SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SHLOMO S. HAGLER** **PART** **17**

Justice

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MARQUIS RICHARDSON, ROLAND RICHARDSON, YOMAIRA VASQUEZ and GARY ARRINGTON, Individually and On Behalf of All Putative Class Members,

Plaintiffs,

- v -

CE SOLUTIONS GROUP, LLC, MARVELOUS MARK TRANSPORTATION CO., INC., EDUARD SLININ, DORA SLININ, MARK NAHKBO, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., Jointly and Severally,

Defendants.

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INDEX NO. 653369/2021

MOTION DATE N/A, N/A

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 33, 34, 42, 43, 58, 59, 61, 62, 63, 66, 67, 71, 72, 73, 74

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 32, 35, 36

were read on this motion to DISMISS.

Motion sequence numbers 001 and 002 are consolidated for disposition.

Plaintiffs Marquis Richardson, Roland Richardson, Yomaira Vasquez, and Gary Arrington bring this action on behalf of themselves and similarly situated construction flaggers. Defendant Consolidated Edison Company of New York, Inc. (Con Edison) moves, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the verified class action complaint as against it (motion sequence number 001).

Defendants CE Solutions Group, LLC (CE Solutions), Eduard Slinin, and Dora Slinin (collectively, the CE Solutions defendants) move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint as against them (motion sequence number 002).

BACKGROUND

Plaintiffs allege that defendants failed to pay them and similarly situated construction flaggers minimum wages, overtime wages, and spread-of-hours wages; failed to pay all wages within seven days after the week in which they were earned; failed to provide proper wage notices and wage statements; and failed to pay prevailing wages for work performed on New York City and New York State public streets, roadways, and sidewalks pursuant to public works contracts (NYSCEF Doc No. 17, verified class action complaint ¶¶ 1-6).

The complaint alleges that CE Solutions "employ[s] flaggers and parking coordinators in the construction industry" (*id.*, ¶ 46). Defendants Eduard Slinin and Dora Slinin are allegedly owners, operators and managers of CE Solutions who set payroll practices (*id.*, ¶ 21). According to the complaint, defendant Mark Nakhbo ("Nakhbo") is an owner, operator and manager of defendant Marvelous Mark, who was responsible for setting the company's payroll practices (*id.*, ¶ 27).

Plaintiffs allege, upon information and belief, that CE Solutions entered into contracts with additional entities to provide flagging and parking services on Con Edison jobsites, including, but not limited to CE 217 LLC and CE Flagging Plus Corp. (*id.*, ¶ 49). In order to avoid paying plaintiffs and defendants' other flaggers minimum wages, overtime, and spread-of-hours premiums and other costs, CE Solutions allegedly "willfully misclassified" the flaggers as "independent contractors" (*id.*, ¶ 56). The complaint further alleges, upon information and belief, that plaintiffs and the other flaggers were "initially hired through CE Solutions and subsequently assigned to be paid by Marvelous Mark or another subcontractor" (*id.*, ¶ 57). According to the complaint, each subcontractor had between 20 and 75 employees at any given time (*id.*). Plaintiffs also allege, upon information and belief, that, in or around May 2016, the

CE Solutions defendants converted certain construction flagger employees to "independent contractors" and began paying them fifteen dollars ($15.00) per hour for all work for which they received compensation (*id.*, ¶ 58).

According to the complaint, the CE Solutions defendants entered into certain contracts with Con Edison to provide flagging work on New York City and New York State public streets, roadways, and sidewalks (the Con Edison contracts) (*id.*, ¶ 81). Plaintiffs allege, upon information and belief, that CE Solutions entered into certain Blanket Purchase Agreements (BPAs) or other contracts that require a flagperson to be present on all Con Edison jobsites (*id.*, ¶ 82). Plaintiffs allege, upon information and belief, that the BPAs or other contracts reference the "Con Edison Standard Terms and Conditions for Construction Contracts" (*id.*, ¶ 83). The "labor" provision of the standard terms provides that:

> "[w]here Contractor employs workers on sites where a permit to use or open a street . . . is required and New York City Administrative Code Section 19-142, or its successor (or a similar law, regulation, or code pertaining to sites locates of New York City ('Similar Local Law') is applicable . . . and that the prevailing wage for similar titles as established by the Comptroller of the City of New York pursuant to Section 220 of the New York State Labor Law (or as established by such other fiscal officer, as specified in Section 220 of the New York State Labor Law, for workers on permitted sites located outside of New York City to which a Similar Local Law applies) [shall be] paid to those so employed"

(*id.*). Nevertheless, upon information and belief, Con Edison allegedly paid CE Solutions at a set hourly rate or "unit price" per flagger, which was well below the applicable prevailing wage laborer rate (*id.*, ¶ 85). Plaintiffs further allege that Con Edison was required to obtain a street opening permit issued by the New York City Department of Transportation (DOT), which contained stipulations including "NONE BUT COMPETENT WORKERS, SKILLED IN THE WORK REQUIRED OF THEM, SHALL BE EMPLOYED ON [EXCAVATIONS]" and "THAT THE PREVAILING SCALE OF UNION WAGES SHALL BE THE PREVAILING

WAGE FOR SIMILAR TITLES AS ESTABLISHED BY THE FISCAL OFFICER PURSUANT TO SEC. TWO HUNDRED TWENTY OF THE LABOR LAW, PAID TO THOSE SO EMPLOYED" (*id.*, ¶ 91). The complaint alleges that a schedule containing prevailing rates of wages and supplemental benefits should have been annexed to the Con Edison contracts (*id.*, ¶ 93).

Plaintiffs further allege that CE Solutions, Marvelous Mark, and Con Edison acted as the joint employers of plaintiffs and the other flaggers (*id.*, ¶ 98). Plaintiffs assert that they were initially hired by a CE Solutions supervisor or Nakhbo and assigned to Nakhbo (*id.*, ¶¶ 134, 150, 164, 184). They allege that "Con Edison controlled virtually all conditions of Plaintiffs' employment while they performed work on Con Edison jobsites, including scheduling, timekeeping, assigning work and training and directing flaggers how to perform their job duties, and controlled the methods and means of flagging work performed on Con Edison jobsites" (*id.*, ¶ 105). According to plaintiffs, Con Edison and CE Solutions jointly conducted scheduling (*id.*, ¶ 106). In support of this allegation, plaintiffs allege that the flaggers were required to call a "hotline" telephone number that welcomed them to the "Con Edison Transportation Desk" before being connected to a CE Solutions dispatcher (*id.*, ¶ 106). Additionally, the complaint alleges that a CE Solutions dispatcher would then call the flagger back to assign that worker to a Con Edison worksite (*id.*). According to the complaint, Con Edison gave the flaggers specific instructions concerning their job responsibilities, including the locations of their assignments, which streets to close and where to erect signage, and directed them to walk with specific construction vehicles and machinery in and out of construction zones (*id.*, ¶ 109).

Plaintiffs allege that the flaggers were required to complete "Con Edison Flagging/Parking Location Timesheets," which had to be signed by a Con Edison supervisor or

foreman in order to receive payment (*id.*, ¶¶ 107, 118-120). Plaintiffs assert that CE Solutions' supervisors' presence on any one site was "short-lived and did not involve substantive or prolonged supervision of Defendants' construction flaggers" (*id.*, ¶ 110). On the other hand, Con Edison had "active, day-to-day involvement in the Defendants' flaggers' work" (*id.*, ¶ 112). Furthermore, the complaint alleges that "Con Edison had the authority to, and often did, discipline flaggers by ordering flaggers off Con Edison jobsite and prohibiting flaggers from ever returning to a project" (*id.*, ¶ 114). Plaintiffs allege that "Con Edison had the ability to directly terminate flaggers or demand that CE Solutions terminate a particular flagger" (*id.*, ¶ 115). Dora Slinin terminated Arrington, "falsely alleging that Plaintiff Arrington did not report to a jobsite on which he had actually worked" (*id.*, ¶ 185). During the relevant time period, Con Edison allegedly "exerted substantial control over Plaintiffs' and Defendants' other flaggers' pay" (*id.*, ¶ 129). According to plaintiffs, Con Edison calculated the number of hours that the flaggers worked based on the timesheets that it retained (*id.*). Plaintiffs also allege that they used equipment and materials provided by Con Edison on Con Edison jobsites, including cones and orange waving flags, flashing lights, and barricades (*id.*, ¶ 131).

Vasquez alleges that she made "numerous complaints" about missing hours to Nakhbo and CE Solutions office staff, and that defendants reduced her hours from eight to twelve hours six days per week to four to six hours per day two to three days per week (*id.*, ¶¶ 176, 179). The complaint further alleges that, on November 18, 2018, Vasquez's sister called Nakhbo to inquire "why the company was sending her to faraway locations in Westchester County and not paying her for all the hours that she worked" (*id.*, ¶ 178). After Vasquez's sister's November 18, 2018 telephone call, defendants did not give Vasquez another job assignment in retaliation for her repeated complaints and inquiries regarding missing hours (*id.*, ¶ 179).

The complaint asserts the following nine causes of action: (1) unpaid minimum wages in violation of Labor Law § 663 (1) *et seq.*; (2) unpaid overtime in violation of Labor Law § 663 (1) *et seq.*; (3) unpaid spread-of-hours in violation of Labor Law §§ 663 *et seq.* and 650, 12 NYCRR 137-1.7, and 12 NYCRR 146-1.6; (4) failure to pay wages in violation of Labor Law §§ 191, 193, and 663 (1) *et seq.*; (5) wage statement violations in violation of Labor Law § 195 (3), including liquidated damages pursuant to Labor Law § 198 (1-d); (6) wage notice violations in violation of Labor Law §§ 191 and 195, including liquidated damages pursuant to Labor Law § 198 (1-b); (7) breach of contract; (8) unjust enrichment and quantum meruit; and (9) retaliation brought by plaintiff Vasquez in violation of Labor Law § 215 (*id.*, ¶¶ 215-217, 217-221, 222-224, 225-230, 231-233, 234-236, 237-241, 242-248, 249-255).[1]

DISCUSSION

"On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), '[w]e accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Under CPLR 3211, "the pleadings are necessarily afforded a liberal construction" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). However, "bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence are not presumed to be true and accorded every favorable inference" (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000] [internal quotation marks and citation omitted]). "Whether a

[1] Marvelous Mark and Nakhbo answered the complaint on August 10, 2021 (NYSCEF Doc No. 11).

plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

To succeed on a CPLR 3211 (a) (1) motion based upon documentary evidence, the evidence must "utterly refute[] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen*, 98 NY2d at 326). "A paper will qualify as 'documentary evidence' only if it satisfied the following criteria: (1) it is 'unambiguous'; (2) it is of 'undisputed authenticity'; and (3) its contents are 'essentially undeniable'" (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019], quoting *Fontanetta v John Doe 1*, 73 AD3d 78, 86, 87 [2d Dept 2010]).

A. Breach of Contract (Seventh Cause of Action)

The seventh cause of action, labeled breach of contract, alleges that: (1) "the Con Edison Contracts entered into by Defendants contained schedules of the prevailing rates of wages and supplemental benefits or referenced to the [Labor Law] provisions governing payment of prevailing wages to be paid to Plaintiff and the employees performing work pursuant to such contracts," (2) "[t]hose prevailing rates of wages and supplemental benefits were made part of the Con Edison Contracts for the benefit of the Plaintiffs and the other employees performing work pursuant to such contracts," and (3) "[d]efendants' failure to pay Plaintiffs at the correct prevailing wage rates for straight time, overtime, and supplemental benefits for work performed pursuant to the Con Edison Contracts constituted a material breach of the contracts. . ." (NYSCEF Doc No. 17 ¶¶ 238-240).

Defendants argue that the breach of contract claim should be dismissed, because the three BPAs for flagging services between Con Edison and CE Solutions do not require the payment of prevailing wages (NYSCEF Doc Nos. 18-20). [2]

To support their position, defendants submit an affidavit from Eduard Slinin, an owner of CE Solutions, who states that Con Edison entered into the following three BPAs for traffic control flagging services with CE Solutions: (1) BPA No. 5005635 for the period November 1, 2017 through July 13, 2018, "to provide flagging services" in Staten Island, the Bronx, and Queens; (2) BPA No. 5187690 for the period September 20, 2018 through October 31, 2018 "to provide flagging services in Manhattan" for Con Edison's repair work on a specific section of steam piping; and (3) BPA No. 5127138 for the period from June 28, 2018 through June 30, 2021, "to provide flagging/parking coordination, and signage posting for the Bronx/Westchester service territory and flagging services for the Staten Island Territory" (NYSCEF Doc No. 32, Slinin aff, ¶¶ 2-5; NYSCEF Doc Nos. 18-20). Rather, the BPAs set hourly rates, including overtime rates, which Con Edison paid to CE Solutions for the hours worked on Con Edison jobsites. In addition, defendants assert that the BPAs expressly disclaim any third-party beneficiary status to CE Solutions employees (NYSCEF Doc No. 18 ¶ 46; NYSCEF Doc No. 19 ¶ 46; NYSCEF Doc No. 20 ¶ 46).

Defendants further contend that plaintiffs fail to allege that they are entitled to prevailing wages under Labor Law § 220. In this regard, defendants assert that plaintiffs fail to allege that a public agency was a party to the BPAs; that the projects they worked on were paid for by public funds; or that the primary objective or function of the work was to benefit the general public.

[2] Defendants make identical arguments in support of dismissal of the seventh and eighth causes of action.

Finally, defendants maintain that New York City's street excavation permits do not create an independent obligation to pay prevailing wages from Labor Law § 220's requirements. Defendants also note that New York City's street excavation permit requirements do not apply in Westchester County. In any event, defendants argue that plaintiffs lack standing to enforce any noncompliance with the street excavation permits under New York City Administrative Code § 19-142.

Plaintiffs counter that they have adequately alleged that they are third-party beneficiaries of public works contracts. They assert that they have alleged the work they performed upon public streets and roadways pursuant to contracts between Con Edison and CE Solutions. Plaintiffs allege that the flagging projects were public works projects governed by public works contracts. Plaintiffs contend that defendants have only submitted a portion of the public works contracts referenced in the complaint, and that they should have the opportunity to pursue discovery as to whether they performed work on public works projects. In addition, plaintiffs allege that Con Edison was required to obtain street opening permits with the New York City DOT for all flagging projects located within New York City. Plaintiffs also maintain that defendants' reliance on public bidding cases is misplaced, and point out that Con Edison has held itself out as a "public utility."

A party asserting third-party beneficiary rights must establish:

> "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [its] benefit, and (3) that the benefit to [it] is sufficiently immediate . . . to indicate the assumption by the contracting parties of a duty to compensate [it] if the benefit is lost"

(*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks omitted]). "[A] party claiming to be a third-party beneficiary has the burden of demonstrating an enforceable right" (*Alicea v City of New York*, 145 AD2d 315, 317 [1st Dept 1988]). "Where a

provision in the contract expressly negates enforcement by third-parties, that provision is controlling" (*Edward B. Fitzpatrick, Jr. Constr. Corp. v County of Suffolk*, 138 AD2d 446, 449-450 [2d Dept 1988], *appeal denied* 73 NY2d 807 [1988], *rearg denied* 73 NY2d 918 [1989]).

At the outset, the court rejects defendants' argument that plaintiffs cannot recover prevailing wages because the BPAs do not contain provisions expressly requiring the payment of such wages. Even though the BPAs do not expressly require the payment of prevailing wages, the BPAs state in article 26 that "[t]he Contractor [CE Solutions] shall comply with all federal, state and local laws . . . applicable at the time of performance of services hereunder" (NYSCEF Doc No. 28 ¶ 26; NYSCEF Doc No. 29 ¶ 26; NYSCEF Doc No. 30 ¶ 26). Courts have held that this language is sufficient to require the payment of statutorily-mandated wage rates (*Filardo v Foley Bros.*, 297 NY 217, 225 [1948], *revd on other grounds* 336 US 281 [1949]; *Lewis v Hallen Constr. Co., Inc.*, 2019 NY Slip Op 31205[U], *5 [Sup Ct, NY County 2019], *affd* 193 AD3d 511 [1st Dept 2021]; *Machuca v Collins Bldg. Servs. Inc.*, 82 Misc 3d 1211[A], 2024 NY Slip Op 50281[U], *2-4 [Sup Ct, NY County 2024]).

The complaint alleges that plaintiffs' work required that defendants pay them prevailing wages and supplemental benefits (NYSCEF Doc No. 17 ¶ 238). Plaintiffs allege two potentially applicable prevailing wage provisions here: Labor Law § 220 and New York City Administrative Code § 19-142.

Labor Law § 220 provides that "[t]he wages to be paid for a legal day's work . . . to laborers, work[ers] or mechanics upon . . . public works, shall be not less than the prevailing rate of wages" (Labor Law § 220 [3] [a]), which is defined as the rate paid to "workers, laborers or mechanics in the same trade or occupation in the locality where the work is being performed"

(Labor Law § 220 [5]). The Court of Appeals has set forth a three-factor test to determine whether a project qualifies as a "public work" within the meaning of the statute:

> "First, a public agency must be a party to a contract involving the employment of laborers, workers, or mechanics. Second, the contract must concern a project that primarily involves construction-like labor and is paid for by public funds. Third, the primary objective or function of the work product must be the use or other benefit of the general public"

(*De La Cruz v Caddell Dry Dock & Repair Co.*, 21 NY3d 530, 538 [2013]; *see also Matter of W.M. Schultz Constr., Inc. v Musolino*, 147 AD3d 1259, 1260 [3d Dept 2017], *lv denied* 30 NY3d 903 [2017]).[3]

When workers on a public works project allege that they were not paid prevailing wages as required by Labor Law § 220,

> "they have two options: (1) enforce their employer's statutory obligations to pay prevailing wages by complying with the statutory mechanism under Labor Law § 220 (7), including filing a complaint with the New York State Department of Labor and awaiting a determination before filing a lawsuit under section 220; or (2) file a third-party beneficiary breach of contract claim against their employer"

(*Dominguez v WRS Envtl. Servs., Inc.*, 2019 NY Slip Op 31601[U], *6 [Sup Ct, NY County 2019]). "[W]here a private sector contract calls for the payment of prevailing wages, the third-party beneficiary doctrine provides workers with a remedy under New York law, even though Section 220 is otherwise inapplicable" (*Ortiz v Consolidated Edison Co. of N.Y., Inc.*, 2024 WL 3086161, *21, 2024 US Dist LEXIS 103088, *60-61 [SD NY, June 7, 2024, 22 Civ No. 8957 (JLR/GS)], *report and recommendation adopted* 2024 WL 3105686, 2024 US Dist LEXIS

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[3] Labor Law § 220 (3-a) (e) (i) provides:

"Utility companies who, under local law or ordinance, are required, as a condition of issuance of a permit to use or open a street, to agree that none but competent workers, skilled in the work required of them shall be employed thereon and that prevailing scale of union wages shall be the prevailing wage for the similar titles as established by the fiscal officer pursuant to this section, paid to those so employed, shall be required to keep original payrolls or transcripts thereof . . ."

110827 [SD NY, June 24, 2024]). "But this common-law remedy is also subject to the common-law limitations attendant to it. Thus, where a provision in the contract expressly negates enforcement by third parties, that provision is controlling, and workers will have no standing to bring [a breach of contract] action" (*id.* [internal quotation marks and citations omitted]).

New York City Administrative Code § 19-142, entitled "Workers on excavations," provides as follows:

> "A person to whom a permit may be issued, to use or open a street, shall be required, before such permit may be issued, to agree that none but competent workers, skilled in the work required of them, shall be employed thereon, and *that the prevailing scale of union wages shall be the prevailing wage for similar titles as established by the fiscal officer pursuant to section two hundred twenty of the labor law, paid to those so employed. No permit shall be issued until such agreement shall have been entered into with the department, and all such permits hereafter issued shall include a copy of this provision.* When permits are issued to utility companies or their contractors, the power to enforce this provision shall be vested with the comptroller of the city of New York consistent with the provisions of section two hundred twenty of the labor law" (emphasis supplied).

In *Ross v No Parking Today, Inc.* (224 AD3d 559, 560-561 [1st Dept 2024]), a putative class action brought by the plaintiff and similarly situated construction flaggers, the First Department held that "the court properly dismissed the portion of plaintiffs' breach of contract claim based solely on the DOT permit" because "the type of permit at issue here is not a contract giving rise to third-party beneficiary rights." But the First Department also held that the plaintiffs "sufficiently alleged a breach of contract claim based on an agreement between Con Edison and the City" (*id.* at 560). The Court determined that:

> "the fact that the breach of contract cause of action in the complaint does not specifically identify the relevant contract but instead refers to 'the promises required to be made pursuant to New York City Administrative Code § 19–142 prior to obtaining such permits,' does not require dismissal. Despite the non-specificity, the complaint "give[s] sufficient notice of the nature of the claim" by referencing Administrative Code § 19–142 and the DOT permits"

(*id.*, citing *Tokhtaman v Human Care, LLC*, 149 AD3d 476, 478 [1st Dept 2017], *lv dismissed* 30 NY3d 1010 [2017]; *see also Lewis v Hallen Constr. Co., Inc.*, 193 AD3d 511, 512 [1st Dept 2021] ["Whether or not the construction projects at issue were public works projects is not dispositive since the prevailing wage requirements of Labor Law § 220 were applicable pursuant to both Administrative Code of City of NY § 19-142 and a contractual provision"]).

"[A]s with remedies available in the Section 220 context, courts have recognized workers may pursue a common law breach of contract action as third-party beneficiaries of an agreement to pay prevailing wages made pursuant to Admin. Code § 19-142" (*Ortiz*, 2024 WL 3086161, *21, 2024 US Dist LEXIS 103088, *62).

Here, plaintiffs assert a breach of contract claim as third-party beneficiaries of the Con Edison contracts (NYSCEF Doc No. 17 ¶¶ 237-241). As the First Department held in *Lewis*, "whether the construction projects were public works projects is not dispositive" of whether plaintiffs are entitled to prevailing wages if the contract requires the payment of prevailing wages pursuant to Administrative Code § 19-142 or similar local law or ordinance (*Lewis*, 193 AD3d at 512).

Nevertheless, the three BPAs submitted by defendants contain the following express disclaimer against third-party beneficiaries:

> "46. Third Party Rights. O&R is a third-party beneficiary of the Contract and may enforce the Contract. The other Con Edison affiliates and other non-parties referenced in Articles 16, 19, 20, 21, 28, 35, 46 and 49 are third party beneficiaries of the Contract and may enforce those Articles and any other articles in which the affiliates or non-parties are specifically referenced. There are no other third party beneficiaries of the Contract"

(NYSCEF Doc No. 18 ¶ 46; NYSCEF Doc No. 19 ¶ 46; NYSCEF Doc No. 20 ¶ 46).

Here, as argued by defendants, the BPAs expressly disclaim third-party beneficiaries to workers such as plaintiffs.[4] Plaintiffs do not address the disclaimer. Although plaintiffs argue that the BPAs should have included prevailing wage schedules "as a matter of law and public policy" (NYSCEF Doc No. 33 at 4), the BPAs are between Con Edison and CE Solutions, and not a public agency. The public policy behind Labor Law § 220 is therefore not implicated (*cf. Wroble v Shaw Envtl. & Infrastructure Eng'g of N.Y., P.C.*, 166 AD3d 520, 521 [1st Dept 2018] [contract clause prohibiting third-party actions for violation of prevailing wage requirements on public works project was void as against public policy]; *see Dominguez*, 2019 NY Slip Op 31601[U], *6 [enforcing disclaimer where "[t]he contracts at issue are with private utility companies, not the states of New York or New Jersey"]). Accordingly, plaintiffs' seventh cause of action must be dismissed to the extent it that it is based upon these BPAs.

Furthermore, to the extent that plaintiffs attempt to assert a breach of contract claim based upon the New York City DOT street opening permits (NYSCEF Doc No. 17 ¶ 91), "the type of permit at issue here is not a contract giving rise to third-party beneficiary rights" (*Ross*, 224 AD3d at 561).

Plaintiffs have failed to allege a breach of contract with respect to their work in Westchester County. Plaintiffs do not allege that they performed work pursuant to public works contracts there (NYSCEF Doc No. 17 ¶¶ 81-84). Additionally, plaintiffs' reliance on Westchester County Code § 813.21 in opposition to the motions is unconvincing (NYSCEF Doc No. 33 at 12; NYSCEF Doc No. 35 at 11). Section 813.21 states that:

> "No person, firm, corporation, improvement district or municipality shall construct any works in or upon any county road or construct any overhead, surface or underground crossing thereof or construct, maintain, alter or repair any drainage,

[4] The BPAs also do not include the "Con Edison Standard Terms and Conditions for Construction Contracts," but, rather, contain the "Standard Terms and Conditions for Service Contracts" (NYSCEF Doc Nos. 18-20).

> sewer, water pipe, conduit or other structure thereon or thereunder without first obtaining a written permit therefor from the Commissioner of Public Works and Transportation."

However, the provision does not state that flaggers must be paid prevailing wages, and only requires that a permit be obtained before work is performed.

Nevertheless, viewing the allegations in the light most favorable to plaintiffs, the complaint sufficiently alleges a breach of contract claim on behalf of plaintiffs and similarly situated individuals (*see Ross*, 224 AD3d at 560). Even though the complaint does "not specifically identify the relevant contract," the complaint "give[s] sufficient notice of the nature of the claim" (*id.*). Indeed, the complaint alleges that "other contracts" between Con Edison and CE Solutions reference the "Con Edison Standard Terms and Conditions for Construction Contracts," and that the Contractor agreed that "[w]here Contractor employs workers on sites where a permit to use or open a street (including excavating the street) is required and New York City Administrative Code Section 19-142 . . . is applicable," "Contractor agrees that pursuant to . . . Section 19-142," "the prevailing wage for similar titles as established by the Comptroller of the City of New York pursuant to Section 220 of the New York State Labor Law (or as established by such other fiscal officer . . . for workers on permitted sites located outside of New York City) . . . [shall] be paid to those so employed" (NYSCEF Doc No. 17 ¶ 83).[5]

In short, the seventh cause of action for breach of contract seeking prevailing wages and supplemental benefits is dismissed only to the extent it is predicated on BPA No. 5005635, BPA No. 5187690, and BPA No. 5127138, for work performed in Westchester County, and the street opening permits issued by the New York City DOT.

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[5] Even if the breach of contract claim were insufficiently pled, plaintiffs would be entitled to leave to replead in light of the language of Administrative Code § 19-142 and *Ross*. Unlike the plaintiffs in *Ross*, plaintiffs do not predicate their breach of contract claim based on a contract between Con Edison and the City (NYSCEF Doc No. 17 ¶¶ 81-84, 238).

B. Unjust Enrichment and Quantum Meruit (Eighth Cause of Action)

The eighth cause of action for unjust enrichment and quantum meruit, pled in the alternative, alleges that "[b]ased on Defendants' failure to pay Plaintiffs and the Class Members the appropriate prevailing wage rates, Defendants were unjustly enriched at the expense of Plaintiffs and the Class Members" (NYSCEF Doc No. 17 ¶ 243). Defendants assert that the plaintiffs cannot recover in quasi-contract because BPAs govern the parties' contractual relationship.

"[A] party may not recover in quantum meruit or unjust enrichment where the parties have entered into a contract that governs the subject matter" (*Cox v NAP Constr. Co., Inc.*, 10 NY3d 592, 607 [2008]). Here, the court is unable to conclude that the three BPAs are the only governing contracts in this case. Accordingly, the court declines to dismiss the eighth cause of action (*see Ortiz*, 2024 WL 3086161, *32, 2024 US Dist LEXIS 103088, *94).

C. Labor Law Wage and Hour Claims (First through Sixth Causes of Action)

The first through sixth causes of action allege that Con Edison and the CE Solutions defendants are liable for wage and hour violations as plaintiffs' "joint employer" (NYSCEF Doc No. 17 ¶¶ 32, 98-133).

Con Edison moves to dismiss the first through sixth causes of action, arguing that the BPAs conclusively demonstrate that it was not a joint employer of plaintiffs. Con Edison also contends that: (1) it did not hire, discipline or terminate the flaggers; (2) CE Solutions, not Con Edison, controlled plaintiffs' work schedules and conditions of employment; (3) CE Solutions controlled plaintiffs' rates and methods of payment; and (4) CE Solutions maintained plaintiffs' employment records.

Similarly, the CE Solutions defendants argue that the referral agreement between CE Solutions and Marvelous Mark shows that Marvelous Mark was plaintiffs' employer. The CE Solutions defendants maintain that they did not have the power to hire or fire plaintiffs; did not supervise or control plaintiffs' work schedules or conditions of employment; did not determine plaintiffs' rate and method of payment; and did not maintain employment records on plaintiffs (*see* NYSCEF Doc No. 32, Slinin aff, ¶¶ 15-17, 27-29).

Labor Law § 190 defines an "employer" as "any person, corporation, limited liability company or association employing any individual in any occupation, industry, trade, business or service," and an "employee" is defined as "any person employed for hire by an employer in any employment" (Labor Law § 190 [2], [3]). In determining whether an entity is an employer for purposes of the Labor Law, New York courts have adopted the "economic reality" test set forth by the federal courts (*see Cohen Finz & Finz, P.C.*, 131 AD3d 666, 667 [2d Dept 2015]; *Bonito v Avalon Partners, Inc.*, 106 AD3d 625, 626 [1st Dept 2013]). "[T]he overarching concern is whether the alleged employer possessed the power to control the workers in question . . .with an eye to the 'economic reality' presented by each case" (*Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 [2d Cir 1999], quoting *Goldberg v Whitaker House Coop.*, 366 US 28, 33 [1961]). In determining whether an employment relationship exists, the court must evaluate the following factors: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment, and (4) maintained employment records" (*Carter v Dutchess Community Coll.*, 735 F2d 8, 12 [2d Cir 1984] [internal quotation marks and citation omitted]). "No one of the four factors standing alone is dispositive" (*Herman*, 172 F3d at 139).

Employer status "does not require continuous monitoring of employees, looking over their shoulders at all times, or any sort of absolute control of one's employees" (*id.*).

Cases also consider whether a non-employer is a joint employer under the "immediate control" formulation (*Brankov v Hazzard*, 142 AD3d 445, 445-446 [1st Dept 2016]).[6]

> "Under the 'immediate control' formulation, a joint employer relationship may be found to exist where there is sufficient evidence that the defendant had immediate control over the other company's employees, and particularly the defendant's control over the employee in setting the terms and conditions of the employees' work. Relevant factors in this exercise include commonality of hiring, firing, discipline, pay, insurance, records, and supervision"

(*id.* [internal quotation marks and citation omitted]). "A complaint will survive a motion to dismiss in this context as long as the facts set forth in the Complaint plausibly suggest a degree of control and involvement by [the defendant] in Plaintiff's employment" (*Jimenez v Concepts of Independence*, 2018 NY Slip Op 30257[U], *11 [Sup Ct, NY County 2018] [internal quotation marks and citation omitted]).

Contrary to Con Edison's contention, the BPAs do not conclusively establish a defense as a matter of law to the wage and hour claims. Defendants rely on *Vacarcel v First Quality Maintenance* (41 Misc3d 1222[A], 2013 NY Slip Op 51793[U], *6 [Sup Ct, Queens County 2013]), which held that "[t]here can be no joint employment relationship where there is an agreement between the purported joint employer and plaintiff's direct employer putting 'the sole responsibility and authority for any and all selection, hiring, management, coaching, evaluation, discipline, promotion and employment termination of its employees' on the direct employer" (internal quotation marks and citation omitted). The BPAs state that "No right of supervision, requirement of approval or other provision of the Contract and no conduct of the parties shall be

[6] Some cases consider the six-factor "functional control" test (*Zurita v New York State Dept. of Labor*, 175 AD3d 1182, 1183 [1st Dept 2019], citing *Zheng v Liberty Apparel Co., Inc.*, 355 F3d 61, 72 [2d Cir 2003]).

construed to create a relationship of . . . joint employers of the Contractor's employers" (NYSCEF Doc No. 18 ¶ 39; NYSCEF Doc No. 19 ¶ 39; NYSCEF Doc No. 20 ¶ 39). However, the BPAs also state that "Contractor shall remove any personnel from performing services under the Contract as may be requested by Con Edison" (NYSCEF Doc No. 18 ¶ 15 [A]; NYSCEF Doc No. 19 ¶ 15 [A]; NYSCEF Doc No. 20 ¶ 15 [A]). It therefore cannot be said that the BPAs gave any entity "*sole* responsibility and authority" over all employment decisions (*see Ortiz*, 2024 WL 3086161, *16, n 17).

Furthermore, while the CE Solutions defendants contend that Marvelous Mark was retained as an independent contractor, that they "shall not employ any [CE Solutions] or ConEd employee to perform any services hereunder," and that "no conduct of the parties shall be construed to create a relationship of . . . joint employers of the Contractor's [Marvelous Mark's] employees" (NYSCEF Doc No. 31 ¶¶ 11, 37), courts have held that "it is not significant how the parties defined the employment relationship" (*Hart v Rick's Cabaret Intl. Inc.*, 967 F Supp 2d 901, 924 [SD NY 2013]; *see also Ocampo v 455 Hospitality LLC*, 2016 WL 4926204, *7, 2016 US Dist LEXIS 125928, *24 [SD NY, Sept. 14, 2016, No. 14-cv-9614] ["[e]conomic realities, not contractual labels, determine employment status"]).

Moreover, at this stage, the complaint sufficiently alleges that defendants were joint employers. Plaintiffs allege that Con Edison gave instructions as to the flaggers' job duties, provided equipment, and provided flagger certification training (NYSCEF Doc No. 17 ¶¶ 104-105, 109-110, 112-113, 131). The complaint also alleges that Con Edison assigned plaintiffs to jobsites, removed them from assignments, and sometimes terminated flaggers from employment (*id.*, ¶¶ 106, 108, 114-117, 122-124, 123-127). Plaintiffs further allege that Con Edison set their schedules (*id.*, ¶¶ 122-124, 126-127).

With respect to the CE Solutions defendants, plaintiffs allege that, in May 2016, CE Solutions converted certain flaggers to "independent contractors" and arranged for these individuals to set up companies, including Marvelous Mark (*id.*, ¶ 58). According to plaintiffs, CE Solutions hired plaintiffs, assigned them to a subcontractor, gave plaintiffs their job assignments, and on occasion terminated employees (*id.*, ¶¶ 57, 106, 124, 134, 184, 185). To be sure, "control may be restricted or only exercised occasionally, while still rendering a defendant as an employer" (*Moses v Griffin Indus., LLC*, 369 F Supp 3d 538, 544 [SD NY 2019]). "Indeed, whether a joint employer relationship exists is essentially [a] factual question[] that cannot be disposed of on a motion to dismiss" (*Jimenez*, 2018 NY Slip Op 30257[U], *16 [internal quotation marks and citation omitted]).

And, CE Solutions defendants' reliance on a conclusory and self-serving affidavit from Eduard Slinin does not warrant dismissal of the first through sixth causes of action (NYSCEF Doc No. 32, Slinin aff, ¶¶ 15-26 [stating that CE Solutions was not involved in the hiring, firing, or rate of pay of the flaggers]). This affidavit fails to demonstrate that "'a material fact as claimed by the [plaintiffs] to be one is not a fact at all and . . . that no significant dispute exists regarding it'" (*High Definition MRI, P.C. v Travelers Cos., Inc.*, 137 AD3d 602, 602-603 [1st Dept 2016], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). It is not relevant on a motion to dismiss whether plaintiffs will ultimately be able to establish its allegations (*see EBC I*, 5 NY3d at 19).

In view of the above, the branches of defendants' motions seeking dismissal of the first through sixth causes of action are denied.

D. CPLR 901 (b)

The fifth and sixth causes of action assert that "Plaintiffs and the Class Members are entitled to recover from Defendants two hundred fifty dollars ($250.00) per employee for each day that the violations occurred or continue to occur, or a total of five thousand dollars ($5,000) per employee, as provided for by [Labor Law] § 198 (1-d)" (NYSCEF Doc No. 17 ¶¶ 233, 236). Plaintiffs also seek statutory damages under Labor Law § 195 (*id.*, ¶¶ 232, 235).

The CE Solutions defendants argue that the fifth and sixth causes of action must be dismissed because they seek liquidated damages pursuant to Labor Law § 198 and statutory damages pursuant to Labor Law § 195 (NYSCEF Doc No. 25 at 23). In response, plaintiffs agree to waive liquidated damages on behalf of the class (NYSCEF Doc No. 35 at 25-26). In reply, defendants contend that plaintiffs cannot waive liquidated damages because those damages are mandatory for willful misconduct. Additionally, the CE Solutions defendants assert that plaintiffs cannot waive liquidated damages because this would render plaintiffs and their counsel inadequate class representatives.

CPLR 901 (b) provides that "[u]nless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action." Courts have held that liquidated damages under Labor Law § 198 constitute a penalty and therefore cannot be sought on behalf of a class (*Carter v Frito-Lay, Inc.*, 74 AD2d 550, 551 [1st Dept 1980], *affd* 52 NY2d 994 [1981]). However, the First Department has explained that "even where a statute creates or imposes a penalty, the restriction of CPLR 901 (b) is inapplicable where the class representative seeks to recover only actual damages and waives the penalty on behalf of the class, and individual class members are allowed

to opt out of the class to pursue their punitive damages claims" (*Downing v First Lenox Terrace Assoc.*, 107 AD3d 86, 89 [1st Dept 2013]; *accord Ridge Meadows Homeowners' Assn. v Tara Dev. Co.*, 242 AD2d 947, 947 [4th Dept 1997]; *Super Glue Corp. v Avis Rent A Car Sys.*, 132 AD2d 604, 606 [2d Dept 1987]). Where plaintiffs waive liquidated damages, they "should be allowed to proceed by way of a class action to recover their actual damages plus interest" (*Downing*, 107 AD3d at 91). In a putative class action seeking reimbursement of rent overcharges under the Rent Stabilization Law, the Court of Appeals observed that "[t]he language of CPLR 901 (b) itself says it is not dispositive that a statute imposes a penalty so long as the action brought pursuant to that statute does not seek to recover the penalty" (*Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 393 [2014]).

Moreover, the court rejects the CE Solutions defendants' argument that the mandatory nature of liquidated damages precludes a valid waiver (*Picard v Bigsbee Enters., Inc.*, 40 Misc 3d 1240[A], 2013 NY Slip Op 51495[U], *2 [Sup Ct, Albany County 2013]). The First Department has previously held, in certifying a class to recover prevailing wages, that "[t]o the extent certain individuals may wish to pursue punitive claims pursuant to Labor Law § 198 (1-a), which cannot be maintained in a class action (CPLR 901 [b]) they may opt out of the class action" (*Pesantez v Boyle Envtl. Servs.*, 251 AD2d 11, 12 [1st Dept 1998]). The fact that plaintiffs waive liquidated damages does not render them inadequate class representatives provided that the notice to the class informs members of the right to opt out and seek liquidated damages (*see Krebs v Canyon Club, Inc.*, 22 Misc 3d 1125[A], 2009 NY Slip Op 50291[U], *16 [Sup Ct, Westchester County 2009]).

Additionally, the fifth and sixth causes of action seek injunctive and declaratory relief, in addition to liquidated damages, attorney's fees, costs, and interest (NYSCEF Doc No. 17 ¶¶ 233,

236). It is generally "premature to dismiss class action allegations before an answer is served or precertification discovery has been taken" (*Griffin v Gregory's Coffee Mgt. LLC*, 191 AD3d 600, 600 [1st Dept 2021]). Defendants have, therefore, failed to show that there is no basis for class action relief as a matter of law. Therefore, the branch of the CE Solutions' defendants' motion seeking dismissal of the fifth and sixth causes is denied.

E. Retaliation Claim Brought By Vasquez Pursuant to Labor Law § 215 (Ninth Cause of Action)

Vasquez alleges that "Defendants retaliated against [her] by reducing her hours and subsequently refusing to assign her to Con Edison jobsites directly in response to repeated complaints about unpaid hours" (NYSCEF Doc No. 17 ¶ 252). According to Vasquez, "[b]y reducing Vasquez's hours and ultimately terminating her employment, Defendants violated and continue to violate NYLL § 215" (*id.*, ¶ 253).

Defendants argue that Vasquez's retaliation claim is untimely because she alleges that she made her complaints to Nakhbo and CE Solutions in September 2017 and claims that she was constructively discharged in response in November 2018. In any event, defendants contend that, even if the complaint is timely, it does not allege any conduct that violated the Labor Law with specificity.

In opposition, plaintiffs contend that Vasquez's retaliation claim is timely considering the Covid toll. In addition, plaintiffs assert that Vasquez has sufficiently alleged retaliation in that she alleges that defendants reduced her schedule and she stopped receiving assignments after her complaints about missing pay. Plaintiffs maintain that defendants are liable for all underpayments in violation of the Labor Law as joint employers.

In reply, defendants do not address plaintiff's argument that Vasquez's retaliation claim is timely.

Labor Law § 215 states that it is unlawful to retaliate against an employee "because such employee has made a complaint to his or her employer . . . that the employer has engaged in conduct that the employee, reasonably and in good faith, believes violates any provision of this chapter, or any order issued by the commissioner" (Labor Law § 215 [1] [a] [i]). "'[T]his chapter' refers to any provision of the Labor Law" (*Epifani v Johnson*, 65 AD3d 224, 235 [2d Dept 2009] [internal quotation marks omitted]).

Labor Law § 215 has a two-year statute of limitations, which runs from the date of the violation during employment (Labor Law § 215 [2] [a]).

Defendants have failed to establish that Vasquez's retaliation claim is untimely. She alleges that she did not receive any job assignments after a November 28, 2018 telephone call (NYSCEF Doc No. 17 ¶ 179). On March 20, 2020, the Governor issued Executive Order No. 202.8 in response to the Covid-19 pandemic, which "tolled" any "specific time limit for the commencement, filing or service of any legal action . . . until April 19, 2020" (9 NYCRR 8.202.8). The toll was extended until November 3, 2020, for a total of 228 days (*Matter of New York City Tr. Auth. v American Tr. Ins. Co.*, 211 AD3d 643, 643 [1st Dept 2022]; *Gabin v Greenhouse House, Inc.*, 210 AD3d 497, 498 [1st Dept 2022]; *Brash v Richards*, 195 AD3d 582, 583-584 [2d Dept 2021]). Giving Vasquez the benefit of the toll, her claim filed on May 21, 2021 is timely (*see Murphy v Harris*, 210 AD3d 410, 411 [1st Dept 2022]).

Additionally, Vasquez adequately alleges a claim for retaliation under Labor Law § 215. "An employee making such a complaint need not cite a specific chapter or provision that is being violated, but must make a complaint of activity that [the employee] reasonably believes

constitutes a violation of the Labor Law" (*Flick v American Fin. Resources, Inc.*, 907 F Supp 2d 274, 279 [ED NY 2012]). In light of Vasquez's allegations that defendants did not give her any further job assignments after she complained that they were withholding wages (NYSCEF Doc No. 17 ¶¶ 178, 179), this claim is sufficient to survive defendants' motion to dismiss (*see Neu v Amelia US LLC*, 226 AD3d 515, 516 [1st Dept 2024] [former employee stated a claim for retaliation after making a complaint about withholding wages]; *Schmidt-Sarosi v Offices for Fertility & Reproductive Medicine, P.C.*, 195 AD3d 479, 481 [1st Dept 2021] [plaintiff stated a cause of action for retaliation under Labor Law § 215 "by alleging that plaintiff was terminated four weeks after complaining of unlawful deductions from her wages"]).

Moreover, "[a] joint employer is jointly and severally liable for all underpayments in violation of the NYLL, whether or not that joint employer facilitated or caused the particular violation" (*People v Domino's Pizza, Inc.*, 2020 NY Slip Op 31615[U], *22 [Sup Ct, NY County 2020], citing *Ansoumana v Gristede's Operating Corp.*, 255 F Supp 2d 184, 196 [SD NY 2003] ["Both Duane Reade and the Hudson/Chelsea defendants were the 'employers' of the plaintiffs under these laws, jointly and severally obligated for underpayments of minimum wage and overtime during the period between January 13, 1994 and March 26, 2000"]; *see also Cordova v SCCF, Inc.*, 2014 WL 3512838, *7, 2014 US Dist. LEXIS 97388, *23 [SD NY 2014] [denying motion to dismiss retaliation claims where "Plaintiffs have plead plausibly that SCCF and S. Luna were Plaintiffs joint employers"]). As noted above, plaintiffs adequately allege that Con Edison and the CE Solutions defendants were plaintiffs' joint employers.

Therefore, defendants are not entitled to dismissal of the ninth cause of action.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 001) of defendant Consolidated Edison Company of New York, Inc. to dismiss the verified class action complaint is granted to the extent of dismissing the breach of contract cause of action (seventh cause of action) to the extent it is predicated on Blanket Purchase Agreement No. 5005635, Blanket Purchase Agreement No. 5187690, Blanket Purchase Agreement No. 5127138, work performed in Westchester County, and street opening permits issued by the New York City Department of Transportation, and the motion is otherwise denied; and it is further

ORDERED that the motion (sequence number 002) of defendants CE Solutions Group, LLC, Eduard Slinin, and Dora Slinin to dismiss the verified class action complaint is granted to the extent of dismissing the breach of contract cause of action (seventh cause of action) to the extent it is predicated on Blanket Purchase Agreement No. 5005635, Blanket Purchase Agreement No. 5187690, Blanket Purchase Agreement No. 5127138, work performed in Westchester County and street opening permits issued by the New York City Department of Transportation, and the motion is otherwise denied; and it is further

ORDERED that the defendants are directed to serve an answer to the verified class action complaint within 20 days after service of a copy of this decision and order with notice of entry.

10/10/2024
DATE

SHLOMO S. HAGLER, J.S.C.

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

653369/2021 RICHARDSON, MARQUIS ET AL vs. CE SOLUTIONS GROUP, LLC ET AL
Motion No. 001 002