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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Justice

Index Number : 109673/2005

ALFARO, LUIS

VS.

VARDARIS TECH, INC.

SEQUENCE NUMBER : 003

PARTIAL SUMMARY JUDGMENT

INDEX NO. 109673/2005

MOTION DATE 11/20/08

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 — 2
Answering Affidavits — Exhibits	3 — 14
Replying Affidavits	15 — 16

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 3/11/09

JUSTICE SHIRLEY WERNER KORNREICH

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

LUIS ALFARO, RICCARDO GUZMAN, ELESTHERIOS VASILATZOGLOU, NIKOLAS KOKKOSIS and JAIME RODRIQUEZ, individually and on behalf of all other persons similarly situated who were employed by VARDARIS TECH, INC., and/or any other entities affiliated with or controlled by VARDARIS TECH, INC..with respect to certain Public Works Projects awarded by THE NEW YORK CITY DEPARTMENT OF DESIGN AND CONSTRUCTION, THE NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY. THE CITY OF NEW YORK, AND VARIOUS PUBLIC SCHOOL DISTRICTS IN NASSAU COUNTY AND SUFFOLK COUNTY,

Plaintiffs,

-against-

VARDARIS TECH, INC., and any related corporate entities, ELIAS RIZO, individually, NATIONAL GRANGE MUTUAL INSURANCE COMPANY and JOHN DOE BONDING COMPANY,

Defendants.

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Index No. 109673/2005

Decision and Order

KORNREICH, SHIRLEY WERNER, J.:

This is a class action on behalf of a class of individuals who furnished labor to defendant Vardaris Tech, Inc. ("Vardaris") and related affiliates and entities in connection with various Public Works Projects within the State and City of New York (the "Class").There is also a sub-class of Vardaris workers whose claims are directed against defendant National Grange Insurance Company ("National"), which issued Payment Bonds in connection with certain construction projects on which this sub-class worked. Plaintiffs claim common-law breach of contract based on defendants' failure to pay them at the prevailing wage and supplemental benefit rate for the work that they performed.

The Consent Order certifying the Class was filed June 5, 2006. By that same Order, the Court dismissed plaintiffs' first cause of action against defendant Elias Rizo ("Rizo") for personal liability under BCL 630, and dismissed all claims against Vardaris and Rizo for the periods before July 13, 1999.

The Class now moves for partial summary judgment against Vardaris and National for "those instances ... where Vardaris' payroll records reflect lower payment amounts than the official payroll reports Vardaris provided to various contracting agencies ...." Plaintiffs' Memo, pg. 2. Plaintiffs submit an attorney's affirmation supported by documentary exhibits. Defendants oppose and cross-move for partial summary judgment to redefine the Class as excluding workers who have "opted out" in writing.[1] Defendants submit an affidavit of Rizo, who is Vardaris' President, identical affidavits from employees opting out of the Class, and other documentary exhibits. The Class argues in Reply that the Cross-Motion is untimely, raises matters not addressed in the Motion, and that the opt-outs should be excluded due to defendants' improper conduct.

1. Unrefuted Facts

The following facts are not refuted. During the period alleged in the Complaint, beginning in about 1998, Vardaris entered into contracts with various municipal agencies to perform work on public projects. In or about September of 2002, Vardaris entered into a contract with the Dormitory Authority - State of New York ("DASNY"), to perform work at the

[1]Vardaris and Rizo submit a joint opposition and cross-motion, and National Grange submits a separate opposition and cross-motion.

Manhattan Civil Court building ("Civil Court Contract").[2] The section of that contract entitled "Wage Rates" sets out the rates of pay that Vardaris agreed to pay the various kinds of workers. Under § 220 of the Labor Law, contractors performing work on public works projects must submit Certified Payroll Reports (Payroll Report) to the contracting agency. These reports contain each worker's name, trade classification, hours worked per day, base wage rate, base supplemental benefit rate, and weekly gross and net pay. Vardaris submitted certified payroll reports for the Civil Court Contract (Motion, Exh. 5), payroll reports on a contract for work on the Carle Place Senior/Middle High School (Exh. 13), and on other projects.

Employee Riccardo Guzman attested that he had worked as a roofer, laborer and bricklayer for Vardaris between 2000 and 2005. The Payroll Reports show that Guzman worked as a laborer, receiving a "Base Rate of Pay Per Hour" of $27.30 and $14.44 per hour for "Supplemental Benefits,"which roughly correspond to the amount set forth in the Civil Court Contract, Exhs. 4, 5. Vardaris maintained "Vendor QuickReports" (Quick Report) which showed the amount of money Guzman and other workers received. The Quick Report for Guzman reflected the hours he worked. The Payroll Reports under-reported the number of hours Guzman actually worked, and overstated the amount he was paid. Guzman attested that he actually was paid at a rate of $10.00-$17.00 per hour, regardless of the amount of hours he worked. Vardaris never paid Guzman in cash or in any other manner to make up the difference between what they said they paid him on the Payroll Reports and what his paychecks and the Quick Reports reflected. The Payroll Reports, as compared to the Quick Reports, also demonstrated under-

[2]Plaintiffs note that this project was misnamed as the "criminal court" building project in plaintiffs' complaint.

payments to some additional workers. Exhs. 11-16.

2. Discussion and Rulings

To obtain summary judgment, a movant must establish its cause of action or defense sufficiently to warrant the court, as a matter of law, in directing judgment in its favor. CPLR 3212(b); *Owusu v. Hearst Communications, Inc.*, 52 A.D.3d 285 (1st Dep't 2008). A movant must support its position with evidentiary proof in admissible form. *Zuckerman v. New York*, 49 N.Y.2d 557, 560-563 (1980). Once a movant has met its initial burden, the burden shifts to the party opposing the motion to establish, through admissible evidence, material issues of fact. *Id.* at 560; CPLR. 3212(b). *See also GTF Marketing Inc. v. Colonial Aluminum Sales, Inc.*, 66 N.Y.2d 965, 967-968 (1985) (complaint properly dismissed on summary judgment where affidavit of opposing counsel was insufficient to rebut moving papers showing case had no merit). The adequacy or sufficiency of the opposing party's proof is not an issue until the moving party sustains its burden. *Bray v. Rosas*, 29 A.D.3d 422 (1st Dept. 2006). Moreover, the parties' competing contentions must be viewed "in a light most favorable to the party opposing the motion." *Lakeside Constr. v. Depew & Schetter Agency*, 154 A.D.2d 513, 515 (2d Dept. 1989).

The Class Motion

The Class seeks partial summary judgment as to liability. They claim standing as third party beneficiaries of the contracts between Vardaris and the various municipal agencies, in which wage rates are set for different classifications of workers. Defendants do not contest this position, which the Court agrees is proper under the controlling law. *See generally Wright v. Herb Wright Stucco, Inc.*, 50 N.Y.2d 837 (1980) (reinstating Supreme Court decision denying motion to dismiss for lack of jurisdiction, on ground that common law breach of contract claim

exists for underpaid workers on public projects); *see also De La Cruz, et al. v. Caddell Dry Dock & Repair Co., Inc., et al.*, 22 A.D.3d 404 (1st Dept. 2005).

The Class, to prove its claims, relies on representative testimony including an affidavit of one employee/class member, contracts between Vardaris and various municipal agencies, Certified Payroll Reports, and Certified Payroll Runs. The Class argues initially that discrepancies between the runs and the reports establish that the reports were falsified. *See Alca Industries, Inc. v. McGowan,* 258 A.D.2d 704, 705 (3rd Dept.), *appeal denied by* 93 N.Y.2d 807 (1999) (agency determination that payroll records falsified supported by substantial evidence in discrepancy between records and payroll stubs). Falsified records constitute improper records, and when an employer maintains improper payroll records, "wage underpayments may be calculated by reference to the best evidence available and the burden shifts to the employer to negate the reasonableness of the calculations." *Gelco Builders, Inc. v. Holtzman,* 168 A.D.2d 232 (1st Dept.), *appeal denied by* 77 N.Y.2d 810 (1991) (court found employee statements, falsified payroll records, and check stubs substantial evidence).

The Court agrees that the Certified Reports submitted by the Class in support of its motion appear to be falsified. If this were not a class action and the Court were being asked just to consider the evidence of underpayment to employee Guzman, or even the other few employees whose true wage payments are reflected in the submitted payroll runs, summary judgment as to liability would be granted. The evidence of underpayment and overwork is manifest, and the Court would normally feel compelled to redress such an inequitable state of affairs. As the great orator and humanist Robert G. Ingersol stated, "There is something wrong in a government where they who do the most have the least."

But this is a class action where the evidence must be sufficiently representational to be considered in determining whether the Class has established a *prima facie* case sufficient to shift the burden to an employer that has provided false or deficient records. *See, e.g., Andersen v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946) (seminal case setting forth principals of burden shifting in wage underpayment cases). The Second Circuit, in *Reich v. Southern New Eng. Telcoms. Corp.*, 121 F.3d 58, 67-68 (2d Cir. 1997), in discussing the requirement of representational evidence in a similar employment wage context , explained, "`Where the employees fall into several job categories, ... at a minimum, the testimony of a representative employee from, or a person with first-hand knowledge of, each of the categories is essential to support a back pay award,'" *quoting, Secretary of Labor v. DeSisto*, 929 F.2d 789, 793 (1st Cir. 1991).

Unfortunately, this case presents a situation where the submitted "representative" evidence does not sufficiently represent all the members of the Class. The Class submits records relating to four laborers who were underpaid by Vardaris. However, other categories of workers were employed on the various projects underlying the Class Action. Indeed, defendants have produced records of payments and purported payments to other categories of workers. Although relatively small numbers of employees have been relied on in other cases where the courts have found the representational evidence sufficient, the numbers far exceed the minimal number in this case and, unlike this case, they represent most categories of employees seeking reimbursement of unpaid wages. In *Reich* the Court found the representational evidence sufficient because,

[T]he testimony covered each clearly defined category of worker; there was actual

> consistency among those workers' testimony, both within each category and overall; SNET offered no contradictory testimony; the abuse arose from an admitted policy of the employer that was consistently applied; and the periods at issue were the employees' lunch hours, which are predictable, daily-recurring periods of uniform and predetermined duration.

Reich, supra, 121 F.3d at 68. *See also* Donovan v. Bel-Loc Diner, 780 F.2d 1113, 1115 (46th Cir. 1985) (testimony of 22 employees for DoL supporting award of backpay to group of 98 employees); *Donovan v. Williams Oil Co.*, 717 F.2d 503, 505 (10th Cir. 1983) (testimony of 19 supported award to group of 34); Donovan v. Burger King Corp., 672 F.2d 221, 224-25 (1st Cir. 1982) (testimony of six employees from six restaurants, with stipulations from 20 others, found to support backpay award to 246 employees at 44 restaurants); *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825, 826, 829 (5th Cir. 1973) (testimony of 16, award to 26).

Here, four general laborers out of as many as 200 or more workers in varying occupations is not sufficient. The Court recognizes the principal that the weight to be accorded evidence is more a function of quality than quantity. *DeSisto*, supra, 929 F.2d at 793 ("'the adequacy of the representative testimony necessarily will be determined in light of the nature of the work involved, the working conditions and relationships, and the detail and credibility of the testimony'"). That principal as applied here, however, does not compel a different result. There were numerous categories of workers on the various public projects, including carpenters, supers, tilers, electricians, drillers, glaziers, ironworkers, masons, and others. Exhs. 4 - 16. The Court, therefore, denies the Class Motion for Partial Summary Judgment on this basis alone and will not reach any additional issues raised in defendants' opposition to the motion.

Defendants' Cross-Motions

The Class objects to the cross-motions as untimely and as including issues that are not

responsive to those raised in the Class motion. The Court disagrees. The parties entered a Stipulation and Order that was "so ordered" on July 21, 2008, extending the time to file and serve any oppositions and cross-motions until August 29, 2008. Czik Affirm., Exh. A. The oppositions and cross-motions were filed on or before August 29, 2008, and thus were timely.

Of far greater concern is the claim defendants make that the "opt outs" should be excluded from the Class, a claim the Court denies for the following reasons. Defendants assert that "About seventy workers out of a potential class of 126, provided written notice to Class Counsel and stated that they do not wish to participate in the class action and opt-out." Rizo Affid., ¶ 24. Seventy-one letters are attached to Vardaris' papers, although they are addressed to Class Counsel. The letters are typed and identical in form, sent by certified mail, return receipt requested, with the envelopes addressed in what appears to be identical handwriting that is dissimilar from the handwritten signatures on the letters inside. Murphy Reply Affirm., Exh. 3. Vardaris has also attached twenty-four "affidavits" from employees stating their desire to opt out. These too are identical typed forms. The inference is inescapable, that Vardaris was responsible for preparing the opt-out letters and "affidavits" and solicited the workers' signatures.

Vardaris' actions embody a number of abuses that the law recognizes in the area of class litigation. Where there is an ongoing business relationship, unilateral communication from the class defendant to class members is inherently coercive and misleading since the class members will need to rely on the defendant in the future. *See, e.g., Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193 (11th Cir. 1985) (unilateral communications scheme between bank and potential class members, bank customers dependent on bank for future borrowing, disfavored). The potential for abuse is even greater where, as here, the relationship is one of employer-

employee. *Wang v. Chinese Daily News, Inc.*, 236 F.R.D. 485, 488 (C.D. Cal. 2006) (relationship has strong potential for coercion where one party relies on other for livelihood).

It is the Court's responsibility as a neutral arbiter, and of the attorneys, to insure that the class members' decision to participate or to opt out be made freely and without coercion and without misleading or false information. *Impervious Paint Industries v Ashland Oil,* 508 F. Supp. 720, 723 (W. D. Ky 1981), *app. dism* 659 F.2d 1081 (6th Cir. 1981); *see Kleiner, supra,* 751 F.2d at 1203 (affirming disqualification of an attorney who advised his client on a plan to unilaterally encourage absent class members to opt-out, noting that "Unsupervised, unilateral communications with the plaintiff class sabotage the goal of informed consent by urging exclusion on the basis of a one-sided presentation of the facts, without opportunity for rebuttal. The damage from misstatements could well be irreparable."); *Hampton Hardware, Inc v. Cotter & Co.*, 156 F.R.D. 630, 633 (N. D. Tex 1994) (holding that it is impermissible to attempt to reduce putative class members' participation in lawsuit through coercive tactics); *Carnegie v. H & R Block,* 180 Misc.2d 67 (Sup Ct, NY County 1999) (test for whether party has had impermissible contact with members of putative plaintiff class is whether contact is coercive, misleading, or attempt to affect a class member's decision to participate in litigation).

The Court's authority to control the course of a class action and to impose conditions on the parties and their attorneys is broad and flexible. *Id.*; Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 907. CPLR 907 provides, in pertinent part,

> In the conduct of class actions the court may make appropriate orders:
>
> 2. requiring, for the protection of the members of the class, or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct ... of any step in the action ....;

6. dealing with similar procedural matters.

New York courts look to Federal precedent in interpreting CPLR Article 9. *Brandon v. Chefetz*, 106 A.D.2d 162, 168 (1st Dept. 1985) (finding CPLR Article 9 modeled on FRCP 23(d)). Federal law recognizes the Court's authority to vacate opt-out notices that have been solicited by defendants through improper conduct. *Kleiner, supra,* 751 F.2d at 1203 (finding exclusion requests voidable); *Wang, supra,* 236 F.R.D. at 488 (court's authority under FRCP 23(d) includes invalidating opt outs). Accordingly, it is

ORDERED that the Class' motion for partial summary judgment is denied; and it is further

ORDERED that the defendants' cross-motions for partial summary judgment are denied; and it is further

ORDERED that opt-out letters and affidavits submitted by defendants in support of the cross-motions for partial summary judgment are vacated; and it is further

ORDERED that the Class attorneys shall give notice to all class members and potential class members, including those who executed the opt-out letters and affidavits submitted by defendants, of this Decision and Order. The Notice also shall include a copy of the prior Notice sent out pursuant to this Court's June 1, 2006 Order certifying the Class, and shall explain that to opt-out, a potential class member must personally prepare and mail a letter to that effect; and it is further

ORDERED that neither defendants nor their attorneys may contact class members or potential class members about this action or the claims made therein without first obtaining the Court's permission.

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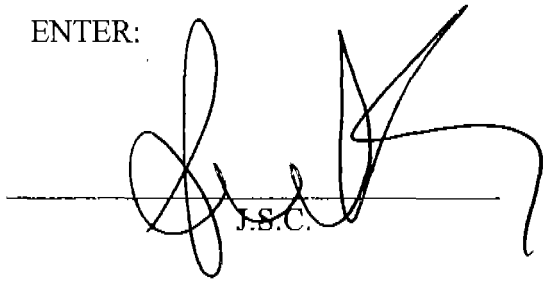

J.S.C.

Date: March 11, 2009
New York, N. Y.