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

PRESENT: HON. JUDITH J. GISCHE PART 10

Index Number : 106778/2007
DABROWSKI, JERZY
VS.
ABAX INC.
SEQUENCE NUMBER : 006
COMPEL

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

his motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
APR 21 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: April 16, 2009

HON. JUDITH J. GISCHE

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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Jerzy Dabrowski, Sebastian Gajewski and Bogan Cwalina, *individually and o/b/o all other persons similarly situated who were* employed by ABAX Incorporated *and/or any other entities affiliated with or controlled by* ABAX Incorporated

Plaintiffs,

-against-

ABAX Incorporated *and any related corporate entities*, **John Bleckman** *and* **Edward Monaco**, *individually and* **John Doe Holding Companies 1- 20**,

Defendants.

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DECISION/ ORDER
Index No.: 106778-07
Seq. No.: 006

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Pltf's n/m (compel) w/LML affirm, exhs	1
Def Abax w/NN affirm, exhs	2
Pltf's reply w/LML affirm, exh	3

Upon the foregoing papers, the decision and order of the court is as follows:

This is a putative class action lawsuit arising from claims by the plaintiffs (individually "Dabrowski," "Gajewski," and "Cwalina") that defendants failed to pay them prevailing wages and benefits while they worked on a number of public works projects. Defendant ABAX Incorporated ("ABAX"), plaintiffs' employer, was the prime or general contractor on these projects. Defendants John Bleckman and Edward Monaco are officers and directors of ABAX ("individuals"). There has been prior motion practice in this case and the reader is presumed to be familiar with this court's decisions dated

May 5, 2008, denying defendants' motion to dismiss and for reargument dated September 23, 2008. Issue has since been joined and the preliminary conference was held on June 5, 2008 ("preliminary conference order"). Discovery is under way.

Plaintiffs contend that Abax and the individual defendants have refused to provide complete responses to their First Set of Document Demands and Interrogatories dated September 15, 2008 ("discovery demands"). Plaintiffs seek documents and information (*inter alia)* identifying each individual who performed work for ABAX at each public and non-public work project on which ABAX was the prime or sub-contractor. In support of these requests, plaintiffs argue that they are entitled to information beyond the three named plaintiffs because they have the burden of proof to certify this case as a class action. Plaintiffs deny this motion is untimely, pointing out that defendants served a late answer and were not amenable to service of discovery demands until they had appeared in the action. Furthermore, plaintiffs allege that defendants, by providing partial answers to their discovery demands, have waived any lateness on plaintiffs' behalf.

Defendants oppose plaintiffs' discovery demands not only because they were reportedly served after the deadline established by the court in the preliminary conference order, but also because the demands are unduly burdensome, not tailored to the litigation, and "irrelevant." Defendants allege that plaintiff's discovery strategy is all wrong and they are not entitled to payroll records for all ABAX employees because this will not help them determine whether a particular employee should have been paid as an iron worker, for example, instead of a laborer. Without agreeing to provide further discovery, defendants alternatively propose they only offer plaintiffs a "sampling" of

representative documents and information for the putative class.

Discussion

Since defendants challenge the timeliness of plaintiffs' motion, the court will first address this dispute. Plaintiffs served their discovery demands on September 16, 2008, after the deadlines established in the preliminary conference order (*i.e.*, July 20, 2008). The defendants responded to these demands on October 28, 2008. Plaintiffs justifiably contend that they could not comply with the court's preliminary conference order because issue was not joined July 3, 2008, when defendants finally answered and appeared. The court find that plaintiffs' demands were timely served, but even if they were untimely, defendants' waived their objection based upon untimeliness by responding to them, albeit incompletely.

Before a motion for class certification is brought, plaintiffs are entitled to limited pre-certification discovery to establish the pre-requisites for class certification. Chimenti v. American Express Company, 97 AD2d 351 (1st Dept 1983) *app dism* 61 NY2d 669 (1983); Meraner v. Albany Medical Center, 199 AD2d 740 (3rd Dept 1993); Scott v. Prudential Ins. Co. of America, 112 AD2d 714 (4th Dept 1985). The pre-requisites are enumerated in CPLR § 901 (a). They are as follows: (1) the class must be so numerous that joinder of all members is impracticable; (2) common questions of law or fact must predominate; (3) the claims of the representative plaintiff must be typical of all members of the class; (4) the representative party must fairly and adequately protect the interests of the class; and (5) a class action must be the most fair and efficient means of resolving the controversy. Casey v. Prudential Securities Inc., 268 A.D.2d 833 (3rd Dept 2000).

In this case each named plaintiff is a carpenter by trade and Polish is their preferred or native language. The putative class, however, is considerably broader. It consists of a variety of private sector laborers, including iron workers, hazardous material workers, painters, etc. who worked for ABAX between May 2001 and the present. The workers within the putative class were employed on public works projects throughout New York City and in the State of New Jersey. It is alleged further that even when the workers worked in excess of 40 hours per week, they were still paid a flat hourly rate of $26, regardless of the number of hours they actually worked.

The amount of discovery granted on class certification issues is generally left to the trial court's considerable discretion and the only limitation is that the court receive "enough evidence, by affidavits, documents, or testimony, to be satisfied that each Rule 23 requirement has been met." Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc., 546 F.3d 196 (C.A. 2 [NY] 2008). In deciding whether plaintiffs' discovery demands should be enforced as made, or they should be limited (as defendants urge) the court considers that the burden is on plaintiffs to prove there is an evidentiary basis for class certification. Chimenti v. American Express, 97 AD2d at 351. The failure to allow discovery where there are substantial factual issues relevant to class certification makes it impossible for the party seeking discovery to make an adequate presentation, either in its memoranda of law or at the hearing on the motion, if one is held. Chateau de Ville Productions, Inc. v. Tams-Witmark Music Library, Inc., 586 F.2d 962, 966 (2d Cir. 1978).

Although CPLR § 901 involves issues of standing (*i.e.*, certification as a class), it does not address the scope of discovery in a class action. These issues are addressed

within Article 31 of the CPLR which is generally applicable to discovery in the context of civil litigation. CPLR § 3101 (a) provides that "all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof . . ." is discoverable. Allen v. Crowell-Collier Pub. Co., 21 N.Y.2d 403 (1968). The words, material and necessary," are interpreted liberally so as to require disclosure of any facts bearing on the controversy which will assist in the preparation for trial by "sharpening the issues and reducing delay and prolixity." Allen v. Crowell-Collier Pub. Co., 21 N.Y.2d at 407. The test is one of "usefulness and reason" (Allen v. Crowell-Collier Pub. Co., *supra*) and the burden of showing that the disclosure sought is improper is upon the party seeking a protective order against production. Roman Catholic Church of the Good Shepherd v. Tempco Systems, 202 A.D.2d 257, 258 (1st Dept 1994).

New York's class action statute is to be "liberally construed" and read to "favor the maintenance of class actions." (Englade v Harper Collins Publishers, Inc., 289 AD2d 159 [1st Dep't 2001]). Nevertheless, preparation for class action certification places a heavy burden on plaintiffs to show (at the appropriate time) that the factors warranting such certification (*i.e.* numerosity, predominance of common issues, typicality etc.) are present. CPLR § 3101 et seq., on the other hand, provides a wide arsenal of tools which allow litigants access to the information they need to prepare their case for a hearing or trial. Thus, in deciding whether the information plaintiffs seek is "material and necessary" in the prosecution of their action, the court also considers whether the information sharpens the issues it will need to consider in connection with the upcoming motion to certify this class. Although defendants have provided information directly related to the three named plaintiffs, this is inadequate on the

issues related to class certification. When plaintiffs move for class certification, will have to lay bare their proof that class certification is justified. Chimenti v. American Express, *supra*. They will not be able to solely rely on the allegations they have made in the complaint. Were the court to find that defendants are only required to provide discovery responses solely related to the three individually named plaintiffs this would render it impossible for plaintiffs, it would it impossible for plaintiffs to show that they are only representative of an entire class of persons too numerous to join.

Defendants' proposal, that they be permitted to disclose only a "representative sampling of information and documents for the putative class members" is not a suitable alternative. This puts defendants in the role of gatekeeper, deciding what information plaintiffs need or should have. It also shapes the case for the plaintiffs, a role the defendants should not have.

The information sought involves a broad range of records and documents related to ABAX "run" construction projects of a public and non-public[1] nature. Such information includes the types of contracts ABAX had, who worked on these projects, what dates the individuals worked on the projects, what they were paid, who supervised these workers, the benefits they were offered, and what wage schedules were used. These demands closely track plaintiffs claims. They are "material and relevant" to plaintiffs claims and will help sharpen the issues in this case since one of the important factors plaintiffs will need to prove (and the court has to decide) is whether common issues of fact or law predominate over any individual claims. *see* Ackerman v Price Waterhouse, 252 AD2d 179, 191 (1st Dept 1998). The time frame for the discovery

[1]Non-public works projects will be discussed separately later on in this decision.

demands (2001 - 2007) coincides with the dates that plaintiffs worked for ABAX.[2]

Although defendants object to plaintiffs' demands as being unduly burdensome because they employed one hundred - if not more - workers, the size of the demand does not determine whether it is burdensome. While there is no affidavit by a person with knowledge of the facts who can explain why it would be so difficult - or impossible - to assemble and produce the information demanded, even if such an affidavit had been provided, the court would require defendants to comply with plaintiffs' discovery demands. The demands are tailored to the issues in this case and the information sought is material and relevant.

In light of the foregoing, the court requires that within thirty (30) days of this order, defendants provide responses to plaintiffs' First Set of Interrogatories as they pertain to public works projects and contracts, for the period of time specified (2001 - 2007). These demands coincide with the plaintiffs claims in their complaint, that ABAX had contracts with several New York and New Jersey agencies to do work on various public works projects throughout each of these states and ABAX had individuals who performed a variety of construction related tasks on those projects (*i.e.*, carpentry, brick laying, masonry, painting, etc.) for which they were (or should have been) paid money, benefits, etc.

The court also requires that within thirty (30) days of this order defendants respond to plaintiffs' demands for the production of documents as they pertain to public works projects and contracts, for the period of time specified (2001 - 2007).

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[2]The operative dates of plaintiffs' claims are also discussed in the court's September 23, 2008 decision on reargument.

Plaintiffs' motion for an order compelling defendants to comply with their demands for disclosure appurtenant to ABAX non-public works projects is denied, without prejudice. The allegations in the complaint are that the plaintiffs (and members of the putative class) worked on public works projects as defined under Article 8 of the Labor Law, and although they worked in excess of 40 hours a week, defendants failed to pay them the prevailing rate of wage for the work they did. The demands regarding non-public works has not been comprehensively addressed in the plaintiffs' motion for the court to decide that the documents and other information sought is warranted.

Plaintiffs have offered to enter into a confidentiality agreement, if that would make defendants more amenable to their document demands. Defendants have not addressed this point in opposition, nor raised any argument that the material sought is confidential. The court therefore does not address this issue.

Conclusion

Plaintiffs' motion to compel responses to their combined discovery demands is granted for the reasons and to the extent provided herein. It is denied without prejudice as to their demands related to non-public works.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
April 16, 2009

So Ordered:

Hon. Judith J. Gische, J.S.C.