IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

MBAYE FAYE, et al.	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Case No. 02ca8322
	:	
SAMUEL G. KOORITZKY, et al.	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

Before the Court are Plaintiffs' Motion for Certification as Class Action under Rule 23(b)(3) and for a Hearing Thereon. The defendants have opposed and each side has filed a supplemental memorandum.

The plaintiffs are immigrants who claim that they were defrauded by their lawyer, defendant Kooritzky and his associate Bogardus, (who was not a lawyer). The essence of the claim is that the defendants promised to obtain immigration status for the plaintiffs and defrauded them by submitting certifications to the Department of Labor that claimed falsely that the plaintiffs had offers of employment from specified employers. It is uncontested that the defendants have

been convicted on federal mail and wire fraud charges in connection with submitting false applications for immigrants seeking labor certification. In their amended complaint, plaintiffs alleged fraud, breach of fiduciary duty, and violation of the District of Columbia Consumer Protection Act. Plaintiffs propose as a class "those individuals who retained defendant Kooritzky and/or his associate, defendant Bogardus, to file the necessary papers to secure a change of immigration status of each plaintiff from alien to permanent resident . . ."

To prevail on their motions, the plaintiffs must satisfy the requirements of Rule 23(a) and one of the requirements of Rule 23(b). The Court will analyze each of the requirements.

1. Numerosity

The numerosity requirement is satisfied. Plaintiffs represent that the Assistant United States Attorney charged with prosecuting the criminal cases has stated that there were some 1600 victims of the

fraud. Joinder of this number of people would be "impracticable."

2. Commonality

Plaintiffs have adequately established commonality. Commonality is satisfied if there is at least one common question of law or fact resolution of which will advance the litigation. Sprague v. General Motors Corporation, 133 F.3d 388, 397 (6th Cir. 1998). In the present case the issue of whether the defendants defrauded the proposed members of the class presents is at least one common question of law and fact. The Court agrees with the plaintiffs that, while the law regarding fraud may be expressed in different ways in Maryland, the District and Virginia, the elements of the tort are virtually the same. See Howard v. Riggs National Bank, 432 A.2d 701, 706 (D.C. 1981); Prospect Development Co., Inc. v. Bershader, 515 S.E.2d 281, 297 (Va. 1999); Lambert v. Smith, 201 A.2d 491, 493 (Md. 1964). Moreover, facts common to potential class members are the applications the defendants submitted to the Department of Labor.

3. Typicality

In Yarmolinsky v. Perpetual Am. Fed. Sav. And Loan Ass'n, 451 A.2d 92, 95 (D.C. 1982), the court stated:

> To determine if the typicality requirement is met, the court considers the allegations in the complaint, the nucleus of facts underlying the allegations, and the evidence necessary to prove those facts . . . . Normally, factual variations do not preclude class certification where the claims arise out of the same legal or remedial theory.

Here, the claims if brought individually would proceed on the same legal theory - viz., that the defendants committed fraud, breach of fiduciary duty, and breach of the D.C. Consumer Protection Act. The issue is whether "the claims of the representative party are similar enough to the claims of the class so that [the representative party] will adequately represent them." 7A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure Civil 2D § 1764 at 231-232 (1995). The Court is of the opinion that the claims are similar enough to meet this requirement. Thus, the plaintiffs satisfy the typicality requirement. In the present case,

whether issues that are not common predominate is better left to analysis under Rule 23(b)(3).

4. Fair and Adequate Representation

The Court is of the opinion that counsel for both sets of Plaintiffs seeking class certification are capable, experienced, and have the resources to prosecute the case. Since the Court has held that the plaintiffs meet the commonality and typicality requirement, there exists no concern that class members will have antagonistic interests or that counsel will have no incentive to prosecute the cases vigorously.

5. Rule 23(b)(3)

To satisfy the requirement of Rule 23(b)(3), the plaintiffs must show

> that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

A. Predominance

This is a case where "the defendant's liability can be determined on a class-wide basis because the cause of the [injury] is a single course of conduct which is identical for each of the plaintiffs." Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1197 (6th Cir. 1988). Plaintiffs' theory is that the defendants violated their duty to the plaintiffs and to the potential class by promising them that they would represent them in obtaining the necessary immigration documentation, and then by submitting a false application to the Department of Labor certifying that their clients had an offer of employment. In the present case, clients that are purported members of the class were presented with written representations in the form of a retainer agreement. Each of the plaintiffs and proposed class members, it is alleged, signed standard form contracts. The form stated that "Capital Law Center agrees to initiate all necessary documentation, and take all appropriate measures to obtain the immigration objective defined below." It assured the signer that "Capital Law Centers will make

every effort to assure that the process is completed successful[ly], and will make a full refund if the firm is responsible for any problem that may cause the case to fail irretrievably . . . ." In securities fraud cases, the general rule is that if fraudulent representations were made "in written form, the material facts pertinent to proving defendants' liability for the statements to all purchasers who received written communications". 7B Wright & Miller, supra, § 1781 at 34.

This Court is of the opinion that the foregoing principle would apply in a case such as this. While different legal theories grow out the core of facts that are common to all potential class members, the difference in legal theories should not be an obstacle to finding predominance. In this connection, the court notes that plaintiffs concede that the Maryland's Consumer Protection Act does not apply to the professional services of attorneys. Md. Code Ann. [Com. Law] §§ 13-104(1) (2003). It also appears that the District of Columbia Consumer Protection Act would not apply to the defendant Kooritzky. D.C. Code § 28-

3903(c)(2); Banks v. D.C. Department of Consumer & Regulatory Affairs, 634 A.2d 433, 437 (D.C. 1993), cert. denied, 513 U.S. 820(1994). Thus, even if choice-of-law principles would require the application of Virginia law to the members of the class who retained the defendant in Virginia, see Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821-822 (1985), it is likely that the common liability issues involving breach of fiduciary duty and fraud will predominate.

Defendants argue that there will be variations in proof with regard to damages. The court recognizes that there may be differences not only in the amount of damages awarded under one theory of liability, such as, for example, fraud, but also the nature of the damages that might be awarded. For example, while the District recognizes breach of fiduciary duty as an independent tort, Beckman v. Farmer, 579 A.2d 618, 652 n.43 (D.C. 1990), Virginia considers it a breach of contract, requiring an independent, willful tort to support punitive damages. O'Connell v. Bean, 556 S.E.2d 741, 743 (Va. 2002). It appears that Maryland would recognize a breach of fiduciary duty as a tort in an

agent-principal relationship such as exists between an attorney and his client, particularly where breach of fiduciary duty is seen as a form of negligence. Insurance Co. of North America v. Miller, 765 A.2d 587, 600-601 (Md. 2001). The court does not see any possible variations as an impediment to finding predominance. First, plaintiffs' theory is that the defendant did commit an intentional tort. Accordingly, if that is proven, it is unlikely that there will be a variation in the kinds of damages allowed. Second, it generally is held that individual issues as to damages are no impediment to finding predominance. See, e.g., 7A Wright & Miller, supra, § 1778 at 533.

Defendants also argue that issues of reliance must be individually determined. The Court agrees with the plaintiffs, however, that reliance issues do not predominate. First, reliance is not an element of proof in a breach of fiduciary duty claim where an attorney is accused of the breach. The cause of action in Maryland for breach of fiduciary duty is (1) the existence of a fiduciary relationship; (2) a breach of a duty owed by the fiduciary to the beneficiary; and

(3) harm resulting from the breach. Alleco Inc. v. Harry & Jeannette Weinberg Foundation, Inc., 665 A.2d 1038, 1046 (Md. 1995). In the District, the elements are the same. Aronoff v. Lenkin Co., 618 A.2d 669, 687 (D.C. 1992)(breach of duty, proximate cause and damages). In Virginia, a breach of fiduciary duty is treated as a breach of contract, and it appears that reliance is not an element of proof. O'Connell v. Bean, supra, 556 S.E.2d at 743.

Reliance is, of course, an element of fraud. Plaintiffs, relying on Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972), and Ackerman v. Price Waterhouse, 683 N.Y.S.2d 179, 192-193 (N.Y. App. 1998), argue that the court may presume reliance. Given Price v. Griffin, 359 A.2d 582, 587 (D.C. 1976), and the absence of controlling authority from New York, the jurisdiction on which plaintiffs rely, see In Re Sumitomo Copper Litigation v. Credit Lyonnais Rouse, Ltd., 262 F.3d 134, 142-143 (2d Cir. 2001)(discussing conflicting authorities), this court is not prepared at this time to go so far as to erect a presumption of reliance. Nevertheless, the court is of the opinion

that the common issues predominate. Even where individual issues of reliance may arise, "[t]he general conclusion appears to be that possible differences in the reliance on the part of individual class members should not require a dismissal of the class action." 7B Wright & Miller, supra, § 1781 at 44. See King v. Club Med, Inc., 430 N.Y.S.2d at 66, 67-68 (N.Y. 1980)(collecting cases). The court can establish subclasses or decertify the class if, at later date, it appears that the reliance issues cause the common issues not to predominate. See 7B Wright & Miller, supra, § 1781 at 47-48, 50-51.

B. Superiority

The Court is of the opinion that a class action is superior to individual actions. If each individual were to bring his or her claim into this Court, the economies achieved by trying the common issues would be lost. Moreover, the amounts at stake in each individual claim might not give the claimant sufficient incentive to bring an individual claim.

Defendant argues that the restitution order issued by the federal court demonstrates that a class action is inferior to compensation through the federal court's receiver. The Court disagrees for the reasons stated by the plaintiff. While putative class members could receive restitution in the federal action, assuming they timely filed their claim and were qualified by the receiver or the Court, they could not obtain compensatory damages (for example, attorney fees and costs in obtaining certification through another attorney). Nor could they obtain punitive damages. See Lazar v. Hertz Corp., 143 Cal. App. 3d 128, 144 (Cal. Ct. App. 1983). Of course, if a class member wishes to pursue his or her remedy in the federal court and not pursue his remedies in this Court, he or she may opt out of this action.

In making its predominance determination, the Court has considered the four factors pertinent to its findings set forth in Rule 23(b)(3). The Court sees no present interest in putative class members controlling the prosecution in separate actions. Aside from the federal litigation mentioned above, there is no

separate litigation already in existence. While there may be more putative members of the class now residing in Virginia or Maryland, there is at least one member who sought the defendant Kooritzky's assistance in this jurisdiction, and Kooritzky had an office in this jurisdiction. Moreover, it is unknown at this time where the members of the class, which might be transient, now reside. The Court sees no difficulty in access to proof, given that all of the defendant's offices were in the metropolitan area. While it might be more convenient to try this case in Virginia or Maryland, the Court cannot say it is inconvenient to try the case here or an undue burden on the courts here. Finally, while as with any class action there might be difficulties in managing the case, the plaintiffs appropriately point to the convictions of the defendants and the common scheme as lessening the difficulties.

CONCLUSION AND ORDER

The Court concludes that the plaintiffs have satisfied the criteria of Rule 23(a) and 23(b)(3).

Accordingly, plaintiffs, after consulting the defense, shall prepare an appropriate proposed order defining the class and setting forth the procedures for notification of the class. See Rule 23(a)(2); Phillips Petroleum Co. v. Shutts, 472 U.S. at 812. (The parties shall, among other things, consider the necessity of notice in languages in addition to English). If the parties cannot agree, the plaintiff shall file a motion pursuant to Rule 23-I(c).[1] Defendants may oppose in accordance with Rule 23-I(c)(2).

SIGNED IN CHAMBERS

March 28, 2003

A. Franklin Burgess, Jr.
Judge

Copies to be mailed to:

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[1] While it appears that plaintiffs did not include a statement as to notice as required by Rule 23-I(c)(1), the defendants have not opposed the motion on that ground. Accordingly, the Court will allow the plaintiffs now to propose a notice in conformance with Rule 23-I(c)(1).

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