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

PRESENT: HON. JUDITH J. GISCHE PART 10

Justice

Dabrowski et al

- v -

ABAX et al

INDEX NO. 106778-97 [redacted]08

MOTION DATE

MOTION SEQ. NO. 008

MOTION CAL. 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	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

And status conf set for 9/16/10 @ 9:30 am

JUL 19 2010

Dated: _____

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

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

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 Bondlng Companies 1- 20**,

Defendants.

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DECISION/ ORDER
Index No.: 106778-07
Seq. No.: 008, 009, 010

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**
Seq. # 008	
ABAX n/m (compel) w/NN affirm, exhs	1
Pltffs' x/m (protective order) w/LML affirm, AK affid (sep back), exhs	2,3
ABAX reply/opp w/NN affirm, exhs	4
Seq. # 009	
Pltffs' n/m (class certif) w/LML affirm, JD, SG, BC, SP, AP affids, exhs	5
Defs JB & EM opp to seq. 8, 9 w/BK affirm, exhs	6
JB affid sep back w/5 vols exhs	7-12
Seq. # 010	
ABAX n/m (sur-reply) w/JML affirm, JB affid	13
JB and other affids affid in support to seq. 10, 9 w/exhs	14
Pltff's opp to surreply w/LML affirm, exh	15

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 representative plaintiffs (individually "Dabrowski," "Gajewski," and "Cwalina") that they were not paid the prevailing rate of wage while employed by defendant ABAX Incorporated ("ABAX"). ABAX was the general contractor ("GC") on certain construction projects and the plaintiffs were laborers who worked on those projects. Defendants John Bleckman and Edward Monaco are officers and directors of ABAX ("individuals"). ABAX is separately represented from the individual defendants.

Presently the court has before it three motions and a cross motion. They are as follows: ABAX's motion to compel plaintiffs' compliance with its discovery demands (motion sequence #8); plaintiffs' cross motion for a protective order; plaintiffs' separate motion for class certification (motion sequence #9); and ABAX's motion for leave to file a sur-reply to plaintiffs' class certification motion (motion sequence #10). The individuals join in ABAX's motions and have submitted John Bleckman's sworn affidavits. The motions are hereby consolidated for decision in this single order because the issues arise from the same underlying dispute.

The parties have already engaged in extensive litigation. There was a motion to dismiss, a motion to reargue the court's decision denying dismissal, an appeal of those orders, and various motions for discovery. Although the court's decision to allow certain causes of action to proceed beyond the pleading state was modified on appeal, it was otherwise affirmed (64 AD3d 426 [1st Dept 2009]). Consequently, because the underlying facts of this case have already been set forth in other decisions and orders, they will not be repeated here. Furthermore, to the extent that either side raises arguments that have already been decided, particularly with respect to discovery, those

decisions are the law of the case and will not be re-examined.

When considering a motion for class certification, the facts as alleged in the complaint, are accepted as true (Ansoumana v. Gristede's Operating Corp., 201 FRD 81, 85 [S.D.N.Y. 2001]). These facts are raised in the complaint and framed by the motions before the court.

Arguments Presented

Plaintiffs are laborers who claim they worked for ABAX on a number of public works projects in New York City and New Jersey. The New York City projects involved public schools, a college and lead abatement in several residential buildings that are owned operated and/or managed, administered, etc., by the City of New York and/or the New York City Department of Housing Preservation and Development ("HPD").

Uniformly, the representative plaintiffs are Polish; English is not their native or first language. The plaintiffs performed various jobs for ABAX during the years 2001 through 2006. Those jobs included: carpentry work, window installation, hazardous material abatement, painting, demolition, and other construction work.

Plaintiffs claim they worked long hours each work, well in excess of 40 hours, and worked on weekends. No matter how many hours they worked, they received a check for "regular" hours, setting forth an hourly rate of pay and, sometimes, another check marked "salary." The salary check does not indicate the hourly rate of pay or number of hours the payment is for. Each plaintiff states that he received this "salary" check instead of prevailing wages or overtime. Each sworn affidavit is accompanied by pay stubs and according to these affidavits, plaintiffs were paid between $17.00 to $29.00 per hour for work which they should have received between $28.20 to $73.65

per hour. The representative plaintiffs each state that the defendants did not post a schedule of prevailing wage rates at any of the public works project sites where they worked.

Although the representative plaintiffs do not know the exact size of the class to be certified, they estimate, based upon their personal interactions with fellow laborers, that the class is at least 50, but possibly 100 different laborers.

Based upon these overarching facts and claims, plaintiffs seek certification to proceed as a class action on behalf of:

> All individuals employed by ABAX or any other related entities between the years 2001 and 2007 who performed carpentry, widow installation, hazardous material abatement, painting, demolition and other construction work at projects for Defendants pursuant to Public Works Contracts. The defined class shall not included any clerical, administrative, professional, or supervisory employees.

Defendants oppose class certification for two reasons: first, that discovery is incomplete and second, the class does not meet the threshold requirements for certification which are typicality, numerosity and commonality. Furthermore, defendants claim a class action is not the optimal way to handle plaintiffs' grievances (assuming they are true). Defendants also contend that the representative plaintiffs cannot adequately represent the interests of the class for reasons addressed later in this decision.

The items that defendants demand production of include the representative plaintiffs' tax returns, all their 1099s, all their W-2s, and all their pay stubs and time cards from other employers. Defendants also demand the representative plaintiffs' cell phone records so they can determine whether plaintiffs were elsewhere at time they

claim to have been at work. Defendants seek the plaintiffs' credit card statements for similar reasons. Defendants also demand responses to their interrogatories pertaining to the amount of wages (i.e. damages) plaintiffs contend they are entitled to and what employers, other than ABAX, they worked for.

In support for their additional demands for marriage and birth certificates for each plaintiff, defendants argue this will help them establish whether any of the plaintiffs are biased or have (or will) tailor(ed) their testimony to help a relative's claim.

While plaintiffs have raised the claims about defendants' own non-compliance with discovery demands, they are not seeking a discovery order at this time. Plaintiffs argue, however, that if the court find any impreciseness in how the putative class is identified, this is because defendants have stonewalled discovery, a tactic they have employed in other wage cases against them (Galdamez v. Biordi Construction Corp., 13 Misc3d 1224 [A] [Sup Ct 2006] *aff'd* 50 AD3d 357 [1st Dept 2008]).

Although plaintiffs object to defendants' discovery demands that are the subject of the motion to compel, plaintiffs' motion for a protective order is primarily focused on defendants' demand for documentation about the plaintiffs' citizenship and legal status and for copies of their passports and visas. Plaintiffs contend that these demands have been made to deter them from pursuing their wage claims.

Defendants provide the sworn affidavits of 13 other ABAX laborers, all of whom are apparently Polish and for whom English is not their native or first language. In the translated affidavits, each laborer makes the following substantially similar statements:

They were employed during the time period encompassed by this law suit (i.e 2001 - 2007). They worked on public works projects as well as private projects. Their

jobs were "classified according to project needs," and each of them were paid prevailing wages on public projects. The regular work week was 40 hours long, 8 hours a day. They were paid overtime when they worked more than those hours in a separate check and "[every] check listed hours worked at the specific project in a given week."

The laborers express their happiness about working for ABAX, stating that they "always felt comfortable" talking to their superiors because ABAX had an "open door policy." The laborers state that they did not feel "exploited by ABAX" and they were "grateful whenever any of our friends and family members found employment at ABAX. I myself advised my friends to apply . . ." According to these employees, they "discussed the satisfaction" they had in being "paid in full and in a timely manner for the hours [they] worked . . ." unlike prior employers. These affidavits are provided to show that plaintiffs have overstated the size of the class, it is not typical, and their claims are not common to the proposed class.

ABAX raises other arguments (as follows) why this case should not be certified:

In 2003 the New York City comptroller ("comptroller") inspected ABAX's payroll records as did the New Jersey Department of Labor ("NJDOL") in 2004. Although the comptroller and NJDOL each found payroll violations ($4,396.43 and $14,512.63, respectively), ABAX contends these violates were minor, when compared to their multi-million dollar payroll and evidence that plaintiffs' claims are baseless.

ABAX argues that it paid workers on the HPD projects in accordance with HPD's own guidelines and an arbitrator's decision that the prevailing rate for lead abatement work is based upon Labor Law § 230, not § 220, as plaintiffs alleged. That decision was made in the matter of ABAX, Inc. v. Local 339 - USWU, IUJAT Union .

According to ABAX, common questions of fact do not predominate because the representative plaintiffs did different jobs on different projects, their dates of employment are not the identical, nor was their employment at ABAX uninterrupted. Furthermore, ABAX contends that although the named plaintiffs have produced "salary" checks, other ABAX employees which plaintiffs seek to include in the class (like the laborers who provided sworn affidavits in ABAX's support) did not receive "salary" checks and, therefore, should not be included in the class.

In ABAX's motion for permission to assert a sur-reply defendants raise many of the same arguments and respond to some of plaintiffs' arguments. In particular, however, the sur reply and other papers in connection with that motion address the affidavits of the ABAX laborers who profess satisfaction with their wages and their treatment by ABAX. Although plaintiffs urge the court to reject the sur-reply, that application is denied. All the papers on the sur-reply motion will be considered, not only because plaintiffs have addressed the sur-reply on the merits, eliminating any possible prejudice, but also because very important issues regarding the "satisfied" employee affidavits provided by ABAX.

Discussion

I. Discovery

The court will first addresses the defendants' motion to compel and plaintiff's cross motion for a protective order because defendants argue there is outstanding discovery that is essential to their defenses and plaintiffs' refusal to provide the information demanded is not only sanctionable, but also a reason to delay, if not outright deny, plaintiffs' motion for class certification.

The motion for a protective order regarding the immigration status and citizenship, passports and visas of the representative plaintiffs and the proposed class plaintiffs is granted. The legal status of any of these plaintiffs is immaterial and irrelevant. Even if any of the plaintiffs (representative or proposed) are undocumented, defendants are obligated to pay them wages. There is clear public policy of paying all workers the wages they are entitled to regardless of their legal status (Zeng Liu v. Donna Karan Intern., Inc., 207 F.Supp.2d 191 [S.D.N.Y. 2002]; Nizamuddowlah v. Bengal Cabaret, Inc.,69 A.D.2d 875 [2nd Dept 1979]; Jara v. Strong Steel Doors, Inc., 16 Misc.3d 1139 (A) [N.Y.Sup. 2007]). Although defendants argue they need this information to prove that the plaintiffs were actually in the United States during the time they claim to have been at work, any legitimate needs that defendants may have for this information is far outweighed by the chilling effect it will have on these plaintiffs proceeding with their vigorous litigation of their claims. (Pineda v. Kel-Tech Construction, Inc., 15 Misc.3d 176 [N.Y.Sup. 2007]; Jara v. Strong Steel Doors, Inc., *supra*). There is no legal authority that would deprive plaintiffs' from wages they earned, but did not get paid for, just because they may be undocumented.

Defendants' demands for cell phone records, credit card statements, time cards, pay stubs, tax returns, W-2s, 1099s, and information about their prior employers and work history is denied as well and plaintiffs' cross motion for a protective orders as to these demands for documents and/or responses to interrogatories is granted. Defendants' reason for seeking these documents and responses is to independently determine whether any of the plaintiffs are lying about the hours they were at work and possibly working elsewhere. Defendants, however, employed the plaintiffs and are

expected to know the hours that the plaintiffs worked for them and what hours they paid them for. They have not explained why their own records are unreliable so that such collateral sources of information is necessary.

Nor have defendants demonstrated their need for information about plaintiffs' other employers and plaintiffs' work history. The explanation provided is that defendants need to find out whether the plaintiffs were qualified for the jobs they claim to have performed. This turns this case on its head. The defendants have never denied that the representative plaintiffs worked for them, or denied that they worked on the projects alleged. As the employer, they are obligated to keep accurate records of their employees' hours and what they paid them (*see* Maldanado v. Everest General Contractors, Inc., 25 Misc.3d 1206(A) [N.Y. Sup. 2009]). The principal dispute in this case is whether plaintiffs were paid prevailing wages for the jobs they did.

Having denied defendants' motion to compel discovery and granted plaintiffs' motion for a protective order, the court proceeds to decide whether this case should be certified as a class.

II. Class Certification

Pursuant to CPLR 901(a), a party seeking class action certification must establish the existence of the following five prerequisites: 1) the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable, 2) there are questions of law or fact common to the class which predominate over any questions 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. In determining whether an action should be certified, the court must also consider factors set forth in CPLR 902. The factors include: 1) The interest of members of the class in individually controlling the prosecution or defense of separate actions; 2) The impracticability or inefficiency of prosecuting or defending separate actions; 3) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class; 4) The desirability or undesirability of concentrating the litigation of the claim in the particular forum; and 5) The difficulties likely to be encountered in the management of a class action. The decision to certify a class lies within the sound discretion of the court.

Initially, the court rejects any argument by defendants that this case should not be certified as a class action because it would be better for the plaintiffs' claims to be investigated and/or determined by an administrative bodies and/or agency. A class action is the preferred and best way to adjudicate a controversy where, as here, the plaintiffs are seeking payment of unpaid prevailing wages and supplemental benefits (Pesantez v. Boyle Environmental Services Inc., 251 A.D.2d 11 [1st Dept 1998]). Furthermore, this argument was previously raised by defendant in its motion to dismiss and the court decided that plaintiffs have the right to maintain a common law breach of contract claim for underpayment of wages and benefits in connection with a publicly financed project (Order, Gische J., 5/5/08).

The court also agrees with plaintiffs, that the affidavits of the 13 "satisfied" workers do not controvert the need for class certification. The tenor of these affidavits is that each worker is grateful to have a paying job with a wonderful employer. There is

no way to ascertain whether the affiants understand why they were asked to sign these statements or the conditions that led to the statements being made (Gortat v. Capala Brothers, Inc., *supra*). Ccontact with putative class members often warrants court supervision to insure that there is no tampering with or distortion of the putative class (Id. *citing* In Re School Asbestos Litigation, 842 F.2d 671 [3rd Cir. 1988]). Since these affidavits were obtained by defendants on their own, without court supervision, the affidavits are inherently unreliable.

The determinations by NJDOL and the HPD contract terms do not resolve or dispose the plaintiffs' wage claims. Defendants raised similar, if not identical, arguments in a prior motion which the court denied (Order, Gische J., 9/23/08). Nothing in the HPD contract presented prevents employees from suing the contractor (ABAX) for unpaid wages wages (see, Sewer Environmental Contractors, Inc. v. Goldin, 98 A.D.2d 606 [1st Dept 1983]). Nor does the NJDOL decision impair any worker's right to pursue a claim for additional wages.

Numerosity

According to defendants, there is a threshold number of putative plaintiffs which must be met before a case should be considered for class certification and if that threshold is not met, the certification motion should be denied. There is no such unwavering rule nor is there a mechanical test to determine whether the numerosity requirement is satisfied (Kelley v. Norfolk & Western Railway, Co., 584 F.2d 34, 35 [4th Cir. 1978]). Although numerosity is presumed at a level of 40 members (Consolidated Rail Corp. v. Town of Hyde Park, 47 F3d 473, 483 [1985]), this is not an unyielding rule. Classes with fewer plaintiffs have been certified (Maldonado v. Everest General

Contractors, Inc., 25 Misc3d 1206 [A] [N.Y. Sup 2009]). In any event, plaintiffs' sworn affidavits, that they worked with 50, but possibly as many as 100, other workers is sufficient to satisfy the numerosity component of class action certification (Gortat v. Capala Brothers, Inc., 2009 WL 3347091 [E.D.N.Y. 2009]).

Commonality

"Commonality" is satisfied where the relief sought is common to all members of the class, so that the relief sought by one will satisfy all. There is no requirement that all questions of law or fact raised be the same, only that individualized issues not predominate (Gortat v. Capala Brothers, Inc., 257 FRD 353 [E.D.N.Y. 2009]; King v. Club Med, Inc., 76 A.D.2d 123 [1st Dept 1980]). Furthermore, the existence of commonality is not determined by any mechanical test, but requires an analysis of whether the class action would achieve economies of time, effort and expense, and promote uniformity of decision as to persons similarly situated (City of New York v. Maul, 59 A.D.3d 187, 190 [1 Dept. 2009] *internal citations omitted*).

Here, common questions of fact predominate. The representative plaintiffs allege that they were not paid prevailing wages or supplemental benefits for the work they did for the defendants. They also claim defendants did not post a schedule of wages at any of the job sites where they worked. This practice is alleged to have resulted in earned, but unpaid wages.

Typicality

The typicality requirement is satisfied when each class member's claim arises from the same course of events and each plaintiff makes similar legal arguments as to why the defendant is liable (Hnot v. Willis Group Holdings, Ltd., 228 FRD 476 [S.D.N.Y.

2005]). This requirement is met because the plaintiffs describe similar events and practices by ABAX, regardless of the jobs the plaintiffs performed. According to plaintiffs, other fellow laborers also received unitemized "salary" checks for overtime work. As already addressed, the affidavits provided by ABAX of other "satisfied" workers are inherently suspect and, in any event, on a motion for class certification the court is not evaluating the merits of the claims, and competing proof is not considered by the court at this stage in the litigation (Hnot v. Willis Group Holdings, Ltd., 228 FRD at 481]).

Adequacy

The adequacy of representation is determined by looking at whether the named plaintiffs' interests are antagonistic to other members of the class and whether plaintiffs' attorneys are qualified, experienced and able to conduct the litigation (Baffa v. Donaldson, Lufkin & Jenrette Securities Corp., 222 F.3d 52 [C.A.2 (N.Y.) 2000]. Defendants have raised a number of arguments which they contend show that the named plaintiffs and/or their attorneys have not satisfied these requirements. None of these arguments are persuasive and, while some arguments border on the frivolous, plaintiffs' application and defendants' cross application for Part sanctions are hereby denied because they would derail the more important issues before the court to decide.

Whether any plaintiff had a habit of consuming alcohol on the job or is related to any of the other representative or putative plaintiffs is irrelevant. The fact that one of the named plaintiffs filed a prior lawsuit for wages 11 years ago, using the same law firm now representing these plaintiffs does not establish that the law firm will not adequately represent the class. The attorneys have established to the court's

satisfaction that they have the experience and ability to vigorously pursue this case on behalf of plaintiffs. There is no basis for defendants' claim that any of the named plaintiffs' interests are antagonist to those of the class. Therefore, the named plaintiffs are adequate class representatives.

Having satisfied the requirements of CPLR 901 and 902, plaintiffs' motion to have this case certified as a class action is granted. Trying all these claims in one class action is preferable because it would promote judicial economy, be more efficient than individually brought actions and joinder is not only undesirable, but impracticable.

III. The Certified Class

Plaintiffs seek certification to proceed as a class action on behalf of:

> All individuals employed by ABAX or any other related entities between the years 2001 and 2007 who performed carpentry, widow installation, hazardous material abatement, painting, demolition and other construction work at projects for Defendants pursuant to Public Works Contracts. The defined class shall not included any clerical, administrative, professional, or supervisory employees.

Defendants' primary objections to the class are that it includes those projects involving HPD contracts. Having already decided that argument against defendants (above, in this decision), the class has been properly identified and certified as such.

Conclusion

In accordance with the foregoing, the defendants' motion (sequence no. 8) for an order compelling plaintiffs' compliance with its discovery demands is denied and plaintiffs' cross motion for a protective order is granted. Defendants' motion (sequence no. 10) for an order allowing a sur-reply is granted. Plaintiffs' motion (sequence no. 9)

for class certification is granted as well and this case is so certified.

The application and cross application for sanctions pursuant to Part 130 is denied.

Since this case was adjourned without a date it is hereby scheduled for a status conference on **September 16, 2010 at 9:30 a.m.** in Part 10 at 60 Centre Street.

Any relief requested but not specifically addressed is hereby denied.

This constitutes the decision and order of the court.

Dated: New York, New York
July 19, 2010

So Ordered:

Hon. Judith J. Gische, JSC