

Jackson v U.S. Specialty Ins. Co.

2013 NY Slip Op 33568(U)

January 24, 2013

Supreme Court, New York County

Docket Number: 156744/2012

Judge: Saliann Scarpulla

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA
Justice

PART 19

Index Number : 156744/2012
JACKSON, ALBERT
vs
U.S. SPECIALTY INSURANCE
Sequence Number : 002
ORDER MAINTAIN CLASS ACTION

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


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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *decided in accordance w/ the accompanying memorandum decision.*

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

Dated: 1/24/13


_____, J.S.C.

SALIANN SCARPULLA

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

-----x

ALBERT JACKSON, RICARDO JACKSON, and
COLDRIDGE JOHNSON, individually and on
behalf of all other persons similarly
situated who were employed by Zoria
Housing LLC and/or any other entities
affiliated with or controlled by Zoria
Housing LLC,

Plaintiffs,

Index No.
156744/2012

-against-

DECISION AND
ORDER

U.S. SPECIALTY INSURANCE COMPANY
d/b/a HCC SURETY GROUP, LAKHI
ZORIA, and ZORIA HOUSING LLC and any
related corporate entities,

Defendants.

-----x

Saliann Scarpulla, J.:

In this action, plaintiffs Albert Jackson (Jackson), Ricardo Jackson (RJackson) and Colridge Johnson (Johnson) move for class certification with respect to their claims against defendants U.S. Specialty Insurance Company d/b/a HCC Surety Group (HCC Surety), Lakhi Zoria (Zoria) and Zoria Housing LLC (ZH), a general contractor, for failure to pay a prevailing rate of wages, supplements and overtime. Defendants cross-move, pursuant to CPLR 906 (2), to divide this proposed class into subclasses on a per-project basis.

Background

In 2009 and 2010, ZH entered into several publicly-financed

construction contracts with the New York City Housing Authority (NYCHA) to perform renovation work on public works projects at different locations in New York (Public Projects). Further, HCC Surety furnished labor and material payment bonds, and, under the terms of each, among other things; HCC Surety agreed to pay unpaid prevailing wages and supplemental benefits to the plaintiffs and the putative class members in the event ZH failed to pay these wages and benefits.

ZH performed these Public Projects at the Highbridge Rehabs, the Throggs Neck Houses, Marble Hill Houses, Woodside Houses, and Highbridge Gardens. ZH did work at Highbridge Rehabs according to a contract directly between NYCHA and ZH. With respect to the other projects, ZH performed work pursuant to agreements between ZH and each project's construction manager. Each construction manager had previously entered into a contract with NYCHA for construction management services at the site.

Plaintiffs commenced this action on or about September 28, 2012, by filing a summons and verified complaint, alleging that they furnished labor to ZH and Zoria, ZH's president, for the Public Projects, but that ZH had failed to pay or ensure payment of prevailing wages and supplemental benefits, as guaranteed by Labor Law §220, to plaintiffs. Plaintiffs assert claims against ZH for breach of contract, quantum meruit and unjust enrichment. Plaintiffs assert a claim for trust diversion against Zoria.

Subsequently, on or about December 7, 2012, plaintiff filed a supplemental summons and an amended verified complaint to add claims for a class action.

Plaintiffs now move to certify a class in this action and argue that such a class satisfies all the prerequisites of CPLR 901 (a). Plaintiffs essentially argue that the class size would be anywhere from 70 to 100 persons, and that the claims of each member of the proposed class arise from a common wrong, namely that ZH did not pay its workers, pursuant to the contract and Labor Law § 220 (3), the prevailing rates of wage, in addition to overtime compensation and supplemental benefits.

According to their affidavits in support of this motion, the plaintiffs each aver that during 2010 and 2011, each worked as an electrician on this project with "over 70 others" (Jackson aff, ¶ 2; RJackson aff, ¶ 2; Johnson aff, ¶ 2). Plaintiffs' affidavits state: "[d]uring this time, I worked for [ZH] and I recall having been assigned to work on the Public Works Project in New York" (Jackson aff, ¶3; RJackson aff, ¶ 3; Johnson aff ¶ 3). Plaintiffs individually state that they were paid approximately \$18.75 per hour. RJackson and Johnson aver they were paid in cash only. All three state they received no benefits from "my employer," ZH (Jackson aff, ¶ 7, RJackson aff, ¶ 7 Johnson aff, ¶ 7). Each avers the prevailing wage was higher and that they should have received supplemental benefits.

According to each of plaintiffs' affidavits, a class action is appropriate in this matter because:

"I do not believe that many of my co-workers knew that they should have been receiving prevailing wages and benefits. In fact, it is possible that many of my former co-workers still do not know that they have a claim for prevailing wages because I know of no instance of any other individual bringing such a claim"

(Jackson aff, ¶ 12; RJackson aff, ¶ 12; Johnson aff, ¶ 12).

Plaintiffs also submit two documents, and each reflects a copy of a check from ZH, and, underneath, a print-out indicating an hourly rate, and taxes deducted. One is made out to RJackson and the other to Johnson.

In opposition, defendants argue that plaintiffs' application is unsupported by evidence concerning the class and is speculative. According to defendants, plaintiffs offer allegations of the defendants' failure to pay the three of them the prevailing wage, but do not offer any facts concerning other workers on the Public Projects. Further, according to defendants, because the three named plaintiffs were independent contractors, and not employees of ZH, they are not entitled to any rights from defendants under Labor Law § 220,¹ they are uniquely situated, and are not in a position to represent a class in this matter.

¹ In their opposition, defendants argue that as a subcontractor, Jackson is not entitled to a prevailing wage, and directs the court to Labor Law § 220 (g), which states: "[f]or the purpose of enforcing this article, the affected employee may bring an action . . . [against] the contractor, the subcontractor . . .". They further argue that, as Jackson's employees, the other two plaintiffs could not seek a prevailing wage from defendants.

Specifically, defendants argue that ZH did not hire Jackson, RJackson or Johnson to work as its own employees at the Project, and, therefore, plaintiffs' claims are not representative of any claims that could be argued by the members of the proposed class, who are ZH's own workers. In support of this argument, defendants submit to the court two 1099 forms issued by ZH to "Albert Jackson." One 1099 is for 2010, in the sum of \$109,952.72, and the other is for 2011, in the sum of \$83,303.00. Defendants proffer 11 checks from ZH to "Albert Jackson," which each include a notation that reads: "(issue 1099)," and either "TNH Bldg" or "Throggs Neck." These checks are dated from April through September 2010. There are an additional four checks that are all dated August 22, 2011 from ZH to "Albert Jackson." These checks also contain the notation "Issue 1099," as well as the notations "HBG," and "Invoice attached."

In connection with this last notation, defendants submit what they refer to as "invoices" to the court, which, according to Zoria's sworn statement, were submitted by Jackson "to ZH reflecting the time spent and the material installed on a particular task. ZH provided the material" (Zoria aff, ¶ 12). There are approximately 60 "invoices," dated from April 2011 to July 2011. They all contain a heading that is either "Throggs Neck Houses," or "TNH." The invoices show, for example, the "scope of work," as well as "2 guys 8pm - 5pm," and they are

signed by the "Site Supervisor" and a "Rep. For Jacko Electrician," which is either RJackson or Jackson. They do not contain dollar amounts (Zoria aff, exhibit H at 1).

According to defendants, the documents "produced by plaintiffs" in this action appear "nothing like" the documents that ZH "actually used to track its own employee's wage and hour information" (Defendants' memorandum of law in opposition to plaintiffs' motion at 7). In his affidavit in opposition to plaintiffs' motion, Zoria avers:

"Plaintiffs do not appear on the certified [School Construction Authority] Sign-ins, which ZH's employees signed at the beginning and end of each day, because they were not ZH employees. Instead Albert Jackson submitted work orders, signed by a ZH representative, or invoices to ZH for payment for the labor provided by him and his crew of workers"

(Lakhi aff, ¶ 12).

In further support of this argument, defendants submit U.S. Department of Labor weekly payroll logs and daily sign-in logs pertaining to the Public Projects for plaintiffs' work, which defendants state were provided to them in discovery by plaintiffs. The documents entitled "daily sign-in log," represent plaintiffs' work at the Throggs Neck, Marble Hill and Woodside sites. The plaintiffs names are listed on the forms alongside the days and hours they worked in 2010 and 2011.

Defendants also submit employment documents, such as sign-in/sign-out sheets and payroll reports that pertain to the Public

Projects and the work of other employees.

Defendants have submitted voluminous employment records, which, according to defendants, do not include plaintiffs' names. Defendants' papers include "contractor daily-sign in sheets," which contain a NYCHA heading, and corresponding weekly payroll reports, which are headed "U.S. Department of Labor." They are for five sites: Throggs Neck Houses, Marble Hill Houses, Woodside Houses, Highbridge Rehab and Highbridge Gardens and span 2010 - 2011. The information contained on the sign-in sheets includes the worker's name, signature and work classification, whereas the payroll reports include the worker's name, work classification, rate of pay.

Defendants ask the court to deny class certification, or, in the alternative, defendants seek a hearing as to the sufficiency of plaintiffs' proof concerning class certification.

Discussion

To proceed with this litigation as a class action, plaintiffs must satisfy the five elements required by CPLR 901

(a):

- "(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."

Plaintiffs seek to certify a class on the ground that ZH systematically denied its laborers a prevailing wage. According to the amended verified complaint and plaintiffs' memorandum of law in support of this motion, the right of the proposed class to a prevailing wage emanates from Labor Law § 220.

To satisfy the requirements under the second element of CPLR 901 (a), plaintiffs must show that "the nature of the claims is such as to indicate a predominance of common issues of law and fact over individual questions of damages" (*Pesantez v Boyle Env'tl. Servs., Inc.*, 251 AD2d 11, 12 [1st Dept 1998]). Likewise, to satisfy the third element, typicality, the plaintiffs must establish that "each class member's claims arise from the same course of events and each class member makes similar legal arguments to prove defendant's liability'" (*Weinstein v Jenny Craig Operations, Inc.*, 41 Misc 3d 1220(A), *5, 2013 NY Slip Op 51783(U) [Sup Ct, NY County 2013][internal citations omitted]). With respect to the fourth element, plaintiffs must establish that they had the same interest as the other members of the proposed class and that there is not a fundamental conflict between their interests and the other members (*id.* at *5).

"The party seeking class certification bears the burden" of establishing the elements set forth above (*Kudinov v Kel-Tech*

Constr. Inc., 65 AD3d 481, 481 [1st Dept 2009][internal citations omitted]). "This burden must be met by providing an evidentiary basis for class certification" (*id.* [internal citations omitted]). "Conclusory assertions are insufficient to satisfy the statutory criteria" (*Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 422 [1st Dept 2010], citing *Chimenti v American Express Co.*, 97 AD2d 351, 352 [1st Dept 1983]; see also *Katz v NVF Co.*, 100 AD2d 470 [1st Dept 1984] (the court denies plaintiffs' motion to certify as a class, because plaintiffs' submission, based upon conclusions and assumptions, was insufficient to demonstrate statutory requirements)).

Here, plaintiffs allege that there were over 70 other workers on the Public Projects, joinder of which is impracticable within the meaning of CPLR 901(a)(1). Yet, with respect to the second, third and fourth elements of proof, requiring, among other things, the existence of facts or law common to the class, the proof is lacking.

Plaintiffs' affidavits do not state that they have knowledge that any other members of the putative class exist. The affidavits aver: "I firmly believe that a class action is appropriate because it will allow many of my former co-workers the opportunity to avail themselves of rights they either don't know they have or may be reluctant to pursue on their own" (*Jackson aff*, ¶ 10). In this way, the affidavits all state that

because each plaintiff allegedly did not receive the prevailing wage, or supplemental benefits, presumably neither did some, or all, of the other workers.

Plaintiffs' affidavits are simply threadbare in that they rely exclusively on this presumption to support their position that this case is well-suited for a class action. Likewise, their attorney's affirmation states that "class counsel" had discussions with "the named Plaintiffs and members of the putative class," yet, nothing is revealed about these conversations. The plaintiffs' submission does not identify one other worker who allegedly did not receive a prevailing wage or supplemental benefits. In their affidavits, plaintiffs do not even state that they were aware of other workers in this position. They offer no knowledge of the names, characteristics or even the existence of any other worker who did not receive those benefits, or who seeks to complain about this. There are no affidavits from other workers or supervisors to this effect. Further, although plaintiffs' memorandum of law describes the claims set forth in this action as "[ZH's] common, systematic, and unrelenting illegal course of conduct in its dealings with its laborers," this is offered as a conclusion with no proof to support it.

Plaintiffs offer no documents or testimony of any kind that might permit this court to accept these statements as any more

than speculation. Thus, the claims for which they seek damages are set forth as personal, individual claims, not claims common to a class. I am, therefore, "invited to speculate" as to whether there are others similarly situated, and whether plaintiffs adequately represent those interests (*Katz*, 100 AD2d at 474). Based upon defendants' submission of plaintiffs' employment documents, and the employment documents of numerous other employees at the Public Projects, I simply cannot assume that there are, or are not, other workers similarly situated. At any rate, such an assumption would not be sufficient to establish that there are any other workers who did not receive a prevailing wage under Labor Law § 220 (3). The parties should, therefore, conduct relevant discovery as to the nature and size of the class, in addition to the discovery concerning plaintiffs' individual allegations in the amended complaint (see *Katz*, 100 AD2d 474; *Chimenti*, 97 AD2d 351).

Finally, defendants cross-move, pursuant to CPLR 906 (2), to divide the proposed class into subclasses for the purpose of managing this case. Defendants argue that this is warranted, because USSIC bonded each project separately, and thus, the different job sites factor into the determination of wages. This motion is denied as premature at this stage of the litigation.

Accordingly, it is hereby

ORDERED that the plaintiffs Albert Jackson, Ricardo Jackson

and Colridge Johnson's motion for class certification is denied;
and it is further

ORDERED that defendants U.S. Specialty Insurance Company
d/b/a HCC Surety Group, Lakhi Zoria, and Zoria Housing LLC's
cross motion pursuant to CPLR 906 (a) is denied; and it is
further

ORDERED that the parties are directed to appear for a
discovery conference in Room 335, on March 26, 2014 at 2:15 p.m.

Dated: 1/24/13



J.S.C.
SALIANN SCARPULLA