SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SABRINA KRAUS **PART** 57TR

Justice

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BRICKZAIDA APONTE,

Plaintiff,

- v -

FEDCAP REHABILITATION SERVICES, INC.,WILDCAT SERVICE CORPORATION

Defendant.

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INDEX NO. 152683/2021

MOTION DATE 10/25/2021

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 38, 39

were read on this motion to/for ORDER MAINTAIN CLASS ACTION.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for DISCOVERY.

PENDING MOTIONS

Plaintiff moves for a class certification, pursuant to New York Civil Practice Laws and Rules (CPLR) Article 9, as to her claims under the New York Labor Law (NYLL) (Mo Seq 1).

In addition to class certification, plaintiff also seeks: designation as the representative of the Class; designation of plaintiff's counsel as the Class counsel; defendants' production of the list of all Class Members, including their names, positions, social security numbers, last known mailing address, all known telephone numbers and e-mail addresses; and distribution of the notice of class action to Class Members via first class mail. Defendants oppose the motion.

Plaintiff also moves to strike defendants' answer, or in the alternative for leave to compel discovery (Mo Seq 2).

The motions have been fully briefed and are consolidated herein for disposition.

For the reasons set forth below, the motions are granted in part.

BACKGROUND

Plaintiff commenced this action on March 17, 2021 against Fedcap Rehabilitation Services Inc. and Wildcat Service Corporation (collectively "Defendants") seeking unpaid wages on behalf of herself and all former and current non-exempt employees that were employed by defendants, through their job placement programs on or after the date that is six (6) years prior to the filing of the initial Complaint ("Class Members" or the "Class").

Defendants operate a job recruiting and placement nonprofit company in New York City. Defendants enrolled plaintiff and Class Members in a job insertion program managed by Defendants. After offering plaintiff and Class Members training with basic working skills (such as MS Office, cleaning, cooking, among others), defendants proceeded to contact their partnered corporations in order to find available entry level job positions for plaintiff and Class Members.

Although plaintiff and Class Members performed work for a third-party company, defendants managed the payroll and oversaw administering plaintiff and Class Members wages and compensations. All plaintiff and Class Members received their paychecks directly from defendants.

Plaintiff was employed as a maintenance worker by defendants and worked at three different homeless shelters. During her employment, plaintiff alleges she suffered significant wage and hour violations. Plaintiff and Class Members allege defendants' common practices included denial of wages and overtime compensation, late payment of wages, and the spread of premium hours in violation of the NYLL.

PLAINTIFF'S CLAIM THAT DEFENDANTS VIOLATED NYLL §191 AND NYLL§ 195(3) MAY NOT BE MAINTAINED IN THIS ACTION

At the onset, defendants argue plaintiff is unable to maintain a class action based upon violations of NYLL §191 and 195, specifically as to the claims of wage frequency, wage notice and wage statement claims, as they seek penalties under NYLL §198, which are not maintainable on a class basis, pursuant to CPLR § 901(b).

Plaintiff is unable to maintain a claim for wage frequency, a violation of NYLL §191, as defendants are non-profit organizations.

NYLL § 191(1)(a) provides,

> a. Manual worker.--- (i) A manual worker shall be paid weekly and not later than seven calendar days after the end of the week in which the wages are earned; provided however that a manual worker employed by an employer authorized by the commissioner pursuant to subparagraph (ii) of this paragraph or by a non-profitmaking organization shall be paid in accordance with the agreed terms of employment, but not less frequently than semi-monthly.

Plaintiff argues she was paid every two weeks in violation of NYLL § 901(a). However, as defendants represent, and plaintiff does not dispute, that they are a not for profit organization, and as such, according to NYLL 901(a)(1)(ii), are exempt from the requirement to pay wages every seven days, but are allowed to make wage payments in accordance with the terms of employment, or not less than twice a month. Plaintiff's own admission is that she was paid every other week. Therefore, defendants cannot be found to be in violation of NYLL § 901.

NYLL § 195(3), provides, in pertinent part, for the employer to

> furnish each employee with a statement with every payment of wages, listing the following: the dates of work covered by that payment of wages; name of employee; name of employer; address and phone number of employer; rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; gross wages; deductions; allowances, if any, claimed as part of the minimum wage; the benefit portion of the minimum rate of home care aide total compensation as defined in section thirty-six hundred fourteen-c of the

> public health law ("home care aide benefits"), if applicable; prevailing wage supplements, if any, claimed as part of any prevailing wage or similar requirement pursuant to article eight of this chapter; and net wages.

Failure to do so, is addressed in NYLL §198(1-d), which provides, in pertinent part:

If any employee is not provided a statement or statements as required by subdivision three of section one hundred ninety-five of this article, he or she shall recover in a civil action damages of two hundred fifty dollars for each work day that the violations occurred or continue to occur, but not to exceed a total of five thousand dollars.

The language of NYLL §198(1-d) requires the court to impose a penalty, therefor the same cannot be maintained in a class action. [1]

PLAINTIFF'S MOTION FOR CLASS CERTIFICATION PURSUANT TO CPLR § 901 & 902 IS GRANTED IN PART

Plaintiff's claim that defendants violated NYLL 195(1) maybe maintained in a class action if statutory and liquidated damages are waived as part of the class action

CPLR § 901(b) provides, unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

NYLL § 198 does impose liquidated damages and statutory penalties, however the language used suggests that the liquidated damages and penalties are precatory and not mandatory. For instance, NYLL 198(1-b), pertaining to wage notice, provides, in pertinent part,

> If any employee is not provided within ten business days of his or her first day of employment a notice as required by subdivision one of section one hundred ninety-five of this article, he or she may recover in a civil action damages of fifty dollars for each work day that the violations occurred or continue to occur, but not to exceed a total of five thousand dollars…

[1] As there is no pending motion for dismissal of these claims the court is not issuing an order dismissing them. The parties if so advised may stipulate to withdraw the claims or take such further action as deemed appropriate given the court's ruling.

The language used by the legislature, "he or she may recover" provides that the penalty is not mandatory, and plaintiff may waive the penalty in order to bring the class action. As plaintiff's complaint seeks an award of statutory and liquidated damages, the same may not be maintained, without an amended complaint, which clearly states plaintiff seeks statutory and liquidated damages only to the extent of her individual claim, and will be waived upon certification of the class. The court grants plaintiff leave to file an amended complaint in accordance with this decision and order.

THE REMAINDER OF PLAINTIFF'S CLAIMS
MAYBE MAINTAINED IN A CLASS ACTION

CPLR § 901(a) provides the prerequisites for a class action. They are:

a. 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.

"Whether a particular lawsuit qualifies as a class action rests within the sound discretion of the trial court. In exercising this discretion, a court must be mindful of our holding that the class certification statute should be liberally construed." (*Kudinov v Kel-Tech Constr. Inc.* 65 AD3d 481 [1st Dept 2009] citing *Englade v HarperCollins Publs.*, 289 AD2d 159[2002]).

The movant has the burden of establishing the prerequisites in CPLR 901(a), *Kudinov* supra. "Any error, if there is to be one, should be ... in favor of allowing the class action." *(Esplin v Hirschi*, 402 F2d 94 [1968]).

Numerosity

CPLR §901(a)(1) requires that the class be so numerous that joinder of all class members is impracticable.

> There is no 'mechanical test' to determine whether ... numerosity has been met nor is there a set rule for the number of prospective class members which must exist before a class is certified...each case depends upon the particular circumstances surrounding the proposed class and the court should consider the reasonable inferences and common sense assumptions from the facts before it.

Friar v Vanguard Holding Corp., 78 AD2d 96 (2nd Dept 1980).

Plaintiff assert defendants operate two nonprofit corporations in New York, and that defendants have hundreds of employees who are laborers and maintenance workers. Plaintiff submits in support two affidavits, her own, and one from another employee, Harold King (King), each affirming defendants engaged in alleged violations of the NYLL. Each affidavit names other possible Class Members.[2]

"The threshold for impracticability of joinder seems to be around forty" (*Galdamez v Biordi Const. Corp*, 13 Misc3d 1224(a) [2006], aff'd 50 AD3d 357 [1st Dept 2008], citing *Dornberger v. Metropolitan Life Ins. Co.,* 182 F.R.D. 72, 77 (SD N.Y.1999; *see also Klakis v. Nationwide Leisure Corp.,* 73 A.D.2d 521, 522 [1st Dept 1979]). In *Galsamez*, plaintiff's affidavits estimated the class consisted of between 30 and 70 workers, and in the affidavits, other members of the proposed class were able to recall the names of between (14) fourteen and (22)

[2] Although the initial affidavits attached to plaintiff's motion were not notarized, plaintiff submitted identical notarized affidavits with her reply, which the court accepts. The failure to notarize the original affidavits and is *de minimums*.

of them. The Appellate Division affirmed the lower court's finding that plaintiff sufficiently established that the class was so numerous that joinder of all members was impracticable, *(Galdamez v Biordi Constr. Corp*, 50 AD3d 357 [1st Dept 2008]).

Here, defendants admit they service 209 locations. Plaintiff affirms that she worked in (4) four of those locations, working with over (50) individuals during her employment. Although plaintiff's supporting affidavits were only able to identify (5) five potential members of the class specifically by name, it is undisputed that defendant employs well over 40 (forty) individuals, and the potential identities of future class members is within defendant's control, and can only be established through future discovery. Therefore, the numerosity requirement has been met.

Commonality

CPLR §901(a)(2) requires there are questions of law or fact common to the class which predominate over any questions affecting only individual members.

"Commonality is not merely an inquiry into whether common issues outnumber individual issues but rather whether the use of a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated." (*Pludeman v Northern Leasing Sys., Inc*, 74 AD3d 420 [1st Dept 2010], citing *Friar,* supra). Class certification is appropriate even when there are questions of law or fact not common to the class (*Pludemon,* supra, citing *Freeman v Great Lakes Energy Partners, L.L.C.*, 12 AD3d 1170, 1171 [2004]).

In this action, plaintiff identifies three[3] essential questions of law and fact common to all members of the putative class:

[3] Plaintiff asserts there are five such claims, but as noted above claims regarding being paid in a timely manner and claims as to wage statements and notices may not be maintained in this action.

(1) Whether Defendants paid Plaintiff and Class Members with all earned wages, including overtime at one-and-one-half times their regular rate for all hours worked over forty (40) per week, due to Defendants' policy of time shaving; and

(2) Whether Defendants properly compensated Plaintiff and Class Members with all earned wages, including overtime compensation at one-and-one-half times their regular rate for all hours worked over forty (40) per week, due to Defendants' policy of impermissible rounding down of hours; and

(3) Whether Defendants properly paid Plaintiff and Class Members with all spread of hours premium earned for workdays exceeding ten (10) hours; and

Plaintiff asserts that her claims and those of the Class Members arise from a common wrong: defendants alleged policy of (i) failing to compensate employees for all their hours worked due to a policy of time-shaving; (ii) failing to compensate employees for all hours worked due to an impermissible policy of rounding; and (iv) failing to pay the spread of hours premium for workdays exceeding ten (10) hours.

Defendants argue plaintiff has failed to prove an unlawful policy or practice. However, the Appellate Division, First Department has held,

> In determining whether an action should proceed as a class action, it is appropriate to consider whether the claims have merit (*Bloom v Cunard Line*, 76 AD2d 237, 240 [1980]). However this "inquiry is limited" (*id.*) and such threshold determination is not intended to be a substitute for summary judgment or trial (*Kudinov v Kel-Tech Constr. Inc.*, 65 AD3d 481, 482 [2009]). Class action certification is thus appropriate if on the surface there appears to be a cause of action which is not a sham (*Brandon v Chefetz*, 106 AD2d 162, 168 [1985]).

Pludeman, supra.

Plaintiff has established common questions of law and fact that predominate over any questions affecting only individual members, as to the alleged issues of time shaving, rounding down, and spread of hours premium.

Defendants' argument that plaintiff has failed to show that her claims involve common questions of liability or damages amenable to class-wide proof is also without merit. Class action litigation is very common in wage disputes, and appropriate even if the Class Members may have different amounts of damages.

> Commonality is met when an employer "failed to pay the required prevailing wage and supplemental benefits owed to" their employees (*Stecko v RLIIns. Co.*, 121 AD3d 542, 543 [1st Dept 2014] ["different trades are paid on a different wage scale and thus have different levels of damages does not defeat certification"]; see *Weinstein v Jenny Craig Operations, Inc.*, 138 AD3d 546, 547 [1st Dept 2016] ["commonality of the claims will be found to predominate, even though the putative class members have different levels of damages"] [internal quotations omitted]; *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 98 [2d Dept 1980] [predominance is not identity or unanimity among class members, "[similarly, the fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action"]).

(Lavrenyuk v Life Care Servs. 2021 NY Misc Lexis 6027, aff'm 2021 WL 4953822).

Therefore, the element of commonality has been met.

Typicality

CPLR §901(a)(3) requires the claims or defenses of the representative parties be typical of the claims or defenses of the class.

> If it is shown that a plaintiff's claims derive "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 ... [the typicality] requirement is satisfied" (*Friar* at 99, 434 N.Y.S.2d 698; *see also Ackerman* at 201, 683 N.Y.S.2d 179; *Freeman* at 1171, 785 N.Y.S.2d 640). Typicality does not require identity of issues and the typicality requirement is met even if the claims asserted by class members differ from those asserted by other class members (*Pruitt v. Rockefeller Cetr. Props.,* 167 A.D.2d 14, 22, 574 N.Y.S.2d 672 [1991]; *Super Glue Corp. v. Avis Rent A Car Sys., Inc.,* 132 A.D.2d 604, 607, 517 N.Y.S.2d 764 [1987]).

Pludeman, supra.

Plaintiff demonstrates, by submitting the affidavit of King, that plaintiff's claims are typical of the proposed class, as the unlawful policy and practice as alleged by King is the same or similar to that of plaintiff. Therefore, the element of typicality has been met.

Adequacy

CPLR §901(a)(4) requires the representative parties will fairly and adequately protect the interests of the class.

> If it is shown that a plaintiff's claims derive "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 ... [the typicality] requirement is satisfied" (*Friar* at 99, 434 N.Y.S.2d 698; *see also Ackerman* at 201, 683 N.Y.S.2d 179; *Freeman* at 1171, 785 N.Y.S.2d 640). Typicality does not require identity of issues and the typicality requirement is met even if the claims asserted by class members differ from those asserted by other class members (*Pruitt v. Rockefeller Cetr. Props.,* 167 A.D.2d 14, 22, 574 N.Y.S.2d 672 [1991]; *Super Glue Corp. v. Avis Rent A Car Sys., Inc.,* 132 A.D.2d 604, 607, 517 N.Y.S.2d 764 [1987]).
>
> *Pludeman, supra.*

Plaintiff has established that she can fairly and adequately protect the interests of the class, as she is seeking the same relief as the class members, specifically the recovery of wages and damages suffered as a result of defendants' alleged unlawful policy and practice of time shaving, rounding down and spread of hours premium.

Plaintiff further establishes that she is represented by counsel that is qualified and experienced in handling class action litigation, and provides a catalog of prior cases, similar in nature to the instant action, that have been litigated by her counsel.

Therefore, the element of adequacy has been met.

Superiority

CPLR §901(a)(5) requires a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

> a class action is the "superior vehicle" for resolving wage disputes "since the damages allegedly suffered by an individual class member are likely to be insignificant, and the costs of prosecuting individual actions would result in the class members having no realistic day in court" (*Nawrocki*, 82 AD3d at 536; *see also Dabrowski*, 84 AD3d at 635).

(Stecko v RLI Inc. Co, 121 AD3d 542 [2014]).

Plaintiff has established the controversy at issues involves wage disputes, therefore the fifth element of CPLR § 901 (a) is established.

If the prerequisites of CPLR § 901(a) have been met, the court must then consider the five factors provided in CPLR § 902, which provides in pertinent part:

> Among the matters which the court shall consider in determining whether the action may proceed as a class action are:
>
> 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.

The elements required under CPLR §§ 902(1), (2), (4) and (5) have been satisfied and discussed above as part of the commonality, typicality and superiority requirements under CPLR §901(a). Regarding CPLR § 902(3), plaintiff asserts there is no extensive, competing litigation already commenced by any member of the class.

Based on the forgoing, the motion to certify the class is granted.

PLAINTIFF'S MOTION TO COMPEL DISCOVERY IS GRANTED IN PART

Plaintiff moves to strike defendants' answer for failure to comply with discovery request, or in the alternative to compel the same. Defendants oppose the motion. For the reasons discussed below, the motion is granted to the extent of compelling defendants to comply with discovery requests.

On June 8, 2021, the same day plaintiff filed the motion seeking class certification, plaintiff issued discovery demands, including document demands, interrogatories and notices to depose defendants. In response, defendants served objections and responses to all of plaintiff's requests. Defendants' primary objections alleged plaintiff's requests were " … vague, ambiguous, overly broad, seeks information outside the applicable limitations period or other appropriate period of discovery, unduly burdensome, and it is not reasonably tailored to lead to the discovery of information that is material and necessary to the claims and defenses" (NYSCEF DOC. NO. 48).

Defendants also alleged plaintiff's counsel's failed to consult in good faith prior to filing the instant motion and that defendants' objections were appropriate for the stage of litigation, as the class had not yet been certified.

CPLR § 3101 provides for full disclosure of all matter material and necessary in the prosecution or defense of an action (*Palmatier v. Mr. Heater Corp.*, 156 A.D.3d 1167, 1168, 68 N.Y.S.3d 530 [2017]. "The words, 'material and necessary,' are to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial" (*Galasso v. Cobleskill Stone Prods., Inc.*, 169 A.D.3d 1344, 1345 [2019]).

The court finds plaintiff has met its burden and established that the discovery request is reasonably calculated to yield material and necessary information (*see Catlyn & Derzee, Inc. v.*

Amedore LandDevs., LLC, 166 A.D.3d 1137, 1141 [2018]). "Supreme Court is vested with broad discretion in controlling discovery and disclosure, and generally its determinations will not be disturbed in the absence of a clear abuse of discretion" (*Gold v. Mountain Lake Pub. Telecom.*, 124 A.D.3d 1050, 1051).

The court finds defendants arguments in opposition unavailing. The argument disclosure was premature prior to class certification is now moot. Notwithstanding the forgoing, there are portions of plaintiff's discovery demands the court agrees maybe overbroad or not reasonably tailored.

Therefore, plaintiff's motion to compel is granted to the extent of directing defendants to submit responses to interrogatories 1 through 6, 8, 10 through 12, and 14 through 19.

The court finds the request in interrogatory number 7 inapplicable, as defendants are a not for profit and not obligated to pay non-exempt employees on a weekly basis as discussed above. As to the request in interrogatory number 9, for "all facts and legal justifications to support each and every Affirmative Defense as set forth in defendants' answer," the court finds this is not an appropriate discovery request, and more akin to a request to amplify the pleadings, appropriate for a bill of particulars. As to the request in interrogatory number 13, for names and contact numbers of various vendors, the court finds this request overly broad.

CONCLUSION

Based on the forgoing, it is

ORDERED that plaintiff's motion to certify the class action for the plaintiff's claims of violations of the New York Labor Law is granted; and it further

ORDERED that the class consists of all non-exempt employees that were employed by Defendants through their job placement programs on or after March 17, 2015 to the present; and it is further

ORDERED that plaintiff Brickzaida Aponte shall serve as the representatives of the Class; and it is further

ORDERED that plaintiff's counsel Lee Litigation Group, PLLC shall serve as Class counsel; and its further

ORDERED that the proposed Notice of Class Action Lawsuit Regarding Wages and Opt-Out Form, attached as Exhibit A to the Memorandum of Law is hereby APPROVED for distribution to Class Members; and it is further

ORDERED that defendants shall produce to plaintiff in Microsoft Excel format a list of all Class Members, including their names, positions, last known mailing address, all known telephone numbers and e-mail addresses ("Class List"), within fourteen (14) business days of this Order; and it is further

ORDERED that plaintiff's counsel shall mail the Notice to Class Members within seven (7) business days of receipt of the Class List from Defendants; and it is further

ORDERED that plaintiff may serve and file an amended complaint within (30) thirty days as discussed above; and it is further

ORDERED that the defendant shall serve an answer to any such amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that plaintiff's motion to compel discovery is granted to the extent of directing defendants to provide within 60 days of receipt of this order the responses to interrogatories as required above; and it is further

ORDERED that the parties appear for a virtual Preliminary Conference on May 3rd, 2022 at 11 am; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not specifically addressed herein has nonetheless been considered and is denied; and it is further

ORDERED that his constitutes the decision and order of the court.

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1/31/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE