Juarez v USA Roofing Co. Corp.
2016 NY Slip Op 31735(U)
September 16, 2016
Supreme Court, New York County
Docket Number: 651437/13
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 45

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JACOBO JUAREZ and NOEL VELASCO, individually and on behalf of all other persons similarly situated who were employed by USA ROOFING COMPANY CORP. and TRIBECA CONTRACTING CORP., along with other entities affiliated or controlled by USA ROOFING COMPANY CORP. with respect to certain Public Works Projects awarded by THE CITY OF NEW YORK, THE NEW YORK CITY HOUSING AUTHORITY, and THE NEW CITY SCHOOL CONSTRUCTION AUTHORITY,

Index No. 651437/13
Motion Seq. 006

Plaintiffs,

- against -

USA ROOFING COMPANY CORP., DEAN BUILDERS GROUP, INC., NEELAM CONSTRUCTION CORPORATION, OLYMPIC CONTRACTING, CORP., P&K CONTRACTING, INC., PADILLA CONSTRUCTION SERVICES, INC., TRIBECA CONTRACTING CORP., ZORIA HOUSING LLC and JOHN DOE BONDING COMPANIES 1-20,

Defendants.

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HON. ANIL C. SINGH:

Plaintiffs Jacobo Juarez and Noel Velasco, individually and on behalf of all others similarly situated move to certify this action as a class action pursuant to CPLR 901.

Defendants USA Roofing Company Corp. (USA), Neelam Construction Corporation (Neelam), Olympic Contracting Corp. (Olympic), Padilla Construction Services, Inc. (Padilla), and Zoria Housing LLC (Zoria) cross-move for an order

dismissing the action as against all defendants, striking the second amended complaint as against all defendants and/or rendering a judgment by default against plaintiffs.

Defendant Dean Builders Group, Inc. (Dean) cross-moves for an order deeming that the issue of the hours allegedly worked by plaintiffs is resolved in accordance with defendants' claims, prohibiting plaintiffs from supporting any claims that they worked additional hours, striking plaintiff's second amended complaint, and rendering judgment in favor of defendants.

Defendant Tribeca Contracting Corp. (Tribeca) joins in USA's and Deans' cross motions.

Plaintiffs contend that they and the putative class are entitled to wages and benefits for work performed on various public works projects under contract with New York City, New York State, and other government authorities. Plaintiffs contend that defendants compensated them at a lower prevailing wage and benefit rate than plaintiffs were entitled to receive for their work, and that defendants failed to pay plaintiffs for all the hours worked. It is alleged that defendants routinely under reported the number of hours worked and that, as a result, plaintiffs and the putative class members were deprived of overtime compensation.

The second amended complaint alleges that USA and Tribeca employed plaintiffs to work on projects where Dean, Neelam, Olympic, Padilla, and Zoria were the general contractors. It is alleged that each contractor set work schedules, directed the work, and had substantial control over plaintiffs' working conditions. It is alleged that the public works contracts required the general contractors to oversee the performance of the work and to ensure that workers were paid prevailing wages and supplemental benefits, including overtime wages. It is alleged that the general contractors failed to ensure that USA and Tribeca made the appropriate payments.

As against USA and Tribeca, the first cause of action is based on breach of contract, the second is based on violation of Labor Law § 663 and 12 NYCRR 142-2.2, and the fourth is based on failure to pay wages pursuant to Labor Law §§ 190, 191, 198, and 198(1-a). As against Dean, Neelam, Olympic, Padilla, and Zoria the third cause of action is based on breach of contract. As against the bonding companies, the fifth cause of action is based on violation of their assumed liability to pay plaintiffs prevailing wages and supplemental benefits pursuant to the terms of each bond, and the sixth is based on Labor Law §§ 220 (8) and 220-g.

Plaintiff Noel Velasco and putative class members submit affidavits in support of class certification. Velasco states that he worked as a roofer for USA from May 2008 until March 2011. "I remember working with no less than 100

workers when I worked for" USA (Velasco aff, ¶ 5). He remembers the first names of 10 coworkers and the full name of one coworker. He was paid between $38 and $39 per hour. Velasco states that his and his coworkers' checks regularly showed far fewer hours than they actually worked. Other coworkers were paid a flat daily rate that ranged between $100 and $120 per day, regardless of how many hours they worked. He and his coworkers routinely spoke with each other about their wages and the fact that the pay stubs did not correspond to the days or hours actually worked. Velasco states that "USA was often the subcontractor at the projects" (*id.*, ¶ 12). He remembers working on projects where Neelam and Tribeca were the general contractors and receiving checks from USA and Tribeca. At any one project, he worked with between 12 and 20 different workers.

The affidavits of Jorge Sol, Juan Miguel Garcia, and Israel Ayala for the most part contain the same allegations as Velasco's affidavit. Where there are differences, they are noted.

Jorge Sol's affidavit says that he worked for USA from June 2011 until December 2012. He worked with up to 40 different workers at any one project. The affidavit of Juan Miguel Garcia states that he worked for USA from January 2010 until December 2012. He was a roofer and sometimes a metal worker. He was paid the flat rate of $170 a day, in cash, regardless of how many hours he worked. The

affidavit of Israel Ayala says that he worked as a roofer and metal worker for USA from February 2010 until September 2011. He remembers working with no less than 50 workers. He says the same as Velasco regarding his wages. He remembers working on projects where Neelam, Tribeca and Padilla were the general contractors.

CPLR 901 (a) lists the prerequisites to a class action.

> "(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"

(*Ackerman v Price Waterhouse*, 252 AD2d 179, 191 [1st Dept 1998]).

Once the requirements of CPLR 901 are satisfied, the court considers the elements set forth in CPLR 902. Those are the possible interest of class members in maintaining separate actions, the feasibility of separate actions, pending litigation regarding the same controversy, the desirability of the proposed forum for the class action, and the difficulties likely to be encountered in managing a class action (*Ackerman,* 252 AD2d at 188).

Whether a particular lawsuit qualifies as a class action ordinarily rests within the sound discretion of the trial court (*Globe Surgical Supply v GEICO Ins. Co.,* 59

AD3d 129, 136 [2d Dept 2008]). Class action certification is appropriate if on the surface there appears to be a cause of action which is not a sham (*Brandon v Chefetz,* 106 AD2d 162, 168 [1st Dept 1985]). The criteria are construed liberally in favor of class certification (*Kudinov v Kel-Tech Constr. Inc.,* 65 AD3d 481, 481 [1st Dept 2009]; *Pruitt v Rockefeller Ctr. Props.,* 167 AD2d 14, 21 [1st Dept 1991]). At the same time, certification will not be granted where the law and the facts do not warrant it (*Evans v City of Johnstown*, 97 AD2d 1, 2 [3d Dept 1983]). Plaintiffs, as the parties seeking class certification, bear the burden to present evidence establishing the criteria (*Kudinov,* 65 AD3d at 481). Plaintiff must provide an evidentiary basis for class certification, and conclusory assertions and assumptions are insufficient to satisfy the statutory criteria (*Pludeman v Northern Leasing Sys., Inc.,* 74 AD3d 420, 422 [1st Dept 2010]; *Katz v NVF Co.,* 100 AD2d 470, 473 [1st Dept 1984]).

Defendants argue that commonality and typicality are lacking in this case, as plaintiffs do not have claims against all the defendants. This argument is related to the threshold issues of standing and identification of the proposed class.

Individual standing is a threshold requirement to maintain an action, including a class action (*Murray v Empire Ins. Co.*, 175 AD2d 693, 695 [1st Dept 1991]; *Raske v Next Mgt., LLC,* 40 Misc 3d 1240[A], 2013 NY Slip Op 51514[U] [Sup Ct, NY

County 2013]; *Ryan, Inc. v New York State Dept. of Taxation & Fin.*, 26 Misc 3d 563, 567 [Sup Ct, NY County 2009], *affd* 83 AD3d 482 [1st Dept 2011]). A plaintiff has no standing to sue a given defendant when she or he has not alleged any injury caused by that defendant (*see Silver v Pataki,* 96 NY2d 532, 539 [2001]; *Tegnazian v Consolidated Edison,* 189 Misc 2d 152, 156 [Sup Ct, NY County 2000]). In a class action, "for every named defendant there must be at least one named plaintiff who can assert a claim directly against that defendant" (*Central States SE & SW Areas Health & Welfare Fund v Merck–Medco Managed Care, LLC*, 504 F3d 229, 241 [2d Cir 2007]).[1] The class representatives "'must allege and show that they have personally been injured, not that injury has been suffered by some other, unidentified members of the class to which they belong and which they purport to represent'" (*Simon v Eastern Ky. Welfare Rights Org.*, 426 US 26, 40 n 20 [1976], quoting *Warth v Seldin,* 422 US 490, 502 [1975]; *Policemen's Annuity & Benefit Fund of City of Chicago v Bank of Am., NA*, 907 F Supp 2d 536, 545 [SD NY 2012]). It is not necessary that each named plaintiff have a claim against each named defendant;

[1] 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 Matter of Colt Indus. Shareholder Litig.*, 77 NY2d 185, 194 [1991]). Because of the similarity, resort may be made to federal cases in determining whether to grant class action status (*City of New York v Maul,* 14 NY3d 499, 510-511 [2010]).

rather, for every named defendant there must be at least one named plaintiff who can assert a claim directly against that defendant (*Central States,* 504 F3d at 241). A class representative must be eligible to sue in his or her own right, otherwise that person cannot act as class representative (*Akerman v Oryx Communications*, 609 F Supp 363, 376 [SD NY 1984], *affd and remanded* 810 F2d 336 [2d Cir 1987]]).

In this case, plaintiffs do not show that there they have standing to maintain claims against general contractor defendant Neelam, Olympic, Padilla, Zoria, or Dean. For standing to exist each defendant would have had to employ at least one named plaintiff, so that there would be at least one who could make a claim against the defendant, and that is not alleged. USA and Tribeca are exceptions. The complaint alleges that USA and Tribeca "employed and/or jointly employed" plaintiffs, and that those companies "are single and/or joint employees under the [Labor Law] in that they share a common business purpose and ownership, maintain common control, oversight and direction over" plaintiffs' work (Second amended complaint, ¶ 4, 5, 6). Therefore, while standing is alleged for USA and Tribeca, it is not alleged for the other defendants.

On a motion for class certification, the court must be convinced that the proposed class is capable of being identified (*see Colbert v Rank Am.,* 1 AD3d 393, 394-395 [2d Dept 2003]; *Lichtman v Mount Judah Cemetery*, 269 AD2d 319, 320-

321 [1st Dept 2000]). Plaintiffs move to proceed as a class thus defined: "the plaintiffs and a class of individuals employed by USA Roofing Company Corp., Dean Builders Group, Inc., Neelam Construction Corporation, Olympic Contracting Corp., Padilla Construction Services, Inc., Tribeca Construction Corp., and/or Zoria Housing LLC., who performed construction work and all work incidental thereto from April 22, 2007 through the present. The defined class shall not include any clerical, administrative, professional, or supervisory employees."

The appellation "and/or" indicates uncertainty regarding whether all of the defendants employed the members of the proposed class and thus should be named as defendants. The proposed class is not definite enough to be identifiable. As stated above, the complaint does allege that all the class members worked for USA and Tribeca. The court will evaluate whether a class action can be maintained where only these two are named as the class members' employers and defendants.

Turning now to the criteria listed in the statute, CPLR 901 (a) requires a showing that the class is so numerous that joinder is impractical. As plaintiffs point out, there is no mechanical test to determine whether there are enough putative class members to satisfy the requirement of numerosity (*Friar v Vanguard Holding Corp.*, 78 AD2d 83, 96 [2d Dept 1980]). The determination entails a case by case inquiry (*id.*). A class of approximately 40 potential members or larger has typically

been deemed sufficient for certification (*Galdamez v Biordi Constr. Corp.*, 13 Misc 3d 1224[A], 2006 NY Slip Op 51969[U] [Sup Ct, NY County 2006], *affd* 50 AD3d 357 [1st Dept 2008]; *see also Consolidated Rail Corp. v Town of Hyde Park*, 47 F3d 473, 483 [2d Cir 1995] [numerosity is presumed for a class of 40 members]; *Hoerger v Board of Educ. of Great Neck Union Free School Dist.*, 98 AD2d 274, 282 [2d Dept 1983] [44 teachers]).

Defendants point out the inconsistency between plaintiffs' claims to have worked with 100 workers and between 12 and 20 or 40 workers. According to plaintiffs, the statements mean that there were 100 or so workers on USA's payroll in total during the years of plaintiffs' employment, while at any one job site, there would be between 12 and 40 workers. It is not clear, however, whether plaintiffs are claiming that the smaller group were USA workers or workers for another contractor. Indeed, plaintiffs' statements are extremely vague on the number of workers and for whom they worked.

The attorney's affirmation in support of plaintiffs' motion refers to an exhibit as "a sampling of payroll documents produced by defendants, showing employee list of 121 individuals is annexed hereto as Exhibit I" (Coyle aff, ¶ 12). The list gives no indication of which defendant produced it or for whom the employees worked.

Plaintiffs' reply to the cross motions attaches three documents, each entitled "Certification of Payroll," listing persons identified as USA employees and their addresses. The Department of Education is identified as the maker of the documents. Each document lists the USA workers for a week ending in October 2012. Two list 20 employees each, and one lists 22 employees. With a few exceptions, all the names are the same. At most, a class of 25 people is thus identified. A class of 25 has been found not enough for certification. *See Klakis v Nationwide Leisure Corp.*, 73 AD2d 521, 521 [1st Dept 1979] [21 class members insufficient]; *Moreno v Future Care Health Servs., Inc.*, 2015 WL 1969753, 2015 NY Misc LEXIS 3371 [Sup Ct, Kings County 2015]. Courts regard "classes of approximately 30 or less as not being sufficiently numerous, although there are exceptions" (*Thomas v Meyers Assoc., L.P.*, 39 Misc 3d 1217[A], 2013 NY Slip Op 50650[U] [Sup Ct, NY County 2013] [citations and internal quotations marks omitted]; *Galdamez,* 13 Misc 3d 1224[A], 2006 NY Slip Op 51969[U]; *Gawez v Inter-Connection Elec., Inc.*, 9 Misc 3d 1107[A], 2005 NY Slip Op 51443[U] [Sup Ct, Kings County 2005], *affd* 44 AD3d 898 [2d Dept 2007]). "If the class has more than forty people in it, numerosity is satisfied; if the class has less than twenty-five people in it, numerosity is probably lacking, if the class has between twenty-five and forty, there is no automatic rule and other factors ... become relevant" (*Globe Surgical Supply v GEICO Ins. Co.*, 59

AD3d 129, 138 [2d Dept 2008] [internal quotation marks and citation omitted]); *see also*, *Dabrowski v Abax Inc.*, 84 AD3d 633, 634 [1st Dept 2011] [numerosity met with 50-100 workers]; *Weinstein v Jenny Craig Operations, Inc.*, 41 Misc 3d 1220(A) [Sup Ct, New York County 2013][J. Singh] ["[g]enerally, a prospective class of forty or more raises a presumption of numerosity")

Plaintiffs fail to satisfy the numerosity requirement. They have not shown that there are more than 25 members of the proposed class and that joining them would be impracticable. They have not shown any special factors that would call for a class of 25 or so members.

Commonality applies to the predominance of common issues, but factual questions specifically applying to each individual are not fatal to certification (*City of New York,* 14 NY3d at 514). Commonality can generally be found in a prevailing wage claim regardless of varying job titles, pay rates and project sites because contract information is typically well documented for public works projects (*Dabrowski v Abax Inc.*, 84 AD3d 633, 634 [1st Dept 2011]). Commonality exists here, as the question whether USA and Tribeca made the appropriate payments applies to all the members of the putative class.

Typicality of claims applies when the named plaintiffs' claims are derived from the same course of conduct as the class members' claims and are based on the

same cause of action (*Pruitt,* 167 AD2d at 22). The claims of the named plaintiffs, that is, the class representatives, need not be identical to those of the class and the named plaintiff need not personally assert all the claims made on behalf of the class (*id.*). Typicality exists in this case insofar as USA and Tribeca employed plaintiffs and other class members. Typicality does not exist as far as the other defendants are concerned. "As a general rule, a proposed class representative's claims will not be deemed to be typical of those of the class when the representative had no dealing with a particular defendant" (William B. Rubenstein, Newberg on Class Actions § 3:49 [5th ed 2016] [Westlaw]). Plaintiffs do not show that they had dealings with the general contractors.

Adequate representation pursuant to CPLR 901 (a) (4) requires that no conflict of interest lies between the putative class members and their representatives (*Nawrocki v Proto Constr. & Dev. Corp.*, 82 AD3d 534, 535 [1st Dept 2011]). The record does not show a conflict of interest among those who worked for USA and Tribeca. Other factors to consider are whether the class representative's understanding of the case is enough to enable that person to serve as an adequate representative and whether the attorneys have the requisite competence and experience (*Borden v 400 E. 55th St. Assoc., L.P.*, 105 AD3d 630, 631 [1st Dept 2013], *affd* 24 NY3d 382 [2014]). The named plaintiffs in this case have either

submitted to deposition or submitted affidavits. These actions show an interest in the case. In addition, their attorneys state that they are experienced commercial litigators who successfully represented workers in numerous class actions such as the instant case. They also state that they have agreed to advance all the costs of the litigation.

Pursuant to CPLR 901 (a) (5), the parties are required to establish that a class action is the best method of adjudicating the controversy. Given the small amount to be recovered by each worker, the First Department has acknowledged that class actions are the "best method of adjudicating" wage and hour disputes (*Pesantez v Boyle Envtl. Servs., Inc.,* 251 AD2d 11, 12 [1st Dept 1998]). A class action is a "superior vehicle" for resolving wage disputes involving large numbers of workers (*Nawrocki,* 82 AD3d at 536; *see also Stecko v RLI Ins., Co.,* 121 AD3d 542, 543 [1st Dept 2014]). However, in this case, there are not enough workers to certify as a class.

Since all of the requirements of CPLR 901 have not been satisfied, there is no need to consider CPLR 902. Plaintiffs' motion for class certification is denied.

Defendants' cross motions contend that plaintiffs destroyed or lost evidence which would have supported their claims. Accordingly, defendants argue, the court should determine the hours that plaintiffs allegedly worked, prohibit them from

supporting any claims that they worked additional hours, strike their second amended complaint, dismiss it as against all defendants, and render judgment for defendants.

When they were deposed, named plaintiffs Juarez and Velasco testified to keeping records of their hours and jobs while they worked for USA. Juarez testified that he threw out the records when he moved in May 2014. He said that the records were among other things that he threw out but that he did not know the records were among those other things. He said that, before May 2014, his attorney asked for the records but he did not give them to the attorney and did not search for them (Juarez tr at 27-33). In reply to defendants' cross motions, Juarez submits an affidavit in which he states that he moved in May 2011, and again in 2013 after this action commenced. He believes that he inadvertently threw out the records during the first move, but it is possible that some records were not thrown out. Any such records were lost during the second, 2013 move. Juarez says that when he was deposed he did not remember that he moved in 2011.

At his deposition, Velasco testified that he got rid of his records because he never thought that he would be involved in a lawsuit. He did not remember when he got rid of them (Velasco tr at 25, 122). In his reply affidavit, Velasco states that he believes that he threw out his records about a year after he stopped working for

defendants, and that he had no idea that he would be suing USA later. He did not know that the records would be important evidence in support of his claims.

CPLR 3126 provides that if a party "wilfully fails to disclose information which the court finds ought to have been disclosed . . . the court may make such orders with regard to the failure or refusal as are just." In deciding what sanction to apply when a party destroys or loses evidence, the court considers the degree to which the destruction or loss prejudices the other party (*Baldwin v Gerard Ave., LLC,* 58 AD3d 484, 485 [1st Dept 2009]). The party seeking sanctions for spoliation must establish prejudice, that is, that the lost evidence deprives it of the means of proving its claim or defense (*id.*; *Tommy Hilfiger, USA v Commonwealth Trucking,* 300 AD2d 58, 60 [1st Dept 2002]). But when the evidence destroyed was not central or prejudicial in its loss, a lesser sanction or no sanction may be appropriate (*Klein v Ford Motor Co.,* 303 AD2d 376, 377 [2d Dept 2003]).

The court also looks at the conduct of the spoliator. While sanctions against a spoliator of evidence may be appropriate whether the destructive conduct was negligent or intentional (*Kirkland v New York City Hous. Auth.,* 236 AD2d 170, 173 [1st Dept 1997]), striking a pleading is a drastic remedy, usually not called for "unless the evidence is crucial and the spoliator's conduct evinces some higher degree of culpability" (*Russo v BMW of N. Am., LLC,* 82 AD3d 643, 644 [1st Dept 2011]).

Conduct that is willful, contumacious, or in bad faith calls for the most drastic sanction (*Roman v City of New York,* 38 AD3d 442, 443 [1st Dept 2007]).

It is clear that Juarez's reply affidavit was tailored to address his deposition testimony that he destroyed the evidence in 2014, after this case commenced in 2013. Destroying evidence after litigation begins indicates at the least negligence, as opposed to destroying evidence before litigation begins and when there is no anticipation of litigation. In any case, regardless of when the records were destroyed, the court does not find deliberate or bad faith conduct. The deposition testimony of both plaintiffs indicates carelessness. In addition, defendants fail to show that the evidence was crucial to them. They do not address that aspect at all. Where the evidence lost is not crucial or prejudicial, no sanction or a lesser sanction may be appropriate (*Klein,* 303 AD2d at 377). This appears to be a case in which the loss is more prejudicial to the parties who lost the evidence. Given that defendants do not show injury and plaintiffs do not appear to have acted with bad intent, sanctions are not appropriate.

USA contends that plaintiffs should exhaust administrative remedies in regard to Labor Law § 220-g claim. Labor Law § 220-g enables an employee to bring an action against the surety to recover on a bond issued pursuant to section 137 of the State Finance Law (*Gawez,* 9 Misc 3d 1107[A]). While there is no private right of

action for underpayment of wages under Labor Law § 220 until there has been an administrative determination (*High Tech Enters. & Elec. Servs. of NY, Inc. v Expert Elec., Inc.*, 113 AD3d 546, 548 [1st Dept 2014]), this claim is asserted only against the bonding companies, identified as John Doe Bonding Companies, and not the other defendants. In addition, in a prevailing wage claim, failure to exhaust administrative remedies under the Labor Law is not a reason to deny certification or dismiss an action, because a party can seek relief under breach of contract (*see De La Cruz v Caddell Dry Dock & Repair Co., Inc.*, 22 AD3d 404, 405 [1st Dept 2005]; *Pesantez*, 251 AD2d at 12).

In conclusion, it is

ORDERED that plaintiffs' motion to be certified as a class action is denied; and it is further

ORDERED that the cross motion by defendants USA Roofing Company Corp., Neelam Construction Corporation, Olympic Contracting Corp., Padilla Construction Services, Inc., Tribeca Contracting Corp., and Zoria Housing LLC is denied; and it is further

ORDERED that the cross motion of defendant Dean Builders Group, Inc. is denied;

No costs.

Date: September 16, 2016
New York, New York

Anil C. Singh