Medrano v Mastro Concrete, Inc.
2018 NY Slip Op 30740(U)
April 25, 2018
Supreme Court, New York County
Docket Number: 151285/2016
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

RAFAEL MEDRANO and WILLIAM SALVATIERRA, for themselves and on behalf of others employed by Defendants, Plaintiffs, -against- MASTRO CONCRETE, INC., MELROSE BUILDING MATERIALS CORP., MASTRO READY MIX, INC., MASTRONARDI BROS, INC., and any other related or affiliated entities, Defendants.	**DECISION AND ORDER** Index No. 151285/2016 Motion Sequence No. 001

Kathryn E. Freed, J.S.C.:

Recitation, as required by CPLR 2219 (a), of the papers considered in review of this motion for class certification, numbered 15 through 26 and 29 through 35 by the New York State Courts Electronic Filing System:

PAPERS	**NUMBERED**
Notice of Motion, Aff. in Support with Exhibits Annexed, and Memorandum of Law	Nos. 15-26
Aff. in Opposition with Exhibits Annexed and Memorandum of Law	Nos. 29-33
Reply Memorandum of Law	Nos. 34-35

Upon the foregoing cited papers, plaintiffs' motion for class certification is decided as follows:

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Plaintiffs Rafael Medrano and William Salvatierra, in their complaint dated February 17, 2016, for themselves and on behalf of others employed by defendants Mastro Concrete, Inc., Melrose Building Materials Corp., Mastro Ready Mix, Inc., and Mastronardi Bros., Inc., and any other related or affiliated entities, seek to recover from defendants as damages earned but unpaid overtime compensation allegedly owed to them, under Sections 190 *et seq.* and 663 of New York's Labor Law and 12 NYCRR 142-2.2.

In motion sequence number 001, plaintiffs move, pursuant to CPLR 901, to certify this action as a class action for:

> "All individuals employed by Mastro Concrete, Inc., Melrose Building Materials Corp., and/or Mastro Ready Mix, Inc., who performed work related to their concrete manufacturing, production, distribution and delivery business throughout New York between February 2010 and the present, including but not limited to mechanics, drivers, batchers and other yard workers (the 'Putative Class' or the 'Class'). The defined class shall not include any manager, corporate officer, director, clerical or office workers."

(Plaintiffs' memorandum of law in support of motion for class certification [plaintiffs' memorandum], at 1]).[1]

[1] The complaint, at ¶ 1, identifies all four defendants as plaintiffs' employers. In plaintiffs' memorandum, at 1, however, plaintiffs identify defendants Mastro Concrete, Inc., Melrose Building Materials Corp, and Mastro Ready Mix, Inc. as the "Employer Defendants," and "Defendants" as the Employer Defendants plus Mastronardi Bros., Inc.

BACKGROUND

According to the complaint, defendants are companies owned and operated by members of the Mastronardi family, which jointly employed plaintiffs and members of the putative class during the period from February 2010 to the present (*see* complaint ¶¶ 2, 19-23).

Defendants employed plaintiff Rafael Medrano as a mechanic from around June 2009 through December 2015 (*id.* ¶ 29). Mr. Medrano typically worked six days a week, Monday through Saturday, from about 7:00 a.m. until 6:00 p.m., and was paid $35 an hour for his first forty hours each week (*id.* ¶¶ 30-31). Mr. Medrano would usually receive about $700 in cash for overtime, i.e., time he worked over and above 40 hours (*id.* ¶ 32). The cash payments Mr. Medrano received for overtime, however, did not equal the amount he would have received had he been paid one and a half times his regular rate (*id.* ¶ 33).

Plaintiff William Salvatierra worked for defendants as a mechanic, machine operator, concrete truck driver, and batcher from about 2000 through March 2015 (*id.* ¶ 34). Mr. Salvatierra typically worked six days a week, Monday through Saturday, from about 7:00 a.m. to 5:00 or 6:00 p.m. (*id.* ¶ 35). Plaintiffs allege Mr. Salvatierra was paid by check about $20.00 to $23.00 per hour for the first 40 hours he worked each week (*id.* ¶ 36).

He would also receive cash for the work he performed beyond 40 hours, usually in the amount of $400 (*id.* ¶ 37). The cash payments Mr. Salvatierra received for overtime, however, did not equal the amount he would have received had he been paid one and a half times his regular rate of pay for those hours (*id.* ¶ 38).

Plaintiffs allege that their coworkers also regularly worked six out of seven days, and were paid by check for their first 40 hours each week (*id.* ¶ 40). Plaintiffs also assert that their coworkers received cash payments for overtime and that those payments did not equal the amounts they would have received had they been paid one and a half times their regular rates of pay for overtime (*id.*).

Plaintiffs contend that, by failing to pay all the overtime compensation due them and the other members of the putative class, defendants violated Labor Law Section 663 and 12 NYCRR 142-2.2.[2]

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[2] 12 NYCRR 142-2.2 states, in part, that "[a]n employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's regular rate. . .."

Labor Law § 663(1) provides, in part, that "[i]f any employee is paid by his or her employer less than the wage to which he or she is entitled under the provisions of this article, he or she shall recover in a civil action the amount of any such underpayments, together with costs all reasonable attorney's fees, prejudgment interest as required under the civil practice law and rules, and unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law, an additional amount as liquidated damages equal to one hundred percent of the total of such underpayments found to be due."

Defendants filed their answer to the complaint on August 5, 2016, denying plaintiffs' allegations.

Plaintiffs rely on the deposition testimony of Mario Mastronardi,[3] their own deposition transcripts and affidavits, and the affidavits of other putative class members on this motion. On this evidence, plaintiffs assert that they and their similarly situated coworkers were denied full payment of overtime, resulting from defendants' continuing and pervasive practices of intentionally undercounting and underreporting the overtime hours they worked, and by defendants' paying them less than the overtime rate of one and a half times their regular pay rate (*see* plaintiffs' memorandum at 4-7).

Defendants deny these assertions and contend that their failure to "keep accurate [time] records. . . does not necessarily imply. . . that this practice resulted in the failure to pay overtime" (defendants' memorandum of law in opposition to certification [defendants' memorandum] at 1).

STANDARDS FOR CLASS CERTIFICATION

"A class action in this state must satisfy the prerequisites of numerosity, commonality, typicality, adequacy of representation and superiority" (*Weinberg v Hertz Corp.*, 116

[3] Mr. Mastronardi is either president, vice president or secretary of each of the defendants in this action.

AD2d 1, 4 [1st Dept 1986], *affd* 69 NY2d 979 [1987] [citing CPLR 901[a]).

CPLR 901, entitled "Prerequisites to a class action," provides, in pertinent part:

> "a. One or more members of a class may sue or be sued as representative parties on behalf of all if:
>
> 1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
>
> 2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
>
> 3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> 4. the representative parties will fairly and adequately protect the interests of the class; and
>
> 5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

"The action may be maintained as a class action only if the court finds that the prerequisites under section 901 have been satisfied" (CPLR 902).

"Plaintiff bears the burden of establishing the propriety of certifying a class, and that the factors set forth in CPLR 901 favor class-action certification" (*Brissenden v Time Warner Cable of New York City*, 25 Misc 3d 1084, 1088 [Sup Ct, NY County 2009], *citing, inter alia, CLC/CFI Liquidating Trust v Bloomingdale's, Inc.*, 50 AD3d 446, 447 [1st Dept 2008]).

"However, these criteria must be liberally construed in favor of allowing the class action" (*id., citing City of New York v Maul,* 59 AD3d 187, 189 [1st Dept 2009]; *see also Friar v Vanguard Holding Co.*, 78 AD2d 83, 100 [2d Dept 1980] ["In view of the purposes to be served by the class action device" and the court's ability to reverse, alter or amend its decision later, "the interests of justice require that in a doubtful case. . . any error, if there is to be one, should be committed in favor of allowing the class action" [internal quotation marks and citation omitted]).

In addition, this inquiry is limited and such a threshold determination is not intended to be a substitute for summary judgment or trial. "Class action certification is thus appropriate if on the surface there appears to be a cause of action which is not a sham" (*Pludeman v Northern Leasing Sys.*, Inc., 74 AD3d 420, 422 [1st Dept 2010] [citations omitted]; *cf. Shelter Realty Corp. v Allied Maintenance Corp.*, 574 F2d 656, 661 n 15 [2d Cir 1978] [on class certification motion, "it is proper to accept the complaint allegations as true"] [citations omitted]).

In the circumstances presented here, plaintiffs may satisfy their burden of proof by providing evidence that, among other things, (i) they, and a sufficient number of other similarly situated employees, were underpaid due to a practice adopted by

the employer defendants, (ii) common issues of law and fact predominated over any minor differences in individual class members' claims, (iii) plaintiffs have shown "at least a general awareness of the claims in this action," and (iv) a "class action is superior to the prosecution of individualized claims" (*Williams v Air Serv Corp.*, 121 AD3d 441, 442 [1st Dept 2014] [citations omitted]).

APPLICATION OF CLASS CERTIFICATION STANDARDS

I. Numerosity

Plaintiffs contend that the proposed class is sufficiently numerous because the individual joinder of all plaintiffs would not be practicable. While no particular number of persons must be shown, numerosity may be shown with fewer than 40 putative class members (*see Caesar v Chemical Bank*, 118 Misc 2d 118, 121 [Sup Ct 1983], *affd* 106 AD2d 353 [1st Dept 1984], *affd as mod* 66 NY2d 698 [1985] [class of 38 satisfied numerosity]).

To satisfy this criterion, plaintiffs rely on the deposition testimony of Mario Mastronardi, an officer of each of the defendants whom, they allege, has indicated that defendants employed more than 40 putative class members during the relevant period (*see* plaintiffs' memorandum at 13). Plaintiffs also contend that documents defendants have produced show the putative class has 59 or more members (*see* affirmation of Alanna

R. Sakovits, Esq. in support of certification, dated August 31, 2017, ¶ 11).

Defendants do not challenge these assertions. Instead, they argue, without citation to any supporting evidence or authority, that their practice of paying for overtime in cash did not aggrieve all putative class members. Even if defendants could establish that some putative class members deny being underpaid, such assertions cannot prevent certification (*Williams v Air Serv Corp.*, 121 AD3d at 442 ["certification is not defeated simply because defendant has submitted declarations from six employees denying they were ever underpaid"], citing *Kudinov v Kel-Tech Constr.*, 65 AD3d 481, 481 [1st Dept 2009]).

Defendants also contend that one of their representatives, whom they fail to identify, provided testimony to the effect "that the cash payments for overtime worked did, in fact, reflect the overtime pay rate of 150% of the regular rate" (defendants' memorandum at 12-13).

This and defendants' other arguments on numerosity, however, "go to the merits of the action" and so "do not avail" them on this motion (*Anonymous v CVS Corp.*, 293 AD2d 285, 285 [1st Dept 2002], citing *Bloom v Cunard Line*, 76 AD2d 237, 240-41 [1st Dept 1980]).

II. Commonality/Predominance

Plaintiffs argue that questions of law and fact common to the class predominate over questions affecting class members individually and so this criterion is satisfied.

Plaintiffs identify the common issues of fact as (1) whether defendants engaged in a pattern of underreporting the hours plaintiffs and other members of the putative class worked, and (2) whether defendants paid these employees for all the hours that they worked, including their regular pay and overtime at 150% of their regular pay rate after they exceeded 40 hours a week.

Plaintiffs identify the common issues of law as (1) whether defendants' failure to pay plaintiffs and other putative class members overtime at 150% of their regular pay rate after they exceeded 40 hours a week violated New York Labor Law Section 663 and 12 NYCRR 142-2.2, and (2) whether defendants' violation of recordkeeping requirements resulted in underpayments to plaintiffs and the putative class.

Thus, plaintiffs show that common questions of fact and law predominate (*see Dabrowski v Abax, Inc.*, 2010 NY Slip Op 31981[U] [Sup Ct, NY County July 19, 2010] [commonality satisfied where individual issues do not predominate]; *Friar v Vanguard Holding Corp.*, 78 AD2d at 98-99 ["the rule requires predominance, not identity or unanimity, among class members"

and "the fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action"] [citations omitted].

Defendants contend that plaintiffs do not satisfy this prong of CPLR 901. Citing *Alix v Wal-Mart Stores*, 16 Misc 3d 844, 851 (Sup Ct, Albany County 2007), *affd* 57 AD3d 1044 [3d Dept 2008], they argue that the court cannot decide whether there is sufficient commonality without first tallying each putative class members' hours, then calculating the amounts he or she received by check and by cash, and how much of a shortfall each had.

The potential need for individualized proof on damages, however, does not preclude a finding of predominance (*see Godwin Realty Assoc. v CATV Enters.*, 275 AD2d 269, 270 [1st Dept 2000] ["[t]o the extent that there may be differences among the class members as to the degree in which they were damaged, the court may try the class aspects first and have the individual damage claims heard by a special master or create subclasses"] [citations omitted]).

III. Typicality

"CPLR 901(a)(3) requires that the claims asserted by the plaintiff(s) seeking to represent the class, as well as any defenses to those claims, be typical of the claims made by and

the defenses asserted against the class members" (*Pludeman v Northern Leasing Sys.*, 74 AD3d at 423). "If it is shown that a plaintiff's claims derive 'from the same practice or course of conduct that gave rise to the remaining claims of other class members and is based upon the same legal theory. . . [the typicality requirement] is satisfied'" (*id.* [citation omitted]). "Typicality does not require identity of issues and the typicality requirement is met even if the claims asserted by class members differ from those asserted by other class members" (*id.* [citations omitted]).

Plaintiffs assert that their claims are typical of the putative class's claims, as they arise from the same conduct, result in injuries from the same wrongs, and are premised on the same legal theories (plaintiffs' memorandum at 21, citing, *inter alia, Pesantez v Boyle Envtl. Svcs.*, 251 AD2d at 12).

Defendants assert plaintiffs have failed to satisfy this criterion, but ignore the typicality factors set forth in CPLR 901(a)(3). Instead, defendants choose to focus on the alleged "specter" of potential conflicts of interests they claim may arise between plaintiffs and class members, and their impact on plaintiffs' adequacy as proposed class representatives (defendants' memorandum at 14-17). These are factors considered under CPLR 901(a)(4). Nonetheless, the potential conflict which defendants identify - that there will be differing measures of

damages, because most class members' regular wages were paid on an hourly basis, while Mr. Salvatierra's regular wages were allegedly paid at a daily rate (*see* defendants' memorandum at 4) – is not dispositive, because "different levels of damages [will] not defeat class certification" (*Englade v Harper Collins Publrs., Inc.*, 289 AD2d 159, 160 [1st Dept 2001], citing, *inter alia, Godwin Realty Assocs. v CATV Enters.*, 275 AD2d at 270).

IV. Adequacy of Representation

New York courts evaluate the adequacy of representation by examining three factors: potential conflicts of interest, personal characteristics of the proposed class representatives, and the quality of class counsel (*see Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 24 [1st Dept 1991]).

Defendants make several objections to plaintiffs' representation of the class. They again raise the possible difference in damages recoverable by plaintiffs and other putative class members as a potential source of conflict of interest. As noted, class certification will not be denied because of such damage issues (*Englade v Harper Collins Publrs., Inc.*, 289 AD2d at 160).

Defendants criticize Mr. Salvatierra, suggesting that he was either evasive at his deposition, or that he lacks sufficient knowledge of the claims to serve as class

representative. Defendants, however, fail to acknowledge that their criticisms are based, at least in part, on Mr. Salvatierra's difficulties conversing in English and his inability to read the English-language documents presented to him during that examination (*see* affirmation of Chad L. Edgar, Esq. in opposition to certification, exhibit 1 [Salvatierra deposition transcript] at 14-17). Defendants also attack Mr. Salvatierra's credibility, based on his provision of false documents to New York State's Department of Motor Vehicles and his conviction for driving while intoxicated (defendants' memorandum at 18).

These objections, however, raise minor collateral issues and do not prevent Mr. Salvatierra from serving as class representative (*see e.g. Galdamez v Biordi Constr. Corp.,* 13 Misc 3d 1224[A] *4, 2006 NY Slip Op 51969[U] [Sup Ct, NY County 2006], *affd* 50 AD3d 357 [1st Dept 2008] [convictions for driving while intoxicated and assault and battery "do not bar the individuals from representing the proposed class, as they do not constitute questionable conduct arising out of or touching upon the very prosecution of the lawsuit"] [citation and internal quotations omitted]; *see also Brandon v Chefetz*, 106 AD2d 162, 170 [1st Dept 1985] [plaintiff with "general awareness of the claims" qualified to serve as class representative]; *Borden v 400 East 55th Street*, 2012 WL 11978517, *3, 2012 NY Slip Op

33712[U] [Sup Ct, NY County Apr 11, 2012], *affd* 105 AD3d 630 [1st Dept 2013], *affd* 24 NY3d 382 [2014] ["An adequate understanding does not require that the representative have a command of every detail of the case. It is sufficient that the class representative be familiar with the basic elements of the claim"] [citations omitted]).

V. Superiority

Plaintiffs contend that "the First Department has acknowledged that class actions are the 'best method of adjudicating' wage and hour disputes" (plaintiffs' memo at 7, *quoting Pesanetz v Boyle Envtl. Svcs.*, 251 AD2d at 12).

Defendants contest this assertion, declaring it is a "misrepresentation" of the law, and arguing that claims for overtime brought pursuant to the Labor Law are best resolved through an administrative proceeding before the New York State Department of Labor (defendants' memorandum at 8-10).

Plaintiffs' position is correct (*see Williams v Air Serv Corp.*, 121 AD3d at 442 [in action brought for underpayment of wages, including overtime, "plaintiffs demonstrated that a class action is superior to the prosecution of individualized claims in an administrative proceeding, given the difference in litigation costs and the modest damages to be recovered by each individual employee"] [citations omitted]). Federal courts also

recognize the superiority of class actions in resolving overtime claims under New York's Labor Law (*see e.g. Indergit v Rite Aid Corp.*, 293 FRD 632, 658 [SD NY 2013]; *Damassia v Duane Reade*, 250 FRD 152, 161-62 [SD NY 2008]).

New York state courts recognize that a class action "also yields a public benefit which makes it superior to an administrative complaint," by providing "'a means of inducing socially and ethically responsible behavior on the part of large and wealthy institutions which will be deterred from carrying out policies. . . harmful to large numbers of individuals. . .'" (*Weinstein v Jenny Craig Operations*, Inc., 41 Misc 3d 1220[A], *5, 2013 NY Slip Op 51783(U) [Sup Ct, NY County Oct 24, 2013], quoting *Pruitt v Rockefeller Ctr. Props.*, 167 AD2d at 23-24).

"Whether a particular lawsuit qualifies as a class action rests within the sound discretion of the trial court. In exercising this discretion, a court must be mindful. . . that the class certification statute should be liberally construed" (*Weinstein v Jenny Craig Operations*, Inc., 41 Misc 3d 1220[A], *5, quoting *Kudinov v Kel-Tech Constr. Inc.*, 65 AD3d at 481). "Thus, any error, if there is to be one, should be in favor of allowing the class action" (*Weinstein v Jenny Craig Operations*, Inc., 41 Misc 3d 1220[A], *5, quoting *Pruitt v. Rockefeller Ctr. Props.*, 167 AD2d at 20-21).

In light of the foregoing, it is hereby:

ORDERED that plaintiffs' motion to grant class certification pursuant to CPLR 901 is hereby granted; and it is further

ORDERED that the class of plaintiffs in this action is hereby certified to include all persons, other than managers, corporate officers or directors, or clerical or office workers, employed by defendants Mastro Concrete, Inc., Melrose Building Materials Corp., and/or Mastro Ready Mix, Inc., who performed work related to their concrete manufacturing, production, distribution and delivery business in the State of New York between February 2010 and the date of this decision and order; and it is further

ORDERED that counsel for the parties shall appear for a compliance conference in Part 2 of this Court, 80 Centre Street, Room 280, on July 17, 2018, at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: April 25, 2018

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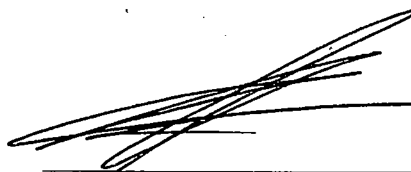

KATHRYN E. FREED, J.S.C.