Andryeyeva v New York Health Care Inc.
2020 NY Slip Op 31362(U)
May 15, 2020
Supreme Court, Kings County
Docket Number: 14309/2011
Judge: Larry D. Martin
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
Commercial Part 12

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LILYA ANDRYEYEVA and MARINA ODRUS, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

NEW YORK HEALTH CARE INC., d/b/a NEW YORK HOME ATTENDANT AGENCY and MURRY ENGLARD

Defendants.

Index no. 14309/2011
DECISION/ORDER
Motion Seq. #5

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Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion for contempt of court.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Plaintiffs Lilya Andryeyeva ("Andryeyeva") and Marina Odrus ("Odrus"), individually and on behalf of all others similarly situated (collectively "plaintiffs"), move for class certification, certifying this case as a class action pursuant to CPLR 901 and 902, requiring production of updated class payroll and address data, and authorizing notice of the action to the putative class by first class mail pursuant to CPLR 904. In the alternative, if the Court rules against class certification, 14 putative class members move to intervene pursuant to CPLR 1013, and plaintiffs also move for class notice of decertification, notifying absent class members of their right to bring individual cases and that the statute of limitations is tolled during the pendency of the class allegations in this case.

Defendants oppose the motion, arguing that the instant motion violated the Court of Appeals decision and order from July 2019, the individualized issues still predominate the class, and plaintiffs failed to satisfy the requirements for typicality and numerosity.

FACTUAL BACKGROUND

Defendant New York Health Care Inc. is an agency licensed by the New York State Department of Health to provide home attendant services to elderly and disabled clients in their homes. Defendants employed home attendants who often work "live-in" shifts where they stay in the homes of the patients for 24 hours.

Plaintiffs Andryeyeva and Odrus are home attendants employed by the defendants. Home attendants are trained by defendants of their duties and responsibilities as live-in home attendants. Plaintiffs allege that, during their employment as live-in home attendants, they frequently were unable to sleep for five uninterrupted hours due to their clients' medical conditions and needs. Plaintiffs also allege that 14 current and former employees of defendants have attested through submitted affidavits that they also never received eight hours of sleep with five uninterrupted hours while working live-in shifts.

PROCEDURAL BACKGROUND

Motion Sequence #1 and 2

On August 2012, plaintiffs moved for class certification, under motion sequence #1, seeking two subclasses: one comprised of home attendants who worked 24-hour shifts for defendants between June 22, 2005, and the date defendants stopped their unlawful practices and a second class comprised of all home attendants who worked more than 40 hours per week and were not paid overtime at a rate of one and one-half times their regular rate of pay for hours worked in excess of 40. Supreme Court Justice Carolyn E. Demarest denied plaintiffs' motion as premature and ordered additional limited discovery to determine the size and identify the class.

On February 2014, plaintiffs filed a Second Class Motion, under motion sequence #2, seeking certification of a class of home attendants who worked 24-hour shifts for defendants under either the New York Health Care or the New York Home Attendant Agency name between June 22, 2008, and the date defendants cease, or are enjoined from, not paying those individuals the minimum, overtime, and spread of hours wages required by the New York Labor Law and regulations. Justice Demarest granted plaintiffs motion and certified a class of home attendants who worked 24-hour shifts for defendants and were not paid the minimum, overtime, and spread of hours wages between June 22, 2008, and the date defendants cease, or are enjoined from not paying those individuals the minimum, overtime, and spread of hours wages required by New

York Labor Law and regulations. Justice Demarest held that the DOL's interpretation of the Wage Order was inapplicable to plaintiffs and defendants were required to pay plaintiffs for each hour of a 24-hour shift.

Defendants appealed the grant of class certification. In September 2017, the Second Department, Appellate Division affirmed Justice Demarest's decision and also found that the plaintiffs established the existence of the five prerequisites to class certification and none of the factors listed on CPLR 902 warranted a denial of the motion.

Court of Appeals Decision

In a joint appeal between this case and *Moreno v Future Care Health Servs., Inc.,* 153 AD3d 1254 (2d Dept 2017), the Court of Appeals (COA) reviewed whether, pursuant to the New York State Department of Labor's (DOL) Miscellaneous Industries and Occupations Minimum Wage Order (Wage Order), an employer must pay for each hour of a 24-hour shift (*Andryeyeva v New York Health Care, Inc.*, 33 NY3d 152 [2019]). DOL interpreted the Wage Order to mean that payment is required for at least thirteen hours of a 24-hour shift if the employee is allowed a sleep break of at least eight hours, and the employee actually receives five hours of uninterrupted sleep, and three hours of meal break time. In a five to two decision, the COA adopted DOL's interpretation of the Wage Order and remanded this case for further proceedings. The COA held that:

> …Appellate Division orders should be reversed[,] and the matters remitted to permit the courts below to evaluate the issues in accordance with DOL's interpretation of the Wage Order and to consider alternative bases for class certification. In *Andryeyeva*, because Supreme Court certified the class upon finding that DOL's interpretation did not apply to plaintiffs, and the Appellate Division affirmed, neither court reached the issue of whether class certification is otherwise warranted. Accordingly, in *Andryeyeva*, the Appellate Division order should be reversed, with costs, the matter remitted to Supreme Court for further proceedings in accordance with this decision, and the certified question answered in the negative."

Defendants argued that if the COA deferred to DOL's interpretation of the Wage Order, individual issues preclude class certification because each putative class member's claim is fact-specific and turns on whether the home attendant received the requisite number of uninterrupted sleep and meal hours. The COA, while it did not pass on the ultimate merits of the class action motions, observed that CPLR 9 class certification provisions are to be liberally construed and that it recognizes that certain claims are unlikely to be litigated because of the cost of individual cases outweighs the possible damages.

The COA noted that claims of uniform systemwide violations are particularly appropriate for class certification and plaintiffs allege and claim there is evidence of defendants' systemic violations of the Wage Order and Labor Law. In particular, plaintiffs allege that defendants failed to adequately compensate home attendants when they did not receive the requisite sleep and meal breaks during their 24-hour shift, failed to maintain records of, or compensate for, the hours actually worked, and provided appropriate sleep facilities. The COA found "[i]ndeed, plaintiffs' allegations suggest a policy or practice of unlawful action of the type our courts have previously found ripe for class treatment."

July 17, 2019 Order

Following the COA decision, plaintiffs moved, under motion sequence #3, to lift the stay on this action and scheduling a briefing to move forward with additional discovery. Defendants cross-moved under motion sequence #4 for a protective order. Justice Sylvia Ash's July 17, 2019 order resolved both of these motions as follow: "Plaintiffs will file supplemental briefing on motion sequence #2 for class certification by [September 13, 2019] and defend[ants] will file supplemental opposition brief by [October 17, 2019]. Motion sequence #3 is granted. Motion sequence #4 is denied without prejudice. Discovery is held in abeyance until further order of the Court." The parties, by stipulation, extended plaintiffs' supplemental briefing on motion sequence #2 to September 27, 2019. Rather than filing a supplemental briefing on motion sequence #2, however, plaintiffs filed motion sequence #5, this current motion, seeking class certification on September 27, 2019.

Plaintiff's Contentions

The plaintiffs contend that courts have certified classes despite the need to calculate individualized damages, and the putative class satisfies CPLR 901 and 902. Alternatively, the putative class members move to intervene and plaintiffs also ask for class notice of decertification.

Plaintiffs ask the Court to certify the class as follows:

> Home attendants who worked 24-hour shifts for New York Health Care Inc. between June 22, 2005, and the date Defendants cease, or are enjoined from, not paying the class members the minimum, overtime, and spread of hours wages for all 24 hours of each 24-hour shift.

The plaintiffs explain that the Court of Appeals remanded to this court the question of whether class certification is appropriate for this case. Plaintiffs note that in its decision, the Court of Appeals explains that class action requirements are to be "liberally construed," and that "the fact that damages may vary by class members does not per se foreclose class certification." Plaintiff also argues that the defendants' failure to keep records of the home attendants' sleep and mealtime could also support class certification. Plaintiffs assert that New York Courts have repeatedly certified classes despite the need to calculate individualized damages and the putative class satisfies the liberally construed criteria of CPLR 901 and 902.

The plaintiffs explain that they meet the requirements of commonality, predominance, and typicality as required by CPLR 901. As to commonality and predominance, plaintiffs argue that the "ultimate issue" in a case like this is whether an employer paid its workers the statutorily required wages, as well as questions on defendants' policies and practices that failed to keep track of the hours worked, including meal and break times. Plaintiffs contend that liability hinges, in part, on the existence of a uniform policy or practice by defendants of underpayment and that the need to calculate individualized damages does not defeat predominance.

As to typicality, plaintiffs explain that plaintiffs' claims need not be identical to those of the class and that the requirement is satisfied even if the class representatives cannot personally assert all the claims made on behalf of the class. Plaintiffs argue that it is when a plaintiff's claim derives from the same practice or course of conduct that gives rise to the claims of other class members and is based upon the same legal theory that the typicality requirement is satisfied.

Plaintiffs contend that defendants failed to keep statutorily mandated employment records of the hours worked by plaintiffs including times when plaintiffs worked during a meal or sleep

break and when plaintiffs failed to receive a minimum of five hours of sleep due to the needs of a patient. Plaintiffs argue that the failure to keep these records allows plaintiffs to enjoy a more relaxed burden of proof. This burden of proof would allow employees to only prove that they in fact performed the work for which they were improperly compensated and that there is sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. Plaintiffs propose that given defendants' failure each class member is entitled to 24 hours' worth of wages for each 24-hour shift worked. Plaintiffs also proposed that class-wide damages may also be calculated by relying on representative and expert testimony and/or dividing the class into subclasses.

Plaintiffs argue that the requirement of adequacy of representation and superiority under CPLR 901 were undisturbed by the Court of Appeals' ruling and are satisfied. As to the requirements under CPLR 902, plaintiffs argue that they satisfy each requirement.

If the Court denies class certification, fourteen putative class members move to intervene, and plaintiffs also move for class notice of decertification.

Defendants' Contentions

Defendants contend that this class certification motion, the third such motion in this case, should be denied because it violated the Court of Appeals' decision and the July 17, 2019 order. Defendants argue that the COA decision held that "[g]iven the posture of these appeals—where the Appellate Division determined that class certification was appropriate under its erroneous interpretation of the Wage Order—we may not consider unaddressed or alternative grounds proffered for class certification. The courts below are charged with that task in the first instance and therefore we remit for that determination" (*Andryeyeva*, 33 NY3d at 185). Defendants also argue that plaintiffs allege a violation of the COA decision, and the July 2019 order is prejudicial to defendants because plaintiffs seek to expand the scope of this action by including claims back to an additional three years. Defendants explained that expanding the period of time to now fifteen years, positions Odrus as a class representative although the plaintiffs explicitly withdrew Odrus as a class representative in the Second-Class Motion.

Defendants further contend that the class motion should be denied because individualized issues still predominate, and plaintiffs failed to satisfy the requirements for typicality and numerosity. Defendants also oppose allowing other individuals to intervene. Defendants argue that

the Court should only consider arguments previously raised by plaintiffs, namely the argument that a class should be certified because defendants purportedly failed to maintain records of sleep or mealtimes. Defendants state that plaintiffs are seeking an end-run around to the requirements for class certification, specifically that defendants' failure to keep records does not allow plaintiffs to meet those requirements. Defendants argue that plaintiff is inventing a requirement that defendants pay home attendants for every hour of a 24-hour shift if they lack records of the time the employee spent sleeping and on their meal breaks.

Further, even if plaintiffs are correct that their burden is reduced to a just and reasonable inference, the putative class still needs to submit evidence to meet that burden and the burden does not shift to the employer until the putative class member meets its burden to show that they performed work for which they were not compensated. Defendants allege that the evidence demonstrates that plaintiffs did not maintain records of how much time they slept or took meal breaks during their 24-hour shift and also did not report to defendants that they were not afforded the requisite time for sleep and meal breaks. Defendants also argue that relevant statutes and regulations do not require employers to maintain records of sleep and meal breaks and only require records of actual hours worked. Even if defendants failed to maintain the appropriate records, defendants argue that it should not lead to a presumption or conclusion that home attendants did not receive sufficient time for sleep and meals during their shifts, and this will lead back to needing particularized inquiries of whether a putative class member even has a claim.

Defendants also argue that plaintiffs failed to satisfy the requirements for numerosity because a case-by-case analysis is necessary to identify whether any individual home attendant satisfies the requirements for class certification and plaintiffs do not identify any objective criteria on which the Court could make such identification. Defendants argue that even taking the fourteen individual intervenors and the two named plaintiffs into account, plaintiffs are short of the 40 individuals needed to establish the numerosity factor.

As to typicality, defendants state that plaintiffs' deposition testimony shows that there was no typical client and no typical shift, such that no home attendant could be considered typical. Defendants argue that the variations between clients and day-to-day confirms that the Court would have to conduct thousands of individual analyses in order to determinate the "typicality" of plaintiffs' claims and the Court cannot extrapolate the experiences of Andryeyeva to hundreds of other clients of defendants.

Defendants also oppose the expert witness of Dr. Cameron R. Hernandez because plaintiffs seek to expand the records on this motion as a substitute for actual evidence, it is speculative, wholly unsubstantiated, and plaintiffs' testimonies rebut Dr. Hernandez's conclusions. Defendants also oppose the motion to allow the fourteen individuals to intervene because they lack standing and intervention is untimely and prejudicial.

DISCUSSION

Defendants argue that the motion should be denied because plaintiffs violated both the COA decision and the July 2019 order by filing this motion. The Court disagrees that this motion violates the COA decision. Further, while the July 2019 order provided that plaintiffs were to submit supplemental briefings and not specifically filed a new motion, denying this motion based on the format of the filings will only delay the review of whether class certification should be granted or denied. Thus, the Court will review this motion as a supplemental brief to the Second-Class Motion.

To obtain certification of a class, plaintiffs must show that each of the threshold requirements of CPLR 901 and 902 has been met. CPLR 901 provides that class may be certified if: (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 predominates 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(a)). The requirements under CPLR 901(a) "should be broadly construed" (*City of New York v Maul*, 14 NY3d 499, 509 [2010]). Once the prerequisites of CPLR 901 are satisfied, the court must consider the factors in CPLR 902.

The plaintiffs argue that the COA decision only requires this Court to reconsider whether the plaintiffs can establish the requirements of commonality, typicality, and predominance and that Justice Demarest's September 2014 decision holding the remaining CPLR 901 and 902 factors were satisfied is undisturbed by the COA's ruling and remains the law of the case. The Court agrees and will only consider whether the plaintiffs has satisfied the requirements of commonality, typicality, and predominance to warrant a grant to the motion for class certification and adopts the findings by Justice Demarest in the Second-Class Motion.

Commonality

Plaintiff asserts that they satisfied the commonality requirement because the "ultimate issue" common to the class is whether an employer paid its workers statutorily required wages. Defendants argue that plaintiffs failed to satisfy this requirement because each individual home attendant must establish, for each shift, that they were not afforded the requisite hours for sleep and meals. Further, defendants argue that this process requires individualized investigation, proof, and determination, which would render this action unfit for class certification.

However, "the rule requires predominance, not identity or unanimity, among class members" (*Friar v Vanguard Holding Corp.*, 78 AD2d 83, 98 [2d Dept 1980]). The commonality requirement "cannot be determined by any mechanical test and the fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action" (*Maul*, 14 NY3d 499, 514). the plaintiffs "allege, and claim there is evidence of, defendants' systemic violations of the Wage Order and Labor Law, such as defendants' failure to adequately compensate home health care aides when they did not receive the minimum time for sleep and meal breaks during their 24-hour shifts, maintain adequate records of, or compensate for, the hours actually worked, and provide appropriate sleep facilities" (*Andryeyeva*, 33 NY3d at 184). The COA stated that "claims of uniform systemwide violations are particularly appropriate for class certification. Indeed, plaintiffs' allegations suggest a policy or practice of unlawful action of the type our courts have previously found ripe for class treatment" (*Id.*).

Despite defendants' contentions, plaintiffs have satisfied the commonality requirement. Plaintiffs have alleged and provided evidence, through their affidavits and deposition testimony, that they worked during their sleep and mealtimes while employed by the defendants and were not compensated for those times. The possibility that the putative class members may have differences in damages award does not automatically warrant a denial of class certification. In fact, the COA explained that "[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" (*Andryeyeva*, 33 NY3d at 185).

Typicality

CPLR 903(a)(3) requires that the claims or defenses of the representative parties are typical of the claims or defenses of the class. because the claims of the plaintiff class representatives derive

from the same course of conduct by the defendants which gave rise to the claims of the other class members and are based upon the same legal theory, the plaintiffs have sufficiently demonstrated that their claims are typical of the claims of the class (*see Dagnoli v Spring Valley Mobile Village*, 165 AD2d 859, 859-860 [2d Dept 1980]). Here, the claims of the representative parties are that home attendants working 24-hour shifts did not received the required sleep and mealtimes and were not compensated for the hours they actually worked. "While there may be issues of fact as to the number of such shifts a putative class member worked, the claims of plaintiffs are typical of the claims of all potential class members" (*Andryeyeva v New York Health Care Inc.*, 45 Misc. 3d 820, 835 [NY Sup 2014] [internal citations omitted]).

Predominance

CPLR 903(a)(2) requires that there be questions of law or fact common to the class which predominate over any questions affecting only individual class members. "The predominance of questions of fact or law over questions affecting only individual members is the test which must be met, not a nice inspection of the claims of each class member" (*Branch v Crabtree*, 197 AD2d 557, 557 [2d Dept 1993}, citing *Weinberg v Hertz Corp.*, 116 AD2d 1, 7 [1st Dept 1986]). "[T]he decision as to whether there are common predominating questions of fact or law so as to support a class action should not be determined by any mechanical test, but rather, 'whether the use of a class action would 'achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated'" (*Friar*, 78 AD2d at 97). As alleged by plaintiffs, all putative class members worked under a uniform policy or practice that denied wages for all hours actually worked by the home attendants working 24-hour shifts. An inspection of each individualized damages suffered by each putative class member does not defeat the predominance of that common issue as to whether defendants had a uniform policy or practice to underpay the home attendants.

CONCLUSION

Plaintiffs' motion for class certification is granted. The June 22, 2005 date is in dispute and the Court makes no finding as to the appropriate date for the commencement of plaintiffs' claims at this time. The motion is granted without prejudice to the defendants to make the

appropriate motion regarding disputed date. The motion to intervene and for notice of class decertification are denied as moot. Defendants' other contentions are without merit.

It is hereby ordered that:

1. A class is certified pursuant to CPLR 901 and 902 consisting of:

   Home attendants who worked 24-hour shifts for New York Health Care Inc. between June 22, 2005, and the date Defendants cease, or are enjoined from, not paying the class members the minimum, overtime, and spread of hours wages for all 24 hours of each 24-hour shift.

2. Notice of the action to the putative class by first class mail is authorized pursuant to CPLR 904.

This constitutes the decision and order of the Court.

Dated: May 15, 2020

E N T E R,

Larry D Martin

HON. LARRY D. MARTIN
J.S.C.