

**Morales v NAP Constr. Co., Inc.**

2010 NY Slip Op 32150(U)

July 2, 2010

Supreme Court, New York County

Docket Number: 601764/2006

Judge: O. Peter Sherwood

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

6  
7-8-10

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

PRESENT: O. PETER SHERWOOD  
*Justice*

PART 61

JOSE R. MORALES, et al.,

Plaintiffs,

-against-

NAP CONSTRUCTION COMPANY, INC., et al.,

Defendants.

INDEX NO. 601764/06

MOTION DATE March 26, 2010

MOTION SEQ. NO. 004

MOTION CAL. NO. 89

The following papers, numbered 1 to 7 were read on this motion to certify this action as a class action

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-7</u>
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, plaintiffs' motion for an order pursuant to CPLR §§ 901 and 902 to certify this action as a class action is decided in accordance with the accompanying decision and order.

RECEIVED

JUL 02 2010

MOTION SUPPORT OFFICE  
NYS SUPREME COURT - CIVIL

FILED

JUL 08 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: July 2, 2010

O. P. Sherwood  
O. PETER SHERWOOD, 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 61

-----X  
JOSE R. MORALES and VICTOR NAN, individually  
and on behalf of all other persons similarly situated  
who were employed by NAP CONSTRUCTION  
COMPANY, INC. and AMAZING CONSTRUCTION,  
INC. along with other entities affiliated or controlled  
by NAP CONSTRUCTION COMPANY, INC. and/or  
AMAZING CONSTRUCTION INC. with respect to  
certain Public Works Projects awarded by THE CITY  
OF NEW YORK and/or THE NEW YORK CITY  
HOUSING AUTHORITY,

Plaintiffs,

-against-

NAP CONSTRUCTION COMPANY, INC.,  
ANTHONY PANAGIO, AMAZING CONSTRUCTION,  
INC., TIRAM NIRANJAN and ATLANTIC MUTUAL  
INSURANCE COMPANY,

Defendants.

-----X  
O. PETER SHERWOOD, J.:

DECISION AND  
ORDER

Index No. 601764/2006

**FILED**  
JUL 08 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiffs Jose R. Morales and Victor Vann (collectively "plaintiffs") bring this putative class action on behalf of themselves and other similarly situated construction trade workers, a class consisting of approximately 40 to 60 individuals, alleging that they were not paid prevailing wages, supplemental benefits and overtime compensation by defendants NAP Construction Company, Inc. ("NAP"), Amazing Construction, Inc. ("ACI"), and the individual defendants Anthony Panagio and Tiram Niranjan (collectively "defendants") for work they performed on certain public works projects located at Tilden Houses and Borinquen Plaza (collectively the "Public Works Projects"). Plaintiffs move for an order pursuant to CPLR §§ 901 and 902 to certify this action as a class action. The motion is unopposed. For the reasons that follow, plaintiffs' motion for class certification is granted.

**Background**

In or about 2003, defendants entered into a number of contracts for Public Works Projects in New York for public entities, including the City of New York and the New York City Housing

Authority ("NYCHA"), for construction work to be performed at various locations including Tilden Houses and Borinquen Plaza in Kings County (the "Public Works Contracts"). The Public Works Contracts provided that defendants would pay to all workers employed on the Public Works Projects the prevailing wages, supplemental benefits and overtime compensation paid in the locality to workers in the same trade or occupation as determined by the New York City Comptroller and the New York State Department of Labor and as required by New York State Labor Law § 220. The applicable schedule of prevailing wages and supplements for employees on the projects was annexed to and formed a part of the Public Works Contracts. Defendant Atlantic Mutual Insurance Company issued payment bonds to defendants guaranteeing the obligations of defendants and their subcontractors under the Public Works Contracts.<sup>1</sup>

Plaintiffs allege that NAP, ACI and the individually named defendants paid them and the other members of the putative class less than the prevailing wages and supplemental benefits listed in the schedule annexed to the Public Works Contracts and failed to pay them overtime compensation for hours they worked over forty hours in any given week.

In March 2006, plaintiffs commenced this action against NAP, ACI, Anthony Panagio, alleged to be one of ten largest shareholders of NAP, Tiram Niranjan, alleged to be one of the ten largest shareholders of ACI, and Atlantic Mutual Insurance Company, the insurance company which issued payment bonds in connection with the Public Works Contracts. Plaintiffs allege causes of action for breach of contract, quantum meruit, unjust enrichment, failure to pay wages, overtime compensation and benefits under Labor Law §§ 190, 191 and 198-c, overtime compensation under Labor Law § 655 and 12 NYCRR 142-3.2, personal liability under the Business Corporation Law § 630, and suretyship.

*Discussion*

CPLR § 901 (a) sets forth the following prerequisites to certification of a class action: (1) the proposed class is so numerous that joinder of all members is impracticable; (2) common questions

---

<sup>1</sup>The complaint alleges that Liberty Mutual Insurance Company issued payment bonds to defendants (Complaint ¶ 22). However, Atlantic Mutual Insurance Company is named as a defendant in the caption of the action and the cause of action in suretyship is against Atlantic Mutual Insurance Company. Thus, Atlantic Mutual Insurance Company is deemed to be the appropriately named surety.

of law and fact applicable to the class predominate over any questions affecting only individual class members; (3) 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) the class action is superior to other available methods for the fair and efficient adjudication of the controversy. The courts have repeatedly held that CPLR article 9 is to be liberally construed and any doubts should be resolved in favor of allowing an action to proceed as a class action (*see, Beller v William Penn Life Ins. Co. of N.Y.*, 37 AD3d 747, 748 [2d Dept 2007]; *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 91 [2d Dept 1980]). The class representative has the burden of establishing the prerequisites to class certification (*see, Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 137 [2d Dept 2008]). The primary issue for the court on a motion for class certification is “whether the claims as set forth in the complaint can be efficiently and economically managed by the court on a classwide basis” (*id.* at 136-137).

#### *1. Numerosity*

There is no set rule for the minimum number of proposed members for class certification nor is there any ‘mechanical test’ to determine whether the first prerequisite of numerosity has been met (*see, Friar*, 78 AD2d at 96). Here, the proposed representatives of the plaintiff class have submitted affidavits indicating that the class consists of between 40 to 60 workers and could, according to plaintiffs’ counsel, amount to as many as 100 workers. The named plaintiffs remember the names of about 38 of those workers which they identified in a list annexed to their respective affidavits. Although the exact number of persons in the proposed class is not known at this time, the numerosity requirement has been met here with at least forty class members, which is large enough that joinder is not practicable, but narrow enough to avoid being over inclusive (*see, Galdamez v Biordi Construction Corp.*, 13 Misc3d 1224 [A], *aff’d* 50 AD3d 357 [1<sup>st</sup> Dept 2008]).

#### *2. Common Issues of Law or Fact*

In determining if this prerequisite, to wit, whether there is a predominating issue of law or fact, has been met, the court should consider “whether the use of a class action would ‘achieve economies of time, effort, and expense and promote uniformity of decision as to persons similarly situated’” [citations omitted] (*Friar*, 78 AD2d at 97). Plaintiffs contend that common factual and legal issues involved in this putative class action, include, but are not limited to: (1) whether the

schedules of prevailing wages and supplemental benefits to be paid all workers were annexed to the respective Public Works Contracts; (2) whether defendants posted notices at a conspicuous place at the job sites advising workers of the prevailing wage and supplemental benefits; (3) whether defendants failed to pay plaintiffs and other putative class members overtime compensation for hours they worked over forty in any given week; (4) whether plaintiffs and other putative class members were third-party beneficiaries of the Public Works Contracts; (5) whether the Public Works Contracts required payment of prevailing wages and supplemental benefits; and (6) the rates of prevailing wages and supplemental benefits that workers were entitled to be paid at the time that class members performed work for defendants under the Public Works Contracts (Aff. of LaDonna M. Lusher, Esq. in Support of Motion [Lusher Aff.], at ¶ 19). Plaintiffs further aver that the sole differences between claims of individual members of the putative class relate solely to the amount of damages owed to each individual member relative to the hours and times worked (*id.* at ¶ 26).

The court finds that plaintiffs have satisfied this criteria as the entire matter of defendants' liability can be easily disposed of once it is determined whether the Public Works Contracts required the payment of prevailing wages and supplemental benefits and whether defendants complied with its obligation in this regard. Thus, to litigate this issue once, rather than 40 to 60 times, would clearly conserve judicial resources, ensure uniformity of decisions for individuals similarly situated and, thereby, serve the purpose for which CPLR article 9 was intended.

### 3. *Typicality*

Typical claims are those that arise from the same facts and circumstances as the claims of the class members (*see, Globe Surgical Supply*, 59 AD3d at 143). Plaintiffs' proposed class representatives have satisfied this prerequisite by each submitting their own personal affidavits demonstrating that they were employed by NAP to work at the sites of the Public Works Projects pursuant to the Public Works Contracts and each was not paid the appropriate prevailing wages, supplemental benefits or overtime compensation. Plaintiffs have also attached to their motion papers affidavits from several other putative class members who also claim to have been employed by NAP to work at the Public Works Projects in question during the same period as the representative plaintiffs and were not paid the prevailing wages and supplemental benefits. Thus, it is clear that the proposed representatives' claims are typical for the entire class as they arose out of the same

course of conduct and are based upon the same causes of action (*see, Ackerman v Price Waterhouse*, 252 AD2d 179, 181 [1<sup>st</sup> Dept 1998]; *Pruitt v Rockefeller Center Properties*, 167 AD2d 14, 22 [1<sup>st</sup> Dept 1991]).

4. *Adequacy of Representation*

The essential factors for the court to consider in determining the adequacy of representation are potential conflicts of interest between the representative and the class members, personal characteristics of the proposed class representatives and the quality of class counsel (*see, Globe Surgical Supply*, 59 AD3d at 144; *Ackerman*, 252 AD2d at 179; *Pruitt*, 167 AD2d at 25-26). As has been previously discussed, the representative plaintiffs were both employed by NAP to perform work on Public Works Projects and assert that they were underpaid for their services. The proposed class members are also contract trade workers employed by defendants to work on the Public Works Projects and were similarly underpaid. Nothing in this record suggests any conflicts between the plaintiff class representatives and the proposed class members. In addition, plaintiffs' counsel contends that they are experienced commercial litigators who have successfully represented classes in numerous class actions involving issues similar to those raised at bar (*Lusher Aff.* At ¶¶ 30-31) Counsel has also agreed to advance all the costs of the litigation and plaintiffs have agreed to reimburse class counsel for all expenses should the litigation prove successful. Thus, plaintiffs have exhibited an interest in this litigation and their counsel have demonstrated a level of competence that they can fairly and adequately represent the class members.

5. *Superiority of Class Action*

CPLR § 901 (a) (5) requires that the class action method be superior to other available methods for the fair and efficient adjudication of the controversy. Here, the court finds that a class action would be the best method to pursue in this litigation in light of the small amount of the potential individual recoveries and the expense of litigation which would preclude the individual class members from pursuing their claims absent class treatment. The alternative method would require numerous individual actions which might result in conflicting determinations and the imposition of incompatible standards. Class certification is the most efficient and economical use of the court's time and resources.

*CPLR § 902 Factors*

In addition to meeting the requirements set forth in CPLR § 901, plaintiffs must also meet the considerations enunciated in CPLR § 902 in demonstrating the right to class certification. Among the matters the court must consider in determining whether a particular action may proceed as a class action are: (1) the interest of the members in individually controlling the prosecution or defense of separate actions; (2) the impracticality 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 by the management of a class action.

These considerations are implicit in the CPLR § 901 prerequisites, particularly the superiority requirement of CPLR § 901(5) (*see* CPLR C902:2). Most have been considered as previously discussed. As noted, requiring the individual class members to pursue independent actions to obtain the wages and benefits owed is both impractical and inefficient and would likely act as a bar to the individual claims. Moreover, class counsel has indicated that the forum is appropriate as many class members reside in New York City and has stated that there are few difficulties in managing a class action based upon the claims asserted, especially when compared to the complications of managing numerous separate actions (*Lusher Aff.* ¶¶ 39-40).

***Conclusion***

Based upon the foregoing discussion, it is hereby

**ORDERED** that plaintiffs' motion for class certification is granted and leave is granted pursuant to CPLR §§ 901 and 902 for plaintiffs to prosecute their action on behalf of a class consisting of individuals employed by defendants NAP Construction Company, Inc. and/or Amazing Construction, Inc. from 2003 to present who performed construction trade work on various New York City Housing Authority public works projects, including but not limited to Tilden Houses and Borinquen Plaza (the Public Works Projects), to recover wages and benefits which class members were contractually entitled to receive for work they performed on these publicly financed projects, but did not receive; and it is further

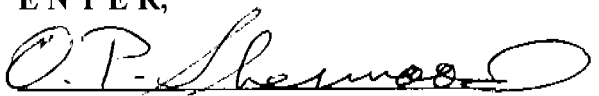
**ORDERED** that within thirty (30) days of the date of this order defendants shall, if they have

not already done so, furnish to plaintiffs' counsel a list of the names and last known addresses of all persons employed in trades including, but not limited to, plumbing, plastering, painting, demolition, tile setting and carpentry, by NAP Construction Company, Inc. and/or Amazing Construction, Inc. from 2003 to present who worked on the Public Works Projects; and it is further

**ORDERED** that plaintiffs shall send a notice to all individuals identified by defendants, within sixty (60) days of the date of this order, and said notice shall include a provision that each individual may "opt out" of the class action, by sending a signed form to plaintiffs' counsel; the form of said notice shall be approved by this Court; such proposed notice shall be sent to counsel for defendants within 30 days of the date of this order for comment which comments shall be submitted to plaintiffs' counsel and the Court within 7 days, and plaintiff may submit a written reply to defendants' comments within 5 days.

This constitutes the decision and order of the Court.

**DATED:** July 2, 2010

ENTER,  
  
O. PETER SHERWOOD  
J.S.C.

**FILED**  
JUL 08 2010  
NEW YORK  
COUNTY CLERK'S OFFICE