

Konstantynovska v Friendly Home Care Inc.

2023 NY Slip Op 33694(U)

October 5, 2023

Supreme Court, Kings County

Docket Number: Index No. 523015/17

Judge: Wavny Toussaint

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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 5th day of October, 2023.

P R E S E N T:

HON. WAVNY TOUSSAINT,

Justice.

-----X
LYUDMYLA KONSTANTYNOVSKA, individually and on behalf of all other persons similarly situated who were employed by FRIENDLY HOME CARE INC.,

Plaintiff,

Index No.: 523015/17

-against-

DECISION AND ORDER

Mot. Seq. #05

FRIENDLY HOME CARE INC.,

Defendant.

-----X
The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) _____

145-170

Opposing Affidavits (Affirmations) _____

173-182

Reply Affidavits (Affirmations) _____

187-189

Upon the foregoing papers in this action to recover wages and benefits, plaintiff Lyudmyla Konstantynovska, individually and on behalf of all other persons similarly situated who were employed by Friendly Home Care Inc.

(hereinafter plaintiff or individually Konstantynovska), moves (Seq. 05), for an order: (1) pursuant to CPLR 602 (a), consolidating the instant action (Action No. 1) with *Boris Pustilnik, et al. v Sincere Care Agency, Inc., et al.* under New York County Supreme Court Index No. 154444/18 (“Action No. 2”), which alleges similar violations of the New York Labor Law (hereinafter NYLL), New York Public Health Law (hereinafter PHL) Section 3614-c, and Section 6-109 of the Administrative Code of the City of New York (Admin. Code), and (2) pursuant to CPLR 3025 (b), granting plaintiff leave to amend the complaint to add non-party Eagle Eye FV, Inc. (hereinafter EEFV) as a defendant, and to amend the caption in this action accordingly (*see* proposed Second Amended Class Action Complaint at NYSCEF Doc No. 168).¹ Defendant Friendly Home Care Inc. (hereinafter FHC) opposes the motion.

Background

Action No. 1

On April 14, 2017, Konstantynovska, a home health aide (hereinafter HHA), commenced the instant action on behalf of herself and a putative class of FHC employees, to recover wages and benefits pursuant to NYLL for a period of time starting in April 2011 through the present.² The complaint alleges that:

¹ Unless otherwise indicated, all references to NYSCEF filing numbers are to those documents filed in Action No. 1.

² For sake of comparison, the complaint in Action No. 1 was filed on behalf of a putative class consisting of:

“[b]eginning in April 2011 and, upon information and belief, continuing through the present, [d]efendant has maintained a policy and practice of requiring [p]laintiffs to regularly work in excess of ten hours per day, without providing proper hourly compensation for all hours worked, or overtime compensation for all hours worked in excess of 40 hours a week in any given week, and ‘spread of hours’ compensation” (*id.*, ¶ 3).

The complaint further alleges that Konstantynovska was employed by FHC as an HHA from approximately June 18, 2014 through January 1, 2015, during which time she provided “personal care services” to FHC’s “ailing elderly clients” (*id.*, ¶¶ 17-18).

On December 7, 2017, FHC interposed an answer. Thereafter, the parties engaged in pre-certification discovery, including a deposition of Konstantynovska, which has since been completed. On April 12, 2021, Konstantynovska filed a motion for class certification and for leave to file an amended complaint. By decision and order dated March 17, 2022 (hereinafter the Prior Order), this Court granted Konstantynovska’s motion for class certification and certified a class consisting of:

“each and every person who is a citizen of the State of New York and who is or was employed by Defendant [FHC] to provide personal care, assistance, health-related tasks and other home care services to Defendant’s clients [at their residences] within the State of New York . . . from April 2011 up to the present (the ‘Putative Class’)” (NYSCEF Doc No. 147, ¶¶ 1, 7, 10).

Konstantynovska seeks to “recover wages and benefits” to which she and the proposed class were “statutorily and contractually entitled to receive pursuant to [NYLL]” (*id.*, ¶ 2). Specifically, the complaint seeks “minimum wages, overtime compensation, ‘spread of hours’ compensation, reimbursement for business expenses borne for the benefit and convenience of the [d]efendant, as well as damages arising from [d]efendant’s breach of contract” (*id.*, ¶ 4).

“[a]ll individuals who performed work on behalf of Friendly Home Care, Inc., as non-residential home health aides and/or personal care assistants in the State of New York at any time between April 14, 2011 and today” (the “Class”; (NYSCEF Doc. No. 90, at 22). In its Prior Order, this Court also granted Konstantynovska leave to file an amended complaint, deeming the proposed first amended complaint served as of this Court’s order with notice of entry.³ On April 25, 2022, FHC filed an answer to the First Amended Complaint.

On July 27, 2022, FHC moved (Seq. 04) to compel certain members of the Class to arbitrate their claims and to sever the claims of those members from the Class.⁴ By decision and order dated February 15, 2023, this Court denied FHC’s motion to, *inter alia*, compel arbitration in its entirety. To date, no post-class certification discovery has transpired as FHC has moved to stay this action pending the outcome of its appeal of this Court’s Prior Order to the Appellate Division, Second Department (*see* Appellate Docket No. 2023-02196, NYSCEF Doc No. 3).⁵

³ On April 14, 2022, FHC filed a Notice of Appeal with respect to this court’s decision and order (in Seq. 02) granting plaintiff’s motion for class certification (NYSCEF Doc. No. 93) (Index No. 2022-02946, 2d Dept), which is fully briefed.

⁴ FHC previously moved (in Seq. 03) for the same relief (NYSCEF Doc. Nos. 97-106), but the motion was withdrawn without prejudice to re-file, per stipulation dated July 19, 2022 (NYSCEF Doc. No. 110), to include FHC’s memorandum of law in support of its motion, which was inadvertently omitted.

⁵ On February 27, 2023, FHC filed a Notice of Appeal with the Appellate Division, Second Department, with respect to this court’s decision and order (in Seq. 04) regarding FHC’s motion to compel arbitration (NYSCEF Doc. No. 142) (Docket No. 2023-02196), which is fully briefed.

Action No. 2

On May 11, 2018, Boris Pustilnik (Pustilnik), also an HHA, commenced an action in New York County Supreme Court on behalf of himself and a putative class consisting of:

“each and every person who is a citizen of the State of New York and who is or was employed by Defendants [Sincere Care Agency, Inc. (SCA) and Advance Home Care LLC d/b/a Sincere Care (AHC), and/or other affiliated entities] to provide personal care, assistance, health-related tasks and other home care services to Defendants’ clients [at their residences] within the State of New York . . . from April 2012 up to the present (the ‘Putative Class’)” (NY County Index No. 154444/18, NYSCEF Doc. No. 1, ¶¶ 1, 3-4, 6-7, 25).

Pustilnik seeks to “recover wages and benefits” to which he and the proposed class were “statutorily and contractually entitled to receive pursuant to [NYLL]” (*id.*, ¶ 2). Specifically, the complaint seeks “minimum wages, overtime compensation, ‘spread of hours’ compensation, as well as damages arising from [d]efendants’ breach of contract” (*id.*, ¶ 4). The complaint alleges that:

“[b]eginning in April 2012 and, upon information and belief, continuing through the present, [d]efendants have maintained a policy and practice of requiring [p]laintiffs to regularly work in excess of ten hours per day, without providing the proper hourly compensation for all hours worked, including failing to pay the lawful minimum wage rate, overtime compensation for all hours worked in excess of 40 hours in any given week, and ‘spread of hours’ compensation” (*id.*, ¶ 3).

On November 5, 2019, SCA and AHC interposed an answer. On February 7, 2020, Pustilnik moved to compel SCA and AHC to produce pre-class certification

discovery, and to extend the pre-certification discovery deadline and the deadline to file the note of issue. By decision and order dated September 21, 2020, Justice Frank P. Nervo (Justice Nervo) granted Pustilnik's motion in its entirety, extending the pre-certification discovery deadline to January 29, 2021 and the note of issue date to April 30, 2021 (*see* NY County Index No. 154444/18, NYSCEF Doc. No. 48). On May 14, 2021, SCA and AHC moved to extend the deadline to complete pre-class certification discovery to June 30, 2021, or, alternatively, to compel Pustilnik's deposition. Similarly on June 14, 2021, Pustilnik again moved to extend the deadline to move for class certification and extend the note of issue date. The motions were unopposed. By decision and order dated April 27, 2022, Justice Nervo extended the deadline to move for class certification to June 30, 2023 and extended the note of issue date to December 29, 2023 (*see* NY County Index No. 154444/18, NYSCEF Doc. Nos. 65-66).

On December 29, 2022, SCA and AHC moved to dismiss claims of putative class members employed by SCA on or after April 1, 2017, or, alternatively to compel arbitration of said claims, and to stay the action as it pertains to those putative class members. Prior to the determination of that motion, Pustilnik moved, via order to show cause, to stay the action pending a decision by this Court in Action No. 1 regarding the instant motion for consolidation. The order to show cause was signed on April 11, 2023, and the motion (Seq. 05) was returnable May 15, 2023 (*see* NY County Index No. 154444/18, NYSCEF Doc. Nos. 141-142). On May 4, 2023, SCA and AHC again moved to compel Pustilnik to appear for a deposition.

However, by decision and order dated June 13, 2023, Justice Nervo granted Pustilnik's motion seeking a stay and stayed Action No. 2 pending a determination of the instant motion. In his June 13th decision and order, Justice Nervo also noted the following:

“The claims asserted in this matter [Action No. 2] and *Konstantynovska* [Action No. 1] are nearly identical, and address the same questions of both fact and law. The motion filed by the instant defendant to compel arbitration in this matter [Action No. 2] is substantively identical to that motion filed by the defendant in *Konstantynovska* [Action No. 1]. Furthermore, defendants' own evidence submitted on these motions to compel, namely the employee handbook acknowledgements relied upon by defendants to compel arbitration, indicate that the defendants in both matters are, effectively, a single entity employing the plaintiffs in both matter[s] see e.g., submissions by [SCA] of handbook acknowledgments from employees working for [FHC] and [FHC's] submissions of handbook acknowledgments from employees working for [SCA]). Further supporting this inference, it appears defendants in both matters share corporate officers, directors, and owners and are represented by the same counsel.” (NY County Index No. 154444/18, NYSCEF Doc. No. 184, at 2). (citation omitted)

Plaintiff's Motion to Consolidate Pursuant to CPLR 602(a)

Plaintiff now moves (Seq. 05), in Action No. 1, for an order, pursuant to CPLR 602 (a), to consolidate Actions No. 1 and 2 on the grounds that “[b]oth actions seek the same relief for the same class members, all of whom performed similar work as HHAs and allege the same underlying facts and violations of [NYLL], [PHL] § 3614-c and [Admin. Code] § 6-109.” To this end, plaintiff contends that FHC, SCA, and AHC are joint employers and/or a single integrated enterprise “and

the relief sought in one action would constitute an offset to that sought in the second.” Plaintiff contends further that the “[p]laintiffs in each action would be subsumed within each action’s class of HHAs if the actions were to proceed separately, thus, consolidating the actions is the most efficient way to proceed.” Additionally, plaintiff argues that “[t]he two actions are not so far apart in their stages of discovery that it would prejudice any party.” Essentially, plaintiff argues that no post-class certification discovery, as related to the merits, has transpired in either action for the varied reasons discussed above. Moreover, the discovery needed in both actions is identical, as are the firms representing the parties, and “[c]onsolidation of the two actions will promote judicial economy, avoid duplication of effort and expense, and avoid the possibility of conflicting rulings.”

Defendant’s Opposition to Plaintiff’s CPLR 602(a) Request for Relief

FHC, in opposition, contends that consolidation is not appropriate because the “two actions here do not arise from the same transaction or occurrence” as the allegations are “by two different individuals who worked for two different home health care agencies” and a motion to consolidate cannot be maintained against “two separate employers.” FHC also contends that since “[p]laintiff has not sought to amend the complaint in [Action No. 1] to hold [these defendants] jointly and severally liable with FHC[,]” consolidation “will not alter the liability . . . of [these defendants]” and, thus, the two actions should not be consolidated. FHC notes that plaintiff’s allegations supporting consolidation “are either incorrect, taken out of context or do not support a claim of a single integrated enterprise.” Specifically,

it contends that the mere “overlap between two entities” as to corporate officers, or the co-ownership of a piece of property, is insufficient “to establish a single integrated enterprise” and does not indicate that FHC has “operational, managerial or financial control” over the named defendants in Action No. 2.

Further, FHC contends that it is a separate legal entity with its own corporate structure and operations, which is fatal to plaintiff’s single integrated enterprise theory and consolidation request. FHC also asserts that to the extent class members in Action No. 1 signed documents related to SCA and putative class members in Action No. 2 signed documents referencing FHC, “these documents represent a fraction of the class members in these two actions[,] approximately one and a half percent (81/4,865) [and does not] show that either FHC or [SCA] exercised managerial, operational or financial control over each other.”

Finally, FHC contends that it will be prejudiced as the two actions “are at markedly different procedural stages [of discovery] and consolidation would result in undue delay in the resolution of either matter.” Specifically, that “[p]re-class action discovery in [Action No. 1] has been completed and the Court has certified this action as a class action [and] [t]he parties have begun merits discovery[,]” whereas, in Action No. 2, “Pustilnik’s deposition is outstanding and no class has been certified and . . . no motion for class certification has even been filed.” For the above reasons, FHC contends that the motion to consolidate should be denied.

Plaintiff's Reply

In reply, plaintiff asserts that the actions should be consolidated because they arise from the same transaction or occurrence and the plaintiffs in each action seek identical relief from the same defendants as joint employers. To that end, plaintiff cites to evidence submitted indicating that “FHC, SCA, and EEFV share corporate officers, directors, owners, and/or shareholders, share a common business purpose, share corporate documents (including employer documents) and maintain common control, oversight and direction over the work performed by the same class members, including employment and payroll practices” (see NYSCEF Doc Nos. 151-167) and claim that FHC did not submit any evidence to the contrary with the exception of a self-serving affidavit. Further, plaintiff argues that the issues of law and fact are identical in both actions as both actions contain the same claims for unpaid wages, which warrants consolidation. Finally, plaintiff argues that FHC failed to demonstrate any prejudice of a substantial right because the only prejudice claimed is that the actions are at different procedural stages, whereupon any remaining discovery can be conducted once the actions are consolidated.

Plaintiff's Motion for Leave to Amend the Complaint

Plaintiff also moves, in Action No. 1, for an order, pursuant to CPLR 3025 (b), to amend the complaint to add EEFV as a defendant on the grounds that EEFV “employed and/or jointly employed” members of the Class and that “FHC does not lose any ‘special right’ through the addition of EEFV.” Plaintiff argues “[t]he amendment will not change the underlying factual allegations and the causes of

action will remain the same, i.e.[.], claims seeking unpaid wages, overtime, spread of hours, and prevailing wages and benefits pursuant to [NYLL], [PHL] § 3614-c and [Admin. Code] § 6-109.” Additionally, plaintiff argues that there is no prejudice to FHC because “FHC has not undergone any change in position, or relinquished any right, in reliance upon the pleading sought to be amended as it has had knowledge that EEJV is a proper party from the beginning of this lawsuit.” Moreover, plaintiff contends that “[a]mending the [c]omplaint so that [p]laintiffs may recover unpaid wages from all alleged employers will not delay resolution of this case [and], [c]onversely, denial of the opportunity to add EEJV as a defendant will hinder or completely preclude [p]laintiffs from properly investigating their allegations and recovering all alleged unpaid wages.” For the above reasons, plaintiff also requests leave to amend the caption of this action to reflect the inclusion of the names of all defendants which may be held liable for damages to the Class.

Defendant’s Opposition to Plaintiff’s Motion to Amend

In opposition, FHC contends that plaintiff’s motion to amend should be denied because the proposed amendment is devoid of merit, amending the complaint is highly prejudicial, and any relation back to the date of the original complaint is premature and improper. As an initial matter, FHC contends that Konstantynovska, “[a]fter six years of litigation[,] seeks to amend the complaint to allege that FHC and EEJV jointly employed her” although she “was [only] employed by FHC from in or about June 2014 through in or about January 2015” and EEJV “did not obtain its license to operate a home health care agency until more than

two years (2/2/2017) after [she] left the employ of FHC.” Accordingly, FHC contends, amendment is improper because it would be “impossible for [EEFV] to have employed [Konstantynovska] either directly or jointly with FHC.” It also says that amendment is improper because, “at the time this action was filed, April 14, 2017, [EEFV] was not operating as a home health care agency and did not employ any HHAs[,] [t]hus, when the action was initially commenced [against] FHC it could not include [EEFV].” FHC again contends that “the facts that purportedly give rise to this amendment are either incorrect and/or do not support a claim of [a] single integrated enterprise” such that “FHC and [EEFV] shared operational, managerial or financial control” based upon plaintiff’s false assertions that SCA and EEFV operated out of the same address; that there is a slight overlap of corporate officers with respect to one individual; and that only two percent (31/1517) of the handbook acknowledgments submitted by FHC reference EEFV, which, notably “were dated well after this action was initiated.”

Further, FHC contends that the motion to amend should be denied because amendment would be highly prejudicial to FHC as the action has been pending for six years, over which time all pre-class certification discovery has been completed. If EEFV were to be added as a party, discovery would essentially cause the litigation to start over and the parties would be forced to “undergo extensive discovery on the issue of [a] single integrated enterprise.”

Plaintiff's Reply

In reply, plaintiff contends that it has set forth sufficient evidence demonstrating that EEFV should be added as a defendant because it is a joint employer with FHC and SCA and is liable for failing to pay lawfully owed wages. Plaintiff asserts that it is irrelevant that EEFV did not exist until after Konstantynovska was no longer employed by FHC since the certified class in Action No. 1 consists of other individuals who performed work for FHC “at any time *between April 14, 2011 and today*[,]” and Konstantynovska represents all class members, including those whose employment commenced after hers ended. Further, plaintiff argues that FHC has not demonstrated any prejudice or surprise from plaintiff’s proposed amendment or that plaintiff’s amendment is devoid of merit. Plaintiff argues that any potential prejudice due to the fact that the two actions are in different phases of discovery can be cured post-consolidation.

“Relation Back” Doctrine

With respect to the motion to amend, plaintiff asserts that the Statute of Limitations should relate back to the filing of the original complaint in Action No. 1, pursuant to CPLR 203 (f) on the grounds that: (1) both claims arose out of the same conduct, transaction, or occurrence; (2) EEFV is united in interest with FHC and can be charged with notice of the institution of Action No. 1 to avoid the prejudice of defending the action on the merits due to the overlap in corporate officers; and (3) for the aforementioned reason, EEFV knew or should have known that the action would have been brought against it as well. In support of its argument,

plaintiff contends “the claims alleged against EEFV and SCA are identical to those alleged against FHC in the original [c]omplaint and [the first amended complaint,]” which satisfies the first prong of the standard for relation back. Second, plaintiff argues, “there is a unity of interest between FHC, SCA and EEFV” as “FHC, SCA and EEFV employed and/or jointly employed [p]laintiffs, and [p]laintiffs allege identical claims for unpaid wages against FHC, SCA and EEFV[,]” which “would [hold them] jointly and severally liable for their failure to pay [p]laintiffs proper wages.” Further, plaintiff argues, FHC, SCA and EEFV all share executives and shareholders, have the same [corporate] policies and employment handbooks, each have possession of the other corporations’ documents[,] [and] EEFV and FHC also have the same address[,]” which makes them “united in interest [such that] a judgment against one will similarly affect the others.” Third, plaintiff argues, “SCA and EEFV ‘knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties,’ this action would have been brought against them as well” because “an identical action [Action No. 2] was already brought against SCA.” Finally, Plaintiff argues there is no tactical advantage to be gained, rather, “[p]laintiffs simply seek to correct their mistake and consolidate this action with [Action No. 2], amend the complaint to add EEFV, and amend the caption in this action to reflect all [d]efendants.”

In opposition, FHC asserts the Court should defer any decision on this issue until after EEFV is served and give it an opportunity to respond to the complaint as a matter of due process. As to the first prong, FHC repeats its assertion that

Konstantynovska cannot establish that the new claims arose out of the same transaction or occurrence because EEFV was not in operation until after her employment with FHC ended. Thus, FHC contends any claims against EEFV “are separate and distinct from the claims asserted in the initial complaint on April 14, 2017.” With respect to the second prong, FHC contends “the issue of joint employer and single integrated enterprise is highly disputed and the record before this court fails to establish, as a matter of law, that FHC and [EEFV] are vicariously liable for the acts of each other[,]” in order to satisfy the united in interest requirement. With respect to the third prong, again, FHC contends EEFV was not in operation at the time of Konstantynovska’s employment with FHC, nor was it in operation when Action No. 1 was initiated, and that it did not “obtain its license to operate as a home health care agency until more than two years [later].”

In reply, plaintiff asserts that because the claims in the proposed Second Amended Class Action Complaint are identical to those alleged in the original and first amended complaints, the proposed Second Amended Class Action Complaint should relate back to the filing of the original complaint. Plaintiff again argues that FHC and EEFV are joint employers or a single enterprise and that FHC fails to demonstrate that plaintiff’s allegations lack a presumption of validity. Further, plaintiff argues that EEFV would not have known about Action No. 1 until after the lawsuit was filed because it did not begin providing home health care services until sometime thereafter, but notice can be imputed to EEFV based upon its shared corporate officers. Plaintiff claims that it only recently discovered evidence of

EEFV's liability due to SCA's motion to compel arbitration in Action No. 2 and, as such, this "lack of this information and discovery 'interfered with plaintiff's ability to name all of the proper defendants' in [its] initial complaint" (*quoting Teodorescu v Resnick & Binder, P.C.*, 29 Misc 3d 1119, 1120 [Sup Ct, Kings County 2010, Kurtz, J.]).

Discussion

Plaintiff's Motion to Consolidate

CPLR 602 (a) provides that "[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order . . . the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." "A motion for consolidation is addressed to the sound discretion of the court, and absent a showing of substantial prejudice by the party opposing the motion, consolidation is proper where there are common questions of law and fact" (*RCN Constr. Corp. v Fleet Bank, N.A.*, 34 AD3d 776, 777 [2d Dep't 2006]; also see *Disa Realty, Inc. v Rao*, 198 AD3d 869, 871-872 [2d Dep't 2021]; *Viafax Corp. v Citigroup Leasing, Inc.*, 54 AD3d 846, 849 [2d Dep't 2008]). Further, "[a] motion to consolidate should be granted absent a showing of prejudice to a substantial right by a party opposing the motion" (*Hanover Ins. Group v Mezansky*, 105 AD3d 1000, 1001 [2013]; *Disa Realty*, 198 AD3d at 871; *Viafax*, 54 AD3d at 849).

Here, consolidation is warranted because Pustilnik, on behalf of himself and the putative class in Action No. 2, seeks the exact same relief as in Action No. 1 –

namely, unpaid wages, overtime compensation, “spread of hours” compensation, and prevailing wages and benefits for work they performed pursuant to the NYLL, PHL 3614-c, and Admin. Code § 6-109. The pleadings and relief sought in both actions create common questions of law and fact justifying consolidation, which “will avoid unnecessary duplication of trials, save unnecessary costs and expenses, and prevent an injustice which would result from divergent decisions based on the same facts” (*Viafax, supra*).

The Court further agrees with the findings of Justice Nervo in his June 13, 2023 Decision and Order, in granting a stay of the New York County *Pustilnik* action, pending a determination of this consolidation motion. That court ruled there are “overlapping issues of law and fact” in the two actions and “that the defendants in both matters are, effectively, a single entity employing the plaintiffs in both matter[s,]” (NY County Index No. 154444/18, NYSCEF Doc. No. 184, at 2). The fact that “defendants in both matters share corporate officers, directors, and owners [who] are represented by the same counsel” indicates a unity of interest (*id.*).

The evidence proffered by plaintiff demonstrating the similarity of corporate officers between FHC, SCA, and AHC further demonstrates a lack of prejudice with respect to consolidation. FHC has failed to demonstrate how it can possibly be prejudiced by consolidation of a seemingly duplicative putative wage and benefit class action lawsuit against seemingly related defendants. Indeed, SCA and AHC would be prejudiced if FHC is permitted to continue litigating Action No. 1 after joinder of issue and pre-class certification discovery. At this juncture, the phases

of discovery in both actions are not that different such that the parties would be prejudiced by consolidation because this aspect can be addressed by setting forth a schedule for post-consolidation discovery (*Zupich v Flushing Hosp. & Med. Ctr.*, 156 AD2d 677, 678 [2d Dep't 1989]). As such, plaintiff's motion to consolidate the two actions is granted.

Plaintiff's Motion for Leave to Amend the Complaint

CPLR 3025 (b) states, in relevant part, that “[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court.” “In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit” (*Catnap, LLC v Cammeby's Mgt. Co., LLC*, 170 AD3d 1103, 1105 [2019], quoting *Mannino v Wells Fargo Home Mtge., Inc.*, 155 AD3d 860, 862 [2017]). “The party opposing the application has the burden of establishing prejudice, which requires a showing that the party has been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position” (*JDI Display Am., Inc. v Jaco Elecs., Inc.*, 188 AD3d 844, 846 [2020] [alterations in original] [internal quotation marks and citation omitted]). “The decision whether to allow an amendment is generally committed to the court's sound discretion” (*Crescimanni v Trovato*, 162 AD3d 849, 852 [2018]).

Here, granting leave to amend the complaint to add EEFV as a party permits an impermissible end run around the procedural and due process rights of EEFV,

particularly with respect to service (*Nossov v Hunter Mtn.*, 185 AD3d 948, 949 [2d Dep’t 2020]). Additionally, leave to amend must also be denied on the merits. As FHC contends, EEFV was not operative at the time of Konstantynovska’s employment with FHC from in or about June 2014 through in or about January 2015. EEFV did not obtain its license to operate a home health care agency until February 2, 2017, more than two years after Konstantynovska left the employ of FHC. As such, Konstantynovska was no longer employed by FHC when EEFV was formed and cannot prove that her claims against EEFV arose out of the same set of facts or transaction or occurrence.

Notwithstanding that issue, plaintiff also failed to sufficiently allege or evidence facts that would support a finding of a single employer relationship between FHC and EEFV, pursuant to the single employer doctrine (*Lockwood v CBS Corp.*, 2023 NY Slip Op. 04585, *2 [2d Dep’t 2023]). The record is devoid of any facts which establish an interrelation of operations, centralized control of labor relations, common management and common ownership or financial control of the two entities (*id.*) Most critically, plaintiff does not provide any detail to demonstrate there was “centralized control of labor” between FHC and EEFV (*id.*). Similarly, the two percent of handbook acknowledgements that refer to EEFV are *de minimis* and immaterial. Additionally, such an amendment would be highly prejudicial to EEFV because it would require significant discovery and new class certification. Accordingly, plaintiff’s motion for leave to amend the complaint to add EEFV as a party is denied.

The “Relation Back” Doctrine

With respect to the relation back doctrine, CPLR 203 (f) states that “[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.” Thus, the Appellate Division, Second Department has long held that:

“In order to establish the applicability of the relation-back doctrine, the plaintiff must demonstrate that: (1) the causes of action arose out of the same conduct, transaction, or occurrence; (2) the new party is united in interest with one or more of the original defendants, and by reason of that relationship can be charged with such notice of the institution of the action that he or she will not be prejudiced in maintaining his or her defense on the merits; and (3) the new defendant knew or should have known that, but for a mistake by the plaintiff as to the identify of the proper parties, the action would have been commenced against him or her as well” (*Sanders v Guida*, 213 AD3d 712, 714-15 [2023], citing *Buran v Coupal*, 87 NY2d 173, 178 [1995]).

“The linchpin of the relation-back doctrine is whether the new defendant had notice within the applicable limitations period” (*id.* at 715 [internal quotation marks and citation omitted]).

While the relation back aspect is now academic in light of this Court’s denial of plaintiff’s motion for leave to amend, the Court will, nonetheless, discuss the parties’ arguments with respect to this issue. With respect to the first prong, as previously noted, Konstantynovska was no longer employed by FHC when EEFV

came into existence, so the causes of action that would be asserted against EEFV could not have possibly arose out of the same conduct, transaction, or occurrence. With respect to the second prong, as discussed *supra*, plaintiff failed to submit sufficient evidence to show that EEFV is or was truly united in interest with FHC or SCA as contemplated by that legal term of art so as to give EEFV sufficient notice of Action No. 1, particularly since EEFV had only obtained its home health care license approximately two months prior to the commencement of the instant litigation (*Montalvo v Madjek, Inc.*, 131 AD3d 678, 680 [2015] [holding that the fact that the president of a corporation is also a member of a limited liability company does not make the corporation and the LLC united in interest]).

As to the third prong, although there is an indicia of an overlap between EEFV and the other defendant entities, because Konstantynovska's employment with FHC ended prior to the formation of EEFV, and EEFV did not obtain its license to operate as a home health care agency until approximately two years after Konstantynovska's employment ended, it was not possible for EEFV to know that, in April 2017, two months after it obtained its license, that it could be held responsible for actions or inactions that transpired two years prior to its formation. This Court notes that plaintiff claims to have learned of the existence of EEFV based upon documents submitted in support of the motion to compel arbitration, but simultaneously claims to know that EEFV should have been a defendant from the start of the instant litigation, which begs the question as to why plaintiff did not seek to add EEFV when she previously was granted leave to amend the complaint.

The Court has considered the parties' remaining contentions and finds them to be without merit.

Conclusion

Accordingly, plaintiff's motion (Seq. 05) is resolved as follows; and it is hereby

ORDERED that part of the motion for consolidation is granted to the extent the above-captioned action is consolidated in this Court with *Boris Pustilnik, et al. v Sincere Care Agency, Inc., et al.*, NY County Index No. 154444/18 under Kings County Index No. 523015/17; and the consolidated action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
LYUDMYLA KONSTANTYNOVSKA, individually and on behalf of all other persons similarly situated who were employed by FRIENDLY HOME CARE INC., and BORIS PUSTILNIK, individually and on behalf of all other persons similarly situated who were employed by SINCERE CARE AGENCY, INC. and ADVANCE HOME CARE, LLC d/b/a SINCERE CARE, along with other affiliated entities,
523015/2017

Index No.:

Plaintiffs,

-against-

FRIENDLY HOME CARE INC., SINCERE CARE AGENCY, INC. and ADVANCE HOME CARE, LLC d/b/a SINCERE CARE, and/or any other related entities,

Defendants.

-----X

And it is further

ORDERED that the Clerk of the Supreme Court, New York County, shall transfer the papers on file under New York County Index No. 154444/18 to the Clerk of Kings County upon service of a certified copy of this order and payment of the appropriate fee, if any; and it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that plaintiff movant is directed to serve a copy of this order with notice of entry on the Kings County Clerk, who shall consolidate the papers in the actions hereby consolidated and shall mark the records to reflect the consolidation; and it is further

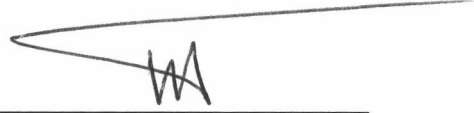
ORDERED that plaintiff movant is directed to serve a copy of this order with notice of entry upon the Clerk of the Trial Support Office, who is hereby directed to mark the Court's records to reflect the consolidation; and it is further

ORDERED that that part of the motion for leave to amend the complaint herein to add non-party Eagle Eye FV, Inc. as a defendant is denied; and it is further

ORDERED that counsel are directed to appear for a status conference in the Central Compliance Part on November 2, 2023; and it is further

ORDERED that this constitutes the decision and order of this Court.

ENTER,



J.S.C.

**HON. WAVNY TOUSSAINT
J.S.C.**

2023 OCT 13 A 9:28
KINGS COUNTY CLERK
FILED