

<b>Herman v Judlau Contr., Inc.</b>
2017 NY Slip Op 32373(U)
November 1, 2017
Supreme Court, New York County
Docket Number: 652249/2017
Judge: Charles E. Ramos
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----x  
RACHEL HERMAN, RENDA GREENHILL, and RANDY  
WILKINS, Individually and on Behalf of  
the Putative Class Members,

Plaintiffs,

Index No. 652249/2017

- against -

JUDLAU CONTRACTING, INC.,

Defendant.

-----x

**Hon. C. E. Ramos, J.S.C.:**

In motion sequence 001, defendant Judlau Contracting, Inc. ("Judlau") moves to dismiss the complaint ("Complaint") filed by plaintiffs Rachel Herman ("Herman"), Renda Greenhill ("Greenhill") and Randy Wilkins ("Wilkins") (collectively, "Plaintiffs"), individually and on behalf of all putative class members, pursuant to CPLR 3211(a)(1) and (7).

For the reasons set forth below, Judlau's motion to dismiss is denied in part, and granted in part.

**Background**

The following factual allegations are taken from the Complaint, and are presumed to be true for purposes of disposition.

Plaintiffs are individuals residing in the State of New York (Complaint, ¶¶ 8-10). Judlau, an active New York corporation headquartered in College Point, New York, is a leader in the

heavy construction business, specializing in large public works projects (Complaint, ¶¶ 11, 21).

Plaintiffs bring their claims on behalf of themselves and on behalf of all Judlau's employees who worked as flaggers on public works projects over the six-year period prior to the filing of this Complaint (Putative Class Members), pursuant to CPLR 901.

Judlau has entered into certain contracts, as either a prime contractor or a subcontractor, with public agencies, such as the New York City Department of Transportation ("DOT") and the New York City Department of Design and Construction ("DDC") to provide, among other services, flagging and other services on New York roadways ("Public Works Contracts"). (Complaint, ¶ 24) (Cara Aff., Ex. D, ¶¶ 1-3, 24).

Plaintiffs allege that under the Public Works Contracts, Judlau was required, pursuant to New York Labor Law (Labor Law) § 220(3)(c) and (5)(e), to compensate Putative Class Members at or above the local prevailing wage rates, including supplemental benefits and overtime premiums for hours worked beyond forty hours a week, eight hours per day, or on weekends (Complaint, ¶ 25). It is also alleged that Judlau was required to prepare a schedule containing the prevailing wage rates and supplemental benefits to the Public Works Contracts, pursuant to Labor Law, Art. 6, § 191.

Putative Class Members worked for Judlau as flaggers on

various public and private projects throughout New York City (Complaint, ¶ 1). Putative Class Members were compensated at an hourly rate that did not include supplemental benefits or prevailing wages (Complaint, ¶ 1). Putative Class Members allege that they were required to wear safety gear, such as working boots, reflective vest, hard-hat, gloves, and goggles when working as a flagger, and were required to take a flagger safety course (Complaint, ¶¶ 50-51). Prior to commencing work, Putative Class Members received flagger certificates from Judlau (Complaint, ¶ 47).

Plaintiffs allege that as Judlau's employees assigned to work on its publicly-financed projects, Plaintiffs and the Putative Class Members were intended third-party beneficiaries of the Public Works Contracts (Complaint, ¶ 26).

In furtherance of the Public Works Contracts, the Putative Class Members performed various flagging tasks, including, but not limited to, holding stop/go signs, directing pedestrian and vehicular traffic around construction sites, walking behind the excavator and steamroller as they move from one construction site to another, and sweeping the construction site (Complaint, ¶ 29).

From July through December 2015, Herman, one of the Plaintiffs, worked for Judlau as a flagger on New York City roadways for Public Works Projects (Complaint, ¶ 32). Herman typically worked forty hours per week and was paid \$15 per hour

without any supplemental benefits (Complaint, ¶¶ 33, 35).

From March 2014 through October 23, 2015 and from October 2016 through March 2017, Greenhill, another Plaintiff, worked for Judlau as a flagger on New York City roadways for Public Works Projects (Complaint, ¶ 37). Greenhill typically worked forty hours per week and was paid eighteen dollars per hour without any supplemental benefits (Complaint, ¶¶ 38, 40).

From April 2015 through April 2017,<sup>1</sup> Wilkins, another Plaintiff, worked for Judlau as a flagger on New York City roadways for Public Works Projects (Complaint, ¶ 42). Wilkins typically worked forty hours per week and was paid eighteen dollars per hour without any supplemental benefits (Complaint, ¶¶ 43, 45).

Plaintiffs allege that Judlau breached corporate policies by failing to provide wage notices and to pay Plaintiffs and the Putative Class Members prevailing wage and supplemental benefits for work performed on Public Works Projects (Complaint, ¶ 54).

On April 26, 2017, Plaintiffs commenced this action, on behalf of themselves and all Putative Class Members, alleging breach of contract, unjust enrichment and quantum meruit, and breach of Labor Law Art. 6, § 191.

---

<sup>1</sup> Wilkins worked for Judlau as a flagger on New York City roadways from April 2015 through April 2017, except for approximately three months when he was laid off in January 2016, March 2016, and January 2017 (Wilkins Aff., ¶ 2).

### Discussion

Judlau moves to dismiss the Complaint pursuant to CPLR 3211(a)(1) and (7).

A motion to dismiss under CPLR 3211(a)(1) is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claim as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

For a motion to dismiss under CPLR 3211(a)(7), a court must consider whether Plaintiff has alleged a legally cognizable cause of action (*Ackerman v 305 E. 40th Owners Corp.*, 189 AD2d 665, 666 [1st Dept 1993]). The facts alleged in the complaint are assumed to be true, and the court must accord a plaintiff the benefit of every possible favorable inference (*Id.*).

A class action can only be maintained if the proponent satisfies the prerequisites of numerosity, commonality, typicality, adequacy of representation, and superiority (CPLR 901; *Pludeman v Northern Leasing Systems*, 74 AD3d 420, 421-22 [1st Dept 2010]).

Judlau argues that Plaintiffs' conclusory allegations that Putative Class Members entered into public works contracts with public entities such as the DOT and DDC are insufficient to establish the existence of a contract. Likewise, Putative Class Members have not specifically referenced the Public Works Contracts on which they performed work as flaggers.

In support of its motion, Judlau references a memorandum ("Comptroller Memorandum"), dated May 1, 1998, by the Office of the New York City Comptroller ("Comptroller"),<sup>1</sup> which provides, in relevant part:

When the worker assigned to those duties is not on a construction work site, and is being utilized to alleviate vehicular congestion by directing the flow of street traffic away from the vicinity of the construction site, that worker is performing traffic control duty. Accordingly, the worker does not fall within the purview of Labor Law Section 220.

However, when a worker is utilized on, adjacent to, or in close proximity to the construction work site, protecting the public from the inherent dangers on and about that site, safeguarding the work crew from street traffic, directing public traffic away from the site, and directing the movement of construction equipment in, on, and off the site, that worker is performing flagging duties which fall within the job specifications of the construction laborer. (Cara Aff., Ex. A).

Judlau maintains that it required flaggers to complete "Pedestrian Crossing Guard Forms" ("Crossing Guard Forms") to ensure that its flaggers did not flag construction site vehicles on-site, and therefore, complied with the Comptroller Memorandum (Cara Aff., Exs. A, B).

In opposition, Plaintiffs allege, that despite their lack of access to and possession of copies of Public Works Contracts, the existence of the Public Works Contracts and the prevailing wage provisions therein for the Putative Class Members' benefit, the

<sup>1</sup> Pursuant to Labor Law § 220(5)(e), the Comptroller is responsible for determining the prevailing wages for all trades and occupations in the City. The Comptroller also is responsible for properly classifying work into a trade or occupation (Labor Law § 220 [3-a][a][I]).

nature, time, and location of Plaintiffs' labor, and Judlau's obligation to pay prevailing wages are sufficient to establish a breach of contract claim.

In addition, Plaintiffs maintain that the three Crossing Guard Forms presented by Judlau only pertain to the individual worker's characterization of his/her work during a specific week at Judlau, and therefore, are insufficient to demonstrate that the nature of work performed by Plaintiffs precluded them from receiving prevailing wages and supplemental benefits. Moreover, the Crossing Guard Forms lack credibility and do not meet the standard for documentary evidence. According to Plaintiffs, a determination as to the nature of the Putative Class Members' duties is a fact-intensive inquiry.

This Court finds that Judlau is not entitled to dismissal, as Plaintiffs have adequately set forth causes of action for breach of contract and breach of Labor Law, Art. 6, § 191. By alleging the existence of Public Works Contracts intended for Plaintiffs and the Putative Class Members' benefit, the various projects the Plaintiffs' participated in, and the prevailing wage provision under Labor Law § 220, Plaintiffs have pleaded a breach of contract action with the requisite particularity (*Dabrowski v ABAX Inc.*, 64 AD3d 426 [1st Dept 2009]). Likewise, Plaintiffs have sufficiently established a cause of action for violation of Labor Law § 195.

Judlau is correct that Plaintiffs do not allege specific contracts or projects under which they performed work. However, Plaintiffs are entitled to access these documents through discovery. Moreover, discovery is necessary to determine whether Judlau has breached the Public Works Contracts or has failed to provide notice of and compensation for the appropriate wages (CPLR 220[3]; *Kelly v Beame*, 15 NY2d 103 [1965]; *Cerchia v V.A. Mesa, Inc.*, 191 AD2d 377 [1st Dept 1993]).

An employee's entitlement to prevailing wages and supplemental benefits on a public works contract pursuant to Labor Law Article 8 is dependent on the nature of the work performed. However, the Crossing Guard Forms are insufficient to warrant dismissal at this juncture. Discovery is necessary to understand the nature of the work performed by Plaintiffs and the Putative Class Members.

However, the Court finds that Plaintiffs' cause of action for unjust enrichment and quantum meruit fails, as an unjust enrichment cause of action is not viable when there are governing written agreements between the parties related to the dispute at issue (*Lorely Fin. [Jersey] No. 3 Ltd. v Citigroup Global Mkts. Inc.*, 119 AD3d 136 [1st Dept 2014]).

Accordingly, it is further

ORDERED that Judlau Contracting, Inc.'s motion to dismiss is denied in part, and granted as to the claims for unjust

enrichment and quantum meruit, which are severed and dismissed;  
and it is further

ORDERED that defendant Judlau Contracting, Inc. shall serve  
an answer to the Complaint within twenty days of the entry of  
this order.

Dated: November 1, 2017

ENTER:

J.S.C.

**CHARLES E. RAMOS**