

Dziura v Human Dev. Assn., Inc.

2023 NY Slip Op 31142(U)

April 11, 2023

Supreme Court, New York County

Docket Number: Index No. 159998/2018

Judge: Verna L. Saunders

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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. VERNA L. SAUNDERS, JSC

PART 36

Justice

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INDEX NO. 159998/2018

MARIANNA DZIURA, individually and on behalf of all other persons similarly situated who were employed by HUMAN DEVELOPMENT ASSOCIATION, INC., HDA, HUMAN DEVELOPMENT ASSOCIATION, INC., H.D.A. INC., EMPRO, INC., HDA CDPAS, LLC, HDA NY, LLC, and JOEL ZUPNICK,
 Plaintiffs,

MOTION SEQ. NO. 001; 002

- v -

DECISION + ORDER ON MOTION

HUMAN DEVELOPMENT ASSOCIATION, INC., HDA, HUMAN DEVELOPMENT ASSOCIATION, INC. and H.D.A. INC., EMPRO, INC., HDA CDPAS, LLC, HDA NY, LLC, and JOEL ZUPNICK,
 Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 67, 69, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 102, 104, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123

were read on this motion to/for MISCELLANEOUS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 68, 70, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 103, 105, 106, 107, 108, 109, 110, 111, 112

were read on this motion to/for AMEND CAPTION/PLEADINGS.

In this action seeking to recover wages and benefits under the New York Labor Law, plaintiff MARIANNA DZIURA, individually and on behalf of all other persons similarly situated who are/were employed by defendants to provide personal care, assistance, health-related tasks and other home care services to defendants' clients within the state, move the court for, among other things, an order, pursuant to CPLR 901, to certify the following class:

“All individuals who performed work on behalf of [d]efendant as non-residential home health aides and/or personal care assistants in the State of New York at any time between October 29, 2012 and today (“Class Period”) class action.”

Plaintiff and the putative class also seek an order designating Virginia & Ambinder, LLP as class counsel and approving for publication the proposed Notice of Class Action Lawsuit and Publication Order annexed as Exhibits 14 and 15 respectively (NYSCEF Doc. No. 35, *notice of motion*).

Plaintiff also seeks an order to amend the complaint to add Empro, Inc. (“Empro”), HDA CDPAS, LLC (“CDPAS”), HDA NY, LLC (“HDA NY”) and individual Joel Zupnick

(“Zupnick”), as defendants (collectively, “proposed defendants”), arguing, *inter alia*, that the proposed defendants are employers and/or joint employers with the named defendants. Defendants oppose the motion, claiming, among other things, that the proposed amendments are futile as they lack merit and would amount to needless litigation and that the amendment is prejudicial.

The court will first consider the motion to amend. It is well-settled that leave to amend a pleading should be freely given in the absence of prejudice or surprise to the non-moving party. (*Fahey v. Ontario County*, 44 NY2d 934, 935 [1978]; see also *Seda v New York City Housing Authority*, 181 AD2d 469, 470 [1st Dept 1992].) The opponent of a motion to amend bears the burden of demonstrating prejudice (see *Seda v New York City Housing Authority*, 181 AD2d at 470). A motion to amend should be denied where it is “clear and free from doubt” that the proposed claim lacks merit. (*Hawkins v. Genesee Place Corp.*, 139 AD2d 433, 434 [1st Dept 1988].) This court finds, upon a review of the arguments advanced and plaintiff’s exhibits, including paystubs that name the proposed defendants as employer, the motion is granted. Defendants fail to show that the amendments are “palpably insufficient” and their contention that the proposed amendment lacks merit is unavailing. (*Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495 [1st Dept 2011] [“the movant need not establish the merit of its proposed new allegations, but [must] simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit”] [internal quotation marks and citations omitted].)

Turning next to the motion for class certification, by memorandum of law, plaintiff argues that they have satisfied the requirements under CPLR 901 and 902 (NYSCEF Doc. No. 52). In support of certification of class status, plaintiff submits, *inter alia*, an affidavit indicating that she worked for defendants as a home-health aid from February 2003 through November 2017 and that, during her employment, no fewer than 100 other individuals worked there, too. Approximately 30-40 individuals attended in-service training. Dziura avers that she generally worked 24-hour shift per week but worked less than 24-hours on occasion. Her co-workers, asserts Dziura, “also worked 24-hour shifts, as well as shifts that were fewer than 24-hours, such as 8, 10 and 12-hour shifts.” She further affirms “[w]hen my co-workers and I worked 24-hour shifts, we did not get an opportunity to sleep without frequent interruptions due to HAD’s clients’ mental and medical conditions and constant need for supervision.” Plaintiff also submits recent decisions granting motions for class certification in similar actions commenced by health-care workers and their respective class members (NYSCEF Doc. Nos. 37-38); excerpts from Dziura’s deposition on April 8, 2021 (NYSCEF Doc. No. 40); HHA’s job description (NYSCEF Doc. No. 41); sampling of putative class duty sheets (NYSCEF Doc. No. 42); pleadings from similar cases (NYSCEF Doc. Nos. 7-9); sampling of Dziura’s payroll (NYSCEF Doc. No. 46); and sampling of putative class payroll (NYSCEF Doc. No. 47)

In opposition to the motion for class certification, defendants contend that plaintiff alleges that she performed Home Healthcare shifts requiring her to remain on the premises of her client for 24-hours and that defendants violated the 13-Hour Rule¹ — which applies to aides working live-in shifts — in that they failed to provide the required sleep/meal breaks. Defendants argue that the factual inquires required to determine whether an aide received the

¹ “The 13-Hour Rule allows employers to pay aides only 13 hours per 24-hour Live-in Shift, so long as aides receive 11 hours of sleep/meal breaks.” (NYSCEF Doc. No. 90 at 7).

breaks required by the 13-Hour Rule precludes class-certification as a matter of law. Also, since plaintiff worked exclusively live-in shifts, her claims are not typical of members who worked hourly/non-live-in shifts. Defendants further contend that plaintiff's employer provided a mechanism for aids to report when the aide did not receive the required breaks and, thus, whether a member is entitled to more than 13 hours requires an assessment of whether the individual member "(i) understood the policy; (ii) adhered to the policy's notification mechanisms; and (iii) did/not have such policy enforced by Plaintiff's employer."

Defendants also argue that plaintiff lacks standing to bring claims against other entities other than HAD because she was never employed by entities other than HAD. They also maintain that plaintiff was subject to the "Companionship Exemption" until December 31, 2014, which exempted HAD from paying her overtime at time-and-one-half her regular pay. Thus, the inquiries necessary to ascertain whether each plaintiff/member met this exemption's requirements precludes class certification. Defendant also assert that, as of December 31, 2018, HDA transferred the license to "employ" any aide as a matter of law to HDA NY LLC ("NY LLC"), which later revised its policies in that it: (i) was not subject to HDA's "non-profit exemption" defense to paying overtime; and (ii) paid all aides straight OT. This, claim defendants, precludes class certification because plaintiff's claims are not identical to claims by members who "(i) were not employed by a "non-profit" institution; and/or (ii) received overtime." (NYSCEF Doc. No. 90, *memo. of law in opp.*).

In reply, plaintiff argues that defendants' argument that an individualized inquiry is necessary has been rejected by both the Court of the Appeals and the Appellate Division.

"CPLR 902 states that a class action can only be maintained if the prerequisites promulgated by CPLR 901(a) are met." (*Pludeman v N. Leasing Sys., Inc.*, 74 AD3d 420, 421 [1st Dept 2010], citing *Weinberg v Hertz Corp.*, 116 AD2d 1, 4 [1st Dept 1986], *aff'd* 69 NY2d 979 [1987].) "Those prerequisites are (1) that the class is so numerous that joinder of all members is impracticable (numerosity); (2) questions of law or fact common to the class predominate over questions of law or fact affecting individual class members (commonality); (3) the claims or defenses of the class representatives are typical of those in the class (typicality); (4) the class representatives will fairly and adequately protect the interests of the class [(adequacy of representation)]; and (5) a class action represents the superior method of adjudicating the controversy (superiority)" (*Pludeman v N. Leasing Sys., Inc.*, 74 AD3d at 421-422; see *City of NY v Maul*, 14 NY3d 499, 508 [2010]; *Dugan v London Terrace Gardens, L.P.*, 186 AD3d 12, 19 [1st Dept 2020].) However, it is well-settled that CPLR 901(a) "'should be broadly construed' and that 'the Legislature intended article 9 to be a liberal substitute for the narrow class action legislation which preceded it'" (*Stecko v RLI Ins. Co.*, 121 AD3d 542, 543-544 [1st Dept 2014], quoting *City of New York v Maul*, 14 NY3d at 509).

Here, this court finds that plaintiff has sufficiently established all the requirements for class certification under CPLR 901 and 902 (see *Lavrenyuk v Life Care Servs., Inc.*, 198 AD3d 569, 570 [1st Dept 2021]; *Andryeyeva v New York Health Care, Inc.*, 33 NY3d 152, 184 [2019]; *Stecko v RLI Ins. Co.*, 121 AD3d 542, 542-543 [1st Dept 2014].) Moreover, this court is guided by recent decisions in New York County which have granted class certification in similar actions involving health-care works and their respective putative class members (see *Troshin v Stella*

Orton Home Care Agency, Inc., 70 Misc 3d 1223[A], 2021 NY Slip Op 50196[U], **8 [Sup Ct, NY County 2021]; *Bernarez v Alternate Staffing, Inc.*, 2020 NY Slip Op 33067[U], **6 [Sup Ct, NY County 2020].)

Defendant’s arguments, in opposition, that plaintiffs have not met the elements of CPLR 901 and 902 are unavailing. Addressing defendants’ specific contention that the motion should be denied on the ground that individualized inquiries are required as to members who worked hourly/non-live-in shifts, this argument is without merit because “the fact that damages may vary by class member does not *per se* foreclose class certification.” (*Andryeyeva v NY Health Care, Inc.*, 33 NY3d at 185). Moreover, it is well-settled that “the legislature enacted CPLR 901 (a) with a specific allowance for class actions in cases where damages differed among the plaintiffs, stating ‘the amount of damages suffered by each class member typically varies from individual to individual, but that fact will not prevent the suit from going forward as a class action if the important legal or factual issues involving liability are common to the class’” (*Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 399 [2014], quoting Mem of St Consumer Protection Bd at 3, Bill Jacket, L 1975, ch 207). Moreover, as noted by the Court of Appeals, “claims of uniform systemwide violations are particularly appropriate for class certification,” and “suggest a policy or practice of unlawful action of the type our courts have previously found ripe for class treatment.” (*Andryeyeva v NY Health Care, Inc.*, 33 NY3d 152, 184 [2019].) All other arguments have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

ORDERED that plaintiffs’ motion to amend the complaint to add Empro, Inc., HDA CDPAS, LLC, HDA NY, LLC and individual Joel Zupnick as defendants (motion sequence 001), is granted; and it is further

ORDERED that the action shall bear the following caption:

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 MARIANNA DZIURA, individually and on behalf of all other persons similarly situated who were employed by HUMAN DEVELOPMENT ASSOCIATION, INC., HDA, HUMAN DEVELOPMENT ASSOCIATION, INC., and H.D.A. Inc., EMPRO, INC., HDA CDPAS, LLC, HDA NY, LLC, and JOEL ZUPNICK,

Plaintiffs,

-against-

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HUMAN DEVELOPMENT ASSOCIATION, INC., HDA, HUMAN DEVELOPMENT ASSOCIATION, INC., and H.D.A., INC., EMPRO, INC., HDA CDPAS, LLC, HDA NY, LLC, and JOEL ZUPNICK,

Defendants.

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and it is further

ORDERED that plaintiff's motion seeking certification of this action as a class action (Mot. Seq. 002) is granted in its entirety; and it is further

ORDERED that the part of the motion to appoint certain lead counsel is granted, and the Court hereby appoints Virginia & Ambinder, LLP as class counsel; and it is further

ORDERED that that branch of the motion to file the Notice of Class Action Lawsuit and Publication Order is granted; and it is further

ORDERED that, within 20 days after this decision and order is uploaded to NYSCEF, counsel for plaintiffs shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being added pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [ww.nycourts.gov/supctmanh]).

This constitutes the decision and order of this court.

April 11, 2023

HON. VERA L. SAUNDERS, JSC

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