SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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ANYELY RODRIGUEZ, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED WHO WERE EMPLOYED BY TRI-BOROUGH CERTIFIED HOME CARE LTD.; TRI-BOROUGH HOME CARE, LTD. D/B/A METROCARE GIVERS, A DIVISION OF TRI-BOROUGH HOME CARE, LTD.; TRI-BOROUGH HEALTH CAREERS, LLC, ALONG WITH OTHER AFFILIATED ENTITIES,

Plaintiff,

- v -

TRI-BOROUGH CERTIFIED HOME CARE LTD., TRI-BOROUGH HOME CARE, LTD., TRI-BOROUGH HEALTH CAREERS, LLC, TRI-BOROUGH CERTIFIED HEALTH SYSTEMS OF NEW YORK, LLC, AND/OR ANY OTHER RELATED ENTITIES

Defendant.

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INDEX NO. 152047/2018

MOTION DATE 10/06/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82

were read on this motion to/for MISCELLANEOUS.

Upon the foregoing documents, Plaintiff's motion for class certification is granted, and the cross-motion by defendants Tri-Borough Certified Home Care Ltd. and Tri-Borough Certified Health Systems of New York, LLC d/b/a Family Care Certified Services, to dismiss the complaint as against them is denied, for the reasons detailed in the plaintiff's submissions. The following summary of some of the salient points is provided.

The Motion for Class Certification:

The complaint in this putative class action lawsuit alleges that defendants engaged in a uniform practice of failing to pay their home health aide workers minimum wages, overtime compensation, spread of hours pay, and uniform maintenance allowance, and failing to pay the

correct wages and supplemental benefits required by the Living Wage Law [the New York City Fair Wages for New Yorkers Act] and the Wage Parity Act (Public Health Law section 3614-c).

CPLR § 901(a)(4) requires that a named plaintiff be in a position to adequately protect the interests of class members. "The factors to be considered in determining adequacy of representation are whether any conflict exists between the representatives 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 [1st Dept 1998].) Adequacy has been met where "[t]he record reveals no conflict of interest between the class members and the class representatives. . . . [P]laintiffs seek the same relief as the class members to receive the wages and benefits allegedly owed to them . . . ." (*Nawrocki v Proto Constr. & Dev. Corp.*, 82 AD3d 534, 535 [1st Dept 2011].)

Defendants have asserted that plaintiff "is unfit to represent the putative class" because of an alleged attempt by "to cash a check for wages, which she claimed was lost in the mail, and then cashed that very check after receiving a replacement check . . . ." (Friedberg Aff. ¶ 7.) However, the record indicates that defendants sent the checks to two different addresses (*compare* Barker Aff. Exhs. A & B). Therefore, defendants' accusation of deceit on plaintiff's part is unsupported by any concrete evidence. But also, "[w]hile the credibility of the representative may figure into the calculus . . . minor and collateral impeachment issues are insufficient to disqualify a class representative" (*Borden v 400 E. 55th St. Assocs., L.P.*, 2012 N.Y. Misc. LEXIS 6670 at *5 [Sup Ct, NY County, April 11, 2012]).

Defendants have asserted that plaintiff, due to the fact that her primary language is Spanish, is not an adequate representative. With respect to determining whether a class representative has an adequate understanding of the case, "[i]t is sufficient that the class

representative be familiar with the basic elements of the claim." (*Borden*, 2012 N.Y. Misc. LEXIS 6670 at *4; *see also, Piscioneri v Commonwealth Land Title Ins. Co.*, 2004 N.Y. Misc. LEXIS 256 at *36-38 [Sup Ct, NY County, Jan. 8, 2004].) Here, plaintiff has demonstrated familiarity with the elements of her claims (*see*, Rodriguez Aff. Exhs. C & N). Class representatives are basically required to understand the nature of the lawsuit. "Courts do not require the representative plaintiff to be the best of all possible plaintiffs or to be especially knowledgeable, intelligent, or possessing a detailed understanding of the legal or factual basis on which a class action can be maintained" (*In re Playmobil Antitrust Litig.*, 35 F Supp 2d 231, 242 [ED NY 1998]).

Regarding commonality: the putative class – consisting of home health aide workers employed by the defendants – were all subject to defendants' common policies and practices of allegedly failing to provide compensation for every hour worked; allegedly failing to pay minimum wages, overtime compensation, spread of hours pay, and uniform maintenance allowances; and allegedly failing to pay the correct wages and supplemental benefits required by the Living Wage Law and the Wage Parity Act (*see, Andryeyeva v N.Y. Health Care Inc.*, 2020 N.Y. Misc. LEXIS 2072 at *19 [Sup Ct, NY County, May 15, 2020] ["An inspection of each individualized damages suffered by each putative class member does not defeat the predominance of that common issue as to whether defendants had a uniform policy or practice to underpay the home attendants."]; *see also, Andryeyeva v New York Health Care, Inc.*, 33 NY3d 152, 184-85 [2019] ["the legislature enacted CPLR 901 (a) with a specific allowance for class actions in cases where damages differed among the plaintiffs. . . ."]).

Defendants oppose certification by asserting that plaintiff was paid correctly. However, "inquiry on a motion for class action certification vis-à-vis the merits is limited to a

determination as to whether on the surface there appears to be a cause of action which is not a sham" (*Brandon v Chefetz,* 106 AD2d 162, 168 [1st Dept 1985]). Whether plaintiffs' claims of incorrect payment ultimately succeed on the merits is a matter to be determined at trial (*see, Banasiak v. Fox Industries,* 2016 N.Y. Misc. LEXIS 962 [Sup Ct, NY County, 2016]; *Weinstein v Jenny Craig Operations, Inc.,* 2013 N.Y. Misc. LEXIS 4932 at *5 [Sup Ct, NY County, Oct. 24, 2013], *affd* 138 AD3d 546 [1st Dept 2016]). Moreover, where contradictions arise between evidence proffered by proponents and opponents of class certification, any inferences should be resolved in favor of class certification (*see, Pruitt v Rockefeller Center Properties, Inc.,* 167 AD2d 14 [1st Dept 1991]).

Defendants do not submit any opposition as to the remaining factors in CPLR §§ 901 and 901, such as numerosity and superiority.

Finally, plaintiffs' proposed Notice of Class Action Lawsuit and Publication Order (Exhs. K & L) are regular on their faces.

The Cross-Motion to Dismiss:

Plaintiffs have sued four Defendants in this action: (1) Tri-Borough Certified Home Care Ltd. ("Tri-Borough Certified Home Care"); (2) Tri-Borough Home Care Ltd. d/b/a Metrocare Givers, A Division of Tri-Borough Home Care Ltd. ("Tri-Borough Home Care"); (3) Tri-Borough Health Careers, LLC d/b/a Metrocare Home Service, A Division of Tri-Borough Health Careers ("TriBorough Health Careers"); and (4) Tri-Borough Certified Health Systems of New York, LLC d/b/a Family Care Certified Services, A Division of Tri-Borough Certified Health Systems of New York ("Tri-Borough Certified Health Systems"). Defendants cross-move to dismiss the action against two of the four Defendants: defendant Tri-Borough Certified Home Care "for the reason that this business entity ceased doing business since 2013" and defendant

Tri-Borough Certified Health Systems "for the reason that this business entity does not employ, nor has it employed, home health care aides" (Notice of Motion).

But defendants fail to submit any evidence to support their assertions except for a few select pages from an incomplete purchase agreement. In addition, the complaint alleges that, at all relevant times, the defendants employed plaintiffs as defined by Labor Law §§ 651(5) and (6) and applicable regulations, 12 NYCRR § 142-2.14. Plaintiffs allege that at all relevant times, all four defendants operated a single integrated business that jointly employed them, and that their operations were interrelated and unified (Complaint ¶¶ 10, 12). Plaintiffs allege that each defendant had substantial control over plaintiffs' working conditions and over the unlawful policies and practices alleged (*id.*). Plaintiffs allege that defendants' enterprise is centrally controlled by the same owners and staff who manage, financially control, and oversee operations (*id.*, ¶¶ 13, 14). Plaintiffs allege that defendants had control over compensation practices and employment policies, including policies governing employee classifications and pay rates (*id.*, ¶¶ 15, 16, 18). These allegations are supported by evidence showing that one, Kenrick Cort, is the president and CEO of all four defendants, which share an address at 883 Flatbush Avenue, Brooklyn, New York, and that the Tri-Borough Home Care workers' compensation policy also lists Tri-Borough Certified Health Systems and Tri-Brough Health Careers under its coverage locations. In any event, interlocutory discovery can go forward on the issue of joint employment. To date, the parties have only completed pre-class certification discovery and have not yet delved into merits discovery on the issue of joint employment (*see, Shanklin v Wilhelmina Models, Inc.*, 2020 N.Y. Misc. LEXIS 1986 at *18 [Sup Ct, NY County, May 8, 2020] [granting plaintiffs' motion for class certification and rejecting defendants' reliance on

cases that had been dismissed on summary judgment following discovery, because the "cases here are in the pre-class-certification stage and the court has yet to authorize merits discovery"]).

Moreover, "[i]n determining who is an 'employer' for purposes of the NYLL, courts utilize an 'economic reality' analysis, where 'the overarching concern is whether the alleged employer possessed the power to control the workers in question'" (*Ponce v Lajaunie,* 2015 N.Y. Misc. LEXIS 2522 at *4 [Sup Ct, NY County, July 15, 2015]). In a similar case where home health aide workers sued their employer for unpaid wages, the defendants, which were several home health agencies, moved for summary judgment to dismiss certain defendants from the lawsuit who they maintained were not plaintiffs' employers (*see, Cedeno v Able Health Care Serv., Inc.,* 2019 N.Y. Misc. LEXIS 6589 at *5 [Sup Ct, NY County, Dec. 11, 2019]). The court denied the defendants' motion, finding that issues of fact existed as to whether the defendants were plaintiffs' joint employers (*see, id.*).

ACCORDINGLY, it is

ORDERED that the plaintiff's motion for class certification is granted; and it is further

ORDERED that the law firms of Virginia & Ambinder, LLP, and Naydenskiy Law Firm, LLC, are designated jointly as class counsel; and it is further

ORDERED that the proposed Notice of Class Action Lawsuit and Publication Order submitted as NYSCEF Doc. Nos. 41 and 42 herein are approved; and it is further

ORDERED that a preliminary conference shall be held on July 11, 2023, at 10:00 a.m., at the Courthouse, 111 Centre Street, Room 1166, New York, New York.

This constitutes the decision and order of the court.

Louis L Nock

4/11/2023
DATE

LOUIS L. NOCK, 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