

<b>Moreno v Future Care Health Servs., Inc.</b>
2015 NY Slip Op 32899(U)
October 27, 2015
Supreme Court, Kings County
Docket Number: 500569/13
Judge: Lawrence S. Knipel
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At an IAS Term, Part COM-4 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 27<sup>th</sup> day of October, 2015.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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

Plaintiffs,

- against -

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

Defendants.

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The following papers numbered 1 to 12 read herein:

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_  
Other: Plaintiffs' memorandum in support of motion \_\_\_\_\_  
Other: Defendants' memorandum in opposition to motion \_\_\_\_\_  
Other: Plaintiffs' reply memorandum \_\_\_\_\_  
Other: Defendants' memorandum in support of cross motion \_\_\_\_\_

Index No. 500569/143  
Mot. Seq. No(s). 4 - 6

Papers Numbered

1-2    6-7    9-10  
\_\_\_\_\_  
          10  
\_\_\_\_\_  
3        8  
\_\_\_\_\_  
4        12  
\_\_\_\_\_  
5        11        11  
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                          12  
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Upon the foregoing papers, plaintiffs, Adriana Moreno and Leonidas Peguero-Tineo (collectively plaintiffs), move this court, pursuant to CPLR 2221, for leave to renew and reargue their motion for class certification that was denied by an order of the court dated April 24, 2014 (May 4, 2015)<sup>1</sup> [Seq. No. 4]. Upon renewal and reargument, plaintiffs seek an order granting class certification in the underlying matter.

Plaintiffs also move to compel defendants to produce payroll data in comma separated value format (CSV), in compliance with plaintiffs' instructions regarding production of electronically stored information (ESI)<sup>2</sup> [Seq. No. 5].

Defendants, Future Care Health Services, Inc. (Future Care), Americare Certified Special Services, Inc., (Americare), Ethan Dreifus (Dreifus) and, Martin Kleinman (Kleinman), (collectively defendants) cross-move for an order, pursuant to 22 NYCRR § 130 - 1.1, for sanctions against the plaintiffs for filing the motion compelling production of payroll data in CSV format [Seq. No. 6].

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<sup>1</sup> Although rendered on April 24, 2015, the formal decision was not issued until May 4, 2015. The court shall, hereafter, refer to this decision as the May 4<sup>th</sup> decision.

<sup>2</sup> While having no bearing on the disposition of plaintiffs' motion to compel certain discovery, it bears mentioning that in support of said motion, plaintiffs offer a document from Michael Russo that purports to be an affidavit. However, the document appears in "affirmation" form as it is not sworn to before a notary, containing only a declaration under penalty of perjury. Absent any evidence that Mr. Russo qualifies to submit an affirmation under CPLR 2106, for his affidavit to be in admissible form, he "must first appear before a notary or other such official and formally declare the truth of the contents of the document" (*Doumanis v Conzo*, 265 AD2d 296, 296 [1999]). Having failed to qualify as an affirmation and having failed to qualify as an affidavit, Mr. Russo's declaration is not entitled to judicial cognizance (*Id.*).

### ***Background***

For a full recitation of the underlying facts of this matter, please refer to the court's two prior decisions, *Moreno v Future Care Health Servs., Inc.*, (43 Misc3d 1202(A), 2014 NY Slip Op 50449(U) [Sup Ct, Kings County 2014]), and *Moreno v Future Care Health Servs., Inc.*, (2015 WL 1969753, \*1 [Sup Ct, Kings County 2015]). The facts, as they relate to the instant motions, appear below.

#### *Plaintiffs' Motion for Renewal/ Reargument*

By order of then Justice David Schmidt, dated May 4, 2015, the plaintiffs' prior motion for class certification was denied. Plaintiffs now move this court, in motion sequence #4, seeking leave to renew and reargue their motion, arguing:

“The Court made several errors that were based on a misapprehension of the law. First, the Plaintiffs submitted sufficient documentation to establish that joinder of all members is impracticable. Second, the Court issued a ruling on the merits with respect to the question of whether the putative Class members should have been paid for every hour of their 24-hour shifts. Ruling on the merits is not appropriate on a motion for class certification. Finally, the Court *sua sponte* raised the question about whether the applicable rate of overtime pay was one and one half times the employee's regular rate of pay or one and one half times the minimum wage, Neither party raised this issue because the parties were in agreement about the proper rate of pay. Accordingly, the issue was not briefed by the parties and should not have been decided.”

In opposition, defendants contend that renewal and reargument should be denied entirely as the plaintiffs are unable to meet the standards for either relief under CPLR 2221. As to the branch seeking renewal, defendants argue that the plaintiffs offer no argument that new facts

have come to light, nor that a change in the law warrants the court to alter its prior determination. As to the branch seeking reargument, defendants proffer that the court's conclusions regarding a lack of both numerosity and commonality were correct. Defendants contend that plaintiffs' arguments to the contrary are not properly couched under a motion to reargue as plaintiffs "fail to show any facts or laws which were overlooked or misapprehended by the Court."

*Plaintiffs' Motion to Compel Production of Payroll Data in CSV Format*

Plaintiffs move the court, in motion sequence #5, to compel the defendants to produce previously provided payroll data in CSV format in accordance with the plaintiffs' specific instructions for the production of ESI. On March 22, 2013, plaintiffs served a notice to produce documents on the defendants. On March 27, 2014, plaintiffs served a supplement to their notice to produce wherein the plaintiffs specified the protocol for the production of ESI, requesting that "[a] single comma delimited text file (CSV) shall be produced that contains a row for each document, whether produced in PDF<sup>3</sup> or native format,<sup>4</sup> with a row

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<sup>3</sup> "PDF" : Stands for "Portable Document Format." PDF is a multi-platform file format developed by Adobe Systems. A PDF file captures document text, fonts, images, and even formatting of documents from a variety of applications. You can e-mail a PDF document to your friend and it will look the same way on his screen as it looks on yours, even if he has a Mac and you have a PC (*see* <http://techterms.com/definition/pdf>, [last accessed September 30, 2015]).

<sup>4</sup> "Native file format," "native format", or "native file" : When you save a file using a certain program, the file is often saved in a proprietary format only that program can recognize. For example, if you save a Microsoft Word document, it is saved as a Word document (i.e. mydocument.doc). This is a "native" Word file -- that is, the file format is native to the Microsoft Word application and may not be recognized by other programs (*see* <http://techterms.com/definition/nativefile>, [last accessed September 30, 2015]).

containing fields for the following metadata<sup>5</sup> information.” Following the previous quote is a list of 23 separate metadata fields. According to the plaintiffs, “instead of producing payroll data in a usable [CSV] format as required, [d]efendants produced thousands of [unsearchable] PDFs.” As plaintiffs contend, “[t]he payroll information was not produced in a structured format such that it can be converted into a spreadsheet format and manipulated using a spreadsheet software such as Excel.” Further, “[p]ayroll data is normally kept in company databases readily exportable into CSV format which is a readable and usable format within Excel, allowing data to be searched, sorted, analyzed, calculated within that or other common, off-the-shelf computer software programs.”

Defendants oppose this motion alleging, (1) that the motion is untimely and subject to waiver because the plaintiffs should have moved the court prior to their moving for class certification, (2) that even if the motion were timely and no waiver is found, the CPLR does not require defendants to produce the requested information in CSV format, (3) compliance is not required because plaintiffs can easily convert the information into CSV format if they so choose, and (4) the court’s denial of class certification bars the plaintiffs from obtaining any payroll data for other than the two named plaintiffs.

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<sup>5</sup> Metadata describes other data. It provides information about a certain item's content. For example, an image may include metadata that describes how large the picture is, the color depth, the image resolution, when the image was created, and other data. A text document's metadata may contain information about how long the document is, who the author is, when the document was written, and a short summary of the document (*see* <http://techterms.com/definition/metadata>, [last accessed September 30, 2015]).

*Defendants' Cross Motion for Sanctions*

Relying on the arguments presented in opposition to the plaintiffs' discovery motion, as well as the court's May 4<sup>th</sup> denial of class certification, the defendants cross-move, in motion sequence #6, for sanctions arguing that as the plaintiffs are clearly not entitled to payroll data for anyone other than Moreno and Peguero-Tineo, their motion seeking such information in CSV format is frivolous pursuant to 22 NYCRR § 130 - 1.1.

Plaintiffs oppose the defendants' cross motion for sanctions alleging that while the CPLR may not specifically compel disclosure in CSV format, it does require that disclosure be made in a usable format. Plaintiffs contend that PDF, by its nature as a graphic file devoid of underlying metadata, is not a usable format. As to the motion's timeliness, plaintiffs contend that "[we] originally believed [we] had enough evidence to support certification without moving to compel and without troubling the court with ancillary motions that would threaten to derail the timetable for the initial motion."

*Discussion*

***Plaintiffs' Motion for Renewal and Reargument Pursuant to CPLR 2221 (Seq. No. 4)***

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221 [e] [2], [3]). A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any

matters of fact not offered on the prior motion” (CPLR 2221 [d] [2]). While plaintiffs move for both renewal and reargument, their application is essentially one for reargument only insofar as they argue that “[t]he Court made several errors that were based on a misapprehension of the law.” Accordingly, that branch of the plaintiffs’ motion seeking leave for renewal under CPLR 2221 is denied and the court shall only address that branch of the instant motion seeking leave to reargue.

*Branch of the Plaintiffs’ Motion Seeking Leave to Reargue*

“A motion for leave to reargue ‘shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion’ (*Grimm v Bailey*, 105 AD3d 703, 704 [2013], quoting CPLR 2221 [d] [2]; see *Matter of American Alternative Ins. Corp. v Pelszynski*, 85 AD3d 1157, 1158 [2011]). ‘While the determination to grant leave to reargue a motion lies within the sound discretion of the court, a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented’ (*Matter of Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819, 820 [2011] [citations and internal quotations omitted])”

(*Ahmed v Pannone*, 116 AD3d 802, 805 [2014]; see also *Deutsche Bank Natl. Trust Co. v. Ramirez*, 117 AD3d 674 [2014]; *Grimm v Bailey*, 105 AD3d at 704).

The court, accordingly, exercises its discretion and grants reargument of the plaintiffs’ motion for class certification that resulted in the May 4<sup>th</sup> order denying same.

As mentioned above, plaintiffs allege that “[t]he Court made several errors that were based on a misapprehension of the law.” Plaintiffs offer a three pronged argument which the court shall address in the same order as that within the moving papers.

*Point 1: “[T]he Court erred when it determined that Plaintiffs had not established numerosity even though Plaintiffs submitted sufficient documentation to establish that joinder of all members is impracticable.”*

After carefully reviewing the plaintiffs’ submissions, the court, in its May 4<sup>th</sup> decision, found, among other things, that:

“[T]he 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.”

Plaintiffs’ re-argue the court’s finding by alleging that:

“The Court of Appeals explained that ‘[a]s to the first factor, numerosity, the legislature contemplated classes involving as few as 18 members...where the members would have difficulty communicating with each other, such as where 'barriers of distance, costs, language, income, education or lack of information prevent those who are aware of their rights from communicating with others similarly situated.’”

\* \* \*

“Joinder here is impractical even if the class were found to be less than forty. . . [t]he very real risk of career damage for both current and former employees, who work in a very insular industry, makes joinder in this case highly impractical.”

Having failed to make either of these two arguments on the original motion, such arguments are impermissible here and offer no support as “a motion for leave to reargue is not designed

to [allow the] unsuccessful party [to]. . . present arguments different from those originally presented” (*Matter of Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d at 820).

Plaintiffs’ continue:

“[a]lthough [p]laintiffs submitted documentation establishing that “the proposed Class consists of at least one hundred Class members” the Court erroneously held that numerosity had not been established by the Plaintiffs. . . The May 4 Opinion failed to address (much less mention) the portion of Plaintiffs’ affidavits that state “I know there are more than forty and possibly over a hundred Class Members because I frequently went to the office to pick up my check and saw other home health care workers there. I also saw other home health care workers at the in-service trainings that I was required to attend.”

\* \* \*

“Defendants admitted in their opposition to Plaintiffs’ motion for class certification, that in 2011, 179 home attendants employed by Defendants worked at least one live-in shift, and that, in 2012, 109 home attendants worked at least one live-in shift Moreno, 2015 WL 1969753 at \*3. Despite this admission-and acknowledgment of the admission in the May 4 Opinion-the Court did not find that Plaintiffs had established numerosity.”

As to plaintiffs’ statements within their affidavits, the court found that the conclusory assertions were insufficient to satisfy the statutory criteria (*see Pludeman v Northern LeasingSys., Inc.*, 74 AD3d 420,422 [2010]; *Chimenti v American Express Co.*, 97 AD2d 351, 352 [1983]) as a proponent of class certification bears the burden of establishing the criteria (*see CLC/CFI Liquidating Trust v Bloomingdale’s, Inc.*, 50 AD3d 446, 447 [2008]), by the tender of evidence in admissible form (*Pludeman*, 74 AD3d at 422; *Feder v Staten Is. Hosp.*, 304

AD2d 470, 471 [2003]). The fact that defendants may have admitted how many home health attendants worked certain shifts does not satisfy the plaintiffs' burden of showing that a sufficient number were aggrieved to satisfy numerosity. "Whether a lawsuit qualifies as a class action matter is a determination made upon a review of the statutory criteria as applied to the facts presented; it ordinarily rests within the sound discretion of the trial court. . ."

(*Small v Lorillard Tobacco Co.*, 94 NY2d 43, 52[1999]; CPLR 901; *see also*, *CLC/CFI Liquidating Trust v Bloomingdale's, Inc.*, 50 AD3d at 447). As the court found:

"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."

\* \* \*

"While plaintiffs and the putative class members might be entitled to some pay for attending classes. . . plaintiffs have failed to present proof satisfying the numerosity requirement. The only proof that no such payment 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."

Additionally, plaintiffs allege:

"[T]he court incorrectly focused on the number of examples submitted . . . in support of certain claims. . . [p]laintiffs are not required under CPLR 901(a)(1) to submit at least 40 examples of each violation, they are only required to show there are 40 class members."

\* \* \*

Furthermore, even if Plaintiffs were required to submit documents demonstrating numerosity for each claim, the Court still erred. The May 4 Opinion erroneously held that numerosity had not been established for: (1) the spread of hour claim because ‘the selected records submitted by plaintiff only show that approximately 25 employees" should have received spread of hours compensation and (2) the failure to timely pay wages claim because the submitted payroll records only show ‘at least 32 other employees with the 'old' pay designation.’”

“There is no ‘mechanical test’ to determine whether the first requirement numerosity has been met, nor is there a set rule for the number of prospective class members which must exist before a class is certified. Each case depends upon the particular circumstances surrounding the proposed class. . . .” (*Friar v. Vanguard Holding Corp.*, 78 AD2d 83, 96 [1980] [internal citations omitted]). In its discretion, the court evaluated the plaintiffs’ submissions and found them lacking with regard to numerosity. In contravention of the plaintiffs’ position, it was not the number of examples of each violation that was lacking, but the approximate number of aggrieved plaintiffs that was found lacking. As the court stated:

“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 [internal quotes omitted].”

*Point II: “Second, the Court issued a ruling on the merits with respect to the question of whether the putative Class members should have been paid for every hour of their 24-hour shifts. Ruling on the merits is not appropriate on a motion for class certification.”*

Initially, the court notes that on a motion for leave to reargue, the plaintiffs are tasked to illustrate matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion (*see Grimm v Bailey*, 105 AD3d at 704; *Matter of American Alternative Ins. Corp. v Pelszynski*, 85 AD3d at 1158). The question of whether the court ruled, properly or improperly, on the merits of a particular issue is irrelevant if such a discussion was not germane to the court’s denial of class certification. Moreover, “[a]lthough 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; *Jatros Automated Elec. Canst. Corp. v Libman*, 37 AD3d 313, 313 [2007]). Delving into the merits is required, to a certain extent, and it is soundly within the court’s discretion to do so (*Matter of Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d at 820).

In contravention of the plaintiffs’ allegation, the court made no such determination regarding the putative class’ entitlement to being paid for every hour of a twenty-four hour shift. The court stated as follows:

*“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.”

Within their memorandum of law in support of reargument, plaintiffs emphasized the first line (as reproduced above) to illustrate their position. Plaintiffs’ position is, however, without foundation.

In an effort to remove any ambiguity, the court did not, by the above language, find that the plaintiffs *should* or *should not* be paid for every hour of their twenty-four hour shifts. The above language states that *having failed to provide any evidentiary basis for the contention that the putative class is entitled to be paid for the entire 24 hour period, as a matter of law*, proving the plaintiffs’ improper pay allegations *would require an analysis of the work actually performed by each proposed class member during each shift*. It is this potential analysis that the court determined to be 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.”

As it pertains to this issue, the court held:

“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, plaintiffs have submitted no evidentiary detail relating to the nature of their work hours during the 24 hour live- in shift 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” (emphasis added).*

Rather than ruling on the merits, the court merely explained that the plaintiffs’ failed to satisfy their burden on their motion for class certification. In fact, mindful of the potential for reargument, the court concluded the May 4<sup>th</sup> decision as follows:

“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.”

*Point III: “Finally, the Court sua sponte raised the question about whether the applicable rate of overtime pay was one and one half times the employee's regular rate of pay or one and one half times the minimum wage, Neither party raised this issue because the parties were in agreement about the proper rate of pay. Accordingly, the issue was not briefed by the parties and should not have been decided.”*

The question on reargument is whether the court misapplied or misapprehended the law or facts (CPLR 2221 [d] [2]); *Deutsche Bank Natl. Trust Co. v. Ramirez*, 117 AD3d at 674). Accordingly, the plaintiffs’ allegations on this point are not properly raised within the framework of the instant motion. The court’s discussion had no bearing on its denial of class certification as that issue had been foreclosed. This was evidenced by the first sentence of the paragraph where the discussion at issue appears, to wit, “[a] lack of commonality precludes certification with respect to plaintiffs’ overtime claims.” Likewise, numerosity had already been held unfounded by the court’s analysis ending the previous page. The discussion

complained of by the plaintiffs was merely dicta and provides no basis for plaintiffs' reargument of the May 4<sup>th</sup> order.

Accordingly, with that branch of plaintiffs' application seeking leave to reargue its prior motion having been granted, upon reargument, the court adheres to its prior determination denying class certification therein. Having already denied that branch seeking leave to renew the prior motion, plaintiffs' instant motion is thus, denied in its entirety.

***Plaintiffs' Motion to Compel Production of Payroll Data in CSV Format (Seq. No. 5)***

Within its January 16, 2014 decision and order, the court granted limited pre-certification discovery as follows:

“In order to determine if the requirements set forth in CPLR 901 are met, and to assess the considerations listed in CPLR 902, limited discovery must be conducted (*Katz v NVF Co.*, 100 AD2d 470, 474 [1984]). Preclass discovery allows the plaintiffs “to determine whether the prerequisites of a class action . . . may be satisfied” (*Rodriguez v Metro. Cable Communications*, 79 AD3d 841[2010]). Indeed, “[t]he purpose of preclass certification discovery is to ascertain the dimensions of the group of individuals who share plaintiffs' grievance” (*Id.*).

The plaintiffs failed to make the instant motion during the pre-certification discovery phase, instead waiting until after having had their motion for class certification denied on May 4<sup>th</sup>, 2015. By filing their motion for class certification, plaintiffs effectively closed the pre-certification discovery window. While the instant motion may not be untimely in relation to the overall litigation, it is, however, untimely for consideration at this juncture. Section 22 NYCRR 202.8 [f], of the Uniform Rules for the New York States Trial Courts reads:

“Where the motion relates to disclosure or to a bill of particulars, and a preliminary conference has not been held, the court shall notify all parties of a scheduled date to appear for a preliminary conference, which shall be not more than 45 days from the return date of the motion unless the court orders otherwise . . .”

A review of the County Clerk’s Electronic Filing System indicates that a preliminary conference has yet to be held in this matter. Therefore, pursuant to 22 NYCRR 202.8 [f ], plaintiffs’ motion is denied without prejudice as premature under the court’s rules and the parties are directed to appear for a preliminary conference in Part COMM - 4 on November 5, 2015 at 9:30 a.m.

***Defendants’ Cross Motion for Sanctions (Seq. No. 6)***

Defendants seek sanctions alleging the following:

- “a. Plaintiffs’ motion is untimely and subject to waiver because they should have filed their motion when the dispute over the payroll records at issue arose during the discovery stage prior to the filing of their motion for class certification and not after the Hon. David I. Schmidt, J.S.C. of this Court denied their motion for class certification in its entirety via decision dated [May 4], 2015;
- b. Assuming arguendo that Plaintiffs’ motion is timely and a waiver did not occur, the CPLR does not require Defendants to reproduce the payroll documents at issue in CSV format;
- c. Plaintiffs can easily convert the payroll documents at issue into Excel format;
- d. The Court’s denial of Plaintiffs’ motion for class certification prohibits them from obtaining the payroll records of employees other than themselves; and

- e. In light of the foregoing arguments, Plaintiffs are clearly not entitled to the payroll records at issue in CSV format thereby rendering their motion frivolous pursuant to 22 NYCRR § 130-1.1.”

The court is authorized to impose financial sanctions for frivolous conduct pursuant to 22 NYCRR 130-1.1(a).

“Among the types of conduct which will be considered frivolous are those determined to be ‘completely without merit in law’ or ‘undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another’ (22 NYCRR 130-1.1[c][1], [2]; see *Ofman v Campos*, 12 AD3d 581; *Stow v Stow*, 262 AD2d 550. In making that determination, the court must consider ‘the circumstances under which the conduct took place’ and ‘whether or not the conduct was continued when its lack of legal or factual basis was apparent [or] should have been apparent’ (22 NYCRR 130-1.1[c]).”

(*Glenn v Annunziata*, 53 AD3d 565 [2008]).

“Making claims of colorable merit can constitute frivolous conduct within the meaning of 22 NYCRR 130-1.1 if ‘undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another’” (*Ofman v Campos*, 12 AD3d 581, 582 [2004], *quoting Stow v Stow*, 262 AD2d 550, 551[1999], *quoting* 22 NYCRR 130-1.1 [c] [2]).

A review of the current case law reveals that the issues presented within the plaintiffs’ discovery motion involve an unsettled area of the law at this time. In light of this unsettled nature, including the court’s above analysis regarding said motion, the plaintiffs’ actions fail to evidence the sanctionable conduct envisioned by the above standard. While the court notes

that improper conduct will not be countenanced, it declines to levy sanctions at this time, subject to reconsideration if later warranted.

**Conclusion**

In sum, that branch of plaintiffs' motion for leave to renew is denied. That branch seeking leave to reargue the court's May 4, 2014 decision is granted and upon reargument, for the reasons above stated, the court adheres to its original decision denying class certification.

Plaintiffs' motion to compel certain discovery is denied as premature and the parties are directed to appear for a preliminary conference in Part COMM-4 on ~~Thursday~~<sup>Friday</sup>, November 6, 2015 at 9:30 a.m.

Defendants' cross motion for sanctions is denied in all respects.

The court, having considered the parties' remaining contentions, finds them to be without merit. All relief not expressly granted herein is denied.

The foregoing constitutes the decision and order of the court.

E N T E R.

  
J. S. C.  
HON. LAWRENCE KNIPEL  
SUPREME COURT JUSTICE

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