SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

DURIM ISUFI and ENVER KLLOGJERI, individually and on behalf of all other persons similarly situated who were employed by PROMETAL CONSTRUCTION, INC., along with other entities affiliated or controlled by PROMETAL CONSTRUCTION, INC., with respect to certain Public Works Projects awarded by the CITY OF NEW YORK, THE NEW YORK CITY HOUSING AUTHORITY,

Plaintiff,

-v-

PROMETAL CONSTRUCTION, INC., STV CONSTRUCTION, INC., and RLI INSURANCE COMPANY,

Defendants.

Index No.: 653265/2012

Motion Date: _____

Motion Seq. No.: 008

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

The following papers, numbered within 195 to 233 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No(s).	195-213
Answering Affidavits - Exhibits	No(s).	215-226
Replying Affidavits - Exhibits	No(s).	231-233

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

Plaintiffs bring this putative class action seeking the recovery of prevailing wages and/or supplemental benefits and overtime allegedly owed to them by the defendants on the theory that plaintiffs are third-party beneficiaries who assert claims that defendants breached the contract.

1. **CHECK ONE:** ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE: MOTION IS:** ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Plaintiffs assert in their complaint that they were employees of defendant Pro-Metal Construction, Inc. (Pro-Metal) and that at the time of their employment Pro-Metal was acting as a subcontractor to STV Construction, Inc. (STV) on a construction job at the New York City Housing Authority's (NYCHA) Walt Whitman and Raymond V. Ingersoll Houses in Fort Greene, Kings County.

The contract between STV and NYCHA dated October 22, 2009, provided that STV "and its subcontractors shall pay to all laborers and mechanics employed in the Work not less than the wages prevailing in the locality of the Project, as predetermined by the Secretary of Labor of the United States pursuant to the Federal wage rate requirements set forth at 40 U.S.C. §1341 et seq. (formerly known as the Davis-Bacon Act) and other related laws and regulations." See Labor Law 220. Similarly STV's subcontract with Pro-Metal similarly provided that it would comply with prevailing wage rate requirements.

Plaintiffs allege in their complaint that defendants breached these contracts by failing to pay them the prevailing wages and overtime compensation as required by the contracts and the Labor Law.

Plaintiff's First Amended Complaint added RLI Insurance as a defendant based upon its payment bond obligations and by stipulation dated July 8, 2013, plaintiff discontinued this action against defendant STV without prejudice. Defendants Pro-

Metal and RLI now move to dismiss plaintiffs' complaint in its entirety on the grounds of collateral estoppel and failure to exhaust administrative remedies.

To the extent that defendants argue that plaintiffs must first exhaust administrative remedies in order to pursue their prevailing wage causes of action based upon Grochowski v Phoenix Const. (318 F3d 80, 87 [2d Cir 2003]), such an argument has been decisively rejected by the Court of Appeals in Cox v NAP Const. Co., Inc. (10 NY3d 592, 606 [2008]).

In Cox, the Court held on the same facts presented on this motion that

> Defendants argue that, even if plaintiffs have a state law cause of action, they may not assert it now because they have not exhausted their administrative remedies. The answer to this argument is simple: plaintiffs do not have any administrative remedies they can exhaust. Defendants rely on regulations of the Department of Labor, promulgated to implement the [Davis-Bacon Act] "and Related Acts" (29 CFR 5.1 et seq.). More specifically, they point to 29 CFR 5.5, 5.6 and 5.7, relating to contract provisions, enforcement of those provisions, and reports to the Secretary of Labor. It is not obvious from the face of these regulations how they apply, if at all, where, as here, the party employing a contractor is not a federal agency; but we need not puzzle over this problem, because in any event the regulations give no rights to workers to initiate or take part in any enforcement proceedings. The enforcement contemplated by 29 CFR 5.6 is enforcement by governmental agencies. The only way for workers to get the benefit of the regulations is to call violations of law to an agency's attention and hope for the best- a course

plaintiffs have already pursued, with very little success.

Since plaintiffs have no remedy under the federal regulations, defendants' "exhaustion" argument boils down to a claim that they have no remedy at all-that they must wait, perhaps forever, for an agency to act. This is really a kind of preemption argument-a weaker one than the one we have already rejected. Defendants are claiming in substance that the Department of Labor's regulations preempt plaintiffs' state law claims, but courts are "even more reluctant to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes" (Hillsborough, 471 US at 717). And the regulations at issue here are not at all "comprehensive" in the relevant sense; they do not provide any means, let alone an arguably exclusive means, by which workers who are paid less than the legally-required minimum may vindicate their rights.

Defendants rely on the mere existence of regulations for agency enforcement of prevailing wage legislation, arguing that lawsuits by private litigants may complicate, or overlap or interfere with, such enforcement. But this is no more true here than in any case where governmental and private remedies coexist. A similar argument might have been made in Strong and Fata. In those cases, a government agency might have sought to enforce the contractor's obligations to provide a bond, or to pay the statutorily-required minimum wage, and a private lawsuit might have made those tasks more complicated, but in both cases we upheld the existence of a common-law remedy. We uphold it again here.

Cox v NAP Const. Co., Inc., 10 NY3d 592, 606-07 [2008].

Contrary to the defendants' arguments, the Court in Cox held not only that employees had the right to bring claims of failure to pay prevailing wages as third-party contract beneficiaries

under common law (see Fata v S. A. Healy Co., 289 NY 401, 406-407 [1943]), that is that federal law did not pre-empt the state common law remedy, but also that federal law did not confer any private remedy upon workers, administrative or otherwise. Defendants' attempts to distinguish Cox on the basis that in this action NYCHA has allegedly rendered a "final determination" of plaintiff's claims is unpersuasive.

The Court of Appeals clearly stated that based upon its interpretation of the statutory framework, workers have no rights to initiate any proceedings, administrative or otherwise, for recovery of prevailing wages under the Davis-Bacon Act. Thus whatever proceedings NYCHA did or did not conduct in this action cannot amount to an alternative forum binding upon the workers.

Defendants' further append to their papers copies of the requests plaintiffs' made to NYCHA to investigate their prevailing wage complaints in support of their position that plaintiffs' have elected to avail themselves of NYCHA forum and should not be permitted to do an "end run" around that choice. However, as the Court in Cox stated, worker requests to the governmental agency to investigate prevailing wage complaints do not obligate the agency to investigate the claim. The fact that NYCHA chose to investigate the complaints in this case does not create such a right in favor of the workers so as to foreclose other remedies. For this court to so hold would mean that a

worker would have to wait to see whether an agency decided to investigate a complaint before the worker could pursue a private remedy, which is exactly the scenario rejected by the Court of Appeals.

Contrary to defendants' argument, the Court in Cox did hold that a private suit may be brought for violation of prevailing wages even if an administrative proceeding is ongoing. In Araujo v Tiano's Const. Corp. (10 NY3d 592 [2008]), a consolidated appeal decided with Cox, the Court modified the Appellate Division by reinstating the breach of contract cause of action equivalent to the one sought to be dismissed here. Importantly, the Appellate Division in Araujo expressly stated that "[p]laintiffs' remedy lies in the pending administrative proceedings." Araujo v Tiano's Const. Corp., 40 AD3d 458 (1st Dept 2007) (emphasis added). The Court of Appeals in Cox stated "the order of the Appellate Division in Araujo v Tiano's Constr. Corp. should be modified to reinstate the breach of contract cause of action." Cox, supra, 10 NY3d at 608. Importantly in Araujo, the Court did not remand the matter to Supreme Court for further proceedings based upon the pending administrative proceedings but instead reinstated the breach of contract cause of action thus holding that the workers' private right of action was independent of any administrative determination reached by NYCHA.

Therefore, to the extent that the defendants here attempt to recast the preemption argument raised in Cox as a collateral estoppel or forum selection argument based upon a NYCHA determination, such an argument must fail as the Court by its holding in the Araujo appeal set forth that the breach of contract action sought to be dismissed here is parallel to and not duplicative of the administrative proceeding as there is no legal privity between the complaining employees and the contracting agency, in this case NYCHA. See David v Biondo, 92 NY2d 318, 322 (1998).

Accordingly, it is

ORDERED that defendants' motion to dismiss is DENIED.

This is the decision and order of the court.

Dated: April 3, 2017 ENTER:

J.S.C.
DEBRA A. JAMES