

<b>Bogdan v Adam's European Contr., Inc.</b>
2018 NY Slip Op 31380(U)
June 27, 2018
Supreme Court, New York County
Docket Number: 654432/12
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 42

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JANUSZ BOGDAN, MARIAN MASLAG, WIESLAW  
KONOPKA, and MARIUSZ KONOPKA, individually  
and on behalf of other persons similarly  
situated who were employed by ADAM'S  
EUROPEAN CONTRACTING, INC.,

Plaintiffs

Index No. 654432/12

v

DECISION AND ORDER

ADAM'S EUROPEAN CONTRACTING, INC., ARCH  
INSURANCE COMPANY, and JOHN DOE BONDING  
COMPANIES 1-6

Defendants.

MOT SEQ 005

-----X

NANCY M. BANNON, J.:

I. INTRODUCTION

In this class action to recover unpaid wages and benefits, the plaintiffs move for preliminary approval of a settlement of the class action, approval of the forms of notices and claims, the appointment of the plaintiff's counsel as class counsel, and the scheduling of a fairness hearing. The defendants do not oppose the motion. The motion is granted.

II. BACKGROUND

The plaintiffs Janusz Bogdan, Marian Maslag, Wieslaw Konopka, and Mariusz Konopka, individually and on behalf of others similarly situated, commenced this action against Adam's European Contracting, Inc. (AEC), its insurer, Arch Insurance

Company, and several unidentified bonding companies, alleging that, from 2006 through 2011, AEC violated Labor Law §§ 650 et seq., Labor Law §§ 190 et seq., Labor Law §§ 220, et seq., and 12 NYCRR 142-3.2 by failing to pay the required minimum overtime wages and supplemental benefits to its employees, who were engaged in public works projects, and compelling those employees to work longer than the maximum number of daily and weekly hours, as limited by law.

The class sought to be certified consists of all individuals employed by AEC who performed construction work and all work incidental thereto from December 19, 2006, through June 21, 2016, excepting clerical, administrative, professional, or supervisory employees.

By order dated September 16, 2015, the court denied the plaintiffs' motion for class certification (SEQ 002) on the ground that they failed to appear for oral argument. By order dated January 6, 2016, the court denied their motion for the same relief (SEQ 003) as procedurally improper, inasmuch as the plaintiffs did not seek to vacate their earlier default before seeking substantive relief. By order dated March 1, 2016, the court granted the plaintiffs' motion to vacate their default (SEQ 004) in appearing. By order dated June 21, 2016, the court ultimately granted the plaintiffs motion under motion sequence 002 to certify the class, as described above.

The proposed class settlement will require the defendants to pay the gross sum of \$1,970,000.00 into a settlement fund, of which \$475,000.00 thereof is allocated to pay the fees of the plaintiff's attorneys. The defendants agree to allocate payments to class members as 50% as W-2 wages and 50% as liquidated damages under the Labor Law, the latter of which shall be reported on IRS form 1099 without withholding.

### III. DISCUSSION

#### A. Preliminary Approval of Settlement Agreement

This court must make an initial evaluation of whether the proposed settlement "is fair, adequate, reasonable, and in the best interest of class members." Klein v Robert's Am. Gourmet Food, Inc., supra, at 73; Matter of Traffic Exec. Assoc.-Eastern R.R., 627 F2d 631, 634 (2<sup>nd</sup> Cir. 1980).

"Where, as here, the action is primarily one for the recovery of money damages, determining the adequacy of a proposed settlement generally involves balancing the value of that settlement against the present value of the anticipated recovery following a trial on the merits, discounted for the inherent risks of litigation."

Klein, supra, at 73. An employer is obligated to pay an employee for overtime at a wage rate of one and one-half times the employee's regular rate or, if no regular rate has been fixed, at one and one-half times the basic minimum hourly rate, in the manner and pursuant to the methods prescribed by the federal Fair

Labor Standards Act. See 12 NYCRR 142-2.2. "The applicable overtime rate shall be paid for each workweek [to] non-residential employees for working time over 40 hours." Id.; see Matter of Aldeen v Industrial Appeals Bd., 82 AD3d 1220 (2<sup>nd</sup> Dept. 2011). Moreover, employees who establish that they were not paid the applicable minimum wage are entitled to "an additional amount as liquidated damages equal to one hundred percent of the total of such underpayments found to be due." Labor Law § 663 (1). The lump sum fund set forth in the settlement agreement to properly pay for overtime wages and liquidated damages fairly and adequately compensates the class members for their unpaid overtime wages and liquidated damages, and is in their best interest.

The settlement here provides for sufficient notice to all class members, as it directs that each member be provided with a copy of the settlement agreement and all forms by first class mail and e-mail. See Vasquez v National Sec. Corp., 48 Misc 3d 597 (Sup Ct, N.Y. County 2015), affd 139 AD3d 503 (1<sup>st</sup> Dept. 2016). It also provides for opt-out rights for those who wish to pursue their remedies on an individual basis, and thus comports with the requirements of due process. See Jiannaras v Alfant, 27 NY3d 349 (2016); Hibbs v Marvel Enters., 19 AD3d 232 (1<sup>st</sup> Dept. 2005). The proposed notice and claim forms conform to generally accepted class action forms. See Hibbs v Marvel Enters., supra;

Matter of Colt Indus. Shareholder Litig., 155 AD2d 154 (1<sup>st</sup> Dept. 1990).

B. Appointment of Plaintiffs' Counsel as Class Counsel

The affidavit of the plaintiff's counsel describes dozens of class actions that her firm has litigated successfully, which "amply demonstrated its experience and skill in class action litigation, and that it will adequately represent the interest of all class members." Ackerman v Price Waterhouse, supra, at 195.

C. Fairness Hearing

The plaintiff also seeks an order scheduling a "fairness hearing" pursuant to Fed. R. Civ. P. 23(a)(2), a procedure which has been adopted in CPLR article 9 class actions in New York. See Jiannaras v Alfant, supra. That application is granted, the hearing is scheduled, and all parties shall appear on September 19, 2018, at 10 a.m.

IV. CONCLUSION

Accordingly, it is

ORDERED that the plaintiff's motion to preliminarily approve the settlement agreement dated January 18, 2018, attached, to approve the forms for notices and claims, attached, and to appoint the plaintiff's counsel as class counsel is granted,

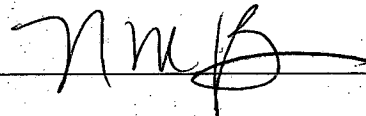
without opposition, the settlement agreement is preliminarily approved, and the forms are approved; and it is further,

ORDERED that a fairness hearing shall be conducted on on September 19, 2018, at 10 a.m.

This constitutes the Decision and Order of the court.

Dated: June 27, 2018

ENTER: \_\_\_\_\_



J.S.C.

**HON. NANCY M. BANNON**