Ramires v AGDG Car Wash Corp.
2020 NY Slip Op 35789(U)
October 1, 2020
Supreme Court, Nassau County
Docket Number: Index No. 616170/19
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 33
NASSAU COUNTY

FREDIS RAMIRES, CARLOS ALVAREZ, EVENOR VELASQUEZ, MANUEL GARCIA, JUAN GARCIA LORGIO INTERIANO, ROBERTO RAMOS a/k/a SANTIAGO LOPEZ, LUCIO GAITAN a/k/a ALEXANDER GAINTAN, MELVIN JOEL GARCIA a/k/a EMERSON GARCIA, OSCAR PAZ CRUZ, DAVID MOLINA, LEONIDAS GONZALEZ, MARIO GRIMALDI, HENRY NUNEZ, FREDIS MANCIA a/k/a JOSE MANCIA, JOSE MARQUEZ, KEVIN BARRIENTOS, WILFREDO CRUZ and JOSE CRUZ, on behalf of themselves and others similarly situated,

Plaintiffs,

Index No.: 616170/19
Motion Seq. No.: 01
Motion Date: 04/10/2020

- against -

AGDG CAR WASH CORP., PM & JP CAR WASH, LLC, RICHARD GABAY, PETER MAZZA and JOSEPH PANZA,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation, Affidavits and Exhibits and Memorandum of Law	**1**
Affirmation in Opposition and Exhibits and Memorandum of Law	**2**
Reply Affirmation and Exhibit and Memorandum of Law	**3**

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiffs move, pursuant to CPLR §§ 901 and 902, for an order certifying a class of all employees of Miami Car Wash who cleaned cars, dried cars or were car detailers from February 15, 2012 to May 7, 2015 (the "Class" or "Class Members"); and move for an order designating plaintiffs Fredis Ramires ('Ramires"), Manuel Garcia and Roberto Ramos a/k/a Santiago Lopez ("Ramos") as class representatives, and their chosen counsel Monteiro & Fishman LLP as class counsel; and move for an order directing defendants to provide contact information (phone numbers, along with names and addresses) for all class members within ten days of the Court's order granting this motion; and move for an order permitting plaintiffs to issue Notice to the Class to the Class Members, in the form annexed to the motion papers. Defendants oppose the motion.

In support of the motion, counsel for plaintiffs submits, in pertinent part, that, "[d]efendants ran a busy car wash for many years called Miami Car Wash, located at 2056 Hempstead Turnpike, East Meadow, NY ('Miami'). PM&JP, Mazza, and Panza sold Miami on October 1, 2014 to AGDG and Gabay for $2,350,000.00, demonstrating how profitable the business was.... To maximize profits, Defendants failed to pay Plaintiffs the minimum wage and forced Plaintiffs to perform significant 'off the clock' work, to avoid paying them overtime.... To perpetuate their illegal payment scheme, Defendants utilized a mixture of a punch card system and notebook system to keep track of employees (*sic*) hours. Defendants instructed Plaintiffs to punch-in at the beginning of their work-day.... Defendants next would either punch-out each Plaintiff, or instructed the Plaintiffs to punch-out themselves during the day to create the 'Fraudulent Hours'.... However, Plaintiffs all continued to work after punching-out (the 'Additional Hours').... The Additional Hours were presumably recorded by Defendants in a notebook and Plaintiffs were paid straight time thereof – which was also under the minimum wage. Indeed, Plaintiffs worked as many as 80 to 90 hours a week – oftentimes with no meal breaks.... Additionally, Defendants sold customers of Miami Car Wash 'tip-cards' where customers could load money on those cards and give them to the employees as a tip.... However, instead of allowing the employees to redeem the tip-card in cash, Miami Car Wash required that the tips be redeemed by purchasing items at the Miami Car Wash store, which consist primarily of auto cleaning supplies and a soft-drink refrigerator stocked with beverages.... [T]he Court of Appeals recently commented on this sort of human exploitation and how those exploited employees were particularly appropriate for class treatment. As demonstrated herein, this Court should grant Plaintiffs' motion to certify the proposed class. Plaintiffs assert that Defendants AGDG Car Wash Corp., along with its principal Richard Gabay, PM&JP Car Wash LLC, along with its principals Peter Mazza and Joseph Panza, *inter alia*: 1) Failed to pay them overtime premium pay when working more than forty hours in a given work-week; 2) Failed to pay spread of hours premium pay when working in excess of ten hours in a single day; 3) Failed to comply with the minimum wage requirements of New York Labor Law ('NYLL'); 4) Failed to furnish proper wage statements in violation of the NYLL § 195(3); and 5) Failed to furnish workers with notifications of pay rate annually until 2015 and at the commencement of their employment pursuant to NYLL § 195(1)(a). Plaintiffs' allegations, supported by their sworn affidavits and verified interrogatory responses, are neither frivolous nor a sham, and are therefore sufficient to satisfy the **minimal** threshold of proof necessary for a class certification at this stage. Moreover, Plaintiffs satisfy the five class certification requirements of CPLR § 901(a), commonly referred to as the numerosity, commonality, typicality, adequacy, and superiority requirements. First, there are about 50 to 60 members of the prospective class. Second, common questions of law and fact predominate over individual questions. Third, Plaintiffs' claims (and defenses to those claims) are typical of the claims of the other prospective class members because like the other class members, Plaintiffs were each subject to the same workplace policies and practices of Defendants. Fourth, Plaintiffs and their counsel are adequate to protect the interests of the class.

Fifth, a class action is superior to other methods of redressing Defendants' wrongs. Also, consideration of the five factors under CPLR § 902 further support certification of the class. First, class members who wish to retain their individual claims will have the opportunity to opt out of the class action. Second, it would be impracticable to prosecute numerous separate actions for the same claims. Third, there is no other pending litigation concerning Defendants' pay practices under the NYLL. Fourth, Nassau County is an appropriate forum for this case because the named Plaintiffs, as well as many other class members reside in this county, and Miami Car Wash is located only a few miles from the Supreme Court courthouse in Nassau County. Fifth, there will be no difficultly in the management of this case as a class action. Plaintiffs further request that the Court designate Plaintiffs Roberto Ramos a/k/a Santiago Lopez, Manuel Garcia and Fredis Ramires, as class representatives and their chosen counsel, Marcus Monteiro of M&F, as class counsel. The class representatives will serve the interests of the class with the same perseverance that they have shown to date. Moreover, proposed class counsel had the experience and resources necessary to litigate this case to trial and have demonstrated success already. Finally, Plaintiffs request that the Court facilitate the dissemination of the Class Notice. Therein, Plaintiffs request that the Court Order the Defendants to produce the contact information for all class members within ten days of the order granting class certification, including the last known addresses and phone numbers. This information is necessary to ensure that Plaintiffs can issue notice to those class members. Plaintiffs ask the Court to authorize a plan for dissemination of the notice, including, authorizing Plaintiffs to mail English and Spanish language translations of the notice to Class members. The Proposed Class Notice provides class members with accurate and comprehensive information concerning their rights with respect to the lawsuit." *See* Plaintiffs' Affirmation in Support Exhibits 1-4, 6, 9 and 10.

Counsel for plaintiffs contends, in pertinent part, that, "[w]hen determining whether to certify a class, Courts must determine whether Plaintiffs have satisfied five requirements commonly referred to as the numerosity, commonality, typicality, adequacy, and superiority requirements. [citation omitted]. Each of those requirements is satisfied here. Plaintiffs easily satisfy the numerosity requirement. This requirement is satisfied 'where the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable.' [citation omitted]. There is no mechanical or precise test to determine whether the numerosity requirement has been met. [citation omitted]. However, 'the threshold for impracticability of joinder seems to be around **forty**.' [citations omitted]. In this case, Plaintiffs total 19 already, and totaled 29 during the Federal Action, and have asserted that there are 50-60 class members who have worked at Miami from February 2012 to May 2015.... The numerosity requirement is therefore satisfied. Plaintiffs also satisfy the commonality requirement of CPLR § 901(a)(2). To satisfy this requirement, Plaintiffs must show that 'there are questions of law or fact common to the class which predominate over any questions affecting only individual members.' [citation omitted]. 'The rule requires predominance, no identity or unanimity, among class members.' [citations omitted]. 'Similarly, the fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action.' [citation omitted].... Here, the case concerns Defendants (*sic*) common overtime, spread of hours premium pay and worker notification practices and whether those practices comply with New York Labor Law and the regulations promulgated thereunder.'... Pursuant to CPLR § 901(a)(3), the typicality factor is satisfied where 'the claims or defenses of the representative parties are typical of the claims or defenses of the class.' [citation omitted]. Courts will deem this factor satisfied where 'plaintiff's claim derives from the same practice or course of conduct that gave rise to the remaining claims of other class members and is based upon the same legal theory.' [citation omitted]…. In this case the typicality requirement is satisfied because Plaintiffs' claims are identical to the claims of the other class members. [citation omitted]. They each derive from Defendants' practice of suffering or permitting their workers to work more than forty hours in a workweek and failing to pay them overtime premium pay. Moreover, with respect to the wage statement and notifications of pay rate required by statute, the Defendants treated Plaintiffs in the same way they treated all other employees – namely, insufficient annual wage notices and incorrect pay statements. Defendants did not provide any of them with the required notices. [citation omitted]…. The adequacy requirement set forth in CPLR § 901(a)(4) requires Plaintiffs to show that they 'will fairly and adequately protect the interests of the class.' [citation omitted]…. A class representative may satisfy the adequacy requirement if she has a 'general awareness of the nature of the underlying dispute, the ongoing litigation, and the relief sought on behalf of the class.' [citation omitted]. Plaintiffs easily satisfy this standard. They have been and will continue to be active participants at each stage of the litigation…. To date, they have assisted in the preparation of the Complaint and submitted affidavits in support of their appointment as class representatives…. Third, Plaintiffs' chosen counsel have the experience and resources necessary to effectively litigate the action on behalf of absent class members…. Moreover, their competence is exhibited by the vigor with which they have litigated this case. Class counsel has already obtained a significant recovery against co-Defendants in the Federal Action of $650,000.00…. Furthermore, I have done substantial work identifying, investigating, prosecuting, and settling the Class's claims…. The Court must also determine whether 'a class action is superior to other available methods for the fair and efficient adjudication of the controversy.' [citation omitted]…. In this case, Plaintiffs have satisfied the superiority requirement because class certification will allow the claims of numerous additional workers to be resolved efficiently and economically. Moreover, Defendants will be able to present all of their defenses to the class. There is no need to litigate these defenses many times over when they can be decided once and for all in the context of a class action." *See* Plaintiffs' Affirmation in Support Exhibits 2 and 11; Plaintiffs Ramires, Manuel Garcia and Ramos' Affidavits in Support.

Counsel for plaintiffs also asserts, in pertinent part, that, "[i]n making a determination of class certification, CPLR § 902 requires the Court to consider the following five discretionary factors: 1) class member interests, 2) impracticability, 3) previously commenced litigation, 4) whether the action(s) should be concentrated in this forum, and 5) potential management difficulties. [citation omitted]. Most of these considerations are implicit in CPLR § 901. [citations omitted]. Consideration of these five factors weighs in favor of class certification. CPLR § 902(1) requires the Court to consider the interests of members of the class in individually controlling the prosecution or defense of separate actions, In this case, any interests of absent class members to control the prosecution of their own actions are served by the opt-out provisions in the Proposed Class Notice. Any class member who wishes to bring a separate claim can do so, simply by opting out of the class. CPLR § 902(2) requires the Court to consider the impracticability or inefficiency of prosecuting or defending separate actions. As stated with respect to the numerosity and superiority requirements, it would be extremely impracticable and inefficient to litigate this case hundreds of times, in multiple forums, before multiple judges. Thus, consideration of this factor strongly favors granting the motion to certify the class. CPLR § 902(3) requires the Court to consider the extent and nature of any litigation concerning the controversy already commenced by or against members of the class. Plaintiffs are aware of no other litigation concerning the claims asserted in this case. Thus, this factor weighs in favor of class certification. CPLR § 902(4) requires the Court to consider the desirability or undesirability of concentrating the litigation of the claim in the particular forum. Nearly all Plaintiffs reside in Nassau County and the courthouse is closer than any other Supreme Court. CPLR § 902(5) requires the Court to consider the difficulties likely to be encountered in the management of a class action. There are no apparent difficulties likely to be encountered in the management of this case as a class action. [citation omitted]."

Counsel for plaintiffs further submits, in pertinent part, that, "[t]he Court should approve Plaintiffs' Proposed Class Notice.... The Class Notice clearly and adequately describes the class and informs potential class members of their rights and options with respect to the lawsuit. [citation omitted].... The date of February 15, 2012 should be approved because that is when the Plaintiffs' claims here begin. Defendants were served with the Third-Party Complaint on April 6, 7 and 15th. Accordingly, Plaintiffs (*sic*) NYLL claims have a statutory period of six years that relate back to that date of service under CPLR 203(e) (now 203(f)). [citations omitted]. As the New York Supreme Court explained: '[W]hen a third-party defendant has been served with the third-party complaint and all prior pleadings in the action, as required by CPLR 1007, the third-party defendant has actual notice of the plaintiff's potential claim at that time and it would not be at odds with the policies underlying the statute of limitations to permit an amended complaint to relate back to the date the third-party action was commenced.' [citation omitted]. Indeed, the issue of whether or not Plaintiffs' claims 'relate back' has already been determined by the EDNY in Plaintiffs' favor.... Additionally, because the Federal Court declined to exercise supplemental jurisdiction of Plaintiffs (*sic*) NYS and NYLL claims by Order on October 30, 2019, and this case was filed on November 13, 2019, all claims are preserved under CPLR § 205(a). [citation omitted]." *See* Plaintiffs' Affirmation in Support Exhibit 14.

Plaintiffs also submit the Affidavits of plaintiffs Ramires, Manuel Garcia and Ramos in support of the motion. *See* Plaintiffs Ramires, Manuel Garcia and Ramos' Affidavits in Support.

In opposition to the motion, counsel for defendants argues, in pertinent part, that, "[p]laintiffs' motion should be denied as they have failed to meet the CPLR §§ 901 and 902 standards. Plaintiffs have filed this State Court Action with no evidence of wage violations during the time period that any of the Defendants owned Miami Car Wash. Instead, Plaintiffs are trying to blur the factual lines to infer liability through made up common questions with clearly no common answers in order to leverage class certification into a larger settlement. Plaintiffs are inadequate class representatives as they have engaged in forum shopping by withdrawing their claims in the Federal Action on essentially the eve of trial in a cynical attempt to wring larger payouts for themselves as class representatives and attorneys' fees by switching to this State Court Action even though such a move will deprive themselves and an entire putative class of potentially half their damage recovery by waiving liquidated damages. Plaintiffs' motion should also be denied as there are no common claims that predominate. Plaintiffs try to paint all Defendants with one brush, inferring that settlement with the current owners somehow means liability and common issues with prior owners. This is untrue and Plaintiffs have failed to establish that any potential common questions would have common answers and so denial of class certification is appropriate. Further, numerosity cannot be established. Plaintiffs have already sent notices in the Federal Action to all putative class members. Both the RPB Defendants from the Federal Action and the Plaintiffs herein made numerous telephone calls to the putative class members in the Federal Action encouraging them to join but only 29 opted in. In the present State Court Action, only 19 individuals have remained. Thus, Plaintiffs also fail to establish numerosity. Further, the Class Period alleged is beyond the six-year statute of limitations and Plaintiffs' relation back theories do not extend the time period as argued. Their claims do not fall within the language of CPLR § 203. The Third-Party Complaint filed by the Bradley defendants against the Defendants that Plaintiffs now seek to use to anchor their claims is not based upon the same claims as those in the instant matter and was filed in an entirely different forum. Further, Plaintiffs knew full well who owned the car wash during what time periods and did not file timely claims against them knowing wage violations did not exist during Defendants' time of ownership. Finally, the interests of putative class members would certainly be better served in individual claims either in court or at the New York State Department of Labor where liquidated damages would not need to be waived. There would be nothing impractical or inefficient about individual class members pursuing these claims against the appropriate Defendants only and for the appropriate time periods instead of trying to fit a square peg into a round whole (*sic*) and shoe-horn in claims for a diverse group of workers over a diverse time period for differing owners. Because their 'class representatives' are looking out more for themselves than for the putative class, class certification should be denied."

Counsel for defendants further contends, in pertinent part, that, "[t]he relevant facts in this case highlight the inappropriate nature of Plaintiffs' motion. Plaintiffs are a diverse group of individuals who worked in varying positions and varying time periods at a car wash that changed ownership several times with varying wage policies and no proof of wage violations during the proposed Class Period. The car wash known as the Miami Car Wash had 4 different ownerships over the last 13 years.... There were also specific differences in the job categories for workers, making it impossible to categorize them all as similar.... Plaintiffs do not differentiate in their allegations between job duties, time periods, ownership, work conditions, instead trying to put everything together into one category. For example, see Roberto, Manuel and Fredis Affidavits where no mention is made of any wage violations during the time period Defendants owned the Miami Car Wash or identifying any Defendants as having violated any wage laws. The facts do not bear out these assertions and differing owners, systems, worker schedules do not provide for class certification."

Counsel for defendants argues, in pertinent part, that, "[t]he burden lies entirely with the Plaintiffs to establish full compliance with the statutory requirements for class action certification under CPLR §§ 901 and 902. In that regard '[g]eneral or conclusory allegations in the pleadings or affidavits are insufficient to sustain this burden.['] 'A class action certification must be founded upon an evidentiary basis.' [citation omitted].... Plaintiffs cannot establish that they 'will fairly and adequately protect the interests of the class' as CPLR § 901(a)(4) requires, Plaintiffs (*sic*) interests are not aligned with the class and conflicts exist. [citation omitted]. Where the interests of the class representative and the proposed class are not aligned, courts find the representatives incapable of fairly and adequately representing the interests of the class. Plaintiffs are not adequate class representatives for several reasons. First, Plaintiffs seek to waive liquidated damages, an amount up to double the potential recovery, on behalf of a putative class without their consent. Second, the Plaintiffs withdrawal of their same claims on the eve of a federal court trial against the Defendants shows Plaintiffs to be improper class representatives as they refused to provide their proofs (*sic*) at trial when they had the opportunity to do so and instead attempted to use the federal court proceeding to gather further information only to withdraw their claims there and file in state court. Plaintiffs ask this Court to grant them status as adequate class representatives, yet they seek to waive potentially half of all putative class members' damages in this case. There is not a justifiable tradeoff for Plaintiffs' actions other than to gain additional compensation by being certified as class representatives and to garner higher attorneys' fees should a class be certified and Plaintiffs' (*sic*) prevail. Neither of these will benefit the putative class in any way and will only serve the individual interests of the Plaintiffs as class representatives and their counsel. This conduct should be disqualifying to serve as adequate class representatives. Plaintiffs understand that there is a conflict that in order to bring a class action in New York for a violation of a statue (*sic*) with a penalty (such as liquidated damages contained in the New York Labor Law as alleged by Plaintiffs herein), Plaintiffs must waive their rights to such liquidated damages. [citation omitted]. Further, as class representatives, Plaintiffs would be waiving such rights on behalf of a potential group of unrepresented and uninformed workers.... Plaintiffs somehow claim that putative class members would be better off receiving potentially half of their damages in a class action rather than pursuing their claims individually in court or through the New York State Department of Labor administratively. By abandoning a significant portion of their own and the putative class members' potential remedies, when the only tangible benefit to aggregate claims under the opt-out class action procedure results in potentially higher attorneys' fees, Plaintiffs and counsel have rendered themselves inadequate class representatives. [citations omitted].... Plaintiffs also fail to prove that 'a class action is superior to all other methods of adjudication for the fair and efficient adjudication of the controversy.' [citations omitted]. As discussed above, it is clear that individual cases would yield superior results for the putative class members in the event Defendants are deemed liable, including double damages.... Further, New York law provides a number of administrative remedies that are available to Plaintiff (*sic*).... [I]ndividual issues in this action predominate as an assessment of each putative class member's claims (and damages, if any) will be necessary and force the Court to conduct separate mini-trials as to the viability of each class members (*sic*) claims.... After years of litigating the same case in Federal Court, sending out opt in notices to putative class members in English and Spanish, contacting putative class members by phone individually and then filing the instant Action in state court, Plaintiffs have only mustered 19 individuals interested in continuing this litigation in state court. Plaintiffs fail to meet the numerosity standards and so class certification is inappropriate. CPLR § 901(a)(1) requires that Plaintiffs establish that 'the class is so numerous that joinder of all members…is impracticable.' Although there is no mechanical test to determine numerosity, it is generally accepted that a putative class of 40 is appropriate for certification. However, the minimum number approved will depend upon the circumstances of each case…. Plaintiffs provide no proofs (*sic*) whatsoever for its (*sic*) allegation that there may be '50-60' class members. Plaintiffs' self-serving and hearsay-filled Affidavits referencing '50-60' should be rejected. It is not even *admissible* as hearsay. [citation omitted]…. Instead, the facts are that only 29 individuals opted into the Federal Action and now only 19 have expressed interest in the State Court Action. Further, the Federal Court clearly did not think Plaintiffs' allegations would meet the Rule 23 standards, including numerosity, as it refused to grant supplemental jurisdiction for Plaintiffs' state law claims…. Moreover, Plaintiffs' own Amended Complaint only indicates about 20 potential class members…. Under CPLR § 901(a)(2), Plaintiffs are required to further establish that 'there are questions of law or fact common to the class which predominate over any questions affecting only individual members.' Class certification will be denied where the fact-finder would need to establish liability by reviewing individualized proof or engaging in a series of mini-trials for each putative class member's claim. Class certification is not appropriate when individual issues predominate. [citations omitted]. Here, individual issues of law and fact predominate over the common issues, rendering class treatment inappropriate…. Here, Plaintiffs have not established predominance of common issues. For example, Plaintiffs concede that there were different Defendant owners over different time periods and so some putative class members would have worked for different owners over different time periods with different wage policies. In 2007 ownership changed hands to PM&JP. Then in 2014 ownership changed hands from PM&JP to AGDG through an asset purchase agreement acquiring only the assets and not the workers or policies from the previous owner. The fact that there was another ownership change to the Bradley Defendants in May 2015 for a time period starting over 5 years ago that has been settled with Plaintiffs adds confusion. Mailing out a class notice without distinguishing the three sets of owners is misleading. Plaintiffs seek to conflate dissimilar workers who were employed by different owners during different time periods. These differences defeat Plaintiffs' attempt to lump together all employees within this purported Class Action. Significantly, Plaintiffs fail to even establish that there were violations of law during the proposed Class Period. Plaintiffs' supporting Affidavits do not distinguish between ownership or time period at all.... Plaintiffs' allegations of improper pay during the current ownership and a subsequent settlement of those claims are inapposite to an argument for class certification during a different time period and different owners with clear and accurate pay records. Plaintiffs also fail to prove that the job titles alleged in the Class motion have common questions that predominate. In fact, there are distinct differences in the work categories alleged. As front of the house workers and dryers all had differing duties, differing schedules, both between and among categories, and different tip structures.... Moreover, as the determination of liability in this case necessarily requires an individual, fact-specific analysis for each Plaintiff, opt-in Plaintiff, and potential class member, there is no commonality, typicality or predominance of class issues. It is now well-settled that common questions will not predominate over class issued for *class certification* purposes where, as here, liability cannot be established on a class-wide basis. The 'mini-trials' that would result if this case were to proceed as currently proposed render a class inappropriate for lack of predominance of common claims." *See* Plaintiffs' Affirmation in Support Exhibit 14.

Counsel for defendants further contends, in pertinent part, that, "[e]ven if Plaintiffs' request for Class Certification was to survive an examination of CPLR 901 requirements, it must fail after an assessment of CPLR 902 considerations. The (*sic*) CPLR 902 requires that a court further consider factors in addition to those enumerated in CPLR 901 to determine if class certification is warranted.... Plaintiffs' request for class certification ignores the fact that there is a powerful incentive for putative class members to individually control prosecution of their separate actions. In waiving putative class members' rights to liquidated damages allowed by the New York Labor Law, they have created that incentive. That incentive is heightened as putative class members can bring (*sic*) with the Department of Labor where they can receive their full measure of damages without the need to prosecute this matter in court. CPLR Section 902(2) directs an examination of the impracticability or inefficiency of prosecuting separate actions. Plaintiffs use a reference to their arguments concerning numerosity and superiority to try to fulfill their burden of satisfying this consideration. They attempt to bolster these arguments by claiming that, absent a class certification, this case will be litigated 'hundreds of times, in multiple forums, before multiple judges.'... Their claim is without foundation. In fact, Plaintiffs themselves contradict this assertion. They admit that, after notice was sent out to potential class members in the Federal Action previously, they could only manage to gather 29 plaintiffs.... To be clear, that means that after the development of their federal case over a period of years and after distribution of an approved notice they only achieved 29 plaintiffs in that matter. There is no reason to believe that there will be any additional potential plaintiffs who are unaware of the matter at this junction to bolster those numbers. This is borne out by Plaintiffs' assertion that there are currently only 19 (out of what they estimate is a potential 50-60) putative plaintiffs in this instant matter. Plaintiffs provide no factual basis or legal argument to explain how they arrive at the 'hundreds' of matters they claimed would result in a denial of class certification. Plaintiffs have in no way proven that their claims of numerosity support a finding that a class certification is required to prevent impracticable or inefficient prosecution of separate actions. As Plaintiffs have failed to establish any impracticability or inefficiency in pursuing separate actions, their request for certification should be denied. [citation omitted]. Plaintiffs' claim that their superiority arguments fulfill the required consideration of CPLR 902(2) are similarly misplaced. They have not established that a class action is the superior method to pursue their claim. Plaintiffs disregard the administrative remedy available to them.... As described above, there has been extensive litigation in federal court in this matter. As a result of that litigation, the current employers settled for claims of most putative class members. This litigation and settlement weigh in favor of denying class certification and further wasting judicial resources. [citation omitted]. As discussed above, the administrative forum of the NYSDOL would be the preferred forum for adjudication of these claims and not this State Court action. [citation omitted]. As such, the fourth element of CPLR 902 weighs against class-wide adjudication.... Plaintiffs also failed to address additional factors regarding the difficulty of managing the requested class. As described above, the requested class involves employment by separate owners, over different time periods, who utilized different procedures and employment policies. The factual questions, and managerial issues, involved in determining how and if each class member was impacted by each different employer's practices and policies over different time periods weights (*sic*) in favor of denial of Plaintiffs' request for class certification."

Counsel for defendants also submits, in pertinent part, that, "[e]ven if the Court should find merit in Plaintiffs' request for class certification, Plaintiffs' assertion that their actionable claims go back as far as January 2012 is wrong. The burden is on a plaintiff to establish that a claim should relate back to an earlier pleading, in effect extending the statute of limitations. [citations omitted]. Plaintiffs have not fulfilled this burden. If a class was certified, the court should look back to 6 years from the filing of the instant action, not to February 15, 2012 as described in Plaintiffs' Proposed Class Notice. Plaintiffs' reliance on the 'relate back' provisions of CPLR Section 203 to justify a statute of limitations period dating from service of the Third-Party Complaint in the original federal matter is completely misplaced. Plaintiffs' (*sic*) assert that date is appropriate under CPLR 203(f). That section, however, states: Claim in amended pleading. A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading. The language of CPLR 203(f) does not apply to the instant matter. Plaintiffs don't event attempt to apply the relate back doctrine to an amended pleading, but instead to an entirely new action, containing new claims, in a different forum. The Complaint in the instant matter and the Third-Party Complaint filed in the federal matter are based on completely different causes of action and theories of recovery. The Third-Party Complaint concerns only contract and contribution claims. Further, the totality of the claims in that Third-Party Complaint were not even brought against all of the Third-Party Defendants.... Plaintiffs clearly knew the time they initiated their federal action that the statute of limitations for their state law claims was six years. There was certainly no impediment to them discovering who the owners were going back six years from when they initiated the federal action, especially as they claim that individual Plaintiffs spanned a range of employment dates that went back that far. Their lead Plaintiff, Fredis Ramires, stated that he was employed by Defefendants from May 2011 through July 2016.... He further states 'Richard Gabay, Peter Maza and Josepha (*sic*) Panza ... were the previous owners.'... It was clear to Plaintiffs that there was a change in ownership and Plaintiffs clearly decided not to pursue the previous owners. As they chose not to do so, they should not be permitted to relate their claims back to an earlier time to inappropriately manipulate the statutes (*sic*) of limitation (*sic*). Further, Plaintiffs should not be permitted to prejudice Defendants in this matter by effectively extending the already lengthy six-year New York statute of limitations to one of almost eight years." *See* Plaintiffs' Affirmation in Support Exhibits 11 and 14.

Counsel for defendants adds, in pertinent part, that, "[i]n the event Plaintiffs' motion is granted, Defendants request that the parties first be afforded an opportunity to meet and confer with the Court to determine the appropriate content of any notice to be distributed to the workers. Defendants object to Plaintiffs' proposed form of notice on a number of grounds, including that the Notice is misleading, contains typos and is factually inaccurate." *See* Plaintiffs' Affirmation in Support Exhibit 1.

Defendants also submit the affidavits of defendants Peter Maza and Richard Gabay in opposition to the motion. *See* Defendants' Affirmation in Opposition Exhibits A, B and D.

With regard to so much of plaintiffs' instant motion as seeks class certification in this matter, the proponent of a class action has the initial burden of establishing the prerequisites of class-action certification by competent evidence in admissible form. *See Osarczuk v. Associated Univs., Inc.*, 82 A.D.3d 853, 918 N.Y.S.2d 538 (2d Dept. 2011); *Emilio v. Robison Oil Corp.*, 63

A.D.3d 667, 880 N.Y.S.2d 177 (2d Dept. 2009); *Feder v. Staten Is. Hosp.*, 304 A.D.2d 470, 758 N.Y.S.2d 314 (1st Dept. 2003).

The prerequisites to a class action are contained in CPLR § 901(a), which provides that:

> One or more members of a class may sue or be sued as representative parties on behalf of all if:
> 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.

Once the prerequisites under CPLR § 901(a) have been satisfied, the Court must consider the factors set forth in CPLR § 902:

> 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;
> 5. The difficulties likely to be encountered in the management of a class action.

CPLR Article 9 is to be liberally construed and the determination as to whether to grant class certification rests in the discretion of the trial court. *See Beller v. William Penn Life Ins. Co. of N.Y.*, 37 A.D.3d 747, 830 N.Y.S.2d 759 (2d Dept. 2007). The statutory criteria governing the permissibility of class actions should be liberally construed so as to allow for the adjudication of claims that would not be economically litigable except by means of a class action. *See City of*

New York v. Maul, 14 A.D.3d 499, 903 N.Y.S.2d 304 (2010); *Dowd v. Alliance Mortg. Co.*, 74 A.D.3d 867, 903 N.Y.S.2d 104 (2d Dept. 2010); *Friar v. Vanguard Holding Corp.*, 718 A.D.2d 83, 434 N.Y.S.2d 698 (2d Dept. 1980). Given the purposes to be served by the class action device, which include economies of time and effort and the promotion of uniformity of decision, and in view of the court's ability to reverse or revise class action status when necessary, the interests of justice require that, in a doubtful case, any error be committed in favor of allowing the class action. *See Globe Surgical Supply v. GEICO Ins. Co.*, 59 A.D.3d 129, 871 N.Y.S.2d 263 (2d Dept. 2008); *Liechtung v. Tower Air, Inc.*, 269 A.D.2d 363, 702 N.Y.S.2d 111 (2d Dept. 2000).

Upon a review of the prerequisites for certification of a class action as defined in CPLR § 901(a), the additional factors set forth in CPLR § 902, and the arguments presented with respect to same by both parties, the Court finds that plaintiffs have satisfied said statutory requirements.

CPLR §203(f) states that, "[a] claim asserted in an ***amended pleading*** is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading (emphasis added)." In the instant matter, plaintiffs are not attempting to amend a complaint, but, rather, are requesting that an entirely new matter relate back to the filing of a third-party complaint in the previously filed, and now settled, federal matter.

For the rule allowing relation back to date of service or filing of the original complaint to be operative in an action in which a party is added beyond the applicable limitations period, a plaintiff is required to prove that (1) both claims arose out of the same conduct, transaction or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the commencement of the action that the new party will not be prejudices in maintaining its defense on the merits by the delayed, otherwise stale, commencement, and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against that party as well. *See Buran v. Coupal*, 87 N.Y.2d 173, 638 N.Y.S.2d 405 (1995); *Mondello v. New York Blood Center-Greater New York Blood Program*, 80 N.Y.2d 219, 590 N.Y.S.2d 19 (1992); *Cardamone v. Ricotta, supra*; *Nani v. Gould, supra.*

As a general matter, unity of interest, for purposes of this statute governing the relation back of the limitations period, will be found where there is a relationship between the parties giving rise to the vicarious liability of one for the conduct of the other. *See Mondello v. New York Blood Center-Greater New York Blood Program, supra.*

The Court finds that the relation back doctrine does not apply to the instant matter. Therefore, the date of February 15, 2012, as contained in the Class Notice is not approved. The applicable date for statute of limitations purposes is six years from the filing of the Complaint in this action.

Accordingly, based upon the above, the branch of plaintiffs' motion, pursuant to CPLR §§ 901 and 902, for an order certifying a class of all employees of Miami Car Wash who cleaned cars, dried cars or were car detailers for the applicable statute of limitations period; and for an order designating plaintiffs Ramires, Manuel Garcia and Ramos as class representatives, and their chosen counsel Monteiro & Fishman LLP as class counsel, is hereby **GRANTED**.

The branch of plaintiffs' motion for an order directing defendants to provide contact information (phone numbers, along with names and addresses) for all class members within ten (10) days of the Court's order granting this motion, is hereby **GRANTED**.

The branch of plaintiffs' motion for an order permitting plaintiffs to issue Notice to the Class to the Class Members, in the form annexed to the motion paper, is hereby **DENIED at this time**. However, it is further

ORDERED that counsel for the parties shall confer with the Court to determine the appropriate content of any notice to be distributed to the workers. Counsel are requested to please contact Chambers, on a conference telephone, call so a date and time to discuss the Class Notice can be selected.

All parties shall appear for a Certification Conference in IAS Part 33, Nassau County Supreme Court, 100 Supreme Court Drive, Mineola, New York, on **November 17, 2020**, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

E N T E R:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
October 1, 2020

ENTERED
Oct 07 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE