SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden Justice

PART 11

Index Number : 156616/2012
JACKSON, ALBERT
vs
U.S. SPECIALTY INSURANCE
Sequence Number : 001
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 with the annexed Memorandum Decision and Order.

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

Dated: January 21, 2014

HON. JOAN A. MADDEN J.S.C.

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 11

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ALBERT JACKSON, ANDREW MITCHELL, and MICHAEL BARKER, 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,

-against-

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

Defendants.

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Index No. 156616/2012

DECISION AND ORDER

Joan Madden, J.:

In this action, plaintiffs Albert Jackson (Jackson), Andrew Mitchell (Mitchell) and Michael Barker (Barker) 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.

Background

In August 2010, ZH entered into a publicly-financed construction contract (the contract) with the New York City School Construction Authority (SCA) to perform renovation work

for a public works project at P.S. 76 (the Public Project). For the Public Project, and in connection with the contract, HCC Surety furnished labor and material payment bonds, and, under the terms of each, HCC Surety agreed, among other things, that in the event ZH does not pay wages and benefits under the contract, it would undertake these contractual obligations on behalf of ZH.

Plaintiffs commenced this action on or about September 24, 2012, by filing a summons and verified complaint, alleging that they furnished labor to ZH and Zoria, ZH's president, for the Public Project, and that ZH 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 defendant 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. Plaintiffs essentially argue that the class size would be anywhere from 30 to 50 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 wage rates, 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 30 others." 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; Mitchell aff, ¶ 3; Barker aff, ¶ 3). Plaintiffs individually state that they typically worked five days per week and eight hours per day, and were paid approximately $18.75 per hour. Barker and Mitchell claim they were paid in cash. Plaintiffs state they received no benefits from ZH. Each maintains that the prevailing wage was higher and that they should have received supplemental benefits (Jackson aff, ¶ 5,6,8,9; Mitchell aff, ¶ 5,6,8,9; Barker aff, ¶ 5,6,8,9).

According to each of the 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; Mitchell aff ¶ 12; Barker aff, ¶ 12).

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 Project. 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 (3),[1] they are uniquely situated, and are not in a position to represent a class in this matter. Specifically, defendants argue that ZH did not hire Jackson, Mitchell or Barker 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 a 1099 form issued by ZH to "Albert Jackson" for 2011 in the sum of $83,303.00, an October 17, 2011 check from ZH to "Albert Jackson" for $25,000.00, which includes a notation that reads: "(issue 1099) PS 76 Project," and an April 1, 2011 letter from ZH to "Albert Jackson," regarding P.S. 76. The letter states:

"Jacko:

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[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.

> We are giving you OK [sic] to install one box on the roof and complete the remaining work on pipe scaffolding on PS 76.
> While you work on the site make sure you get [a] signature from Paul every day that you work and when you request payment for this work bring a copy of this letter as well as [a] signed work order for all work completed to [the] office for payment or fax it to us"

(Bondy aff, exhibit G 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).

Defendants offer weekly payroll logs and daily sign-in logs pertaining to the Public Project for plaintiffs' work, and the employment documents, such as sign-in/sign-out sheets and payroll reports that pertain to the Public Project and the work of other employees. The daily sign-in logs that include plaintiffs' names on the ledger under the heading "name," also include the job site at P.S. 76 and indicate the week that the work was done. For

each plaintiff, Jackson, Mitchell and Barker, there are check marks indicating the days of the week the work was completed and there are handwritten "8's" representing the hours worked each day. Likewise, the payroll records which contain plaintiffs' names, and contain the heading "U.S. Department of Labor," include their names, their work classification as "electrician," the total hours they worked per week, their rate of pay as "99.75," the contractor is ZH, and the project is described as P.S. 76.

The "certification of payroll" documents, that defendants' state do not include plaintiffs' names, list names under the heading "employee's name," and, among other things, provide information for each employee's work classification, days and hours worked, rate of pay, total base wages, supplemental benefits and indicate the contractor as ZH and the school name as P.S. 76. Plaintiffs' work was noted on ZH's NYSCA/Build Project - Daily Project Update reports at the bottom of the reports, separate from the "work activity" section, which notes the work of other employees.

Defendants ask the court to deny plaintiffs' motion for 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."

Labor Law 220 (3) and independent contractors

Plaintiffs seek to certify a class on the ground that ZH systematically denied its laborers a prevailing wage. According to plaintiffs papers: "Zoria Housing has engaged in a uniform policy and practice of wage abuse throughout its performance in the Public Works Project in New York State that denies employees of wages at the prevailing wage rate" (plaintiffs' memorandum of law in support of motion for class certification at 1). According to the amended verified complaint and plaintiffs' memorandum of law in support of the motion, the right of the proposed class to a prevailing wage emanates from Labor Law § 220.

In their motion, plaintiffs argue that there are common

questions of law and fact, such as: (1) whether schedules of the applicable prevailing rates of wages and supplemental benefits were attached to the Public Works Contract; and (2) whether the Public Works Contracts was [sic] for "public work" requiring payment of prevailing wages and supplemental benefits.

In opposition, defendants argue that plaintiffs cannot represent this proposed class, because ZH did not hire plaintiffs as employees on the Public Project, and that, instead, plaintiffs were hired as independent contractors. Defendants argue that, as a result of this status, plaintiffs are not entitled to rights under Labor Law § 220, and are, consequently, unable to satisfy the second, third and fourth elements of CPLR 901 [a].

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 Envtl 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] *4, 2013 NY Slip Op 51783 [U] [Sup Court, 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; *see also Pruitt v Rockefeller Ctr. Props*, 167 AD2d 14, 24 [1st Dept 1991]). On this point, defendants argue that because Barker and Mitchell worked for Jackson, who is a subcontractor, Jackson was responsible for their wages and, again, they have no rights under Labor Law § 220.

Labor Law § 220 (3) (a) states, in pertinent part:

> "The wages to be paid for a legal day's work, as hereinbefore defined, to laborers, workmen or mechanics upon such public works shall be not less than the prevailing rate of wages as hereinafter defined. ... The wages to be paid for a legal day's work, as hereinbefore defined, to laborers, workmen or mechanics upon any material to be used upon or in connection therewith, shall be not less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work on, about or in connection with which such labor is performed in its final or completed form is to be situated, erected or used. Such contracts shall contain a provision that each laborer, workman or mechanic, employed by such contractor, subcontractor or other person about or upon such public work, shall be paid the wages herein provided."[2]

The text of the statute does not contain the term "independent contractor," it does not expressly include or exclude independent contractors, and does not contain the term

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[2] Labor Law § 220 is the codification of rights under Article I § 17 of the State Constitution, which states: "No laborer, worker or mechanic, in the employ of a contractor or sub-contractor engaged in the performance of any public work, shall be permitted to work more than eight hours . . . nor shall he or she be paid less than the rate of wages prevailing . . . ."

"employees." It uses the term "employed by," however, in its description of the covered workers: "each laborer, workman or mechanic, employed by such contractor, subcontractor or other person about or upon such public work . . . ." The definition of "employee" as set forth in the Labor Law, and pertaining to this section of the statute, describes employees in broad terms: "'Employee' means a mechanic, workingman or laborer working for another for hire" (Labor Law § 2 [5]).

Likewise, New York courts, in applying this statute, have not expressly included or excluded independent contractors from its protection. Yet, there are cases in which the courts found that the statute excludes students who are engaged in a public project for the purpose of instructional training, and public assistance recipients who are participants in a "work experience program" (*see Brukhman v Giuliani*, 94 NY2d 387 [2000]; *Matter of Onondaga-Cortland-Madison Bd. of Coop. Educ. Servs. v McGowan*, 285 AD2d 36 [3d Dept 2001]). In these cases, the courts recognize that to be entitled to benefits under the statute, the worker must receive some compensation, wage or salary in exchange for the work (*Matter of Onandaga-Cortland-Madison Bd. of Coop. Educ. Servs.*, 285 AD2d at 40; *Brukhman*, 94 NY2d at 396).

Additionally, cases assessing other sections of the Labor Law provide some indication as to the contemplated scope of

individuals who are entitled to a prevailing wage.[3] For example, the definition of "employee" as set forth in Labor Law § 190, "any person employed for hire by an employer in any employment," is not as broad as that set forth in Labor Law § 2 (5), and there is case law that states that "'[t]his definition [§ 190] excludes independent contractors'" (*Hernandez v Chefs Diet Delivery, LLC*, 81 AD3d 596, 597 [2d Dept 2011] quoting *Akgul v Prime Time Transp.*, 293 AD2d 631, 633 [2d Dept 2002]).

Furthermore, in *Stringer v Musacchia*, the Court of Appeals applied the definition of "employee" in Labor Law § 2 (5), the one applicable here, when addressing an issue concerning Labor Law § 240 (1), the primary purpose of which is "to extend special protections to 'employees' or 'workers'" (*Stringer*, 11 NY3d 212, 215 [2008]), and the Court of Appeals stated in a footnote: "The statute [§ 240 (1)] also applies to independent contractors, but it is not alleged here that Stringer acted in this capacity" (*Stringer*, 11 NY3d at 216 n2). The Court then noted three factors that are usually present when a person has been "hired": (1) "the voluntary undertaking of a mutual obligation - the

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[3] The A.L.R.5th discussion of "who is 'employee,' 'workman' or the like, of contractor subject to state statute requiring payment of prevailing wage on public works projects," does not exclude an independent contractor. However, it does cite to an Ohio case, discussing a statute similar to Labor Law § 220, that holds that "a sole proprietor who personally performs physical work as a laborer, workman, or mechanic in the construction of a public improvement is not subject to Ohio's prevailing wage law" (5 A.L.R.5th 513, citing *International Union of Operating Engineers, Local 18 v Dan Wannemacher Masonry Co.*, 36 Ohio St 3d 74 [Sup Court of Ohio 1988]).

employee agrees to perform a service in return for compensation (usually monetary) from the employer . . ."; (2) "although not an essential factor, an employer may exercise authority in directing and supervising the manner and method of the work . . ."; and (3) "the employer usually decides whether the task undertaken by the employee has been completed satisfactorily" (*Stringer*, 11 NY3d at 215-216).

Moreover, the legislative purpose of Labor Law § 220 reveals who is entitled to its protection. Labor Law § 220 was enacted to "thwart what had become a widespread competitive practice among contractors of exploiting the labor force in order to submit the lowest bid for public work" (*Matter of Monarch Elect. Contr. Corp. v Roberts*, 70 NY2d 91, 95 [1987]). Its purpose was to level the playing field in the construction industry with respect to the wages for workers on a public project:

> "a reading of the statute [Labor Law § 220] discloses a basic underlying policy that those persons who are employed on public works should receive the prevailing rate of wage that those doing the same work on nonpublic works receive. This is an attempt to insure that persons working on public works are not 'penalized' by receiving a lower wage than those working on the outside"

(*Matter of Kelly v Beame*, 15 NY2d 103, 110 [1965]).

It appears, therefore, that it flies in the face of the purpose of the statute to hire "independent contractors" to perform labor on a public work and pay them less than the prevailing wage. Ultimately, it is the facts of the employment

relationship at hand that should determine whether it would be consistent with the purpose of the statute to apply the rights set forth under Labor Law § 220 (*see Matter of Tenalp Constr. Corp. v Roberts*, 141 AD2d 81, 85 [2d Dept 1989]). In *Tenalp Construction Corporation*, in determining whether a worker, who was hired as both a carpenter and a supervisor, was entitled to a prevailing wage for his work on a public project, the court stated:

> "Job titles are not controlling. A contractor subject to the provisions of Labor Law § 220 cannot avoid or circumvent the protection afforded to those workers covered by the law by bestowing job titles instead of adequate pay. Rather, 'the pivotal question is the nature of the work actually performed'"

(*id.* at 85 [internal citations omitted]).

Here, the parties' submissions do not support a determination, at this point, that these three plaintiffs cannot represent the proposed class. In general, independent contractors are not expressly excluded from rights under Labor Law § 220 (3). Thus, the questions raised by this record include what is the nature of the work plaintiffs actually performed, and is it of a nature that entitles them to the same benefits under Labor Law § 220 (3) as any other employee. There are some facts alleged that suggest that the plaintiffs might be covered under the statute: (1) they worked as electricians on the Public Project; (2) the daily sign-in sheets that include plaintiffs' names reflect that each of the three worked full 8-hour days, and

indicate a pay rate for each; and (3) the payroll sheets suggest that they were paid compensation for their work. Yet, there are other characteristics of their work that create questions concerning that coverage. Accordingly, this issue has not been addressed sufficiently for the court to make a finding as to whether the plaintiffs are able to satisfy the requirements under CPLR 901 (a), and permits the parties time to conduct limited discovery on this issue.

Conclusory allegations and plaintiffs' burden under CPLR 901(a)

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.*). "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, 473 [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 30 other workers on the Public Project, joinder of which is impracticable

[* 16]

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 offer their affidavits and the memoranda of law drafted by their attorneys in support of their application.

Plaintiffs' affidavits do not state that they have knowledge that any other members of the proposed class actually exists. 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. Yet, the plaintiffs do not identify one other worker who allegedly did not receive a prevailing wage or supplemental benefits. 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 court 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. In the words of the Appellate Division, First Department, in *Katz*, this court is, consequently, "invited to speculate" as to whether there are others similarly situated, and whether plaintiffs adequately represent those interests (*id.* at 474). On this topic, defendants offer voluminous employment documents to establish that plaintiffs were not similarly situated to other employees, however, defendants have not offered any statements or proof that anyone on this project was paid a prevailing wage. Defendants have not offered proof of the completeness of the documentation, i.e., are these documents representative of the entire body of workers on the Public Project, and neither the plaintiffs nor the defendants has offered to the court the schedule of prevailing wages for this

project.

Thus, the court is unable to determine on this record whether the prerequisites to class certification listed in CPLR 901 are present (*see Chimenti*, 97 AD2d at 352 [court held it was an abuse of discretion for the lower court to certify a class on submission which contained conclusory allegations and decertified the class without prejudice to renewal of the motion, entitling the parties to limited discovery as to whether the statutory requirements for certification were met]). Based upon defendants' submission of plaintiffs' employment documents and the employment documents of numerous other employees at the Public Projects, this court 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 are, therefore, permitted limited discovery on the issues presented in this decision. More precisely, the plaintiffs' are entitled to limited discovery in order to adduce evidence to meet their burden of showing that the statutory prerequisites to certification of a class are met. The defendants are likewise entitled to limited discovery on the statutory prerequisites.

Accordingly, it is hereby

ORDERED that plaintiffs' motion for class certification is granted to the extent of directing that pre-certification disclosure be conducted regarding whether plaintiffs satisfy the numerosity, commonality and superiority requirements of CPLR 901; and it is further

ORDERED that a preliminary conference shall be held on March 6, 2014 at 9:30 am in Part 11, room 351, 60 Centre Street, New York, NY.

Dated: January 21, 2014

J.S.C.

HON. JOAN A. MADDEN
J.S.C.