SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **DEBRA A. JAMES** **PART 59**
Justice

ERJON ISUFI and ENVER KLLOGJERI, individually and on behalf of all other persons similarly situated who were employed by PROMETAL CONSTRUCTION, INC., along with other entities affiliated or controlled by PROMETAL CONSTRUCTION, INC., with respect to certain Public Works Projects awarded by the CITY OF NEW YORK, THE NEW YORK CITY HOUSING AUTHORITY,

Plaintiff,

-v-

PROMETAL CONSTRUCTION, INC., STV CONSTRUCTION, INC., and RLI INSURANCE COMPANY,

Defendants.

Index No.: 653265/2012

Motion Date: _____

Motion Seq. No.: 004

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

The following papers, numbered within 117 to 147 were read on this motion to certify a class.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No(s).	117-132
Answering Affidavits - Exhibits	No(s).	137-142
Replying Affidavits - Exhibits	No(s).	144-147

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

On this motion pursuant to CPLR 901 and 902, plaintiffs seek to certify a class as follows:

> All individuals employed by Defendant PROMETAL CONSTRUCTION, INC., along with other entities affiliated or controlled by PROMETAL CONSTRUCTION, INC., who performed construction work and all work incidental thereto from September 19, 2006 through the present on Public Works Projects, including, but not limited to, the Ingersoll Houses Project. The defined class shall

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

not include any clerical, administrative, professional, or supervisory employees.

Plaintiffs bring this putative class action seeking the recovery of prevailing wages and/or supplemental benefits and overtime allegedly owed to them by the defendants on the theory that plaintiffs are third-party beneficiaries. By decision and order of this same date the court has denied defendants' motion to dismiss plaintiff's complaint.

Plaintiffs assert in their complaint that they were employees of defendant Pro-Metal Construction, Inc. (Pro-Metal) and that at the time of their employment Pro-Metal was acting as a subcontractor to STV Construction, Inc. (STV) on a construction job at the New York City Housing Authority's (NYCHA) Walt Whitman and Raymond V. Ingersoll Houses in Fort Greene, Kings County. The contract between STV and NYCHA dated October 22, 2009, provided that STV "and its subcontractors shall pay to all laborers and mechanics employed in the Work not less than the wages prevailing in the locality of the Project, as predetermined by the Secretary of Labor of the United States pursuant to the Federal wage rate requirements set forth at 40 U.S.C. §1341 et seq. (formerly known as the Davis-Bacon Act) and other related laws and regulations." See Labor Law 220. Similarly STV's subcontract with Pro-Metal similarly provided that it would comply with prevailing wage rate requirements.

Plaintiffs allege in their complaint that defendants breached these contracts by failing to pay them the prevailing wages and overtime compensation as required by the contracts and the Labor Law. Plaintiff's First Amended Complaint added RLI Insurance as a defendant based upon its payment bond obligations and by stipulation dated July 8, 2013, plaintiff discontinued this action against defendant STV without prejudice.

Defendants oppose plaintiffs' motion arguing that the class is too broadly defined, not numerous enough, lacks commonality and otherwise fails to satisfy the statutory requisites.

Instructive in application to the current allegations herein is the Court's decision in Pesantez v Boyle Envtl. Services, Inc. (251 AD2d 11 [1st Dept 1998]) wherein the Court, modifying the trial court, found that employees of an asbestos contractor who performed work under a public works contract were entitled to maintain a class action based on the allegations asserted in the complaint. The court in Pesantez stated at the threshold that

> Plaintiffs fail to establish the existence of any employees of a subcontractor of Boyle or of Greaney, much less one who was paid less than the "prevailing rate" of wages and benefits, and thus the IAS court erred in expanding the definition of the class to include such employees, and should have limited any class definition to Boyle's employees, who are the only persons identified by the complaint itself.

Pesantez, supra 251 AD2d 11. Thus the court in this case agrees with the defendants that the proposed class should be limited to employees of Pro-Metal since those are the only persons alleged

to have been undercompensated. Should discovery establish that there are others similarly situated from entities affiliated with Prometal who performed work on the Ingersoll Houses Project plaintiffs may move to expand the class definition. The court also agrees that based upon the allegations in the complaint the current class definition should properly be limited to those workers who performed work on the Ingersoll Houses Project under the relevant contract under which third-party beneficiary status is being claimed as there is no evidence as yet that the same employees were also underpaid by this employer at other public projects. Contrast Dabrowski v Abax Inc., 84 AD3d 633, 634 [1st Dept 2011] (allegations that employees were underpaid at numerous public works contract jobsites justified larger class definition).

With the aforesaid modifications, the court finds that the scope of the class is appropriate. Contrary to defendants' additional arguments, the nature of work performed by the class is not so amorphously defined as to be incapable of definition as there is a contract governing the work performed. As the Court in Pesantez continues:

> Such a group of persons meets the requirements for certification under CPLR 901 and 902. Boyle's certified payroll records list over a hundred employees who worked on the project in question, and the named plaintiffs identify about 80 workers; whatever the exact number, we are satisfied that joinder of all of Boyle's employees is impracticable within the meaning of CPLR 901(a)(1). All proposed class members worked on the same project, were

due the prevailing rate of wages and benefits and were allegedly underpaid; thus the named plaintiffs' claims are typical of those of the proposed class (CPLR 901[a][3]), and the nature of the claims is such as to indicate a predominance of common issues of law and fact over individual questions of damages (CPLR 901 [a][2]). To the extent certain individuals may wish to pursue . . . claims . . . which cannot be maintained in a class action (CPLR 901[b]), they may opt out of the class action. Plaintiffs have exhibited an interest in the action and their counsel have demonstrated a level of competence ensuring that they can fairly and adequately represent the class members (CPLR 901[a][4]). Finally, a class action would be the best method of adjudicating this controversy (CPLR 901[a][5]), in light of the small amount of potential recovery by each individual, the fact that the liability . . . is only contingent upon the remaining defendants' failure to pay the prevailing rate, . . ., the fact that many of the proposed class members have not sought relief in an administrative proceeding pursuant to Labor Law §220(7) and (8), and the lack of any serious problems in managing the claims of a maximum of 300 individuals where most of the individual differences can be resolved by the documentary evidence of payroll checks and time sheets.

Pesantez, supra 251 AD2d 11-12.

Similar reasoning applies to the application before this court. Plaintiffs have produced not only affidavits but also a review of the payroll records sufficient to establish that there may be as many as one hundred class members and such proof is sufficient to meet the numerosity requirement. See Dabrowski v Abax Inc., 84 AD3d 633, 634 (1st Dept 2011). Similarly the commonality of the claims is established by the work and rate of pay set under the prevailing wage rate schedules as set forth in the relevant contracts. The affidavits of the class representatives and the experience of counsel as set forth in

counsel's affirmation demonstrate that the interests of the class will be adequately represented. Furthermore, because "the costs of prosecuting individual actions would result in the class members having no realistic day in court, we find that a class action is the superior vehicle for resolving this wage dispute." Nawrocki v Proto Const. & Dev. Corp., 82 AD3d 534, 536 [1st Dept 2011].

Accordingly, it is

ORDERED that plaintiffs' motion for class certification is GRANTED for the following class:

> All individuals employed by Defendant PROMETAL CONSTRUCTION, INC., who performed construction work and all work incidental thereto from September 19, 2006 through the present on the Ingersoll Houses Project. The defined class shall not include any clerical, administrative, professional, or supervisory employees.

and it is further

ORDERED that class counsel submit to the court within 30 days of this Order a form of Notice of Pendency of Class Action Lawsuit to be attached as Exhibit "A" to the Proposed Publication Order set forth as Exhibit L to the affirmation of movant's counsel on this motion for the court's approval of notice to the class.

This is the decision and order of the court.

Dated: April 3, 2017

ENTER:

DEBRA A. JAMES J.S.C