SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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XIAO HE HUANG ZHANG,

Plaintiff,

- v -

VMC EAST COAST LLC,ANH MANAGEMENT & CONSULTING LLC,K & F TRAVEL & TOUR INC, MARK TRAN, GLENN LEDET, ANH T DUONG, YAYI GUO, KENT KWAN

Defendant.

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INDEX NO. 656032/2020

MOTION DATE 03/21/2024

MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 99, 100, 101, 102, 103, 104, 105, 106, 107, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 160

were read on this motion to/for ORDER MAINTAIN CLASS ACTION.

Plaintiff's motion for class certification is denied.

Background

Plaintiff commenced this Labor Law action based on defendants' alleged failure to satisfy the minimum wage requirements, overtime rates and earned wages as well as other employer obligations. She insists that defendant did not pay her additional compensation for hours worked in excess of forty hours per week as well as the spread of hours for days in which shifts lasted longer than ten hours. In the complaint, she contends that she worked as a tour guide for defendants from June 1, 2015 through November 27, 2016. Defendants operated a tour bus company that would take passengers from Chinatown and Flushing to the Mohegan Sun casino in Connecticut.

In this motion, plaintiff moves for class certification.

Class Certification

"The determination whether plaintiffs have a cause that may be asserted as a class action turns on the application of CPLR 901. That section provides that one or more members of a class may sue or be sued as representative parties on behalf of all where five factors – sometimes characterized as numerosity, commonality, typicality, adequacy of representation and superiority are met" (*Maddicks v Big City Props., LLC*, 34 NY3d 116, 123, 114 NYS3d 1 [2019] [internal quotations and citation omitted]).

"Courts have recognized that the criteria set forth in CPLR 901(a) should be broadly construed not only because of the general command for liberal construction of all CPLR sections, but also because it is apparent that the Legislature intended article 9 to be a liberal substitute for the narrow class action legislation which preceded it" (*City of New York v Maul*, 14 NY3d 499, 509, 903 NYS2d 304 [2010]).

The Court observes, as an initial matter, that this motion was filed quite late in the litigation (it was filed well after the note of issue was filed). Typically, motions for class certification are made within 60 days after defendant's time to serve an answer has expired pursuant to CPLR 902 although here, the parties stipulated to extend the time to make this motion for years and years. The central problem with that timing, as will be discussed in greater detail below, is that because plaintiff has already filed a note of issue, she has certified that discovery is complete.

Curiously, plaintiff certified that discovery was complete before seeking to certify a class and now claims she does not know precisely who is in that proposed class. That renders plaintiff's assertions that she does not know the exact names or a total amount of possible class

members as a glaring deficiency. This is not a situation in which discovery is still proceeding and plaintiff will have a chance to send discovery demands about the class members.

Numerosity

The Court finds that plaintiff failed to meet her burden to establish the numerosity requirement.

Plaintiff contends that the number of potential class members is "unknown" but that she speculates that there are about 20 tour guides in her affidavit and that records show that there were at least 35 employees. The complaint contends that there were "around 20-30 employees at VMC" (NYSCEF Doc. No. 127, ¶ 35). Defendants claim that this does not satisfy the standard for numerosity. Plaintiff's affidavit offers only first names (she explains that these are English nicknames) for about 20 people (NYSCEF Doc. No. 101, ¶ 32). One of these appears to be *defendant* Yvonne Guo (whom this Court recently dismissed from the case). Defendants correctly question how a member of plaintiff's purported class could also be a defendant, and therefore, also plaintiff's employer under the Labor Law.

Plaintiff did not come close to meeting her burden to show the requisite numerosity. At this stage of the case, long after discovery has been completed, plaintiff can only speculate as to how many fellow tour guides would be part of a purported class. Even if there were 20, that would not satisfy the requirement for numerosity (*Klakis v Nationwide Leisure Corp.*, 73 AD2d 521, 521, 422 NYS2d 407 [1st Dept 1979] [finding that 21 individuals were not sufficient for the numerosity requirement]).

Moreover, plaintiff did not submit sufficient evidence to show that these tour guides were subject to the same purported Labor Law violations detailed in this complaint. Simply observing

that there were other tour guides and speculating that they received the same treatment is not sufficient. Plaintiff did not attach any current affidavits from other potential class members. Instead, she included a single affidavit from another tour guide from more than *seven years ago* that was filed in support of a separate motion for class certification in federal court (NYSCEF Doc. No. 102). That case later settled (NYSCEF Doc. No. 129).

Plaintiff's reply makes it clear that she failed to establish the numerosity requirement. She claims that "although the precise number of potential plaintiffs is still unknown, it is reasonable to infer that the number exceeds forty (40) employees who were working for and received pay from Defendants for their work as tour guides or other positions, since the tour guides just for 2016 were reportedly approximately about 35 employees" (NYSCEF Doc. No. 160 at 8). At this stage of the case, plaintiff should not be "inferring" or "guessing"—plaintiff should know with a reasonable degree of certainty the number of proposed class members as discovery is closed. To be sure, plaintiff need not know a precise number. But plaintiff only offers a vague guess on these papers—that is not sufficient.

Commonality

"[C]ommonality cannot be determined by any 'mechanical test' and that the fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action. Rather, it is predominance, not identity or unanimity, that is the linchpin of commonality" (*Maul,* 14 NY3d at 514). In considering a motion for class certification, a Court is "not expressing an opinion on the merits of plaintiffs' causes of action." (*id.*).

Defendants contend that the vast majority of the potential class members signed an independent contractor's agreement and includes copies of those agreements (NYSCEF Doc.

Nos. 134-154). They observe that each of these agreements requires disputes to be handled in arbitration before the American Arbitration Association ("AAA") (*e.g.*, NYSCEF Doc. No. 147, ¶ 19). These agreements also all contained a class action waiver (*id*. ¶ 20).

Plaintiff argues that these agreements are invalid and that these individuals should not be considered as independent contractors despite signing an agreement that states they are independent contractors.

These independent contractor agreements also compel the Court to deny the motion as they raise serious questions about both numerosity and commonality of a potential class. Plaintiff did not attach any affidavits from these individuals, she appears to request (although not directly) that this Court issue, essentially, declaratory relief finding these arbitration/class action waiver agreements to be unenforceable as a matter of law.

But, of course, these individuals are not parties to this case and plaintiff did not sufficiently explain how this Court can render an opinion about the validity of agreements signed by non-parties. The Court cannot presume or speculate that these individuals would not want to go to arbitration. Moreover, these agreements suggest that these other individuals are not similarly situated to plaintiff (who apparently did not sign such an agreement). These independent contractor agreements contain both an arbitration clause and a waiver for class action claims. Whether or not such agreements are enforceable is besides the point- they suggest that there are unique questions of both law and fact that do not favor the certification of a class with plaintiff.

The Court also observes that under AAA's rules, questions of arbitrability and the "scope or validity of the arbitration agreement" are decided, in the first instance by the arbitrator (*WN Partner, LLC v Baltimore Orioles Ltd. Partnership*, 179 AD3d 14, 16, 112 NYS3d 68) [1st Dept

2019]). That means that, as defendants point out, if these individuals were made a part of a purported class, defendants would seek to send their claims to arbitration and an arbitrator would decide, in the first instance, about the validity of the arbitration clause. Presumably, there would also be significant litigation about the class action waiver (which of course would not involve plaintiff, who did not sign this type of agreement). Accordingly, the Court cannot conclude that these individuals should be considered towards either the numerosity or commonality factor.

Typicality

Given the arbitration clauses in the above-cited agreements (but not applicable to plaintiff), the Court observes that the claims for many of the purported class members lack the required typicality.

As the plaintiff must meet all of the factors under CPLR 901, the Court need not analyze the remaining factors or the CPLR 902 factors relevant to this type of motion.

Summary

As defendants point out, the majority of the identifiable class members signed agreements containing arbitration clauses and class waivers. And, at least on this record, there is no indication that any of them requested that a Court invalidate those agreements; in fact, plaintiff did not submit affidavits at all from any of the purported class members. Plus, plaintiff's affidavit only offers vague allegations about the size of the potential class while defendants stressed that at least three of plaintiff's purported class members already brought a similar case in federal court, which has settled.

The major question, then, is how many members of a proposed class remain? Plaintiff admits that she has no idea and suggests that the number is unknown. But plaintiff should know

by now as this is a post-note of issue case. Simply put, plaintiff failed to meet her burden to certify a class.

Accordingly, it is hereby

ORDERED that plaintiff's motion for class certification is denied.

3/25/2024
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE