

**Pustilnik v Premier Home Health Care Servs., Inc.**

2022 NY Slip Op 33818(U)

November 10, 2022

Supreme Court, New York County

Docket Number: Index No. 155081/2016

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. DAVID B. COHEN **PART** **58**

*Justice*

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BORIS PUSTILNIK,

Plaintiff,

- v -

PREMIER HOME HEALTH CARE SERVICES, INC.,

Defendant.

-----X

**INDEX NO.** 155081/2016

**MOTION DATE** 06/03/2022

**MOTION SEQ. NO.** 007

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 007) 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428

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

Plaintiff moves for an order certifying this action as a class action, designating his counsel, Virginia & Ambinder, LLP, as class counsel, and approving for publication his proposed notice of class action lawsuit and publication order.

I. PROCEDURAL BACKGROUND

A. The instant action

In June 2016, plaintiff Marina Getts commenced this putative class action on behalf of herself and all similarly-situated persons employed by defendant. (NYSCEF 1). Plaintiff alleges in her complaint that defendants failed to pay her and other employees compensation due to them for work they performed for defendant, in violation of the New York Labor Law, New York Public Health Law, and the New York City Administrative Code. She further maintains that beginning in June 2010 and continuing to the present, defendant has failed to properly and

adequately pay its employees who provide personal care and assistance, and health-related tasks and other home care services to defendant's clients. (*Id.*).

In lieu of answering, defendant moved to dismiss the complaint, which was denied by decision and order dated December 18, 2017. In the decision, which details the underlying facts in this matter, and as pertinent here, the court rejected defendant's argument that the parties' collective bargaining agreement (CBA) required the arbitration of plaintiff's claims, finding that neither the CBA nor any of its memoranda of agreement (MOA) required arbitration of statutory claims. (NYSCEF 29).

Defendant thereafter appealed the decision, and moved for a stay pending its appeal, which was denied in January 2019. (NYSCEF 93).

In November 2019, Getts filed a second amended complaint, in which she was removed as the named plaintiff and was replaced by the current plaintiff, Pustilnik. (NYSCEF 95).

In January 2020, plaintiff moved by order to show cause for a temporary restraining order and preliminary and permanent injunction, seeking to prevent the arbitration of his claims, while defendant filed a motion seeking to compel arbitration and to dismiss plaintiff's second amended complaint. By decision and order dated July 16, 2020, plaintiff's motion was granted and a permanent injunction was ordered, and defendant's motion was denied. (NYSCEF 299).

Also in July 2020, the parties stipulated that the action involves claims by employees whose work for defendant ended before the effective date of a 2016 MOA. (NYSCEF 374).

In October 2020, plaintiff's motion for pre-class certification discovery was granted (NYSCEF 332), and in November 2020, defendant's motion for reargument and/or renewal of the decision granting plaintiff a permanent injunction and denying its motion to compel arbitration was denied (NYSCEF 334).

In April 2022, the Appellate Division, First Department, affirmed the denial of defendant's motion to compel arbitration, but modified the denial of the motion to dismiss the second amended complaint to the extent of dismissing plaintiff's Labor Law 193 claims related to alleged unlawful deductions. The Court held that people employed by defendant before 2016 were not parties to any agreement to arbitrate their statutory claims. (204 AD3d 479 [1st Dept 2022]).

Once the parties completed their pre-class certification discovery, plaintiff filed the instant motion. After the motion was submitted, the parties filed several letters, and submitted subsequently-issued decisions in other cases. (NYSCEF 422-428).

#### B. The arbitration

In January 2019, the union representing members employed by several agencies, including defendant, filed a class grievance involving the same claims at issue here, and in January 2020, arbitration of the grievance commenced. In February 2022, the arbitrator issued an arbitration award, which, as pertinent here, requires defendant to implement a Special Wage Fund in the approximate amount of \$30 million to compensate its former employees, with distributions to begin this year (NYSCEF 373, 374).

### II. APPLICABLE LAW

“A class action in this state must satisfy the prerequisites of numerosity, commonality, typicality, adequacy of representation and superiority” (*Weinberg v Hertz Corp.*, 116 AD2d 1, 4 [1st Dept 1986], *aff'd* 69 NY2d 979 [1987] [citing CPLR 901[a]).

CPLR 901 provides that one or more members of a class may sue on behalf of others 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.

A movant seeking class certification must clearly define the putative members of the class and convince the court that “the proposed class is capable of being identified.” (*Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 137 [2d Dept 2008] [citations omitted]). “The action may be maintained as a class action only if the court finds that the prerequisites under Section 901 have been satisfied.” (CPLR 902).

The court must also determine whether:

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; [and]
5. The difficulties likely to be encountered in the management of a class action.

(CPLR 902).

The plaintiff bears the burden of establishing that the prerequisites for class certification pursuant to CPLR 901 and 902 are met. (*Cupka v Remik Holdings LLC*, 202 AD3d 473 [1st Dept 2022]).

### III. CONTENTIONS

Plaintiff contends that he and the other proposed plaintiffs shared similar work experiences while employed by defendant, that they all share common claims against defendant based on its failure to pay them required wages, and that class certification is routinely granted in wage and hour actions. He cites to numerous cases pending in this court involving claims against home health care agencies such as defendant wherein it was alleged that defendants failed to pay home health care workers proper wages and in which class certification was granted.

Plaintiff also maintains that he satisfies the requirements of certifying a class, including that there are potentially between 100 and 1,000 putative class members; questions of law and fact common to the class predominate over individual claims; his claims are typical of the putative class claims and he will adequately protect the class's interests; and that the class action is the superior way to resolve the class claims.

Defendant argues that class certification should be denied as plaintiff's and the putative class members' claims involve individual issues which predominate over common questions of law or fact, and as the evidence submitted by plaintiff does not demonstrate a systematic violation or widespread practice of violations. Moreover, the allegations contained therein are disputed and contradicted by defendant's affiants.

Defendant also contends that Pustilnik's claims are unique to him and not common to other putative class members, and that its records reflect that Pustilnik was compensated for the hours which he worked. Defendant denies that Pustilnik can adequately protect the interests of the class as he is not involved in the arbitration whereas other putative class members are or may be involved, and thus Pustilnik has a conflict of interest with the potential class members.

Defendant further denies that a class action is the superior method for resolving the issues presented here, observing that the arbitration award has issued and covered employees will begin receiving distribution awards this year, while here, in contrast, the action is six years old and a class has not been certified and no discovery has been exchanged other than pre-class certification discovery.

Finally, defendant contends that given plaintiff's overbroad definition of the potential class, which could be over 1,000 members, a class action would prove unwieldy and difficult to manage, leading to less judicial efficiency.

Plaintiff argues in reply that the arbitration is irrelevant as the class here consists of those members whose claims are not covered by the arbitration, along with other class members who were never in the union as certain of defendant's locations were not unionized. To the extent that there is a dispute about whether certain class members' claims are covered here, plaintiff suggests that the class be certified and discovery exchanged to determine whether a member is properly included in the class. Nor does the arbitration award have any res judicata effect on the claims, especially given this court's injunction against the arbitration.

Plaintiff also denies that the merits of the claims are relevant to whether the class should be certified, and in any event, denies defendant's allegations as to the merits. He claims that he establishes the factors required pursuant to CPLR 901 and 902.

#### IV. LEGAL ANALYSIS

Plaintiff establishes that the potential class is so numerous that joinder is impracticable, and defendant does not allege otherwise. As to commonality, plaintiff demonstrates that his unpaid wage claims are common to the class members and that all of the members were subject to the same policies and practices implemented by defendant. That plaintiff may not have had

the same work experience as other class members is not probative as to whether his claims are nonetheless typical of the class. (*See Andryeyeva v New York Health Care, Inc.*, 33 NY3d 152, 184-185 [2019] [in analyzing class certification of home health attendant claims for wage violations, “Claims of uniform systemwide violations are particularly appropriate for class certification . . . the fact that damages may vary by class member does not per se foreclose class certification.”]; *see also Atakhanova v Home Family Care, Inc.*, 2020 WL 4207437 [ED NY 2020] [typicality requirement satisfied in wage cases when plaintiff and proposed class members were exposed to same general employment practices, even if factual differences among claims; same for commonality, which depends on whether defendant engaged in unlawful policy and practices and not on each member’s employment history]).

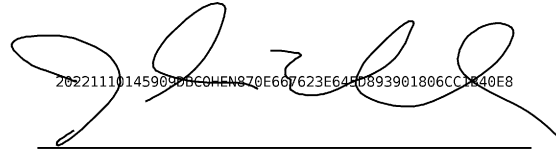
Given the prior holding in this matter enjoining the arbitration, which was affirmed by the Appellate Division, the arbitration award and determination are irrelevant. That plaintiff did not participate in the arbitration does not affect his ability to protect the interests of the class, nor does he have a conflict of interest with the class members. Similarly, a class action is the superior method for resolving the class claims.

Defendant raises no objection to plaintiff’s allegations related to the CPLR 902 factors. Finally, defendant does not contest either plaintiff’s counsel’s request to be designated as class counsel or to approve for publication his proposed notice of class action lawsuit and publication order.

Accordingly, it is hereby

ORDERED, that plaintiff’s motion is granted in all respects, and it is further

ORDERED, that plaintiff submit a proposed order in accordance with this decision  
forthwith.



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11/10/2022  
DATE

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DAVID B. COHEN, J.S.C.

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