

Henix v Liveonny, Inc.
2019 NY Slip Op 31444(U)
May 23, 2019
Supreme Court, New York County
Docket Number: 158222/2016
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

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AVERY HENIX and ANTHONY WARE, on behalf of
themselves and all others similarly situated,

Plaintiffs,

- v -

LIVEONNY, INC.,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111

were read on this motion for class certification.

Plaintiffs move pursuant to CPLR article 9 to certify a class of all similarly situated persons. Defendant opposes.

I. BACKGROUND

In their amended complaint, plaintiffs allege the following:

Plaintiffs were formerly employed by defendant as tissue recovery specialists (“TRSs”). As TRSs, plaintiffs and the proposed class traveled to hospitals, recovered tissue, facilitated the recovery of tissue for transplant, complete paperwork, and communicated with other members of the recovery team. Until May 15, 2016, they were misclassified as exempt employees and paid a flat fee per tissue recovery case. On May 15, 2016, TRSs were re-classified as non-exempt hourly workers.

Plaintiffs thus seek to certify a class consisting of:

All current and former TRSs who worked for Defendant in the State of New York during the Class Period and who (a) were not compensated for all time spent traveling to jobs and between jobs; (b) were not compensated for all time spent

on-call; (c) were not paid at their straight or agreed upon rate for all hours worked under forty (40) hours in a week; (d) were not paid overtime of time and one-half their regular rate of pay for all hours worked over forty (40) in a week; (e) were not paid spread of hours pay and/or (f) were not provided accurate wage statements.

(NYSCEF 82).

II. CLASS CERTIFICATION

On a motion for class certification, the plaintiffs bear the burden of demonstrating the prerequisites for class certification under CPLR article 9. (*Williams v Air Serv Corp.*, 121 AD3d 441, 441 [1st Dept 2014]). Certification of a class is within the court's discretion and the statute is to be liberally construed. (*Kudinov v Kel-Tech Const. Inc.*, 65 AD3d 481, 481 [1st Dept 2009]). While conclusory allegations in pleading or affidavits do not meet the plaintiff's burden (*Rallis v City of New York*, 3 AD3d 525, 526 [2d Dept 2004]), the court should neither decide substantive issues concerning the merit of the underlying claims nor determine credibility (*Genxiang Zhang v Hiro Sushi at Ollie's Inc.*, 2019 WL 699179, *6 [SD NY Feb. 5, 2019] [internal quotation marks and citations omitted]).

A. Merits

To the extent both parties present lengthy arguments as to the merits of this action, they are not considered. On a class certification motion, the court considers the merits only to ensure that "on the surface there appears to be a cause of action which is not a sham." (*Pludeman v N. Leasing Sys., Inc.*, 74 AD3d 420, 422 [1st Dept 2010]; *Kudinov*, 65 AD3d at 482 [analysis of merits on class certification motion "is not intended to be a substitute for summary judgment or trial"]).

Plaintiffs' claims that they were not paid appropriate wages as required under the Labor Law are sufficiently meritorious.

B. CPLR 901

Pursuant to CPLR 901(a), a lawsuit may be maintained as a class action if the following criteria are met: (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members (commonality); (3) the claims of the representative parties are typical of the claims of the class (typicality); (4) the representative parties will fairly and adequately protect the class's interests (adequacy of representation); and (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy (superiority). (*City of New York v Maul*, 14 NY3d 499, 508 [2010]). The moving party bears the burden of establishing each criterion. (*Matter of Colt Indus. Shareholder Litig.*, 155 AD2d 154, 159 [1st Dept 1990], *affd as mod* 77 NY2d 185 [1991]).

1. Numerosity

i. Plaintiffs' contentions

Plaintiffs maintain that there are approximately 38 proposed class members, as defendant produced a list of 28 TRSs, and Henix identified an additional ten. As a class consisting of 40 members is presumed to satisfy numerosity, 38 members is sufficient. In support, plaintiffs submit a list, produced by defendant, of current and former TRSs employed by defendant during the class period (NYSCEF 83), affidavits of six proposed class members who state that they fall within the class definition (NYSCEF 86-91), and two affidavits in which Henix identifies, by name, a combined ten additional proposed class members. (NYSCEF 92, 93).

ii. Defendant's contentions

Defendant alleges that plaintiffs' proposed class consists of 28 members, too few to satisfy numerosity, and that the additional "nine" class members should not be considered

because they were not “per diem TRS’s like plaintiffs,” and thus, are not similarly situated and cannot be part of the class.

In support defendant produces the same list offered by plaintiffs. (NYSCEF 106).

iii. Reply

In reply, plaintiffs contend that defendant fails to rebut the existence of 38 class members, as it offers no explanation as to why the additional ten employees are not members of the class. Plaintiffs reference the affidavit of one proposed class member who asserts that he is a member of the proposed class, despite not being on defendant’s employee list (NYSCEF 88).

iv. Analysis

There is no mechanical test to determine whether the requirement of numerosity has been met. (*Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 137 [2d Dept 2008] [citations omitted]). Classes of 40 proposed members have been deemed sufficient for class certification (*Stecko v Three Generations Contracting Inc.*, 2013 NY Slip Op 31524[U] [Sup Ct, NY County 2013], *affd* 121 AD3d 542 [1st Dept 2014]), whereas classes comprised of fewer members have also been certified (*see e.g., Galdamez v Biordi Const. Corp.*, 13 Misc 3d 1224[A] [Sup Ct, NY County 2006], *affd* 50 AD3d 357 [1st Dept 2008] [class consisting of between 30 and 70 members sufficiently numerous]; *Caesar v. Chem. Bank*, 118 Misc 2d 118, 120 [Sup Ct, NY County 1983], *affd* 106 AD2d 353 [1st Dept 1984], *mod* 66 NY2d 698 [1985] [class of 38 members sufficiently numerous]).

That Henix personally knows of an additional ten potential class members is sufficient to establish numerosity. (*See e.g., Stecko*, 121 AD3d at 542 [“Plaintiffs’ affidavits stating that they recalled working with at least fifty other workers established that the class is so numerous that joinder of all members is impracticable”]; *Dabrowski v Abax Inc.*, 84 AD3d 633, 634 [1st Dept

2011] [relying on proposed class members' affidavits to find numerosity]; *Galdamez*, 13 Misc 3d 1224[A] [same]).

Defendant's assertion that the additional ten proposed class members should not be considered because they are not similarly situated with the plaintiffs is a question of commonality and typicality, not numerosity.

2. Commonality

i. Plaintiffs' contentions

Plaintiffs maintain that commonality is met because plaintiffs and the proposed class members held the same job title and worked during the class period. Moreover, plaintiffs contend that common questions among the proposed class members include whether they were misclassified as exempt, whether they were unlawfully denied pay for travel time, on-call time, and straight time, and whether they are owed overtime pay. They argue that the proposed class members' claims predominate over individual issues because they concern whether defendant instituted an unlawful wage policy or practice. In support, plaintiffs reference their affidavits, as well as those of the proposed class members who state that they were not paid for travel and/or on-call time (NYSCEF 84-91).

ii. Defendant's contentions

Defendant argues that commonality has not been satisfied as individual issues predominate over those common to the class, and because there were: (1) different starting points for each job assignment; (2) different job locations; (3) different job durations; (4) different ending points for each job assignment; (5) different compensation structures depending on level of TRS; (6) different job titles; (7) different times when employees were on-call; (8) different times where employees accepted a job while on-call; (9) different times where employees

declined a job while on-call; and, (10) different employment statuses.

Even if a common question exists as to whether they were not compensated properly, that question must predominate over all individual issues, defendants assert, and as plaintiffs identify one or two common issues, predominance is not satisfied.

iii. Plaintiffs' reply

Plaintiffs contend that the individual issues identified by defendant do not alter the analysis of defendant's liability. Differences in proposed class members' damages does not preclude a finding of commonality and predominance.

iv. Analysis

The determination of whether common issues predominate over individual issues does not include a consideration of the proposed class members' damages. Rather, the proposed class members must have been subjected to the same alleged unlawful conduct of the defendant. (*Weinstein v Jenny Craig Operations, Inc.*, 138 AD3d 546, 547 [1st Dept 2016]).

Here, plaintiffs demonstrate that common issues predominate over individual issues because each proposed class member was subject to the same allegedly unlawful wage policy, whereas the issues highlighted by defendant reflect differences in the damages alleged by the class members. Thus, the assessment of liability is identical for each class member, and certification is not precluded. (*Id.* ["Class action is an appropriate method of adjudicating wage claims arising from an employer's alleged practice of underpaying employees"]; *Stecko*, 121 AD3d at 543 [commonality met where all class members allege that defendant failed to pay required prevailing wage and supplemental benefits]; *Kudinov*, 65 AD3d at 482 ["that different trades are paid on a different wage scale and thus have different levels of damages does not defeat certification"]).

3. Typicality

i. Plaintiffs' contentions

Plaintiffs contend that their claims are typical of the class because defendant's wage policies and practices affected them and all proposed class members in the same manner: they were not adequately paid for travel time and/or on-call time.

ii. Defendant's contentions

Defendant observes that although plaintiffs assert claims based on minimum wage, overtime, spread-of-hours compensation, and accurate wage statements, they only seek certification based on travel time and failure to compensate on-call time. As plaintiffs have claims different from those of the proposed class, the requirement of typicality is not satisfied.

iii. Plaintiffs' reply

Plaintiffs clarify that, in contrast to their first motion for certification, they now advance the same claims as those of the proposed class.

iv. Analysis

Claims are typical when the named plaintiffs' claims "derive[] from the same practice or course of conduct that gave rise to the remaining claims of other class members and [are] based upon the same legal theory." (*Friar v Vanguard Holding Corp.*, 78 AD2d 83, 99 [2d Dept 1980]; *Maul*, 59 AD3d at 190 [typicality is met when plaintiffs' claims and those of class "generally flow from the same alleged conduct"]).

Here, plaintiffs' claims are typical of those of the proposed class as they are premised on the same allegedly unlawful wage policy. That some class members may not advance all the claims asserted by the named plaintiffs is no bar to class certification. (*See Pludeman*, 74 AD3d at 423 ["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”]; *Pruitt v Rockefeller Ctr. Properties, Inc.*, 167 AD2d 14, 22 [1st Dept 1991] [typicality is met “even if the class representative cannot personally assert all the claims made on behalf of the class”]).

In any event, to the extent further discovery reveals that the claims of plaintiffs are not typical of those of the class, defendants may move to decertify the class. (*Jones v Mega Imperial Const. Corp.*, 251 AD2d 229, 229 [1st Dept 1998]).

4. Adequacy

i. Plaintiffs’ contentions

Plaintiffs maintain that their proposed class counsel is qualified and experienced to litigate this matter as a class action. In support, plaintiffs’ counsel submits an affidavit detailing his background and experience with class action litigation. The named plaintiffs are themselves adequate because they have been injured in the same manner as was the proposed class. (NYSCEF 70).

ii. Defendant’s contentions

Defendant asserts that the named plaintiffs are inadequate to serve as representatives because they assert claims that are not common with the proposed class.

iii. Reply

Plaintiffs reiterate that the claims they advance are identical to those of class.

iv. Analysis

When assessing the adequacy of the representative parties, the court considers the “potential conflicts of interest between the representative and the class members, personal characteristics of the proposed class representative (*e.g.* familiarity with the lawsuit and his or

her financial resources), and the quality of the class counsel.” (*Globe Surgical Supply*, 59 AD3d at 144, citing *Ackerman v Price Waterhouse*, 252 AD2d 179 [1st Dept 1998]).

Plaintiffs’ claims are identical to those of the proposed class, and thus, there are no conflicts of interest between the named plaintiffs and the class. Additionally, the affidavits of the named plaintiffs demonstrate that they understand the nature of the case and the claims asserted therein. (*See Williams*, 121 AD3d at 442 [“the named plaintiffs have sufficiently demonstrated at least a general awareness of the claims in this action, which is sufficient for certification”]). Finally, it is undisputed that plaintiffs’ counsel is qualified to serve as class counsel. Counsel has practiced employment law and litigation for 30 years, and has successfully handled numerous wage and hour class actions, some as lead or co-lead class counsel.

5. Superiority

i. Plaintiffs’ contentions

Plaintiffs contend that adjudicating this matter as a class action is superior to other methods, as otherwise there would be numerous individual actions, each of which would be duplicative and wasteful. In addition, the size of individual damages may disincentivize class members from pursuing their claims absent class certification.

ii. Defendant’s contentions

Defendant contends that a class action is not a superior method of adjudication as plaintiffs have the administrative remedy of filing a complaint pursuant to Labor Law § 196 and 196-a with the Department of Labor (DOL) which has specialized knowledge and experience with wage and hour claims and can provide full relief to plaintiffs and the class.

iii. Plaintiffs’ reply

Plaintiffs argue that they are entitled to seek relief in this court, and that in this venue, the

statute of limitations is six years, whereas a claim filed with the DOL would be subject to a two-year statute of limitations. Moreover, plaintiffs observe that other courts have rejected attempts to dismiss on similar grounds.

iv. Analysis

A class action is considered a superior method of adjudication where there is a large number of proposed class members with similar claims and a relatively small potential recovery for each member. (*Jim & Phil's Family Pharmacy, Ltd. v Aetna U.S. Healthcare, Inc.*, 271 AD2d 281, 282 [1st Dept 2000]).

Class certification is appropriate for wage and hour actions like this one, even where an administrative remedy is available. (*See Weinstein*, 138 AD3d at 547 [“Class action is an appropriate method of adjudicating wage claims arising from an employer’s alleged practice of underpaying employees”]; *Dabrowski*, 84 AD3d at 635 [“class action is superior to the prosecution of individualized claims in an administrative proceeding in view of the difference in litigation costs, the laborers’ likely insubstantial means, and the modest damages to be recovered by each individual laborer, if anything”]; *Nawrocki v Proto Const. & Dev. Corp.*, 82 AD3d 534, 536 [1st Dept 2011] [class action vehicle superior to administrative remedies under Labor Law]).

C. CPLR 902

In determining whether to certify a class, the court must consider: (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. (*Jiannaras v Alfant*, 124 AD3d 582, 584 [2d Dept 2015), *affd* 27 NY3d 349 [2016]).

1. Contentions

i. Plaintiffs

Plaintiffs contend that the costs of prosecuting individual actions outweigh the potential individual recovery, and thus, no class member would have an interest in filing an individual action. Moreover, it would be inefficient and a burden on the judicial system if each class member were to bring their own individual action. Plaintiffs maintain that they know of no other action commenced by class members asserting the same wage claims and assert that this court is the proper forum as affected class members like plaintiffs live in New York County, and there would be no manageability issues if the class were certified.

ii. Defendant

Defendant contends that certification of the proposed class would present management issues for the court, as it would require mini-trials for liability and damages for each class member. It reiterates that an administrative remedy is available.

iii. Plaintiffs' reply

Plaintiffs argue that this case is manageable as a class action, as damages may be calculated using a summary of each member's unpaid wage damages. In addition, instead of having each class member testify, plaintiffs can offer a sampling of testimony to establish damages and liability. They reiterate their argument against administrative remedies.

2. Analysis

As the assessment required for determining liability is the same for each class member, the holding of individual trials is unnecessary and the differences in class members' damages

does not defeat class certification. (*See Andryeyeva v New York Health Care, Inc.*, 2019 WL 1333030, *12 [2019] [“A difference in damage awards is an insufficient basis to deny certification as a matter of law where the class may rely on representative evidence of the class-wide violations”]; *Borden v 400 E. 55th St. Assocs., L.P.*, 105 AD3d 630, 631 [1st Dept 2013], *affd* 24 NY3d 382 [2014] [“The need to conduct individualized damages inquiries does not obviate the utility of the class mechanism for this action, given the predominant common issues of liability”]).

It is uncontested that there are no pending actions by proposed class members concerning the claims advanced here, and given the relatively small individual potential recovery, there is little incentive for a class member to forego certification in favor of prosecuting individual claims. (*See Stecko*, 121 AD3d at 543 [class action is superior in cases alleging wage payment violations because costs of prosecuting individual action disincentivize individuals from bringing their own actions]).

The availability of administrative remedies does not render this forum inappropriate. (*See supra* at II.B.5.iv).

D. Abandonment

In opposition, defendant contends that plaintiffs have abandoned their non-travel time claims. Plaintiffs expressly state that they seek class certification for all claims. Accordingly, plaintiffs have not abandoned any of their claims.

E. Class definition

To be certified, the proposed class must be capable of being identified. (*Globe Surgical Supply*, 59 AD3d at 137). Similarly, a proposed class may not constitute a fail-safe class, one “whose membership can only be ascertained by a determination of the merits of the case because

the class is defined in terms of the ultimate question of liability.” (*Hicks v T.L. Cannon Corp.*, 35 F Supp 3d 329, 356 [WD NY 2014], quoting *In re Rodriguez*, 695 F3d 360, 369–370 [5th Cir 2012]). A fail-safe class is impermissible because it “shields the putative class members from receiving an adverse judgment.” (*Hardgers-Powell v. Angels in Your Home LLC*, FRD , 2019 WL 409276, *6 [WD NY 2019], quoting *Hicks*, 35 F Supp 3d at 356).

Plaintiffs’ proposed class definition constitutes an impermissible fail-safe class as it presumes liability. Here, the class is defined as TRSs who were not provided accurate wage statements. If it were ultimately determined that the wage statements provided were accurate, class members other than plaintiffs would not be bound by the adverse judgment because there would be no class. (*See Hicks*, 35 F Supp 3d at 357 [“In a fail-safe class, either the class members win or, by virtue of losing, they are not in the class, and therefore not bound by the judgment.”]).

Nevertheless, the court may exercise its discretion to amend the class definition. (*See Hardgers-Powell*, 2019 WL 409276, *8 [the court “retains the discretion to redefine a faulty class definition”]; *B & R Supermarket, Inc. v MasterCard Int’l Inc.*, 2018 WL 1335355, *10 n 17 [ED NY 2018]) [same]).

As it is uncontested that plaintiffs seek to represent all TRSs employed by defendant within the class period, the class is redefined as follows: All current and former tissue recover specialists who worked for LIVEONNY, INC. in the State of New York from September 29, 2010 to the present.

F. Notice

Plaintiffs propose that if the class were to be certified, class counsel should be permitted to send notices to the last known address defendant has for each class member.

Pursuant to CPLR 904(b), "reasonable notice of the commencement of a class action shall be given to the class in such manner as the court directs." However, "the content of the notice shall be subject to court approval." (CPLR 904[c]). As plaintiffs do not submit a proposed notice, they are directed to do so within 30 days of the date of this decision.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for class certification is granted; it is further

ORDERED, that plaintiffs Avery Henix and Anthony Ware are appointed as lead plaintiffs and class representatives; it is further

ORDERED, that the Law Firm of Louis Ginsberg, P.C. is appointed as class counsel; it is further

ORDERED, that plaintiffs are to submit a proposed notice to class members within 30 days of the date of this order, and defendant is to file opposition, if any, within 10 days thereafter; and it is further

ORDERED, that the parties appear for a compliance conference on July 24, 2019 at 2:15 pm at 60 Centre Street, Room 341, New York, New York.

5/23/2019
DATE

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BARBARA JAFFE, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE