At an IAS Term, Part 22, 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 31st day of March, 2003

P R E S E N T :

HON. MICHAEL J. GARSON,
Justice.

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ISRAEL MALDONADO, ET ANO., ETC.,

Plaintiffs,

- against -

Index No. 38454/01

OLYMPIA MECHANICAL PIPING & HEATING CORP., ET. AL

Defendants.

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The following papers numbered 1 to 5 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavit: (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3-4
Reply Affidavits (Affirmations)	5
_____ Affidavit (Affirmation)	
_____ Other Papers	

Upon the foregoing papers, defendant Olympia Mechanical Piping & Heating Corp. ("Olympia") moves for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing the complaint insofar as asserted against it.

Background

In this purported class action, plaintiffs Israel Maldonado ("Maldonado") and Ruben Reyes ("Reyes"), individually and on behalf of others allegedly similarly situated, seek to recover prevailing wages and benefits which plaintiffs claim they failed to receive for labor performed for their employer, Olympia, on certain unidentified public works projects for the New York City Housing Authority and Department of Environmental Protection and for other unspecified "municipalities or public entities."

Plaintiffs commenced this action against Olympia in or about October 2001 and, in or about November 2001, filed a supplemental summons and amended complaint, naming three payment sureties - - - Lumbermans Mutual Casualty Company ("Lumbermans"), RLI Insurance Company ("RLI") and Ulico Casualty Company ("Ulico") - - - as additional defendants.

Plaintiffs allege that, beginning "in or about 1994," they worked as plumbers and other construction trade workers on various public works projects within New York City and contend that they were paid at a prevailing wage and benefit rate less than that to which they were entitled under § 220 of the Labor Law.[1]

In their amended complaint, plaintiffs set forth five causes of action - - - the first four against Olympia and the fifth cause of action against the above-mentioned payment sureties.

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[1] Plaintiffs concede that there is no private right of action under the Labor Law until there has been an administrative determination *(see Pesantez v Boyle Environmental Services, Inc.*, 251 AD2d 11; *Majstrovic v R. Maric Piping, Inc.*, 171 Misc 2d 429), and that they have either not sought the required administrative remedy or that there has been no final determination in an administrative proceeding.

The first cause of action alleges a violation of Article 1, Section 17 of the New York State Constitution. The second cause is for breach of contract. The third cause of action sounds in *quantum meruit*, for the reasonable value of services allegedly provided. The fourth alleges unjust enrichment. The fifth and final cause of action refers to bonds which the sureties allegedly issued in connection with several unidentified public works projects.

Neither plaintiffs' original nor amended complaint annexes or specifically identifies any of the public works contracts or surety agreements upon which plaintiffs' claims are purportedly based.

Olympia has not yet interposed an answer to plaintiffs' amended complaint. In or about December 2001, Ulico served and filed an answer to plaintiffs' amended complaint and, in or about January 2002, Lumbermans and RLI served and filed their joint answer. Thereafter, Ulico commenced a third-party action against several parties, including Olympia.

Analysis

Olympia now moves for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing plaintiffs' complaint.[2]

A motion to dismiss, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action "must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law'" *(511 West 232nd Owners Corp v Jennifer Realty* Co., 98 NY2d 144, 152, *citing Polonetsky* v *Better Homes Depot, Inc.*, 97 NY2d 46, 54, *quoting Guggenheimer* v *Ginzburg*, 43 NY2d 268, 275; *see also Halpern v Halpern*, 109 AD2d 818,

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[2] Olympia further requests that the instant motion be treated as one for summary judgment. However, upon review of the submissions of the respective parties, it cannot fairly be said that the parties, particularly plaintiff, have been "deliberately charting a summary judgment course," and have "laid bare" their proof (*O'Dette* v *Guzzardi*, 204 AD2d 291, 292). The request is, thus, denied

819). The pleadings in the complaint are to be liberally construed and the court must accept plaintiffs' allegations as true, and resolve all inferences which reasonably flow therefrom in their favor *(see Leon* v *Martinez,* 84 NY2d 83, 87-88; *Morone* v *Morone, 50* NY2d 481,484; *Schulman* v *Chase Manhattan Bank,* 268 AD2d 174,177; *Rhode* v *Port Washington Cinema Corp.,* 267 AD2d 444,445).

Here, plaintiffs' complaint asserts both statutory and common law causes of action, sounding in contract and quasi-contract, but fails to specifically identify any one of the numerous public works contracts, projects or surety agreements upon which the claims are purportedly based. Moreover, because the complaint also fails to specify, or to even reasonably approximate, the period during which their wage payments are alleged to have been made (other than that the period commenced in or about 1994),[3] and further fails to allege the rate or rates at which any of the plaintiffs were actually compensated, it is not possible to discern from the complaint the relevant prevailing wage and benefit rates then mandated by Article 8 of the Labor Law.

Further, the court also notes that plaintiffs' failure to annex or specifically identify even one contract and to specifically plead the issue of funding, leaves unanswered the pertinent question of whether one, some or all of these public works projects were federally-funded, rather than being funded by New York State or a locality, in whole or in part. The issue is relevant because, if these projects had been funded by the Federal government, State law would be preempted by the Davis-Bacon Act, requiring the dismissal of plaintiffs' State claims (see *Grochowski* v *Phoenix Construction, 318 F3d 80; Grochowski v Ajet Construction Corp.,* 1999 WL 688450, * **3,** *citing*

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[3] Plaintiffs' amended complaint neither asserts that the claimed Labor Law § 220 wage violations ceased on a date certain nor that the violations continue to date, *i.e.* that this is an ongoing or continuing violation.

Majstrovic, 171 Misc 2d at 431-433; *see also Gonzalez v D&S Zaffuto Joint Venture*, 271 AD2d 356).[4]

Finally, upon the pleadings and other record before the court or, more particularly, the lack thereof, the court finds that plaintiffs have not met their burden of establishing that class action certification would be appropriate in this matter, since they have merely alleged in conclusory fashion that they have satisfied the requirements of CPLR 901 *(see generally Hoerger v Board of Education of the Great Neck Union Free School District*, 98 AD2d 274,282; *Chimenti v American Express Co.*, 97 AD2d 351,352; *Friar v Vanguard Holding Corp.*, 78 AD2d **83).** It is not clear that, even if the complaint were sufficiently pleaded, this purported class action could be properly maintained by the representative plaintiffs.

With this general overview in mind, the court now addresses each of the five causes of action set forth in the subject complaint.

First Cause of Action

Plaintiffs' first cause of action alleges that, beginning sometime in or about 1994, and continuing for some indefinite period, Olympia, with respect to numerous unidentified public works projects, willfully and in violation of Article 1, Section 17 of the New York State Constitution, failed to pay plaintiffs and other workers similarly situated, the prevailing wages and supplemental benefits mandated by § 220 of the Labor Law.

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[4] Plaintiffs amended complaint alleges only that these public works projects, some performed for the New York City Housing Authority (an entity that directly and indirectly receives large amounts of federal funding, and that at issue in the *Grochowski* matters), were "*publicly* financed construction projects in New York," allowing no reasonable inference as to the source or sources of said financing (*emphasis supplied*).

As mentioned, plaintiffs' amended complaint does not allege how these various public works projects were funded. In any event, and contrary to plaintiffs' assertion, Article 1, section 17 of the New York State Constitution is not a self-executing provision and provides no basis for a private right of action except where brought in reliance upon § 220 of the Labor Law; *i.e.*, the constitutional provision is dependent upon the statute insofar as "the machinery necessary to obtain the benefits set forth" therein *(see Kaufman* v *City of New York*, 61 NYS2d 779, 781-782; *see also United States v Handakas*, 286 F3d 92, 106 [the duties imposed by Article 1, section 17 of the New York State Constitution and § 220 of the New York State Labor Law are enforceable by an action sounding in contract, but are "not enforceable by an action in tort"]). Here, plaintiffs proffer no contract and assert no tort causes of action independent of the Labor Law statute.

The court finds absolutely no merit in plaintiffs' self-serving assertion that they should be allowed to proceed based upon this alleged "constitutional tort" (as described by plaintiffs) merely because, in plaintiffs' view, the implementing statute, Article 8 of the Labor Law, is inadequate and impracticable *(see Grochowski*, 318 F3d at 85 ["It is an 'elemental canon' of statutory construction that where a statute expressly provides a remedy, 'courts must be especially reluctant to provide additional remedies"'], *citing Karahalios* v *National Federation of Federal Employees, Local 1263*, 489 US 527, 533).

The first cause of action set forth in plaintiffs' amended complaint is, therefore, dismissed.

Second Cause of Action

Plaintiffs' second cause of action sounds in breach of contract and alleges that "[t]he Public Works Contracts" entered into by Olympia set forth prevailing wages and supplemental benefit rates for the benefit of plaintiffs and others similarly situated and that Olympia breached those

unidentified contracts by failing to insure that plaintiffs received the prevailing wages and supplemental benefits "for all labor performed upon the Public Works."

Although New York allows parallel actions for recovery of wages by non-public employees under both the Labor Law and through common law remedies, such as an action alleging breach of contract *(see Wright v Herb Wright Stucco, Inc.*, 72 AD2d 959, *rev'd & reinstated for reasons stated in dissent*, 50 NY2d 837; *see also Fata v S. A. Healy* Co., 289 NY 401; *Pesantez*, 251 AD2d at 12), the private employee's common law action pleading requirements are not satisfied merely by stating that a violation of Article 8 of the Labor Law or Labor Law § 220 has occurred. "In an action to recover damages for breach of contract, the complaint must, *inter alia*, set forth the terms of the agreement upon which liability is predicated, either by express reference or by attaching a copy of the contract, and allege the special damages sustained" *(Davantzis* v *PaineWebber, Inc.*, 2001 WL 1423519, [NY Sup.], 2001 NY Slip Op. 40221 [U]).

"The pleadings must be 'sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved' as well as 'the material elements of each cause of action or defense"' (*Atkinson* v *Mobil Oil Corp.*, 205 AD2d 719, 720, *quoting DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 239; *see also Spano v Perini Corp.*, 25 NY2d 11, 18; *Payrolls & Tabulating, Inc. v Sperry* ***Rand*** *Corp.*, 22 AD2d 595, 596).

"[T]he notice requirement of the statute 'must be accomplished with sufficient precision and specificity to enable the court to control the case and to permit the parties to prepare for trial' .... The purpose of the statute is to prevent surprise ... and, thus, to avoid confusion, delay and injustice"

(Alvord and Swift v Muller Construction Company, Inc., 46 NY2d 276, 284 [Cooke, J., *concurring] [citations omitted]*).

Upon a thorough review of the amended complaint and other portions of the record, the court finds the allegations and statements set forth in the amended complaint to be insufficiently particular to apprise defendants of the specific transactions and/or occurrences at issue and of the material elements of each claim which they would be required to defend *(see* CPLR 3013).

Axiomatically, "[if] the alleged breaches stem from a single source contract, the fact should appear clearly. If based upon several contracts the pleading should, to that extent, be separate causes" *(Payrolls & Tabulating, Inc.*, 22 AD2d at 596). Here, plaintiffs' amended complaint, while referring to an unspecified number of unidentified public works contracts, alleges a breach of contract in a single cause of action and in the most general terms possible.

The record is uncontradicted that Olympia is presently, and has been during the past decade, involved in a substantial number of public works projects in New York, yet the amended complaint fails to identify even one contract and, noticeably absent, are any reasonably approximated dates, locations and names of a single public works project upon which the claims are said to be based. Moreover, because no copies of any applicable contracts are provided, except for hearsay, supposition and opinion, plaintiffs have presented no evidence that the prevailing wage language alleged is contained therein *(see Vardi* v *Mutual Life Insurance Company of New York*, 136 AD2d 453, 456). Thus, there can be no inference that plaintiffs have a contractual claim against Olympia or even that they were employed by Olympia on any of the public works projects during the time when the alleged wrongdoing occurred.

Plaintiffs' second cause of action, alleging breach of contract, is, therefore, dismissed. Because no contracts have been annexed to the complaint or any of the submissions herein, the court has not considered the parties' arguments regarding plaintiffs' rights to enforce the terms of any agreement which has allegedly been breached by defendant.

Third and Fourth Causes of Action

Plaintiffs' third and fourth causes of action are quasi-contractual, sounding in ***quantum meruit*** and unjust enrichment. These causes of action must also be dismissed.

"The general rule is that the existence of a valid and enforceable written contract governing a particular subject matter precludes recovery in quasi contract for events arising out of the same subject matter .... However, a party is not precluded from proceeding on both breach of contract and quasi-contract theories where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue" ***(Curtis Properties Corp. v Greif Companies***, 236 AD2d 237,238; ***Randall v Guido,*** 238 AD2d 164).

Here, plaintiffs' third and fourth causes of action incorporate by reference the allegations of the second cause of action, which sounds in breach of contract. Although plaintiffs fail to specifically identify or annex copies of the relevant contractual agreements, they, nevertheless, assert (without contradiction), that such agreements exist and do not allege that the agreements fail to cover the subject matter for which they seek to recover in ***quantum meruit*** and for unjust enrichment. As a result, there can be no recovery by plaintiffs based on these causes of action ***(see Aviv Construction, Inc. v Antiquarium, Ltd.,*** 259 AD2d 445, 446-447; ***see*** *also* ***Melissakis v Proto Construction & Development Corp.,***294 AD2d 342, ***citing Clark-Fitzpatrick, Inc. v*** *Long* ***Island*** *R.R.* Co., 70 NY2d 382).

Mcreover, "[t]o state a cause of action for unjust enrichment, a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor" *(Smith* v *Chase Manhattan Bank, USA, N.A.*, 293 AD2d 598,599, *quoting Nakamura* v *Fujii*, 253 AD2d 387, 390). Here, plaintiffs do not allege that they were not compensated by Olympia for their labor. Further, the complaint fails to state a viable claim for unjust enrichment because it fails to allege that the benefits plaintiffs received were less than what they themselves, as opposed to the municipal entities, bargained for, and that any and all wage and benefi compensation paid by these entities to Olympia belong to plaintiffs as a matter of equity *(Smith, 243* AD2d at 599). In other words, plaintiffs have failed to allege that they had any expectation of compensation, other than what they themselves actually bargained for and received. Indeed, because no copy of a contract has been annexed, the court has no basis upon which to determine that any of these purported contracts contained a prevailing wage provision, other than the conclusory assertion set forth in the complaint.

Fi[illegible]h Cause of Action

The fifth and final cause of action set forth in the complaint alleges plaintiffs' entitlement, pursuant to the terms of unidentified bond agreements, to payment from the sureties of any wages and supplemental benefits which Olympia itself failed to pay. These causes of action are clearly derivative of plaintiffs' constitutional and contract causes of action, those which the court has already determined not to have been sufficiently or adequately pleaded. The court finds that the fifth cause of action is not pleaded with sufficient particularity to provide notice to the surety-defendants

of the particular transactions and occurrences, or series of transactions and occurrences, intended to be proved and of the material elements of the cause of action against them.[5]

Plaintiffs' request to serve a second amended complaint is denied. Plaintiffs have failed to submit any evidence that may properly be considered on a motion for summary judgment in support of a new pleading and, to the extent such evidence may be deemed to have been submitted, the court is not satisfied that plaintiffs have a reasonable ground to support their proposed causes of action *(see* CPLR 3211 [e]; *Sebro Packaging Corp. v S.T.S. Industries, Inc.*, **93** AD2d **785, 785-786).**

In light of the above relief, it is not necessary to consider whether the documentary evidence submitted by Olympia would constitute a defense to plaintiffs' claims pursuant to CPLR 3211 (a) (1).

The court has considered plaintiffs' remaining arguments and determined them to be without merit.

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[5] Plaintiffs' amended complaint, moreover, fails to allege that these were common-law bonds ano that they were not issued pursuant to the requirements of the contracting public entity. In that event, plaintiffs would be requited to exhaust their administrative remedies if the bonds at issue fall within the meaning of Labor Law § 220-g *(see Atlantic Coast Fireproofing, Inc. v J. Greaney Construction Corp.*, 245 AD2d 119, 120, *citing Scaccia Concrete Corp. v Hartford Fire Insurance Co.*, 212 AD2d 225). Moreover, the amended complaint does not plead with adequate specificity the provisions of the bond agreement and/or agreements or allege plaintiffs' compliance regarding time and subject matter provisions therein

Conclusion

Olympia's motion is granted and the action is dismissed in its entirety and plaintiffs are denied leave of the court to serve a second amended complaint.

The foregoing constitutes the decision, order and judgment of this court.