Juarez v USA Roofing Co. Corp.
2017 NY Slip Op 31239(U)
June 7, 2017
Supreme Court, New York County
Docket Number: 651437/13
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 45
--X
JACOBO JUAREZ and NOEL VELASCO, individually and on behalf of all other persons similarly situated who were employed by USA ROOFING COMPANY CORP. and TRIBECA CONTRACTING CORP., along with other entities affiliated or controlled by USA ROOFING COMPANY CORP. with respect to certain Public Works Projects awarded by THE CITY OF NEW YORK, THE NEW YORK CITY HOUSING AUTHORITY, and THE NEW CITY SCHOOL CONSTRUCTION AUTHORITY,

Plaintiffs,

- against -

USA ROOFING COMPANY CORP., DEAN BUILDERS GROUP, INC., NEELAM CONSTRUCTION CORPORATION, OLYMPIC CONTRACTING, CORP., P&K CONTRACTING, INC., PADILLA CONSTRUCTION SERVICES, INC., TRIBECA CONTRACTING CORP., ZORIA HOUSING LLC and JOHN DOE BONDING COMPANIES 1-20,

Defendants.
--X

DECISION & ORDER
Index No. 651437/13
Motion Seq. 007

HON. ANIL C. SINGH:

Plaintiffs have submitted this motion for leave to reargue their motion for class certification pursuant to CPLR 2221 and to designate a class defined as,

> All individuals who furnished labor to USA ROOFING COMPANY CORP. and/or TRIBECA CONTRACTING CORP., and related entities and affiliates on all publicly financed construction projects from April 22, 2007 through the present. These projects include, but not limited to: PS 79, Wagner High School, PS 29, PS 106, Taft High School, PS 177, PS 55, JHS 72, Co-op Tech HS, PS 36, IS 143, IS 319, PS/IS 194, PS 3, PS 115, Newcomers High School, PS 52, PS 7, PS

> 235, PS 161, as well as NYC Housing Projects located in Harlem, Astoria, and Rockaway. The defined class shall not include any clerical, administrative, professional, or supervisory employees.

Defendants oppose the motion.

Named Plaintiffs Jacobo Juarez ("Juarez") and Noel Velasco ("Velasco") brought this action on behalf of themselves and on behalf of all others similarly situated (together, "Plaintiffs") alleging that they were not paid prevailing wages, supplemental benefits and overtime compensation for all hours of work that they performed.

Plaintiffs were hired and directly paid for their work by subcontractor Defendants USA Roofing Company Corp. ("USA") and Tribeca Contracting Corp. ("Tribeca") (collectively, the "SC Defendants"). Plaintiff performed roofing, sheet metal, and other related construction on public works projects. Plaintiffs allege that they were typically required to work 6-7 days per week, from 7:00 am until 5:00 or 6:00 pm on a day shift, or they worked a night shift from 3:00 pm until approximately 1:00am or 2:00am. Plaintiffs further allege that they were often required to work a day shift at one public works project, followed immediately by a night shift at a second jobsite. Plaintiffs testified that the pay they received from the SC Defendants reflected fewer hours than they worked.

Plaintiffs have also initiated this action against general contractor Defendants Dean Builders Group, Inc. ("Dean"), Neelam Construction Corporation ("Neelam"), Olympic Contracting Corp. ("Olympic"), Padilla Construction Services, Inc. ("Padilla"), and Zoria Housing LLC ("Zoria") (collectively, the "GC Defendants").

Plaintiffs allege that the GC Defendants were the general contractors on the public works projects where Plaintiffs performed work for the SC Defendants. Plaintiffs allege that the GC Defendants entered into contracts with government agencies to perform roofing and related construction on the public works projects (the "Public Works Contracts"). Plaintiffs allege that pursuant to Labor Law 220-3(a), the Public Works Contracts were required to contain provisions guaranteeing payment of prevailing wages to all workers who performed work on the projects. As the general contractors, Plaintiffs argue that the GC Defendants are vicariously liable.

On October 19, 2016, Plaintiffs filed their Second Amended Complaint alleging breach of contract and Labor Law violations against the SC and GC Defendants.

On December 29, 2015, Plaintiffs filed an application to have their unpaid wage claims certified as a class action pursuant to CPLR 901 and 902.

On September 19, 2016, this Court denied Plaintiffs' application for class certification. This Court found that while standing had been met as to the GC Defendants, Plaintiffs did not show that "they have standing to maintain claims against general contractor defendants Neelam, Olympic, Padilla, Zoria and Dean." The Court held that "(f)or standing to exist each defendant would have had to employ at least one named plaintiff, so that there would be at least one who could make a claim against the defendant, and that is not alleged. The Court also found that numerosity and superiority was not satisfied although commonality, typicality and adequacy was satisfied as to the SC Defendants. In particular, the Court rejected the payroll documents attached to the Plaintiffs' motion as vague.

Discussion

"A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided. Nor does reargument serve to provide a party an opportunity to advance arguments different from those tendered on the original application. It may not be employed as a device for the unsuccessful party

to assume a different position inconsistent with that taken on the original motion." Foley v. Roche, 68 A.D.2d 558, 567-568 (1st Dept 1979).

Reargument is granted for the reasons set forth below.

Standing

Labor Law section 220 (3) (a) provides that "[t]he wages to be paid for a legal day's work, as hereinbefore defined, to laborers, workmen or mechanics upon such public works, shall be not less than the prevailing rate of wages as hereinafter defined." Further, public works contract "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." The Court of Appeals has held that Labor Law 220 serves to protect workers from "being induced, or obliged, to accept wages below the prevailing rate from a public employer" and "must be construed with the liberality needed to carry out its beneficent purposes". Bucci v. Village of Port Chester, 22 N.Y.2d 195, 201 (1968).

In addition to the statutory remedy provided by Labor Law 220, laborers who are underpaid by their subcontractor employees have a right to sue, as third party beneficiaries, the general contractor on a Public Works project for breach of contract to ensure payment to the subcontractor-employees under the prevailing wage provisions of the contract. Wright v. Herb Wright Stucco, Inc., 50 N.Y.2d 837

(1980), overruling and adopting dissent, 72 A.D.2d 959 (4th Dept 1979). In Wright, plaintiffs alleged that they had not been paid prevailing wages on a public works project by the subcontractor defendant, Herb Wright Stucco. Herb Wright Stucco was a subcontractor of defendant general contractor, Jewel Builders. Jewel Builders had a general contract with a public entity for public works. The Court upheld plaintiffs' right to sue the general contractor for failing to pay prevailing wages as required by the contract. The Court of Appeals upheld plaintiffs' claims for breach of the general contract.

Similarly, in Lane v. KBC Concrete Corp, Index No. 100627/2011 (S. Ct. N.Y. Ctny, Feb 4, 2016) (Kalish, J.), the court held that,

> [W]here the Labor Law requires the inclusion of a provision for payment of the prevailing wage in a labor contract between a public agency and a contractor, the employees of subcontractors are de facto third-party beneficiaries to said public contracts for the purpose of making common law breach of contract claims against the general contractor for underpayment ... [S]aid employees are not required to make any additional showing nor plead any additional facts to establish their status as third-party beneficiaries under the public contracts for the purpose of making breach of contract claims against the general contractor for underpayment.

See also, Wrobel v. Shaw Environmental & Infrastructure Engineering of New York, P.C., 2017 WL 1959518, at *5 (S. Ct. N.Y. Ctny., May 9, 2017) (Scarpulla, J) (where the court agreed that the employees of the subcontractor are third-party beneficiaries

of the prevailing wage promise in the prime contract and should be permitted to allege that the general contractor breached that obligation).

CPLR 901

CPLR 901 and 902 enumerates the prerequisites to a class action. CPLR 901(a) states in relevant part that, one or more members of a class may sue as representative parties on behalf of all if:

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

The First Department has held that "[t]he party seeking class certification bears the burden of establishing the criteria prescribed in CPLR 901(a)." Kudinov v. Kel-Tech Const. Inc., 65 A.D.3d 481 (1st Dept 2009). The court in Kudinov also held that "[w]hether a particular lawsuit qualifies as a class action rests within the sound discretion of the trial court." "In exercising this discretion, a court must be mindful of [the First Department's] holding that the class certification statute should be liberally construed". Id.

Numerosity (CPLR 901(a)(1))

There is no mechanical test or set quantity of prospective class members which must exist to determine whether class membership is so numerous as to make actual joinder impractical. See e.g., Williams v. Air Serve Corporation, 2013 WL 2369843 at *2 (S. Ct. N.Y. Ctny, Apr. 19, 2013) aff'd 121 A.D.3d 441 (1st Dept 2014) (where the court held that at an early stage of the litigation, plaintiffs need not show the exact number of class members and the class can be from 50-100); Dabrowski v. Abax Inc., 84 A.D.3d 633, 634 (1st Dept 2011) (the class can be from 50-100); Pesantez v. Boyle Environmental Services, Inc., 251 A.D.2d 11 (1st Dept 1998) (holding that plaintiff satisfied numerosity as subcontractor's certified payroll records list over 100 employees who worked on the project in question, and the named plaintiffs identify about 80 workers); Pajaczek v. CEMA Const. Corp., 2008 WL 541298, at *3 (S. Ct. N.Y. Ctny, Feb 21, 2008) (where the court held that the numerosity requirement has been satisfied with forty class members).

Plaintiffs' evidence in support of class certification may include affidavits and payroll records. See e.g., Stecko v. RLI Ins. Co., 121 A.D.3d 542, 542–43 (1st Dept 2014) (plaintiffs' affidavits stating that they recalled working with at least fifty other workers established that the class is so numerous that joinder of all members is impracticable); Dabrowski, 84 A.D. 3d 634 (1st Dept 2011) (where the court looked

at paycheck stubs); Kudinov v. Kel-Tech Const. Inc., 65 A.D.3d 481 (1st Dept 2009) (where the court took into account certified payroll records).

Here, Plaintiffs have alleged that the class is believed to be between 50 to 120 employees. In support, Plaintiffs submitted affidavits and testimony from Jacobo, Velasco and other class members and former employees of the Subcontractors, each of whom testified that, during the time they worked on the public works project, they recall working with "no less than 100 workers". Class Member Ayala also submitted an affidavit where he recalls working "with no less than 50 workers". Plaintiffs have also submitted certified payroll records and payroll documents that show that as many as 121 class members were employed by the SC Defendants on the public works project. (NYSCEF No. 205, 244).

Moreover, Dean, a general contractor, states in its Answer that in the time period referenced in the Second Amended Complaint, it hired USA as subcontractor for the public works projects. (NYSCEF. No. 155 at p. 17). Another defendant general contractor, Zoria, also states in its Answer that it was the general contractor on at least two public works project referenced in the initial Complaint. (NYSCEF. No. 11). Furthermore, the owner of USA testified that since 2007, USA has primarily performed roofing and metal work as a subcontractor to Neelam, Padilla and Dean. (NYSCEF No. 164).

Accordingly, the evidences sufficiently demonstrate that between 50 to 120 of the putative class members were employed by the SC Defendants to work on the public works project for the GC Defendants. Therefore, numerosity is satisfied.

Commonality (CPLR 901(a)(2))

This Court finds that commonality exists as to Plaintiffs' claims against the SC and GC Defendants. In Dabrowski v. Abax Inc., 84 A.D.3d 633, 634 (1st Dept 2011), the court found that commonality exists despite the varying job titles, pay rates, and the differing project sites and contracts involved, because the laborers' pay claims were not complex, and the pay scales, hours worked and other relevant contract information would typically be well-documented for the public works projects at issue. Moreover, in Kudinov, 65 A.D.3d at 482, the court held that "the commonality of claims predominates, given the same types of subterfuges allegedly employed to pay lower wages". The Kudinov court also held that different trades, different wage scale and different levels of damages did not defeat certification as such issues can be resolved by referring to payroll and other documentary evidence.

Here, Plaintiffs have sufficiently alleged that both the SC and GC Defendants failed to pay or ensure payment of prevailing rates of wages and supplemental benefits to the employees of their subcontractors. Plaintiffs have alleged a common wrong, and legal and factual issues that predominate individual issues. Namely, the

Plaintiffs have alleged that the SC Defendants underpaid prevailing wages and supplemental benefits to members of the class for work they performed on the public works projects, and that the SC and GC Defendants are liable for the underpayments.

Typicality (CPLR 901(a)(3))

Typicality exists when the named Plaintiffs' claims "arise out of the same course of conduct as the class members' claims and is based on the same cause of action." Pruitt v. Rockefeller Center Properties, Inc., 167 A.D.2d 14, 22 (1st Dept 1991). "[I]t is not necessary that the claims of the named plaintiff be identical to those of the class." Id. The requirement is satisfied even if the class representative cannot personally assert all the claims made on behalf of the class. Id. See also, Pludeman v. Northern Leasing Systems, Inc., 74 A.D.3d 420, 423 (1st Dept 2010).

Here, Plaintiffs' claims against the SC and GC Defendants are typical because they are derived from the same course of conduct as the class members' claims and are based on the same cause of action. The Plaintiffs allege that the SC Defendants failed to pay them the proper wages that were due, and the GC Defendants are liable as they entered into Public Work Contracts, which were required by law to guarantee that Plaintiffs and all class members would be paid prevailing wages and benefits for the work they performed.

Adequate Representation (CPLR 901(a)(4))

"The factors to be considered in determining adequacy of representation are whether any conflict exists between the representatives and the class members, the representative's familiarity with the lawsuit and his or her financial resources, and the competence and experience of class counsel." Ackerman v. PriceWaterhouse, 252 A.D.2d 179, 194 (1st Dept 1998).

Here, the Court discerns no conflict between Juarez and Velasco, the Named Plaintiffs, and the other class members. The Named Plaintiffs have demonstrated an awareness of the action in their depositions and affidavits. (NYSCEF No. 199, 203, 204). Plaintiffs' counsel has stated that they are experienced commercial litigators who have successfully represented workers in numerous class actions. Moreover, Plaintiffs' counsel has also agreed to advance all costs of the litigation.

Superiority (CPLR 901(a)(5))

The courts have held that a class action is the superior method for resolving underpayment of wage claims. See e.g., Dabrowski, 84 A.D.3d 635; Nawrocki v. Proto Const. & Dev. Corp., 82 A.D.3d 534, 536 (1st Dept 2011); Pesantez, 251 A.D.2d at 12.

A class action is the superior method to pursue this litigation. The alternative of requiring at least fifty individual actions is an ineffective and inefficient method, which could lead to conflicting determinations.

CPLR 902

CPLR 902 provides that the court should consider the following factors:

> 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.

Most of the considerations in CPLR 902 are implicit in CPLR 901. See, Nawrocki v. Proto Const. & Dev. Corp., 2010 WL 1531428, at *5 (S. Ct. N.Y. Ctny, April 7, 2010).

Here, no other individual has instituted an action against the SC and GC Defendants for underpayment of wages and supplemental benefits in connection with the Public Works Contracts. CPLR 902 (1). There is no extensive competing litigation commenced by any member of the class. CPLR 902 (3). This forum is appropriate as the sites of the public works projects were in New York. CPLR 902 (4).

Labor Law 223

Contrary to Defendants' argument, Labor Law 223[1] does not bar Plaintiffs' claims. Section 223 is limited to administrative proceedings brought by the NYC Comptroller or the Department of Labor, and has no applicability to a common-law breach of contract action. The Court of Appeals has affirmed that plaintiffs can maintain a common-law breach of contract action for unpaid prevailing wages as third-party beneficiaries of public works contracts. See e.g., Cox v. Nap Construction Co., Inc., 10 N.Y.3d 592 (2008) (upholding workers' claims as third-party beneficiaries of public works contracts noting that "[t]he Contractors promised NYCHA that they would pay plaintiffs certain wages, and under long-settled rules plaintiffs would be third-party beneficiaries of those promises."); Wright v. Herb Wright Stucco, Inc., 50 N.Y.2d 837 (1980) (similar); Pesantez, 251 A.D.2d at 12 (1st Dept 1998) (a plaintiff class can proceed on its common-law breach of contract claims for underpayment of wages and benefits as it was not a claim for private right of action under Labor Law 220).

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[1] Labor Law 223 states, "If the fiscal officer as defined herein finds that any person contracting with the state, a municipal corporation, or any commission appointed pursuant to law, for the performance of any public work fails to comply with or evades the provisions of this article, he shall present evidence of such non-compliance or evasion to the officer, department, board or commission having charge of such work for enforcement. Wherein such evidence indicates a non-compliance or evasion on the part of a sub-contractor, the contractor shall be responsible for such non-compliance or evasion. It shall be the duty of any officer, department, board or commission in charge of the construction of such public work contracts to enforce the provisions of this article."

Accordingly, it is hereby

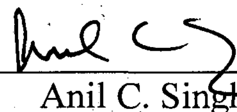
ORDERED that plaintiffs' motion for leave to reargue its motion to certify this action as a class action is granted; and it is further

ORDERED that, upon reargument, the Court vacates its prior order, dated September 16, 2016 and entered on September 19, 2016 (NYSCEF No. 188); and it is further

ORDERED that Plaintiffs' motion for class certification is granted pursuant to CPLR 901 and 902 for Plaintiffs to prosecute their action on behalf of the class defined as:

> All individuals who furnished labor to USA ROOFING COMPANY CORP. and/or TRIBECA CONTRACTING CORP., and related entities and affiliates on all publicly financed construction projects from April 22, 2007 through the present. These projects include, but not limited to: PS 79, Wagner High School, PS 29, PS 106, Taft High School, PS 177, PS 55, JHS 72, Co-op Tech HS, PS 36, IS 143, IS 319, PS/IS 194, PS 3, PS 115, Newcomers High School, PS 52, PS 7, PS 235, PS 161, as well as NYC Housing Projects located in Harlem, Astoria, and Rockaway. The defined class shall not include any clerical, administrative, professional, or supervisory employees.

Date: June 7, 2017
New York, New York



Anil C. Singh