Cruz v Brink's Inc.
2018 NY Slip Op 33502(U)
June 26, 2018
Supreme Court, Nassau County
Docket Number: 604448-16
Judge: Timothy S. Driscoll
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ORIGINAL

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER

Present: HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

---x

CARLOS CRUZ, individually and on behalf of others similarly situated,

Plaintiffs,

-against-

BRINK'S INCORPORATED; JEFFREY HILL; and any other related entities,

Defendants.

---x

TRIAL/IAS PART: 11
NASSAU COUNTY

Index No. 604448-16
Motion Seq. Nos. 2 and 3
Submission Date: 6/11/18

The following papers have been read on these motions:

Notice of Motion..........x
Affirmation in Support and Exhibit..........x
Memorandum of Law in Support..........x
Affirmation in Opposition and Exhibits..........x
Memorandum of Law in Opposition..........x
Notice of Motion, Affirmation in Support and Exhibits.......x
Memorandum of Law in Support..........x
Memorandum of Law in Opposition..........x

This matter is before the Court for decision on 1) the motion filed by Defendant Brink's Incorporated ("Brink's" or "Defendant") on June 1, 2018, and 2) the motion filed by Plaintiff Carlos Cruz ("Cruz" or "Named Plaintiff"), individually and on behalf of others similarly situated ("Plaintiffs") on June 1, 2018, both of which were submitted on June 11, 2018. For the reasons set forth below, the Court 1) grants Defendant's motion and dismisses the Complaint as asserted against Brink's; and 2) denies Plaintiffs' motion.

BACKGROUND

A. Relief Sought

Defendant moves for an Order, pursuant to CPLR § 3212, granting Defendant's motion for summary judgment and dismissing Plaintiff's Complaint with prejudice.

Plaintiffs move for an Order 1) certifying this action as a class action; 2) designating Leeds Brown Law, P.C. (the "Leeds Firm") as class counsel; 3) approving for publication the proposed Notice of Wage & Hour Class Action Lawsuit; and 4) endorsing the proposed Publication Order.

B. The Parties' History

The Class Action Complaint ("Complaint") (Ex. A to Warshaw Aff. in Supp.) alleges as follows:

Named Plaintiff is currently employed by Defendants Brink's and Jeffrey Hill ("Hill") ("Defendants"), and has been so employed since approximately 1994, out of the company's location in Brooklyn, New York. Hill is and was at all relevant times a manager, officer, director, president, vice president, Chief Executive Officer and/or owner of Brink's. Beginning in June 2010 and continuing through the present, Defendants employed the Named Plaintiff and other members of the putative class to perform functions related to Defendants' operations that are comprised, in part, of "armored car transportation, money processing, long-distance transport of valuables, vaulting and other value-added solutions" (Comp. at ¶ 23) in nonexempt positions, including as drivers and messengers.

Defendants have employed Cruz as a driver since approximately February 1994. During his employment tenure, Cruz has typically worked five (5) days per week, from approximately 7:00 a.m. to 8:00 p.m., Monday through Friday. In total, Cruz typically works approximately 60 hours per week. Cruz is not exempt from overtime compensation under the New York Labor Law ("Labor Law"). During his employment tenure, Defendants typically paid Cruz overtime compensation for the first five (5) hours of overtime that he worked in a given week, regardless of how many overtime hours he worked in a given week. All remaining overtime hours worked by Cruz in a given week are compensated as "straight time" (Comp. at ¶ 27) for which Cruz receives only his regular hourly rate of $20.75 per hour, rather than his overtime premium of $31.13 per hour. Accordingly, Plaintiffs allege, Defendants have typically failed to compensate Cruz with the required $10.38 per hour premium for approximately 15 hours per week for all hours worked in excess of 40 hours per week during a typical week. Other members of the putative class typically worked in excess of 40 hours per week, but received an overtime premium rate for only five (5) such hours per week, regardless of how many hours they may have worked in a given week.

The Complaint contains a single cause of action titled "New York Overtime Compensation," which is based on the following allegations:

1) Defendants are "employers" within the meaning contemplated by Labor Law Article 6 § 190(3), Labor Law Article 19 § 651(6), and cases interpreting same;

2) Named Plaintiff and other members of the putative class are "employees" within the meaning contemplated pursuant to Labor Law Article 6 § 190(2), Labor Law Article 19 § 651(5), 12 NYCRR § 142-2.14, and cases interpreting same;

3) The provisions of Labor Law Articles 6 and 19, and the supporting New York State Department of Labor ("NYSDOL") regulations, including 12 NYCRR Part 142, apply to Defendants and protect the Named Plaintiff and members of the putative class;

4) Pursuant to 12 NYCRR 142-2.2, "an employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's regular rate...[where] [t]he applicable overtime rate shall be paid for each workweek: for working time over 40 hours;"

5) Here, Named Plaintiff and, upon information and belief, other members of the putative class, typically worked in excess of 40 hours per week, but Defendants failed to compensate them at an overtime rate of one and one-half times their regular rate of pay for all hours worked in excess of 40 in a given week;

6) Accordingly, Defendants failed to pay Named Plaintiff, and other members of the putative class, all earned wages;

7) Defendants' failure to pay overtime compensation was willful;

8) Labor Law § 663 provides that "[i]f any employee is paid by his employer less than the wage to which he is entitled under the provisions of this article, he may recover in a civil action the amount of any such underpayments, together with costs and such reasonable attorney's fees;" and

9) In light of the foregoing, Defendants have violated 12 NYCRR § 142-2.2, implicating Labor Law Article 6 § 198 and Labor Law Article 19 § 663, and are liable to the Named Plaintiff and members of the putative class in an amount to be determined at trial, plus interest, attorney's fees and costs.

Plaintiffs allege that this action is brought on behalf of Named Plaintiff and a class consisting of every other person who worked for Defendants in the State of New York in nonexempt positions between June 2010 and the date of the final judgment in this matter, and Plaintiffs refer to all said persons, including Named Plaintiff, as the "Class" (Comp. at ¶ 13). In support of their request for Class certification, Plaintiffs allege *inter alia* that

1) the members of the Class are readily ascertainable through Defendants' records;

2) Plaintiffs believe that there are over 100 members of the Class who were employed by Defendants during the relevant time period, and the proposed Class is so numerous that joinder of all members is impracticable;

3) there are questions of law and fact common to the Class which predominate over any questions affecting only individual Class members, including whether Defendants properly compensated Named Plaintiff and the Class members with overtime compensation at one and one-half time their regular hourly rate;

4) the claims of the Named Plaintiff are typical of the claims of the Class;

5) Named Plaintiff and the members of the Class have sustained similar injuries as a result of Defendants' actions;

6) Named Plaintiff and his counsel will fairly and adequately protect the interests of the Class; and

7) a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

In support of Brink's motion, counsel for Brink's ("Brink's Counsel") provides copies of the following (Exs. B-J to Warshaw Aff. in Supp.): the United States Department of Labor Investigator's ("DOL's") 2015 assessment of Brink's Brooklyn branch (Ex. B); relevant pages from the deposition transcript of Brink's representative Philip Tomco ("Tomco"), dated January 1, 2018 (Ex. C); the company snapshot for Brink's from the United States Department of Transportation's ("DOT's") Federal Motor Carrier Safety Administration Safety and Fitness Electronic Records ("SAFER") System website (Ex. D); relevant pages from Cruz's deposition transcript, dated November 13, 2017 (Ex. E); relevant pages from the deposition transcript of Brink's representative Jody Lirette ("Lirette"), dated November 17, 2017 (Ex. F); a termination letter to Cruz from Luis Garcia dated October 5, 2016 (Ex. G); Cruz's earnings statements from December 28, 2015 through October 16, 2016 (Ex. H); a memorandum dated January 6, 2014 to

hourly employees regarding modifications to Brink's pay policy (Ex. I); and the job description for the Commercial Driver position (Ex. J).

Defendant submits that, by Cruz's own admissions, Cruz's employment for Brink's as a driver met all of the elements under the Motor Carrier Act ("MCA") exemption to the overtime pay requirements under the Fair Labor Standards Act ("FLSA"). Therefore, Defendant contends, Cruz cannot claim overtime compensation as a matter of law, and his individual claim and purported class claim must be dismissed. In support of its position, Defendant cites to the following testimony by Cruz at his deposition:

1) On or about December 27, 1994, Brink's hired Cruz at its Brooklyn branch as a driver (Tr. at 27:4-6);
2) At all times during his employment, Crux held a Class C Commercial Driver's License, which allowed him to drive vehicles with a gross vehicle weight rating ("GVWR") of up to 26,000 pounds (Tr. at 30:11-23; 40:3-9);
3) When Cruz began his employment, his regular route was from the Brooklyn branch to a Brink's customer located on Water Street in downtown Manhattan and, from there, Cruz drove to Garden City, New York (Tr. at 41:17-24);
4) On these routes, Cruz picked up, transported, and delivered various forms of bonds (Tr. at 41:17-24);
5) Cruz would occasionally also deliver food stamps to a post office in downtown Manhattan during this time (Tr. at 47:8-22);
6) Cruz drove on the Long Island Expressway to get to and return from Garden City (Tr. at 52:24-53:8);
7) In or around 2008, Cruz's regular route changed (Tr. at 41:25-42:22);
8) For a few months, Cruz drove within the borough of Brooklyn and completed pickups of cash and coins from various bank locations (Tr. at 43:12-22; 48:15-49:2);
9) Subsequently, Cruz's regular route included driving from the Brooklyn branch to east Long Island, and ending at the Brooklyn branch (Tr. at 42:20-22; 44:14-24);
10) On this route, Cruz transported cassettes of cash and coins, and he regularly drove on the Long Island Expressway (Tr. at 49:18-50:8);
11) In or around 2013, Cruz began driving vehicles outside of New York State (Tr. at

53:19-55:6) (Question: " During the time that you drove for Brink's, did you ever drive a Brink's truck outside of New York State" Answer: "Yes." Question: "Do you recall how long that period was?" Answer: "Maybe about a year.");

12) At least two or three times a week, Cruz drove from the Brooklyn branch to Jersey City to pick up bonds and deliver them to other locations in Jersey City or Fort Hamilton in the borough of Brooklyn (Tr. at 55:10-59:22);

13) As a Brink's driver, Cruz provided motor vehicle transportation of valuables for compensation (Tr. at 170:21-171:6);

14) During his employment with Brink's, Cruz never drove a vehicle that had a GVWR of less than 10,000 pounds (171:7-173:7); and

15) Cruz was engaged in interstate commerce when he drove goods across state lines (175:5-14) (Question: "And so do you understand whether, when you drove from New Jersey to Brooklyn, you were engaged in interstate commerce?" Answer: "I guess that's what it is then.").

Defendant asserts that the evidence establishes, further, that on or about October 3, 2016, Cruz was involved in an accident on the Long Island Expressway (Cruz Dep. Tr. at 113:16-114:2). As set forth in correspondence from Luis Garcia ("Garcia"), the Senior Manager at Brink's Brooklyn Branch, to Cruz (Ex. G to Warsaw Aff. in Supp.), on October 5, 2016, Brink's terminated Cruz's employment because his statement about the accident contradicted the video evidence from his vehicle. Garcia advised Cruz that "[t]he evidence indicates you were either not paying attention to the road prior to the collision or you deliberately misrepresented the circumstances of the accident." The letter also advised Cruz that the interior facing camera in his truck had been turned toward the road, in contravention of Brink's policies which forbid tampering with security cameras. Cruz testified, however, that he was paying attention to the road during the accident, that a vehicle served in front of him, and that he did not adjust his vehicle's interior facing camera (Cruz Dep. Tr. at 113:16-125:4).

Defendant submits that Brink's properly classified Cruz as exempt from overtime requirements pursuant to the MCA exemption because he operated vehicles that have a GVWR of 10,001 or more pounds and was engaged in interstate commerce, citing deposition testimony of Lirette, a Brink's representative (Tr. at 38:3-15). In addition, throughout his employment, Cruz was paid for all hours that he worked for Brink's, meaning that he does not assert that he

performed any "off the clock" work for Brink's (D's Memo. of Law in Supp. at p. 4). Defendant cites Cruz's deposition testimony at pages 83-84, which includes the following (Tr. at 83):

> Q: Other than the time that you were given hours for someone else and then the issue with the five hours pay that you just described, did you ever find any other discrepancies between what you wrote in your notebooks versus your pay stubs?
>
> A: Not that I can recall.

Defendant submits that the evidence that it provides establishes that until January 5, 2014, Brink's paid Cruz time and a half his regular rate of pay for all hours worked in excess of 40 hours per week. Beginning on or about January 6, 2014, Brink's modified its pay policy for drivers and messengers such as Cruz who are subject to the MCA exemption, as outlined in the January 6, 2014 memo from Brink's to its U.S. Hourly Employees (Ex. I to Warshaw Aff. in Supp.). When such employees worked over 40 hours, but fewer than 45 hours, they received a premium at the rate of time and one-half of their regular rate of pay (*see* Tomco Dep. Tr. at 34-35 Q: "What is Brink's current overtime policy?" A: "They receive time and a half from 40 to 45 and it goes back to straight time rate after 45."). Thus, for hours worked above 45 in a workweek, Cruz always received his regular rate of pay.

Defendant asserts that in 2015, the DOL conducted a routine audit of the Brooklyn branch of Brink's (*see* Ex. B to Warshaw Aff. in Supp.) and concluded that Brink's drivers and messengers are engaged in interstate commerce, and otherwise meet the MCA exemption. Defendant contends that the DOL's investigator, in her investigation notes, specifically found that drivers operated on interstate highways, are likely to serve international airports, and operate within the chain of commerce. The audit includes the following (*see* Ex. B to Warshaw Aff. in Supp. at BRINKS000B90):

> Section 213(b)(1) - Motor Carriers Exemption: Drivers, Driver's Helpers, Loaders; exemption applicable...Teams of Drivers and Messengers transport the goods in interstate commerce: All teams could be called upon to travel on routes that service international airports. Drivers affect the safe operation of the vehicle in the course of driving the vehicle on public and interstate roads. Messengers perform Helper duties by assisting the driver in navigating, backing up, and directing traffic. Loaders affect the safe operation of the vehicle by loading the goods so that they are balanced properly...

In further support of Defendant's contention that Cruz was engaged in interstate commerce, Defendant cites Tomco's testimony that on a typical Monday, 48 to 52 routes are going out (Tr.

at 27), 3 of which leave the state of New York on a given day, with one going to New Jersey and two going to Connecticut (Tr. at 28).

In its job description for the Commercial Driver position (Ex. J to Warshaw Aff. in Supp.), Brink's stated that a commercial driver "is responsible for safely driving and controlling the Brink's vehicles to and from various customers and guarding the Messenger at pick-up and delivery locations." The job description also stated that the position "functions in an armed environment" and Cruz testified that he obtained a gun license within the first year of working for Brink's (Tr. at 63). Thus, Defendant submits, Plaintiff's employment directly affected the safety of operation of motor vehicles, providing further evidence that Plaintiff's claim is within the MCA exemption, and not viable.

In opposition to Brink's motion, Cruz (Affidavit at Ex. A to Cohen Aff. in Opp. and Ex. F to Cohen Aff. in Supp.) affirms that he worked as a driver for Brink's from approximately December 1994 through October 2016 at its Brooklyn branch. During that employment, Cruz was compensated on an hourly basis. For any workweek in which he worked more than 40 hours, which occurred more frequently than not, he received overtime pay at time and one half his regular hourly rate for all such hours worked over 40. Cruz affirms that it is his "understanding" (Cruz Aff. at ¶ 5) that other drivers, as well as messengers who accompanied drivers on their routes, received overtime compensation in the same manner.

Cruz affirms that in 2014 he became aware that, as of January 1, 2014, Brink's had stopped compensating drivers and messengers for all overtime hours worked in a given workweek at time and one half their respective regular hourly rates, but would do so only for up to five (5) hours per workweek. Cruz became aware of this new practice when he heard other workers discussing that their paychecks did not reflect overtime compensation for all overtime hours worked. Cruz thereafter examined his pay stub, which he did not do regularly because he participated in direct deposit, and confirmed that he was not receiving overtime in the same manner that he had previously received overtime. Cruz affirms that he never received any notification that Brink's intended to unilaterally reduce his overtime rate of pay, and never attended any meeting at which a video was shown purportedly advising employees about the new overtime practice.

In response to Brink's contention that Cruz and other employees like him are exempt workers because they "supposedly engaged in interstate commerce" (Cruz Aff. at ¶ 13), Cruz

affirms that, from at least the time that Brink's changed its practice to cap overtime at five (5) hours per work on January 1, 2014, he did not engage in interstate commerce as he never crossed state lines on his routes. In addition, nearly all of the routes assigned to Brink's drivers and messengers originating out of the Brooklyn branch were limited to intrastate routes. Cruz asks the Court to permit him to represent himself and the other drivers and messengers who worked for Brink's since January 1, 2014, so that they can recover the overtime compensation that they should have received, but did not.

In further opposition to Defendant's motion, counsel for Plaintiffs ("Plaintiffs' Counsel") provides copies of the following (Exs. B-F to Cohen Aff. in Opp.): Defendant's Response to Plaintiffs' Second Interrogatory Requests (Ex. B); Deposition Transcript of Tomco (Ex. C); Defendant's Response to Plaintiffs' First Pre-Class Certification Requests for Documents (Ex. D); Internal Brink's Memoranda (Ex. E); and NYSDOL Wage Theft Prevention Act Fact Sheet (Ex. F). In support of Plaintiffs' motion, Plaintiffs' Counsel provides copies of the following (Exs. A-H to Cohen Aff. in Supp.): the Complaint (Ex. A); Defendants' Response to Plaintiffs' Interrogatory Requests and Requests for Admissions (Ex. B); Plaintiff's Pay Stubs (Ex. C); Defendants' Response to Plaintiffs' Second Interrogatory Requests (Ex. D); Deposition Transcript of Tomco (Ex. E); Cruz affidavit (Ex. F); Proposed Notice (Ex. G); and Proposed Publication Order (Ex. H).

C. The Parties' Positions

Defendant submits that Cruz was exempt from overtime pay requirements under the FLSA, MCA exemption, which is incorporated under the Labor Law. Defendant cites cases issued in Federal Courts in Illinois and Florida, as well as the 11th Circuit Court of Appeals (*see* D's Memo. of Law in Supp. at p. 9) , holding that 1) the MCA exemption barred FLSA and Illinois Minimum Wage Law overtime claims by armored truck drivers; 2) the MCA exemption barred FLSA overtime claims by Brink's armored truck messengers, drivers and ATM mechanics; and 3) the MCA exemption barred FLSA overtime claims by armored truck drivers, messengers and guards. Moreover, Defendant asserts, the DOL's 2015 routine audit concluded that Brink's drivers and messengers at the Brooklyn branch are engaged in interstate commerce, and otherwise meet the MCA exemption. Under these circumstances, Defendant submits, there is no issue of fact or law regarding Cruz's entitlement to overtime pay.

Defendant submits that the MCA exemption is clearly applicable in light of the fact, *inter*

alia, that 1) Brink's drivers and messengers at the Brooklyn branch, including Cruz, transport coin, currency, checks, other negotiable instruments, and valuables within New York that are generally bound out-of-state; 2) despite Cruz's assertion that he was not engaged in interstate commerce, the evidence establishes that Cruz sometimes traveled from New York to New Jersey as part of his route; 3) case law makes clear that the interstate commerce requirement does not require a vehicle to actually cross state lines, and it is clear that the items that Cruz regularly transported were part of the stream of interstate commerce; and 4) Cruz was engaged in activities that directly affected the operational safety of armored vehicles, which is further supported by the fact that Cruz obtained a pistol license shortly after becoming employed by Brink's. Thus, Defendant submits, as Cruz's Labor Law claim fails, he lacks standing to pursue any class claim.

Plaintiffs oppose Defendant's motion submitting that Brink's has failed to establish that Cruz and his putative class members were actually engaged in interstate commerce in consideration, *e.g.*, of testimony that only 3 of the 48 to 54 routes typically crossed state lines and that generally individuals other than Cruz were assigned these out-of-state routes. Plaintiffs contend that Defendant's reliance on cases holding that the MCA exemption was applicable is misplaced because that authority did not analyze whether the property itself was involved in interstate commerce, and those cases all involved property destined for an out-of-state location. Plaintiffs also submit that Defendant's reliance on the DOL audit is misplaced because a review of that audit demonstrates that the DOL focused its attention on "ancillary compensation issues" (Ps' Memo. of Law in Opp. at p. 11) and did not thoroughly analyze or investigate whether the transportation of the property at issue constituted interstate commerce.

With respect to Plaintiffs' motion for class certification, Plaintiffs submit that class certification is proper because 1) class certification is routinely granted in actions alleging unpaid wages; 2) the class is so numerous that joinder of all members is impracticable because the record demonstrates that Brink's Brooklyn branch alone includes up to 150 drivers and messengers combined at a given time, and Defendants admit that no fewer than 40 individuals held the same job title as Cruz during the relevant period; 3) there is one essential question of law and fact common to all members of the putative class that will predominate, specifically whether Defendants properly compensated Cruz and the putative class members despite failing to provide them with the premium overtime rate of time and one half their regular hourly rate for all hours worked in excess of 40 hours in a given workweek, and the need to compute damages

individually does not defeat predominance or class certification; 4) Named Plaintiff's claims are typical of the claims of the class and, in fact, are identical to the claims of the members of the putative class, in that Named Plaintiff and the members of the putative class worked for Defendants as drivers and messengers during the Class Period, and Named Plaintiff alleges that Defendants failed to pay him and putative class members overtime for all overtime hours worked; 5) Named Plaintiff will fairly and adequately protect the interests of the putative class in light of the fact that he seeks the same relief as the class members, is familiar with this lawsuit and the claims of the individuals that he seeks to represent, and wishes to represent other employees to help them recover unpaid wages and commissions; and 6) a class action is superior to other available methods because the common issues presented in the instant action can be most efficiently and economically addressed on a class-wide basis. Plaintiffs submit, further, that a consideration of the factors set forth in CPLR § 902 supports class certification, in part because the putative class is likely comprised of hundreds, if not thousands, of individuals, demonstrating the impracticability and inefficiency of prosecuting separate actions.

Defendants oppose Plaintiffs' motion submitting that 1) Cruz is not an adequate representative of the class in light of a) his unfamiliarity with this lawsuit and the allegations upon which it rests, as evidenced by his deposition testimony demonstrating his lack of knowledge regarding his purported class claims, the parties, or his own factual allegations (*see* Cruz Dep. Tr. at 143-147), and b) the fact that Cruz is subject to individualized defenses, specifically that he was inconsistent and evasive regarding the circumstances surrounding the accident in which he was involved, thereby creating the possibility that his credibility could become the focus of cross examination, to the detriment of the class; 2) Cruz has not established that the class is so numerous as to make joinder impracticable, as Cruz has not identified a single class member other than Cruz who is similarly situated to him, and has not produced any evidence demonstrating how they are similarly situated; 3) the questions of law and fact affecting individual class members predominate over those common to the class as evidenced by the fact that Cruz has not adduced any evidence that each of the putative class members was entitled to receive overtime pay, and that each of those employees did not receive the overtime pay to which he or she was entitled; 4) Cruz lacks standing to bring class claims because, for the reasons outlined in Brink's motion, Cruz's individual Labor Law claim fails; 5) for the same reasons that Cruz fails to meet his other requirements, Cruz fails to establish that his claims are

typical of the claims of the class; 6) a class action is not the superior method for adjudication of this controversy in light of the fact that Cruz's Labor Law claim is unavailable; and 7) Cruz has not satisfied the factors set forth in CPLR § 902, in part because, to the extent that Cruz's claim is subject to dismissal because it is not viable, the individual class members will suffer because they will not have been afforded the resources, time, and arguments that they would receive if they pursued individual claims.

RULING OF THE COURT

A. Summary Judgment

On a motion for summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP*, 26 N.Y.3d 40, 49 (2015), quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action. *Nomura*, 26 N.Y.3d at 49, citing *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012), quoting *Alvarez*, 68 N.Y.2d at 324.

B. Overtime Compensation

The New York Labor Law ("NYLL") does not have specific provisions governing overtime compensation. *Wills v. RadioShack Corp.*, 981 F. Supp. 2d 245, 252 (S.D.N.Y. 2013), quoting *Ballard v. Cmty. Home Care Referral Serv., Inc.*, 264 A.D.2d 747 (2d Dept. 1999). The NYLL's standards for paying overtime instead are governed by regulations promulgated by the New York Department of Labor ("NYDOL"). *Wills*, 981 F. Supp. 2d at 252, quoting *Severin v. Project Ohr, Inc.*, 2012 U.S. Dist. LEXIS 85705 (S.D.N.Y. 2012). The NYDOL's regulations, in turn, state that an employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's regular rate in the manner and methods provided in and subject to the exemptions of Sections 7 and 13 of the Fair Labor Standards Act ("FLSA"). *Wills*, 981 F. Supp. 2d at 252, quoting 12 N.Y.C.R.R. § 142-2.2. The regulations define an employee's regular rate as the amount that the employee is regularly paid for each hour of work. *Wills*, 981 F. Supp. 2d at 252, quoting 12 N.Y.C.R.R. § 142-2.16. For employees paid a salary rather than an hourly rate, the regular rate shall be determined by dividing the total hours worked during the week into the employee's total earnings. *Wills*, 981 F. Supp. 2d at 252, quoting 12 N.Y.C.R.R. § 142-2.16.

These definitions accord with those used by the U.S. Department of Labor in construing the FLSA. *Wills*, 981 F. Supp. 2d at 252, citing 29 C.F.R. § 778.114(a). The NYDOL's regulations as to overtime pay under the NYLL thus both incorporate and track the FLSA. On this basis, the New York courts have consistently held that the NYLL follows the FLSA in how it calculates statutorily required overtime pay. *Wills v. RadioShack Corp.*, 981 F. Supp. 2d at 252-53 citing, *inter alia*, *Scott Wetzel Servs. Inc. v. N.Y. State Bd. of Indus. Appeals*, 252 A.D.2d 212 (3d Dept. 1998).

Under the Motor Carrier Act ("MCA") exemption to the FLSA's overtime requirements, *see* 29 U.S.C. § 213(b(1), certain motor carrier operations are exempt from the FLSA and are instead subject to regulation by the Secretary of Transportation. *Thompson*, 246 F. Supp. 3d 697, 700 (E.D.N.Y. 2017). Covered operations include "motor private carrier[s]" which are enterprises that do not primarily provide transportation services but rather transport goods they own for sale or similar purposes. *Id.*, citing 49 U.S.C. §§ 13102(15); 31502(b)(2) ("The Secretary of Transportation may prescribe requirements for...maximum hours of service of employees of...a motor private carrier."). An employee falls within the MCA exemption if his "activities...directly affect[] the safety of operation of motor vehicles, in interstate or foreign commerce within the meaning of the Motor Carrier Act." *Thompson*, quoting 29 C.F.R. § 782.2(a). Truck drivers may thus be covered by the MCA exemption. *Thompson*, 246 F. Supp. 3d at 700-01, citing *Fox v. Commonwealth Worldwide Chauffeured Transp. of N.Y. LLC*, 865 F. Supp. 2d 257, 266 (E.D.N.Y. 2012) ("There are four broad categories of workers whose duties are said to directly affect the safety of vehicle operation: drivers, mechanics, loaders, and helpers of the first three.").

The MCA exemption may apply even if a truck driver does not cross state boundaries so long as a substantial part of his activities relate to goods moving in the channels of interstate commerce. *Thompson*, 246 F. Supp. 3d at 701, quoting *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 572 (1943); 29 C.F.R. § 782.7(b)(1) ("Transportation within a single State is in interstate commerce within the meaning of the [FLSA]...where it forms a part of a "practical continuity of movement" across State lines from the point of origin to the point of destination."). As a result, delivery route drivers who do not cross state lines may be covered by the MCA exemption if the essential character of a shipment is interstate in nature. *Thompson*, 246 F. Supp. 3d at 701, citing *Deherrera v. Decker Truck Line, Inc.*, 820 F.3d 1147, 1155 (10th Cir.

2016), quoting *Foxworthy v. Hiland Dairy Co.*, 997 F.2d 670, 672 (10th Cir. 1994), and citing *Bilyou v. Dutchess Beer Distribs., Inc.*, 300 F.3d 217, 224-25 (2d Cir. 2002) (finding the interstate commerce requirement to be satisfied where intrastate route driver picked up empty bottles and cans intended for shipment out of state).

Brink's is a motor carrier that transports property in interstate commerce because Brink's transports checks destined for banks outside of Florida and transports property destined for interstate and foreign locations. *Hernandez v. Brink's Inc.*, 2009 U.S. Dist. LEXIS 2726, * 7 (S.D. Fla. 2009). It is unnecessary for an employee to engage in interstate travel as long as the property being transported is bound for an interstate destination. *Id.*, citing *Baez v. Wells Fargo Armored Serv. Corp.*, 938 F.2d 180, 181-82 (11th Cir. 1991). The *Hernandez* court also held that the plaintiffs who worked as drivers fell within the regulation's definition of drivers who affect the safety of operation and were therefore covered by the FLSA's motor carrier exemption. *Hernandez*, 2009 U.S. Dist. LEXIS 2726 at * 10.

C. Class Action Litigation

CPLR § 901(a) requires that a plaintiff who wishes to maintain an action on behalf of a class must establish that:

1. The class is so numerous that joinder of all members 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.

Courts must broadly construe these criteria not only because of the general command for liberal construction of all CPLR sections (CPLR § 104), but also because it is apparent that the Legislature intended article 9 to be a liberal substitute for the narrow class action legislation which preceded it. *Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 91 (2d Dept. 1980). The plaintiff bears the burden of establishing that the class exists and that the prerequisites are met. *Canavan v. Chase Manhattan Bank, N.A.*, 234 A.D.2d 493, 494 (2d Dept. 1996) citing, *inter*

alia, *Brady v. State of New York*, 172 A.D.2d 17, 24-25 (3d Dept. 1991). With respect to the typicality requirement set forth in CPLR § 901(a)(3), typical claims are those that arise from the same facts and circumstances as the claims of the class members. *Globe Surgical Supply v. GEICO Ins. Co.*, 59 A.D.3d 129, 143 (2d Dept. 2008).

If the five prerequisites outlined in CPLR § 901 are satisfied, the Court must then consider the practical manageability considerations set forth in CPLR § 902. Pursuant to CPLR § 902, among the matters which the court shall consider in determining whether the action may proceed as a class action are:

1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;
2. The impracticability or inefficiency of prosecuting or defending separate actions;
3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum; and
5. The difficulties likely to be encountered in the management of a class action.

D. Application of these Principles to the Instant Action

The Court dismisses the Complaint as asserted against Brink's based on its conclusion that the evidence establishes, as a matter of law, that Cruz's employment for Brink's as a driver met all of the elements under the MCA exemption to the overtime pay requirements under the FLSA. Therefore, Cruz cannot claim overtime compensation as a matter of law. This conclusion is supported by evidence demonstrating that Cruz's position directly affected the safety of operation of motor vehicles, and that he was involved in interstate commerce. That evidence includes the DOL audit, testimony regarding Cruz's operation of vehicles out of state, and testimony regarding other Brink's drivers' operation of vehicles out of state which supports the conclusion that a substantial part of Cruz's activities related to goods moving in the channels of interstate commerce. This conclusion is further supported by case law holding that Brink's drivers, and other drivers engaged in similar conduct, are engaged in interstate commerce.

Although the Court has granted Brink's motion to dismiss the Complaint, the Court will address Plaintiffs' motion, which the Court denies based on its conclusion that Plaintiffs have not met their burden of establishing that the class in question exists and that the prerequisites are met. The Court so rules based on its determination that:

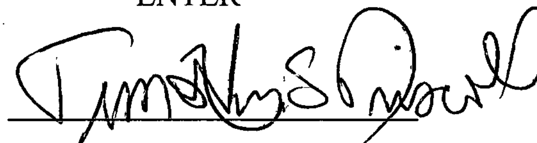
1) Cruz is not an adequate representative of the class in light of his unfamiliarity with this lawsuit and the allegations upon which it rests, as well as the fact that Cruz is subject to individualized defenses, specifically that he was inconsistent and evasive regarding the circumstances surrounding the accident in which he was involved, thereby creating the possibility that his credibility could become the focus of cross examination, to the detriment of the class;
2) Cruz has not established that the class is so numerous as to make joinder impracticable, as Cruz has not identified any class member other than Cruz who is similarly situated to him, and has not produced any evidence demonstrating how they are similarly situated;
3) Cruz has not established that there are questions of law or fact common to the class which predominate over any questions affecting only individual members as Cruz has not adduced any evidence that each of the putative class members was entitled to receive overtime pay, and that each of those employees did not receive the overtime pay to which he or she was entitled;
4) Cruz lacks standing to bring class claims in light of the Court's determination that Cruz's individual Labor Law claim fails;
5) Cruz has failed to establish that his claims are typical of the claims of the class;
6) A class action is not the superior method for adjudication of this controversy in light of the Court's determination that Cruz's Labor Law claim is not viable; and
7) Cruz has not satisfied the factors set forth in CPLR § 902, in part because, in light of the Court's dismissal of Cruz's claim, the individual class members will suffer because they will not have been afforded the resources, time, and arguments that they would receive if they pursued individual claims.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
June 26, 2018



ENTERED
JUN 29 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE

HON. TIMOTHY S. DRISCOLL
J.S.C.