

**Ansah v A.W.I. Security & Investigation, Inc.**

2014 NY Slip Op 30941(U)

April 9, 2014

Sup Ct, New York County

Docket Number: 151032/12

Judge: Shlomo S. Hagler

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 17**

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**SAMUEL ANSAH and EMANUEL IMAH  
individually and on behalf of all other persons similarly  
situated who were employed by A.W.I. SECURITY &  
INVESTIGATION, INC., ADAZE W. IMAFIDON,  
WHITESTONE CONSTRUCTION CORP., and/or any  
other entities affiliated with or controlled by A.W.I.  
SECURITY & INVESTIGATION, INC., and/or  
ADAZE W. IMAFIDON,**

**Plaintiffs,**

**-against-**

**Index No. 151032/12  
Motion Sequence No.: 001  
DECISION & ORDER**

**A.W.I. SECURITY & INVESTIGATION, INC.,  
ADAZE W. IMAFIDON,  
WHITESTONE CONSTRUCTION CORP.,  
and/or any other entities affiliated with or controlled by  
A.W.I. SECURITY & INVESTIGATION, INC.,  
and/or ADAZE W. IMAFIDON,**

**Defendants.**

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**HON. SHLOMO S. HAGLER, J.S.C.:**

This is a putative class action brought on behalf of plaintiffs Samuel Ansah (“Ansah”) and Emmanuel Imoh<sup>1</sup> (“Imoh”) (collectively “plaintiffs”) and similarly situated employees to recover unpaid prevailing wages and benefits on various public contracts. Plaintiffs move for an order pursuant to CPLR § 1002(b) and § 3025(b) for leave to amend the complaint to add WDF, Inc. as an additional defendant in this action, and pursuant to CPLR § 2004, granting them an extension of time in which to file their motion for class certification. Defendants A.W.I. Security & Investigation, Inc. (“AWI”) and Adaze W. Imafidon (“Imafidon”) (collectively, the “AWI defendants”)-cross-move, pursuant to CPLR § 3212, for summary judgment dismissing the complaint as against them.

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1. Plaintiff Emmanuel Imoh’s name is spelled as Emanuel Imah in the caption. However, an affidavit filed in opposition to defendants’ cross motions indicates that his name is Emmanuel Imoh.

Defendant Whitestone Construction Corp. (“Whitestone”) also cross-moves, pursuant to CPLR § 3212, for summary judgment dismissing the complaint as against it.

### **BACKGROUND**

Plaintiffs allege that from March 2006 through the present, they worked as security guards and fireguards on various public contracts with government entities such as the City of New York, the State of New York, the New York City School Construction Authority (“NYCSCA”), the Department of Environmental Protection, and various school districts throughout New York. The projects allegedly included, but were not limited to, the Soundview Housing project, Public School (“P.S.”) 277, P.S. 230(K), P.S. 20, P.S. 288, P.S. 3, P.S. 39, P.S. 129, P.S. 139, Clinton High School, Manhattan Graphic School of Art, Bronx High School of Visual Art, and John Jay High School. Plaintiffs allege in the complaint that they are entitled to prevailing wages as “building service employees” pursuant to Labor Law § 230. According to plaintiffs, they were paid less than the prevailing wage rates and supplemental benefit rates, and were not paid all of the overtime compensation for hours that they worked in excess of 40 hours per week.

The complaint alleges three causes of action: (1) breach of the public contracts; (2) failure to pay overtime compensation pursuant to Labor Law § 663 and 12 NYCRR 142-2.2; and (3) failure to pay wages in violation of Labor Law § 191. Plaintiffs seek interest, costs, and attorneys’ fees on all three causes of action.

In its answer, Whitestone asserted a cross-claim against AWI for contractual and common-law indemnification.

Plaintiffs move for leave to amend the complaint to add WDF, Inc. as a defendant in this action. Additionally, plaintiffs seek an extension of time to file their motion for class certification pursuant to CPLR § 901 for three reasons: (1) to allow for pre-class certification discovery; (2) to schedule a preliminary conference to resolve any discovery issues; and (3) to set a briefing schedule for the motion for class certification and any cross-motions by defendants.

The AWI defendants and Whitestone cross-move for summary judgment dismissing the complaint. Defendants argue that plaintiffs are not entitled to prevailing wages because they are not “building service employees” covered by Labor Law § 230. In addition, defendants contend that plaintiffs are not entitled to prevailing wages under Labor Law § 220, since plaintiffs were not construction workers and did not replace, maintain or repair public works. The AWI defendants submit an affidavit from Adaze W. Imafidon (“Imafidon”), the chairman and chief executive officer of AWI, who states that AWI provides security guard services to various public and private entities, and that each of the contracts described in the complaint was a public school construction project (Imafidon Aff., ¶¶ 3, 9). Imafidon avers that all AWI employees who work more than 40 hours in one week or eight hours in one day are paid at the overtime rate of time and one-half, and that plaintiffs were paid overtime wages when they worked overtime (*id.*, ¶¶ 11, 12). Whitestone also submits an affidavit from Steven Grzic (“Grzic”), the president of Whitestone, who states that the security guards patrolled the various construction sites, checked visitor identification, and provided other security-related services (Grzic Aff., ¶ 6).

Defendants also point out that, in a memorandum dated July 1, 2010, the New York City Comptroller’s Office determined that public works construction and renovation projects are only subject to the prevailing wage requirements of Labor Law § 220, and that security guards who patrol

buildings, check visitor identification, and provide other security services on construction sites are not laborers, workers or mechanics under Labor Law § 220 (Singer Affirmation, Exhibit “A”). Defendants contend that this determination is entitled to deference. Defendants also assert that the New York City Housing Authority (“NYCHA”) advised in an e-mail dated September 2, 2011, in response to Whitestone’s inquiry, that there was no required prevailing wage rate for security guards on federally funded NYCHA construction, modernization, and repair contracts (*id.*, Exhibit “B”). Based on the Comptroller’s memorandum and NYCHA’s e-mail, AWI reduced the hourly rate charged to Whitestone for security guards employed by AWI on NYCSCA and NYCHA projects in or about September 2011 (Grzic Aff., ¶ 9). Additionally, the AWI defendants argue that a motion for class certification would be premature because plaintiffs have failed to exhaust their administrative remedies.

In opposition to the cross-motions, plaintiffs contend that summary judgment must be denied as premature because defendants are exclusively in possession of the public works contracts and payroll documents. Plaintiffs further argue that they are entitled to prevailing wages as building service employees under Labor Law § 230 because they fit within the enumerated occupations of “watchman” or “guard” and because they performed work within the public schools themselves. Plaintiffs submit their own affidavits and affidavits from their co-workers indicating that, at P.S. 125, they inspected fire extinguishers, patrolled the hallways, inspected emergency alarms, made sure that there were no fire hazards, and guided students out of the building during fire drills (Ansah Aff., ¶ 6; Imoh Aff., ¶ 6; Klugey Aff., ¶ 6; Mensah Aff., ¶ 5). Plaintiffs further state that they also patrolled the work site, guarded equipment, and ensured that only authorized individuals entered the work site (Ansah Aff., ¶ 5; Imoh Aff., ¶ 5; Klugey Aff., ¶ 5; Mensah Aff., ¶ 4). Plaintiffs also rely on one

of Imoh's pay stubs from 2009, which shows that he received prevailing wages (Ambinder Affirmation, Exhibit "F"). In addition, plaintiffs submit a prevailing wage schedule issued by the New York City Comptroller's Office for security guards covered by Labor Law § 230 (*id.*, Exhibit "G").

Plaintiffs next contend that there are issues of fact as to whether they are entitled to prevailing wages under Labor Law § 220. Plaintiffs maintain that the affidavits submitted by defendants are silent as to plaintiffs' actual job responsibilities. In addition, plaintiffs point out that the federal analog to Labor Law § 220, the Davis-Bacon Act, includes watchmen and guards among those entitled to be paid prevailing wages. Additionally, according to plaintiffs, the AWI defendants have failed to meet their burden on their overtime claims. In any event, plaintiffs submit affidavits indicating that they did not receive overtime for all the overtime they worked (Ansah Aff., ¶¶ 14-16; Imoh Aff., ¶¶ 14-16; Klugey Aff., ¶¶ 14-16; Mensah Aff., ¶¶ 13-15). Finally, plaintiffs argue that they are not required to exhaust administrative remedies, because they are not suing directly under Labor Law §§ 220 or 230, but rather, are seeking recovery as third-party beneficiaries of the public works contracts.

In reply to the cross-motions, the AWI defendants submit AWI's subcontract for the public works project at P.S. 125 (Imafidon Reply Aff., Exhibit "A"). The AWI defendants assert that the principal purpose of this project was the construction, renovation, and repair of the building's sprinkler system and related fire suppression equipment, and that AWI's role was to provide security on the job site during construction, renovation and repair work; at no point did the scope of duties of AWI's employees include patrolling hallways in the school or leading students in and out of buildings during fire drills (*id.*, ¶¶ 5, 7). Whitestone also submits the following evidence: (1) an

invitation to bid for prospective bidders and the public works contract between NYCSCA and Whitestone on the Kipp Star College/P.S. 125 Annex School construction project which sets forth the scope of work as construction services and not building services (Grzic Reply Aff., Exhibit “A”); (2) Whitestone’s contract with China Construction America, Inc., NYCHA’s construction manager for the Soundview Houses project, which indicates that the scope of work was for construction services (*id.*, Exhibit “C”); and (3) Whitestone’s subcontract with AWI for security guard services on the Soundview Houses project (*id.*, Exhibit “D”).

At oral argument on the motions, plaintiffs withdrew the branch of their motion seeking leave to amend the complaint to add WDF, Inc. as a defendant (Oral Argument Transcript at 5:4-5). The Court also permitted plaintiffs the opportunity to submit a sur-reply to address the contracts submitted by defendants in their replies (*id.* at 32:5-11). The Court also granted the parties leave to submit a supplemental memorandum of law providing case law and legislative history as to whether security guards are covered under Labor Law § 220 and Labor Law § 230 (*id.*).

In their sur-reply, plaintiffs argue that the contracts, along with defendants’ admission that they paid security guards prevailing wages for over a year, raise issues of fact as to whether they are entitled to prevailing wages.<sup>2</sup>

### **DISCUSSION**

The Court must first consider whether plaintiffs are entitled to prevailing wages, supplemental benefits, and overtime compensation under the law.

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2. Plaintiffs also request that the Court reinstate their motion for leave to amend the complaint to add WDF, Inc. as a defendant. Nevertheless, this request was made in plaintiffs’ sur-reply, and defendants did not have an opportunity to respond to this request. Plaintiffs may move again for leave to amend the complaint to add WDF, Inc. as a defendant, if so advised.

“[T]he proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]; see also *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action” (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). “On a motion for summary judgment, issue-finding, rather than issue-determination, is key” (*Shapiro v Boulevard Hous. Corp.*, 70 AD3d 474, 475 [1st Dept 2010]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

### **Labor Law Article 8**

Article 8 of the Labor Law governs public works. Labor Law § 220(3)(a) provides that “[t]he wages to be paid for a legal day’s work, as hereinbefore defined, to laborers, workmen or mechanics upon such public works, shall not be less than the prevailing rate of wages as hereinafter defined.” Article I, section 17 of the State Constitution similarly states that “[n]o laborer, worker or mechanic, in the employ of a contractor or sub-contractor engaged in the performance of any public work . . . shall . . . be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, erected or used.” As noted by Judge Cardozo in *Austin v City of New York* (258 NY 113, 117 [1932]):

“The present statute is an attempt by the State to hold its territorial subdivisions to a standard of social justice in their dealings with laborers, workmen and mechanics. It is to be interpreted with the degree of liberality essential to the attainment of the end in view.”

There are two conditions which must be satisfied before the statute applies: “(1) the public agency must be a party to a contract involving the employment of laborers, workmen or mechanics, and (2) the contract must concern a public works project” (*Matter of Erie County Indus. Dev. Agency v Roberts*, 94 AD2d 532, 537 [4th Dept 1983], *affd* 63 NY2d 810 [1984]). Last year, the Court of Appeals added a third condition, that the project’s primary objective or function must be for the use or benefit of the general public (*De La Cruz v Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d 530, 535 [2013]).

“It is hornbook law that the Labor [Law] provision applies only to workers involved in the construction, replacement, maintenance and repair of ‘public works’ in a legally restricted sense of that term” (*Varsity Tr. v Saporita*, 71 AD2d 643, 644 [2d Dept 1979], *affd* 48 NY2d 767 [1979]; *see also De La Cruz*, 21 NY3d at 535; *Bruckhman v Giuliani*, 94 NY2d 387, 396 [2000]).<sup>3</sup> “The pivotal question is the nature of the work actually performed” (*Matter of Kelly v Beame*, 15 NY2d 103, 109 [1965]). Thus, in *Varsity Tr.*, *supra*, the Court held that school bus drivers were not within the class of employees covered by the statute (*Varsity Tr.*, 71 AD2d at 644). In *Matter of Pinkwater v Joseph* (300 NY 729 [1950]), the Court of Appeals affirmed, without opinion, an order of the Appellate Division confirming a determination by the City Comptroller that laundry workers were not entitled to prevailing wages. In *Matter of Wright Metal, Inc.* (283 NY 47, 49 [1940]), the Court held that a factory superintendent was not a mechanic, worker or laborer for purposes of Labor Law § 196.

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3. The Court rejects defendants’ contention that the Comptroller’s determination is entitled to deference. Although the Comptroller is charged with the administration of section 220, where the issue is one of pure statutory construction, the Comptroller’s interpretation is not entitled to deference (*see Matter of Erie County Indus. Dev. Agency*, 94 AD2d at 541).

Conversely, in *Matter of Miele v Joseph* (280 AD 408, 409 [1st Dept 1952], *affd* 305 NY 667 [1953]), sign painters and letterers were entitled to prevailing wages given the nature of their work. In *Matter of Golden v Joseph* (307 NY 62, 67 [1954]), the Court held that stationary firemen were covered under the statute, where it was undisputed that they regularly made boiler repairs, i.e., repaired heating facilities which were necessary parts of a building. Similarly, in *Matter of Tenalp Constr. Corp. v Roberts* (141 AD2d 81 [2d Dept 1988]), a carpenter who performed supervisory and non-supervisory duties was within the class covered by the statute. According to the Court, “[a]lthough [the carpenter] assumed some supervisory functions on behalf of [his employer] at the school project work site, his duties . . . remained predominantly physical in nature and he often ‘when necessary jumped in and helped’ his men” (*id.* at 86). The Court continued, stating that “the language used by the Court of Appeals in the *Austin* case . . . clearly implies that an employee in a truly supervisory position would be exempt from the prevailing wage requirements” (*id.* at 87).

CPLR § 3212(f) provides that “[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.” This is especially so when the opposing party had not had a reasonable opportunity for disclosure prior to making the motion (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 103 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]). “A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence” (*Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 [1st Dept 2000]; *see also Ruttura & Sons Constr. Co. v Petrocelli Constr.*, 257 AD2d 614, 615 [2d Dept], *lv dismissed and denied in part* 93 NY2d 956 [1999]).

However, “[t]he mere hope that further disclosure might uncover evidence likely to help [plaintiffs’] case” provides no basis for postponing summary judgment (*Maysek & Moran v Warburg & Co.*, 284 AD2d 203, 204 [1st Dept 2001]).

Here, plaintiffs have shown that “facts essential to justify opposition may exist” but cannot now be stated (CPLR § 3212[f]). Whitestone’s president states that the security guards patrolled the construction sites, checked visitor identification, and provided other security-related services (Grzic Aff., ¶ 6). The security guards indicate that their responsibilities included guarding equipment, patrolling work sites, making sure that authorized individuals entered the work sites, ensuring that there were no fire hazards, and inspecting fire extinguishers (Ansah Aff., ¶ 5; Imoh Aff., ¶ 5; Klugey Aff., ¶ 5; Mensah Aff., ¶ 4).

In their reply, defendants only submitted four sample contracts with respect to the P.S. 125 and Soundview Houses projects. Since defendants did not provide all of the contracts on the all of the relevant projects, the terms and conditions of the remaining contracts are exclusively within the knowledge of AWI and Whitestone (*see Voluta Ventures, LLC v Jenkins & Gilchrist Parker Chapin LLP*, 44 AD3d 557 [1st Dept 2007]). In *Austin*, Judge Cardozo noted that “[w]hether the word [foreman] stands for workman or something else cannot be known in advance as a matter of dictionary definition, without knowledge or heed of the conditions of the job” (*Austin*, 258 NY at 116). At this early stage of the action, discovery, including the production of all the contracts for all of the projects at issue, is required to determine the predominant nature of plaintiffs’ responsibilities and whether plaintiffs are entitled to prevailing wages under these contracts.

Defendants’ contention that plaintiffs have failed to exhaust their administrative remedies under the Labor Law is without merit. The First Department has noted that the issue of whether the

plaintiff exhausted administrative remedies is “irrelevant, because the Labor Law is not the exclusive remedy to recover prevailing wages” (*Nawrocki v Proto Constr. & Dev. Corp.*, 82 AD3d 534, 536 [1st Dept 2011] [internal quotation marks and citation omitted]). Indeed, New York courts have held that workers may pursue common-law remedies for underpayment of prevailing wages and supplemental benefits as third-party beneficiaries of a wage rate promise in a public works contract (see *Wright v Wright Stucco*, 50 NY2d 837, 839 [1980]; *Fata v S.A. Healy Co.*, 289 NY 401, 406-407 [1943]; *Pesantez v Boyle Envtl. Servs.*, 251 AD2d 11, 12 [1st Dept 1998] [“while plaintiff class can proceed on its common-law breach of contract claims for underpayment of wages and benefits, a private right of action for underpayment of wages does not exist under Labor Law § 220 until there has been an administrative determination pursuant to subdivision (8) that either has gone unreviewed or been affirmed in the claimants-employees’ favor”] [citations omitted]).

Here, the first cause of action in the complaint seeks recovery for breach of the public works contracts. As noted above, since the Court has not been supplied with all the relevant contracts for the projects at issue, the Court does not have sufficient information to determine whether the plaintiffs are entitled to prevailing wages under the relevant contracts. Therefore, plaintiffs are entitled to discovery into the terms and conditions of the public works contracts, in addition to the job responsibilities under those contracts, to determine whether they are entitled to prevailing wages under Labor Law § 220.

### **Labor Law Article 9**

Article 9 of the Labor Law governs prevailing wage for building service employees. Labor Law § 231 provides that “[e]very contractor shall pay a service employee under a contract for

building service work a wage of not less than the prevailing wage in the locality for the craft, trade or occupation of the service employee” (Labor Law § 231[1]). Labor Law § 230 defines “building service work” as “work performed by a building service employee” (Labor Law § 230 [2]). A “building service employee” is defined as “any person performing work in connection with the care or maintenance of an *existing building . . . for a contractor under a contract with a public agency* which is in excess of one thousand five hundred dollars and *the principal purpose of which is to furnish services through the use of building service employees*” (Labor Law § 230[1] [emphases added]). The service employees covered by the statute include, but are not limited to, “*watchman, guard, doorman, building cleaner, porter, handyman, janitor, gardener, groundskeeper, stationary fireman, elevator operator and starter, window cleaner, and occupations relating to the collection of garbage or refuse, and to the transportation of office furniture and equipment . . . and fossil fuel*” (*id.* [emphases added]). “Building service employee” does not include any employee covered by Article 8 of the Labor Law (*id.*).

The Court’s research has not found any cases illuminating the meaning of the phrase “principal purpose of which is to furnish services through the use of building service employees.” On a question of statutory interpretation, the Court turns first to the “plain language of the statutes as the best evidence of legislative intent” (*Malta Town Ctr. I, Ltd. v Town of Malta Bd. of Assessment Review*, 3 NY3d 563, 568 [2004]; *see also* McKinney’s Cons Laws of NY, Book 1, Statutes §§ 92[b] [(t)he intention of the Legislature is first to be sought from a literal reading of the act itself . . .], 94 [(t)he legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or strained construction]). “Principal” means “[f]irst, highest or

foremost in importance, rank, worth or degree; chief” (American Heritage Dictionary of the English Language 1395 [4th ed 2000]).

“[T]he legislative history of an enactment may also be relevant and ‘is not to be ignored, even if words be clear’” (*Riley v County of Broome*, 95 NY2d 455, 463 [2000], quoting McKinney’s Cons Laws of NY, Book 1, Statutes § 124). The legislative history of Labor Law Article 9 indicates that it was enacted to extend the protections of Labor Law Article 8 (*Feher Rubbish Removal, Inc. v New York State Dept. of Labor, Bur. of Public Works*, 28 AD3d 1, 5 [4th Dept 2005], *lv denied* 6 NY3d 711 [2006]). The bill jacket includes memoranda indicating that the purpose of the bill was “[t]o require the payment of prevailing wages and fringe benefits to employees who work under building service contracts with State and local governmental agencies,” and that the law would not “appl[y] to all service employees working under public contracts” (Defendants’ Supp. Memo. of Law, Exhibits “C,” “D,” “E”).

In this case, although plaintiffs would fall into the enumerated occupations of “watchman” or “guard,” at this time it is uncertain if they qualify as “building service employees” covered under Labor Law Article 9. To be so covered, plaintiffs would have to be “performing work in connection with the care or maintenance of an existing building, . . . *for a contractor under a contract with a public agency . . . the principal purpose of which [was] to furnish services through the use of building service employees*” (Labor Law § 230 [1] [emphasis added]). Plaintiffs allege in the complaint that they were employed as security guards on various public contracted projects (Complaint, ¶ 1). Imafidon states that all of the contracts referenced in the complaint were construction projects (Imafidon Aff, ¶ 9). Grzic avers that, between 2002 and 2011, Whitestone entered into contracts with AWI for AWI to supply security guards on public construction projects

with NYCSCA and NYCHA (Grzic Aff, ¶ 5). Grzic further states that the security guards patrolled the construction sites, checked visitor identification, and provided other security-related services (*id.*, ¶ 6). Plaintiffs have submitted affidavits indicating that they performed work within the public schools on the work sites (Ansah Aff, ¶¶ 5-6; Imoh Aff, ¶¶ 5-6; Klugey Aff, ¶¶ 5-6, Mensah Aff, ¶¶ 4-5). Furthermore, plaintiffs' contend that they received prevailing wages for a period of time which would raise an issue of fact as to their entitlement to prevailing wages under the law.

As set forth in the discussion of Labor Law Article 8 above, since the Court has not been supplied with all the relevant contracts for the projects at issue, the Court does not have sufficient information to determine whether the plaintiffs are entitled to prevailing wages pursuant to Labor Law Article 9 under the relevant contracts. Without reviewing the relevant contracts at issue, which are within the custody and control of the defendants, "facts essential to justify opposition may exist but cannot [] be stated" (CPLR 3212 [f]). Therefore, plaintiffs are entitled to discovery into the terms and conditions of the public works contracts, in addition to the job responsibilities under those contracts, to determine whether they are entitled to prevailing wages under Labor Law § 230.

### **Davis-Bacon Act**

Plaintiffs may be entitled to prevailing wages and supplemental benefits on the Soundview Houses project. The Davis-Bacon Act, codified at 40 USC § 3142, states that:

"(a) Application.— The advertised specifications for every contract . . . for construction, alteration, or repair, including painting and decorating, of public buildings and public works of the Government or the District of Columbia that are located in a State or the District of Columbia and which requires or involves the employment of mechanics or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics.

“(b) Based on prevailing wage.— The minimum wages shall be based on the wages the Secretary of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there.”

(40 USC § 3142[a] and [b]). Pursuant to the regulations promulgated under the Davis-Bacon Act,

“[t]he term laborer or mechanic includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial. The term laborer or mechanic includes apprentices, trainees, helpers, and *in the case of contracts subject to the Contract Work Hours and Safety Standards Act, watchmen or guards*”

(29 CFR 5.2[m] [emphasis added]).

The United States Housing Act of 1937 states that any contract between the federal government and a public housing agency for funding of a project shall “contain a provision that not less than the wages prevailing in the locality, as predetermined by the Secretary of Labor pursuant to the [Davis-Bacon Act], shall be paid to all laborers and mechanics employed in the development of the project involved . . .” (42 USC § 1437j[a]).

Here, Article 35.1(c) of Whitestone’s contract on the Soundview Houses project states that “[t]he Contractor and its subcontractors shall pay, to all laborers and mechanics employed in the Work, not less than the wages prevailing in the locality of the Project, as predetermined by the Secretary of Labor of the United States pursuant to the Federal wage rate requirements set forth at 40 USC § 3141 *et seq.*” (Grzic Reply Aff., Exhibit “C”).<sup>4</sup> As pointed out by plaintiffs, the Contract

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4. Article 34.1 of AWI’s subcontract on the Soundview Houses project also states that the “Subcontractor shall submit to the Contractor weekly certified payroll forms . . . including a certified statement that all information is correct and complete, [and] that the wages set forth are not less than those required by the Contract Documents . . .” (Grzic Reply Aff., Exhibit “D”).

Work Hours and Safety Standards Act applies to federally funded and assisted contracts over \$100,000 (*see* 40 USC § 3701 [b]). Defendants submitted Whitestone's contract with China Construction America, Inc. on the Soundview Houses project (Grzic Reply Aff., Exhibit "C"), and AWI's subcontract with Whitestone for security guard services for the same project (*id.*, Exhibit "D"). However, neither the contract nor the subcontract includes the value of the public works contract. Thus, the prevailing wage requirements of the Davis-Bacon Act may apply.

In *Cox v NAP Constr. Co., Inc.* (10 NY3d 592, 603-606 [2008]), the Court of Appeals held that workers on federally funded public housing projects may sue under state law for unpaid prevailing wages as third-party beneficiaries of the contracts, and that the Davis-Bacon Act and Housing Act did not preempt those claims. Although defendants contend that plaintiffs have failed to exhaust their administrative remedies, as noted by the Court of Appeals, "plaintiffs do not have any administrative remedies they can exhaust" (*id.* at 606). Thus, plaintiffs may proceed on their breach of contract claim for unpaid prevailing wages and benefits on the Soundview Houses project.

### **Overtime Compensation**

Plaintiffs' second cause of action alleges that defendants failed to pay them overtime in violation of Labor Law § 663 and 12 NYCRR 142-2.2. Labor Law § 663 authorizes a civil action for overtime wages in accordance with 12 NYCRR 142-2.2 (*see Stennett v Moveway Transfer & Stor., Inc.*, 97 AD3d 655, 657 [2d Dept 2012] [trial court erred in dismissing cause of action which alleged failure to pay overtime wages in violation of Labor Law Article 19; "(a)n employee may commence a civil action to recover wages to which he or she is entitled under article 19 of the Labor Law, and unlike a Labor Law § 231 cause of action, there is no requirement that an employee

exhaust his or her administrative remedies prior to commencement of an action alleging a violation of Labor Law article 19”]). 12 NYCRR 142-2.2 provides that under the state minimum wage act, overtime shall be paid at the rate of one and a half (1½) times the regular rate, subject to any exceptions in the Fair Labor Standards Act of 1938, and that the applicable overtime rate for non-residential employees shall be paid for working time over forty (40) hours per workweek (*see Anderson v Ikon Off. Solutions, Inc.*, 38 AD3d 317 [1st Dept 2007]).

Here, the AWI defendants submit an affidavit from Imafidon indicating that plaintiffs were paid overtime for all of the hours that they worked (Imafidon Aff, ¶ 12). However, plaintiffs and their co-workers state that: (1) before 2010, they were not paid overtime for their work over forty (40) hours in a week or eight (8) hours in one day, and (2) after 2010, they were not paid overtime for all the hours worked over forty (40) hours in a week or eight (8) hours in a day, and also were not paid overtime when they worked holidays (Ansah Aff., ¶¶ 14-16; Imoh Aff., ¶¶ 14-16; Klugey Aff., ¶¶ 14-16; Mensah Aff., ¶¶ 13-15). Therefore, there are issues of fact as to whether plaintiffs are entitled to overtime compensation.

#### **Plaintiffs' Request for an Extension of Time to File their Motion for Class Certification**

Plaintiffs request an extension of time to file their motion for class certification in order to conduct discovery. CPLR § 902 requires a motion for class action certification to be made within “[w]ithin sixty days after the time to serve a responsive pleading has expired for all persons named as defendants. . . .” “While class certification is an issue that should be determined promptly, a trial court has discretion to extend the deadline upon good cause shown, such as the plaintiff’s need to conduct preclass certification discovery to determine whether the prerequisites of a class action set

forth in CPLR § 901(a) may be satisfied” (*Rodriguez v Metropolitan Cable Communications*, 79 AD3d 841, 842 [2d Dept 2010] [citations omitted]; *see also* Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, C902:1 at 178). “The purpose of preclass certification discovery is to ascertain the dimensions of the group of individuals who share plaintiff’s grievance” (*Rodriguez*, 79 AD3d at 842 [internal quotation marks and citation omitted]). Defendants have not opposed this branch of plaintiffs’ motion. Accordingly, plaintiffs’ request is granted with the length of the extension to be determined at a conference before the Court.

#### CONCLUSION

Accordingly, it is hereby

**ORDERED** that the branch of plaintiffs’ motion (sequence number 001) for an extension of time to seek class certification is granted; and it is further

**ORDERED** that the branch of plaintiffs’ motion (sequence number 001) for leave to amend the complaint to add WDF, Inc. as an additional defendant in this action is denied without prejudice; and it is further

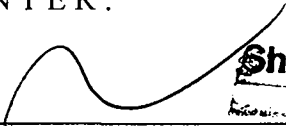
**ORDERED** that the cross-motion of defendants A.W.I. Security & Investigation, Inc. and Adaze W. Imafidon for summary judgment dismissing the complaint is denied; and it is further

**ORDERED** that the cross-motion of Whitestone Construction Corp. for summary judgment dismissing the complaint is denied; and it is further

**ORDERED** that the attorneys for the parties shall appear in Part 17, 60 Centre Street, Room 335, on Monday, June 16, 2014 at 2:30 P.M. for a conference at which a pre-certification discovery schedule will be set and plaintiffs' time for moving for class certification will be determined.

ENTER:

Dated: April 9, 2014  
New York, New York

  
**Shlomo Hagler**  
J.S.C.  
\_\_\_\_\_  
Hon. Shlomo S. Hagler, J.S.C.