SUPREME COURT OF NEW YORK
COUNTY OF NEW YORK: PART 58

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ENDRIT KLLOGJERI and KUJTIM ISUFI, individually and on behalf of all other persons similarly situated who were employed by AMB CONSTRUCTION, INC. and/or any other entities affiliated with or controlled by AMB CONSTRUCTION, INC.,

Plaintiffs,

-against-

Index No.: 155544/16
Motion Seq. No.: 003

AMB CONSTRUCTION, INC. and/or any other entities affiliated with or controlled by AMB CONSTRUCTION, INC., and JOHN DOE BONDING COMPANY,

Defendants.

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Cohen, David B., J.:

In this action for failure to pay prevailing wages, plaintiffs Endrit Kllogjeri and Kujtim Isufi, individually (named plaintiffs) and on behalf of all other persons similarly situated who were employed by defendant AMB Construction, Inc. (AMB) and/or any other entities affiliated with or controlled by AMB and John Doe Bonding Company (putative class), move, pursuant to CPLR 901 and 902, for an order seeking class certification of the action on behalf of all individuals who performed construction work on the Syosset High School roof replacement project for or on behalf of AMB during the summer of 2015.

Defendants AMB and John Doe Bonding Company oppose.

Background

In 2015, AMB entered into a public work contract to perform construction work on the "Syosset Project" at the Syosset High School in Syosset, New York (the Project). Upon information and belief, a schedule of prevailing rates of wages and supplemental benefits containing the wage rates to be paid to the construction works was made a part of the public

work contract. Under the public work contract, defendant AMB was required to pay its workers prevailing wages and supplemental benefits for every hour the workers worked and furnished labor on the Project. Plaintiffs maintain that AMB failed to pay the named plaintiffs and the potential class members of the putative class the prevailing rates of wages and supplemental benefits for every hour worked, in addition to overtime compensation which the named plaintiffs and potential class members were entitled to receive for the work they performed on the Project.

Plaintiffs submit the affidavits of the named plaintiffs, in addition to three putative class members, Ergys Gjona, Enver Kllogjeri and Zeni Isufi (plaintiffs exhibits B through F). All of the affiants worked for AMB on the Project during the summer of 2015 (Kllogjeri aff, ¶ 2; Isufi aff, ¶ 2; Gjona aff, ¶ 2; Enver Kllogjeri aff, ¶ 2; Zeni aff, ¶ 2). During their employment, plaintiffs were classified as "roofers", working from approximately 5:00 a.m. until 7:00 p.m. from five to seven days per week (Kllogjeri aff, ¶¶ 3, 6; Isufi aff, ¶¶ 3, 6; Gjona aff, ¶¶ 3, 6; Enver aff, ¶¶ 3, 6; Zeni aff, ¶¶ 3, 6). Each of the affiants aver that AMB failed to pay the roofer the prevailing hourly wage rate and benefits rate for every hour worked (Kllogjeri aff, ¶ 8; Isufi aff, ¶ 8; Gjona aff, ¶ 8; Enver aff, ¶ 9; Zeni aff, ¶ 9), and that the other workers on the Project were also not paid the correct wages for work performed (Kllogjeri aff, ¶ 8; Isufi aff, ¶ 8; Gjona aff, ¶ 8; Enver aff, ¶ 11; Zeni aff, ¶ 11).

Enver and Zeni aver that they were paid by check and that the checks grossly understated the amount of hours they worked per week (Enver aff, ¶¶ 8, 9; Zeni aff, ¶¶ 8, 9). For example, AMB paid the two for 32 to 40 hours per week when they actually worked 60 or more hours per week (*id.*). All of the affiants aver that at least 35 other individuals worked as roofers on the Project that summer, and have provided the court with the names of no less than 20 individuals

who they could identify as roofers on the Project during the summer of 2015 (plaintiff exhibit G).

Plaintiffs seek to certify a class of members consisting of "[a]ll individuals who performed construction work on the Syosset High School roof replacement project for or on behalf of AMB Construction, Inc. during the summer of 2015."

In opposition, AMB states that although it disputes the merits of the claims asserted by plaintiffs, for purposes of the instant motion, AMB states that it entered into a construction contract with Syosset Central School District to perform roofing in connection with the Project known as "Partial Roofing Replacement at Syosset High School (Syosset), Contract G-General Constr. Work." Defendants submit no supporting affidavits to refute the facts as alleged by plaintiffs.

Discussion

In order to maintain a class action pursuant to CPLR 901, the moving party bears the burden of establishing each of the following: (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 (CPLR 901; *Ackerman v Pricewaterhouse*, 252 AD2d 179 [1st Dept 1998]). These factors are commonly referred to as the requirements of numerosity, commonality, typicality, adequacy of representation and superiority (*City of New York v Maul*, 14 NY3d 499, 508 [2010]).

"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 of our holding that the class certification statute should be liberally construed" (*Kudinov v Kel-Tech Constr. Inc.*, 65 AD3d 481, 481 [1st Dept 2009]). 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 Northern 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"]).

Numerosity

There is no "mechanical test" of prospective class members which must exist to determine whether class membership is so numerous as to make actual joinder under CPLR 901 impracticable (*Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 137 [2d Dept 2008]). Plaintiffs claim in their respective affidavits that they recalled working with at least 30 other workers who are potential class members. Such evidence is sufficient to support class certification (*see Stecko v RLI Ins. Co.*, 121 AD3d 542, 542 [1st Dept 2014] [affidavits that plaintiffs recalled working with at least 30 other workers established that the class is so numerous that joinder of all members is impracticable]).

Defendant counters that this number is insufficient to establish numerosity and argues that there could be individuals in the putative class that were paid accurately and therefore are not aggrieved (citing *Alix v Wal-Mart Stores, Inc.*, 16 Misc 3d 844 [Sup Ct, Albany County 2007], *affd* 57 AD3d 1044 [3d Dept 2008]). However, there is no factual evidence in the record that that is case here. The court finds, therefore, that plaintiffs have met their burden in this regard (*see Stecko v RLI Ins. Co.*, 121 AD3d at 542; *Galdamez v Biordi Constr. Corp.*, 13 Misc

3d 1224[A], 2006 NY Slip Op 51969[U] [Sup Ct, NY County 2006], *affd* 50 AD3d 357 [1st Dept 2008] [affidavits of putative class members indicating class size supports finding of numerosity]).

Commonality

In determining whether the claims of the named plaintiffs and putative class members share common questions of law or fact "factual identity between the [p]laintiff's claim and those of the class he seeks to represent is not necessary if these claims arise, at least in part from a common wrong or set of wrongs regardless of individual factors" (*Pajaczek v CEMA Constr. Corp.*, 18 Misc 3d 1140[A], 2008 NY Slip op 50386[U], **3-4 [Sup Ct, NY County 2008] [internal quotation marks and citation omitted]). Notably, defendants ineptly counter with the blanket statement that "appellants' [sic] failure to satisfy the CPLR's 'commonality' prerequisite mandates denial of their motion for class certification as common issues of fact do not predominate over questions which affect only individual class members" (opposition at 8). Here, plaintiffs have sufficiently alleged that AMB failed to pay or ensure payment of prevailing wages and supplemental benefits to the workers on the Project. Whether they were paid prevailing wages and supplemental benefits and failed to pay them all required overtime payments are predominate common questions of law and fact (*Slecko v RLI Ins. Co.*, 121 AD3d at 543 [commonality found as all class members alleged that defendant failed to pay required prevailing wages and supplemental benefits]; *Kudinov*, 65 AD3d at 482 ["the commonality of claims predominates, given the same types of subterfuges allegedly employed to pay lower wages"]).

Typicality

Typicality is established when the named plaintiffs' claims "arise[] out of the same course of conduct as the class members' claims and is based on the same cause of action" (*Pruitt*

v Rockefeller Ctr. Props., 167 AD2d 14, 22 [1st Dept 1991]). Here, plaintiffs' claims are typical of the claims of all class members since they each arise from defendant's alleged failure to pay prevailing wages and supplemental benefits (*id.*; *see also Williams v Air Serv. Corp.*, 121 AD3d 441, 442 [1st Dept 2014] ["minor differences in each individual class member's claim do not defeat typicality"]; *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 99 [2d Dept 1980]).

Adequacy

"The factors to be considered in determining adequacy of representation are whether any conflict exists between the representatives and the class members, the representatives' familiarity with the lawsuit or his or her financial resources, and the competence and experience of counsel" (*Ackerman*, 252 AD2d at 202). Defendants do not dispute the adequacy of representation. Having served as counsel in numerous wage and hour legal matters and more specifically prevailing wage class actions in this county, the court finds plaintiffs' counsel has "demonstrated a level of competence ensuring" that they are an adequate representative for the class (*Pesantez v Boyle Envtl. Servs.*, 251 AD2d 11, 12 [1st Dept 1998]; *Nawrocki v Proto Constr. & Dev. Corp.*, 82 AD3d 534, 535 [1st Dept 2011] [representation adequate as plaintiff sought same relief as class members, to receive wages and benefits allegedly owed]).

Superiority

Plaintiffs argue, and the court agrees, that the cost of prosecuting individual actions is likely to exceed the damages suffered by the individual class members, thereby making a class action a superior procedure for resolving the instant claims (*Stecko,* 121 AD3d at 543 [class action is superior for resolving wage disputes]; *Dabrowski v Abax Inc.*, 84 AD3d 633, 635 [1st Dept 2011] [class action is "superior to the prosecution of individualized claims . . . in view of the difference in litigation costs, the laborers' likely insubstantial means, and the modest

damages to be recovered by each individual laborer"]; *Nawrocki*, 82 AD3d at 536). Defendants argue that plaintiffs submission of five affidavits to support their claims is insufficient to establish superiority. However, as noted above, these affidavits are sufficient to establish numerosity, and therefore, the court finds that to have at least 30 or more individual actions is an inefficient and ineffective method of due process, which could lead to conflicting determinations.

B. CPLR 902

In determining whether to certify a class under CPLR 902, the court must consider:

1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;
2. The impracticality 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 by the management of a class action.

Most of the considerations in CPLR 902 are implicit in CPLR 901 (*Nawarocki*, 82 AD3d 534). As discussed above, a class action is appropriate in prevailing wage cases, as pursuing individual actions, given the number of individual workers, would be impractical and inefficient (*Weinstein v Jenny Craig Operations, Inc.*, 138 AD3d 546, 547 [1st Dept 2016]). To the knowledge of class counsel, there are no other actions which have been commenced by potential class members. The forum is appropriate as the roofing project is located in New York, and all claims arise under New York law.

Conclusion

Accordingly, it is

ORDERED that the motion by plaintiffs, Endrit Kllogjeri and Kujtim Isufi, for class certification is granted and leave is granted pursuant to CPLR 901 and 902, for plaintiffs to

prosecute the action on behalf of a class consisting of individuals employed by defendant AMB Construction, Inc. (AMB) and/or any other entities affiliated with or controlled by AMB and John Doe Bonding Company during the summer of 2015 who performed construction work on the Syosset High School roof replacement project for or on behalf of AMB, to recover wages and benefits which class members were entitled to receive for work they performed on these projects but did not receive; and it is further

ORDERED that, within 30 days of the date of this order, defendants shall furnish to plaintiffs' counsel a list of the names and last known addresses of all persons employed by AMB during the summer of 2015 who worked on the Syosset High School roof replacement project; and it is further

ORDERED that plaintiffs shall send a notice to all of the individuals identified by defendants, within 30 days of the date of this order, and said notice shall include a provision that each individual may "opt-out" of the class action, by sending a signed form to plaintiffs' counsel; the form of said notice shall be approved by the court, and it is further

ORDERED that the notice shall be translated into Spanish and Albanian by a legal translation service; and it is further

ORDERED that the proposed notice shall be sent to counsel for defendants within 30 days of the date of this order for comment, which shall be submitted in writing to opposing counsel and the court within seven days; and it is further

ORDERED that the parties shall appear for a compliance conference on MAY 13, 2020, at 9:30 a.m./~~p.m.~~ in room 574 at 111 Centre Street in New York, NY, at which time the notice shall be discussed, as well as any other issues including settlement.

Dated: MARCH 13, 2020

ENTER: _____

J.S.C.

HON. DAVID B. COHEN
J.S.C.