SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHLOMO S. HAGLER **PART** 17

Justice

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SAMUEL ANSAH, EMANUEL IMAH,

Plaintiff,

- v -

A.W.I. SECURITY & INVESTIGATION, INC.,ADAZE W IMAFIDON, WHITESTONE CONSTRUCTION CORP.

Defendant.

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INDEX NO. 151032/2012

MOTION DATE 06/19/2020, 06/19/2020, 06/19/2020

MOTION SEQ. NO. 006 007 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 301, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 364, 366, 368

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 299, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 330, 362, 363, 365, 367

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 300, 302, 303, 304, 305, 306, 307, 329, 331, 332, 333, 334, 335, 369

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Motions bearing sequence numbers 006, 007, and 008 are consolidated herein for disposition. In motion sequence 006, defendants A.W.I. Security & Investigation, Inc. (AWI) and Adaze W. Imafidon (Imafidon and, together with AWI, AWI defendants),[1] move for summary

[1] Imafidon is the Chief Executive Officer and Director of Operations of AWI (Adaze W. Imfidon affidavit, sworn to June 19, 2020 [Imafidon aff (NYSCEF Doc No. 289)], ¶ 1).

judgment, pursuant to CPLR 3212, seeking dismissal of the causes of action which plaintiffs Samuel Ansah (Ansah) and Emanuel Imoh (Imoh)[2] have asserted against them. In motion sequence 007, defendant Whitestone Construction Corp. (Whitestone) moves for summary judgment, seeking dismissal of the single cause of action plaintiffs have asserted against it. In motion sequence number 008, plaintiffs move for summary judgment, holding defendants liable for failing to pay them and members of their class the prevailing wages and supplemental benefits allegedly owed to them for work they performed at City and State construction projects.

Background

In their complaint, e-filed on March 21, 2012 (NYSCEF Doc No. 1), plaintiffs assert claims individually and on behalf of other unarmed guards employed at certain public works projects (Public Projects) conducted by "the City of New York, the State of New York, New York City School Construction Authority (SCA), Department of Environmental Protection (EPA), and various school districts throughout New York City," which plaintiffs defined as the "Government Entities" (complaint ¶ 1).[3] Plaintiffs assert their claims against AWI, the security company which employed them, and Whitestone, the contractor employed by the State or City of New York which subcontracted with AWI for their services.[4]

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[2] As noted in the court's March 15, 2017 decision & order (NYSCEF Doc No. 184), Imoh's surname was misspelled in the caption, but was corrected in an affidavit which plaintiffs submitted in opposition to defendants' motions in sequence numbers 004 and 005.

[3] These quotes appear in paragraph 1 of the Preliminary Statement, at the top of the complaint's second page. The next section, headed "The Parties," also begins with paragraph 1.

[4] In the complaint, plaintiffs also identify the Soundview Housing Project as one of the Public Projects at which they worked (*id.*), but they fail to list New York City Housing Authority (NYCHA), the owner of that property, as one of the Government Entities for which they provided security services (*see* Stipulation of Undisputed Facts, dated June 17, 2020 [NYSCEF

Plaintiffs assert three causes of action, involving alleged breaches on the part of AWI defendants and Whitestone occurring between March 2006 and March 21, 2012, the date of the complaint. In their first cause of action, plaintiffs allege that each AWI defendant and Whitestone breached their respective contracts and subcontracts on these Public Projects by failing to pay them and other class members the prevailing wages and supplemental benefits due them, as reflected in the schedules annexed to such "Public Contracts" and subcontracts (complaint ¶¶ 21-24).

The second cause of action alleges that AWI defendants willfully refused to pay plaintiffs and members of their class the overtime compensation due them for working more than forty hours a week for defendants on Public Projects, in violation of New York Labor Law Section 663 and 12 NYCRR Section 142-2.2 (*id.* ¶¶ 26-27).

In their third cause of action, plaintiffs allege that AWI defendants violated New York Labor Law Section 191 by failing to pay them and members of their class the prevailing wages, supplemental benefits, and overtime compensation due them, under contract and statute, for the work they performed on Public Projects (*id.* ¶¶ 29-30). Plaintiffs seek interest, costs, and attorneys' fees on all three causes of action (*id. ad damnum* clause).

Whitestone e-filed its verified answer with cross claim on June 11, 2012, generally denying plaintiffs' allegations and asserting cross claims for contractual and common law indemnification against AWI (NYSCEF Doc No. 2).

AWI defendants generally denied plaintiffs' allegations in their verified answer, dated April 11, 2012, a copy of which was e-filed on June 19, 2020, with annexed proof of service by

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Doc No. 213], exhibit B [Whitestone prime contract with NYCHA for repair of exterior brickwork and replacement of roofing at Soundview Houses]).

mail, as exhibit C (NYSCEF Doc No 277) to the affirmation of Christopher S. McCann, Esq., executed June 19, 2020 (McCann affirmation) (NYSCEF Doc No 274).

In its Decision and Order, dated March 15, 2017 (NYSCEF Doc No. 184), this court granted plaintiffs' motion for class certification (sequence number 003), for leave to prosecute their action on behalf of a class consisting of individuals employed by AWI, from March 21, 2006 through March 20, 2012, "who performed work as security guards or fireguards and work incidental thereto on the public works projects" that AWI undertook with Whitestone, "to recover wages and benefits which class members were contractually entitled to receive for work they performed on these publicly-financed projects, but did not receive" (*id.* at 20).

In motion sequence number 006, AWI defendants move for summary judgment, seeking dismissal of plaintiffs' causes of action asserted against them under Sections 220 and 230 of New York's Labor Law, in their entirety.

In motion sequence number 007, Whitestone moves for summary judgment, seeking dismissal of plaintiffs' first cause of action, the sole cause of action asserted against it. In addition, Whitestone and plaintiffs (in sequence number 008 discussed below), request that their time to move for summary judgment be extended from April 24 to June 19, 2020, reiterating the stipulation that they entered with AWI defendants and submitted to the court on May 20, 2020 (NYSCEF Doc No. 205). This request was granted at the hearing on these motions held on December 22, 2020 (*see* hearing transcript [Tr] [NYSCEF Doc No. 361], at 2:10-11, 22).

In motion sequence number 008, plaintiffs move for summary judgment, pursuant to CPLR 3212, seeking an order determining that AWI and Whitestone are liable for their failure to pay

them and the members of their class the prevailing wages and supplemental benefits to which they are entitled, for:

> (1) work they performed at New York City Public School and DASNY projects, or, in the alternative,
>
> (2) work they performed at (i) Public School (PS) 125, Bronx High School of Science, PS 12 and Intermediate School (IS) 10; and (ii) work they performed pursuant to DASNY Contract No. 128335 and AWI's contract with STV Construction, Inc., and for work they performed at IS 84, PS 279, Bayard Ruston Humanities High School, New Campus Community College, PS 38, Junior High School (JHS) 56, and PS 26

(see NYSCEF Doc No. 237).[5]

Plaintiffs also seek an order, striking AWI defendants' answer and granting plaintiffs a rebuttable presumption that they are entitled to recover prevailing wages and supplemental benefits owed for all hours worked, during the period from March 21, 2006 through March 15, 2017, because of AWI defendants' spoliation of time records and other evidence.[6]

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[5] During oral argument of the summary judgment motions, plaintiffs' counsel explained that they sought to establish defendants' liability for prevailing wages and supplemental benefits owed to them and their class for all contracts involving Public Projects, under Labor Law Section 230. In the alternative, should the court determine Section 230 does not apply, plaintiffs move for summary judgment, seeking to recover for breach of contract for those contracts which expressly promised to pay plaintiffs and their class prevailing wages and supplemental benefits.

Notably, plaintiffs again fail to identify the Soundview Houses or Whitestone's prime contract with NYCHA as bases for defendants' potential liability, even though plaintiffs executed the Stipulation, which described the Soundview Houses prime contract and included it as an exhibit, only two days before they e-filed their motion in sequence number 008. As the parties have mutually agreed to include NYCHA and Soundview Houses in their Stipulation, the court will treat those entities as included within the ambit of plaintiffs' causes of action.

[6] Plaintiffs seek no relief against defendant Imafidon in their summary judgment motion but only wish to include Imafidon in the proposed order to strike AWI defendants' answer and to grant them a rebuttable presumption that they and their class are entitled to recover prevailing wages and benefits for all hours worked during the relevant period.

On their current motions, none of the parties seek relief with respect to plaintiffs' second cause of action, asserted against AWI defendants for their failure to pay plaintiffs and members of their class overtime compensation allegedly due them for working more than 40 hours per week on Public Projects. In the Decision and Order, dated April 9, 2014 (NYSCEF Doc No. 62), at 16-17, however, this court previously identified questions of material fact concerning whether plaintiffs are entitled to overtime compensation which precluded summary judgment.

Stipulated Facts

The parties entered a Stipulation of Undisputed Facts, dated June 17, 2020 (Stipulation), a copy of which was submitted as exhibit E (NYSCEF Doc No. 213) to the affirmation of Michael R. Fleischman, Esq., executed on June 19, 2020 (Fleischman affirmation [NYSCEF Doc No. 208]), in support of Whitestone's motion in sequence number 007.

Therein, the parties stipulated and agreed, among other things, that

> "Plaintiffs were employed as unarmed security guards at various projects for the construction, replacement, modernization, renovation, or repair of schools, apartments, and other public works (the 'Public Projects'), for state and city agencies including but not limited to the New York City School Construction Authority (the 'SCA'), New York City Housing Authority ('NYCHA'), and the Dormitory Authority of the State of New York ('DASNY') (collectively, the 'Public Entities')"

(*id.* ¶ 1).

The parties also stipulated that plaintiffs were employed on the Public Projects by AWI (*id.* ¶ 2), that AWI was hired "to provide security guard services for the Public Projects primarily by subcontract with general contractors engaged under prime contracts with the Public Entities, or such general contractor's subcontractors" (*id.* ¶ 3), and that Whitestone is a general contractor

which was one of the general contractors which engaged AWI to provide security services on Public Projects (*id.* ¶ 4).

The Stipulation also annexed exemplars of contracts which Whitestone entered with SCA (exhibit A) and NYCHA (exhibit B), as well as an exemplar of the subcontract which Whitestone entered with AWI (exhibit C).[7]

A. Whitestone's Contracts

The SCA exemplar is comprised of several documents. Its first page is captioned as a "Bid and Contract Agreement" for "Windows, Roofs, Parapets & Safety Systems" at I.S. 73 in Queens County (Stipulation, exhibit A, at A0001).[8] In this "BID/CON," on a page headed "TO BE COMPLETED BY BIDDER," Whitestone proffers a Lump Sum Bid Amount of $8,431,000.00 for the work to be performed under contract, which is signed by Christine Persico, Vice President of Whitestone, on May 19, 2009 (*id.* at A0007).[9] The BID/CON form also contains a paragraph captioned "Prevailing Wage Enforcement," which provides

> "The Contractor agrees to pay for the cost of any investigation conducted on or behalf of SCA which discovers a failure to pay prevailing wages by the Contractor or its subcontractor(s). the Contractor also agrees, that should it fail or refuse to pay for any such investigation, the SCA is hereby authorized to deduct from the Contractor's account an amount equal to the cost of such investigation"

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[7] Defendants fail to provide an exemplar for any contract which Whitestone entered with DASNY and do not offer any evidence or argument that the boilerplate provisions of DASNY contracts differ in any relevant way from those contracts which Whitestone entered with SCA and NYCHA. Considering this, defendants will not be heard to argue that Whitestone's contracts with DASNY varied in any material way from its SCA or NYCHA contracts.

[8] The exhibits to the Stipulation have Bates numbering located at the top center of each page. The letter prefix to each corresponds to the exhibit's letter designation.

[9] Considering that Whitestone stipulates that it hired AWI to provide security services on Public Projects, payment for AWI's services presumably made up one element of Whitestone's bid for each contract it sought.

(*id.* at A0006).

In a one-page "Phasing Exhibit" on SCA letterhead, also included in exhibit A to the Stipulation (at A0032), Whitestone acknowledges that it is "fully aware that this work is be performed in an occupied school" and that the work must be performed after normal school hours. Whitestone also agrees that, as Contractor, it must provide two security guards to work at the school, for 16 hours a day on weekdays and for 24 hours a day on weekends and holidays, and that the Contractor and SCA shall coordinate regarding the selection of security posts and clock station locations at the school.

In another document, captioned "The New York City School Construction Authority Safety Program and Procedures Manual," under "Part 10: Fire Protection," SCA sets forth certain requirements for fire guards and watch persons to be present at sites where the area under construction, alteration, or demolition exceeds 10,000 square feet or the building exceeds 75 feet in height. These include having one or more fire guards, certified by the Fire Department of the City of New York, present on-site when construction workers quit for the day until midnight, at which time one or more competent watch person(s) would take over monitoring the site until 8 o'clock in the morning (*id.* at A0364-65).

The NYCHA contract exemplar under exhibit B to the Stipulation is also comprised of multiple documents. The first document, printed on the letterhead of China Construction America, Inc. (CCA), is captioned "Bid Booklet for Repairing Exterior Brickwork and Roofing Replacement at Soundview Houses," dated January 2010 (*id.* at B0001) and provides instructions and forms for general contractors bidding on that project. The fourth page of the Bid Booklet (B0004) sets forth a list of "Additional Requirements" the selected general contractor must meet, including adhering

to all conditions imposed by NYCHA and the Federal Department of Housing and Urban Development and providing security guards "24/7 for [the] duration of this project as needed...."

Under paragraph 11 of "Special Conditions," NYCHA indicates that it hired CCA to be the Construction Manager for the Soundview Houses project and to act as NYCHA's representative at the site (B0008). It further provides that each contractor must provide personnel lists for their workers and subcontract workers, provide all workers security badges, and provide daily lists of workers to CCA, with badge numbers. Contractor's failure to comply may result in the removal of unidentified persons from the site and suspension of the contractor's work (*id.* at B0009). Paragraph 12 of "Special Conditions" provides that contractor's personnel may only access work areas by first signing in at the Construction Manager's Trailer and showing their photo ID (*id.*).

The contract section headed "Site Security" (*id.* B0167 *et seq.*) indicates, among other things, that "[t]he Contractor is responsible for the security of the work sites and provides suitable site protection to prevent unauthorized entry into the site, until final acceptance by" NYCHA (*id.* at B0168, ¶ L). Further on, in a section headed "Temporary Facilities and Controls," the contract states that "[t]he Contractor shall Provide [sic] the temporary facilities and controls as hereinafter specified," including "Security Guard Services," in accordance with the "Security Guard Act, Article 7-A, of the General Business Law" (*id.* B0175). This section also sets out requirements for the licensing of the security firm and the registration of individual security guards assigned at the Project (*id.*). Finally, a later subsection headed "Site Protection" requires the Contractor to

> "A. Provide 24-hour site protection seven days per week to prevent unauthorized entry into the work areas. This shall include *three* 8-hour shifts of uniform guard service during the term of this contract. Provide a minimum of two

> guards for each building where construction work is taking place. The guard service company must provide an on-site supervisor for the guards.... The guard will be responsible for checking worker ID's and preventing unauthorized access to resident apartments while construction work is taking place. This will commence from the issuance of the Notice to Proceed and continue until each building is turned over to [NYCHA] as complete.
>
> B. The guard service shall be performed by an established, *bonded* company using only experienced uniform guards who shall possess a certificate of fitness issued by the fire department as fire guards. Guards shall perform the duties of fire guard in addition to their security obligations.
>
> C. The General Contractor shall submit the name of the guard service, and all required items for approval of subcontractors, to [NYCHA] prior to the start of work. The Guard Service shall submit daily watch reports to [NYCHA] on a weekly basis or as requested"

(*id.* at B0179 [emphasis in original]).

B. AWI's Subcontract

Annexed as exhibit C to the Stipulation is an exemplar of AWI's subcontracts, headed "Agreement Between Contractor and Subcontractor," dated as of January 13, 2010 (Subcontract). The heading expressly states that the Subcontract is between Whitestone as Contractor and AWI as Subcontractor with respect to the "Prime Contract" which Whitestone entered with SCA, the property owner, to perform construction at IS 73 in Queens (*id.* at C0001).

Article 1 of the Subcontract, captioned "The Subcontract Documents," provides, in pertinent part, that

> "The Subcontract Documents, without limitation, consist of (1) this Agreement; (2) the Prime Contract, consisting of the Agreement between the Owner and the Contractor and the other Contract Documents enumerated therein... (3) other documents referred to in this Agreement; and (4) Modification to this Subcontract issued after execution of this Agreement.
>
> These form the Subcontract and are as fully a part of the Subcontract as if attached to this Agreement or repeated herein. The Subcontract represents the entire and

> integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. . .
>
> All liabilities incurred and obligations assumed by Contractor under the Prime Contract with the Owner are hereby assumed by the Subcontractor, so far as they arise out of or are connected with the scope of work to be performed or material to be supplied under this Agreement"

(*id.*).

Summary Judgment Standard

"The proponent of 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. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]] [internal citations omitted]).

To prevail at summary judgment, the movants must produce evidentiary proof in admissible form sufficient to warrant granting summary judgment in their favor (*GTF Mktg. v Colonial Aluminum Sales,* 66 NY2d 965, 967 [1985]). Once the movants have made their showing, the burden shifts to the opposing party, to submit proof in admissible form sufficient to show a question of fact exists, requiring trial (*Kosson v Algaze,* 84 NY2d 1019, 1020 [1995]).

In deciding a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmovant (*Prine v Santee*, 21 NY3d 923, 925 [2013]). Party affidavits and other proof must be examined carefully "because summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978] [citation and internal quotation marks omitted]).

Still, "only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment" (*id.*).

Labor Law Article 8

Article 8 of the Labor Law governs public work. Labor Law § 220 (3) (a) provides that "[t]he wages to be paid for a legal day's work, as hereinbefore defined, to laborers, workmen or mechanics upon such public works, shall not be less than the prevailing rate of wages as hereinafter defined." Article I, section 17 of the State Constitution similarly states that "[n]o laborer, worker or mechanic, in the employ of a contractor or sub-contractor engaged in the performance of any public work, . . . shall . . . be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, erected or used." As noted by Judge Cardozo in *Austin v City of New York* (258 NY 113, 117 [1932]),

> "The present statute is an attempt by the State to hold its territorial subdivisions to a standard of social justice in their dealings with laborers, workmen and mechanics. It is to be interpreted with the degree of liberality essential to the attainment of the end in view."

There are two conditions which must be satisfied before the statute applies: "(1) the public agency must be a party to a contract involving the employment of laborers, workmen or mechanics, and (2) the contract must concern a public works project" (*Matter of Erie County Indus. Dev. Agency v Roberts*, 94 AD2d 532, 537 [4th Dept 1983], *affd* 63 NY2d 810 [1984]). In addition, the project's primary objective must be to benefit the public (*De La Cruz v Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d 530 [2013]).

"It is hornbook law that the Labor [Law] provision applies only to workers involved in the construction, replacement, maintenance and repair of 'public works' in a legally restricted sense

of that term" (*Varsity Tr. v Saporita*, 71 AD2d 643, 644 [2d Dept 1979], *affd* 48 NY2d 767 [1979]; *see also De La Cruz*, 21 NY3d 530, *Brukhman v Giuliani*, 94 NY2d 387, 396 [2000]). "The pivotal question is the nature of the work actually performed" (*Matter of Kelly v Beame*, 15 NY2d 103, 109 [1965]). Thus, in *Varsity Tr.*, *supra*, the Court held that school bus drivers were not within the class of employees covered by the statute (*Varsity Tr.*, 71 AD2d at 644). In *Matter of Pinkwater v Joseph* (300 NY 729 [1950]), the Court of Appeals affirmed, without opinion, an order of the Appellate Division confirming a determination by the City Comptroller that laundry workers were not entitled to prevailing wages. In *Matter of Wright Metal, Inc.* (283 NY 47, 49 [1940]), the Court held that a factory superintendent was not a mechanic, worker or laborer for purposes of Labor Law § 196. Similarly, in *Matter of Tenalp Constr. Corp. v Roberts* (141 AD2d 81 [2d Dept 1988]), a carpenter who performed supervisory and non-supervisory duties was within the class covered by the statute. According to the Court, "[a]lthough [the carpenter] assumed some supervisory functions on behalf of [his employer] at the school project work site, his duties . . . remained predominantly physical in nature and he often 'when necessary jumped in and helped' his men" (*id.* at 86). The Court continued, stating that "the language used by the Court of Appeals in the *Austin* case, . . . clearly implies that an employee in a truly supervisory position would be exempt from the prevailing wage requirements" (*id.* at 87).

Conversely, in *Matter of Miele v Joseph* (280 AD 408, 409 [1st Dept 1952], *affd* 305 NY 667 [1953]), sign painters and letterers were entitled to prevailing wages given the nature of their work. In *Matter of Golden v Joseph* (307 NY 62, 67 [1954]), the Court held that stationary firemen were covered under the statute, where it was undisputed that they regularly made boiler repairs, i.e., repaired heating facilities which were necessary parts of a building.

In *Herman v Judlau Contr., Inc.* (2021 N.Y. Slip Op. 31640[U]), the court held that flaggers, whose job purpose was to ensure public safety within close proximity to construction sites, were entitled to prevailing wages. However, in that case, the court's basis was that the flaggers' work was predominantly physical in content and exposed them to the attendant risks due to the presence of construction, construction equipment and public traffic. The Appellate Division, in affirming the ruling, stated that the pivotal question is whether the nature of the work required payment of prevailing wages. *Herman v Judlau Contr., Inc.*, 204 AD3d 496 [1st Dept 2022]. The Appellate Division concluded that "[p]laintiffs established entitlement to summary judgment through undisputed testimony about the nature of their flagger duties, which were consistent with the type of qualifying work identified by the Comptroller as entitled to prevailing wages—namely, work involving a protection of public safety near a construction site." (*ibid*).

Here plaintiffs are security guards and do not qualify as "laborers, workmen or mechanics" under Labor Law § 220 (3) (a). In the Stipulation in paragraph 4, the parties stipulated that the plaintiffs, as AWI security guards, conducted regular, periodic work site patrols, checked visitors' photo identification, and performed other functions within the meaning of General Business Law § 89-f (6). They were not mechanics, nor were they journeymen or apprentices who qualify as workmen. They did not perform physical labor. This is consistent to the Comptroller's memorandum dated July 1, 2010 (NYSCEF Doc. 222), which states that security guards on public work construction projects are not workers, laborers or mechanics within the meaning of Labor Law § 220. Therefore, plaintiffs are not entitled to prevailing wages under Labor Law Article 8.

Labor Law Article 9

Article 9 of the Labor Law governs prevailing wage for building service employees. Labor Law § 231 provides that "[e]very contractor shall pay a service employee under a contract for building service work a wage of not less than the prevailing wage in the locality for the craft, trade or occupation of the service employee" (Labor Law § 231 [1]). Labor Law § 230 defines "building service work" as "work performed by a building service employee" (Labor Law § 230 [2]). A "building service employee" is defined as "any person performing work in connection with the care or maintenance of an *existing building*, . . . , for a contractor under a contract with a public agency which is in excess of one thousand five hundred dollars and *the principal purpose of which is to furnish services through the use of building service employees*" (Labor Law § 230 [1] [emphases added]). The service employees covered by the statute include, but are not limited to, "*watchman*, *guard*, doorman, building cleaner, porter, handyman, janitor, gardener, groundskeeper, stationary fireman, elevator operator and starter, window cleaner, and occupations relating to the collection of garbage or refuse, and to the transportation of office furniture and equipment . . . and fossil fuel" (*id.* [emphases added]). "Building service employee" does not include any employee covered by article 8 of the Labor Law (*id.*).

The legislative history of Labor Law article 9 indicates that it was enacted to extend the protections of Labor Law article 8 (*Feher Rubbish Removal, Inc. v New York State Dept. of Labor, Bur. of Public Works*, 28 AD3d 1, 5 [4th Dept 2005], *lv denied* 6 NY3d 711 [2006]). The bill jacket includes memoranda indicating that the purpose of the bill was "[t]o require the payment of prevailing wages and fringe benefits to employees who work under building service contracts with

State and local governmental agencies," and that the law would not "appl[y] to all service employees working under public contracts" (Defendants' supp. mem. of law, exhibits C, D, E).

In this case, although plaintiffs fall into the enumerated occupations of "watchman" or "guard," they nevertheless do not qualify as "building service employees," under Article 9 since they were not "performing work in connection with the care or maintenance of an existing building, *. . . for a contractor under a contract with a public agency . . . the principal purpose of which [was] to furnish services through the use of building service employees*" (Labor Law § 230 [1] [emphasis added]). Plaintiffs allege in the complaint that they were employed as security guards on various public contracted projects (complaint, ¶ 1). Attached as Exhibit "A" and Exhibit "B" to the Stipulation are exemplars of all of Whitestone's contracts with the SCA and NYCHA. All Whitestone contracts with the SCA and NYCHA contain identical or substantially identical terms as those in the exemplar contracts. As evident from the exemplar contracts, and as specifically stipulated to in paragraph 8 in the Stipulation, Whitestone's contracts with the SCA, NYCHA, and DASNY were for the "construction, replacement, modernization, or repair of a public work" and were not building service contracts and therefore they do not fall under the purview of Labor Law § 230 [1]. Accordingly, plaintiffs are also not entitled to prevailing wages under Labor Law article 9.

Plaintiffs argue that they should be entitled to prevailing wages under Article 9 because they allege that the defendants essentially used a contractual loophole to incorporate a building service contract under a construction contract. They argue that the court should look at the strong public policy under the prevailing wage law and liberally construe Article 9 to include all building service employees, even those who are employed pursuant to a construction contract. This

argument is unavailing because the language of Labor Law § 230 is clear and unambiguous that it applies only to work done under a contract that the principal purpose is furnish services through the use of building service employees.

Contracts that Require Payment of Prevailing Wages

Plaintiffs further argue that even if they are not entitled to statutory prevailing wages, they would still be contractually entitled to prevailing wages pursuant to certain contracts that allegedly contain express terms requiring the payment of prevailing wages to AWI's security guards. An express agreement to pay prevailing wages is not conditioned on the applicability of statutory prevailing wages (*De La Cruz v Caddell Dry Dock & Repair Co., Inc.*, 22 AD3d 404, 405 [1st Dept 2005] ["Plaintiffs' claim that they were denied prevailing wages and benefits—even in the absence of a Labor Law violation—is not foreclosed simply because they were not parties to the contracts. Indeed, the Labor Law is not the exclusive remedy to recover prevailing wages."]).

Defendants argue that the fact that public contracts contains references to prevailing wages does not mean the parties intended to confer a contractual right to prevailing wages. Defendants claim that the references to prevailing wages are boilerplate and inserted only to the extent that they are statutorily required. In support of this claim, defendants cite other clauses in the contract that are clearly not applicable in the instant contract, such as the obligation to pay "union dues benefits."

"A contract is ambiguous if on its face it is reasonably susceptible of more than one interpretation" (*Schulte Roth & Zabel LLP v Metro. 919 3rd Ave. LLC*, 202 AD3d 641, 641 [1st Dept 2022]). Being that the contracts can reasonably be interpreted both ways, plaintiffs' motion for summary judgment on the issue of contractual entitlement of prevailing wages is denied.

Spoliation

"Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence ... before the adversary has an opportunity to inspect them" (*Jerrick Assoc., Inc. v Phoenix Owners Corp.*, 191 AD3d 472, 472 [1st Dept 2021] [internal quotation marks and citation omitted]; see also *China Dev. Indus. Bank v Morgan Stanley & Co.*, 183 AD3d 504, 505 [1st Dept 2020], citing *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543 [2015] ["Spoliation sanctions are available regardless of whether evidence was destroyed intentionally, willfully or negligently"]). "The determination of a sanction for spoliation is within the broad discretion of the court" (*Hughes v Covey*, 131 AD3d 581, 583 [2d Dept 2015] [citations omitted]).

"A party who seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it when it was destroyed, the evidence was destroyed with a culpable state of mind, and the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" (*China Dev. Indus. Bank*, 183 AD3d at 505 [internal quotation marks and citation omitted]). "If determined that evidence was intentionally or willfully destroyed, the relevancy of the destroyed evidence is presumed. If determined that evidence was negligently destroyed, the party seeking sanctions must establish that the destroyed evidence was relevant to the party's claim or defense" (*id.* [citation omitted]).

Here, although plaintiffs have established that AWI did not retain a significant amount of business records relevant to their causes of action, they have not established that the destruction of evidence "was willful, contumacious or in bad faith" (*Hall v Elrac, Inc.*, 79 AD3d 427, 428 [1st Dept 2010]). Therefore, court declines to impose the drastic sanction of striking the answer and defers the issue of the appropriate sanction for spoliation of evidence to trial (*id.*).

Conclusion

Accordingly, it is

ORDERED that the motions of AWI defendants for summary judgment in sequence number 006 and Whitestone's motion for summary judgment in sequence number 007 are granted to the extent of dismissing the claims that plaintiffs are statutorily entitled to prevailing wages and otherwise denied; and it is further

ORDERED that the branch of plaintiffs' motion for summary judgment in sequence number 008 is denied; and it is further

ORDERED that the branch of plaintiffs' motion to strike AWI's answer in sequence number 008 is denied without prejudice and deferred for determination at the time of trial.

10/7/2022
DATE

SHLOMO S. HAGLER, J.S.C.

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