

**Matakov v Kel-Tech Constr. Inc.**

2010 NY Slip Op 30701(U)

March 26, 2010

Supreme Court, New York County

Docket Number: 603591/2003

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 603591/2003

MATAKOV, VADYM

vs

KEL-TECH CONSTRUCTION

Sequence Number : 014

COUNSEL FEES, EXPENSES

INDEX NO. \_\_\_\_\_

MOTION DATE 12/5/09

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

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

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-3

4-5

6-7

Cross-Motion:      Yes      No

Upon the foregoing papers, it is ordered that this motion

*is decided in accordance with the general memorandum decision and order.*

**FILED**

APR 01 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3/26/10

JANE S. SOLOMON

J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55  
-----X

VADYM MATAKOV and YAN DORAS 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. 603591/2003

Plaintiffs,

-against-

KEL-TECH CONSTRUCTION INC., IANNELLI  
CONSTRUCTION CO., INC., T.A. AHERN  
CONTRACTORS CORP., FOURTH AVENUE  
ENTERPRISES PIPING CORP., MERIS  
CONSTRUCTION CORP., SANTA FE  
CONSTRUCTION, INC., CALCEDO CONSTRUCTION  
CORP., SHROID CONSTRUCTION, INC., SEABOARD  
SURETY CO., THE AMERICAN INSURANCE  
COMPANY, LUMBERMENS MUTUAL CASUALTY  
COMPANY, THE MOUNTBATTEN SURETY  
COMPANY, INC., UNIVERSAL BONDING  
INSURANCE COMPANY, ST. PAUL FIRE AND  
MARINE INSURANCE COMPANY, UNITED STATES  
FIDELITY AND GUARANTY COMPANY, RELIANCE  
INSURANCE COMPANY, VINCENT KELLEHER and  
PHILIP KELLEHER,

DECISION and ORDER

Defendants.

**FILED**  
APR 01 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
JANE S. SOLOMON, J

Plaintiffs brought this class action, with causes of  
action for breach of contract and violation of the New York Labor  
Law (inter alia), to obtain prevailing wages for work they  
performed at New York City public schools pursuant to public  
contracts. Defendant Kel-Tech Construction, Inc. (Kel-Tech)  
employed members of the plaintiff class. After more than five  
years of litigation, which included two unsuccessful appeals by

Kel-Tech, the parties settled plaintiffs' claims in this and another case (Stipulation of Class Action Settlement, Notice of Motion, Ex. 3; the other case resolved under the Stipulation is *Kudinov v Kel-Tech Construction, Inc.*, index no. 114646/08, hereafter referred to as the Stipulation).

In this motion, made under CPLR 909, plaintiffs' class counsel, Virginia & Ambinder, LLP (V&A), seeks attorneys' fees. It is partially opposed by defendants Kel-Tech, Vincent Kelleher and Philip Kelleher (together referred to as Kel-Tech), who argue that attorneys' fees should be granted in an amount significantly less than sought.<sup>1</sup>

The Stipulation provides that Kel-Tech will pay the difference between the wages paid to class members and prevailing wages up to \$600,000, subject to certain limitations, upon completion of an audit. It further provides that once the terms of the agreement establishing the compensation due to class members is complied with, V&A will expeditiously seek court approval for attorneys' fees, not to exceed \$200,000. The attorneys' fees are to be paid out of the maximum settlement amount of \$600,000. The Stipulation states that Kel-Tech will not oppose the fee application unless it is "unreasonable and/or deviate[] from the terms specified herein" (Stipulation, paragraph 18[iii]).

Pursuant to the procedure set forth in the Stipulation, plaintiffs and Kel-Tech have agreed to establish a fund to settle

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<sup>1</sup> Plaintiff's motion seeks attorneys' fees incurred in connection with both the *Matakov* and *Kudinov* actions; this is consistent with the terms of the Stipulation and is not opposed.

the class claims, net of attorneys fees, in the amount of \$116,648.66 (Aff. of Ahmed A. Massoud, Esq., paragraph 4). Of this, \$22,800 will be deducted to pay costs and disbursements approved by an Order and Judgment dated July 27, 2009 (*id.*). This leaves \$93,848.66 for distribution to the class members.

V&A submits documentation showing that its attorneys worked a total of 1,256 hours on these actions, and its paralegals worked 433 hours. Lloyd Ambinder, Esq., lead attorney for class counsel, states that if the firm charged its normal hourly rates for this work, the amount owed would exceed \$389,000 (Ambinder Aff., paragraph 13). Ambinder also describes the qualifications and experience of the attorneys in the area of Federal and State wage and hour law litigation. In light of this, V&A contends that \$200,000 represents a reasonable attorney fee using the lodestar method for calculating fees in class action settlements, as used by New York State courts (citing *Nager v Retirement System of the City of New York*, 57 AD3d 389 [1<sup>st</sup> Dept 2008], and other cases).

Kel-Tech objects to the fee application on the ground that the amount sought is unreasonable in that it greatly exceeds the amount payable to the class members. Kel-Tech urges the court to base V&A's fee on a percentage of the class member's recovery. Kel-Tech maintains (citing, e.g., *Washington Federal Savings and Loan Assoc. v Village Mall Townhouses, Inc.*, 90 Misc.2d 227 [Sup. Ct. Queens Co. 1977] and *Goldberger v Integrated Resources, Inc.*, 209 F3d 43 [2d Cir. 2000]) that other courts, New York State and Federal, have found percentage of recovery to be an appropriate measure for class counsel fees. Kel-Tech also argues that

prevailing wage cases are relatively simple and risk-free, and the only reason class counsel logged so many hours is that they did not handle the matter well.<sup>2</sup>

In considering an award of attorney's fees, these factors should be considered: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation (i.e., the contingent nature of the fee); (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations" (*In Re Union Carbide Corp. Consumer Products Business Sec. Litigation*, 724 F.Supp. 160 [SDNY 1989]). No single consideration is determinative. The court has discretion in the award of fees, and such award need not be apportioned mechanically based on the plaintiff's success or failure on particular issues (*Deep v Clinton Central School Dist.*, 48 AD3d 1125 [4<sup>th</sup> Dept 2008], quoting *Hensley v Eckerhart*, 461 US 424, 437 [1983]).

Kel-Tech contends that the third, fourth and fifth considerations cited in *Union Carbide* suggest that the fee sought is excessive. Kel-Tech maintains that prevailing wage litigation is simple and low-risk, but it is worth noting that it was not so in this action, which twice went to the Appellate Division, and involved fourteen motions and many lengthy and contentious conferences. In no small part, this was occasioned by the

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<sup>2</sup> Kel-Tech's counsel also questions the validity of some of the time billed, for example, in drafting and revising the Stipulation. These allegations are rebutted by Ambinder's reply affirmation.

aggressive litigation tactics employed both by Kel-Tech and plaintiffs. Defendants were successful in significantly limiting the scope of the class members' potential recovery from that sought in the original complaints.

Of the factors referenced in *Union Carbide*, the only one clearly undercutting V&A's fee request is the relation of the fee to the class member's recovery. Where a percentage of recovery calculation is used to set counsel fees, the amount awarded is typically twenty to thirty percent (see *Goldberger*, 209 F3d 43). The fee sought by V&A is far more than that. A related factor is that V&A may have cast too broad a net in drafting the complaint, which is a reflection on the quality of representation, and a great deal of expense on all sides would have been avoided had the plaintiffs' claims been appropriately investigated before a lawsuit was filed. These factors militate against a full grant of attorneys fees using the lodestar method.

A consideration in favor of a full grant of fees, however, is the public policy implication of V&A's successful opposition to Kel-Tech's appeal of this court's April 19, 2005 order denying summary judgment. Kel-Tech had substantively challenged plaintiffs' right to bring this lawsuit, arguing that the claims were pre-empted by Section 301 of the Labor Management Relations Act of 1947, and by the terms of the applicable collective bargaining agreements. The First Department rejected Kel-Tech's arguments (see, *Wysocki v Kel-Tech Constr. Inc.*, 46 AD3d 251 [1<sup>st</sup> Dept 2007]).

The court finds that V&A's hourly billing rates are reasonable. While the number of hours billed is large, the court is aware that this matter was hard-fought, and even routine disclosure issues resulted in heated conferences and motion practice. Accordingly, the hours billed is not inconsistent with the effort required of V&A to prosecute this action, and \$389,000 represents a reasonable lodestar calculation before any adjustment for the class members' recovery or quality of representation.

Since the amount V&A seeks is approximately 51% of the unadjusted lodestar figure, the court finds that it is reasonable under the circumstances, and in particular, in consideration of the public policy favoring the payment of prevailing wages on public works contracts in accordance with Labor Law § 220. Accordingly, it hereby is

ORDERED that the motion for approval of class counsel attorney's fees in the amount of \$200,000 is granted, with no additional fee to be had in the *Kudinov* action.

Dated: March 26, 2010

ENTER:

  
**JANE S. SOLOMON**  
\_\_\_\_\_  
J.S.C.

**FILED**  
APR 01 2010  
NEW YORK  
COUNTY CLERK'S OFFICE