

Moreno v Future Care Health Servs., Inc.
2015 NY Slip Op 31752(U)
May 4, 2015
Supreme Court, Kings County
Docket Number: 500569/13
Judge: David I. Schmidt
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At an IAS Term, Part COM-2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of April, 2015.

P R E S E N T:

HON. DAVID I. SCHMIDT,
Justice.

-----X
ADRIANA MORENO AND LEONIDAS PEGUERO-TINEO,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

Plaintiffs,

- against -

Index No. 500569/13

FUTURE CARE HEALTH SERVICES, INC., .
AMERICARE CERTIFIED SPECIAL SERVICES, INC.,
ETHAN DREIFUS, ESAN DRESUS AND MARTIN
KLEINMAN,

Defendants.

-----X

The following papers numbered 1 to 8 read on this motion :

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	<u>1, 2, 3, 4, 5</u>
Opposing Affidavits (Affirmations)_____	<u>6, 7</u>
Reply Affidavits (Affirmations)_____	<u>8</u>
_____ Affidavit (Affirmation)_____	_____
Other Papers_____	_____

Upon the foregoing papers, plaintiffs Adriana Moreno and Leonidas Peguero-Tino move for an order, pursuant to CPLR 902, certifying the action as a class action, appointing plaintiffs Adriana

Moreno and Leonidas Pegurero-Tino to represent the class, and appointing Abbey Sanier, LLP, Getman Sweeney, PLLC, and the National Employment Law Project as class counsel.¹

Plaintiffs' motion is denied.

BACKGROUND

In this action, plaintiffs allege that defendants, Future Care Health Services, Inc. (Future Care), Americare Certified Special Services, Inc., (Americare), Ethan Dreifus (Dreifus) and, Martin Kleinman (Kleinman),² among other things, violated the Labor Law by failing to pay plaintiffs' wages when due and by failing to pay the plaintiffs for all hours worked for "live in" shifts (live-in shifts), for overtime, for spread of hours pay, for in-service training, and for uniforms and other work related expenses. Plaintiffs also allege that defendants failed to comply with the Labor Law's record keeping requirements and failed to provide wage and hour information required by the Labor Law as well as failing to comply with the requirements of the wage parity act. Finally, plaintiffs have alleged breach of contract and unjust enrichment causes of action. Moreno and Peguero-Tineo allege they were employed by defendants as health care workers who provided home care services for disabled and elderly individuals. Moreno alleges she was employed by defendants from December, 2008 to July, 2012 and Peguero-Tineo alleges she was employed by defendants from June, 2010 to August, 2011.

¹ The court notes that the plaintiffs' timely moved for class certification in light of this court's order, dated June 13, 2013, extending plaintiffs' time to move for class certification and in light of the parties' stipulation extending plaintiffs' time to move until August 11, 2014.

² In opposing the motion, defendants assert that only Future Care may be deemed the employer of plaintiffs and the putative class members. As the defendants other than Future Care have not moved for relief on this ground, the court has not addressed it in determining the motion as that determination is not relevant to the merits of plaintiffs' motion. The court has used the term "Defendants" for ease of reference, and has made no factual or legal findings as to which of the defendants act as employers of plaintiffs and the putative class members.

Plaintiffs commenced this action in February 2013. Defendants thereafter moved, pursuant to CPLR 3211 (a) (1) and (a) (7), among other grounds, for an order dismissing the complaint. This court, in an order dated January 16, 2014, denied the motion with respect to the majority of plaintiffs' causes of action. The court granted the motion only to the extent that it dismissed the breach of contract and wage parity claims relating to Peguero-Tineo and dismissed such wage parity and breach of contract claims relating to Moreno that occurred prior to February 29, 2012 and breach of contract claims that occurred in Nassau, Suffolk and Westchester counties. Defendants having produced certain payroll and wage records pursuant to discovery requests by plaintiffs,³ plaintiffs now make the instant motion for class certification.

CLASS ACTIONS

CPLR 902 states that a class action can only be maintained if each of the prerequisites promulgated by CPLR 901 (a) are met (*Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 421 [1st Dept 2010]; *Alix v Wal-Mart Stores, Inc.*, 57 AD3d 1044, 1045 [3d Dept 2008]; *Weinberg v Hertz Corp.*, 116 AD2d 1, 4 [1986], *aff'd* 69 NY2d 979 [1987]). Those prerequisites are (1) that the class is so numerous that joinder of all members is impracticable (numerosity); (2) questions of law or fact common to the class predominate over questions of law or fact affecting individual class members (commonality or predominance); (3) the claims or defenses of the class representatives are

³ Although plaintiffs complain that defendants provided the records as PDFs, rather than in the "CSV" format requested by plaintiffs, plaintiffs have not moved for any specific relief relating to defendants' provision of the discovery in PDF format (*see Wyeth v Impax Laboratories, Inc.*, 248 FRD 169, 171 [D Del 2006]; *cf. Brandofino Communications, Inc. v Augme Technologies, Inc.*, 42 Misc 3d 1218 [A], 2014 NY Slip Op 50077 * 4-5 [U] [Sup Ct, New York County 2014]).

typical of those in the class (typicality); (4) the class representatives will fairly and adequately protect the interests of the class; and (5) a class action represents the superior method of adjudicating the controversy (superiority) (*Hurrell-Harding v State of New York*, 81 AD3d 69, 71-72 [3d Dept 2011]; CPLR 901 [a]). If the prerequisites set out in CPLR 901 (a) are met, the court, in deciding whether to grant class action certification should then consider the additional factors promulgated by CPLR 902 such as the interest of individual class members in maintaining separate actions and the feasibility thereof; the existence of pending litigation regarding the same controversy; the desirability of the proposed class forum; and the difficulties likely to be encountered in managing the class action (CPLR 902; *Ackerman v Price Waterhouse*, 252 AD2d 179, 191 [1998]).

Whether the facts presented on a motion for class certification satisfy the statutory criteria is within the sound discretion of the trial court (*Small v Lorillard Tobacco Co.*, 94 NY2d 43, 52 [1999]; *CLC/CFI Liquidating Trust v Bloomingdale's, Inc.*, 50 AD3d 446, 447 [2008]). The proponent of class certification bears the burden of establishing the criteria promulgated by CPLR 901 (a) (*CLC/CFI Liquidating Trust*, 50 AD3d at 447; *Ackerman*, at 191), and must do so by the tender of evidence in admissible form (*Pludeman*, 74 AD3d at 422; *Feder v Staten Is. Hosp.*, 304 AD2d 470, 471 [2003]). Conclusory assertions are insufficient to satisfy the statutory criteria (*Pludeman*, 74 AD3d at 422; *Chimenti v American Express Co.*, 97 AD2d 351, 352 [1983]). Although the class certification motion is no substitute for summary judgment or a trial, it is appropriate for the court to consider the merit of the claims in determining the motion (*Pludeman*, 74 AD3d at 422; *Matros Automated Elec. Const. Corp. v Libman*, 37 AD3d 313, 313 [1st Dept 2007]).

DISCUSSION

Applying these principles first to plaintiffs assertions with respect to live-in shifts, plaintiffs assert that defendants, starting from around May 2011, required plaintiffs to work 24 hour shifts. Defendants called these shifts live-in shifts, and paid Moreno a flat rate of \$115 to \$120 for each of her 24 hour shifts and paid Peguero-Tineo a flat rate of \$120 to \$125 for each of her 24 hour shifts. Defendants' payroll records submitted by plaintiffs and by defendants in opposition to the motion show that many of defendants' employees were paid flat rates for these live-in shifts. Indeed, defendants, in the affidavit of Fran Pascal, a bookkeeper employed by defendants, concede that in 2011, 179 out of 477 of the home attendants employed by defendants worked at least one live-in shift, and that, in 2012, 109 out of 316 the home attendants worked at least one live-in shift.

Labor Law § 652 requires that employers pay their employees the minimum wage "for each hour worked." The minimum wage in effect between July 24, 2009 and December 30, 2013, the majority of the relevant time period, was \$7.25 per hour (12 NYCRR 142-2.1 [a] [2]). Also relevant is 12 NYCRR 142-2.1 (b), which provides that:

"(b) The minimum wage shall be paid for the time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee. However, a residential employee—one who lives on the premises of the employer—shall not be deemed to be permitted to work or required to be available for work:

- (1) during his or her normal sleeping hours solely because he is required to be on call during such hours; or
- (2) at any other time when he or she is free to leave the place of employment."

In opposing plaintiffs' motion, defendants contend that the minimum wage statute and the Department of Labor regulations do not require that they pay their employees for the entire 24 hours the employees are present at a patient's residence and that they may properly exclude sleep time and meal time from an employee's work time for the calculation of wages.⁴ Defendants' view is supported by a Department of Labor (DOL) opinion letter dated March 11, 2010, in which the DOL stated that:

“[I]t is the opinion and policy of this Department that live-in employees must be paid not less than for thirteen hours per twenty-four hour period provided that they are afforded at least eight hours of sleep and actually receive five hours of uninterrupted sleep, and that they are afforded three hours for meals. If an aide does not receive five hours of uninterrupted sleep, the eight-hour sleep exclusion is not applicable and the employee must be paid for all eight hours. Similarly, if the aide is not actually afforded three work-free hours for meals, the three-hour meal period exclusion is not applicable (Counsel Opinion Letter, N.Y. Dep't of Labor, RO-09-00169 Live-In Companions [March 11, 2010], available at <http://labor.ny.gov/legal/counsel-opinion-letters.shtm>).

In the opinion letter, the DOL noted that not all live-in employees may be deemed residential employees for purposes of 12 NYCRR 142-2.1 (b). Nevertheless, the DOL emphasized that the distinction between residential and nonresidential live-in employees only matters for purposes of

⁴ Defendants also argue that plaintiffs' claims are without merit because the flat rate pay provision without overtime was part of a collective bargaining agreement entered into between defendants and the union representing the employees. The collective bargaining agreement, however, does not affect the plaintiffs and putative class members statutory rights relating to minimum wages, spread of hours pay and overtime pay given that these rights do not turn on an interpretation of the collective bargaining agreement (*see Bell v Southeastern Pennsylvania Tr. Auth.*, 733 F3d 490, 493-496 [3d Cir 2013]; *Ramirez v Riverbay Corp.*, 35 F Supp3d 513, 522-524 [SDNY 2014]; *Severin v Project OHR, Inc.*, 2011 WL 3902994 * 4 [SDNY 2011]; *see also Matter of American Broadcasting Cos. v Roberts*, 61 NY2d 244, 250 [1984]).

determining the number of hours for which overtime is owed (i.e. 44 for residential employees and 40 for non-residential employees), and that the DOL “applies the same test for determining the number of hours worked by all live-in employees.”

The DOL opinion letter, in which the DOL states what constitutes working hours for live-in employees for purposes of a statute and regulation that it is charged with enforcing, is entitled to deference in that the interpretation of what constitutes availability for work does not run counter to the clear wording of the statute and regulations at issue (*see Severin v Project OHR, Inc.*, 2012 WL 2357410 * 8-9 [SDNY 2012]; *see also Samiento v World Yacht Inc.*, 10 NY3d 70, 79 [2008]; *LMK Psychological Servs., P.C. v State Farm Mut. Auto. Ins. Co.*, 12 NY3d 217, 223 [2009]; *Matter of Albano v Kirby*, 36 NY2d 526, 532-533 [1975]; *Seenaraine v Securitas Sec. Servs. USA, Inc.*, 37 AD3d 700, 701-702 [2d Dept 2007], *lv denied* 9 NY3d j813 [2007]).⁵ This court notes that the court in *Andryeyeva v New York Health Care, Inc.* (45 Misc 3d 820 [Sup Ct, Kings County 2014]) makes some reasonable arguments for finding that non-residential live-in home care workers are essentially on call for 24 hours a day and are thus entitled to be paid for each hour they are present on the premises regardless of the time spent for meals or sleeping (*id.* at 829-834).⁶ These arguments relied

⁵ In denying defendants’ motion to dismiss, the court found that DOL opinion letter did not constitute documentary evidence with respect to defendants’ payroll practices. Such a holding in no way precludes this court from taking judicial notice of the opinion letter under CPLR 4511 (*see Flatbush Chiropractic, P.C. v Metlife Auto & Home*, 35 Misc3d 1203 [A], 2012 NY Slip Op 50541 * 3 [U] [Civ Ct, Kings County 2012]; *McVey v McVey*, 26 F Supp3d 980, 985 [CD Cal 2014]).

⁶ This court notes that, in contrast to the proof submitted by plaintiffs here, the plaintiffs in *Andryeyeva* presented a detailed factual record regarding their actual duties while performing 24 hour shifts, including deposition testimony by one of the plaintiff’s that she never got three hours for meals or five hours of uninterrupted sleep when she worked such shifts (*Andreyeyeva*,

upon by the court in *Andryeyeva*, however, do not show that the DOL's interpretation is contrary to the plain wording of the statute and the regulation at issue. As such, this court finds that - at least to the extent that it may be inferred that the court in *Andryevyva* held that the opinion letter is inapplicable to non-residential live-in employees as a matter of law - the *Andryeyeva* court failed to pay sufficient deference to the DOL's opinion letter and its decision in this regard should not be followed (*see Severin*, 2012 WL 2357410 * 9).

In light of the DOL's gloss on how the working hours of live-in home care workers must be treated, the court finds that the facts before the court fail to demonstrate an across the board violation of the rights of defendants' employees to be paid for the hours they worked, to be paid overtime and to be paid for spread of hours work. Namely, assuming a worker had three hours for meals, eight hours for sleep and had five hours of uninterrupted sleep, the worker, during 2011 and 2012 would be entitled to be paid a minimum wage of \$7.25 for 13 hours of work of \$94.25.⁷ In addition, since 12 NYCRR 142-2.4 (1) provides that workers who work more than 10 consecutive hours or a split shift are entitled to an additional hour of pay at minimum wage, a sleep in worker working 13 hours would be entitled to an additional \$7.25, for a total of \$101.50. As plaintiffs and the putative class members were not paid less than \$115 for their live-in shifts, a finding that a worker's pay violated the minimum wage statute and DOL regulations would require a finding that

45 Misc 3d at 830).

⁷ Plaintiffs' claims relating to the live-in shifts all appear to have occurred in 2011 and 2012, when the minimum wage was \$7.25 an hour (12 NYCRR 142-2.4 [1]).

the worker either did have three hours of meal time⁸ or did not have eight hours of sleep time, five of which was uninterrupted.⁹

Plaintiffs contention that defendants records do not mention spread of hours does not, in and of itself, demonstrate that defendants violated the spread of hours requirements for the live-in shifts. Notably, “The “spread of hours” regulation does not require all employees to be paid for an additional hour, but merely that the total wages paid be equal to or greater than the total due for all hours worked at the minimum wage plus one additional hour at the minimum wage” (*Roach v T.L. Cannon Corp.*, 889 F Supp2d 364, 367 [NDNY 2012] [quoting a DOL opinion letter dated April 12, 2006]; *see Seenaraine*, 37 AD3d at 701-702; *see also* Counsel Opinion Letter, DOL, RO-08-0086 Spread of Hours Pay [August 26, 2009], available at <http://labor.ny.gov/legal/counsel-opinion-letters.shtm>). As demonstrated above, defendants’ flat rate payment for live-in shifts does not violate the spread of hours pay requirements as long as the worker had sufficient meal time and sleep.

Plaintiffs request class certification with respect to the flat rate payment for the live-in shifts based solely on the assumption that plaintiffs and the putative class members were entitled to payment for each of the 24 hours they were present on the work site. In support of their motion,

⁸ Pursuant to the opinion letter, if a worker did not have three hours for meal time, but received sufficient sleep time, he or she would be entitled to minimum wage for 16 hours equaling \$116, plus an hour of spread of hours pay, for a total of \$123.25. Under such circumstances, the flat rate pay of \$115 to \$120 would be insufficient.

⁹ Pursuant to the opinion letter, if a worker had adequate meal time, but did not have adequate sleep time, he or she would be entitled to minimum wage for 21 hours, plus an hour of spread of hours pay, for a total of \$159.50.

plaintiffs have submitted no evidentiary detail relating to the nature of their work hours during the 24 hour live-in shifts they worked. They have made no representation that they, or the other workers performing such shifts, did not have meal or sleep time. In sum, plaintiffs have failed to identify an across the board policy of defendants that would allow a finding that defendants did not follow rules outlined in the DOL opinion letter or otherwise show that the flat rate pay for the 24 hour shifts was inadequate for them and the putative class members. While defendants' payroll records do not specifically identify the hours actually worked for the live-in shifts, any failure to keep such records merely reduces plaintiffs' burden of proof, and does not eliminate plaintiffs' burden of providing some factual basis for finding that defendants' policies require a finding that plaintiffs and the putative class members be paid for all 24 hours of the live-in shifts (*cf. Anderson v Mt. Clemens Pottery Co.*, 328 US 680, 687-688 [1946]; *Matter of A. Uliano & Son, Ltd. v New York State Dept. of Labor*, 97 AD3d 664, 666 [2d Dept 2012]; *Matter of Mid Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 [2d Dept 1989]).¹⁰ Without a basis for finding that defendants were required to pay plaintiffs and the putative class members for the entire 24 hours of each live in shift as a matter of law, the determination of adequacy of the flat rate pay turns on an analysis of the work actually performed by each proposed class member during each shift, a heavily fact specific inquiry that militates against any finding that common questions of law or fact predominate over individual issues regarding hours worked at minimum wage and spread time for such live-in shifts (*see Severin*,

¹⁰ Nothing in the language of Labor Law § 196-a suggests that its language shifting the burden where an employer fails to keep proper records applies anywhere other than in a proceeding before the Commissioner of Labor of the State of New York.

2012 WL 2357410 *10; *see also* *Alix*, 57 AD3d at 1047-1048 [3d Dept 2008]; *cf. Orgill v Ingersoll-Rand Co.*, 110 AD3d 573, 574 [1st Dept 2013]; *Andryeyeva*, 45 Misc 3d at 832-833).

With respect to spread of hours pay for hourly shifts, Moreno's own time records show that, in 2011, she routinely worked 12 hour shifts at a pay rate of \$7.50 per hour and received \$90 total pay for those shifts. The relevant minimum wage at that time was \$7.25, and Moreno thus would have been entitled to total pay of \$94.25 (i.e., $12 \times 7.25 = 87 + 7.25 = \94.25) and thus received \$4.25 less than she was entitled for each such shift. Nevertheless, plaintiffs have failed to demonstrate that the defendants' other employees were not paid spread of hours pay. Indeed, the payroll records only show that a few employees earned \$7.80 or less, which would appear to be the approximate cut off point at which spread of hours pay might be required.¹¹ While the selected payroll records show that shift of over 10 hours were not uncommon, they do not show that an extra hour was not added as spread of hours pay for those workers. In any event, even if it can be inferred from the records that spread of hours pay was not paid to those employees, the selected records submitted by plaintiff only show that approximately 25 employees earned less than \$7.80 per hour and worked sufficient hours from which it can be inferred that there shifts were longer than 10 hours. This is simply an insufficient basis to infer that numerosity has been satisfied (*see Klakis v Nationwide Leisure Corp.*, 73 AD2d 521, 522 [1st Dept 1979]; *Sidden v Accentcare of New York, Inc.*, 2014 WL 4063038 * 4 [U] [Sup Ct, Kings County 2014]; *cf. Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 137-138 [2d Dept 2008]).

¹¹ The total pay for a 12 hour shift at \$7.80 per hour is \$93.60, 60 cents less than the worker would be entitled for such a shift.

A lack of commonality precludes certification with respect to plaintiffs' overtime claims. The same individualized issues relating to how many hours each worker worked for each of his or her live-in shifts applies to the overtime claims. In addition, the rate of overtime pay (i.e. whether overtime is paid at one and one half times the employee's regular rate of pay or at one and one half time the minimum wage) under New York law turns on whether worker provided "companionship services" as defined in the Fair Labor Standards Act (FLSA) (Labor Law §§ 2 (16) and 170; 12 NYCRR 142-2.2; *Severin*, 2012 WL 2357410 * 6-7). The determination of whether the companionship services exception applies would likewise appear to require an individualized assessment of a worker's duties (*Severin*, 2012 WL 2357410 * 6-7). Unlike other cases where class certification has been granted, these issue cannot be resolved by mere reference to payroll records (*cf. Kudinov v Kel-Tech Constr., Inc.*, 65 AD3d 481, 482 [1st Dept 2009]).

The court notes that defendants' pay records supplied by plaintiff show that, assuming that companionship services exception applies (which plaintiffs have failed to provide facts showing that the exception would not apply), that the total pay of a worker who performed four such live-in shifts in a week at a flat rate of \$115 for each shift and was paid \$460 for the week received more compensation than required by the combination of the minimum wage, spread of hours and overtime laws and regulations.¹² The pay records also show, however, that some workers performed five live-

¹² Assuming that the worker is deemed a non-resident live-in worker entitled to overtime after 40 hours and is found to have received sufficient sleep and meals times, the worker worked a total of 52 hours (*see* DOL Opinion Letter), and would be entitled to at least a minimum wage for 40 hours at a rate of \$7.25 for a total minimum wage due of \$290, spread of hours pay for four days of \$29 (4 times \$7.25), and overtime at a rate of \$10.875 for 12 hours equaling \$130.50, for a total weekly pay of \$449.50.

in shifts in a week at a rate of \$115 per shift for which it would appear that the total weekly pay of \$575 is less than the total minimum wage, spread of hours and overtime pay of \$598.11 to which the worker would be entitled.¹³ Nevertheless, aside from the individualized nature of the overtime inquiry discussed above, the payroll records before the court only show that a few workers performed such shifts, and there is no way of determining from the record that a sufficient number of putative plaintiffs were affected by such a practice to warrant a finding that the numerosity requirement has been satisfied (*see Klakis*, 73 AD2d at 522; *Sidden*, 2014 WL 4063038 * 4; *cf. Globe Surgical Supply*, 59 AD3d at 137-138).

With respect to the alleged failure to provide reimbursement for the purchase and laundry of uniforms, plaintiffs have failed to provide non-conclusory allegations showing that they were in fact required to wear a uniform as defined under DOL regulations (*see* 12 NYCRR 142-2.5 [c] and 142-2.22; *cf. Mendoza v Little Luke, Inc.*, 2015 WL 998215 * 6 [U] [EDNY 2015] [clothing that may be worn as part of an employees everyday wardrobe is not included in the definition of required uniform]). Nor have they provided any non-conclusory allegations demonstrating that the purchase of necessary supplies, such as rubber gloves, brought their remuneration below the minimum wage (*see* 12 NYCRR 142-2.10 [b]). Even if plaintiffs' own assertions in their supporting affidavits are sufficient to show that they did not receive payment for such expenses, they have failed to provide a factual basis for inferring that defendants' other employees were denied such payments. Plaintiffs'

¹³ With the same assumptions made in footnote 9, a worker would have worked a total of 65 hours, be entitled to \$290 for 40 hours of work, \$36.25 for spread of hours pay, and \$271.88 for 25 hours, for a total of \$598.11.

have thus failed to demonstrate numerosity of the proposed class on this issue (*see Klakis*, 73 AD2d at 522; *Sidden*, 2014 WL 4063038 * 4; *cf. Globe Surgical Supply*, 59 AD3d at 137-138).

Turning to pay for in-service training, the classes are required by New York Department of Health regulations (*see* 10 NYCRR 700.2 [b] [9] and 766.11 [i] [1]). Pursuant to a August 28, 2008 DOL opinion letter (Counsel Opinion Letter, N.Y. Dep't of Labor, RO-08-0020 Employee Training [August 27, 2008], available at <http://labor.ny.gov/legal/counsel-opinion-letters.shtm>), the state mandated in-service training would likely be deemed for the benefit of the employees, and there would not be a New York statutory or regulatory obligation on defendants to pay plaintiffs and the putative class members for the in-service training (*see Hasvard v American Med. Response Northwest, Inc.*, 237 F Supp2d 1151, 1153-1165 [D Ore 2001]; *Freeman v Total Sec. Mgt.-Wisconsin LLC*, 2013 WL 4049542 *8 [WD Wisc 2013]; *cf. Chao v Tradesman Intern., Inc.*, 310 F3d 904, 907-912 [6th Cir 2002]; *but see Fowler v Incor*, 279 Fed Appx 590, 598-599 [10th Cir 2008]; *Kosakow v New Rochelle Radiology Assocs., P.C.*, 274 F3d 706, 720-722 [2d Dept 2001]).¹⁴ While plaintiffs and the putative class members might be entitled to some pay for attending classes pursuant to the terms of defendants' employee handbook (*see Miloscia v B.R. Guest Holdings, LLC*, 94 AD3d 563, 564-565 [1st Dept 2012]; *Falcone v EDO Corp.*, 141 AD2d 498, 499 [2d Dept 1988]; *DiCostanzo v Jeffrey Ween & Assocs.*, 35 Misc 3d 148 [A], 2012 NY Slip Op 51080 *1-2 [U] [App Term, 2d Dept 2012]; *Zandier v Babcock & Wilcox Constr. Co., Inc.*, 2015 WL 757480 * 10 [U] [WD Pa 2015]) plaintiffs have failed to present proof satisfying the numerosity requirement. The

¹⁴ Some of these Federal cases suggest that such training might be deemed hours worked under the FSLA. Plaintiffs, however, appear to rely only on the Labor Law and have not pled any claims under the FSLA.

only proof that no such pay was received were plaintiffs own conclusory assertions contained in their affidavits and they have presented no proof that the putative class member did not receive such pay. The selected payroll records provide no basis for inferring the lack of such payments. Without such proof, plaintiffs have failed to present evidence satisfying the numerosity requirement (*see Klakis*, 73 AD2d at 522; *Sidden*, 2014 WL 4063038 * 4; *cf. Globe Surgical Supply*, 59 AD3d at 137-138).

Plaintiffs also contend that a common question is presented by defendants' failure to timely pay wages earned in violation of Labor Law § 191 (1) (a). Section 191 (a) (1) requires, with exceptions that do not appear to be relevant here, that wages for manual workers be paid weekly and not more than seven days after they are earned. In their affidavits submitted in support of the motion, both Peguero-Tineo and Moreno assert that they were often not paid all of their wages when due, and when defendants did so, defendants paid plaintiffs in the following pay check with a notation of either "old-hourly" or "old-live in." Plaintiffs have supported this assertion with their own pay stubs containing the "old" pay designation and selected payroll records showing that at least 32 other employees with the "old" pay designation for certain pay periods. Again, even assuming that the "old" pay designation may be equated with untimely payment of wages, the records submitted by plaintiffs fails to show that the numerosity criteria has been satisfied (*see Klakis*, 73 AD2d at 522; *Sidden*, 2014 WL 4063038 * 4; *cf. Globe Surgical Supply*, 59 AD3d at 137-138). (*see Klakis*, 73 AD2d at 522; *Sidden*, 2014 WL 4063038 * 4; *cf. Globe Surgical Supply*, 59 AD3d at 137-138).

With respect to the prevailing wage claim under Public Health Law § 3614-c, plaintiffs have submitted no evidence showing the applicable prevailing wage. Without proof of the prevailing wage, there is no basis for finding that defendants violated section 3614-c, and, if it was violated, the number of employees who were not paid the prevailing wage. As such, there is no basis to infer the merits of the claim, or that the numerosity or commonality requirements have been satisfied.

Since plaintiffs do not appear to seek any specific relief based on the alleged deficiency of defendants' record keeping practices under Labor Law § 195, any violation would appear to be only relevant to the burden of proof, and such a violation does not appear to be sufficient grounds for finding a common question of fact or law for purposes of class certification (*see Gardner v Western Beef Properties, Inc.*, 2011 WL 6140518 * 3 [EDNY 2011], *report accepted as modified on other grounds* 2011 WL 6140512 [EDNY 2011]).¹⁵

Plaintiffs, in their reply memorandum of law, assert that many of the issues discussed above were decided by the court in denying the motion to dismiss, and that, as such, the law of the case doctrine bars a contrary finding. The law of the case doctrine, however, is inapplicable here given the differing procedural postures and burdens of proof at issue in the context of a motion to dismiss and the motion to certify a class (*see Madison 96th Assocs., LLC v 17 East 96 Owners Corp.*, 120 AD3d 409, 410 [1st Dept 2014]; *Stroem v Plackis*, 96 AD3d 1040, 1042 [2d Dept 2012]; *Tenzer, Greenblatt, Fallon & Kaplan v Capri Jewelry*, 128 AD2d 467, 469 [1st Dept 1987]). Notably, in a

¹⁵ The court notes that the minimum recoveries and penalties for violations of Labor Law § 195 that are contained in Labor Law § 198 may not be pursued in the context of this action since that section does not allow for their recovery in the context of a class action (CPLR 901 [b]).

motion to dismiss for failing to state a cause of action, the pleading is to be afforded a liberal construction (CPLR 3026), and the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory (*see Hurrell-Harring v State of New York*, 15 NY3d 8, 20 [2010]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1995]). In contrast, as noted above, a plaintiff bears the burden of proving, with evidentiary proof, his or her entitlement to class certification (*see Pludeman*, 74 AD3d at 422; *CLC/CFI Liquidating Trust*, 50 AD3d at 447; *Feder v Staten Is. Hosp.*, 304 AD2d 470, 471 [2003]). Under these circumstances, this court's denial of the motion to dismiss in no way compels a finding that plaintiffs have sufficiently established their entitlement to class certification (*see White v Western Beef Properties, Inc.*, 2011 WL 6140512 * 3[U] [EDNY 2011], *compare Severin*, 2011 WL 3902994 * 5-7 [court denied motion to dismiss similar wage claims] *with Severin*, 2012 WL 2357410 * 6-11 [court denied class certification]). It bears emphasizing that the denial of class certification with respect to these claims is, for the most part, not based on a finding that plaintiffs' individual claims lack merit, but rather, on a finding that plaintiffs have failed to demonstrate that they are amendable to determination in a class action.

The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. DAVID I. SCHMIDT