

Kudinov v Kel-Tech Constr. Inc.

2007 NY Slip Op 32495(U)

August 9, 2007

Supreme Court, New York County

Docket Number: 0114646/2005

Judge: Jane S. Solomon

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JANE S. SOLOMON

PART SS

Index Number : 114646/2005

KIDINOV, ALEXANDER

vs

KEL TECH CONSTRUCTION

Sequence Number : 001

ORDER MAINTAIN CLASS ACTION

INDEX NO. _____

MOTION DATE 7/31/07

MOTION SEQ. NO. _____

MOTION CALL NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits

Answering Affidavits — Exhibits

Replying Affidavits

1-4
5-19
20-26

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached memorandum decision.

~~_____~~

[Signature]

Dated: 8/9/07

[Signature]
JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

----- X

ALEXANDER KUDINOV, JOSE PORTAL, CLEMENTE CAMPOS, RAMON PAYERO and CESAR SALDIVAR individually and on behalf of all other persons similarly situated who are presently or were formerly employed by KEL-TECH CONSTRUCTION INC. with respect to public works projects awarded by The City of New York and The New York City School Construction Authority,

Index No. 114646/05

DECISION

Plaintiffs,

- against -

KEL-TECH CONSTRUCTION INC., IANNELLI CONSTRUCTION CO., INC., FOURTH AVENUE ENTERPRISES PIPING CORP., MERIS CONSTRUCTION CORP., CALCEDO CONSTRUCTION CORP., SEABOARD SURETY CO., ST. PAUL MERCURY INSURANCE COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, FIDELITY AND DEPOSIT COMPANY OF MARYLAND, VINCENT KELLEHER and PHILIP KELLEHER,

Defendants.

----- X

JANE S. SOLOMON, J.:

Plaintiffs move for an order (1) determining that this action may proceed as a class action pursuant to CPLR 901 and 902; (2) designating plaintiffs Alexander Kudinov, Jose Portal, Clemente Campos, Ramon Payero, and Cesar Saldivar as class representatives; (3) designating the firm of Barnes, Iaccarino, Virginia, Ambinder & Shepard, PLLC as counsel to the certified class; and (4) consolidating this action with the already-certified class action entitled *Wysocki v Kel-Tech Constr., Inc.*, Index No. 603591/03 (*Wysocki Action*).

Plaintiffs request that the action be permitted to proceed as a class action on behalf of the present and past employees of defendant Kel-Tech Construction Inc., or any related

entities, who performed work on public works projects identified in the motion papers. Of the nineteen public works projects set forth in counsel's affirmation in support of the motion, one project (Public School 165) is not mentioned in the complaint (Ambinder Aff., Exhibit DD). The complaint refers to several other projects (including P.S. 180, P.S. 223, P.S. 29, P.S. 107, Automotive Trades Vocational High School and the School Construction Authority office) for which plaintiffs do not seek class certification on this motion.

Defendants Seaboard Surety Co. (Seaboard), St. Paul Fire and Marine Insurance Company (St. Paul), and United States Fidelity and Guaranty Company (USF&G) cross-move (1) pursuant to CPLR 3212 (b), granting Seaboard partial summary judgment, and dismissing any claims that plaintiffs may have regarding the "Public Works Projects" referenced in the complaint as P.S. 150 and I.S. 263 on the ground that plaintiffs did not provide labor to defendant Kel-Tech Construction Inc. (Kel-Tech) on those projects for which projects Seaboard served as surety for Kel-Tech or Iannelli Construction Co., Inc. (Iannelli); (2) pursuant to CPLR 3212 (b), granting USF&G partial summary judgment, and dismissing any claims that plaintiffs may have regarding the Public Works Projects referenced in the complaint as P.S. 180, SCA Office, J.H.S. 281, and P.S. 29 on the ground that plaintiffs did not provide labor to Kel-Tech on those projects for which projects USF&G served as surety for Kel-Tech or Iannelli; and (3) pursuant to CPLR 906 (2), dividing the purported class into subclasses on a project-by-project basis as to the remaining projects referenced in the complaint.

Defendants Kel-Tech and Meris Construction Corp. (Meris) cross-move for summary judgment dismissing the action. Defendant Fidelity & Deposit Company of Maryland (F&D) cross-moves for summary judgment dismissing, as against it, the claims of plaintiffs,

particularly those of plaintiff Alexander Kudinov.

Background

The complaint alleges as follows: plaintiffs, individuals residing in King's County, New York, bring this action on their own behalf, and on behalf of a putative class of individuals who performed pointing, caulking, masonry, demolition, painting, and related construction work for Kel-Tech on various Public Works Projects in New York pursuant to Public Works Contracts entered into with the City of New York (City). Under Labor Law Article 8, all such contracts must contain a provision requiring that each laborer, workman, and mechanic be paid prevailing wages and supplemental benefits (*see* Labor Law § 220).

In 1999, Kel-Tech entered into numerous Public Works Contracts with the City, the New York City School Construction Authority (NYCSCA), and other entities, including defendants Iannelli, Fourth Avenue Enterprises Piping Corp. (Fourth Ave.), and Meris (collectively, the General Contractor Defendants) to perform general construction and renovation work at public schools and other public facilities in the City.

Seaboard, F&D, St. Paul, St. Paul Mercury Insurance Company (St. Paul Mercury), and USF&G issued to Kel-Tech and the General Contractor Defendants "Labor and Material Payment Bonds" thereby ensuring the payment obligations incurred by Kel-Tech, the General Contractor Defendants, and their subcontractors while performing the Public Works Contracts.

Beginning in 2000, in furtherance of Kel-Tech's Public Works Contracts, plaintiffs performed pointing, caulking, masonry, demolition, painting, and related construction work for Kel-Tech. Plaintiffs allege further that defendants breached the various Public Works

Contracts by failing to pay plaintiffs and the other members of the putative class the prevailing rates of wages and supplemental benefits for all labor performed on the Public Works Projects that they were statutorily and contractually entitled to receive for the work that they performed.

The complaint contains 13 causes of action. The first cause of action is against Kel-Tech and the General Contractor Defendants for breach of the Public Works Contracts by failing to pay plaintiffs and the other members of the putative class the prevailing rates of wages and supplemental benefits for all work performed on the Public Works Projects.

The second cause of action is against Kel-Tech for breach of the subcontracts that Kel-Tech entered into with the General Contractor Defendants on the Public Works Projects by failing to pay plaintiffs and the other members of the putative class prevailing rates of wages and supplemental benefits.

The third cause of action is against Kel-Tech for violation of Labor Law § 655 and 12 NYCRR 142-3.2 for failing to pay overtime compensation for the time worked in excess of 50 hours per week for Kel-Tech on the Public Works Projects.

The fourth through seventh causes of action are against Kel-Tech for fraud, quantum meruit, and unjust enrichment.

The eighth cause of action is against Kel-Tech for violation of Labor Law § 191 for failing to timely pay the statutorily and contractually required prevailing wages, supplemental benefits, and overtime compensation.

The ninth cause of action is against Vincent Kelleher and Phillip Kelleher – officers, directors, or owners of Kel-Tech – seeking to pierce the corporate veil so as to hold them liable for Kel-Tech's conduct.

The tenth, eleventh, twelfth, and thirteenth causes of action are against USF&G, St. Paul, Seaboard and St. Paul Mercury, and F&D, respectively, for suretyship.

As a preliminary matter, it appears that plaintiffs have withdrawn the fourth through seventh causes of action for fraud, unjust enrichment, and quantum meruit (*see* footnote 11, on page 24 of plaintiffs' Opposition Memorandum of Law).

Summary Judgment

Kel-Tech & Meris

The motion by defendants Kel-Tech and Meris for dismissal of all causes of action against them is granted in part.

The mandate of Article I, § 17 of the New York State Constitution, as embodied in Labor Law § 220 (3), requires a contractor undertaking a public work project to pay its employees the prevailing rate of wages, and to pay or provide them with supplements (i.e., remuneration for employment paid in any form other than cash or reimbursement for expenses) in accordance with prevailing practices for private sector work in the same locality (*Matter of Chesterfield Assoc. v New York State Dept. of Labor*, 4 NY3d 597, 599 [2005]). Labor Law § 220 (3) provides in part:

“The wages to be paid for a legal day’s work, as hereinbefore defined, to laborers, workmen or mechanics upon such public works, shall be not less than the prevailing rate of wages as hereinafter defined.”

The workers protected by Labor Law § 220 are third-party beneficiaries of the contract between their employer and the municipality (*Maldonado v Olympia Mech. Piping & Heating Corp.*, 8 AD3d 348, 349 [2d Dept 2004]).

Notwithstanding the above-cited mandate, Kel-Tech and Meris argue that

plaintiffs may not maintain this action because of the existence of collective bargaining agreements (CBA's) between Kel-Tech and union organizations and collective bargaining units of these union organizations, including: (1) the District Council of New York City and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO; (2) Pointers, Cleaners, and Caulkers, Local Union No. 1, New York, of the International Union of Bricklayers and Allied Craftsmen; and (3) the Mason Tenders District Council of Greater New York, Local 79. Based upon these agreements, Kel-Tech and Meris argue, plaintiffs' common-law claims are pre-empted by Section 301 of the Labor Management Relations Act, 29 USA 185 (a) which provides:

“Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.”

The courts must treat the resolution of a state law tort claim as a claim arising under federal labor law when the claim is substantially dependent on the construction of the terms of a collective bargaining agreement (*United Steelworkers of Am., AFL-CIO-CLC v Rawson*, 495 US 362, 371 [1990], citing *Allis-Chalmers Corp. v Lueck*, 471 US 202 [1985]). Section 301 pre-empts state law in that only the federal law fashioned by the courts under Section 301 governs the interpretation and application of collective bargaining agreements (*United Steelworkers of Am., AFL-CIO-CLC*, 495 US at 368).

Based upon the foregoing, Kel-Tech and Meris argue that the benefits and rights included in the Public Works Contracts upon which plaintiffs base their claims are not distinct or

independent from those covered by the CBA's in question, but, rather, depend upon the existence of those very CBA's. That is because, they argue further, the commissioner of labor (the Comptroller within New York City), in establishing rates of pay and benefits to be paid persons employed on a public works project, adopts the rates included in the collective bargaining agreements in the locality where the work is performed. They assert that resolution of plaintiffs' claims – that defendants failed to pay proper wages – is inextricably intertwined with, and substantially dependent upon, construction of the terms of the CBA's. They contend that, based on the nature of the claims, the court will be required to interpret the provisions of each of the applicable CBA's to determine whether the work that plaintiffs claim to have performed falls within the scope of work that their trade classification covers. Furthermore, the court will be required to review and interpret the provisions of each of the CBA's to determine whether a night shift differential was due for work claimed to have been performed.

This argument is unpersuasive. Pre-emption is not at issue because the numerous CBA's are not at the core of the issues raised in this action. The only mention of a collective bargaining agreement in the complaint is at Paragraph 26, which states that the prevailing rate of wage is the rate of wage paid in the locality by virtue of collective bargaining agreements between bona fide labor organizations and employers of the private sector. Plaintiffs seek unpaid wages and benefits sought in the public works contracts (*Caterpillar Inc. v Williams*, 482 US 386 [1987]). The decision herein accords with that rendered in the related *Wysocki Action*, that involved different named plaintiffs, but, as is the case here, included among the defendants Kel-Tech, the General Contractor Defendants, Calcedo Construction Corp., Seaboard, St. Paul, USF&G, Vincent Kelleher, and Phillip Kelleher (*see* decision and order of this court, dated April

8, 2005 [2005 *Wysocki Action Order*]; *see also* decision and order, dated August 4, 2005, also in the *Wysocki Action*).

The other argument for dismissal (exhaustion of administrative remedies) is equally unpersuasive, again for the reasons set forth in the 2005 *Wysocki Action Order*. As set forth therein and above, it is not necessary for plaintiffs to exhaust their administrative remedies, because their claims are not based upon the CBA's. Plaintiffs may proceed on their common law breach of contract claims for underpayment of benefits and wages (*Brandy v Canea Mare Contr., Inc.*, 34 AD3d 512 [2d Dept 2006]; *Pesantez v Boyle Envtl. Servs.*, 251 AD2d 11 [1st Dept 1998]). The Labor Law is not the exclusive remedy to recover prevailing wages (*De La Cruz v Caddell Dry Dock & Repair Co., Inc.*, 22 AD3d 404 [1st Dept 2005]).

The third cause of action against Kel-Tech for violation of Labor Law § 655 and 12 NYCRR 142-3.2, allegedly for failing to pay overtime compensation for the time worked in excess of 50 hours a week on the Public Works Projects is dismissed, again for the reasons set forth in the 2005 *Wysocki Action Order*, as is the eighth cause of action, for violation of Labor Law § 191, allegedly for failing to timely pay the statutorily and contractually required prevailing wages, supplemental benefits, and overtime compensation.

The cross-motion also is granted with respect of those projects where there is no evidence that a plaintiff worked at that location because plaintiffs have not made a prima facie case with respect to those projects. Accordingly, the motion is granted to the extent that the complaint is dismissed so far as it alleges that Kel-Tech or Meris failed to pay prevailing wages at these projects: P.S. 150, P.S. 153, P.S. 46, P.S. 161, P.S. 274, P.S. 180, P.S. 29, P.S. 107, P.S. 223, Automotive Trades Vocational H.S. and the School Construction Authority office.

Seaboard, St. Paul, and USF&G

The motion by the sureties Seaboard, St. Paul, and USF&G is granted in part. Plaintiffs' claims against the sureties are derivative of the breach of contract claims (*De La Cruz v Caddell Dry Dock & Repair Co., Inc.*, 22 AD3d 404, *supra*), which, as discussed above, are viable. It is undisputed, however, that the named plaintiffs did not perform any work at P.S. 150, the School Construction Authority office, P.S. 180 and P.S. 29 (*see Wysocki Action*, 33 AD3d 375 [1st Dept 2006]). I find unpersuasive plaintiffs' assertion that it is not necessary that the claims of the named plaintiffs be identical to those of the class members (citing *Super Glue Corp. v Avis Rent A Car Sys.*, 132 AD2d 604 [2d Dept 1987]). Unless the named plaintiff worked on a particular project, that person has no claims against the employer (*see Pesantez v Boyle Env'tl. Servs.*, 251 AD2d 11, *supra* [affirming the certification of a class in an action to recover the prevailing rate of wages where all proposed class members worked on the same project]). There is evidence showing that Portal worked at I.S. 263 and that Saldivar worked at Junior H.S. 281 (Ambinder Aff., Exhibit X), so the motion is denied with respect to those projects.

Moreover, it is not likely that the named representatives can be expected to adequately represent workers on projects of which they were not involved. Indeed, Ramon Payero testified that, because of personal financial difficulties, he was prepared to accept a large payment to abandon the class action. To be a named representative, the record must establish that such person (and counsel) will vigorously and adequately pursue the action (*Super Glue Corp. v Avis Rent A Car Sys.*, 132 AD2d at 607). Because the disposition of a class action binds class members who do not directly participate in the action, the trial court must act as "the

protector of the rights of the absent class members” (*Klein v Robert’s Am. Gourmet Food, Inc.*, 28 AD3d 63 [2d Dept 2006]).

These movants also seek an order, pursuant to CPLR 906 (2), dividing the purported class into subclasses on a project-by-project basis as to the remaining projects referenced in the complaint. They assert that this is warranted because the sureties each issued separate bonds on a project-by-project basis, and any claims that plaintiffs will have against one bond will be limited to the project and contract for which that specific bond was issued. Thus, they argue, subclasses are necessary to facilitate any payment that might be due plaintiffs by either USF&G, Seaboard, or St. Paul. The request, which is unopposed and reasonable, is granted.

F&D

F&D cross-moves, pursuant to CPLR 3212, for summary judgment dismissing as against it the claims of plaintiffs, particularly those of plaintiff Alexander Kudinov.

F&D argues as follows: Relevant to this motion is the thirteenth cause of action that alleges that F&D is liable to plaintiffs on three Kel-Tech projects (P.S. 104, P.S. 114, and P.S. 198) pursuant to payment bonds that F&D issued. Of the five proposed class representatives, only one, Kudinov, a union carpenter with Local 906, claims to have worked on any of the three F&D bonded projects. However, F&D contends, he is not a suitable class representative because (1) he has not demonstrated that he has a claim against Kel-Tech, (2) his inconsistent testimony at his deposition so damages his credibility that he cannot represent the proposed class of workers, (3) his testimony about the number of carpenters who worked at these projects demonstrates that this action, against F&D, fails to satisfy the numerosity prerequisite

for class certification, and (4) he is the only class representative on the three F&D bonded projects, and, therefore, summary judgment should be granted dismissing the action against F&D.

In response, plaintiffs argue that there is at least a factual issue as to whether he worked on these projects, and as they argue with respect to the motion by Seaboard, St. Paul, and USF&G, he can represent the class even if he did not work on every project.

F&D's cross-motion is denied. There is evidence in the record that Kudinov worked at the three locations at issue (P.S. 104, P.S. 114, and P.S. 198) (*see* Exhibits B, D, and E to Affirmation of Mark S. Gamell, Esq.). The allegations regarding inconsistent testimony are not dispositive, raising issues of credibility that cannot be resolved on these papers. Kudinov will ultimately be required to substantiate his claims in order to prevail as to liability and damages.

As for the numerosity issue, there is no "mechanical test" to determine whether this requirement has been met, nor is there a set rule for the number of prospective class members that must exist before a class is certified; each case depends upon the particular circumstances surrounding the proposed class (*Friar v Vanguard Holding Corp.*, 78 AD2d 83, 96 [2d Dept 1980]). Here, I do not find numerosity to be an issue, because these projects will be but a subclass (or subclasses) of the other labor law claims in this action involving numerous other workers and class members.

Class Certification

CPLR 901 authorizes a class action if: (1) the class is so numerous that joinder of all members is impracticable, (2) questions of law or fact common to the class predominate over

any question affecting only individual members, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately protect the interests of the class, and (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy (CPLR 901 [a]; *Rabouin v Metropolitan Life Ins. Co.*, 25 AD3d 349, 350 [1st Dept 2006]). Plaintiffs have the burden of establishing compliance with these prerequisites (*id.*).

For the reasons set forth in the *Wysocki Action*, class certification is granted. As I found to be the case in that related action, this action meets the basic requirements for class certification. Jose Portal, Cesar Saldivar, and Alexander Kudinov are designated as class representatives, and the law firm of Barnes, Iaccarino, Virginia, Ambinder & Shepard, PLLC as class counsel. Although these three individuals, at their respective depositions, did not remember all details underlying this action, they appear to be adequate class representatives in that they have a basic understanding of the nature of their claims. In addition, the record indicates that the size of the class will not be less, or at least not considerably less, than in the *Wysocki Action*. Furthermore, counsel in this action is the same as in that action.

I do not find, however, that Payero and Campos are proper representatives for similar reasons as found to be the case in the *Wysocki Action* (*see* Transcript of Oral Argument held on September 12, 2005, and 33 AD3d 375 [1st Dept 2006] [affirming this court's denial of class certification as to these individuals in the *Wysocki Action*]). As discussed above, Payero testified that, because of personal financial difficulties, he was prepared to accept a large payment to abandon the class action, and that Clemente Campos also sought to do the same.

Kel-Tech argues that, because plaintiffs are seeking punitive damages, this action

may not be maintained as a class action. Although punitive damage claims may not be maintained in a class action, the named plaintiffs also sued in their individual capacities. To the extent that punitive damages are sought on behalf of the class plaintiffs, that claim is dismissed.

Finally, plaintiffs' request for an order consolidating this action with the already-certified *Wysocki Action*, also assigned to this court, is denied. Although both actions involve substantially the same defendants, including the same employer defendant (Kel-Tech) and essentially the same claims, the two lawsuits are now on different tracks. Unfortunately, this motion has been subjudice for a long time, and recently motions for summary judgment were decided in the *Wysocki Action*. The two actions are before me, and we can address at a conference in this action shared discovery or such other economic use of counsel's time and resources, as well as the court's, as feasible.

Settle order, including a provision scheduling a conference to address discovery and other issues.

Dated: August 9, 2007

ENTER:



J.S.C.
JANE S. SOLOMON