SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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MARCIN BANASIAK and ANDRZEJ BANASIAK, individually and on behalf of all other persons similarly situated who were employed by FOX INDUSTRIES, LTD. and/or any other entities affiliated with or controlled by FOX INDUSTRIES, LTD.

Plaintiffs,

- against -

FOX INDUSTRIES, LTD., and/or any other entities affiliated with or controlled by FOX INDUSTRIES, LTD., and ARCH INSURANCE COMPANY,

Defendants.

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Index Number:150233/2015

DECISION AND ORDER

Motion Seq. No. 002

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 3, were used on plaintiff's motion, pursuant to CPLR 901 and 902, to certify this action as a class action:

Papers Numbered:

Notice of Motion - Affirmation - Affidavits - Exhibits (memorandum of law) 1
Affidavit in Opposition - Exhibits (memorandum of law) 2
Reply Affirmation - Reply Affidavit (reply memorandum of law) 3

Upon the foregoing papers, the motion is granted.

Background

On January 8, 2015, plaintiffs Marcin Banasiak and Andrzej Banasiak, construction workers formerly employed by defendant Fox Industries, Ltd. ("Fox"), commenced this action to recover wages and supplemental benefits allegedly due to them and a putative class of Fox's former and current employees, for construction-related work performed on various public works projects for Fox. The complaint asserts three causes of action: (1) the first against Fox for breach of the public works contracts in failing to pay plaintiffs prevailing wages; (2) the second against Arch Insurance Company ("Arch") and various (as yet unnamed) bonding companies for payment of wages and supplemental benefits under certain labor and material payment bonds issued to Fox; and (3) the third against Arch and the bonding companies for payment of wages and supplemental benefits under the aforesaid bonds pursuant to Labor Law § 220-g. On March 15, 2015, Fox and Arch (represented by the same attorneys) served an answer, in which they deny the material allegations of the complaint and raise various affirmative defenses, including, inter

alia, that plaintiffs cannot meet the criteria necessary to maintain a class action. On March 20, 2015, plaintiffs moved to extend their time to seek class certification to the close of pre-certification discovery, and this Court granted the motion by Order dated May 4, 2015. Apparently, between early May 2015 and early November 2015, the parties completed pre-certification discovery, including depositions of named plaintiffs.

Plaintiffs now move, pursuant to CPLR 901 and 902, for class certification. In support of the motion, plaintiffs submit, inter alia: (a) their own affidavits, as well as the affidavits of four other former Fox employees, each attesting that they were paid the same hourly wage regardless of the type of work performed (i.e., they were mis-classified under the prevailing wage schedules), were paid for fewer hours than they worked, and that 50-100 other Fox workers were similarly mis-classified and underpaid; (b) the public works contracts; (c) the prevailing wage schedules; and (d) Fox's certified payroll documents. Plaintiffs argue that the putative class satisfies CPLR 901, in that: (1) the evidence reveals there are at least 40 and as many as 100 other workers who were deprived of wages, and therefore the class is so numerous that joinder of all plaintiffs is impracticable; (2) common questions of law and fact predominate throughout the class, for instance, inter alia, whether Fox paid its workers correct prevailing wages and benefits for the work they performed, and whether Fox paid its workers for all hours worked; (3) the named plaintiffs' prevailing wage and benefits claims are typical of those of the proposed class; (4) the named plaintiffs and their attorney will adequately represent the class; and (5) a class action is superior to any other remedies available to the putative plaintiffs. Plaintiffs also argue that the Court should grant certification under CPLR 902 because (1) there is no competing litigation by any member of the proposed class; (2) the existence of 50 - 100 class members makes separate actions impracticable and inefficient; (3) New York State Supreme Court is the appropriate forum because the Public Works projects were within New York; and (4) it will not be difficult to manage the class action as compared to managing separate actions.

Fox opposes the motion by way of the affirmation of its attorney, to which is annexed, inter alia, the named plaintiffs' wage claim submissions to the NYS Department of Labor, and deposition transcripts. Fox also submits the affidavit of its vice-president and co-owner, George Curis, attesting, inter alia, that Fox had consulted with the MTA about the proper worker classifications and properly paid its workers prevailing wages and supplemental benefits; Fox classified and paid its workers at the higher wage rate of "laborer" even when they were not performing laborer worker; and workers signed a form when they received their weekly paychecks indicating that they reviewed the hours paid. In support of the claim that Fox properly paid its workers, Mr. Curis attaches to his affidavit: (a) his typewritten notes of Fox's meeting with the MTA purportedly clarifying worker classifications; and (b) the affidavits of 37 current, and 15 former, of Fox's workers, each attesting, essentially, that they were paid the correct prevailing wage and for the correct hours worked. Fox argues that the class should not be certified because: (1) plaintiff's claims "have no merit"; (2) plaintiffs can not show "the required forty (40) class members"; (3) plaintiffs can not adequately represent the class because of "substantial and self-evident conflicts of interest between members of the proposed class"; and (4) the Department of Labor is the superior adjudication forum because it has the expertise to determine proper "trade classifications," which is at the heart of the instant matter.

In reply, plaintiffs argue that, under well-settled New York law, which liberally construes Article 9, plaintiffs have established that their claims against Fox "are not a sham." Plaintiffs argue that

the worker affidavits submitted by Fox are unreliable, insufficient to rebut their showing, and should be disregarded. Plaintiffs submit an affidavit from Carlos Serrano, a worker currently employed by Fox, stating that, on December 22, 2015, his supervisor asked him to sign a papers about a lawsuit, but "did not explain what the case was about," and that he refused to sign the papers. Plaintiffs also argue that, as demonstrated by their deposition transcripts, they are credible and very familiar with the specifics of the claims herein. As to superiority, plaintiffs argue that they are not required to pursue their claims with the Department of Labor, and cite several First Department and New York Supreme Court cases involving similar claims for prevailing wages and benefits in which the Courts certified, or upheld certification of, the class.

Discussion

A proponent of class certification under CPLR 901(a) bears the burden of satisfying, by evidence in admissible form, the following five criteria: (1) 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); (3) the claims or defenses of the class representatives are typical of those in the class (typicality); (4) the class representatives will fairly and adequately protect the interests of the class (adequacy of representation); and (5) a class action represents the superior method of adjudicating the controversy (superiority). CPLR 901(a)(1) - (5); see also Pludeman v Northern Leasing Sys., Inc., 74 AD3d 420, 422 (1st Dep't 2010) (class certification proponent "bears the burden of establishing the criteria promulgated by CPLR 901(a) (citations omitted) and must do so by the tender of evidence in admissible form"). Once the initial burden is met, the Court must then consider the factors set forth in CPLR 902, to wit: the interest of individual class members in maintaining separate actions and the feasability 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.

The decision as to whether the proponent's proof satisfies the CPLR 901 and 902 criteria rests within the Court's sound discretion and the Court may make a "limited inquiry" into the merit of plaintiffs' claims; however, plaintiff is required to meet only a minimum threshold showing that "on the surface there appears to be a cause of action which is not a sham." See Pludeman v Northern Leasing Sys., Inc., supra 74 AD3d at 422; City of New York v Maul, 14 NY3d 499, 508-509 (2010)

On this record, plaintiffs have met their burden of establishing entitlement to class certification pursuant to CPLR 901, in that they have demonstrated numerosity, commonality, typicality, adequacy of representation, and superiority. Plaintiff s have also satisfied the elements required for class certification under CPLR 902.

At the outset, this Court rejects, as contrary to New York's well-settled law, Fox's contention that the Court should apply the more restrictive, "higher standard" for class certification as is found in Federal Rule 23, and in doing so, find that plaintiffs' claims "have no merit." See Stecko v RLI Ins. Co., 121 AD3d 542, 543 (1st Dep't 2014) ("We note that the motion court was not required to apply the 'rigorous analysis' standard utilized by the federal courts in addressing class certification motions under rule 23 (b) of the Federal Rules of Civil Procedure, given this Court's recognition that CPLR 901 (a) 'should be broadly construed' and that 'the Legislature

intended article 9 to be a liberal substitute for the narrow class action legislation which preceded it'"). Indeed, Fox's reliance on City of New York v Maul, 14 NY3d 499, 508-509 (2010) and O'Hara v Del Bello, 47 NY2d 363, 368-369 (1979), to support its argument in this regard is misplaced, as these cases reiterate the principal that Article 9 is to be liberally construed and that searching inquiry into the merit of plaintiff's claims is not required. Equally unavailing is Fox's reliance upon Corsello v Verizon New York, Inc., 18 NY3d 777, 792 (2012), to support its argument that class certification should be denied because plaintiffs' claims lack merit. In Corsello, the Court of Appeals upheld the denial of class certification upon the distinct grounds that the plaintiffs failed to meet the commonality and typicality requirements of CPLR 901, and rejected the defendant's argument that the plaintiff's claims had no merit. Corsello v Verizon New York, Inc., supra, 18 NY3d at 792 ("We do not imply that Verizon's evidence necessarily defeats plaintiffs' claims on the merits"). Because, as shown below, plaintiffs have satisfied their minimal threshold burden for class certification, Fox's attempts to attack the merits of plaintiffs' claims by way of Mr. Curis's affidavit and the affidavits of Fox's 52 former and current workers, purporting to show that plaintiffs were properly classified and fully paid, is futile. At best, Fox's purported proof on the instant motion merely raises questions of fact to be determined at trial. See Weinstein v Jenny Craig Operations, Inc., 981 NYS2d 639 (Supreme Court New York County 2013) ("The court finds these painstaking assaults on the merits of plaintiffs' case to be futile.").

CPLR 901(a)(1): Numerosity. The affidavits of named plaintiffs, and the affidavits of four other former Fox employees and one current employee, each attesting that they recalled working with at least 50 and up to 100 other workers who were mis-classified and underpaid, demonstrate that the class is so numerous that joinder of all members is impracticable. CPLR 901(a)(1); Stecko v RLI Ins. Co., supra 121 AD3d at 542-543; Dabrowski v Abax Incorp., 84 AD3d 633 (1st Dep't 2011); Galdamez v Biordi Construction Corp., 50 AD3d 357 (1st Dep't 1008). The Court declines to consider the 52 affidavits of Fox's current and former employees purporting to opt-out of the class, as they raise more issues than they answer (i.e., whether they were signed under circumstances which would give rise to an inference of coercion). See Alfaro v Vardaris Tech, Inc., 69 AD3d 436 (1st Dep't 2010). Even if the Court considers Fox's affidavits, plaintiffs still meet the numerosity requirement because (a) it is undisputed that there were 104 workers on one of the public works projects at issue, leaving at 52 least putative class members; and (b) even if the putative class ultimately consists of fewer than 40 of Fox's current and former workers, that number is still sufficient as "the legislature contemplated classes involving as few as 18 members." Borden v 400 East 55th St. Assoc., L.P., 24 NY3d 382, 399 (2014).

CPLR 901(a)(2), (3): Commonality and Typicality. It is clear to this Court plaintiffs have satisfied the commonality and typicality requirements. There are common questions of law and fact as to whether Fox mis-classified its workers, failed to pay proper prevailing wages and benefits, and systematically underpaid its workers, which predominate throughout the class. CPLR 901(a)(2), (3); see Pludeman v Northern Leasing Sys., Inc., supra 74 AD3d at 422-423; Dabrowski v Abax Incorp., supra 84 AD3d at 634. Indeed, in arguing that the Department of Labor is the superior venue for plaintiffs' claims, Fox admits that there is a "unique" common question of law on the alleged mis-classification of Fox's workers. Contrary to Fox's argument, that class members will have different, individualized damages claims because different trades are paid different wages and class members worked different hours, does not preclude class

certification. See Stecko v RLI Ins. Co., supra 121 AD3d at 543 ("The fact that 'different trades are paid on a different wage scale and thus have different levels of damages does not defeat certification.'").

CPLR 901(a)(4): Fair and adequate representation. The Court finds that the named plaintiffs will fairly and adequately protect the interests of the class as they have more than a general awareness of the claims, and, from the outset, have been actively involved in this litigation, including showing up for depositions. See Williams v Air Serv Corp., 121 AD3d 441 (1st Dep't 2014). Moreover, plaintiffs attorneys have demonstrated their expertise and zealous representation of plaintiffs herein, as well as in several prior class actions. See Dabrowski v Abax Incorp., supra 84 AD3d at 634. This Court rejects, as unavailing, Fox's argument that the named plaintiffs have a conflict with other putative class members in that named plaintiffs are "competing with" the putative class members for a limited number of higher wage jobs allegedly available on the subject public works projects. The issue to be determined is whether Fox mis-classified and underpaid its workers for the work they actually performed on the public works projects, and named plaintiffs seek the same relief as the class members – to be paid what they were owed. Thus, there is no conflict. See Nawrocki v Proto Const. & Dev. Corp., 82 AD3d 534 (1st Dep't 2011) ("The record reveals no conflict of interest between the class members and the class representatives. Indeed, plaintiffs seek the same relief as the class members–to receive the wages and benefits allegedly owed to them under public works contracts.").

CPLR 901(a)(5): Superiority. Plaintiffs cite a wealth of authority in which the First Department upheld class certification in prevailing wage actions similar to the instant action, and Fox has failed to distinguish, on the facts or the law, a single case cited by plaintiffs. Indeed, this lawsuit is superior to the prosecution of individualized claims in an administrative proceeding before the Department of Labor, "given the difference in litigation costs and the modest damages to be recovered by each individual employee." Williams v Air Serv Corp., supra 121 AD3d at 442.

Finally, this Court finds that plaintiffs satisfied the additional factors set forth in CPLR 902, demonstrating that class certification is warranted. The Court has considered the parties' other arguments and finds them to be unavailing.

Conclusion

Plaintiffs' motion for class certification is hereby granted.

Dated: March 23, 2016

Arthur F. Engoron, J.S.C.