

Matute v Defalco Constr. Inc.
2022 NY Slip Op 34186(U)
December 8, 2022
Supreme Court, New York County
Docket Number: Index No. 154387/2020
Judge: Louis L. Nock
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK

PART

38M

Justice

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GUSTAVO MATUTE, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED WHO WERE EMPLOYED BY DEFALCO CONSTRUCTION INC., X-TREME CONCRETE INC., LIBERTY READY MIX, INC., MICHAEL FALCO AND GIACOMO V. GISONDA AND ANY OTHER, JOSE SALINAS, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED WHO WERE EMPLOYED BY DEFALCO CONSTRUCTION INC., X-TREME CONCRETE INC., LIBERTY READY MIX, INC., MICHAEL FALCO AND GIACOMO V. GISONDA AND ANY OTHER,

INDEX NO. 154387/2020

MOTION DATE 12/15/2021

MOTION SEQ. NO. 001

Plaintiffs,

- v -

**DECISION + ORDER ON
MOTION**

DEFALCO CONSTRUCTION INC., X-TREME CONCRETE INC., LIBERTY READY MIX, INC., MICHAEL FALCO, GIACOMO V. GISONDA, ANY OTHER ENTITIES AFFILIATED WITH, CONTROLLING, OR CONTROLLED BY DEFALCO CONSTRUCTION INC., X-TREME CONCRETE INC., LIBERTY READY MIX, INC., AND MICHAEL FALCO AND GIACOMO V. GISONDA INDIVIDUALLY,

Defendants.

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The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, and 57

were read on this motion for CLASS CERTIFICATION & CROSS-MOTION

LOUIS L. NOCK, J.

Upon the foregoing documents, the plaintiffs' motion for class certification is granted for the reasons set forth in the plaintiffs' moving and reply papers, in which the court concurs as set forth below; and defendants' cross-motion dismissing the complaint as to defendants X-treme Concrete Inc. and Michael Falco and for denial of class certification is denied for the reasons set forth in plaintiffs' opposition papers, in which the court concurs as set forth below.

CPLR 901 provides that a class action may be commenced where the class is so numerous as to render joinder impracticable; the class predominantly shares common questions of law and fact; the class representatives' claims are typical of the class; the class representatives will fairly protect the interests of the class; and a class action is superior to other available methods of resolving the controversy. In addition, the court is directed by statute to consider whether the putative class members have an interest in individually controlling the prosecution of separate actions; whether separate actions are impracticable or inefficient; the existence of any other litigation regarding the controversy; whether the forum is a desirable choice to resolve the dispute; and what difficulties will be encountered in managing a class action (CPLR 902). The statutory requirements are to be liberally construed (*Wilder v May Dept. Stores Co.*, 23 AD3d 646, 649 [2d Dept 2005]). "While it is appropriate in determining whether an action should proceed as a class action to consider whether a claim has merit, this inquiry is limited, and such threshold determination is not intended to be a substitute for summary judgment or trial" (*Kudinov v Kel-Tech Const. Inc.*, 65 AD3d 481, 482 [1st Dept 2009] [internal quotation marks and citation omitted]). Courts should therefore err in favor of allowing the class action to proceed (*Pruitt v Rockefeller Ctr. Properties, Inc.*, 167 AD2d 14, 21 [1st Dept 1991]). "Whether a particular lawsuit qualifies as a class action rests within the sound discretion of the trial court" (*Kudinov*, 65 AD3d at 481).

Here, the putative class representatives and three other putative class members (the "class plaintiffs") allege that the defendants each employed them in various construction trades and had a common practice of not paying their workers, including the putative class representatives, all of their earned wages at both prevailing and overtime rates (affidavits of class plaintiffs, NYSCEF Doc. Nos. 22-26). In addition, it is alleged that defendants failed to issue paystubs or issued

inaccurate paystubs, deducted pay for unused lunch breaks, and did not distribute annual wage statements as required by Labor Law § 195.1 (*id.*). In addition to the affidavits of the class plaintiffs, plaintiffs also submit work schedules (NYSCEF Doc. No. 28), a sample of the putative class representatives' paychecks and a spreadsheet showing hours worked (NYSCEF Doc. No. 29), and payment receipts (NYSCEF Doc. No. 30).

These submissions are sufficient to certify a class action as requested by the motion. The Appellate Division, First Department, has repeatedly held that a class action is the preferred method for resolving wage and hour claims such as those presented herein (*e.g.*, *Stecko v RLI Ins. Co.*, 121 AD3d 542, 543 [1st Dept 2014] ["We note that, as we have previously held, a class action is the superior vehicle for resolving wage disputes"] [internal citations and quotation marks omitted]). The claims of all the putative class members arise from the same alleged common practice of failing to pay accurate wages (*id.* at 543). Further, and contrary to defendants' arguments regarding part-time versus overtime status and different trades and pay scales, the common claims predominate, and the putative class representatives' claims are typical of the class, especially as individual discrepancies may be easily resolved by reference to defendants' records to determine the accurate individual measures of damages (*id.*; *see also Kudinov*, 65 AD3d at 481-82). Inconsistencies in the evidence and testimony presented by plaintiffs are not, at this stage, a bar to class certification (*Kudinov*, 65 AD3d at 482 [1st Dept 2009] ["While Kudinov's testimony and his affidavit as to his record keeping and the number of employees at the projects where he worked contained inconsistencies, his claim has sufficient merit for the limited purposes of determining whether to certify this class"]).

Defendants make no meritorious objections to the requirements of numerosity, or fair representation by the putative class representatives and their counsel of record, Virginia &

Ambinder LLP. Their claim that the employer defendants are not actually related is unsupported by anything other than defendant Michael Falco's essentially conclusory and self-serving affidavit.¹ Finally, and with respect to those factors set forth in CPLR 902 not yet addressed, no objection is raised as to the propriety of this court hearing the case, and no other litigation regarding this controversy has been filed. The court notes that defendant Giacomo V. Gisonda has not appeared and has not been served, and accordingly excludes him from the definition of the class.

Defendants' cross-motion, which seeks several items of relief, is denied in its entirety. As to whether defendants X-treme Concrete Inc. and Michael Falco were properly served, the court notes that these defendants answered the complaint and failed to raise lack of jurisdiction as a defense (Answer, NYSCEF Doc. No. 4). Accordingly, that defense has been waived (CPLR 3211[e]; *Iacovangelo v Shepherd*, 5 NY3d 184, 186 [2005]). As to the timeliness of the motion for class certification, as plaintiffs correctly point out, the parties executed several stipulations extending the time for plaintiffs to seek class certification (NYSCEF Doc. Nos. 12, 13, 17), and defendants may not now be heard to complain that the motion was untimely when it was made well within the time specified in the most recent such stipulation (NYSCEF Doc. No. 17). Finally, to the extent that defendants seek to compel certain disclosures from plaintiffs, they cite no authority requiring that such discovery be provided prior to certifying the class, and in any event the information sought may be obtained through the discovery process as this action continues and is not a "sound basis" for compelling further pre-certification discovery (*Dabrowski v Abax Inc.*, 84 AD3d 633, 635 [1st Dept 2011]). The court also notes plaintiffs' representation that more than a year has passed since plaintiffs provided responses to defendants'

¹ The court declines to consider the documents purportedly submitted in further support of defendants' cross-motion as essentially an unpermitted sur-reply

pre-certification discovery demands, and in that time, defendants failed to raise an objection to the responses until the instant motion practice.

Accordingly, it is hereby

ORDERED that the motion by plaintiffs to certify this action as a class action pursuant to CPLR 901 and 902 is granted, and the class is to be defined as:

“all individuals who worked for Defalco Construction Inc., X-treme Concrete Inc., Liberty Ready Mix, Inc., and Michael Falco performing construction work including, but not limited to, carpentry, iron work, masonry, and concrete and cement work on construction projects throughout New York during the period from June 2014 through the present (the “Class” and “Class Members”); and it is further

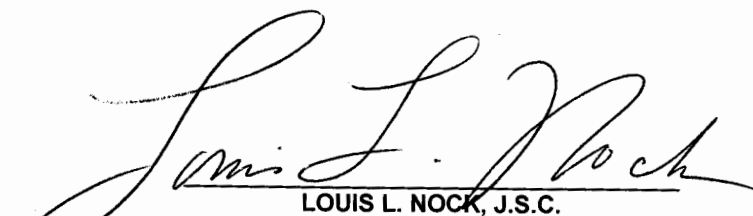
ORDERED that publication of notice to the members of the class shall proceed in accordance with the annexed publication order of even date herewith; and it is further

ORDERED that defendants’ cross-motion for various reliefs is denied in its entirety; and it is further

ORDERED that counsel are to appear for a preliminary conference in Room 1166, 111 Centre Street, New York, New York, on March 8, 2023, at 10:00 AM.

This constitutes the decision and order of the court.

ENTER:


LOUIS L. NOCK, J.S.C.

12/8/2022
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	

APPLICATION:

CHECK IF APPROPRIATE: