Ramires v AGDG Car Wash Corp.
2022 NY Slip Op 35219(U)
August 23, 2022
Supreme Court, Nassau County
Docket Number: Index No. 616170/19
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 30
NASSAU COUNTY

FREDIS RAMIRES, CARLOS ALVAREZ, EVENOR VELASQUEZ, MANUEL GARCIA, JUAN GARCIA, LORGIO INTERIANO, ROBERTO RAMOS a/k/a SANTIAGO LOPEZ, LUCIO GAITAN a/k/a ALEXANDER GAINTAN, MELVIN JOEL GARCIA a/k/a EMERSON GARCIA, OSCAR PAZ CRUZ,DAVID MOLINA, LEONIDAS GONZALEZ, MARIO GRIMALDI, HENRY NUNEZ, FREDIS MANCIA a/k/a JOSE MANCIA, JOSE MARQUEZ, KEVIN BARRIENTOS, WILFREDO CRUZ and JOSE CRUZ, on behalf of themselves and others similarly situated,

Plaintiffs,

Index No.: 616170/19
Motion Seq. No.: 04
Motion Date: 03/30/2022
XXX

- against -

AGDG CAR WASH CORP., PM & JP CAR WASH, LLC, RICHARD GABAY, PETER MAZZA and JOSEPH PANZA,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits and Memorandum of Law	**1**
Affirmation in Opposition and Exhibits	**2**
Reply Affirmation and Exhibit	**3**

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiffs move for an order approving the class action settlement, costs and service awards and noticing the Class that this case is closed. Defendants oppose the motion.

In support of the motion, counsel for plaintiffs asserts, in pertinent part, that, "[u]nder CPLR 908, a class action may not be dismissed or compromised without approval of the Court. Here, Plaintiffs seek to have the settlement approved, the Plaintiffs paid their settlement proceeds and costs, the service awards granted, and the case be closed. Plaintiffs sued for wage and overtime wages under various provisions of New York Labor Laws ('NYLL') at §§ 650, 663, 195, 198(1-b), and 198(1-d) et. seq.... By Order dated October 1, 2020, this Court granted Plaintiffs' motion seeking certification of a class of all employees of Miami Car Wash, who cleaned, dried, or detailed cars from November 5, 2013 to May 12, 2015 under Civil Practice Law and Rules ('CPLR') §§ 901(a) and 902 (the 'Class Order').... Also, this Court granted Plaintiffs Roberto Ramos a/k/a Santiago Lopez, Fredis Ramires and Manuel Garcia as class representatives and their chosen counsel of Marcus Monteiro, at M&F, as class counsel and directed Defendants to provide contact information.... Defendants provided Plaintiffs' counsel with the required contact information for all employees of Miami Car Wash from November 5, 2013 to May 12, 2015 (the 'Class List').... However, the class list consisted of only nine additional employees that were not already Class Members.... On January 18, 2021, Defendants served an Offer to Comprise (*sic*) Plaintiffs' claims under CPLR 3221 for $150,000.00.... Plaintiffs' counsel met with all of the 15 named Plaintiffs, and with their unanimous approval, on January 28, 2021, Plaintiffs accepted the Offer and filed that acceptance with the Court (the 'Acceptance').... On December 7, 2021, Plaintiffs' counsel mailed the Miami Car Wash Settlement Participation Form and Allocution Formula (*sic*) to the Class List, including the nine additional class members who were not already named plaintiffs, and provided them with 45 days from the date of the mailing to participate in the settlement amount (the 'Notice').... The Notice resulted in three additional class members providing claim forms, swelling the class to 18 people…. No objections or opt-outs were ever received. The settlement amount under the Order has since been paid to Plaintiffs' counsel in the amount of $158,625.00 (which includes then current interest) and is currently in their escrow account pending the resolution of this motion. Therefore, Plaintiffs' counsel hereby request that the settlement and service awards be approved and distributed to the 18 class members and that the Class be noticed that the case has been settled and is now closed." *See* Plaintiffs' Affirmation in Support NYSCEF Documents Nos. 1, 44 and 63 and Exhibits 1, 2 and 4.

Counsel for plaintiffs further asserts, in pertinent part, that, "[h]ere, the settlement should be approved and the case closed. The parties, all represented by experienced counsel, engaged in arm's-length hard-fought negotiations over several years. Accordingly, the settlement is entitled to a presumption of fairness and adequacy. [citation omitted]. Additionally, Plaintiffs' counsel, experienced in class action employment cases, approves the settlement. Further litigation would have resulted in additional expense and delay, including additional discovery. A complicated trial would be necessary, featuring extensive testimony by Defendants, Plaintiffs, Class Members, experts, and possibly third-party witnesses. Preparing and putting on evidence on the complex factual and legal issues at such a trial would consume tremendous amounts of time and resources for both sides, as well as require substantial judicial resources to adjudicate the parties' disputes. Any judgment would likely be appealed, thereby extending the duration of the litigation and depleting any possible recovery. This Settlement, on the other hand, makes monetary relief available to the class members in a prompt and efficient manner. In evaluating the degree of class members' support for a settlement, courts look to the proportion of the class that object to and opt out of the settlement. Where relatively few class members opt-out or object to the settlement, the lack of opposition supports court approval of the settlement. [citation omitted]. Here, the 15 named class members **all** approved the settlement. Plaintiffs' counsel next served the Notice, resulting in three additional class members providing claim forms, thereby allowing those class members to participate in the Settlement Award. Importantly, no objections or opt-out were received. Thus, there is overwhelming settlement approval. Furthermore, attorney fees **were not included in the settlement amount** – nearly all of which will go to class members (excepting nominal costs)." *See* Plaintiffs' Affirmation in Support Exhibit 4.

Counsel for plaintiffs adds, in pertinent part, that, "[p]laintiffs further request separate payments of $5,000.00 are (*sic*) to be awarded to named Plaintiffs Roberto Ramos a/k/a Santiago Lopez, Fredis Ramires and Manuel Garcia. The three service awards total $15,000.00. A court may grant such awards in a class action. In doing so, a court will consider: [t]he existence of special circumstances including the personal risk (if any) incurred by the plaintiff-applicant in becoming and continuing as a litigant, the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value (e.g., factual expertise), any other burdens sustained by that plaintiff in lending himself or herself to the prosecution of the clam (*sic*), and of course, the ultimate recovery. [citation omitted]. Enhancement awards 'are particularly appropriate in the employment context … [where] the plaintiff is often a former or current employee of the defendant, and thus . . . he has, for the benefit of the class as a whole, undertaken the risks of adverse actions by the employer or co-workers." [citations omitted]. Roberto Ramos a/k/a Santiago Lopez, Fredis Ramires and Manuel Garcia each expended considerable time and effort to assist Class Counsel with the case. They initiated this action and regularly communicated with Class Counsel about the case…. Plaintiffs provided Class Counsel with documents, reviewed documents, and explained relevant and necessary factual information to Class Counsel…. Roberto Ramos a/k/a Santiago Lopez, Fredis Ramires and Manuel Garcia were all deposed (a task that consisted of two entire days) attended mediation sessions, assisted with preparing for the mediation assisted with factually fleshing out Defendants pay practices and establishing the Classes' claims…. In fact, they each were deposed for many hours. Thus, Plaintiffs' assistance was crucial in the prosecution and proposed resolution of the case."

In opposition to the motion, counsel for defendants argues, in pertinent part, that, "… the motion is inappropriate as it fails to: comply with requirements for class actions; submit relevant documents and proofs; present accurate details regarding the class; and conform with applicable New York law. First, class certification was authorized by Order dated October 1, 2020, and entered October 7, 2020 (… the 'Class Order'), but the proposed notice to be sent to the Class was not approved at the time due to a dispute over the start of employment date to be included on said notice. Plaintiffs insisted that period of employment should begin as of February 15, 2012, and the Court concluded that the date should be six years from the filing of the Complaint (i.e., November 19, 2013)…. The parties were directed to confer about the content of notice, to be approved by the Court. Plaintiffs moved for leave to renew and reargue this finding, and that motion was denied by Order entered January 15, 2021…. That motion was denied by Order entered January 15, 2021…. My clients advise that nothing was ever completed as to the foregoing, which means that the class could not be described, as required by CPLR § 903, and the class notice was not approved by the Court, as required by CPLR § 904. Accordingly, no notice could have been sent. Second, the affirmation of Marcus Monteiro, Esq. dated March 16, 2022 (the 'Monteiro Affirmation') claims, at paragraph 7, that he met with the 15 named plaintiffs to approve the settlement proposed by defendants on January 18, 2021, and that there was unanimous approval. This is wrong, and there are 19 plaintiffs named in the caption.... Further, this fails to specify: where and when such meeting was held; where the copies of the ballots taken are; the names of the persons present (i.e., which of the 4 named plaintiffs were not consulted); what division of funds was approved; and how attorney fees were to be paid. These details and documents need to be provided. Next, assuming there could be a settlement without a class notice, and without a properly defined class, the terms of such settlement had to be approved by the Court pursuant to CPLR Rule 908. It is submitted that such approval had to be done at the time of acceptance of the settlement on January 28, 2021 ..., and not more than one year later. This would have allowed a timely determination about inclusion of fees in the settlement. Indeed, as provided by CPLR § 905, the judgment in an action maintained as a class action, whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. This is not in the judgment entered February 8, 2021.... Moreover, settlements in class actions of this type need to include an allocation for attorneys (*sic*) fees. If this standard had been followed, the Court would have approved the overall size and how it would be distributed between claimants and counsel. But, rather than move for approval, plaintiffs' counsel decided to make a separate application for fees, which defendants have maintained is improper.... Here, there was no finding that fees were not to be paid from the settlement fund, nor was there a finding of bad faith or improper conduct by defendants. At paragraph 8 the Monteiro Affirmation claims that the notice attached as Exhibit 1 to the Motion was mailed to persons to (*sic*) the list of employees provided by defendants (the 'Class List'). The first issue is that the Notice was not approved by the Court, nor were the terms set forth therein. The purported Notice was not filed with NYSCEF, nor did defendants have any advisement that it was being sent. There is no affidavit of service showing all of the names on the Class List, along with the addresses to where each notice was purportedly mailed on December 7, 2021. This would ostensibly indicate what 9 additional persons were notified. Paragraph 8 of the Monteiro Affirmation also claims 3 new claimants responded to the notices mailed on December 7, 2021. That would bring the class size to 22, not 18, as claimed by Mr. Monteiro. Next, there are 21 potential distributees listed on the Class Action Allocation worksheet attached to the Motion as Exhibit 3. This does not agree with the statements presented. Further, the notice sent requires the form to be returned to counsel no later than January 21, 2022. These forms should be attached to the motion, and not just the ones from the 3 new purported members. As to the Class Action Allocation worksheet (Exhibit 3 to Motion), it claims that 'Service Awards' are to be given to three class members. Under New York law, such incentive awards are not allowed. [citation omitted]. As to allocating payments, it would be advisable to do based on number of hours worked by each claimant (versus the moths (*sic*) of employment), which is a more logical approach in (*sic*) this case alleges violation of wage and hour laws. At paragraph 12 the Monteiro Affirmation asks for retrospective approval of the settlement supposedly agreed to over a year ago which did not address counsel fees, nor composition of the class. Moreover, (*sic*) plaintiffs' Memorandum of Law (at page 2), the following factors should be considered by the court when reviewing a settlement: the likelihood of success, the extent of support from the parties, the judgment of counsel, the presence of bargaining in good faith, and the nature of the issues of law and fact. There is nothing presented that would allow this Court to assess these factors. In lieu of same, the Memorandum of Law proceeds (at pages 2 -3) with unsupported assertions such as 'negotiations over several years,' 'a presumption of fairness,' and problems if the litigation had continued. These are not legal arguments, and the citation of federal case law in this New York action is inappropriate unless there are no New York authorities. The Memorandum of Law also improperly cites (at page 4) federal law as supposed support for the proposed Service Awards to class members. As noted above …, such awards are not available under New York law…. Moreover, anything the plaintiffs wanted to say about added service would need to be through their own affidavits. It is submitted that the foregoing issues and deficiencies prevent approval by the Court. Accordingly, the motion should be denied." *See* Defendants' Affirmation in Opposition Exhibits A-C; *See* Plaintiffs' Affirmation in Support Exhibits 1 and 3.

In reply to the opposition, counsel for plaintiffs argues, in pertinent part, that, "[d]efendants' 'opposition' is stunning, insofar as it somehow opposes this Court's approval of the class action settlement – based on a settlement offer they themselves submitted. For starters, Defendants have no standing to oppose the settlement and whether its (*sic*) fair to the Class Members. Indeed, I have never once received an objection to a class action settlement motion when an Offer made by Defendants was received. The only thing Defendants' 'opposition' demonstrates is their endless desire to frivolously litigate any and all positions, whether or not they have a legitimate argument or not. Also, what Defendants don't understand is that their opposition (legally incorrect in all respects) appears to advocate that the settlement not be approved on a class-wide basis. However, should that occur, then the $150,000.00 settlement would be allocated for the named plaintiffs only, and the class members would be free to continue to pursue their claims against Defendants. As damaging as this would be for Defendants – their counsel amazingly espouses this exact position. Additionally, while there are 19 names (*sic*) plaintiffs in the caption, there are 15 named plaintiffs whose claims fall within the class period after the Court limited the class period – a fact Defendants' counsel be (*sic*) aware of since he referenced that Class Order dated October 7, 2020 … at paragraph 2 of his Attorney Affirmation. Defendants (*sic*) counsel next appears to make up rules requiring class approval – requiring facts such as 'where and when such meetings were held' or how 'ballots' were taken. He cites to no case or rule that requires such action – because none exits. That is not how class action settlements are approved. Rather, Defendants' counsel spends most of his 'opposition' relitigating how attorneys (*sic*) fees are included in the settlement, an argument he already lost, and an argument that has no place in this motion. In fact, attorneys (*sic*) fees not being included in the settlement actually militates in favor of approval of the settlement is it results in a greater distribution to the Class Members. Indeed, the 'opposition' offers no legitimate basis for this Court to not approve the settlement as all the predicates are satisfied. The main crux of a class action settlement approval is whether it is the result of collusion between the attorneys or the result of negotiations. Here, there can be no honest dispute that settlement was the product of arm's length negotiations after meaningful discovery. The settlement was also approved by all Named Plaintiffs with class claims and all class members. [citation omitted]. There was not a single objection to the settlement mailed to this office or a single opt-out. Attorneys' fees will not be taken out of the settlement as those fees are to be paid separately. Finally, Plaintiff's (*sic*) counsel request additional costs of $2,167.60 as those 'costs' associate with the opposition of Defendants' appeal." *See* Plaintiffs' Affirmation in Support NYSCEF Documents No. 44.

The Court will not consider defendants' Sur-Reply insofar as such is not provided for in the CPLR and the Court did not give defendants permission to submit same.

Based upon the foregoing and upon all of the evidence and arguments presented in the papers before the Court, the class action settlement is approved as fair and reasonable. The Court is satisfied that the proposed settlement in this action meets both procedural and substantive fairness.

Therefore, the branches of plaintiffs' motion, for an order approving the class action settlement and noticing the Class that this case is closed, are hereby **GRANTED**.

IT IS HEREBY ORDERED that this Court has jurisdiction over the subject matter of this litigation and over all parties to this litigation, including all members of the class.

FURTHER, that for purposes of this Order, all terms not otherwise defined herein shall have the same meanings set forth in the Agreement.

FURTHER, that this Court hereby approves the settlement set forth in the Agreement and finds that the settlement is, in all respects, fair, reasonable, adequate and in the best interest of the plaintiffs and the class members in accordance with New York Civil Practice Law and Rules §§ 901 and 902, and directs implementation of all its terms and provisions.

FURTHER, that plaintiffs and all other class members who have not properly and timely exercised their opt-out rights in this lawsuit are hereby conclusively deemed to have released or discharged defendants from, and are permanently enjoined and barred from asserting, either directly or indirectly, against defendants, any and all claims released in the Settlement Agreement. All such matters are hereby finally concluded, terminated and extinguished.

FURTHER, that the notice given to the members of the class fully and accurately informed the members of the class of the proposed settlement, was the best notice practicable under the circumstances and constituted valid due and sufficient notice to all members of the class complying fully with New York Civil Practice Law and Rules § 908.

FURTHER, that without affecting the finality of this judgment in any way, this Court hereby retains jurisdiction over consummation and performance of the Settlement Agreement.

FURTHER, that the Clerk of the Court is directed to close this case bearing Index No. 616170/2019 on the thirty-first (31st) day after this Order is entered.

The branch of plaintiffs' motion for an order granting costs and service awards, is hereby **DENIED**.

Counsel for plaintiffs' further request, in his reply papers, for "additional costs of $2,167.60 as those 'costs' associate with the opposition of Defendants' appeal," (while not even properly before this Court) is also hereby **DENIED**.

This constitutes the Decision and Order of this Court.

E N T E R:

DENISE L. SHER, A.J.S.C.
XXX

Dated: Mineola, New York
August 23, 2022

ENTERED
Aug 24 2022
NASSAU COUNTY
COUNTY CLERK'S OFFICE