SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **Hon. James D'Auguste** **PART 55**

Justice

----------X

ANTHONY BROWN AND ROBERT HENDERSON, INDIVIDUALLY AND ON BEHALF OF ALL SIMILARLY SITUATED,

Plaintiffs,

v.

A & M WARSHAW PLUMBING & HEATING, INC., A&M WARSHAW SERVICES LLC, HUNTER ROBERTS CONSTRUCTION GROUP LLC, JOHN DOE BONDING COMPANY, RXR 9-47 HALL STREET OWNER LLC, RXR CONSTRUCTION SERVICES LLC, and JOHN DOE SUBCONTRACTORS,

Defendants,

and

THE CITY OF NEW YORK HEALTH AND HOSPITALS CORPORATION,

Defendant-Stakeholder.

----------X

INDEX NO. 150040/2024

MOTION DATE 05/13/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for DISMISS.

BACKGROUND

Defendant New York City Health and Hospitals Corporation ("HHC") and defendants RXR 9-47 Hall Street Owner LLC and RXR Construction Services LLC (collectively, "RXR") bring a pre-answer motion to dismiss the Amended Class Action Complaint ("Amended Complaint") which asserts a proposed class action under CPLR §§ 3211(a)(1) and 3211(a)(7). NYSCEF Doc. Nos. 6, 15-31. Defendants A&M Warshaw Plumbing & Heating, Inc. and A&M Warshaw Services LLC (collectively, "A&M") have filed an affirmation in support of the

motion. NYSCEF Doc. No. 35. In a separate statement, defendant Hunter Roberts Construction Group, LLC ("Hunter Roberts") also joins in the motion in its entirety. NYSCEF Doc. No. 33. HHC, RXR, A&M, and Hunter Roberts are hereinafter collectively referred to as "Movants."

The named plaintiffs, Anthony Brown and Robert Henderson ("Plaintiffs"), have submitted papers in opposition to the motion. *Id.* Doc. Nos. 36-40. HHC and RXR have submitted papers in reply. *Id.* Doc. No. 41. The motion has therefore been fully submitted and the Court resolves the motion below, keeping in mind that, as this is a pre-answer motion, the Court liberally construes the Amended Complaint and gives Plaintiffs the benefit of every favorable inference. *E.g.*, *Chen v Romona Keveza Collection LLC*, 208 A.D.3d 152, 157 (1st Dep't 2022).

As background, the Court notes that New York Labor Law ("Labor Law") § 220(3)(a) provides:

> The wages to be paid for a legal day's work ... to laborers, workmen or mechanics *upon such public works*, shall be not less than the prevailing rate of wages …. The wages to be paid for a legal day's work ... to laborers, workmen or mechanics upon any material to be used upon or in connection therewith, shall be not less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such *public work* ... is performed …. Such contracts shall contain a provision that each laborer, workman or mechanic, employed by such contractor, subcontractor or other person about or upon such public work, shall be paid the wages herein provided.

(Emphasis added). This provision codifies the prevailing wage principle in Article I, 17 of the New York State Constitution. *See De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 N.Y.3d 530, 533-34 (2013). The statute "'is an attempt by the State to hold its territorial subdivisions to a standard of social justice in their dealings with laborers, workmen and mechanics'" and, as such, courts should interpret it liberally. *Id.* at 535 (quoting *Austin v City of New York*, 258 N.Y. 113, 117 (1932)).

The phrase "public works" is not early defined in the statute. In *De La Cruz*, the Court of Appeals applied a three-prong test to determine whether a project constitutes a public work:

> 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.

21 N.Y.3d at 538. A contract does not involve a public work when it benefits a specific, narrowly defined group consisting of private citizens rather than the public at large. *Id.*

PLAINTIFFS' ALLEGATIONS

The proposed class action currently before the Court arises out of work that Plaintiffs and other individuals performed relating to an HHC construction project at 47 Hall Street in Brooklyn ("Project"). NYSCEF Doc. No. 6. In connection therewith, the Amended Complaint makes the allegations below.

The Project involved the conversion of a building located at 47 Hall Street and adjoining buildings into a "2,000 bed dormitory-style respite shelter to house migrant men." *Id.* ¶¶ 20-21.

The Project was undertaken as the result of Mayor Eric Adams' Emergency Executive Order No. 224, which declared a state of housing emergency due to the influx of asylum seekers into New York City. NYSCEF Doc. No. 38. HHC entered into a license agreement with RXR for the project, and RXR contracted with Hunter Roberts, which provided labor, material, and equipment and performed both construction work and project management. *Id.* Doc. No. 6 ¶ 22. In turn, Hunter Roberts contracted with A&M and other companies that provided labor, material, and equipment and performed "carpentry, sheet metal work, painting, demolition, electrical work, masonry, and tile work." *Id.* ¶ 23.

According to the Amended Complaint, either expressly or pursuant to Labor Law § 220(3)(a), the above contractors and subcontractors were required to pay the laborers they employed pursuant to a specific schedule of prevailing wage and supplemental benefits rates, which were or should have been annexed to the contracts at issue. *Id.* ¶¶ 24-26. Plaintiffs assert that they and the putative class members performed various types of construction-related improvement work on the Project but nonetheless received wages that fell below the mandatory pay and benefits schedule. *Id.* ¶¶ 27-29. Plaintiffs also allege that John Doe Bonding Company ("Bonding Company") "issued a Labor and Material Payment Bond to Hunter Roberts, the terms of which guaranteed payment of prevailing wages and benefits to the Named Plaintiffs and putative class members" if RXR, A&M, Hunter Roberts or any other subcontractor did not pay the required amounts to the laborers. *Id.* ¶ 30.

Although Plaintiffs worked for A&M, the Amended Complaint alleges that they represent a putative class of laborers who worked not only for A&M but also for Hunter Roberts, RXR, and all of the subcontractors on the project. The Amended Complaint asserts the first three causes of action for breach of contract against RXR, Hunter Roberts, and A&M, respectively. The fourth cause of action is against Bonding Company based on its suretyship. The Amended Complaint cites Labor Law § 220-g as the basis for the fifth cause of action against Bonding Company. The sixth cause of action is asserted against HHC in its capacity as a stakeholder under Lien Law Article 3-A because allegedly HHC holds funds in connection with the Project. In addition to compensation for the unpaid wages and benefits, the Amended Complaint seeks attorneys' fees against RXR, Hunter Roberts, and Bonding Company. The Amended Complaint further seeks a court order that directs HHC either to pay the funds it allegedly holds in escrow to Plaintiffs and the putative class members, or to deposit these funds with the Clerk of the Court.

ANALYSIS

In their motion to dismiss, HHC and RXR argue that documentary evidence – *i.e.*, the license – establishes that Plaintiffs cannot seek relief as third-party beneficiaries to the contracts at issue.[1] They cite cases such as *Dockery v. Camba, Inc.*, 2021 NY Slip Op. 32624 (Sup. Ct. N.Y. County 2021), in which the trial court dismissed a proposed class action where the proposed class included workers whose contracts were not of the type covered by Labor Law § 230.[2] They also cite *Santana v. San Mateo Const. Corp.*, 2023 NY Slip Op. 32086[U] (Sup. Ct. N.Y. County 2023), *modified*, 234 A.D.3d 562 (1st Dep't 2025), in which the trial court rejected the plaintiffs' third-party beneficiary argument because the contract on which they relied included a disclaimer that denied there were any third-party beneficiaries.

In *Santana*, the court also noted that there was no contractual language that entitled workers to the prevailing wage. *See also Dominguez v. WRS Envtl. Servs. Inc.*, 2019 NY Slip Op. 31601 [U] (Sup. Ct., N.Y. County 2019) (finding that plaintiff was not a third-party beneficiary where contract contained a "no third-party beneficiary" clause). Here, Movants argue that because the contractual provisions do not expressly mention Labor Law § 220 or contain a wage schedule, there is no basis for this action.

The Court concludes that, as Plaintiffs contend, this argument lacks merit. After Movants filed their motion papers, *Santana*, on which they relied, was modified on the exact issue currently before the Court. *See* 234 A.D.3d 562. For the same reason, Movants cannot rely on *Ross v. No Parking Today, Inc.*, 80 Misc.3d 499 (Sup Ct., N.Y. County 2023), *modified*, 224

[1] Movants' submissions include the affirmations of Daniel Halajian and Jeremy Berman, a Project Executive for Hunter Roberts and the Deputy General Counsel for HHC, respectively. NYSCEF Doc. Nos. 24, 22.

[2] Labor Law § 230 affords the same wage and benefit guarantees as Labor Law § 220, but it applies to building services workers.

A.D.3d 559, 560 (1st Dep't 2024), which also was modified on this issue after Movants filed their papers.

In its ruling in *Santana*, the First Department held that the covenant in the agreement that required the defendant "to comply with all applicable laws" implicitly required compliance with other applicable laws that might mandate the payment of prevailing wages and therefore it rendered the putative class members third-party beneficiaries of the contract. *Santana*, 234 A.D.3d at 563 (further holding that "[t]he contractual disclaimers of third-party beneficiary rights are void as against public policy"). This holding is consistent with the goal of Labor Law § 220, which is "to provide the maximum protection to laborers, who are often in the least powerful bargaining position." *Wroble v. Shaw Envtl. & Infrastructure Eng'g of N.Y., P.C.*, 56 Misc.3d 798, 801 (Sup Ct., N.Y. County 2017], *aff'd*, 166 A.D.3d 520 (1st Dep't 2018) (applying principle where "a worker ... employed by a subcontractor" brought putative class action against the general contractor under Labor Law § 220).

To the extent that Movants argue that Plaintiffs may not sue as third-party beneficiaries of the contracts, this argument lacks merit. If the underlying license is a public work contract, then Plaintiffs are third-party beneficiaries and the lawsuit is proper. *Wroble*, 166 A.D.3d 520, 521 (1st Dep't 2018) ("in public works contracts, a subcontractor's employees have both an administrative remedy under the statute as well as a third-party right to make a breach of contract claim for underpayment against the general contractor"). Indeed, more recent decisions in this Department have ruled that a laborer can enforce such provisions. *E.g.*, *Footman v. D'Onofrio Gen. Contrs. Corp.*, 215 A.D.3d 487, 488 (1st Dep't 2023). Movants' reply papers did not respond to Plaintiffs' argument on this point.

Movants next argue that Labor Law § 220 does not apply here because the Project is not a public work. They contend that a public work must benefit the general public, and a contract

whose purpose is to provide temporary shelter to migrants who seek asylum does not fall within this category. Accordingly, they argue, the agreement does not benefit the general public within the meaning of Labor Law § 220.

In support of their argument, Movants cite the Fourth Department decision in *Cattaraugus Community Action v. Hartnett*, 166 A.D.2d 891, 891 (4th Dep't 1990). *Cattaraugus* found that the construction of a privately developed home, the Zafron Home for Parenting Adolescents, was "used for a specific and narrowly defined group" – specifically, a home for unhoused mothers – was not a public work project even though the State provided financial assistance. In support of its conclusion, the Fourth Department stressed that "[t]he public purpose behind the financing scheme of a project should not be confused with the private purpose or function of the venture itself." *Id.* at 891-92. Movants argue that here, as in *Cattaraugus*, asylum seekers represent a specific, narrowly defined group of individuals, and therefore the project is not a public work.

As additional support, they cite the decision in *Matter of Erie County Indus. Dev. Agency v. Roberts*, 94 A.D.2d 532 (4th Dep't 1983), *aff'd*, 63 N.Y.2d 810 (1984), an Article 78 appeal of a determination by the Commissioner of Labor. *Erie County* involved the construction of a printing and binding plant by a for-profit company. The Commissioner of Labor had concluded that the construction was a public work because the project received public funding as part of a statewide program to attract commercial and industrial developers to New York. In its decision, the Fourth Department concluded, *inter alia*:

> Since the function of the ... plant is private and the economic attributes of ownership are vested in Quo Vadis [the owner], and not the agency, the Quo Vadis project is not a public works. Neither the fact that the agency holds formal title to the project, nor the fact that certain tax exemptions are accorded to the project, transform that which is, in essence, a private venture into something that may be deemed public ….

Id. at 540.

In their opposition, Plaintiffs contend that the Project is a public works because it was primarily intended to benefit the public at large. They cite *De La Cruz,* 21 N.Y.3d at 538-39, in which the Court of Appeals concluded that although the general public did not use the fireboats, tugboats, or barges at issue, these vehicles serve the general public and thus are public works within the meaning of the statute. Additionally, they point to *Matter of Twin State CCS Corp. v. Roberts*, 72 N.Y.2d 897, 899 (1988) (internal quotation marks and citation omitted), in which the Court of Appeals, focusing on "the purpose or function of the project," concluded that "the installation of a telecommunications system which ... was installed in a public building for use by public employees" was a public work for the purposes of Labor Law § 220(3) even though the immediate benefit was to the public employees.

In further support of their argument, Plaintiffs note that the emergency executive order that resulted in the license at hand required a finding by Mayor Adams that there is a public emergency which creates a "reasonable apprehension of immediate danger" that imperils public safety. Executive Law § 24(1). Plaintiffs point to several provisions in the license agreement between HHC and RXR (NYSCEF Doc. No. 23) that refer to the emergency executive order as a justification for the agreement and states that the use of the primarily vacant campus "is necessary ... to address the effects of the emergency situation." *Id.* at 1. As the Project obviated a public emergency, Plaintiffs contend that the benefit was to the greater public.

In reply, Movants adhere to their original position that the 47 Hall Street project only benefits asylum seekers and not New York City's unhoused population as a whole. They state that despite the emergency declaration, the Project's benefit to the public is only incidental. They cite *Matter of Vulcan Affordable Hous. Corp. v. Hartnett*, 151 A.D.2d 84, 87 (3d Dep't

1989), for the principle that a private, for-profit project is not within the purview of Labor Law § 220 simply because it benefits the public in an attenuated fashion.

After careful consideration, the Court finds that Movants have not satisfied their burden under CPLR § 3211(a)(7) or CPLR § 3211(a)(1). *See Gym Door Repairs, Inc. v. Astoria Gen. Contr. Corp.*, 144 A.D.3d 1093, 1094-95 (2d Dep't 2016). Here, the Amended Complaint asserts facts that, if true, set forth a cognizable claim under the Labor Law. *Cf. Odigie v. Gateway Sec. Guard Servs., Inc.*, 213 A.D.3d 495 (1st Dep't 2023) (reversing denial of default judgment and granting default judgment on liability based on plaintiffs' prima facie case).

Several of the cases upon which Movants rely are Article 78 proceedings in which a petitioner challenges an agency determination. *See Vulcan*, 151 A.D.2d 84 (challenge to city determination); *Cattaraugus*, 166 A.D.2d 891 (review of Labor Commissioner's order and determination). Thus, the courts in the cited cases considered whether a hearing was decided based on substantial evidence or whether a determination without a hearing was supported by the record. Here, on the other hand, no discovery, hearing or other proceedings has yet occurred, so the standard of review is not the same. The *Cattaraugus* decision is further distinguishable because there, unlike HHC in the instant case, "the State does not lease, occupy, or hold title to the property." 166 A.D.2d at 892. *Erie County* is also distinguishable because it involved the construction of a printing and binding plant for a private company, a situation far removed from the construction of "humanitarian" housing for migrants in order to alleviate a public emergency.

As for the documentary evidence, Plaintiffs correctly argue that the license itself sets forth its public purpose. Among other things, the agreement refers to the fact that the parties entered into the agreement because "the Mayor of the City of New York ... issued an emergency executive order directing City agencies to establish and operate facilities that will provide assistance for arriving asylum seekers and *preserve health and public safety* during the

humanitarian crisis resulting from the increased influx of asylum seekers." NYSCEF Doc. No. 23 at 1 (emphasis added). This indicates a benefit to the public at large and it is sufficient to withstand the application for pre-answer dismissal on this issue.

Next, Movants argue that even if the Project benefitted the general public, it still is not a public works contract because RXR is a private corporation whose primary objective is to make a profit. They cite *Matter of 60 Mkt. St. Assocs. v. Hartnett*, 153 A.D.2d 205 (3d Dep't 1990), *aff'd* 76 N.Y.2d 993 (1990), an Article 78 proceeding that challenged a determination of the Commissioner of Labor following a hearing. The case itself involved a contract pursuant to which the Dutchess County Department of Public Works ("DPW") leased office space from the petitioner. DPW had solicited lease proposals for new and existing buildings, and the winning bidder, which subsequently conveyed the property to the petitioner, had not yet constructed its building. The Fourth Department found that because the petitioner "retained all of the risks and benefits of ownership ... [and] the building was constructed on privately owned property ... [and] financed entirely by private funds," the construction of the building could not be viewed as a public work even though the agency had the option to purchase the property and had a guaranteed 15-year lease. *Id.* at 207-08. Movants note that the Court of Appeals summarily affirmed the *60 Market* decision based on its reasoning, and the law has not been overturned. Movants assert that this case binds the Court because RXR was solely responsible for the construction, retained the right to terminate the agreement after two years upon formal notice to HHC, bore the sole financial risk of loss, and entered into the license agreement with the sole purpose of earning a profit.

Plaintiffs oppose this argument. They cite the Fourth Department's decision in *Feher Rubbish Removal, Inc. v. New York State Dept. of Labor, Bur. of Pub. Works*, 28 A.D.3d 1, 3 (4th Dep't 2005), in which the court concluded that the plaintiffs were obliged to pay their

employees the prevailing wage rate and benefits required by Labor Law § 230. In that case, the court rejected the plaintiffs' contention that the work was not covered by the statute because the buildings were privately owned. Instead, it held that "the prevailing wage requirement of Labor Law 230(1) applies to private buildings as long as the work is being done pursuant to a public work contract." *Feher*, 28 A.D.3d at 5. Further, they contend that cases such as *60 Market* and *Erie County* must be interpreted in light of the Court of Appeals' decision in *De La Cruz*. More specifically, they state that the three-prong test in *De La Cruz* (21 N.Y.3d at 538) implicitly modified the *60 Market* decision and allows for the consideration of contracts with privately owned, for-profit property as public work projects.

In reply, Movants adhere to their position that *60 Market* mandates the dismissal of this action because RXR is privately owned and for-profit. They reject Plaintiffs' reliance on *Feher* because it involved Labor Law § 230, which applies to building service workers, and thus the court applied the clear definition of "building service employees" in determining the applicability of the statute.

Here, too, Movants have not satisfied their burden under CPLR § 3211. The statute applies to "prevailing wage laws on jobs ... in which private parties are carrying out public work projects on behalf of public owners." *Matter of New York Charter School Assn. v. Smith*, 15 N.Y.3d 403, 411 (2010) (concluding that Labor Law § 220 was nonetheless inapplicable because the charter school in question was not a public owner as defined by the statute). The three-prong test of *De La Cruz* applies to situations in which the public agency is a party to the contract and does not exclude situations in which a private, for-profit business is also involved in the project at issue.

Movants' attempt to distinguish *Feher* on the basis that it involved the applicability of Labor Law §§ 230 and 231 is unpersuasive.[3] The distinction upon which they rely was relevant in the court's determination that the garbage collectors who brought the lawsuit were covered employees under Labor Law § 230, not to the court's analysis of whether a contract with a public agency could include contracts involving private buildings.

Plaintiffs urge the Court to explicitly rule that *De La Cruz* implicitly overruled *60 Market*, but the Court need not do so to reach its decision. Plaintiffs are correct that the three-prong test in *De La Cruz* – which requires only that a public agency be a party to the construction project which is paid for by public funds and whose primary function is to benefit the general public – is the more recent ruling of the Court of Appeals. 21 N.Y.3d at 538. Plaintiffs are also correct that, unlike in *De La Cruz*, the Court of Appeals in *60 Market* did not provide any analysis or guidance, but rather simply summarily affirmed the Third Department's decision.

But *60 Market* is also distinguishable because it was an Article 78 proceeding that challenged a determination made after a hearing, and therefore the court had the entire record, including testimony and documents, at its consideration. *Cf. Wroble*, 166 A.D.3d at 521-22 (noting, in dicta, that the motion to dismiss would not have been granted on threshold issue because "the record [was] inadequate to make a determination"). In this case, neither the complaint nor the license provides information sufficient to warrant dismissal at this early stage of the proceeding. All parties agree that the purpose of a project is paramount in the determination regarding whether it is subject to the prevailing wage requirement of Labor Law § 220. As such, the three-prong test the Court of Appeals articulated in *De La Cruz* "[has] to be

[3] The Court notes that Movants' papers rely on *Dockery*, 2021 NY Slip Op 32624 [U], which involved a claim brought pursuant to Labor Law § 230.

applied on a case-by-case basis in order for its contours to be fully explored." 21 N.Y.3d at 538. Under these circumstances, granting dismissal at this early juncture would not afford a nuanced evaluation and, therefore, would be inconsistent with the mandate that courts liberally interpret the statute to further its purposes.

Accordingly, it is hereby

ORDERED that the motion to dismiss the complaint under CPLR §§ 3211(a)(1) and (a)(7) is denied; and it is further

ORDERED that all defendants shall serve and file their answers to the complaint, if they have not already done so, within 20 days of the date of entry of this order.[4]

12/29/2025
DATE

Hon. James d'Auguste, 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

[4] The Court appreciates the invaluable assistance of court attorneys Andrew J. Lorin, Esq. and Beth Herstein, Esq. in connection with this matter.