	:Superior Court of New Jersey
	:Law Division
	:Middlesex County
	:
ANTHONY VETTER,	:
	:
Plaintiff,	:
	:Civil Action
vs.	:Docket No. MID-L-3650-16
	:
GUARANTEED SUBPOENA SERVICES, INC., et al.	:
	: Decision and Order
Defendants :	:
	:

December 31, 2018

BEFORE:

Hon. J. Randall Corman, J.S.C.

APPEARANCES:

Clark Law Firm
Attorneys for Plaintiff

Antonelli Kantor, P.C.
Attorneys for the Defendants

This matter comes before the Court as a motion for reconsideration of the Court's Orders of June 22, 2018 denying the Defendants' motion for summary judgment and granting the Plaintiff's motion for class certification brought by counsel for the Defendants.

This dispute arises from prior litigation in 2011 where the Plaintiff's counsel requested Defendant Guaranteed Subpoena to serve a subpoena along with an attendance fee check on the Bayonne Municipal Court and paid a fee of 59.95 to Guaranteed Subpoena plus a $10 fee to cover the face amount of the check. Guaranteed Subpoena issued the check and served both the subpoena and the check on the Bayonne Municipal Court. However, the Bayonne Municipal Court never cashed the check and Guaranteed Subpoena never refunded the $10 to the Plaintiff. Instead, at some point the Bayonne

Municipal Court forwarded the check to the Plaintiff and the Plaintiff filed a complaint claiming Guaranteed Subpoena engaged in deceptive and unconscionable business practices in violation of the Consumer Fraud Act.

The Defendants' motion for summary judgment sought to dismiss the complaint based on the notion that the Plaintiff had sustained no ascertainable loss and could therefore not maintain an action pursuant to the Consumer Fraud Act. Counsel for the Defendants argue that "Plaintiff has in his possession that which the Firm paid for, a $10 Check issued to the Bayonne Municipal Court and is now seeking to be reimbursed for the same thing that he has in his possession." However, while the Plaintiff may have a check payable to a party other than the Plaintiff, Guaranteed Subpoena has the $10 the Plaintiff paid for the check. The ascertainable loss is not the check, but funds in the amount of $10 that the Plaintiff is now without.

In addition, throughout the Defendant's briefs their repeat like a mantra that "the Plaintiff could have negotiated the check." However, nowhere do the Defendants explain how the Plaintiff could negotiate a check where the Plaintiff is not the payee. See NJSA 12A:3-110. Defendants also imply that the Plaintiff could have gotten the Bayonne Municipal Court to endorse the check to him, but such a practice would appear to be contrary to NJSA 40A:5-15 of the Local Fiscal Affairs Law and Defendants point to no statute or regulation that would authorize a municipal agency to endorse a check payable to that agency to another party.

The Defendants also claim that the Plaintiff could have simply sought a refund from Guaranteed Subpoena, which brings us to the essence of the Plaintiff's claim that the Defendants have engaged in an unconscionable commercial practice in violation of the Consumer Fraud Act. The Plaintiff claims that the Guaranteed Subpoena website advertises that there are no hidden fees and alleges that a $10 charge as a fee to purportedly reimburse Guaranteed for the check payable to the Bayonne Municipal Court was a hidden fee because this $10 was never paid to the Bayonne Municipal Court and Guaranteed kept the $10. Transcript of Motions for Summary Judgment and Class Certification, June 22, 2018 at 36. The Defendants argue that any uncashed checks remain an open obligation and note that despite the language on the face of each check that states it is invalid more than 30 days after issuance, banks have cashed such checks years after issue and that the cost of a stop payment order would exceed the value of any of these checks. Finally, the Defendants also claim they do provide refunds to customers if they can prove the check has been returned or destroyed.

A review of these issues requires that the motion for reconsideration of the Order denying summary judgment to the Defendants must be denied. The Defendant's accountant has testified in deposition that amount of the uncashed checks constitutes income to Guaranteed Subpoena. Consequently, a rational jury could conclude this practice was designed to generate income from fees that appear to be reimbursements but were for charges never incurred. During argument before this Court on the prior motion for summary judgment, Defendant's counsel asserted that Guaranteed Subpoena had an oral refund policy and that "[A]ttorneys are – are aware of the refund policy," although

counsel was unable to articulate how the refund policy was communicated to the customers of Guaranteed Subpoena. Transcript of Motions for Summary Judgment and Class Certification, June 22, 2018 at 34-35. Since it is reasonable to assume that there will be at least some customers that are unaware of an unwritten refund policy, a jury may similarly conclude that this substantiates Plaintiff's claim that a hidden fee is being charged contrary statements made on the Guaranteed Subpoena website. Furthermore, there is no legal requirement that a customer informally seek a refund before commencing litigation nor can the customer be compelled to accept a refund in order to defeat the claims of the putative class. Gambrell v. Hess, Dkt. No. MID-L-7600-12 (Law Div. 2013). Since every available inference must be accorded to a nonmoving party in a motion for summary judgment, summary judgment was properly denied by this Court and the Defendant's motion for reconsideration must also be denied.

With regard to the Defendant's motion for reconsideration of the Order granting the Plaintiff's class certification, we must start with the criteria for granting such certification. Pursuant to R. 4:32-1(a), the four initial requirements for class certification are numerosity, commonality, typicality and adequacy of representation. Furthermore, in "determining a motion for class certification, a court must accept as true all of the allegations in the complaint, and consider the remaining pleadings, discovery (including interrogatory answers, relevant documents, and depositions), and any other pertinent evidence in a light favorable to the plaintiff." Dugan v. TGI Fridays, Inc., 231 NJ 24 (2017) at 49.

As to the issue of numerosity, there should be no serious dispute, since the number of uncashed checks ranges from 5,000 to 12,000 per year based on data provided by the principal of Guaranteed Subpoena, Defendant Philip Geron, in his deposition testimony. Since class certification has been granted in cases where the class was as low as 40 members, the criteria of numerosity seems inconvertible. See Cerbo v. Ford of Englewood, Dkt. No. BER-L-2871-03 (Law Div. 2006). Nevertheless, Defendants argue that the numerosity requirement has not been met because in some cases Guaranteed Subpoena has not been paid by the customer or because some checks might still be cashed notwithstanding the "VOID AFTER 30 DAYS" statement on each check. However, these issues only relate to whether specific checks are in the class or not. Since it is not necessary for the precise number of class members to be known to obtain class certification, the numerosity requirement must be deemed satisfied. Gallano v. Running, 139 NJ Super 239 at 245-6.

The issues of commonality and typicality are closely related. Rule 4:32-1(a)(2) requires that there be common elements of law and fact to all members of the putative class and Rule 4:32-1(a)(3) requires that the claims or defenses of the representative plaintiff be typical of claims or defenses of the members of the class. These requirements serve the judicial economy function of the class action, since by proving the claims of a proper class representative whose claims are typical of those of the class, the claims of all the class members will have been proved because they all have common elements of law and fact.

The Plaintiffs set forth six common questions for the class representative and for the class member: 1) whether Defendants billed for attendance fee costs that were not actually incurred; 2) whether Defendants misrepresented their costs on bills to customers by including charges for pass through attendance fee expenses; 3) whether Defendants misrepresented or omitted material facts to their customers regarding attendance fee billing and lack of reimbursement; 4) whether Defendants should have reimbursed class members for pass through attendance fee costs paid to Defendants but which Defendants never actually incurred; 5) whether Defendants followed standardized billing practices for attendance fee costs; and 6) whether Defendants conduct in billing, collecting, and failing to reimburse customers for un-incurred attendance fee costs violated the Consumer Fraud Act.

It is clear from the deposition testimony of Defendant Philip Geron that the Defendants do have standardized billing practices with regard to attendance fee costs, so the fifth question is not in dispute. Furthermore, Mr. Geron's testimony that there are thousands of uncashed attendance fee checks each year means that the first question is not in dispute. Finally as to questions 2, 3, 4 and 6, this Court has already concluded in its decision on the Defendant's summary judgment motion that these are all issues that must be decided by the jury.

In opposition the Defendants claim that the uncashed checks are live and continuing obligations of Guaranteed Subpoena and that the possibility that a check issued long ago could be cashed after a particular class member was awarded damages creates the risk of double recovery in individual cases and creates an issue that would not be common to all members of the class. Thus, Defendants argue that because any of these checks could be cashed in the future, there is no way to know who is properly in the class and who is not.

However, based on the Uniform Commercial Code, the Defendant's characterization of these uncashed checks as "live" is inaccurate. A check that is uncashed more than six months after the date it was issued is customarily described as "stale," and pursuant to NJSA 12A:4-404, a bank is under no obligation to cash such a check if it is uncertified. The rationale behind this statute is obvious. If Bank A cashes a seven month old check for $100 and then presents the check to Bank B, which is the bank upon which the check is drawn, and in the intervening seven months the issuer of the check has closed his account, Bank B will refuse payment and Bank A will be out $100. Thus, for purposes of fixing the class status of the uncashed checks, the parties could request the Court to issue an Order, after notice to the Defendant's bank prohibiting the bank from honoring any of these stale checks during the pendency of the litigation, or the Defendant could simply move its account to a different bank which will prevent any of these checks from being charged to the Defendant's closed account.

Furthermore, a review of the Defendant's bank records will illuminate the question of how frequently these stale checks actually are cashed. While Defendants have claimed that discovery is complete, it is apparent that the Defendants have not supplied copies of their bank records in response to Plaintiff's discovery requests. A review of

these records will enable a determination of whether these uncashed checks are really a significant ongoing liability to Guaranteed Subpoena or whether they simply represent a handful of inattentive bank tellers cashing stale checks. Since the record currently reflects that Guaranteed Subpoena considers these uncashed checks to be income and has not set aside these funds as a reserve to cover stale checks that are presented for payment in the future, it would appear that Guaranteed Subpoena considers this to be an insignificant risk.

The Defendants also proffer a chart purporting to depict a plethora of permutations as to how each attendance fee check issued on behalf of each customer in the proposed class has a plenitude of factual issues that must be separately litigated, thereby rendering this matter unsuitable as a class action. The Court must note that it is not necessary for all facts be identical with regard to all class members. Delgozzo v. Kenny, 266 NJ Super 169 (App. Div. 1991) at 185. Most of the issues raised by Defendants in their chart are addressed in other sections of this opinion and the others are manifestly irrelevant. There is really only one relevant factor that will establish membership in the class: whether a customer of Guaranteed Subpoena paid for the issuance of an attendance fee check that was never cashed and for which no refund has ever been provided. Once the Defendants bank records are produced in discovery, membership in the class will have been determined.

Defendants contest whether the Plaintiff has the requisite typicality because the Plaintiff actually obtained the uncashed check. The claims that the Plaintiff could have "negotiated" the check or that the Plaintiff could have sought a refund have already been addressed *supra*. The only distinguishing characteristic between the Plaintiff and the members of the proposed class is that the Plaintiff came into possession of the uncashed check and thereby obtained documentary evidence of this practice of the Defendants. It is reasonable to assume that there may be thousands of past customers of Guaranteed Subpoena who mistakenly believe they paid for a check that has been cashed but have had no practical way to learn otherwise. To bar class certification because the representative plaintiff learned of a practice that others did not would defeat the purpose of the class action and "wrongs would go without redress." In re Cadillac, 93 NJ 412 (1983) at 435.

The requirement of adequacy of representation is disputed by the Defendants because they assert that the Clark Law Firm has a conflict of interest and that the principal of the Clark firm a necessary witness in the litigation with a personal interest in the matter. Plaintiff's counsel argue that this issue was already disposed of by Judge Cresitello when he denied a motion by the Defendants to disqualify the Clark firm. The Court must note that co-counsel to the Plaintiff are the firms of Kanner and Whitely, LLC and Kelly Law, P.C., both having experience in class action litigation on behalf of consumers. The experience of the Kanner firm is particularly impressive, having been selected by the State of New Jersey as special counsel in litigation seeking natural resource damages from polluters. Even if new circumstances were to require that Judge Cresitello's decision be revisited, the Kanner and Kelly firms would provide more than adequate representation so there is no basis to deny class certification on this basis.

Having satisfied the four initial requirements for class certification (numerosity, commonality, typicality and adequacy of representation), the Plaintiff must satisfy Rule 4:32-1(b)(3) as to predominance and superiority. The requirement of predominance means that the common issue of law and fact for the class are not obscured by other issues relating to individual class members. All that really needs to be determined is whether a prospective class member paid for an attendance fee check that was never cashed (which is readily discernable through a review of Defendant's financial records) and whether this procedure constitutes an unconscionable business practice in violation of the Consumer Fraud Act (which is a question for the jury). In addition to arguments in opposition already rejected *supra*, Defendants claim that because the attendance fee checks range from $2 to $10 there must be "a fact-sensitive, case-by-case analysis and an inquiry into the value of each check." This is nonsense. The Defendant's check register will indicate the value of each check and their bank records will indicate whether it has been cashed and the amount of the uncashed check will constitute ascertainable loss for each class member for purposes of the Consumer Fraud Act.

As to superiority, the Plaintiff's must establish that a class action is superior to other available methods for adjudication of the controversy. The Plaintiff has unquestionably met this requirement. This is a classic case involving a large number of customers of a business who are arguably owed a small refund, i.e., "modest individual claims that are unlikely to be brought in an alternative forum." Dugan at 66. The New Jersey Supreme Court has held that because "of the very real likelihood that class members will not bring individual action, class actions are "often the superior form of adjudication when the claims of the individual class members are small"." Iliadis v. Wal-Mart Stores, 191 NJ 88 (2007) at 115, quoting Weber v. Goodman, 9 F.Supp. 2d 163 (E.D.N.Y. 1998) at 170-71. As in the Iliadis case, "the nominal value of each class members' claim counsels in favor of class litigation." Id. at 115. The unlikelihood that individual customers of Guaranteed Subpoena will litigate over amounts that range from $2 to $10 is compounded by the fact that a large number of them have no idea they paid for a check that was never cashed. Furthermore, a significant number of these customers paid for the uncashed check through their attorney. If they are being billed by the hour, the cost to have their attorney to write Guaranteed Subpoena for a refund, or to even make a call in that regard, would no doubt exceed the value of the uncashed check.

Therefore, the Defendants motion for reconsideration of the Order granting class certification to the Plaintiff is accordingly denied.

J. Randall Corman, J.S.C.