David v Winthrop-University Hosp. Assn.
2015 NY Slip Op 32468(U)
January 20, 2015
Supreme Court, Queens County
Docket Number: 700864 2013
Judge: Duane A. Hart
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

ORIGINAL

Present: HONORABLE DUANE A. HART IA Part 18
Justice

NIRVA DAVID and AMANDA HARRIOT, on behalf of himself and all others similiarly situated employees, x	Index Number 700864 2013
Plaintiff,	Motion Date August 27, 2014
-against-	Motion Cal. Number 22
WINTHROP-UNIVERSITY HOSPITAL ASSOCIATION,	Motion Seq. No. 2
Defendant. x	

The following papers numbered 1 to 8 read on this motion by plaintiff Nirva David and plaintiff Amanda Harriott for an order permitting this action to be prosecuted as a class action.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-2
Answering Affidavits - Exhibits	
Reply Affidavits	3
Memoranda of Law	4-8

FILED
JAN 26 2015
COUNTY CLERK
QUEENS COUNTY

Upon the foregoing papers it is ordered that the motion is denied.

I. The Allegations of the Plaintiffs

Plaintiff Nirva David and plaintiff Amanda Harriott are members of the Float Pool Nursing Assistants (FPNA's) who work at defendant Winthrop University Hospital. FPNA's typically assist nurses in providing patient care such as feeding, bathing, and walking, but FPNA's may also be assigned on a one-to-one basis to particular patients who need special care. FPNA's report to the nursing office located in the first floor of the medical center's

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main building for the purpose of receiving their daily assignments, and they are then sent to one of twenty-four nursing units that are located on twenty floors of five separate hospital buildings. Nurse Manager Denise Hodish supervises FPNA's, who currently number fifty, about half of which are full time employees and the other half part-time or per diem workers.

Plaintiff David, hired in November, 2000, works an average of two to four days a week, usually from 3:00 PM to 11:00 PM. She alleges that she has not been compensated for work performed before and after her scheduled shifts and during her thirty-minute lunch break. Plaintiff Harriott, hired in 2008, works an average of two to four days a week, usually from 3:00 PM to 11:00 PM, and she makes the same allegations about uncompensated work.

Nurse Manager Hodish and Winthrop's other supervisors have instructed FPNA's to report to the nursing office ten to fifteen minutes prior to their scheduled shifts to receive their assignments. The Daily Attendance Records (DAR's) signed by FPNA's upon their arrival at the nursing office show the scheduled start and end times for their shifts and not the worker's actual arrival and departure times.

FPNA's assigned on a one-to one basis to patients do not receive compensation when they have to work past the scheduled end time of their shifts because their relief has not arrived on time. FPNA's also do not receive compensation when they have to work through their lunch breaks.

II. The Allegations of Defendant Winthrop

Defendant Winthrop provides all Nursing Assistants, including FPNA's, at least four different ways of recording their time worked and of notifying management of all time worked. The first method is to record the time worked on the DAR or DAR Addendum, including extra time worked. The second method allows the FPNA to examine biweekly time cards that are available for review in the Nursing Office. FPNA's are instructed to review the time cards and either initial them if they are correct or make any necessary changes, including work performed during a meal break or after the end of scheduled shift, before they are sent to payroll. The third method allows an FPNA to submit a payroll discrepancy form to the Nurse Manager. The fourth method allows an FPNA to use an "HR Hotline, " and every check issued to an FPNA states: " Important Information" : HRHotline: Have a discrimination issue or were not properly compensated for O/T? Call 663-4901."

Those FPNA's that complied with the hospital's procedures were properly compensated for all extra work performed. The named plaintiffs did not regularly comply with the proper procedures for receiving compensation for extra work.

III. Procedural Background

Plaintiff Junior Prophete began an action captioned *Prophete v. Winthrop-University Hospital Association,* Index No. 700105/13 on November 23, 2012. Plaintiff Nirva David and plaintiff Amanda Harriott began an action captioned *David v. Winthrop-University Hospital,* Index No. 700864/13 on March 13, 2013. All three plaintiffs initially sought to maintain their actions on a class wide basis. Pursuant to a so-ordered stipulation dated July 10, 2013, this court consolidated the two actions under Index No. 700105/13. Plaintiff Prophete has abandoned his attempt to gain class action status for a broader pool that he allegedly typified.

The three plaintiffs allege that the practices of defendant Winthrop violate the New York State Labor Law and corresponding regulations. The first cause of action alleges that the defendant failed to pay correct wages and overtime in violation of Labor Law§§190, 191, 193, 198 and 652 and 12 NYCRR 142-3.1 and 142-3.2. The second cause of action alleges that the defendant failed to pay overtime in violation of New York State Labor Law §650 et seq. and corresponding state regulations.

IV.Discussion

A. CPLR 901 and 902

CPLR 901 and 902 specify the factors which a court must consider before permitting class action certification. (*See, Negrin v. Norwest Mortgage, Inc.*, 293 AD2d 726; *Ackerman v. Price Waterhouse*, 252 AD2d 179.) "A class action may be maintained in New York only after the following five prerequisites of CPLR 901(a) have been met: (1) the class is so numerous that joinder of all members is impracticable; (2) common questions of law or fact predominate over any questions affecting only individual members; (3) the claims of the representative parties are typical of the class as a whole; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) the class action is superior to other available methods for the fair and efficient adjudication of the controversy ***. Once these prerequisites are satisfied, the court must consider the factors set out in CPLR 902, to wit, the possible interest of 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 the management of a class action ***." (*Ackerman v. Price Waterhouse, supra*, 191;*Cooper v. Sleepy's, LLC,* 120 AD3d 742)

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CPLR 902 provides that the court may permit a class action to be maintained only if it finds that all of the prerequisites under CPLR 901 have been satisfied. (*See*, *Cooper v. Sleepy's, LLC, supra*.) The plaintiff has the burden of showing that the criteria of CPLR 901 and 902 have been satisfied. (*Cooper v. Sleepy's, LLC, supra*; *Globe Surgical Supply v. GEICO Ins. Co.*, 59 AD3d 129; *Bettan v. Geico General Ins. Co.*, 296 AD2d 469; *Ackerman v. Price Waterhouse*, *supra*; *Canavan v. Chase Manhattan Bank*, 234 AD2d 493.)

New York's class action statute (CPLR 901–909) is similar to Federal Rule 23, and the prerequisites to the maintenance of a class action under state law are virtually identical to those expressed in Rule 23. (*See*, *Colt Industries Shareholder Litigation v. Colt Industries Inc.*, 77 NY2d 185.) Because of the similarity, resort may be made to federal cases in determining whether to grant class action status. (*See*, *City of New York v. Maul*, 14 NY3d 499; *Geiger v. American Tobacco Co.*, 181 Misc2d 875, affd, 277 AD2d 420.)

B. Numerosity

The statute does not specify a minimum number of class members needed to satisfy the numerosity requirement, and there is no mechanical test to determine whether the members of a putative class are sufficiently numerous. (*See*, *Globe Surgical Supply v. GEICO Ins. Co., supra; Friar v. Vanguard Holding Corp.*, 78 AD2d 83.) "While there is no bright-line test or general rule for gauging numerosity, the numerosity threshold seems to be 40" (N.Y.Prac., Com. Litig. in New York State Courts § 20:4 [3d ed.]), and the federal courts have presumed numerosity at a level of 40 members. (*See*, *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F3d 473.) The New York State Legislature "contemplated classes involving as few as 18 members ***where the members would have difficulty communicating with each other ***." (*Borden v. 400 East 55th Street Associates, L.P.* , - NY3d- 2014 WL 6607407.)

In the case at bar, Hodish testified at her pre-trial deposition that the current Float Pool consists of only fifty FPNA's, and the plaintiffs offered no proof that about the same number has been lost through attrition since 2008. "Although the court may make common sense assumptions to support a finding of numerosity, it cannot do so on the basis of pure speculation without any factual support." (*Jeffries v. Pension Trust Fund of Pension, Hospitalization and Benefit Plan of Electrical Industry,* 172 FSupp2d 389, 394 [internal quotation marks and citation omitted].) Moreover, defendant Winthrop has submitted statements and deposition testimony of ten current and former FPNA's who admit that they have been fully compensated for all work performed. "It is settled law in New York that the numerosity requirement can only be met by a proposed class of individuals who have been aggrieved by the conduct forming the basis of the complaint ***." (*Alix v. Wal-Mart Stores, Inc.,* 16 Misc3d 844, 848, affd, *Alix v. Wal-Mart Stores, Inc.*, 57 AD3d 1044.) The two

named plaintiffs have identified only three other FPNA's who claim that they have not been fully compensated by defendant Winthrop. In other words, even counting all three others as current members, only ten per cent of the current float pool has been identified as having an alleged grievance against defendant Winthrop, and this low percentage cannot be excused on the basis that the putative members of the class – who are co-workers– are having difficulty communicating with each other. (*See, Borden v. 400 East 55th Street Associates, L.P., supra.*)

The court finds that the plaintiffs have not established numerosity as required by CPLR 901(a)(1).

B. Commonality

The second prerequisite of CPLR 901 concerns "questions of law or fact common to the class which predominate over any questions affecting only individual members." (CPLR 901[a][2]; *see, Karlin v. IVF America, Inc.*, 239 AD2d 562.)

A party seeking class certification must establish more than that issues exist which are common to the entire class and that they are substantial and significant; the party must show that these common issues predominate over unique circumstances that may pertain to each individual's situation. (*Alix v. Wal-Mart Stores, Inc.* 57 AD3d 1044.) Class action certification is not warranted where the " proceeding would inevitably splinter into individual trials, and would not achieve economics of time, effort, and expense, and promote uniformity of division [sic: decision] as to persons similarly situated ***." *(Kleinberg v. Frankel,* 89 AD2d 556, 557-558 [internal quotation marks and citations omitted].)

Yet,"commonality cannot be determined by any 'mechanical test' and *** the fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action. Rather, it is predominance, not identity or unanimity, that is the linchpin of commonality ***." (*City of New York v. Maul, supra*, 514.)

In the case at bar, common issues do not predominate over the issues that are unique to each putative class member. For the pre-shift claim, the individual issues include (1) who directed the employee to arrive early, (2) when the employee arrived for work, (3) whether the additional time was de minimis, (4) whether the employee applied for compensation fo the additional time, and (5) whether the employee was paid for the additional time. For the post-shift claim, the individual issues include (1) who instructed the employee to stay late, (2) how much extra time the employee worked, (3) whether the employee applied for compensation for the extra work, and (4) whether the employee received compensation for the extra work. For the claim involving meal breaks, the individual issues include (1) whether

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the employee worked through a meal break, (2) whether the employee applied for compensation for working through the meal break, and (3) whether the employee received compensation for working through the meal break.

Any common issues pertaining to defendant Winthrop's allegedly improper employment practices do not predominate over an individual employee's unique circumstances. (*See*, *Alix v. Wal-Mart Stores, Inc.* 57 AD3d 1044 [class certification denied in action brought by former employees alleging violations of the Labor Law, including failure to pay earned wages and overtime and compulsion to work off the clock].) The impact of defendant Winthrop's alleged violations of the Labor Law on a particular employee necessarily requires proof of the specifics of each employee's complaint. (*See*, *Alix v. Wal-Mart Stores, Inc., supra.)*

In this case predicated on violations of the Labor Law, the issue of damages can only be proven on an individual basis, not a class wide basis, making class action certification inappropriate. (*See*, *Roach v. T.L. Cannon Corp*., 2013 WL 1316452.) "[T]he damages to which each class member would be entitled would necessarily depend upon his or her individual circumstances and could only be accurately ascertained by a fact-specific inquiry into each individual complaint ***." (*Alix v. Wal-Mart Stores, Inc*., supra, 1047.) The proposed class action would inevitably splinter into numerous individual trials. (*See*, *Kleinberg v. Frankel, supra.*)

The court finds that the plaintiffs have not established commonality as required by CPLR 901(a)(2).

C. Superiority

The plaintiffs did not show that a class action is superior to other methods available to them for the redress of their grievances. (*See*, CPLR 901[a] [5]; *Alix v. Wal-Mart Stores, Inc*., *supra*.) "[A]n administrative remedy is available by which plaintiffs, in their status as employees, could file wage related complaints with the Department of Labor (see Labor Law §§ 196, 196–a)." (*Alix v. Wal-Mart Stores, Inc*., *supra*, 1048.)

Dated: January 20, 2015

J.S.C.

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