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New York Court Rules Rule 67 Deposit Cannot be Used to Pick Off Named Plaintiffs in Putative Diet Pill Class

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Recently, a ***New York*** court held that a putative class action defendant's depositing of funds sufficient to cover the full amount of a plaintiff's individual claims does not moot the plaintiff's case and therefore cannot be used as a vehicle to defeat the individual plaintiff's attempt certify a class. This was the first attempt by a federal court to answer a question left unresolved by the ***Supreme Court***'s January 20, 2016 decision in *Campbell-Ewald Co. v. Gomez*.

In *Gomez*, the Supreme Court held that an unaccepted pre-certification settlement offer to a named plaintiff does not moot either the plaintiff's claim or that of the putative class. However, the majority opinion explicitly left open the question of "whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to plaintiff, and the court then enters judgment for the plaintiff in that amount." Justice Roberts' and Alito's dissents each made plain that they believed in such circumstances there would be no case or controversy, and thus a plaintiff would lack Article III standing.

In a letter motion filed on January 21, 2016 the defendants in *Brady v. Basic Research, L.L.C.*, No. 2:13-cv-07169 (E.D.N.Y.) sought to test that theory. The defendants, a diet pill maker and their spokeswoman (former "Jersey Shore" star Nicole "Snooki" Polizzi), argued that they should be permitted to deposit their offer of judgment to the named plaintiffs with the court under Fed. R. Civ. P. 67(a) and thereby moot the putative class representatives' claims that they were snookered into buying diet pills that were neither safe nor effective.

Plaintiffs responded that this tactic was an improper use of Rule 67, which they argued was designed to be a procedural device merely for the safekeeping of funds. They also contended that the defendants' strategy was contrary to the spirit of *Gomez* in which the majority wrote disapprovingly of gamesmanship that offered relief only to a class representative while entirely denying prospective relief to the broader putative class. In addition, plaintiffs argued that allowing defendants to deposit money with the Court would not provide complete relief, as it "does not address the class claims, it does not admit liability, and it fails to address the Plaintiffs' claims for injunctive relief."

Judge Sandra J. Feuerstein agreed with the *Brady* plaintiffs. In her order denying the defendants'

Rule 67(a) motion, Judge Feuerstein quoted the Supreme Court in *Gomez,* writing: “a would-be class representative with a live claim of her own *must be accorded a fair opportunity* to show that certification is warranted”.

This is an issue certain to find its way into the Courts of Appeals and possibly back at the Supreme Court. How will appellate courts handle this issue and will other courts embrace Judge Feuerstein’s interpretation in the interim, or will they allow this use of FRCP 67 to gain traction as a vehicle to avoid class certification? Watch this space for further developments on this critical question.

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