

Stecko v Three Generations Contr. Inc.

2013 NY Slip Op 31524(U)

July 12, 2013

Sup Ct, New York County

Docket Number: 100059/11

Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

CHRISTOPHER STECKO, JERZY RACZYNSKI and KRZYSTOF JARGILO, individually and on behalf of all other persons similarly situated who were employed by, THREE GENERATIONS CONTRACTING, INC., and/or any other entities affiliated with or controlled by THREE GENERATIONS INC.,

INDEX NO. 100059/11
MOTION DATE 06-19-13
MOTION SEQ. NO. 005
MOTION CAL. NO. _____

Plaintiffs,

-against-

THREE GENERATIONS CONTRACTING INC. and any related corporate entities, MARIE FABRIZIO and ROBERT FABRIZIO, individually, CAROLINA CASUALTY INSURANCE COMPANY, and RLI INSURANCE COMPANY,

Defendants.

FILED

JUL 16 2013

COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1 to 8 were read on this Motion to/for Class Certification

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____ cross motion _____
Replying Affidavits _____

| PAPERS NUMBERED |
|-----------------|
| <u>1 - 3</u> |
| <u>4 - 6</u> |
| <u>7 - 8</u> |

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers it is Ordered that plaintiffs' motion pursuant to CPLR §901 and §902 seeking to certify this action as a class action and directing notice of this action be published to the putative class, is granted.

Plaintiffs seek an Order pursuant to CPLR §901 and §902, certifying this action for prevailing wage and supplemental benefits as a class action and directing that notice of this action be published to the putative class.

This action seeks to recover based on the alleged failure of Three Generations Contracting Inc., Marie Fabrizio and Robert Fabrizio (hereinafter referred to collectively as "Three Generations") to comply with Labor Law §220 and pay prevailing wages and deducted supplemental benefits payments to the plaintiffs. The complaint alleges that the plaintiffs performed various tasks on public works for the City of New York (Mot. Exh. 6). The underlying contracts were bonded by RLI Insurance Company (hereinafter referred to as "RLI") and Carolina Casualty Insurance Company (hereinafter referred to as "Carolina") which issued material and labor payment bonds. Pursuant to the terms of the bonds RLI and Carolina are responsible as sureties for paying all wages and supplemental benefits that were not paid by Three Generations on the various publicly financed projects (Mot. Exh. 6). Plaintiffs seek to recover for the period from January 1, 2008 through 2011, on behalf of various construction related trades performing work at publicly financed job sites under contracts entered into with the City of New York (Mot. Exh. 6). Three Generations ceased to work on public contracts about September of 2011 because Robert Fabrizio, the principal owner pled guilty to felony counts of employee benefit fraud, money laundering and unlawful payments to union officials (Mot. Exhs. 4).

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

The determination concerning qualification of a lawsuit as a class action under the statutory requirements, rests within the sound discretion of the trial court (*Small v. Lorillard Tobacco Co.*, 94 N.Y. 2d 43, 720 N.E. 2d 892, 698 N.Y.S. 2d 615 [1999]). The burden is on the class representative to produce evidence that establishes the prerequisites of certification. A certification motion is required to establish that the proposed class can be identified (*Kudinov v. Kel-Tech Constr. Inc.*, 65 A.D. 3d 481, 884 N.Y.S. 2d 413 [N.Y.A.D. 1st Dept., 2009]).

The five criteria to be considered in determining class action status is stated in CPLR §901(a), as follows: "(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" (CPLR §901 and *Small v. Lorillard Tobacco Co.*, 94 N.Y. 2d 43, supra).

CPLR §901(a)(1), is the numerosity requirement, and it is dependent on the circumstances of each case (*Pesantez v. Boyle*, 251 A.D. 2d 11, 673 N.Y.S. 2d 659 [N.Y.A.D. 1st Dept., 1998]). A class of approximately forty (40) potential members or larger has typically been deemed sufficient for certification (*Galdamez v. Biordi Construction Corp.*, 13 Misc. 3d 1224(A), 8231 N.Y.S. 2d 347 [N.Y. Sup. Ct., 2006], aff'd 50 A.D. 3d 357, 855 N.Y.S. 2d 104 [N.Y.A.D. 1st Dept., 2008]). Pursuant to CPLR §901(a)(2), commonality applies to predominance of common issues, there is no mechanical test and factual questions specifically applying to each individual are not fatal to certification (*City of New York v. Maul*, 14 N.Y. 3d 499, 929 N.E. 2d 366, 903 N.Y.S. 2d 304 [2010]). Commonality can be found in a prevailing wage claim regardless of varying job titles, pay rates and project sites because contract information is typically well documented for public works projects (*Dabrowski v. ABAX Incorporated*, 84 A.D. 3d 633, 923 N.Y.S. 2d 505 [N.Y.A.D. 1st Dept., 2011]). Pursuant to CPLR §901(a)(3), typicality of claims applies when the named plaintiffs claims are derived from the "same course of conduct as the class members claims and are based on the same cause of action" (*Pruitt v. Rockefeller Center Properties, Inc.*, 167 A.D. 2d 14, 574 N.Y.S. 2d 672 [N.Y.A.D. 1st Dept., 1991]). Adequate representation pursuant to CPLR §901(a)(4), requires no conflict of interest between the putative class members and their representatives (*Nawrocki v. Proto Constr. & Dev. Corp.*, 82 A.D. 3d 534, 919 N.Y.S. 2d 11 [N.Y.A.D. 1st Dept., 2011]). Pursuant to CPLR §901(a)(5), the parties are required to establish a class action is the best method of adjudicating the controversy. In a prevailing wage claim, failure to exhaust administrative remedies under the Labor Law is not a reason to deny certification because a party can seek relief under breach of contract (*De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 22 A.D. 3d 404, 804 N.Y.S. 2d 58 [N.Y.A.D. 1st Dept. 2005]).

Pursuant to CPLR §902, additional factors the Court, "shall consider" in determining whether a lawsuit should be certified a class action are: "(1) the interest of members of the class 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 in the management of a class action" (CPLR

§902 and *Downing v. First Lenox Terrace Associates*, 965 N.Y.S. 2d 9, 2013 N.Y. Slip Op. 02853 [N.Y.A.D. 1st Dept., 2013]).

Plaintiffs contend that this action is merely a continuation of another class action which was certified on the consent of all parties. The Hon. Marcy S. Friedman certified an action in Supreme Court, New York County, titled, *Wojnowski et al v. Three Generations Contracting, Inc.*, Index No. 603337/06 (Mot. Exh. 1). *Wojnowski et al v. Three Generations Contracting, Inc.*, covered all class member claims through December 31, 2007, and was settled in December of 2011 (Mot. Exh. 2). As of January 1, 2008, plaintiffs claim that Three Generations entered into two new contracts. All the remaining work performed between 2008 through 2011, was based on the pre-existing contracts listed in *Wojnowski et al v. Three Generations Contracting, Inc.* (Mot. Exh. 3).

Plaintiffs claim that they satisfy all the elements of CPLR §901(a). They satisfy the numerosity requirement because there are no fewer than sixty-six (66) potential members of the class for this action (Mot. Exh. 10). The claims of the putative class members arise from the common wrong based on defendants failure to pay prevailing wages and supplemental benefits. Commonality relates to liability and not damages. Commonality applies in this action to the recovery for prevailing wage claims and paid supplemental benefits, regardless of where and when the work was performed. The named plaintiffs' claims are typical of those of the proposed putative class based on the claims of failure to pay the prevailing wage and contribution to supplemental benefits. The named plaintiffs are in a position to represent the interests of the putative plaintiffs because there is no conflict of interest and their counsel is competent. A class action is superior to other methods of resolving all the claims because it is economical and the entire class was paid less than the prevailing rate as part of the public works contracts. The additional potential factors of CPLR §902 have been addressed as part of the arguments under CPLR §901(a)(1) and there remains a basis for certification.

RLI opposes the motion claiming that this case is not a continuation of *Wojnowski et al v. Three Generations Contracting, Inc.*, all the named defendants participated in that action. The plaintiffs have stipulated to discontinue this action as to Three Generations and Carolina. RLI is the only remaining defendant in this action. Plaintiffs have the burden of establishing which security bonds RLI is liable for since bonds were also issued by Carolina. Plaintiffs have not annexed copies of the relevant security bonds. The named plaintiffs were unable to specifically identify the job sites or their co-workers for the relevant 2008-2011 period (Opp. Exhs. D, E & F). The named plaintiffs have testified at depositions that they worked intermittently and at various job sites. The named plaintiffs did not establish that during the relevant time period they worked on public work sites, and were entitled to prevailing wages under a specific contract or project.

RLI contends that the CPLR §901(a) and CPLR §902, criteria have not been met because, plaintiffs have not established the relationship of the prevailing wage rates from Three Generations to the bonds issued by RLI. Plaintiffs have not established that the potential class claims are only limited to RLI Bonds. The claims of the named plaintiffs are individualized and not typical of class claims because the workers were varied and they went to different locations on different dates. Certification as a class action is not a superior method resulting in efficient adjudication, because any award of damages will require individual assessments for each of the putative members. Plaintiffs' speculative assertions have not established the potential size of the class, or provided evidence of the amount of claims based upon remaining contracts.

Upon review of all of the papers submitted this Court finds that the plaintiffs have established a basis for class certification pursuant to CPLR §901 and CPLR §902. The sixty-six potential class members satisfies the numerosity requirement. Although plaintiffs by stipulation have discontinued this action against the Three Generations defendants and Carolina Casualty Insurance Company there remain issues concerning RLI's liability on the bonds it issued. Certification does not need to be denied based on varied workers being assigned to projects inconsistently and to different job sites, because the contracts involved will document potential recovery. Plaintiffs have not provided proof that work under public works contracts for the Three Generations contracts continued after December 31, 2011 and that will be the cut off date for this action. Claims existing prior to January 1, 2008 were addressed and resolved in *Wojnowski et al v. Three Generations Contracting, Inc.*

Accordingly, it is ORDERED that plaintiffs' motion pursuant to CPLR §901 and §902 seeking to certify this action as a class action and directing notice of this action be published to the putative class, is granted, and it is further,

ORDERED that, this action shall be maintained and shall proceed as a class action against RLI INSURANCE COMPANY, to the extent that RLI INSURANCE COMPANY issued a payment bond in connection with construction contracts to THREE GENERATIONS CONTRACTING INC.. The "Class" shall hereinafter be defined as:

Plaintiffs, and all other individuals who furnished labor to Three Generations Inc., and related affiliates and entities, on all publicly financed construction projects undertaken by Three Generations Contracting Inc., from January 1, 2008 through December 31, 2011. These contracts and projects include but are not limited to, City Hall, 60 Centre Street, 52 Chambers Street, 80 Centre Street, 2 Lafayette Street, 1 Centre Street, 100 Centre Street, 100 Gold Street, 111 Centre Street, 137 Centre Street, 125 Worth Street, 253 Broadway, 51-53 Chambers Street, 346 Broadway (all in Manhattan); 198 161st Street (Bronx); Borough Hall (Staten Island); 209 Joralemon Street (Municipal Building) and 210 Joralemon Street (Borough Hall) (Brooklyn) ; "General Construction Requirements Contract for Manhattan and Bronx"; Various DCAS Buildings"; and "General Construction at 250 Broadway." The defined class shall not include any clerical, administrative, professional or supervisory employees.

and it is further,

ORDERED that, the law firm of Virginia & Ambinder, LLP shall be designated as counsel to the Class, in this action; and it is further;

ORDERED that, the Notice of Pendency of Class Action Lawsuit annexed to the motion papers as Exhibit 11, is approved after the following modifications:

" All individuals who furnished labor to Three Generations Inc., and related affiliates and entities on all publicly-financed construction projects undertaken by Three Generations Contracting Inc., from January 1, 2008 through December 31, 2011. These contracts and projects include but are not limited to, City Hall, 60 Centre Street, 52 Chambers Street, 80 Centre Street, 2 Lafayette Street, 1 Centre Street, 100 Centre Street, 100 Gold Street, 111 Centre Street, 137 Centre Street, 125 Worth Street,

253 Broadway, 51-53 Chambers Street, 346 Broadway (all in Manhattan); 198 161st Street (Bronx); Borough Hall (Staten Island); 209 Joralemon Street (Municipal Building) and 210 Joralemon Street (Borough Hall) (Brooklyn) ; "General Construction Requirements Contract for Manhattan and Bronx"; Various DCAS Buildings"; and "General Construction at 250 Broadway." The defined class shall not include any clerical, administrative, professional or supervisory employees."

and

"It is the plaintiff's contention that for the period of January 1, 2008 through December 31, 2011, the prevailing wage and benefit that should have been paid to individuals performing such work as carpentry, painting and demolition, ranged from approximately \$50.00 to \$85.00 per hour, depending on trade."

and it is further,

ORDERED that, the Court approves the Notice of Pendency of Class Action Lawsuit as modified and on or before thirty (30) days after plaintiffs receive defendant's mailing list, the plaintiffs or their designated representatives shall cause a copy of the modified Notice of Pendency of Class Action Lawsuit to be mailed by first class mail to:

All individuals who furnished labor to Three Generations Inc., and related affiliates and entities on all publicly-financed construction projects undertaken by Three Generations Contracting Inc., from January 1, 2008 through December 31, 2011. These contracts and projects include but are not limited to, City Hall, 60 Centre Street, 52 Chambers Street, 80 Centre Street, 2 Lafayette Street, 1 Centre Street, 100 Centre Street, 100 Gold Street, 111 Centre Street, 137 Centre Street, 125 Worth Street, 253 Broadway, 51-53 Chambers Street, 346 Broadway (all in Manhattan); 198 161st Street (Bronx); Borough Hall (Staten Island); 209 Joralemon Street (Municipal Building) and 210 Joralemon Street (Borough Hall) (Brooklyn) ; "General Construction Requirements Contract for Manhattan and Bronx"; Various DCAS Buildings"; and "General Construction at 250 Broadway." The defined class shall not include any clerical, administrative, professional or supervisory employees.

and it is further,

ORDERED that, the mailing of the Notice of Pendency of Class Action Lawsuit as set forth herein, shall constitute the best notice practicable under the circumstances to the class; and it is further,

ORDERED that, within thirty (30) days after entry of this Order, plaintiffs' counsel shall prepare a list of the names and last known addresses of all individuals employed by the defendants who performed construction trade work between January 1, 2008 and December 31, 2011 at projects for the defendants pursuant to public works contracts; and it is further,

ORDERED that the Notice of Pendency of Class Action Lawsuit shall be translated into Spanish and Polish by an English translation service; and it is further,

ORDERED that, on or before thirty (30) days after entry of this Order, plaintiffs' counsel shall cause a copy of the modified Notice of Pendency of Class Action Lawsuit in substantially the same form as indicated herein, to be published in, "El Diario La Prensa," a local Spanish language newspaper and "Super Express - Polish American Daily," a local Polish language newspaper. The newspaper publication shall be published on three (3) separate days over a two week period; and it is further,

ORDERED that, on or before thirty (30) days, after entry of this Order, plaintiffs' counsel shall cause a copy of the modified Notice of Pendency of Class Action Lawsuit to be posted on plaintiffs' counsel's website located at "www.vandallp.com"; and it is further,

ORDERED that, the parties shall appear for a Status Conference, in IAS Part 13, room 210, at 71 Thomas Street, New York, New York at 9:30a.m. on September 25, 2013.

ENTER:



MANUEL J. MENDEZ,
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Dated: July 12, 2013

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

FILED

JUL 16 2013

COUNTY CLERK'S OFFICE
NEW YORK