

<b>Lutfieva v MZL Home Care Agency, LLC</b>
2022 NY Slip Op 30170(U)
January 19, 2022
Supreme Court, New York County
Docket Number: Index No. 159740/2017
Judge: Verna Saunders
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36M

Justice

INDEX NO. 159740/2017

GULCHEKHRA LUTFIEVA, individually and on behalf of all other persons similarly situated who were employed by MZL HOME CARE AGENCY, LLC, Plaintiffs,

MOTION SEQ. NO. 004

- v -

DECISION + ORDER ON MOTION

MZL HOME CARE AGENCY, LLC, Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 63, 64, 65, 66, 67, 68, 69, 70, 74, 75, 76, 77, 78, 79, 80, 86, 87, 88, 89, 90, 91, 92, 95, 96, 97, 98, 99, 100, 112, 113, 115, 116

were read on this motion to/for MISCELLANEOUS

Plaintiff moves the court seeking preliminary approval of the Settlement Agreement and Release, certification of the proposed class under Article 6 of the Civil Practice Law and Rules for settlement purposes, appointment of plaintiff's counsel Virginia & Ambinder, LLP as class counsel, and authorization for distribution of the proposed Notice of Settlement and Class Action Lawsuit and Claim form. (NYSCEF Doc. No. 63, Notice of Motion). The plaintiff also moves the court seeking to amend its complaint to add an additional cause of action under the Fair Labor Standards Act as amended, 29 USC § 201 et seq. (NYSCEF Doc. No. 69, Amended Complaint).

Defendant does not oppose the motion. However, Viorica Malancea ("Malancea"), a day shift homecare worker, opposes the motion and cross-moves seeking permission to intervene under CPLR 1012 and 1013, or in the alternative dismissal of the action pursuant to CPLR 3211(a)(4). (NYSCEF Doc. No. 74, Notice of Motion in Opposition).

Plaintiff commenced this action on behalf of herself and the proposed class seeking to recover unpaid wages and benefits under New York Labor Law. After a preliminary conference, discovery, settlement conferences, and mediation, the parties agreed upon a proposed settlement. (NYSCEF Doc. No. 65, Settlement Agreement). The class members include all home health care workers, performing 24-hour or regular hourly shifts, employed by defendant at any time from November 1, 2011 through and including December 31, 2018. The proposed amount of \$3,000,000.00 is intended to cover payments to claimants, attorneys' fees and costs, service payments, and claims administrative fees and costs. Interested claimants, upon receiving the Notice of Proposed Class Action Settlement, are required to file a claim form and supporting documentation and opt-in to this settlement agreement. Class members seeking to opt-out and preserve any claims must opt-out pursuant to the proposed deadline. Failure to timely opt-out will result in a release and waiver of all wage and hour claims against defendant. Claimants would receive an allocated share of the settlement based upon their classification as either a

“Live-In HHA” (24-hour shift Home Health Aide) or an “Hourly HHA” (hourly Home Health Aide). Attorney’s fees are not to exceed one-third of the settlement fund.

Plaintiff asserts that the proposed settlement should be approved as it is the result of extensive, protracted, and contested negotiations between counsel, with the assistance of a highly credentialed mediator having extensive experience in the home health care industry. Plaintiff further asserts that they meet the prerequisites of CPLR 901 and 902 as the class contains over two thousand (2,000) members; there are common questions of law and fact such as whether defendant paid the correct wages to the class members during the settlement period; plaintiff’s claims are typical of the claims of the proposed class as they all alleged entitlement to receive the correct wages for the hours worked; plaintiff is represented by counsel experienced in wage and hour law; and the class action method of litigation is superior to any other method for adjudication of this action.

Proposed intervenor Malancea, opposes the motion seeking a denial of the preliminary approval, permission to intervene, a dismissal of plaintiff’s class action claims, or alternatively, to stay the proceeding to allow Malancea’s federal action to proceed. Malancea argues that she filed her class and collective action complaint on February 1, 2018 in the United States District Court for the Eastern District of New York (*Malancea v MZL Home Care Agency LLC.*, No. 18 Civ 732 [CBA] [CLP]) and that plaintiff’s proposed agreement attempts to extinguish the claims of the thousands of hourly home care workers involved in that action. Malancea submits that if plaintiff sends its notice to the proposed class it will result in a waste of resources and cause confusion. Malancea contends that the settlement’s only purpose is to secure \$1,000,000.00 in attorney’s fees for plaintiff’s counsel who have done very little work to settle the action as they mediated for only three hours and conducted insufficient discovery. Malancea further contends that the action is being settled for well below its value and that it fails to address other violations such as defendant’s failure to pay overtime, travel time, and blended overtime rates. Malancea also asserts, among other things, that the settlement favors 24-hour workers like plaintiff rather than hourly workers like Malancea.

In opposition to Malancea’s cross-motion and in further support of its motion seeking preliminary approval of the proposed settlement, plaintiff asserts Malancea filed the federal court action three months after plaintiff filed the instant action, seeking to represent the same class. Plaintiff avers that Malancea was aware of the instant action yet elected to ignore the First Filed Rule and the Colorado River Abstention Doctrine by commencing a duplicative action alleging the same claims of unpaid wages on behalf of the same class. Plaintiff contends that this action has been actively litigated for over three years and the parties have engaged in court appearances, motion practice, and extensive discovery where thousands of pages of records were produced including payroll information, time records, collective bargaining agreements, employee records, employee databases, and wage parity data. Plaintiff maintains that prior to the class certification motion being briefed, the parties engaged in arms-length settlement negotiations which included numerous conversations regarding plaintiff’s damages and defendant’s defenses. To assist with settlement, the parties secured Martin F. Scheinman, leading mediator in the industry. Plaintiff asserts that while this action has been in litigation, Malancea has struggled to maintain her claim in federal court which seeks recovery for two hours of unpaid overtime and that to date, no member has filed consent to join her action.

Plaintiff avows that Malancea's motion to intervene should also be denied as it is untimely. Malancea provided the complaint in the case at bar as evidence in support of her motion for collective certification in her duplicate action in federal court. However, despite her awareness of the instant action, Malancea waited over three years to move this court seeking to intervene. Moreover, plaintiff argues that intervention is not necessary to protect Malancea's rights because the proposed settlement includes an opt-out mechanism, as well as, the right to object to the settlement at the final approval hearing, and that plaintiff is adequately represented by counsel with extensive experience in class actions and labor law cases. Plaintiff also submits that the settlement is fair and reasonable, and intervention would result in delay and possibly destroy the resolution and recovery for class members who have waited over three years for recovery.

In reply, Malancea maintains, *inter alia*, that the proposed settlement was a result of insufficient discovery and a rushed three-hour mediation of which she was not provided notification; that of the \$3,000,000.00 proposed recovery, only a small fraction will go to the workers whereas the attorneys will receive \$1,000,000.00; that plaintiff fails to alert the court that Malancea commenced an action in federal court; and finally, that the settlement will mostly help 24 hour worker like plaintiff and not hourly workers like Malancea.

To grant a motion for preliminary approval of class settlement, the court must: (1) conditionally certify the Settlement Class; (2) find the settlement terms fair and reasonable; and (3) find the notice provisions adequate. (*see Matter of HSBC Bank U.S.A. N.A. Checking Account Overdraft Litig.*, 49 Misc 3d 1211[A], 2015 NY Slip Op 51582[U] [Sup Ct, NY County 2015].)

Pursuant CPLR 901, five prerequisites must be satisfied in order to obtain class certification: (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) questions of law or fact common to the class predominate over questions of law or fact affecting individual class members (commonality); (3) the claims or defenses of the class representatives are typical of those in the class (typicality); (4) the class representatives will fairly and adequately protect the interests of the class (adequacy); and, (5) a class action represents the superior method of adjudicating the controversy (superiority). Where a class seeks certification for settlement purposes only, "these prerequisites — and particularly those designed to protect absentee class members — must still be met and, indeed, demand undiluted, even heightened, attention." (*Matter of HSBC Bank U.S.A. N.A. Checking Account Overdraft Litig.*, 49 Misc 3d 1211[A], 2015 NY Slip Op 51582[U] [Sup Ct, NY County 2015], citing *Klein v Robert's American Gourmet Food, Inc.*, 28 AD3d 63, 70 [2d Dep't 2006].)

In addition to the CPLR 901 prerequisites, the proposed class must also satisfy CPLR 902, which asks the court to consider: (1) the interest of class members in individually controlling the prosecution; (2) the impracticability or inefficiency of prosecuting or defending separate actions; (3) the extent and nature of any litigation concerning the controversy 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 a class action. (*see Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 421-22 (1st Dep't 2010).)

As an initial matter the court will address Malancea's cross-motion to intervene.

Under CPLR 1012, upon a timely motion, any person shall be permitted to intervene, as of right, in any action when a statute of the state confers an absolute right to intervene; or when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment; or when the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment.

Under CPLR 1013, upon timely motion, any person may be permitted to intervene, with permission, in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.

Rather than seeking to intervene in the instant action when Malancea opined that her interests would not be properly represented by plaintiff here, Malancea elected to commence a duplicate action in federal court and wait over three years to seek to intervene in this action. "Consideration of any motion to intervene begins with the question of whether the motion is timely" and where proposed intervenors have known about an action for years the court properly denied the motion to intervene. (*see Matter of HSBC Bank U.S.A.*, 135 AD3d 534 [1st Dept 2016].) Insofar as Malancea's cross motion to intervene is untimely, it is denied in its entirety.

Assuming *arguendo*, the court also finds that intervention is not necessary as the plaintiff has been adequately represented, the class members for the proposed settlement include both hourly and 24-hour shift workers, and the claims asserted by plaintiff are identical to that of the proposed intervenor, to wit: payment of unpaid wages pursuant to relevant provisions of the Labor Law and the Living Wage Law. Moreover, pursuant to the settlement agreement, the proposed intervenor or any class member who wishes to object or opt-out of the final settlement may do so before the final approval thus, preliminary approval of the proposed settlement will not bind or prejudice the intervenor. Finally, intervention at this stage, three years after the commencement of this action would result in unduly delay and prejudice of the other class members and parties to this action. In accordance, with the foregoing, plaintiff's motion seeking preliminary approval of the proposed settlement is granted.

Upon a review of the pleadings, the memorandum of law and exhibits in support of plaintiff's motion, including the Settlement Agreement (NYSCEF Doc. No. 65), Claim Form and Release (NYSCEF Doc. No. 67), Notice of Proposed Class Action Settlement (NYSCEF Doc. No. 66), the court finds that the requirements of CPLR 901 and 902 have been met.

Specifically, it is undisputed that the class consists of anywhere from 2,000 to 2,400 members, all of whom have common questions of law and fact such as whether defendant paid members the correct wages and benefits, including overtime pay and living wage pay, during the

settlement period. Furthermore, plaintiff's claims and the proposed class member's claims are derived from the same conduct by defendant and based upon the same legal theories pertaining to unpaid wages for the hours worked. Moreover, despite the proposed intervenor's allegation of inadequate representation, the court finds that plaintiff's representation has been fair and adequate, and the interests of plaintiff and the proposed class will be protected. Finally, insofar as there are numerous class members involved in this wage and hour action, a class action is the most efficient mechanism for adjudication of the claims asserted. Furthermore, the court finds that the terms of the settlement agreement are fair and reasonable and the notice provisions are adequate.

In addition, the branch of plaintiff's motion seeking to amend the complaint to add additional cause of action under the Fair Labor Standards Act as amended, 29 USC § 201 et seq. is likewise granted. Based on the foregoing, it is

**ORDERED**, that the branch of plaintiff's motion seeking to amend the complaint in the form annexed to the moving papers (NYSCEF Doc. No. 69, *Amended Complaint*) is granted; and it is further

**ORDERED**, that plaintiff's motion seeking preliminary approval of the settlement memorialized in the Settlement Agreement and Release, attached to the Lusher Affirmation, dated January 23, 2020, as Exhibit A, conditional certification of settlement class, appointment of Virginia & Ambinder, LLP as class counsel, approval of the Notice of Class Action Settlement and Claim form, attached as Exhibit B and C to the Lusher affirmation, and authorization for distribution of the proposed Notice of Class Action Settlement and Claim form is hereby granted; and it is further

**ORDERED**, that the conditionally certified Settlement Class shall include the Named Plaintiff and all individuals employed as Home Health Care Workers by defendant MZL Home Care Agency, LLC in New York from November 1, 2011 through and including December 31, 2018 who do not opt out of the litigation, currently amounting to approximately 2000 class members; and it is further

**ORDERED**, that Virginia & Ambinder, LLP is appointed as class counsel; and it is further

**ORDERED**, that the proposed Notice of Class Action Settlement and Claim attached as Exhibit B to the moving papers is approved and shall be distributed to the Class; and it is further

**ORDERED**, that within twenty days after this decision and order is uploaded to NYSCEF defendants shall provide the settlement administrator with the list of names, last known addresses, last known telephone numbers, social security numbers, and dates of employment of all presumed class members; the settlement administrator shall mail the Notice of Class Action to members with thirty days of receipt of the class member list; class members will have sixty days from the date of the Notice is mailed to opt out of the settlement or object to the settlement; plaintiff will file a Motion for Final Approval of Settlement within fifteen days of the fairness

hearing; and the Court will hold a fairness hearing remotely on June 22, 2022 at 2:30 P.M. The parties will receive Microsoft Teams credentials no later than June 17, 2022; and it is further

**ORDERED**, that all remaining arguments have been considered and are either without merit or need not be addressed given the findings above.

January 19, 2022

  
HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE