

Dylo v R. King Windows Corp.

2021 NY Slip Op 32759(U)

December 21, 2021

Supreme Court, New York County

Docket Number: Index No. 157253/2019

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 42

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<p>MARCIN DYLO, STANISLAW BAJ, ADRIAN KOSIOR, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED WHO WERE EMPLOYED BY R. KING WINDOWS CORP., ALUMINUM FABRICATORS CORP., AND MARK KLICH, INDIVIDUALLY, AND/OR ANY OTHER RELATED OR AFFILIATED ENTITIES</p>	<p>INDEX NO. <u>157253/2019</u></p> <p>MOTION DATE <u>10/26/2021</u></p> <p>MOTION SEQ. NO. <u>001</u></p>
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Plaintiff,

- v -

R. KING WINDOWS CORP., ALUMINUM FABRICATORS
 CORP., MARK KLICH, INDIVIDUALLY AND/OR ANY
 OTHER RELATED OR AFFILIATED ENTITIES,

Defendant.

**DECISION + ORDER ON
 MOTION**

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HON. NANCY BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 53, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107

were read on this motion to/for

MISCELLANEOUS

I. INTRODUCTION

In this action pursuant to the New York Labor Law (NYLL) to recover unpaid overtime wages, the plaintiffs move pursuant to CPLR 901 and 902 to certify a class comprising all individuals employed by the defendants R. King Windows Corp. (RK Windows), Aluminum Fabricators Corp. (Aluminum), and/or Mark Klich (Klich), who performed window fabrication, delivery, and installation work throughout New York from July 22, 2013, through the present, excepting any manager, corporate officer, director, clerical, or office workers. The defendants oppose the motion and cross-move pursuant to CPLR 3211(a)(7) to dismiss the complaint as

against Klich, individually, and to dismiss the plaintiffs' class claims. The defendants also seek summary judgment pursuant to CPLR 3212 dismissing the complaint as against Klich. The plaintiffs oppose the cross-motion.

For the reasons that follow, the plaintiffs' motion is granted and the defendants' cross-motion is denied.

II. BACKGROUND

The named plaintiffs, Marcin Dylo, Stanislaw Baj, and Adrian Kosior (the plaintiffs) allege that beginning on or about February 2011, the defendants employed them to perform window installation work on properties in the New York metropolitan area. Specifically, the plaintiffs state they were employed by RK Windows and/or Aluminum (together, the employer defendants), two jointly owned and operated companies that operate out of the same location in New York, have employed up to 100 employees during the relevant time period, and subject their employees to the same policies and procedures regarding hiring, scheduling, and payroll practices. Klich is the president and sole owner of both RK Windows and Aluminum.

The plaintiffs claim that when they were first hired, they were advised they would be paid a set amount of money for each week of work. However, over the course of their employment, when they worked in excess of 40 hours in one week, they were not paid the statutory overtime rate of one and one-half times their regular rate of pay, as required pursuant to 12 NYCRR 142-2.2. Beginning in 2015, the plaintiffs were required to sign payroll sheets to receive their weekly paychecks. Each payroll sheet stated that by signing the document, the signer certified that he was "paid in full for the whole period [he] was employed at R. King Windows and/or Aluminum Fabricators Corp. All overtime hours were paid at 1.5 rate of [signer's] regular hourly wage."

The payroll sheets were written in English, a language which the plaintiffs, native Polish speakers, aver they do not understand. The plaintiffs were prohibited from keeping the payroll sheets.

The plaintiffs further claim that the defendants never provided them with wage notification documents at hiring and when their wage rates changed, as required by NYLL § 195.1. As such, the plaintiffs state that their paystubs were inaccurate. The plaintiffs were paid for the first 40 hours they worked per week by check and in cash for all additional work hours over 40. However, the rates of pay on the plaintiffs' paystubs were routinely lower than on the signed payroll sheet. Moreover, any cash payments made to the plaintiffs for the hours they worked over 40 in one week did not compensate the plaintiffs at the statutory rate.

The plaintiffs, individually and on behalf of similarly situated co-workers, commenced this action to recover the overtime wages they claim they are entitled to. Pre-class-certification discovery was completed as of the status conference held before this court on June 24, 2021. The instant motions ensued.

III. DISCUSSION

A. Defendants' Cross-Motion

Since the defendants seek relief in their cross-motion that may be wholly or partially dispositive of the plaintiffs' motion for class certification, the court addresses the cross-motion first.

i. CPLR 3211(a)(7)

On a motion to dismiss for failing to state a cause of action under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts

alleged in the complaint or counterclaim, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). However, “bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration.” Silverman v Nicholson, 110 AD3d 1054, 1055 (2d Dept 2013) (internal quotation marks and citation omitted). “In assessing a motion under 3211 (a) (7), . . . the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” Leon v Martinez, supra at 88 (internal quotation marks and citations omitted). Moreover, “[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss.” EBC I, Inc. v Goldman Sachs & Co., 5 NY3d 11, 19 (2005).

The plaintiffs’ first cause of action seeks to hold each of the defendants liable for violations of article 19 of the NYLL (the Minimum Wage Act). The Minimum Wage Act and attendant New York Department of Labor regulations require, *inter alia*, that New York employers pay their employees time and a half for overtime, which is defined as work in excess of 40 hours per week for non-residential employees. See 12 NYCRR 142-2.2; NYLL § 655(5)(b). The Minimum Wage Act authorizes suit against parties that qualify as “employers.” See Bonito v Avalon Partners, Inc., 106 AD3d 625, 626 (1st Dept. 2013). NYLL § 651(6) defines “employer” as “any individual, partnership, association, corporation, limited liability company, business trust, legal representative, or any organized group of persons acting as employer.” Additionally, corporate officers who are not “employers” may be held liable under the Minimum Wage Act where a plaintiff demonstrates that the corporate veil should be pierced. See Bonito v Avalon Partners, Inc., supra at 626.

The plaintiffs' second cause of action seeks to hold the defendants liable for violations of article 6 of the NYLL. Article 6 of the NYLL "regulates the payment of wages by employers." Pachter v Bernard Hodes Group, Inc., 10 NY3d 609, 614 (2008). Like the Minimum Wage Act, article 6 authorizes suit against any party that constitutes an "employer" within the meaning of the statute. See Bonito v Avalon Partners, Inc., supra at 625-26. NYLL § 190(3) broadly defines "employer" as "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service." Governmental agencies are excluded from the definition of "employer." Id.

The defendants move pursuant to CPLR 3211(a)(7) to dismiss the complaint as against Klich on the grounds that Klich is not an "employer" within the meaning of the NYLL and that the plaintiffs assert no basis for piercing the corporate veil. In assessing whether a defendant qualifies as an "employer" within the meaning of the Minimum Wage Act and article 6 of the NYLL, courts have applied the "economic reality" test set forth by the federal courts. Accordingly, "[t]he central inquiry in determining whether one qualifies as an 'employer' under these generous definitions is 'whether the alleged employer possessed the power to control the workers in question, ... with an eye to the "economic reality" presented by the facts of each case.'" Doo Nam Yang v ACBL Corp., 427 F Supp 2d 327, 342 (SD NY 2005) (quoting Herman v. RSR Sec. Servs. Ltd., 172 F3d 132, 139 [2nd Cir 1999] [internal quotations omitted]). Relevant factors in considering the "economic reality" of a situation include whether the "employer" had authority to hire and fire employees, supervised and controlled employee work schedules and/or conditions of employment, or determined the rate and method of payment to employees. See id.; Harris v Structuretech N.Y., Inc., 191 AD3d 470, 471-72 (1st Dept. 2021);

Tezoco v GE & LO Corp., 199 AD3d 541 (1st Dept. 2021); Bonito v Avalon Partners, Inc., *supra* at 626.

The plaintiffs allege in their complaint that Klich, along with RK Windows and Aluminum, was their employer “within the meaning contemplated pursuant to [the NYLL.]” In opposition to the defendants’ cross-motion, the plaintiffs also submit affidavits, wherein they state that Klich hired the plaintiffs to work for RK Windows and Aluminum, ran the company on a daily basis, set the plaintiffs’ rate of pay, and received complaints from employees about not receiving overtime pay. These allegations, all of which may be considered on a motion pursuant to CPLR 3211(a)(7), (see Rovello v Orofino Realty Co., 40 NY2d 633, 635 [1976]; CPLR 3211[c]), are sufficient at the pleading stage to state NYLL wage claims against Klich as an employer. See Harris v Structuretech N.Y., Inc., *supra* at 471-72 (allegations that individual defendant was an owner and officer of corporate employer and had authority to fire plaintiff, supervised and controlled plaintiff’s conditions of employment, and determined the rate and method of payment to the plaintiff sufficient to state article 6 wage claim against individual defendant); Bonito v Avalon Partners, Inc., *supra* at 626 (allegations that individual defendant exercised control over “day-to-day” operations, hired and fired employees, supervised and controlled employee work schedules, determined rate and method of pay, kept employment records, and approved vacations sufficient to state article 6 and Minimum Wage Act claims). The branch of the defendants’ motion seeking to dismiss the complaint as against Klich is therefore denied.

The defendants further move pursuant to CPLR 3211(a)(7) to dismiss the plaintiffs’ class claims because the Minimum Wage Act allows employees to recover liquidated damages “unless the employer proves a good faith basis to believe that its underpayment of wages was in

compliance with the law.” NYLL § 663. While CPLR 901(b) prohibits any claim for penalties to be brought as a class action, it is well-settled that “it is not dispositive that a statute imposes a penalty so long as the action brought pursuant to that statute does not seek to recover the penalty.” Borden v 400 E 55th St. Assoc., L.P., 24 NY3d 382, 393 (2014). Here, the plaintiffs do not demand recovery of liquidated damages either for themselves or for the putative class. Indeed, no reference is made to liquidated damages anywhere in the complaint. Thus, the branch of the defendants’ motion seeking to dismiss the plaintiffs’ class claims as barred pursuant to CPLR 901(b) is denied.

ii. CPLR 3212

The defendants move, in the alternative, pursuant to CPLR 3212 for summary judgment dismissing the complaint against Klich. The movant on a summary judgment motion “must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The facts must be viewed in the light most favorable to the non-moving party. See Vega v Restani Constr. Corp., 18 NY3d 499 (2012); Garcia v J.C. Duggan, Inc., 180 AD2d 579 (1st Dept. 1992). Once the movant meets his burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See Vega v Restani Constr. Corp., *supra*.

The defendants submit in support of their application pursuant to CPLR 3212, *inter alia*, pre-class-certification discovery demands and documents exchanged by the parties and deposition transcripts of the plaintiffs and Klich. The defendants point out that the plaintiffs

testified that they were employed by RK Windows and/or Aluminum Fabricators and did not allege in the complaint any facts against Klich other than his ownership of the corporate defendants. Additionally, Klich's deposition testimony, affidavits submitted by the plaintiffs, pay stubs, and payroll receipts identify the corporate defendants as the plaintiffs' employers.

However, at his deposition, Klich also testified regarding his unimpeded control and management over the day-to-day business operations of each of the corporate defendants. For example, Klich stated that he was the CEO and sole owner of the corporate defendants, was solely responsible for financial decisions at his companies, including hiring or firing people or giving them raises and determining their wages, and was in charge of time-keeping practices for the company. Moreover, Dylo testified at his deposition that he was directly employed by Klich, and both Dylo and Kosior testified that they complained to Klich about not being paid overtime. Baj testified that Klich was the person who hired him and referred to him as the "boss."

In light of the foregoing, the defendants fail to establish, *prima facie*, that Klich was not an "employer" within the meaning of the NYLL. Thus, the branch of the defendants' motion seeking summary judgment dismissing the complaint against Klich is denied without regard to the sufficiency of the plaintiffs' opposition papers. See E.B.-W. by Bou v New York City Housing Authority, 185 AD3d 458, 458 (1st Dept. 2020).

B. Class Certification

CLR 901(a) provides that a named plaintiff or plaintiffs may maintain a class action 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.” In determining whether to permit the matter to proceed as a class action, the court must consider “(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 902. Article 9 of the CPLR is to be “liberally construed” (Beller v William Penn Life Ins. Co. of N.Y., 37 AD3d 747, 748 [2nd Dept. 2007]) in favor of the granting of class certification if all of the prerequisites of CPLR 901(a)(1)-(5) and CPLR 902(1)-(5) are met. See Matter of Colt Indus. Shareholder Litig., 77 NY2d 185 (1991); Ackerman v Price Waterhouse, 252 AD2d 179 (1st Dept. 1998).

The evidence submitted by the plaintiffs in support of class certification, which includes affidavits of the named plaintiffs, a transcript of Klich’s deposition testimony, sample paystubs and payroll sheets from the relevant period, a list of employees produced by the defendants during pre-class-certification discovery, an attorney’s affirmation, and a proposed class action notice and publication order demonstrates the merit of their claims that they and other similarly situated laborers may have been subject to the defendants’ practice of denying their employees statutory overtime pay. See CPLR 901; Dabrowski v ABAX, Inc., 84 AD3d 633, 634 (1st Dept 2011).

The group of persons identified by the plaintiffs meets the requirements for certification as a class under CPLR 901 and 902. The plaintiffs have named at least 30 individuals they aver

were employees of the defendants during the relevant period and have each averred that they recall working with at least 100 other employees. Moreover, the defendants have produced the names of 16 individuals they state they employed during the relevant period. The court finds on the evidence presented that joinder of all of the defendants' employees who were allegedly underpaid, which may range from at least 30 to 100, is impracticable within the meaning of CPLR 901(a)(1). See CPLR 902(2); Dabrowski v ABAX, Inc., supra at 634; Pesantez v Boyle Env'tl. Servs., Inc., 251 AD2d 11, 11-12 (1st Dept 1998); Robidoux v Celani, 987 F2d 931, 935 (2nd Cir 1993).

Since all of the proposed class members performed work for the defendants' window fabrication and installation business in New York, were due statutory overtime wages, and were allegedly underpaid, the named plaintiffs' claims are typical of those of the proposed class (see CPLR 901[a][3]; Dabrowski v ABAX, Inc., supra, at 634; Pesantez v Boyle Env'tl. Servs., Inc., supra, at 12), and the nature of the claims is such as to indicate a predominance of common issues of law and fact over individual questions of damages. See CPLR 901(a)(2); Weinstein v Jenny Craig Operations, Inc., 138 AD3d 546, 546-547 (1st Dept 2016); Dabrowski v ABAX, Inc., supra, at 634; Pesantez v Boyle Env'tl. Servs., Inc., supra, at 12; Pruitt v Rockefeller Ctr. Props., 167 AD2d 14, 22 (1st Dept 1991).

The named plaintiffs have exhibited an interest in the action and their counsel have demonstrated a level of competence ensuring that they can fairly and adequately represent the class members, inasmuch as counsel has zealously represented several classes of laborers bringing claims analogous to those of the putative class. See CPLR 901(a)(4); Dabrowski v ABAX, Inc., supra, at 634; Nawrocki v Proto Constr. & Dev. Corp., 82 AD3d 534 (1st Dept

2011); Kudinov v Kel-Tech Constr., Inc., 65 AD3d 481 (1st Dept 2009); Pesantez v Boyle Envntl. Servs., Inc., supra, at 12.

Finally, a class action would be the best method of adjudicating this controversy (see CPLR 901 [a][5]; Nawrocki v Proto Constr. & Dev. Corp., supra; Brandy v Canea Mare Contr., Inc., 34 AD3d 512, 514 [2nd Dept 2006]; Ortiz v J.P. Jack Corp., 286 AD2d 671 [2nd Dept 2001]), in light of the small amount of potential recovery by each individual, the laborers' likely insubstantial means, and the lack of any serious problems in managing the claims of a maximum of approximately 100 individuals where most of the individual differences can be resolved by the documentary evidence of payroll checks and time sheets. See CPLR 902(5); Dabrowski v ABAX, Inc., supra, at 635;; Pesantez v Boyle Envntl. Servs., Inc., supra, at 12.

The court has considered the defendants' arguments in opposition to class certification and finds them to be without merit.

IV. CONCLUSION

Accordingly, it is

ORDERED that the plaintiffs' motion to certify a class comprising all individuals employed by R. King Windows Corp., Aluminum Fabricators Corp., and/or Mark Klich, who performed window fabrication, delivery, and installation work throughout New York between July 22, 2013, and the present, excepting any manager, corporate officer, director, clerical, or office workers, is granted, and such class is so certified; and it is further

ORDERED that the defendants' cross-motion pursuant to CPLR 3211(a)(7) to dismiss the complaint as against Klich, individually, and to dismiss the plaintiffs' class claims, and for

summary judgment pursuant to CPLR 3212 dismissing the complaint as against Klich, is denied in its entirety; and it is further

ORDERED that the parties shall commence post-certification discovery and appear for a status conference via Microsoft Teams on March 24, 2022, at 10 a.m.; and it is further

ORDERED that the Note of Issue deadline is extended until April 25, 2022.

This constitutes the Decision and Order of the court.

DATE: December 21, 2021



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON