

<b>Zuparov v Bestcare Inc.</b>
2021 NY Slip Op 30245(U)
January 22, 2021
Supreme Court, Kings County
Docket Number: 506914/15
Judge: Lawrence S. Knipel
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 22<sup>nd</sup> day of January, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X  
BAKHTIYOR ZUPAROV, SVETLANA  
RASULOVA, AND TATIANA KONDRATYEVA,  
INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY  
SITUATED,

PLAINTIFFS,

-AGAINST-

Index No. 506914/15

BESTCARE INC.,

DEFENDANTS,

-----X  
The following papers numbered 21-74 read herein:

NYSCEF Docket No.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>21-28, 41-56</u>
Opposing Affidavits (Affirmations) _____	<u>29-34, 57-67</u>
Reply Affidavits (Affirmations) _____	<u>35-40, 68-74</u>
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, plaintiffs Bakhtiyor Zuparov, Svetlana Rasulova, and Tatiana Kondratyeva (plaintiffs or named plaintiffs) move, in motion (mot.) sequence (seq.) 1, for an order lifting the stay in this action. Plaintiffs further move for an order granting them leave to amend the complaint to remove the causes of action for failure to provide wage notices and wage statements in violation of Labor Law § 195, add failure to pay wages and

breach of contract causes of action, and add additional factual allegations. In addition, plaintiffs move for leave to extend the time for class certification pursuant to CPLR 2004. Plaintiffs move, in mot. seq. 2, for an order certifying this action as a class action, designating Virginia & Ambinder, LLP and Naydenskiy Law Firm, LLC as class counsel, and approving for publication the proposed Notice of Class Action Lawsuit and Publication Order annexed to their papers.

### *Background Facts and Procedural History*

On June 4, 2015, plaintiff Bakhtiyor Zuparov commenced the instant action on behalf of a putative class consisting of home health aides employed by defendant Bestcare, Inc. (defendant or Bestcare) who did not reside in the homes of Bestcare clients, but worked hourly shifts in which they provided these clients with personal and health care services. Thereafter, defendant joined issue and served an answer to the complaint. On February 9, 2016, Zuparov filed an amended complaint adding Svetlana Rasuloва as a plaintiff. On April 27, 2016, plaintiffs Zuparov and Rasuloва filed a second amended complaint adding Tatiana Kondratyeva as a plaintiff. Among other things, the second amended complaint sought damages for Bestcare's alleged failure to provide legally required wage statements and notices, unpaid minimum wages, overtime compensation, and spread of hours pay required by the Labor Law and the NYCRR.

On September 28, 2016, the parties entered into a stipulation in which they agreed to stay the action pending the Appellate Division, Second Department's ruling in the appeal of

*Andryeyeva v New York Health Care, Inc.* (45 Misc. 3d 820 [2014]) “and all appeals thereon.” In this regard, the parties agreed that *Andryeyeva* presented some of the same issues involved in the instant case and the Appellate Division’s determination in *Andryeyeva* could prove to be dispositive. On March 28, 2017, this stipulation was so-ordered by the court. In *Andryeyeva*, home health care aides brought an action against their employers on behalf of themselves and similarly situated employees alleging that their employers failed to pay them the required minimum wage. These workers worked 24 hour shifts at their clients’ residences and were paid an hourly rate for the 12 daytime hours of their 24 hour shifts and a flat rate for the 12 nighttime hours. However, the plaintiffs maintained that they were entitled to the minimum wage for each hour of their 24-hour shifts. In contrast, the defendant employers argued that under the New York State Department of Labor’s (DOL) interpretation of its Miscellaneous Industries and Occupations Minimum Wage Order (the Wage Order), they were only required to pay the employees for 13 hours per 24 hour shift provided that the employees were afforded at least eight hours of sleep, and actually received five hours of uninterrupted sleep, and that they were afforded three hours for meals.

On September 13, 2017, the Appellate Division issued its decision in *Andryeyeva*, which upheld the lower court’s ruling granting class certification (*Andryeyeva v New York Health Care, Inc.*, 153 AD3d 1216 [2017]). In so ruling, the Appellate Division found that the DOL’s interpretation of the Wage Order was neither rational nor reasonable because it conflicted with the plain language of the Wage Order (*id.* at 1218). On March 26, 2019, the

Court of Appeals reversed the Appellate Division's ruling in *Andryeyeva* (*Andryeyeva v New York Health Care, Inc.* 33 NY3d 152 [2019]). In this regard, the Court determined that the Appellate Division erred in ruling that the DOL's interpretation of the Wage Order was irrational and unreasonable (*id.* at 164). The Court further remitted the matter "for consideration of alternative grounds for class-certification for alleged violations of New York's Labor Law, inclusive of defendants' alleged systematic denial of wages earned and due, unaddressed by the courts below because of their erroneous rejections of DOL's interpretation [of the Wage Order]" (*id.*). Further, although the Court did not rule on the merits of the plaintiffs' class certification motions, in dicta, it addressed the defendants' argument that, because each putative class member's claim is fact specific and turns on whether the aide received the required number of uninterrupted sleep and meal hours, the plaintiffs could not offer generalized proof on a class-wide basis. In particular, the Court noted that "the fact that damages may vary by class member does not per se foreclose class certification" and 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). The Court further stated that:

"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. Claims of uniform

systemwide violations are particularly appropriate for class certifications.” (*id.* at 184).

On September 27, 2019, after the matter was remanded by the Court of Appeals, the *Andryeyeva* plaintiffs again moved for class certification before the trial court. Among other things, the motion identified 14 additional former employees who alleged that they worked 24 hour shifts, did not receive the requisite hours for sleep and meal times, and were not paid minimum wage for each of the 24 hours that they worked during these shifts. In a decision and order dated May 15, 2020, Hon. Larry D. Martin of this court granted the *Andryeyeva* plaintiffs’ motion for class certification (*Andryeyeva v New York Health Care, Inc.*, 2020 NY Slip Op 31362[U] [Sup.Ct, Kings County 2020]). Thereafter, the *Andryeyeva* defendants appealed Justice Martin’s order and this appeal is currently pending before the Appellate Division, Second Department.

#### ***Plaintiffs’ Motion to Vacate the Stay***

Plaintiffs move for an order vacating the stipulation staying this action pending the Appellate Division’s ruling in the appeal of *Andryeyeva* (45 Misc. 3d at 820) and all appeals thereon. In support of this branch of their motion, plaintiffs point out that the Appellate Division has issued its ruling, that this ruling was appealed to the Court of Appeals, and the Court of Appeals has rendered its decision on the matter as well. Accordingly, plaintiffs maintain that the stay should be lifted.

In opposition to this branch of plaintiffs’ motion, defendant argues that the motion should be denied as moot inasmuch as the stay was automatically lifted when the Court of

Appeals issued its ruling in *Andryeyeva* on March 26, 2019. In support of this argument, defendant points to the language of the stipulation, which states that the matter was stayed pending the Appellate Division's ruling and all appeals thereon.

In reply to defendant's opposition, plaintiffs maintain that defendant is incorrect in asserting that the stay was automatically lifted inasmuch as it has been docketed as "stayed" by the court since the stipulation was so-ordered. Plaintiffs further maintain that it is disingenuous for defendant to now claim that the stay was automatically lifted inasmuch as, after the Court of Appeals issued its ruling in *Andryeyeva*, the parties engaged in extensive negotiations regarding a proposed stipulation to lift the stay and amend the complaint. According to plaintiffs, defendant never took the position during these negotiations that the stay had automatically been lifted. Plaintiffs also maintain that their delay in moving to vacate the stay was caused by these lengthy negotiations in which they made a good faith effort to reach an agreement with defendant whereby the parties would stipulate to lift the stay and to permit the filing of an amended complaint.

The court finds no merit to defendant's argument that the stipulation was automatically lifted upon the issuance of the Court of Appeals' ruling in *Andryeyeva*. In particular, there was no self executing language in the stay that specified that it would be automatically lifted following the resolution of all appeals. Further, it is undisputed that the action remained docketed as stayed after the Court of Appeals ruled. Under the circumstances, a subsequent stipulation or court order was necessary in order to lift the stay.

Accordingly, that branch of plaintiffs' motion which seeks an order lifting the stay set forth in the September 28, 2016 stipulation is granted.

*Plaintiffs' Motion to Amend the Complaint*

Plaintiffs move for leave to file a third amended complaint to add additional causes of action, remove the causes of action for failure to provide wage notices and wage statements in violation of Labor Law § 195, and to add additional factual allegations. Specifically, plaintiffs seek to add a cause of action against Bestcare for failure to pay wages pursuant to Labor Law §§ 191 and 193. In addition, plaintiffs seek to add causes of action for breach of contract under Public Health Law § 3614-c and New York City Administrative Code § 6-109. In this regard, the proposed amended complaint alleges that Bestcare entered into contracts and/or subcontracts which required that it pay plaintiffs and similarly situated employees pursuant to Public Health Law § 3614-c, that Bestcare breached these contracts, and that plaintiffs were third-party beneficiaries of these contracts and entitled to all damages that arise out of the breach. Similarly, the proposed amended complaint alleges that Bestcare entered into city service contracts which contained provisions requiring the payment of living wages and health benefits pursuant to New York City Administrative Code § 6-109, that Bestcare breached these contracts, and that plaintiffs were third-party beneficiaries of the contracts.

The proposed amended complaint also adds additional factual allegations in support of plaintiffs' claims asserted on their own behalf, as well as on behalf of the putative class

members, such as hours worked and rates of pay. These new facts include the allegation that plaintiffs and the putative class worked 24 hour shifts and were not paid for each of the 24 hours worked notwithstanding the fact that they did not receive the requisite hours for sleep and meal times. Finally, the proposed amended complaint removes the causes of action for failure to provide wage notices and wage statements in violation of Labor Law § 195.

In support of their motion for leave to file a third amended complaint, plaintiffs maintain that Bestcare cannot demonstrate any undue prejudice as a result of the amendments inasmuch as the amendments merely amplify the claims already asserted in the lawsuit. In particular, plaintiffs contend that the additional causes of action build upon allegations already made in this action and will not cause defendant to undergo any change in position. Further, plaintiffs note that this litigation is still in its early stages given the stay that was put in place in September of 2016. Finally, plaintiffs note that defendant cannot claim any prejudice by the removal of plaintiffs' Labor Law § 195 claims.

In opposition to plaintiffs' motion to serve an amended complaint, defendant argues that plaintiffs have failed to attach a copy of the proposed amended complaint to their motion papers "clearly showing the changes or additions to be made to the pleadings" as required by CPLR 3025 (b). In addition, defendant contends that it was unnecessary to move to amend the complaint to remove the claims under Labor Law § 195 since plaintiffs could have done this by notice to defendant dismissing these claims. Furthermore, defendant argues the motion to amend should be denied inasmuch as the new claims are duplicative of existing

claims and allowing the amended complaint would cause unnecessary delay. Finally, defendant maintains that it will suffer prejudice if the motion to amend is granted since discovery has already occurred in this case. In this regard, defendant notes that both sides have served interrogatories and document requests.

Under CPLR 3025 (b), leave to amend pleadings “shall be freely given upon such terms as may be just.” “Thus, motions for leave to amend are liberally granted absent prejudice or surprise” (*Ricca v Valenti*, 24 AD3d 647, 648 [2005]). As a general rule, “a court hearing a motion for leave to amend will not examine the merits of the proposed amendment” (*id.*). However, when the proposed amendment is “patently devoid of merit,” the motion to amend should be denied (*Citimortgage, Inc., v Heyman*, 186 AD3d 1487, 1488-1489 [2020]).

Here, defendant has failed to show that the proposed amended complaint would prejudice it or otherwise result in undue surprise inasmuch as the new allegations in the amended complaint are consistent with the existing claims. Moreover, while some discovery has already occurred, this action is still in its beginning stages inasmuch as it has been stayed for several years. Indeed, no depositions have taken place to date. Furthermore, it cannot be said that the proposed new breach of contract claims are patently without merit because they are duplicative of the existing claims seeking unpaid wages under the Labor Law. In particular, the contracts which defendant allegedly breached imposed obligations beyond

what is required under the Labor Law including the payment of supplemental benefits and/or hourly pay rates that exceed the minimum wage.

Finally, under the circumstances of this case, plaintiff's failure to attach a "red-lined" copy of the proposed amended complaint is not a basis for denying the motion to amend. CPLR 3025 (b) requires that a motion to amend a pleading shall "be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading." Here, plaintiffs' motion to amend included complete copies of both the second amended complaint and the proposed third amended complaint, thereby allowing defendant to compare the two pleadings and see the changes made. Further, plaintiffs' memorandum of law in support of their motion to amend described the changes in the proposed amended complaint and plaintiffs reply papers contained a red-lined copy of the amended complaint (*Putrelo Constr. Co., v Town of Marcy*, 137 AD3d 1591, 1592 [2016]; *Medina v City of New York*, 134 AD3d 433 [2015]). In addition, prior to the making the motion, defendant was provided with a red-lined copy of the proposed amended complaint when the parties were negotiating the terms of a possible stipulation to allow plaintiffs to amend. Thus, for the purposes of CPLR 3025 (b), defendant was sufficiently advised of the changes in the proposed amended complaint.

Accordingly, that branch of plaintiffs' motion to amend their complaint is granted and the third amended complaint is deemed served.

### *Motion for Class Certification*

Plaintiffs move for an order certifying this action as a class action, designating Virginia & Ambinder, LLP and Naydenskiy Law Firm, LLC as class counsel, and approving for publication the proposed Notice of Class Action Lawsuit and Publication Order annexed to their papers.<sup>1</sup> In particular, plaintiffs seek an order certifying the class as:

“All individuals who performed work on behalf of Defendant as non-residential home health aides and/or personal care assistants in the State of New York at any time between June 4, 2009 and today.”

In support of their motion for class certification, plaintiffs submit affidavits from all three named plaintiffs in which they make similar allegations. In particular, the named plaintiffs allege that they were employed by Bestcare as home health aides who provided services to Bestcare’s homebound clients.<sup>2</sup> The plaintiffs further allege that they worked overnight and 24-hour shifts while they maintained their own residences and did not live in the homes of Bestcare clients. In addition, the plaintiffs allege that Bestcare required that when working 24-hour shifts, they stay in the clients’ homes and assist them as needed during the 24-hour shifts. According to the named plaintiffs, they typically worked between

---

<sup>1</sup>Plaintiffs originally moved, in mot. seq. 1, for an order granting them leave to extend the time for class certification. However, inasmuch as plaintiffs now move for an order granting class certification, that branch of their original motion which sought to extend the time in moving for class certification is moot.

<sup>2</sup>Plaintiff Zuparov worked for Bestcare between June, 2011 and December, 2012. Plaintiff Rasulova worked for Bestcare between April, 2011 and September, 2014. Plaintiff Kondratyeva began working for Bestcare in April, 2013.

three to six 24-hour shifts per week. The plaintiffs also allege that they did not receive regularly scheduled, uninterrupted duty free breaks for sleep and meals during these 24-hour shifts. Specifically, the named plaintiffs allege that they did not receive three uninterrupted meal breaks of one hour during these shifts, nor did they receive eight hours of sleep, including at least five hours of uninterrupted sleep, during these shifts. Furthermore, the plaintiffs allege that Bestcare did nothing to track whether they actually received sleep and meal breaks during the 24-hour shifts, but instead required that they call an automated telephone system to record their attendance at the beginning of their shifts or to submit weekly time sheets that recorded the start and end time of their shifts but contained no space to record sleep or meal breaks. Further, the named plaintiffs allege that, notwithstanding the lack of meal and sleep breaks during these 24-hour shifts, they were only paid for 12 or 13 of the hours worked.

In further support of their motion for class certification, the named plaintiffs allege in their affidavits that they were not paid overtime at the applicable overtime rate during weeks that they worked in excess of 40 hours, and that they did not receive benefits while working for Bestcare. In addition, the named plaintiffs allege that Bestcare employed at least 100 home health aides when they worked there. Further, the named plaintiffs allege that, like themselves, their co-workers also worked 24-hour shifts but were only paid for 12 or 13 hours of this time and were not given uninterrupted breaks for meals or sleep. Finally, the

named plaintiffs allege that when they worked more than 10 hours per day, they were not paid a “spread hours” premium of one additional hour at minimum wage.

In further support of their motion for class certification, plaintiffs submit samples of their time records, payroll records, and check stubs from their employment with Bestcare. Among other things, these records indicate that the named plaintiffs were never paid for more than 13 hours during any of their 24-hour shifts. In addition, plaintiffs submit a sample of plaintiff Zuparov’s time slip which contained no space where she could indicate time for meals or sleep.

Given this evidence, plaintiffs maintain that they have satisfied all of the prerequisites for class certification set forth in CPLR 901. In particular, plaintiffs maintain that the numerosity requirement has been met inasmuch as at least 100 Bestcare employees who were subject to its pay policies and that joinder would be impractical. Plaintiffs also argue that the questions of law and fact common to the class predominate over questions affecting only individual class members. In particular, plaintiffs note that all class members were subject to a uniform policy implemented by Bestcare. Further, plaintiffs point out that, although the damages suffered by members of the class will differ, the Court of Appeals made it clear in its *Andryeyeva* ruling that this is an insufficient basis for denying class certification.

Plaintiffs further maintain that their claims are typical of the putative class claims inasmuch as their claims derive from the same practice and conduct that gave rise to the remaining claims of the class members and is based upon the same legal theory. In

particular, plaintiffs note that they and members of the putative class provided similar home health services to Bestcare's clients and all members of the class were paid pursuant to identical policies, including the practices of paying its employees 12 or 13 hours for 24-hour shifts regardless of how many hours were worked, and of failing to ensure regularly scheduled meal and sleep breaks. Plaintiffs also contend that this practice deprived them and members of the putative class minimum wages, overtime compensation, spread of hours pay, and prevailing wages and benefits.

In further support of their motion for class certification, the named plaintiffs maintain that they will adequately protect the interests of the class inasmuch as they are familiar with and fully aware of the claims and the claims of the individuals they seek to represent. In addition, the named plaintiffs note that they are represented by attorneys who are experienced in class actions and employment law and have successfully represented classes in numerous class actions. Plaintiffs also argue that a class action is superior to other available methods inasmuch as courts have long recognized that a class action is the superior method for resolving claims for underpayment of wages. In particular, plaintiffs assert that the workers' likely insubstantial means and the modest damages to be recovered for each individual worker weigh against seeking relief on an individual basis.

As a final matter, plaintiffs argue that they have satisfied the requirements of CPLR 902 in seeking class certification. In this regard, plaintiffs note that most of the considerations set forth in CPLR 902 are implicit in CPLR 901. Further, plaintiff contends

that the existence of no fewer than 100 class members demonstrates the inefficiency of prosecuting or defending separate actions.

In opposition to plaintiffs' motion for class certification, defendant argues that the motion must be denied as untimely under CPLR 902. In this regard, defendant notes that under the statute, a motion for class certification must be brought within 60 days after the time to serve a responsive pleading has expired for all persons named as defendants. Here, the answer to the original complaint was served on December 11, 2015 but plaintiffs failed to move for class certification within 60 days of that date (i.e., February 9, 2016). Defendant further notes that it filed an answer to the amended complaint on March 25, 2016 and, assuming that the service of this answer is the relevant date, plaintiffs failed to move for class certification within 60 days of that date (i.e., May 24, 2016). Moreover, defendants point out that the answer to the second amended complaint was served on June 30, 2016 and plaintiffs failed to move within 60 days of that date (i.e., August 29, 2016). Defendants also contend that the stay that was entered into on March 28, 2017 was automatically lifted on March 26, 2019, when all appeals were exhausted in the *Andryeyeva* case. Thus, assuming that the lifting of the stay re-started the 60-day time period for moving for class certification, defendant contends that plaintiffs should have moved no later than May 25, 2019, which they failed to do. Finally, defendant points out that a Preliminary Conference Order required that plaintiffs move for class certification on or before October 20, 2016, which they also failed to do. Under the circumstances, defendant argues that plaintiffs' motion is untimely.

In further opposition to plaintiffs' motion for class certification, defendant argues that the motion must be denied on its merits. In particular, defendant argues that plaintiffs have failed to establish commonality as required under CPLR 902 (a)(2). In support of this argument, defendant notes that for each plaintiff and member of the putative class, an individual inquiry will be necessary on a shift-by-shift, day-by-day, week-by-week, and patient-by-patient basis in order to determine whether or not they received the required meal and sleep break and whether or not they worked hours for which they were not compensated. Further, defendant notes that during the relevant time period, some putative class members were covered by the terms of a collective bargaining agreement (CBA) and some were not, which impacts upon their pay rate. Thus, defendant notes that an individual inquiry would be necessary for each class member in order to determine whether they were covered under the CBA.

Defendant also argue that plaintiffs cannot demonstrate numerosity as required under CPLR 901 (a) because a case-by-case analysis is necessary to even identify whether any individual home health aide, among some 55,000 employed by Bestcare during the relevant time period, fits within the proposed class. In addition, defendant argues that the individual inquiries necessary precludes plaintiffs from establishing typicality under CPLR 901 (a)(3). According to defendant, there is no typical client or shift such that any home health aide could be considered typical.

In further opposition to plaintiffs' motion for class certification, defendant argues that plaintiffs have not established that they will fairly and adequately protect the interests of the class as required under CPLR 901 (4). In this regard, defendant maintains that, without the benefit of deposition testimony, which has not taken place to date, it cannot be determined whether the individually named plaintiffs can adequately represent the class. Furthermore, defendant contends that a class action is not superior to plaintiffs' other remedies. In particular, defendant argues that plaintiffs and the putative class have an available administrative remedy under the Labor Law which is superior to a class action given the highly individualized, fact intensive nature of each individual claim. Similarly, defendant maintains that the difficulties likely to be encountered in the management of a class action mitigate against class certification, as a class action would be unmanageable and require the court to conduct individualized mini-trials into both liability and damages for thousands of putative class members identified by plaintiffs.

In further opposition to plaintiffs' motion for class certification, Bestcare submits an affidavit by its president, Bernhard Schiel, in which he states that all Bestcare home health aides who worked 24-hour shifts were notified that they were expected to take three one-hour meal breaks and one eight-hour sleep break which consisted of at least five uninterrupted hours of sleep.

As an initial matter, the court must address defendant's argument the plaintiffs' motion for class certification is untimely. In this regard, CPLR 902 requires that a motion

for class certification be brought within 60 days after the time to serve a responsive pleading has expired for all defendants. Here, plaintiff commenced this action on June 4, 2015 and the parties stipulated to extend defendant's time to file an answer to December 11, 2015, thereby setting a February 9, 2016 deadline to move for class certification. On February 9, 2016, the parties stipulated to allow plaintiffs to file an amended complaint and set defendant's time to answer the amended complaint to March 25, 2016, thereby setting a May 24, 2016 deadline for moving for class certification. On April 22, 2016, a Preliminary Conference order was issued in which the parties agreed to extend plaintiffs' time to move for class certification until October 20, 2016. However, prior to the expiration of this deadline, on September 28, 2016, the parties entered into a stipulation to stay this action pending the resolution of all appeals in the *Andryeyeva* case. Furthermore, the court has already determined that this stay was not automatically lifted when the Court of Appeals issued its ruling in *Andryeyeva*. Thus, the instant motion for class certification is timely under CPLR 902 since the plaintiffs have simultaneously moved to lift the stay and for class certification.

Turning to the merits of plaintiffs' motion for class certification, in moving for class certification, "[t]he proposed class representative bears the burden of establishing compliance with the requirements of both CPLR 901 and 902" (*Krobath v. South Nassau Comm. Hosp.*, 178 AD3d 805, 806 [2019]). In particular, "[a] class action may be maintained in New York only after the five prerequisites of CPLR 901 [a] have been satisfied [and] [o]nce those

prerequisites are satisfied, the court ‘shall consider’ the factors set forth in CPLR 902” (*Cooper v Sleepy’s LLC*, 120 AD3d 742, 743 [2014], quoting CPLR 902). “[T]he criteria to be considered in granting class action certification, is to be liberally construed” (*Krobath* at 806, citing *Dowd v Alliance Mtge. Co.*, 74 AD3d 867, 869 [2010]). Further, as previously noted, claims of uniform and systematic underpayment of wages “are particularly appropriate for class certifications” (*Andryeyeva*, 33 NY3d at 184). Finally, the determination of whether to grant class certification is vested in the sound discretion of the trial court (*Cooper* at 743).

Turning to the first prerequisite, CPLR 901 (a) (1) requires a showing that the class is so numerous that joinder of all members is impracticable. “[T]he minimum number permissible may depend on a variety of factors [and] ‘[t]here is no mechanical test to determine whether ... numerosity has been met’” (*Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 137 [2008], quoting *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 96 [1980]). Although there is no set number which establishes numerosity, “[i]t has been held that the threshold for impracticability of joinder seems to be around forty” (*Globe Surgical Supply* at 138, quoting *Dornberger v Metropolitan Life Ins. Co.*, 182 FRD 72, 77 [SD NY 1999]). Here, the three named plaintiffs state in their affidavits that they worked with at least 100 other home health aides who were subject to the same underpayment of wages and benefits that they experienced. Under the circumstances, the numerosity requirement has been satisfied.

CPLR 901 (a) (2) requires that there be “questions of law or fact common to the class which predominate over any questions affecting only individual members.” Courts have consistently certified class actions notwithstanding differing individual damages where “there is uniformity in contractual agreements and/or statutorily imposed obligations (*Globe Surgical Supply*, 59 AD3d at 139). Indeed, where there is evidence of underpayment of statutorily and contractually required wages based upon an employers’ uniform and systematic policy, “[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).

Here, as noted above, plaintiffs allege that they and members of the putative class were paid a flat rate of 12 or 13 hours per 24-hour shift when they did not receive the required uninterrupted sleep and meal breaks, that there was no system in place to track whether or not they received these breaks, that they did not receive overtime pay for hours worked beyond 40 hours per week, that they did not receive the spread of hours premium payment, and they did not receive the prevailing wages and benefits required under the Public Health Law and New York City Administrative Code. Plaintiffs have further alleged that this illegal underpayment of wages and benefits took place in the context of a systematic and uniform policy adopted by Bestcare. Moreover, plaintiffs have submitted evidence in the form of the named plaintiffs’ affidavits, as well as payroll records, which support their allegations. Under the circumstances, plaintiffs have satisfied the commonality requirement

set forth in CPLR 901 (a) (2). In reaching this conclusion, the court finds no merit to defendant's arguments in opposition. In particular, taken as a whole, defendant's argument boils down to the claim that each class member's damages will have to be individually calculated. While this is true, it is insufficient as a matter of law to defeat a motion for class certification (*Andryeyeva*, 33 NY3d at 185).

CPLR 901 (a) (3) requires that the "claims and defenses of the representative parties [be] typical of the claims or defenses of the class." "Typical claims are those that arise from the same facts and circumstances of the claims of the class members" (*Globe*, 59 AD3d at 143). "Typicality does not require identity of issues and the typicality requirement is met even if the claim asserted by class members differ from those asserted by other class members" (*Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 423 [2010]). Here, as noted above, the named plaintiffs allege that they and members of the putative class provided similar care to Bestcare's clients and they were subject to the same illegal and systemic pay policies instituted by their employer. Accordingly, the typicality requirement has been satisfied.

CPLR 901 (a) (4) requires that a party moving for class certification demonstrate that the representative plaintiffs "will fairly and adequately protect the interests of the class." "The three essential factors to consider in determining adequacy of representation are potential conflicts of interest between the representative and the class members, personal characteristics of the proposed class representative (e.g. familiarity with the lawsuit and his

or her financial resources), and the quality of the class counsel” (*Globe*, 59 AD3d at 144). Here, the named plaintiffs stand to gain a pecuniary benefit through the successful prosecution of this action and seek the same relief as the putative class members. Thus, there are no potential conflicts of interests between the name plaintiffs and putative class members. Further, the named plaintiffs have demonstrated in their affidavits that they are familiar with the lawsuit. Finally, it is undisputed that the named plaintiffs’ attorneys are experienced in class actions and labor and employment law and have successfully represented classes in prior class action lawsuits. Accordingly, plaintiffs have satisfied the requirements of CPLR 901 (a) (4).

CPLR 901 (a) (5) states that a class action may be certified only if “a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” As previously noted, the Court of Appeals has specifically stated that claims such as the ones underlying the instant action, including the systemic failure to pay statutorily required wages, provide the minimum time for sleep and meal breaks, and to maintain adequate records of the hours actually worked, “are particularly appropriate for class certifications” (*Andryeyeva*, 33 NY3d at 184). Moreover, the fact members of the putative class have an administrative remedy under the Labor Law is not a basis for denial of class certification since an individual class member may opt out of the class sought to be certified if they wish to pursue this administrative remedy (*Globe*, 59 AD3d at 146). Accordingly, plaintiffs have satisfied the requirements of CPLR 901 (a) (5).

Having determined that plaintiffs have satisfied the five prerequisites set forth in CPLR 901 (a), the court must consider the additional factors contained in CPLR 902 which include:

“(1) The interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) The impracticability or inefficiency of prosecuting or defending separate actions; (3) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (4) The desirability or undesirability of concentrating the litigation of the claim in the particular forum; [and] (5) the difficulties likely to be encountered in the management of the class action.”

Initially, the court notes that most of the factors set forth in CPLR 902 have already been considered by the court in its CPLR 901 analysis. Moreover, there does not appear to be any litigation concerning the underlying controversy that has already been commenced. In addition, this court is an appropriate forum since all of the class members were employed as home health aides in the State of New York. Thus, plaintiffs have satisfied the requirements of CPLR 902.

Accordingly, plaintiffs’ motion for class certification is granted and leave is granted for plaintiffs to prosecute their action on behalf of a class consisting of:

“All individuals who performed work on behalf of Defendant as non-residential home health aides and/or personal care assistants in the State of New York at any time between June 4, 2009 and today.”

Furthermore, the proposed Notice of Class Action Lawsuit attached to plaintiffs’ motion papers as exhibit K (NYSCEF Document no. 53) is approved for publication.

As a final matter, within 45 days after entry of this order, Bestcare shall furnish plaintiffs' counsel with a class list containing the names of all individuals employed by Bestcare as non-residential home health aides in New York between June 4, 2009 and today. This list shall include the individuals' last known mailing and email addresses and, to the extent possible, the list is to be furnished in electronic form. Within 30 days after plaintiffs' counsel receives this list, plaintiff shall cause a copy of the Notice of Class Action to be mailed to every class member in English, Russian, Spanish, Polish, and Chinese once by first class mail and once by electronic mail (when possible). In addition, within 30 days after plaintiffs' counsel receives the class list, counsel shall cause a copy of the Notice of Class Action to be made available at a designated location on Virginia & Ambinder, LLP's website located at [www.vandallp.com](http://www.vandallp.com).

### *Summary*

In summary, those branches of plaintiffs' motion, in mot. seq. no. 1, which seek an order lifting the stay in this action and for leave to amend the complaint are granted. Plaintiffs' motion, in mot. seq. no. 2, for an order certifying this action as a class action, designating Virginia & Ambinder, LLP and Naydenskiy Law Firm, LLC as class counsel, and approving for publication the proposed Notice of Class Action Lawsuit and Publication Order is granted as provided for above.

This constitutes the decision and order of the court.

ENTER,



J. S. C.  
HON. LAWRENCE KNIPEL  
ADMINISTRATIVE JUDGE