Medina v HS Floors Inc
2022 NY Slip Op 31868(U)
June 14, 2022
Supreme Court, New York County
Docket Number: Index No. 158220/2020
Judge: Arlene Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE BLUTH** **PART** **14**

Justice

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CARLOS MEDINA, LUIS LOPEZ, LUIS SORIEL, individually and on behalf of all other persons similarly situated who were employed by HS FLOORS INC and NACHMEN FISCH and any other entities affiliated with, controlling or controlled, by HS FLOORS INC and NACHMEN FISCH individually,

Plaintiffs,

- v -

HS FLOORS INC, NACHMEN FISCH, and any other entities affiliated with, controlling, or controlled by HS FLOORS INC and NACHMEN FISCH individually,

Defendants.

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INDEX NO. 158220/2020

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 51, 52, 54, 55, 56, 57, 58, 59

were read on this motion to/for CLASS CERTFICIATION.

The motion by plaintiff for class certification is granted.

Background

Plaintiffs contend that defendants employed the named plaintiffs and the putative class members to work at various job sites. Plaintiffs argue that defendants failed to properly pay plaintiffs or ensure that plaintiffs received their earned wages. They insist they were not paid the basic minimum wage or the applicable overtime pay when eligible. Counsel for plaintiffs insist they are experienced attorneys who handle class actions regularly and should be appointed as class counsel.

Plaintiffs argue that the class contains workers who performed demolishing, tiling, concrete and cement work for defendants and they were typically paid by cash or check. They

allege that they did not receive pay stubs on most occasions and, when they did, the pay stubs did not indicate the number of hours worked per week. Plaintiffs argue they only received a flat rate for their pay.

Plaintiffs contend that the factors relating to a class action compels the Court to grant the motion. They argue that the class is so numerous that joinder of all members is impracticable and insist that worker affidavits are sufficient for this factor. Plaintiffs also argue that questions of law and fact common to the class predominate over questions relating to individual members. They point out the case arises out of a common wrong- the purported failure to pay workers for the wages they earned and whether they maintained the proper records.

Plaintiffs argue that their claims are typical of the putative class and, in fact, the claims are identical. They assure the Court they will fairly and adequately protect the interests of the class and that a class action is superior to the other available methods for pursuing the relief sought in this action.

In opposition, defendants claim that defendant HS Floors sells various flooring products and, as part of the business, they arrange for installation of the floors. They maintain that they use outside installers, including one known as X 24 Flooring and that plaintiff Luis Soriel worked for X 24 and that Mr. Soriel installed some of HS Floors' products.

Defendants insist that they did not hire, fire, schedule or supervise any of the X 24 employees. They argue that X 24 controlled the installation but admit that, in accordance with a request from X 24, they began making payments directly to the X 24 employees because X 24 apparently had some cash flow issues. Defendants allege that a representative from X 24 (Jesus) would come pick up the checks from defendants and distribute them to the installers. Defendants take issue with the allegation that plaintiffs received checks on Saturday and point out that

defendant Fisch is an observant Orthodox Jew who would not have done any business on Shabbat.

Defendants acknowledge that the typical number of installers for a project was between three and four, and the maximum was seven. They deny that they ever compensated anyone in cash, as alleged by plaintiff Medina, and also object to any claim that they should have paid X 24 employees overtime wages. Defendants insist that most of the jobs were at construction sites that have inflexible eight-hour shifts.

Defendants posit that X 24 is the true employer but that plaintiffs have not named this entity because plaintiff Soriel is the brother-in-law of Jesus and does not want to bring a lawsuit against a family member. They conclude that plaintiffs have failed to satisfy the factors sufficient to support a class action.

Discussion

"The determination whether plaintiffs have a cause that may be asserted as a class action turns on the application of CPLR 901. That section provides that one or more members of a class may sue or be sued as representative parties on behalf of all where five factors – sometimes characterized as numerosity, commonality, typicality, adequacy of representation and superiority are met" (*Maddicks v Big City Props., LLC*, 34 NY3d 116, 123, 114 NYS3d 1 [2019] [internal quotations and citation omitted]).

"Courts have recognized that the criteria set forth in CPLR 901(a) should be broadly construed not only because of the general command for liberal construction of all CPLR sections, but also because it is apparent that the Legislature intended article 9 to be a liberal substitute for the narrow class action legislation which preceded it" (*City of New York v Maul*, 14 NY3d 499, 509, 903 NYS2d 304 [2010]).

Numerosity

The Court finds that plaintiffs have satisfied this factor. Plaintiff Lopez maintains that there were about 40 different workers while he worked for HS Floors (NYSCEF Doc. No. 37, 12). A potential class member, Gregorio De La Cruz, contends that there were approximately 120 different workers (NYSCEF Doc. No. 39, ¶ 13). Defendants' efforts to characterize the potential class as limited to a maximum of 16 is of no moment. On a motion for class certification the Court need not make factual findings or evaluate the viability of plaintiffs' claims. The affidavits from plaintiffs and potential members of the class satisfies plaintiffs' burden for this factor.

Commonality

"[C]ommonality cannot be determined by any 'mechanical test' and that the fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action. Rather, it is predominance, not identity or unanimity, that is the linchpin of commonality" (*Maul,* 14 NY3d at 514). In considering a motion for class certification, a Court is "not expressing an opinion on the merits of plaintiffs' causes of action. Their resolution must await further proceedings" (*id*.).

Here, the alleged commonality between the class members is clear and obvious. They were all purported workers for HS Floors and contend they did not receive the full amount of wages they were owed.

Typicality

Similarly, the Court finds that this factor is satisfied. The allegations are likely to be identical for all the potential class members—they will allege they were not paid the wages they should have been paid by HS Floors. A class action is appropriate with respect to this factor.

Adequacy of Representation

"The factors to be considered in determining adequacy of representation are whether any conflict exists between the representative and the class members, the representative's familiarity with the lawsuit and his or her financial resources, and the competence and experience of class counsel" (*Ackerman v Price Waterhouse*, 252 AD2d 179, 202, 683 NYS2d 179 [1st Dept 1998] [citation omitted]).

The Court is satisfied that the named plaintiffs are sufficient representatives for the class. They allegedly did work for HS Floors and all contend that they did not get paid what they were owed. The Court also finds that counsel for plaintiffs, a firm that routinely handles class actions, is eminently qualified to serve as counsel for the class.

Superiority

The Court finds that a class action is the ideal manner to adjudicate this dispute. The fact is that there were, purportedly, dozens and dozens of workers and the work was transitory-- that makes a class action a preferable method. Given the number of alleged workers and the risk of inconsistent rulings if each were to be handled separately, this factor favors plaintiffs' request to certify a class.

Other Factors

"Once these prerequisites [under CPLR 901] are satisfied, the court must consider the factors set out in CPLR 902, to wit, the possible interest of class members in maintaining separate actions and the feasibility thereof, the existence of pending litigation regarding the same controversy, the desirability of the proposed class forum and the difficulties likely to be encountered in the management of a class action" (*Ackerman v Price Waterhouse*, 252 AD2d 179, 191, 683 NYS2d 179 [1st Dept 1998]).

The Court finds that these factors are satisfied as well. There is no evidence presented that there are interested class members who want to pursue separate actions or that there is another pending action regarding the same controversy. The instant forum is appropriate and the Court does not foresee any difficulties in managing the class action.

Summary

The Court recognizes that most of defendants' arguments in the opposition papers and at oral argument are focused on their claim that, essentially, they are not the right parties against whom plaintiffs should seek damages. They claim that they merely decided to pay X 24 employees as a favor when X 24 was low on cash flow. Unfortunately, that argument is relevant for a dispositive motion and not a motion for class certification. It may be that plaintiffs cannot establish that defendants were responsible to pay them and it was, in fact, X 24 who was obligated to ensure that the workers received the wages they earned. But on this motion, the Court cannot make findings with respect to liability or credibility. It can only evaluate whether plaintiffs have satisfied the various factors required in order to certify a class and plaintiffs have do so here.

The Court certifies the class to be all individuals who worked for defendants and were given designated job classifications to include (but not limited to) demolition workers, tilers, cement and concrete workers, and other related occupations and who performed related work at construction sites in the New York City Metropolitan areas between October 2014 through the present.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for class certification is granted (and the class is certified as defined above), Virginia & Ambinder LLP are designated as class counsel, the Court

approves the publication of the proposed Notice of Class Action Lawsuit (NYSCEF Doc. No. 47) and approves the proposed Publication Order (NYSCEF Doc. No. 48).

Remote Conference: Already Scheduled for July 7, 2022 at 11:30 a.m. (NYSCEF Doc. No. 53 [directing that the parties upload a discovery update by June 30, 2022]).

6/14/2022
DATE

ARLENE BLUTH, J.S.C.

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