SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE KINGS: IAS PART 90

PRESENT: HON. EDGAR G. WALKER, J.S.C.

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FRANCKLIN GASTON,
Individually and on Behalf of All Other
Persons Similarly Situated,

Plaintiff,

Decision and Order

-against-

Index No. 501710/2018

THE DORAL INVESTORS GROUP, LLC d/b/a
House Calls Home Care, DAVID LIPSCHITZ and
JOHN DOES #1-10,

Defendants.

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Plaintiff, on behalf of himself and the members of the putative class, moves for an order, pursuant to Article 9 of the CPLR, certifying this action as a class action. Plaintiff alleges that the putative class members, employees of the defendants, worked for defendants for over 40 hours per week without being paid overtime wages. Plaintiff alleges that they were not paid time and one-half for overtime hours worked as required by the New York Labor Law [hereinafter, "NYLL"] and the supporting New York State Department of Labor regulations. *See*, NYLL §650 et seq.; 12 NYCRR §142-2.2. The New York State Minimum Wage Orders contain the State's overtime requirements. These requirements are in addition to those required by federal law, including the Fair Labor Standards Act (FLSA). Plaintiff claims that he and the putative class members who worked as live-in healthcare aides employed by defendants were not paid overtime wages for their hours worked past 40 in any given week of their employment. Plaintiff, on behalf of the putative class, seeks damages in the amount of these unpaid overtime wages

In deciding whether to certify the class in this action, this Court has divided the potential class of 1035 possible members into four sub-classes. CPLR 906(2) permits a class to "be divided into subclasses and each subclass treated as a class." City of New York v. Maul, et al., 14 N.Y.3d 499, 513 (2010). In City of New York, the Court of Appeals held that the "…Supreme Court would have the option of creating subclasses to group together members with analogous claims." Id.

The first sub-class consists of employees of defendants who are signatories to, and bound by, an individual Arbitration Agreement with defendants to submit the claims asserted in this action to arbitration before the American Arbitration Association. The approximately 809 employees of this sub-class, who all signed individual Arbitration Agreements with defendants, are barred from joining any class action, having agreed to arbitrate the specific claims at issue with defendants on an individual basis. The agreements provide, in paragraph 3, that no individual employee may "seek to bring his or her dispute on behalf of other employees as a class or collective action."

Traditionally, class action waivers found in arbitration agreements have been upheld by courts at all levels. The Supreme Court has held that "Congress has instructed in the Arbitration Act that arbitration agreements providing for individualized proceedings must be enforced, and neither the Arbitration Act's saving clause nor the NLRA suggests otherwise … The Arbitration Act requires courts to enforce agreements to arbitrate, including the terms of arbitration the parties select." Epic Sys. Corp. v. Lewis, 138 S.Ct. 1612, 1616 (2018). Similarly, it has long been the strong public policy preference of New York to favor arbitration. Adams v. Kent Security of New York, Inc., 156 A.D.3d 588, 589 (1st Dep't 2017) (explaining that "New York has a 'long and strong public policy favoring arbitration,' and 'courts interfere as little as

possible with the freedom of consenting parties to submit disputes to arbitration …'" (quoting Matter of Smith Barney Shearson v. Sacharow, 91 N.Y.2d 39, 49-50 (1997))). As such, the law is established that "…a clear and unmistakable agreement to arbitrate statutory wage claims is not unenforceable as against public policy." Id.

As a rule, an arbitration clause which requires arbitration of individual claims is not necessarily enforceable on its face. Rather, it needs to meet certain specificity requirements:

> '"[a] 'clear and unmistakable' waiver exists where one of two requirements is met: (1) if the arbitration clause contains an explicit provision whereby an employee specifically agrees to submit all causes of action arising out of his employment to arbitration; or (2) where the arbitration clause specifically references or incorporates a statute into the agreement to arbitrate disputes. Arbitration clauses that cover 'any dispute concerning the interpretation, application, or claimed violation of a specific term or provision' of the … agreement do not contain the requisite 'clear and unmistakable' waiver because 'the degree of generality [in the arbitration provision] falls far short of a specific agreement to submit all federal claims to arbitration.'"
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> Tamburino v. Madison Square Garden, L.P., 115 A.D.3d 217, 222–23 (1st Dep't 2014) [*citations omitted*].

Here, the individual Arbitration Agreement that the first sub-class of potential class members signed appears to meet these specificity requirements, as it specifically requires arbitration of "[a]ny and all claims for … breach of contract … failure to pay wages or commissions, spread of hours pay, and failure to pay overtime."

Plaintiff argues in his reply memorandum that defendants waived their right to arbitrate by engaging in this litigation and failing to make any motion to arbitrate any putative class members' claims. In support of this position, plaintiff cites to Ryan v. Kellogg Partners Institutional Services, 58 A.D.3d 481 (1st Dep't 2009) as a case in which the defendant was

found to have waived its right to arbitration by answering the plaintiff's complaint and litigating the case. However, in Ryan, the First Department found that the "[d]efendant waived any right to arbitration by failing to raise it as a defense in its answer…", which is not the case here. Defendants have clearly raised the defense that some members of the putative class are barred from being a part of any class action due to their having signed the arbitration agreement, and defendants have repeatedly made this argument in subsequent motions as well. The Court finds that defendants have not waived their right to arbitrate the claims of those putative class members who signed an arbitration agreement. The first sub-class of the putative class is therefore barred from joining this suit.

Accordingly, the Court finds that the Agreement is enforceable and that this sub-class of employees must seek to arbitrate their claims.

The second sub-class consists of about 508 employees of defendants who were employed by defendants on or after January 1, 2018, and who are bound pursuant to the terms of the Collective Bargaining Agreement [hereinafter, the "CBA"] which defendants and Local 713 negotiated, and to which said members explicitly agreed, to submit the claims asserted in this action to arbitration as provided in the CBA. The CBA contains a specific dispute resolution and arbitration provision which provides, in Article 17, that "…all claims brought by either the Union or Employee(s), present or past, including collective actions and class actions, asserting violations of or arising under the Fair Labor Standards Act ("FLSA") and the regulations thereunder ... and any other cause of action related to wages, hours, and/or benefits in any manner ... shall be subject exclusively to the grievance and arbitration procedures described in this Article." A CBA which requires arbitration of individual claims is not necessarily enforceable on its face, as "[a] CBA cannot preclude a lawsuit concerning individual statutory

rights unless the arbitration clause in the agreement …" meets those same specificity requirements any arbitration clause must meet to be enforceable. *See* Tamburino, 115 A.D.3d at 222–23. The Court finds that the arbitration provision in the CBA at issue here clearly meets the specificity requirements to be enforceable, as it contains both explicit provisions whereby employees who signed the CBA agree to submit all causes of action arising out of their employment to arbitration, and the arbitration provision explicitly covers disputes concerning wages and hour disputes. It specifically provides that the federal and state wage and hour claims brought by employees, including for violations of New York Labor Law, are subject exclusively to the arbitration procedures detailed in the CBA. In Arrigo v. Blue Fish Commodities, Inc., 408 Fed.Appx. 480, 481 (2011), the Court of Appeals for the Second Circuit, in a case for unpaid overtime wages similar to the one before us, held that "…the parties' signed agreement contains language authorizing an arbitrator 'to resolve all federal and state statutory claims.' … Arrigo's unpaid overtime claims arise under federal and state statutes, and therefore fit comfortably within the jurisdiction that the parties have assigned to the arbitrator. As a result, arbitration is the proper forum for Arrigo's claims." Id. Similarly, where in the instant case the CBA's arbitration provision contained the same language as the Court in Arrigo found enforceable, this Court likewise holds that this second sub-class of employees is required to arbitrate their claims and cannot be a part of the putative class.

The third sub-class consists of about 30 employees who settled their claims against the defendants in a prior federal court action, Reid v. Emergency Staffing, Inc… d/b/a House Calls Home Care. These members of the putative class entered into a "Settlement Agreement and General Release" with defendants, and in so doing agreed not to bring or participate in a class action against defendants. In Reid, the plaintiff, Louise Reid, filed a complaint on behalf of

herself and all other then-current and former employees of the defendants alleging many of the same causes of action as plaintiff alleges here. By signing the settlement agreement, each member of this sub-class agreed, in exchange for cash consideration, not to file, commence, or participate in any collective or class action, and as such, cannot be a part of the putative class.

The fourth and final sub-class consists of all remaining employees of defendants who do not fall within any of the previous three sub-classes. This group numbers approximately 226 members of the approximately total 1035 potential members of the putative class. This group of 226 members can proceed forward as the putative class in this class action should it be certified.

CPLR 901(a) provides:

> "a. One or more members of a class may sue or be sued as representative parties on behalf of all if:
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> "1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
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> "2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
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> "3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
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> "4. the representative parties will fairly and adequately protect the interests of the class; and
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> "5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy."
>
> CPLR 901

The above factors "…are commonly referred to as the requirements of numerosity, commonality, typicality, adequacy of representation and superiority." City of New York, 14 N.Y.3d at 508. The application of CPLR 901(a) to the facts of a particular case rests "…within the sound

discretion of trial court." Small v. Lorillard Tobacco Co., Inc., 94 N.Y.2d 43, 52 (1999). The statute must be liberally construed. Globe Surgical Supply v. GEICO Ins. Co., 59 A.D.3d 129, 135 (2d Dep't 2008); Beller v. William Penn Life Ins. Co. of N.Y., 37 A.D.3d 747, 748 (2d Dep't 2008); Friar v. Vanguard Holding Corp., 78 A.D.2d 83, 93 (2d Dep't 1980).

CPLR 901(a)(1) does not specify a minimum number of class members needed to satisfy the numerosity requirement, and there is no mechanical test to determine whether the members of a putative class are sufficiently numerous. *See* Globe Surgical Supply, 59 A.D.3d at 137-138; Friar, 78 A.D.2d at 96. "Each case depends upon the particular circumstances surrounding the proposed class and the court should consider the reasonable inferences and common sense assumptions from the facts before it." Id. There is also no requirement that the exact number of class members be immediately known. *See* Smith v. Atlas International Tours, 80 A.D.2d 762 (1st Dep't 1981). It has been held that "…the threshold for impracticability of joinder seems to be around forty…". Dornberger v. Metropolitan Life Ins. Co., 182 F.R.D. 72, 77 (SDNY 1999); *see also* Klakis v. Nationwide Leisure Corp., 73 A.D.2d 521, 522 (1st Dep't 1979) (upholding denial of class certification where putative class consisted of only 21 individuals); Caesar v. Chemical Bank, 118 Misc.2d 118, 119 (New York County Sup. Ct. 1983) (certifying class consisting of 39 bank employees); Cannon v. Equitable Life Assur. Soc. of U.S., 106 Misc.2d 1060, 1065 (Queens County Sup. Ct. 1980), vacated, 87 A.D.2d 403 (2d Dep't 1983) (explaining that there has been a trend "…to regard classes of approximately 30 or less as not being sufficiently numerous, although there are exceptions" [*citations and internal quotations omitted*]).

> "[T]he legislature contemplated classes involving as few as 18 members (Mem of St Consumer Protection Bd at 8 n 11, Bill Jacket, L 1975, ch 207) where the members would have difficulty

> communicating with each other, such as where 'barriers of distance, cost, language, income, education or lack of information prevent those who are aware of their rights from communicating with others similarly situated' (Mem of St Consumer Protection Bd at 3, Bill Jacket, L 1975, ch 207).
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> Borden v. 400 E. 55th St. Assoc., 24 N.Y.3d 382, 399 (2014).

Such reasoning could apply here, where there may be as many as 226 putative class members who were all employed by Defendants during a six-year period dating back to at least 2012. These potentially hundreds of individuals earned minimum wage and were not necessarily in communication with each other even when they were all employees of Defendants, as they lived separately in their clients' residences. Where the putative class includes these former employees, the reasoning of Borden--that joinder is impracticable where class members would have difficulty communicating--is applicable here. The burden on the putative class members to communicate with each other is significant and weighs in favor of this Court certifying the putative class.

However, the representative of the proposed class nevertheless has the burden of demonstrating that all five prerequisites, including numerosity, have been met, Askey v. Occidental Chemical Corp., 102 A.D.2d 130, 137-38 (4th Dep't 1984), and class action certification "…must be founded upon an evidentiary basis." Yonkers Contracting Co., Inc. v. Romano Enters. of New York, Inc., 304 A.D.2d 657, 658 (2d Dep't 2003). Thus, general conclusory allegations are insufficient to sustain a plaintiff's burden of establishing compliance with statutory requirements for class action certification. *See* Rallis v. City of New York, 3 A.D.3d 525 (2d Dep't 2004); Katz v. NVF Company, APL, 100 A.D.2d 470, 473 (1st Dep't 1984).

While plaintiff maintains that he can prove that there are at least 40 members of the putative class upon completion of discovery, he has failed to do so in these motion papers. Plaintiff does submit paystubs of 10 different individuals who were employed by defendants during the relevant class period, showing that they worked what constitute overtime hours under the NYLL, and showing that they were not correspondingly paid overtime wages as required. However, plaintiff offers nothing to clearly establish that there are at least 40 putative class members. Plaintiff argues that defendants have not provided payroll records of their employees as requested. Yet, it is the burden of plaintiff to show numerosity.

Plaintiff contends that, through discovery, he will gain the evidence with which to establish that there at least 40 members of the class, and that the class is so numerous as to render joinder of all class members impracticable. Defendants counter that the burden such discovery would impose on them would be too great. In Stewart v. Roberts, 163 A.D.3d 89 (3d Dep't 2018), in order to identify the putative class size and class members in that case, the plaintiff needed the defendant to review over 12,000 applications submitted to it. The defendant argued that such discovery would be too burdensome. The Third Department held that the Supreme Court should not have denied the plaintiff's motion for class certification without first having granted her request for discovery on the issue of numerosity, finding that the defendant had electronic records of each of these applications and could search through these records for those individuals who would meet the putative class criteria. Id., at 96. Here, where the individual arbitration agreements, the CBA, and involvement in the related federal class action preclude hundreds of potential class members, leaving only 226 employees of defendants as potential class members, the burden of determining who the potential class members are through discovery is greatly reduced.

While on this motion plaintiff has not set forth a sufficient evidentiary basis to meet the numerosity requirement, the motion may be renewed after the parties have conducted limited discovery on the CPLR 901(a) issues. *See* Geiger v. American Tobacco Co., 252 A.D.2d 474, 476-77 (2d Dep't 1998).

Accordingly, the Court finds that plaintiff has not established the numerosity requirement on the instant motion for class certification. Nonetheless, insofar as there is an issue as to defendants' compliance with discovery requests, the motion shall be denied without prejudice to renew.

This constitutes the decision and order of the Court.

Dated: _____

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Hon. Edgar G. Walker, J.S.C.