whether there are common predominating questions of fact or law so as to support a class action should not be determined by any mechanical test, but rather, whether the use of a class action would 'achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated'" (*Friar*, 78 AD2d at 97 [citations omitted]). Thus, the fundamental issue is "whether the group asserting class status is seeking to remedy a common legal grievance" (*Mendelson v Trans World Airlines*, 120 Misc 2d 423, 427 [Sup Ct, Queens County 1983]). In this case, members of the purported TAS and EA Classes allege that defendants deducted wages in the form of Business Expense Debits in violation of the New York Labor Law.

Plaintiffs contend that the commonality prerequisite has been met since purported class members' entitlement to compensation was uniformly governed by contract and raise a common question of interpretation of such contract (NYSCEF Doc. No. 160 at 22). NYL argues that the TAS contracts have been amended during the proposed time period of 2001 to present, and would therefore defeat the commonality requirement. Specifically, NYL states "post-November 2009 contracts specifically reference expense authorization agreements and describe how the agent's compensation will be the net amount after ledger credits and debits are reconciled" (NYSEF Doc. No. 180 at 17). Furthermore, NYL contends that individual inquiries are required to ascertain what specific agreements each agent had with NYL and their understanding of their employment contract as determined through their individual conduct (*id.* at 1-2). To support this contention, NYL relies on *Pachter v Bernard Hodes Group, Inc.* (10 NY3d 609, 618 [2008], *rearg denied* 11 NY3d 751 [2008]), where the Court held that when a commission is "earned" can be regulated by an implied agreement between the parties. The court looked to the parties' conduct over the course of 11 years to conclude that there was an implied contract, thereby establishing that the parties mutually agreed to depart from the common-law rule (*id.*). However, as plaintiffs correctly point out, the court in *Pachter* examined the parties' course of dealing because of the "absence of a governing written instrument" (*id.*; *see also Julien J. Studley, Inc. v New York News*, 70 NY2d 628, 629 [1987], *rearg denied* 70 NY2d 748 [1987] ["A contract cannot be implied in fact where there is an express contract covering the subject matter involved"]). Here, both the TAS and EA purported class members bring their claims based on written contracts. As to the variations in contracts over the course of almost 20 years, NYL provides only two alterations, neither of which addresses the Business Expense Debits (*see Steinberg v Nationwide Mut. Ins. Co.*, 224 FRD 67, 74 [ED NY 2004] [When "key terms, their definitions, and other pertinent contractual provisions are substantively similar, if not identical . . . such contracts can be considered 'form contracts' . . . and appear to present the classic case for treatment as a class action"]).

Moreover, NYL contends that the Agent's Contracts and TAS Agreements signed after November 2011 include arbitration clauses with class action waivers, precluding those agents from participating in a class action and excluding plaintiffs from meeting the CPLR 901 requirements of commonality, typicality and adequacy of representation (defendants' supplemental memorandum of law, NYSCEF Doc. No. 289 at 6-7). Plaintiffs counter that the

post-November 2011 contracts do not "prevent[] a signatory to New York Life's arbitration agreement from being an absent or 'passive class member' in court proceedings initiated and maintained by another" (plaintiffs' supplemental reply, NYSCEF Doc. No. 290 at 4). Plaintiffs rely heavily on *Maor v Hornblower N.Y., LLC* (51 Misc 3d 1231[A], * 6 [Sup Ct, NY County 2016]), where the court held that commonality existed even though some members of the putative class had signed arbitration agreements while the class representatives had not. The court reasoned that,

> "This 'Employment Application' clause does not expressly prevent any putative class member from being a passive class member. Thus, it does not destroy commonality between the named plaintiffs and the rest of the putative class (*see e.g. Guzman v Three Amigos SJL Inc*., 117 F Supp 3d 516, 526 [SD NY 2015], citing *Lloyd v J.P. Morgan Chase & Co*., 2014 WL 2109903, at *7 [SD NY Apr. 1, 2014] ['[T]he precedent in this District ... holds that the existence of an arbitration agreement is irrelevant at the conditional certification stage'])"

(*id.*, at *7). Similarly, here, the NYL arbitration clause precludes "initiating," "maintaining," and "bringing" a claim as a plaintiff, but does not prevent signatories from being a passive class member (plaintiffs' supplemental memorandum of law, NYSCEF Doc. No. 288 at 6). Moreover, "[c]ourts have consistently held that the existence of arbitration agreements is 'irrelevant' to collective action approval 'because it raises a merits-based determination'" (*Guzman v Three Amigos SJL Inc*., 117 F Supp 3d 516, 526 [SD NY 2015] [citations omitted]).

Finally, NYL argues that the analysis for each agent will differ based on when a "challenged debit hit a theoretically 'earned' amount (i.e., a credit supported by paid premiums) or how much of the amount was 'earned' . . . for each 'pay period,'" and calculating damages for every agent and every ledger withdrawal they made would make this class action untenable (NYSCEF Doc. No. 180 at 22, 30-31). However, this inquiry is relevant as to damages and "[t]o the extent that there may be differences among the class members as to the degree in which they were damaged, the court may try the class aspects first and have the individual damage claims heard by a special master or create subclasses" (*Godwin Realty Assoc. v CATV Enters.*, 275 AD2d 269, 270 [1st Dept 2000]).

As such, common questions of law and fact predominate over issues affecting individual members. Therefore, plaintiffs have met the commonality prerequisite (*see Pludeman*, 74 AD3d at 423). In making this determination, the court is mindful that "any error, if there is to be one, should be committed in favor of allowing the class action" and "[t]he fact that questions

peculiar to each individual may remain after resolution of the common questions is not fatal to the class action" (*Friar*, 78 AD2d at 98, 100 [internal quotation marks and citation omitted]).

3. Typicality

To satisfy the requirement of typicality, plaintiff must show that "the claims or defenses of the representative parties are typical of the claims or defenses of the class" (CPLR 901[a][3]). "Typical claims are those that arise from the same facts and circumstances as the claims of the class members" (*Globe Surgical Supply*, 59 AD3d at 143).

Plaintiffs argue that not only are their interests similar to the proposed classes, they are identical, due to the "common nucleus of law and fact *i.e.*, whether defendant, in violation of Labor Law § 193, improperly deducted expenses from their earned commissions and other pay" (NYSCEF Doc. No. 160 at 28). Defendants respond that typicality is not met because plaintiffs Brian Chenesky and Sheree N. Johnson only held the title of Established Agent for five and eight weeks, respectively. As such, NYL argues that their experience is not typical of those members they aim to represent. However, regardless of the length of time plaintiffs were Established Agents. Their "claims arise from the same conduct (i.e., the same alleged wrong committed by Defendants) and Plaintiffs' claims are based on the same legal theory . . . the typicality requirement has been satisfied" (*Martin v Restaurant Assoc Events Corp*., 2013 WL 4351788 [Sup Ct, Westchester County 2013]).

4. Adequacy of Representation

"The factors to be considered in determining adequacy of representation are: whether any conflicts exists between the representative and the class members, the representative's familiarity with the lawsuit and his or her financial resources, and the competence and experience of class counsel" (*Ackerman v Price Waterhouse*, 252 AD2d 179, 202 [1st Dept 1998]). "In order to be found adequate in representing the interests of the class, class counsel should have some experience in prosecuting class actions" (*Globe Surgical Supply*, 59 AD3d at 144).

Plaintiffs argue their "mutuality of interest, as [p]laintiffs and all other Class members seek the same relief, *i.e.*, recovery of the unlawful deductions New York Life imposed on them in violation of Labor Law § 193" (NYSCEF Doc. No. 160 at 29). While defendants do not challenge the adequacy of class counsel, they argue that the plaintiffs are inadequate representatives of class members because they "lack the knowledge and experience required to speak on behalf of people who have acted as Established Agents, running their own businesses, for years . . . [and] have

virtually no stake in the issue of whether Established Agents are independent contractors" (NYSCEF Doc. No. 180 at 39). NYL calculates that Chenensky could potentially collect $255.68 and Johnson could potentially collect $624.47 (*id.*). Nevertheless, the arguments raised by defendants are not factors that the court looks to when determining adequacy of representation (*see Ackerman*, 252 AD2d at 202). Defendants do not argue that a conflict exist between the plaintiffs, or that they are unfamiliar with this lawsuit that has been active for eight years. Neither has plaintiffs' financial resources been at issue. Therefore, the adequacy of representation prerequisite has been met.

5. Superiority of Class Action

CPLR 901 provides that a class may be certified only if "a class action is superior to other available methods for the fair and efficient adjudication of the controversy" (*Globe Surgical Supply*, 59 AD3d at 145–146). Here, the alternative to a class action could mean numerous individual actions that may result in conflicting determinations. It is clear that in order to avoid inefficiency and conflict, a class action is the superior method to resolve this dispute.

6. CPLR 902 Factors

Finally, the court must also consider the following five factors set forth in CPLR 902 in determining whether certification is appropriate: (i) the class members' interest in individually controlling the prosecution or defense of separate actions; (ii) the impracticality or inefficiency of prosecuting or defending separate actions; (iii) the extent and nature of any other litigation concerning the same controversy; (iv) the desirability or undesirability of concentrating the litigation of the claim in the particular forum; and (v) the difficulties likely to be encountered in the management of a class action (CPLR 902). These factors are pragmatic considerations, most of which are "implicit in CPLR 901" and have been discussed (*Gilman v Merrill Lynch, Pierce, Fenner & Smith*, 93 Misc 2d 941, 948 [Sup Ct, NY County 1978]). Plaintiffs have indicated that they "are not aware of any separate litigation on the same or similar claims commenced by any Class member and the appropriateness of this forum was already explored in earlier proceedings concerning venue" (NYSCEF Doc No. 160 at 30). While defendants argue that calculating damages would be complex and unmanageable, "the complexity of the damage issue is not a bar to class action certification" (*Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 23 [1st Dept 1991]). Therefore, the court finds that the requirements of CPLR 902 have been met.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiffs' motion for class certification (motion sequence number 005) is granted and leave is granted, pursuant to CPLR 901 and 902, for plaintiffs to prosecute their action on behalf of (1) the "TAS Class" which comprises every person who worked for Defendants in the State of New York at any time since December 21, 2001 as a TAS Agent, under an Agent's Contract as modified by a Training Allowance Subsidy Plan Agreement and (2) the "EA Class" which comprises every person who worked for Defendants in the State of New York at any time since December 21, 2001 as an Established Agent, under an Agent's Contract, excluding any periods of work as a retired agent, corporate agent or sub-agent, partner, senior partner, or managing partner; and it is further

ORDERED that, within thirty (30) days of the date of service of this order with notice of entry, defendants New York Life Insurance Co., New York Life Insurance and Annuity Corp., NYLIFE Securities LLC, and NYLIFE Insurance Co. of Arizona shall furnish to plaintiffs' counsel lists of the names and last known addresses of all persons employed by said defendants who performed work as TAS Agents or Established Agents, excluding those with any periods of work as a retired agent, corporate agent or sub-agent, partner, senior partner, or managing partner; and it is further

ORDERED that plaintiffs shall send a notice to all of the individuals identified by defendants New York Life Insurance Co., New York Life Insurance and Annuity Corp., NYLIFE Securities LLC, and NYLIFE Insurance Co. of Arizona, within ninety (90) days of receipt of the lists and such notice shall include a provision that such individuals may "opt-out" of the class action, by sending a signed form to plaintiffs' counsel; the form of such notice shall be approved by this court.

This constitutes the decision and order of the court.

DATED: May 28, 2020

E N T E R,

O. PETER SHERWOOD J.S.C.