

At Commercial Division Part 1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8th day of May, 2012.

P R E S E N T:

HON. CAROLYN E. DEMAREST,

Justice.

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ALIMJAN KODIROV and GALYNA DEMYANCHUCK,

Plaintiffs,

**DECISION  
AND  
ORDER**

- against -

Index No. 6870/11

COMMUNITY HOME CARE REFERRAL SERVICE,  
INC., d/b/a HELPING HANDS ATTENDANT SERVICES,  
and BARRY WEISS,

Defendants.

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The following papers numbered 1 to 4 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1, 2, 3, 5
Opposing Affidavits (Affirmations) _____	_____
Reply Affidavits (Affirmations) _____	7, 8
_____ Affidavit (Affirmation) _____	_____
Other Papers <u>Memoranda of Law</u> _____	4,6

Named plaintiffs Alimjan Kodiriv and Galyna Demyanchuck (collectively, Plaintiffs) bring this action, pursuant to CPLR Article 9, alleging three causes of action on behalf of a proposed class of all current and former home health care workers employed by defendants in New York during the period from March 28, 2005 up to the date defendants cease, or are enjoined from, the alleged unlawful practices (the Class). Plaintiffs allege three violations

of New York Labor Law, including: failure to pay the statutory minimum wage in violation of New York Labor Law [“Labor Law”] § 652 and 12 NYCRR 142-2.1; failure to pay one and a half times the basic minimum hourly rate for all hours worked in excess of forty per work week in violation of Labor Law § 650 et seq. and 12 NYCRR 142-2.2; and failure to pay the “spread of hours” premium as required by 12 NYCRR §142-2.4. In an effort to avoid providing the class discovery demanded by Plaintiffs, defendant Community Home Care Referral Service, Inc., (Community) now moves to dismiss Plaintiff’s class wide claims pursuant to CPLR 3211(a)(7) claiming, based upon facts recited in the affidavit of defendant Weiss, that no violations occurred and that, because the conditions of employment are unique to each prospective class member, class certification is therefore precluded.

Defendants further rely on a Labor Department Opinion Letter dated March 11, 2010, which is ambiguous, at best, and does not conclusively establish that there is no merit to Plaintiffs’ claims. Plaintiffs have cross-moved for an order compelling defendants to completely answer their demands, including those addressed to the prospective class members. In their response to Plaintiffs’ demands as to the Class, defendants contend such demands are overbroad, burdensome, and vague and have argued that such demands are premature in that no class has been certified.

It is the defendants’ motion that is premature.

## BACKGROUND

Plaintiffs were employed by Defendants to provide services to their homebound, elderly and disabled clients. According to the Complaint, Plaintiff's duties included: personal care services, such as assistance with walking, bathing, dressing, personal grooming, meal preparation, feeding and toileting; heavy and light cleaning, such as vacuuming, mopping, dusting, cleaning windows, cleaning bathrooms, doing laundry and taking out garbage; shopping; running errands; and escorting clients. Plaintiffs worked several 24 hour shifts during their employment, and as many as four such shifts back to back. When working these 24 hour shifts, Plaintiffs were required to stay overnight at the residences of Defendants' clients so as to be available to provide assistance throughout the night, but do not "live" in the home of their employer.

According to the Complaint, Plaintiff Kodirov was paid by the hour for the 12 daytime hours per 24 hour pay period, and a flat rate for the 12 nighttime hours. From October 2005 through December 2006, Kodirov was paid \$10.10 per hour for his weekday daytime hours and \$11.20 per hour for his weekend daytime hours. Thereafter, Kodirov's daytime hourly wage was increased to \$10.40. It is alleged that throughout his employment, Kodirov was paid "only a total of \$16 for his 12 nighttime hours" (Compl. ¶ 22). Kodirov was not paid overtime for the hours worked in excess of 40 hours per week.

Plaintiff Demyanchuk, who is still employed by defendants, has been paid \$10.30 hourly for the 12 daytime hours per 24 hour pay period. She was paid \$16.95 as a flat rate

for the 12 nighttime hours. According to the Complaint, Demyanchuck was not paid overtime for the hours worked in excess of 40 hours per week.

Plaintiffs assert that members of the Class have the same duties, and are paid in the same manner, at an hourly daytime rate and flat rate for the nighttime hours.

According to the Complaint, Defendant failed to maintain and preserve payroll records as required by Labor Law §195 and 12 NYCRR §142-6(a)(4). Defendant failed to post a notice in a conspicuous place in its establishment summarizing minimum wage provisions as required by 12 NYCRR §142-2.8. Finally, Defendant failed to pay the Plaintiffs and members of the Class the “spread of hours” premium in violation of NYCRR §142-2.4.

### **DISCUSSION**

Plaintiff moves to compel Defendants to complete class-wide responses to discovery requests. Defendant argues that Plaintiff’s class wide claims should be dismissed, as the class does not meet the requirements set forth in CPLR 901 and 902, the proposed class is facially overbroad, and that the litigated issues are too individualized for class treatment.

In order to obtain certification of a class, Plaintiffs must show that each of the prerequisites of CPLR 901 have been met, including “(1) the class is so numerous that joinder of all members is . . . impracticable; (2) there are questions of law or fact common to the class which predominate over questions affecting only individual members; (3) the claims . . . of the representative parties are typical of the claims . . . of the class; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) the

class action is superior to other available methods for the fair and efficient adjudication of the controversy.” In order to determine if the requirements set forth in CPLR 901 are met, and to assess the considerations listed in CPLR 902, limited discovery must be conducted (*Katz v NVF Co.*, 100 AD2d 470, 474 [2d Dept 1984]; *Chimenti v Am. Express*, 97 AD2d 351, 358 [1st Dept 1983]). Plaintiffs must be allowed to assemble evidence to meet their burden of showing that the statutory prerequisites to certification of a class are met. (*Rodriguez v Metro. Cable Communications*, 79 AD3d 841 [2d Dept 2010]; *Katz*, 100 AD2d at 474; *Simon v Cunard Line Ltd.*, 75 AD2d 283, 290-1 [1st Dept 1980]; *Gewanter v Quaker State Oil Refining Corp.*, 87 AD2d 351, 352 [4th Dept 1982]; *Vallone v Delpark Equities*, 95 Misc 2d 161 [Sup Ct NY County 1978]).

Here, Plaintiff must first be allowed to conduct the limited discovery necessary to adduce evidence to satisfy the requirements set forth by the CPLR. Once the limited discovery is completed, Plaintiff will bear the burden to show the requirements of class certification are met. *Kudinov v Kel-Tech Constr. Inc.*, 64 AD 3d 481 [1st Dept 2009]. Dismissal of Plaintiff’s class wide claims on the grounds that the criteria for certification has not been established is inappropriate at this time.

Defendant also argues that the proposed class is “fatally overbroad”, as the Complaint states the purported class to include “all current and former home health care workers employed by Defendants in New York during the period from March 28, 2005" onward. As a rule, the class “must not be defined so broadly that it encompasses individuals who have

little connection with the claim being litigated; rather, it must be restricted to individuals who are raising the same claims or defenses as the representative" (7A Wright, Miller and Kane, Federal Practice and Procedure Civil 3d § 1760). Succinctly, "the class cannot be so broad as to include individuals who have not been harmed by the defendants' allegedly wrongful conduct" (*Klein v Robert's Am. Gourmet Food, Inc.*, 28 AD3d 63, 71 [2d Dept 2006]; see also *Naftulin v Sprint Corp.*, 16 Misc 3d 1131A [NY Sup Ct 2007]).

Plaintiffs' claims allege Defendants' failure to comply with several aspects of the New York Labor Law, among them, the failure to pay the statutory minimum wage. Contrary to Defendants' argument, it appears that such claims are not without legal merit (see *Matter of Settlement Home Care, Inc v Indus. Board of Appeals*, 151 AD2d 580 [2d Dept 1989]). The proposed class encompasses those home care attendants employed by Defendant within New York State, during an approximately seven year period. Given the requirements of law to maintain records of employee compensation for at least three years (see Labor Law § 195 [4]), it should not be overly burdensome to supply the information requested for that three year period beginning July 1, 2008 and Defendants are hereby ordered to do so, leaving to another day whether the proposed class is overbroad. At this time, pending completion of limited class discovery, it is pre-mature to determine whether the proposed class is over-inclusive.

Defendants also cite to the "commonality" requirement under CPLR 901(a)(2), arguing that the claims by the individual Plaintiffs are far too individualized to allow class

treatment. However, when the only differences between members of the putative class are the hours worked, wage scale, and work locations, the commonality requirement is not defeated (*see Dabrowski v Abax Inc.*, 84 AD3d 633, 634 [1st Dept 2011]; *Kudinov*, 65 AD3d at 481; *Englade v Harper Collins Publr., Inc.*, 289 AD2d 159 [1st Dept 2001]). While members of the putative class might differ in hourly pay rate and hours and locations worked, these differences do not present grounds for dismissing the class claims.

Notwithstanding defendants' contentions, this is not a motion for class certification but is a motion pursuant to CPLR 3211 to dismiss prior to joinder of issue. In ruling on a 3211 motion, "the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-4 [2d Dept 2008]). The court may only consider allegations of fact and not "bare legal conclusions" (*id.*). Furthermore, the court will afford no deference to allegations that are "inherently incredible or flatly contradicted by documentary evidence" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

Defendants do not claim that the Plaintiffs have not adequately pled facts to support their claims. Whether such factual contentions are sufficiently applicable to the other members of the proposed class will be determined upon the motion to certify the class.

## CONCLUSION

Defendants' motion to dismiss the class action allegations is denied. Plaintiffs' motion to compel is granted to the extent indicated and defendants are directed to completely respond to Plaintiffs' First Demand for Discovery and Inspection within 30 days.

The unsworn purported statement of plaintiff Demyanchuck, submitted by Defendants, is stricken and will not be considered by this Court, as it was apparently improperly obtained through direct contact with a represented litigant.

The foregoing constitutes the decision and order of the Court.

E N T E R,

J. S. C.