STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

CAITLIN FERRARI, on Behalf of Herself and All Others Similarly Situated,

Plaintiff

v.

DECISION
Index No. 804125-2014

STEPHANIE MATECZUN,
CITADEL BROADCASTING COMPANY,
CITADEL COMMUNICATIONS COMPANY, LTD., and
BUFFALO BILLS, INC.

Defendants

DOLCE PANEPINTO, P.C.
Sean E. Cooney, Esq.
Attorneys for Plaintiff, Caitlin Ferrari, on Behalf of Herself and All Others Similarly Situated

LEVI KORSINSKY LLP
Shane T. Rowley, Esq.
Danielle Rowland Lindahl, Esq.
Justin G. Sherman, Esq.
Attorneys for Plaintiff, Caitlin Ferrari, on Behalf of Herself and All Others Similarly Situated

THE MARLBOROUGH LAW FIRM, P.C.
Christopher Marlborough, Esq.
Attorneys for Plaintiff, Caitlin Ferrari, on Behalf of Herself and All Others Similarly Situated

THE SAMARRCO LAW FIRM, LLP
Andrea Sammarco, Esq.
Attorneys for Plaintiff, Caitlin Ferrari, on Behalf of Herself and All Others Similarly Situated

LIPPES MATHIAS WEXLER FRIEDMAN LLP
Dennis C. Vacco, Esq.
Stacey L. Moar, Esq.
Attorneys for Defendant, Stephanie Mateczun

BOND SCHOENECK & KING
Scott M. Philbin, Esq.
Louis Orbach, Esq.
Attorneys for Defendant Citadel Broadcasting Company

LIPSITZ GREEN SCIME CAMBRIA LLP
Jeffrey F. Reina, Esq.
Attorneys for Defendant, Buffalo Bills, Inc.

PROSKAUER ROSE LLP
Steven D. Hurd, Esq.
Attorneys for the National Football League

TIMOTHY J. DRURY, J.S.C.

The Plaintiffs Caitlin Ferrari, Alyssa U., Maria P., and Melissa M., on behalf of themselves and all others similarly situated, have sought to sue the defendants as representatives in a class action for unpaid funds earned as Buffalo Jills cheerleaders (The Jills). The lawsuit has been detailed in this Court's two prior decisions. The above plaintiffs seek certification of a class and subclass of all members of the defendants' cheerleading and ambassador squads since April 9, 2008 and April 27, 2008, respectively. The plaintiffs has moved pursuant to CPLR Section 901(a) and 902 that (1) they be designated as class representatives and their counsel as class counsel; (2) the defendants be ordered to provide the plaintiffs with contact information for absent class members within 10 days from this Court's order; and (3) they be permitted to issue notice of the pendency of this action to members of the putative class and subclass in the form annexed to plaintiffs' counsel's affirmation.

"The party or parties seeking class certification have the burden of establishing compliance with every requirement of both CPLR 901 and 902 and the determination whether to certify a class is vested in the sound discretion of the court (cites omitted) (*Rife et al v. The Barnes Firm*, 48 AD3d 1228, 1229).

"The proponent of class certification bears the burden of establishing the criteria promulgated by CPLR 901 and must do so by the tender of evidence in admissible form... (cites omitted)" (*Pludeman et al v Northern Leasing Systems, Inc.*, et al, 74 AD3d 420, 422).

"Appellate courts in this state have repeatedly held that the class action statute should be liberally construed...Thus, any error, if there is to be one, should be ... in favor of allowing the class

action ... since a class action may, as a practical matter, be the only available method for the determination of the issues raised ... (cites and quotes omitted)" (*Pruitt v Rockefeller Center Properties, Inc.*, et al, 167 AD2d 14, 21).

CPLR Section 902(3) states that the Court shall consider the extent and nature of any litigation concerning the controversy already commenced by or against members of the class.

Attached to the Bills Amended Answer to the Plaintiffs' Second Amended and Supplemental Class Action and Complaint as Exhibit A is the Second and Amended Radio Broadcast Rights Agreement between Citadel and the Bills. The Agreement is referred to in the Amended Answer (See 221, 227, 228). The Agreement granted Citadel exclusive cheerleading rights for the Buffalo Jills at Bills home games. The Agreement covers seasons 2007, 2008, 2009 and 2010. The Agreement states that the Jills are the sole responsibility of Citadel. According to the Agreement, the Bills were granted the right to have reasonable approval of the operating procedure and policies of the Jills. The Agreement states that all of the cheerleaders were to execute an attached Cheerleading Agreement and General Release, which would be delivered to the Bills two weeks prior to the first pre-season home game. The Jills Cheerleader Agreement is not attached to the Amended Answer. However, Caitlin Ferrari attached her Agreement to her affidavit submitted in support of this motion. Ms. Ferrari signed it April 9, 2009. Her Agreement was with Citadel. She was a member of the Jills during the 2009-2010 season. Her Agreement stated that she would not receive payment for appearances at the Bills football game. The Agreement specified that her relationship with Citadel was at all times that of an independent contractor.

Attached to Ms. Ferrari's affidavit was a Code of Conduct which repeated that she was not an employee of Citadel or the Bills and was an independent contractor. The Code of Conduct then

detailed stringent conditions for her work as a Jill which called into question her status as an independent contractor.

Attached to the Bills Answer to the Plaintiffs' Third Amended and Supplemental Class Action Complaint as Exhibit A is the Third and Amended Radio Broadcast Rights Agreement between Citadel and the Bills. It is similar to the second one. This Agreement covers seasons 2009, 2010, and 2011. Attached to this Agreement as Exhibit A is the same Cheerleading Agreement as is attached to Ms. Ferrari's affidavit. It should be noted that both Bills-Citadel Agreement were attached as Exhibits in the submissions by the NFL in support of its Motion to Dismiss Plaintiffs' Second Amended Complaint. It should also be noted that both Agreements between the Bills and Citadel were approved by Roger Goodell, the Commissioner of the NFL.

Attached to the Answer of the Defendants Mateczun and Stejon to the Plaintiffs' Second Amended and Supplemental Complaint is the License Agreement between the Bills and Stejon. It ran between February 1, 2014 and January 31, 2016. It granted Stejon exclusive cheerleading rights for the Bills home football games and stated that Stejon was solely responsible for managing the team. The Agreement stated that all performances were subject to the reasonable approval of the Bills. It also stated that the members of the Jills were to each sign a Waiver and Release form which was attached and that the form was to be delivered to the Bills two weeks prior to the first home preseason game. No copy of the Waiver and Release form was attached. However, a copy is attached to Melissa Phillips' affidavit which is identical to that signed by Ms. Ferrari. Ms. Phillips' affidavit ha been submitted in support of this motion. Ms. Phillips was a member of the Jills for the 2013-2014 season. She signed the Waiver and Release form on March 19, 2013. She also stated

in her affidavit that Stejon operated the Jills at the time and that her direct supervisor was Stephanie Mateczun.

Alyssa Urson also signed an Affidavit which has been submitted in support of the instant motion. She stated in her affidavit that she was a member of the Jills squad during the 2012-2013 season. She stated that at the time the Jills were operated through Stejon. She stated that her direct supervisor was Stephanie Mateczun. She stated that she also was required to sign the same Cheerleader Waiver and Release Form referred to above prior to the season beginning.

Maria Pinzone also submitted an affidavit in support of the instant motion. She has stated in her affidavit that she was also a Jill Cheerleader for the 2012-2013 season. She stated that the Jills were operated by Stejon. She stated that her direct supervisor was Stephanie Mateczun. She stated she was required to sign the same Cheerleader Agreement mentioned above.

Jaclyn Cole also submitted an affidavit in support of the instant motion. She stated that she was a cheerleader with the Jills during the 2010-2011, 2011-2012, and 2012-2013 seasons. She stated that the Jills were operated by Citadel for the first two seasons she was a Jill, but that Stejon operated the Jills for her last season. She stated that Stephanie Mateczun was her direct supervisor while Citadel operated the Jills and she was also her direct supervisor while Stejon operated the Jills. Ms. Cole stated that there was practically no difference working under Citadel and working under Stejon.

All five cheerleaders stated in their affidavits that the vast majority of the appearances made by the Jills were made in the capacity of Buffalo Bills cheerleaders. They stated that the primary purpose of the cheerleaders practices was to perfect their cheerleading performances for Buffalo Bills

home games. They stated that the Jills were required to provide cheerleading services for the Buffalo Bills home games without cash compensation.

In Ms. Mateczun's Response to the Plaintiffs' First Set of Interrogatories she has stated that she was the Buffalo Jills Director for Citadel (No. 19, p. 12) and for Stejon and that there was no significant change in operational policy with Stejon once it took the Jills over (No. 4, pp. 4-5). Also, she stated that the Bills did not provide any monetary compensation to Stejon or her for appearances made by the Jills (No. 3, p. 4). In Ms. Mateczun's Second Cross-Claim she states that from 2008 through 2011 she was an employee of Citadel responsible for managing the Buffalo Jill for Citadel (#57).

Ms. Mateczun stated in her cross-claims against the Bills and Citadel, "Despite the lack of financial support, the Buffalo Bills cheerleaders are controlled by the Buffalo Bills Management" (7).

Ms. Mateczun also stated in her response to Plaintiffs' First Set of Interrogatories, "The Buffalo Bills operated the Buffalo Jills through Stejon Production Corporation by exercising control over the Buffalo Jills routines, musical selection, sponsorships, physical appearance...and all aspects of being a member of the Buffalo Jills as outlined in the Code of Conduct and other rules disseminated to the Jills by Stejon. The Buffalo Jills operate for the benefit of the Buffalo Bills " (No. 5, p. 5).

Therefore, the Plaintiffs have submitted evidence from April 9 and April 27, 2008 to the present that the members of the Jills cheerleader squad were required to work for the defendants not as employees but as independent contractors and not paid by the Bills or the other defendants, when in fact they were employees of the defendants. Given the above, the defendants would be in

violation of the various causes of action the plaintiffs have alleged dealing with their wage claims. The Bills would be responsible for requiring the other employer defendants to misclassify the Jills and the NFL would be responsible for affirmatively approving the unlawful practice.

As far as the class certification requirements of CPLR 901(a), in Ms. Mateczun's response to Plaintiffs' First Set of Interrogatories, she stated that there were approximately 40 positions open on the Buffalo Jills for each season. There are six seasons of cheerleading at issue. Also, the Bills have admitted that it issued security credentials to 134 individual that it believed were engaged as cheerleaders at its home games (See Bills response to Plaintiff's Interrogatory No. 27).

Therefore, the first requirement that the putative class of cheerleaders be so numerous that joinder be impracticable has been met (See *Nawrocki v. Proto Constr. and Dev. Corp.*, 27 Misc. 3d 1211 (A). "The threshold for impracticality of joinder seems to be around forty").

The next requirement for class certification is that common questions of law predominates over questions affecting individual members. The common questions are the misclassification of the Jills cheerleaders as independent contractors and the actions of the defendants in not paying them their mandated minimum wages as employees. The defendants have argued that the details of the Jills' work and payment would require that each Jill be dealt with individually and militate against a determination done by class. However, Stejon and Mateczun have disclosed employment records for Gina (last name unknown), Jaclyn Cole, Alyssa Urson, and Maria Pinzone for the 2012-13 season and Melissa Phillips for the 2013-2014 season. The records include not only the hours spent at cheerleading practice and games but also the time spend at other appearances and the amount each cheerleader was paid. Since Ms. Mateczun ran the Citadel organization as well as Stejon for the six year period and has admitted that Citadel was operated in much the same way as she did Stejon,

similar records should be available for the six seasons in question. If all the records are not available, they should be able to be recreated from the existing records which would reflect the typical time necessary to prepare the squad in practices and the time spent at home games. The affidavits of the cheerleaders have stated that the vast majority of their time was spent in cheerleader related activities.

Jaclyn Cole stated in her affidavit that while Ambassador Jills attended less practices than performing Jills they made up much of the difference with additional personal appearances. Melissa Phillips stated in her affidavit that she worked as both a performing Jill and am Ambassador Jill and she repeated that the Ambassador Jills made up the lack of attending practices with making personal appearances. Jaclyn Cole also stated in her affidavit that since she worked as a Jill for two seasons under Citadel and one season under Stejon, she observed that there was no difference in how these two organizations ran the Jills cheerleading squad.

As stated earlier, Ms. Mateczun's Response to the Plaintiffs' First Set of Interrogatories was that she was the director of the Jills cheerleading squad for the six years at issue and that the Jills were operated in the same way throughout that six year period. In other words, the evidence is that there was no difference as to which entity ran the cheerleading organization. Also, as a consequence, the Plaintiffs would be able to serve as representatives of cheerleaders in seasons during which they were not employed.

Therefore, the various distinctions the defendants have sought to draw in the circumstances of the cheerleaders employment which would arguably require individual proof of liability do not exist or are not significant enough to require individual proof. As the plaintiffs have maintained, their proof as to the circumstances of their employment would be in the form of documentation and

through the class representative who could testify for the members of their class since they were all treated in the same way. Also, as the plaintiffs have argued, all the Jills were governed by the same agreement they were required to sign and the same code of conduct. As the plaintiffs have argued, these factors are the overarching issues in their litigation. The putative cheerleaders' responsibilities were essentially the same and their pay can readily be ascertained once liability has been established. "The fact that different trades are paid on a different wage scale and thus have different levels of damage does not defeat certification...The ability to resolve such inquiries by referring to payroll and other documentary evidence distinguishes this case from those in which individualized inquiries defeat commonality..." (cites omitted), *Kudinov et al v. Kel-tech Construction, Inc.* et al, 65 AD3d 481, 482).

The defendants Bills and Citadel have maintained that common issues with respect to plaintiffs' common law claims do not predominate.

As to common law fraud, each Jill was subject to the same misrepresentation set forth in the Cheerleading Agreement which they were required to sign. The falsity of the Agreement is evident in the strictures of the Code of Conduct that bound them which treated them as employees.

"Because the reliance issue ordinarily is specific to each individual, it presents one of the most frequent stumbling blocks to certification in fraud cases "(McKinney's CPLR 901, commentaries by Vincent C. Alexander, C901.15, pp 88-89 (cites omitted)).

However, "As has been oft times stated, in fraud cases, where identical representations are made in writing to a large group, individual questions of reliance do not justify denial of class status...(cites omitted) "(*Pruitt v. Rockefeller Center Properties Inc.*, et al, supra).

The defendants have claimed that the plaintiffs were in fact independent contractors. However, they cannot sustain that claim in the face of the Code of Conduct that bound them and treated them as employees. By definition the defendants could not produce a viable cheerleading squad with independent contractors.

The defendants have argued that they should be able to individually question the putative cheerleaders on the issue of whether they had a reasonable opportunity to discover that they were rejecting the possibility of union representation.

However, the NLRB decision occurred when the cheerleaders were youngsters so that it would be unusual if they were aware of the issue. Moreover, what cheerleaders would agree if they knew it would cost them over $20,000, as claimed by the plaintiffs. Finally, as the plaintiffs have argued, the cheerleaders would not have agreed to the misrepresentation if they had known that they were participating in the commission of a crime by agreeing to serve as Bills cheerleaders.

Therefore, if the plaintiffs were individually questioned by the defendants on the issue of reliance, it would not be productive since they would also be examined on the other consequences of the misrepresentation as set forth above.

The other common law claims are also not amenable to being resolved individually for the same reasons. The plaintiffs' claims based on quantum meruit and unjust enrichment are based on all of the Jills being required to falsely commit themselves to being treated as independent contractors and not being paid legitimate wages. The equities that flow from their situation are apparent and the wages that they are owed are easily computed.

However, class certification does not lie for putative class members for a retaliatory counterclaim that has now been dismissed. Individual questioning would be appropriate to determine if the class members were aware of this counterclaim.

The typicality requirement of CPLR Section 901 (a)(3) has been met since the putative Jills claims are identical. The claims are based on the actions of the defendants in requiring the Jills to execute illegal independent contractor agreements and then failing to compensate them at the minimum wages required by law. The distinctions sought to be drawn by the defendants in the manner of the plaintiffs' employment have been shown to not amount to real differences (see above).

The adequacy requirement of CPLR Section 901(a)(4) has also been met. The plaintiffs have experienced identical or similar cheerleading activities or appearances to the putative members of the class and subclass. They have pursued the instant litigation with fortitude and would be expected to continue to do so. They have waived their right to pursue liquidated damages to enable them to bring their wage claims on a classwide basis. However, the members of the putative class can still assert a claim including one for liquidated damages by opting out of the classwide action.

The Plaintiffs' counsel has also pursued the instant litigation vigorously and with skill and would be expected to continue to do so. The fact that there are three law firms representing the plaintiffs is not inordinate given the fact that they are opposing four law firms representing the defendants.

Finally, the plaintiffs have also met the requirement of CPLR Section 901(a)(5) as to the superiority of a class action over other available methods for the fair and efficient adjudication of the controversy. There is no guarantee that the Department of Labor would pursue the plaintiffs'

claim for unpaid wages. Moreover, some claims could not be brought because of the statute of limitations if the claims were brought now.

A class action would be a far more efficient means of litigation as opposed to a multitude of individual lawsuits that would be necessary in the instant situation.

Finally, there is a societal benefit to pursuing a class certification because it would induce social and ethical behavior in large entities, as are involved in the instant litigation.

The Court has considered the factors listed in CPLR Section 902 in determining whether the action may proceed as a class action.

The fact that there is a separate action pending concerning two other Jills does not mean that a multitude of separate actions are preferable. A class action is still the most efficient manner of resolving the instant controversy. Class members still have the option of not joining the class action and proceeding individually. As it is, both cases have been litigated together in a most efficient manner. None of the defendants have challenged the current choice of forum, which is entirely appropriate for a case concerning the welfare of Buffalo area workers.

Finally, as to the management difficulties likely to be encountered (CPLR Section 902(5), the commonality requirement has been shown to dominate over individual differences. The individual cheerleaders worked in similar fashion and their wages can be readily proven through documentation and the testimony of class representatives.

Therefore, the Court finds first that the prerequisites under CPLR Section 901 have been met for a class action. The Court also finds that after considering the matters under CPLR Section 902, a class action is the most efficient and appropriate manner of resolving the instant litigation. Accordingly, the class of Jills cheerleaders from April 9, 2008 forward to the subclass from

April 27, 2008 forward are certified as class actions pursuant to CPLR Article 9. Their counsel are also certified as class counsel.

The defendants are directed to provide contact information for absent class members within 21 days of the Court's Order granting the instant motion.

The plaintiffs are permitted to issue notice to the putative class in the form of the revised Notice of Pendency submitted by the plaintiffs. The opt-out process is the fairest form of notice and the form tested by usage in other class action cases.

The plaintiffs are directed to submit an Order embodying the instant Decision forthwith.

SUBMIT ORDER.

Buffalo, New York
January 4, 2016

Hon. Timothy J. Drury, J.S.C.

GRANTED

JAN 05 2015

BY: JUDITH M. CONNERS
COURT CLERK