Badzio v Americare Certified Special Servs., Inc.
2017 NY Slip Op 31310(U)
June 15, 2017
Supreme Court, Kings County
Docket Number: 506155/16
Judge: Martin M. Solomon
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At an IAS Term, Part 38 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15th day of June, 2017.

P R E S E N T:

HON. MARTIN M. SOLOMON,
Justice.

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TAMARA BADZIO and LARYSA SALO, individually and on behalf of all others similarly situated,

Plaintiffs,

- against -

Index No. 506155/16

AMERICARE CERTIFIED SPECIAL SERVICES, INC., and AMERICARE, INC.,

Defendants.

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The following papers numbered 1 to 4 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4
Statement of Material Facts	
Other Papers	

Upon the foregoing papers, defendants Americare Certified Special Services, Inc. and Americare, Inc., move for an order, pursuant to CPLR 3211 (a) (5), dismissing the complaint to the extent that plaintiff Tamara Badzio's causes of action seek unpaid wages prior to April 18, 2010 and to the extent that plaintiff Larysa Salo's causes of action seek unpaid wages prior to January 30, 2011.

Plaintiffs bring this action on behalf of themselves and a putative class of current and former employees of defendants for alleged unpaid minimum, overtime and spread of hour wages in violation of the requirements of Labor Law articles 6 and 19 and the supporting Department of Labor regulations (First Amended Complaint). Plaintiffs define the intended class as, "all employees of Defendants who worked as home attendants and failed to receive statutorily-required compensation for all hours worked on 24 hour shifts, and/or all statutorily required overtime pay for hours worked in excess of 40 in the work week from December 19, 2005 until such time as Defendants cease their unlawful acts ('Class Period')" (First Amended Complaint at ¶ 6). The court notes that, by way of an order dated May 11, 2017, the court extended plaintiffs' time to move for class certification until June 30, 2017.

The parties do not dispute that the original summons and complaint in this action were filed on April 18, 2016, and that the first amended complaint, in which plaintiff Larysa Salo was added as a lead plaintiff, was filed on January 30, 2017. Nor is the six year statute of limitations for the wage claims at issue in dispute (*see* Labor Law §§ 198 [3], 663 [3]; *Dragone v Bob Bruno Excavating, Inc.*, 45 AD3d 1238, 1239 [3d Dept 2007]; *Jacobs v Macy's East, Inc.*, 262 AD2d 607, 608 [2d Dept 1999]; *Chernishova v Ultimate Services for You, Inc.*, 2016 WL 4581548 *2 [U] [Sup Ct, Kings County 2016]). Based upon the filing dates of the respective pleadings and the six year statute of limitations, defendants contend that plaintiff Tamara Badzio may not seek recovery of unpaid wages for work performed prior to April 18, 2010, and plaintiff Larysa Salo may not seek recovery of unpaid wages for

work performed prior to January 30, 2011. Plaintiffs, in opposing the motion, however, assert that the statute of limitations for plaintiffs and the putative class were tolled by prior federal and state actions brought against defendants, by Raisa Melamed and Galyna Malyaruk on behalf of themselves and all others similarly situated, based on alleged violations of the wage requirements of Labor Law articles 6 and 9.

The putative class action in *Melamed v Americare Certified Special Services Inc.*, CV11-4699, was commenced on September 27, 2011 by the filing of a complaint with the United States District Court for the Eastern District of New York. The complaint in the federal action was amended on February 27, 2012 to add defendant Americare, Inc. By an order dated August 15, 2012, the Federal District Court granted defendants' motion to dismiss the complaint on jurisdictional grounds, but without prejudice to plaintiffs recommencing the action in state court.[1] On October 4, 2012, Melamed and Malyaruk commenced an action in this court entitled *Melamed, et ano., v Americare Certified Special Services, Inc., et ano.*, and bearing Kings County index No. 503171/12. Thereafter, the plaintiffs in the *Melamed* state court action moved to certify the class, which motion was denied, in a December 11, 2014 order (Schmidt, J.), as premature and without prejudice to renewal pending additional discovery and the submission of additional evidence on the adequacy of the proposed class (*Melamed v Americare Certified Special Services, Inc.*, 2014 NY Slip Op 33296 [U] [Sup Ct, Kings County, 2014]). Ultimately, defendants moved to

[1] While plaintiffs' have not appended a copy of this decision, defendants do not dispute plaintiffs' characterization of the grounds for the dismissal of the *Melamed* federal action.

dismiss the class action portion of the *Melamed* action on the ground that plaintiffs had failed to timely seek a determination of class certification following the limited pre-certification discovery period. This court (King, J.) granted the motion by way of an order dated January 20, 2016.

Determination of whether the *Melamed* actions serve to toll the statute of limitations with respect to the instant plaintiffs' putative class action here turns on the applicability of the toll – enunciated by the United States Supreme Court in *American Pipe & Constr. Co. v Utah* (414 US 538 [1974]) and *Crown, Cork & Seal Co., Inc. v Parker* (462 US 345 [1983]) and expanded upon in numerous decisions by various circuits of the United States Courts of Appeal – to class actions under New York law. In *American Pipe*, the Supreme Court addressed the timeliness of claims of individual putative class members seeking to intervene in an action after the trial court had denied class certification and held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action" (*American Pipe & Constr. Co.*, 414 US at 554) until the time that class certification is denied (*id.* at 561). The Supreme Court reasoned that, in the absence of tolling, individual class members would not be able to rely on the existence of the suit to protect their rights and would have to intervene in an action as the statute of limitations approached, thereby negating the intended benefits of a class action, which are the efficiency and economy of litigating class actions as a group rather than individually (*id.* at 553).

Further, the Court found that tolling the statute of limitations is not contrary to the intended function of the statute of limitations, since the commencement of the putative class action gives notice to defendants of the nature of the claim and the generic identity of the potential claimants (*id.* at 554). In *Crown, Cork & Seal*, the Supreme Court held that the rationale of *American Pipe* applied to putative class members who, after class certification was denied, commenced separate actions rather than intervening in the existing action (*see Crown, Cork & Seal Co., Inc.*, 462 US at 354-355).

Relying on the rationale of the decisions in *American Pipe* and *Crown, Cork & Seal*, the majority of the Circuits of the United States Courts of Appeal that have addressed the issue have held that a plaintiff who commences an action in the form of a class action can rely on the statute of limitations toll arising from a prior action brought in the form of a class action of which the plaintiff would have been a putative class member at least as long as the issue of class certification was not determined on the merits in the prior class action (*see Resh v China Agritech, Inc.*, ___ F3d ___, 2017 WL 2261024 *5 [9th Cir 2017]; *Phipps v Wal-Mart Stores, Inc.*, 792 F3d 637, 652-653 [6th Cir 2015]; *Sawyer v Atlas Heating & Sheet Metal Works, Inc.*, 642 F3d 560, 563-564 [7th Cir 2011]; *Yang v Odom*, 392 F3d 97, 111-112 [3d Cir 2004]).[2] Indeed, in *Resh*, *Phipps* and *Sawyer*, the courts went one step further and

[2] In *Great Plains Trust Co. v Union Pacific R.R. Co.* (492 F3d 986, 997 [8th Cir 2007]) the court stated its general agreement with this line of cases, but, in the case before it, found that the plaintiffs in the new action had waited too long to institute the second class action after the dismissal of the first. While noting that the 8th Circuit's statement in *Great Plains Trust Co.* is dicta, a United States District Court within that circuit has held that tolling may apply to a subsequent class action where the prior action was settled before the issue of class action

held that tolling applies regardless of the basis for the denial of class certification in the prior case and that the prior denial of class certification is more appropriately addressed as an issue of claim preclusion and/or comity (*Resh*, 2017 WL 2261024 *5; *Phipps*, 792 F3d at 652-653; *Sawyer*, 642 F3d at 564-565). As noted by the 7th Circuit in *Sawyer*, where class certification is not determined on the merits, the remaining members of the class should have "one full and fair opportunity to litigate the question whether a class action is appropriate" (*Sawyer*, 642 F3d at 564). Further, the 7th Circuit explained that decisions from other circuits such as *Basch v Ground Round, Inc.* (139 F3d 6 [1st Cir 1998], *cert denied* 525 US 870 [1998]), *Korwek v Hunt* (827 F2d 874 [2d Cir 1987]) and *Salazar-Calderon v Presidio Valley Farmers Assoc.* (765 F2d 1334 [5th Cir 1985]) that reject successive class actions are properly seen not as involving the statute of limitations or tolling, but as involving the preclusive effect of denying class certification on a subsequent action (*see Sawyer*, 642 F3d at 563-564).[3]

The 11th Circuit is the only circuit that has expressly disallowed tolling for successive class actions even where class status in the initial class action is not determined on the merits

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certification was determined (*see Looney v Chesapeake Energy Corp.*, 2016 WL 3626741 [WD Ark 2016]).

[3] United States District Courts within the Second Circuit have similarly found that the holding in *Korwek* does not bar tolling the statute of limitations for a later class action where there has been no determination on the merits of the class status in the previous action (*see Famular v Whirlpool Corp.*, 2017 WL 2470844 *7-10 [U] [SDNY 2017][wherein the court speculated that the Court of Appeals, which has not addressed the issue, would recognize the tolling of the statute of limitations]; *Kulig v Midland Funding, LLC*, 2014 WL 6769741 *5 [SDNY 2014]).

(*see Ewing Industries Corp. v Bob Wines Nursery, Inc.*, 795 F3d 1324, 1328 [11th Cir 2015]; *Griffin v Singletary*, 17 F3d 356 [11th Cir 1994]). In so holding, the 11th Circuit expressed concern that allowing tolling in such circumstances can lead to endless rounds of litigation over the adequacy of successively named plaintiffs to serve as class representatives by piggybacking one class action into another (*see Griffin*, 17 F3d at 359; *see also Ewing Industries Corp.*, 795 F3d at 1328 [constrained by prior holding in *Griffin*]). In *Resh*, however, the 9th Circuit asserted that the concerns related to the abusive filing of class actions are adequately addressed by rules of claim preclusion and comity and by the fact that attorneys do not have an incentive to repeatedly file new suits were they are unlikely to achieve a recovery (*Resh*, 2017 WL 2261024 *5).

These federal decisions, while not binding, provide relevant authority as to how the issues should be addressed under New York's class action statute given that New York's statute is generally modeled on the federal provisions (*see Huebner v Caldwell & Cook*, 139 Misc 2d 288, 292 [Sup Ct, Monroe County 1988]; *see also* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C901:2; *Matter of Carver v State of New York*, 87 AD3d 25, 33 [2d Dept 2011], *affd* 26 NY3d 272 [2015]). Regarding the issues here, the Appellate Divisions have expressly adopted the tolling rules from the Supreme Court's decision in *American Pipe* and *Crown, Cork & Seal* (*see Desrosiers v Perry Ellis Menswear, LLC*, 139 AD3d 473, 474 [1st Dept 2016]; *Osarczuk v Associated Univs., Inc.*, 130 AD3d 592, 595 [2d Dept 2015]; *Paru v Mutual of Am. Life Ins. Co.*, 52 AD3d 346,

348 [1st Dept 2008]; *Clifton Knolls Sewerage Disposal Co., Inc. v Aulenbach*, 88 AD2d 1024, 1024-1025 [3d Dept 1982]).[4] It does not appear, however, that any New York appellate court has addressed the issue of whether the *American Pipe* toll applies to successive class actions. In the absence of any binding precedent, this court finds that the rationale underlying *American Pipe* requires that a toll apply to successive class actions, at least where there has been no determination of class certification on the merits (*see Resh*, 2017 WL 2261024 *5; *Phipps*, 792 F3d at 652-653; *Sawyer*, 642 F3d at 563-564; *Yang*, 392 F3d at 111-112; *see also Adams v Bigsbee EnterPrises, Inc.*, 53 Misc 3d 1210 [A], 2015 NY Slip Op 52998 * [U]; *but see Lucker v Bayside Cemetery*, 2017 NY Slip Op 31018 *2 [U] [Sup Ct, New York County 2017]).[5]

Applying these principles here, this court finds that the dismissal of the class action portion of the *Melamed* action was not on the merits, at least as to the plaintiffs in this action, who were part of the putative class in the *Melamed* action but not named plaintiffs. The December 11, 2014 order that denied the *Melamed* plaintiffs' motion for class certification, in essence, reserved decision on the merits of class certification until after limited discovery

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[4] While decided before *Crown, Cork & Seal* was issued, the decision in *Clifton Knolls Sewerage Disposal Co., Inc.* provided that an *American Pipe* type toll applied to plaintiff's commencing new actions, not just to interveners (*see Clifton Knolls Sewerage Disposal Co., Inc.*, 88 AD2d at 1024-1025).

[5] Given, as discussed below, that the prior dismissals of the class action claims in the *Melamed* actions were not on the merits, the court need not determine how a prior decision on the merits should be addressed, i.e. whether the prior decision on the merits should preclude tolling or whether it should be addressed as an issue of claim preclusion/comity as suggested by the courts in *Resh* and *Sawyer*.

on the issue was completed. The January 20, 2016 order that dismissed the class action allegations from the *Melamed* complaint was solely based on the *Melamed* plaintiffs' failure to timely move for class certification and did not determine the merits of class certification. As such, the January 20, 2016 order in the *Melamed* action, while binding on the named plaintiffs as law of the case, is in no way binding on the plaintiffs here, who were only putative class members in that action (*see Astil v Kumquat Props., LLC*, 125 AD3d 522, 523 [1st Dept 2015]). The dismissal of the class action claims in the *Melamed* action thus does not bar these plaintiffs from obtaining the benefit of the statute of limitations toll for the period that the *Melamed* actions proceeded as class actions. The fact that the law firm that represents the plaintiffs here represented the named plaintiffs in the *Melamed* action does not change this result, but may be relevant in determining class certification, since the competence of counsel is a factor relevant to whether plaintiffs "will fairly and adequately protect the interests of the class" (CPLR 901 [a][4]; *Ackerman v Price Waterhouse*, 252 AD2d 179, 202 [1st Dept 1998]).

The court finds that the statute of limitations was generally tolled during the course of the *Melamed* action.[6] At least with respect to defendant Americare Certified Special Services Inc., the toll began at the time the initial *Melamed* action was commenced in federal

[6] The courts note that these tolling principles mean that, in addition to the toll arising from the *Melamed* actions, plaintiff Larysa Salo's claims were tolled once this action was commenced, since she was a putative class member from the commencement of this action until the time the complaint was amended to add her as a named plaintiff.

court on September 27, 2011.[7] Since the federal action was not dismissed on the merits, and since the *Melamed* state court action was commenced within the six-month grace period provided by CPLR 205 (a) (*see Dyer v Cahan*, 150 AD2d 172, 173 [1st Dept 1989]; *see also United States Fid. & Guar. Co. v Smith Co.*, 46 NY2d 498, 505 [1979]; *Marrero v Crystal Nails*, 114 AD3d 101, 108-109 [2d Dept 2013]), the toll was uninterrupted by the dismissal of the federal action and continued until the class action portion of the *Melamed* action was dismissed by way of the January 20, 2016 order (*cf. Giovanniello v ALM Media, LLC*, 726 F3d 106, 116 [2d Cir 2013] [*American Pipe* tolling ends upon denial of class certification]). As such, the statute of limitations only precludes claims accruing prior to approximately six years prior to the commencement of the *Melamed* federal action.[8] Defendants' motion is thus denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

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[7] It appears that Amaricare, Inc., was not added as a defendant in the federal action until the complaint was amended on February 27, 2012. As such, this may mean that the tolling period with respect to Amaricare, Inc. may have a different start date than that of Ameircare Certified Special Services, Inc.

[8] The court notes that the time between the effective date of the January 20, 2016 order in *Melamed* and the commencement of this action is not tolled. As the parties have not addressed the effective date of that order for the purposes of tolling (i.e., the issuance date, the entry date, or the date it was served on plaintiff), the court has not made a determination of the exact number of days that are excluded from the tolling. Similarly, the parties have not addressed the fact that, as noted in footnote 7, defendant Americare, Inc., was not a defendant in the *Melamed* federal action at the time such action was commenced.