# SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

**PRESENT:** DEBRA A. JAMES **PART 59**
*Justice*

RICKY MARSHALL, RALEIGH McQUILLER and HERMAN BLACK, individually and on behalf of all other person similarly situated who were employed by ROSELLI MOVING AND STORAGE CORP. and/or other entities affliated or controlled by ROSELLI MOVING AND STORAGE CORP.,

Plaintiffs,

-v-

ROSELLI MOVING AND STORAGE CORP. and ROBERT D. VILLANO,

Defendants.

Index No.: 103478/09
Motion Date: 08/23/11
Motion Seq. No.: 02
Motion Cal. No.:

The following papers, numbered 1 to 5 were read on this motion for class certification.

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/Order to Show Cause -Affidavits -Exhibits | 1, 2 |
| Answering Affidavits - Exhibits | 3, 4 |
| Replying Affidavits - Exhibits | 5 |



**Cross-Motion:** ☐ Yes ☒ No

Upon the foregoing papers,

Plaintiffs move, pursuant to CPLR 901 and 902, for an order certifying this action as a class action. Specifically, plaintiffs assert that the class should include themselves and all individuals employed by defendant Roselli Moving and Storage Corp. (Roselli) "or any other related entities since 2003 who performed work including moving packing, storage, inventory and

**MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):**

**Check One:** ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

**Check if appropriate:** ☐ DO NOT POST ☐ REFERENCE

☐ SETTLE/SUBMIT ORDER/JUDG.

other related tasks (the Class). [The Class] shall not include any clerical, administrative, professional or supervisory employees." For the reasons that follow, the motion shall be granted.

As alleged by the plaintiffs, the individually named plaintiffs, Ricky Marshall, Raleigh McQuiller and Herman Black, as well as other members of the putative class of no less than 200 members, worked and were paid by defendants Roselli and Robert D Villano (Villano) in furtherance of the public works contracts with various municipal agencies. Plaintiffs allege that defendants failed to pay them the prevailing rates of wages, supplemental benefits and overtime wages for all work performed during that period.

Plaintiffs also allege that they and the putative class also performed work for defendants in furtherance of a number of contracts with private individuals and companies at office buildings, residential households and doctors' offices.

Each public works contract contained a provision requiring defendants to pay and/or guarantee payment of the prevailing wages and supplemental benefits to the named plaintiffs and the putative class for the work performed as promulgated by New York law. In addition, plaintiffs assert that New York Labor Law requires that defendants pay the named plaintiffs and putative class time and one-half their normal hourly rate for all hours

worked in excess of 40 hours each week. Upon information and belief, plaintiffs claim that the prevailing rates of wages and supplemental benefits that each member of the putative class was entitled to receive ranged from approximately $15.42 per hour in 2003 to $35.57 per hour in 2009 for the work that they performed. Plaintiffs claim that they were paid less than the prevailing rates of wages and supplemental benefits that they were owed, and were not paid time and one-half for all hours worked in excess of 40 hours each week.

Pursuant to CPLR 901 (a), a party seeking class action certification must establish the existence of the following five prerequisites:

> (1) the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable; (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (4) the representative parties will fairly and adequately protect the interests of the class; and, (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Pursuant to CPLR 902 "[a]mong the matters which the court shall consider in determining whether the action may proceed as a class action are: 1. The interest of members of the class in individually controlling the prosecution or defense of separate actions; 2. The impracticability or inefficiency of prosecuting or defending separate actions; 3. The extent and nature of any

litigation concerning the controversy already commenced by or against members of the class; 4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum; 5. The difficulties likely to be encountered in the management of a class action." The court shall therefore examine the requisite factors in turn.

Although numerosity is presumed at a level of 40 members (Consolidated Rail Corp. v Town of Hyde Park, 47 F3d 473, 483, cert denied 515 US 1122 [1995]), this is not an unyielding rule. Classes with fewer plaintiffs have been certified (Maldanado v Everest Gen. Contrs., Inc., 25 Misc 3d 1206 [A], 2009 NY Slip Op 51987 [U] [Sup Ct, Kings County 2009]) and the court is to consider the particular circumstances of each case and "the reasonable inferences and commonsense assumptions from the facts before it" (Friar v Vanguard Holding Corp., 78 AD2d 83, 96 [2d Dept 1980]).

The class representatives have submitted affidavits indicating that the class consists of no fewer than 200 individuals, but at least 73, according to payroll records. In opposition, defendants contend that although 73 employees were identified as being on Roselli's payroll for the years 2004-2008, all but 10 employees worked sporadically and earned less than $2,000 in any calendar year. Further, they assert that the prevailing wage claim applies solely to those employees on public

works contracts which exceeded $1,500.00 (citing NY Labor Law § 203), and that pursuant to the schedule of wages, the hourly rate is dependent upon a number of factors, including the nature of the work and the number of hours worked over or under 800 hours in a calendar year. Defendants claim that only two other individuals, aside from the three named plaintiffs, worked more than 800 hours in any calendar year. Therefore, they aver that numerosity cannot be established and class certification would be improper.

There is no dispute that defendants had at least 73 employees on its payroll which is sufficient to satisfy the numerosity requirement (see Pesantez v Boyle Envtl. Servs., 251 AD2d 11 [1st Dept 1998]; Hnot v Willis Group Holdings Ltd., 228 FRD 476, 485 [SD NY 2005]). In addition, even if the class members would not fall into the prevailing wage rate category, plaintiffs also allege defendants' failure to pay overtime. As such, should that part of the class not qualify under the prevailing wage claims, there may simply be the need for a subclass (see CPLR 906; Weinberg v Hertz Corp., 116 AD2d 1, 6 [1st Dept 1986]).

Therefore the court finds that plaintiffs have satisfied the numerosity requirement of CPLR 901 (a) (1).

"Commonality" is satisfied where the relief sought is common to all members of the class, so that the relief sought by one

will satisfy all. This standard requires "predominance, not identity or unanimity, among class members" (Friar, 78 AD2d at 98; King v Club Med, 76 AD2d 123 [1st Dept 1980]). Furthermore, the existence of commonality is not determined by any mechanical test, but requires an analysis of whether the class action would achieve economies of time, effort and expense, and promote uniformity of decision as to persons similarly situated (City of New York v Maul, 59 AD3d 187, 190 [1st Dept 2009] [internal citations omitted], affd 14 NY3d 499 [2010]).

It is not required that the very issue be common to all members of the class (Super Glue Corp. v Avis Rent A Car Sys., 132 AD2d 604 [2d Dept 1987]). Moreover, while damages may differ for each class member because they worked a different number of hours, that is not a reason to deny class status (Godwin Realty Assoc. v CATV Enters., 275 AD2d 269 [1st Dept 2000]; Mimnorm Realty Corp. v Sunrise Fed. Sav. & Loan Assn., 83 AD2d 936 [2d Dept 1981]).

Plaintiffs have satisfied the commonality requirement, establishing that there are common questions of law and fact. Specifically, plaintiffs alleged that defendants failed to pay overtime compensation, supplemental benefits and the prevailing rates of wages pursuant to the public works contracts and applicable statutes. Each of the named plaintiffs have averred that they and their co-workers who comprise the Class:

(1) performed moving, packing, storage, inventory and related tasks; (2) performed work for defendants in furtherance of public works contracts; (3) were not paid overtime at time and one-half for all hours worked in excess of 40 hours in any given week; and (4) were not paid the hourly prevailing wage rate and supplemental benefit rate for work performed under the public works contracts. This satisfies the commonality requirement.

The typicality requirement is satisfied when each class member's claim arises from the same course of events and each plaintiff makes similar legal arguments as to why the defendant is liable (Hnot, 228 FRD at 485). CPLR 901 (a) (3) requires that the claims or defenses of the representative parties be typical of the claims or defenses of the class. Indeed, "[t]he essence of the requirement of typicality . . . is that not only must the representative party have an individual cause of action but the interest of the representative must be closely identified with the interests of all other members of the class" (Gilman v Merrill Lynch, Pierce, Fenner & Smith, 93 Misc 2d 941, 945 [Sup Ct, NY County 1978], quoting 2 Weinstein-Korn-Miller, NY Civ Prac, ¶ 901.09; Fed Rule Civ Pro, rule 23 [a] [3]). Plaintiffs' claims need not be identical to those of the class (see Branch v Crabtree, 197 AD2d 557, 557 [2d Dept 1993]). In other words, when a plaintiff's claims derive from the same practice or course of conduct that gives rise to the claims of other class members,

and are based upon the same legal theory, the typicality requirement is satisfied (see Friar, 78 AD2d at 99).

For the reasons noted above, namely, that the named plaintiffs and 73 putative class members were injured by defendants' failure to pay them overtime, supplemental benefits and the prevailing wage rate that they were legally entitled to receive, typicality is present (Pesantez, 251 AD2d at 12).

The adequacy of representation is determined by looking at whether the named plaintiffs' interests are antagonistic to other members of the class and whether "plaintiffs' attorneys are qualified, experienced and able to conduct the litigation" (Baffa v Donaldson, Lufkin & Jenrette Sec. Corp., 222 F3d 52, 60 [2d Cir 2000]). CPLR 901 (a) (4) provides that the plaintiffs must be able to "fairly and adequately protect the interests of the class." A class representative acts as a fiduciary with respect to the interests of other class members (see City of Rochester v Chiarella, 65 NY2d 92, 100 [1985]). The responsibility of a class representative includes the duty to act affirmatively to secure the rights of class members and to oppose adverse interests asserted by others (id.). In determining whether a named plaintiff is a suitable class representative, the court may consider: (1) "whether a conflict of interest exists between the representative and the class members;" (2) "the representative's background and personal character, as well as his [or her]

familiarity with the lawsuit, to determine [the] ability to assist counsel in its prosecution;" and (3) "the competence, experience and vigor of the representative's attorneys" (see Pruitt v Rockefeller Ctr. Props., 167 AD2d 14, 24 [1st Dept 1991]).

Here, there are no conflicts between the representatives and the class members as all have the same interests, i.e., to recover the amount of wages, supplemental benefits and overtime for work performed but not paid while working for Roselli. Each of the representatives has expressed the desire to represent their current and former co-workers in this action. Moreover, plaintiffs' counsel attests to their experience in class actions, labor and employment law and prevailing wage cases, in particular. The court, therefore, finds that the adequacy requirement has likewise been met.

Where, as here, plaintiffs' claim that they and putative class members were not paid prevailing wages, supplemental benefits and overtime compensation, the court finds that a class action is the superior method for resolving those claims (see Brandy v Canea Mare Contr., Inc., 34 AD3d 512, 514 [2d Dept 2006] ["Supreme Court providently exercised its discretion in granting the plaintiffs' motion for class action certification, certifying the class of individuals who furnished labor to the defendants on various public works projects"]). A class action is particularly

effective in cases such as the one at bar, because most of the individual differences among class members' claims can be resolved by the documentary evidence (Pesantez, 251 AD2d at 12 ["class action would be the best method of adjudicating this controversy . . . in light of the small amount of potential recovery by each individual . . . most of the individual differences can be resolved by the documentary evidence of payroll checks and time sheets"]). Moreover, where there may be a small amount of recovery by each individual, joinder of claims in such cases would not be practical given the cost of litigation, the reluctance of class members to serve as named plaintiffs, and the lack of resources the relatively unskilled workers may have to prosecute their own claims (see Pesantez, 251 AD2d at 12; Pruitt, 167 AD2d at 24; Smellie v Mount Sinai Hosp., 2004 WL 2725124, 2004 US Dist LEXIS 24006 [SD NY 2004]).

As discussed above, the common issues amongst the plaintiffs can be most efficiently and economically addressed on a class-wide bases. As such, the court finds that a class action is the superior method for obtaining relief for the fair and efficient adjudication of the issues before the court.

While defendants argue that plaintiffs' claims are barred due to their failure to exhaust their administrative remedies under Labor Law § 220, the court holds that such an argument is "irrelevant, because 'the Labor Law is not the exclusive remedy

to recover on prevailing wages'" (Nawrocki v Proto Constr. & Dev. Corp., 82 AD3d 534, 536 [1st Dept 2011], quoting De La Cruz v Caddell Dry Dock & Repair Co., Inc., 22 AD3d 404, 405 [1st Dept 2005]). Where, as here, the plaintiff class seeks to proceed on "'common-law breach of contract claims for underpayment of wages and benefits'" (Nawrocki, 82 AD3d at 536, quoting Pesantez, 251 AD2d at 12), defendants' contention that plaintiffs' failed to exhaust their administrative remedies is without merit (id.).

As defendants do not challenge whether the requirements of CPLR 902 are met, and having held that class certification is warranted pursuant to CPLR 901, the court need not address these arguments. That notwithstanding, most of the considerations under CPLR 902 are implicit in CPLR 901 and have been discussed in detail above.

Based on the foregoing, the court holds that a class action is the proper method in which to resolve this wage dispute (Nawrocki, 82 AD3d at 536).

Accordingly, it is

ORDERED that the motion by plaintiffs for class certification is GRANTED and leave is granted pursuant to CPLR 901 and 902, for plaintiffs to prosecute their action on behalf of a class consisting of individuals employed by defendant Roselli Moving and Storage Corp. from 2003 to present who worked on various public works projects, including, but not limited to,

the New York City Law Department, New York City Department of Information Technology & Telecommunications, New York City Department of Health and Mental Hygiene, New York City Department of Transportation, New York City Department of Buildings, New York City Department of Education, New York City Department of Youth and Community Development, New York City Department of Environmental Protection, New York City Department of Juvenile Justice, Brooklyn Community Board # 13, New York City Department of Investigation, New York City Taxi and Limousine Commission, New York City Department of Finance and the New York City Transit (the Public Works Projects), as well as a number of contracts with private individuals and companies at office buildings, residential households and doctors' offices (private contracts) to perform moving, packing, storage, inventory and related tasks to recover wages and benefits which class members were contractually entitled to receive for work they performed on these publicly financed, as well as private, projects, but did not receive; and it is further

ORDERED that within thirty (30) days of the date of service of this order with notice of entry, defendants shall furnish to plaintiffs' counsel a list of the names and last known addresses of all persons employed by Roselli Moving and Storage Corp. from 2003 to present who worked on all the Public Works Projects, as well as private contracts, and it is further

ORDERED that plaintiffs shall send a notice to all of the individuals identified by defendants, within sixty (90) days of the date of service of this order with notice of entry, and such notice shall include a provision that each individual may "opt-out" of the class action, by sending a signed form to plaintiffs' counsel; the form of such notice shall be approved by this Court; such proposed notice shall be sent for comment to counsel for defendants within forty-five (45) days of the date of service of this order with notice of entry, which shall be submitted in writing to opposing counsel and the Court within seven days thereafter, and plaintiffs may submit a written reply to defendants' comments within five days after submission of such comments; and it is further

ORDERED that the parties shall appear in IAS Part 59, Room 103, 71 Thomas Street, New York, New York for a status conference on March 13, 2012 at 2:30 P.M. at which time the notice shall be discussed, in addition to any other matters.

This is the decision and order of the court.

**Dated:** January 23, 2012 ENTER:

DEBRA A. JAMES J.S.C.