Montero v McMillan's Home Care Agency Inc.
2011 NY Slip Op 34219(U)
August 2, 2011
Supreme Court, New York County
Docket Number: 104779/2010
Judge: Paul Wooten
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN PART 7
Justice

JOSEFINA A. TOLEDO MONTERO, Individually
and on behalf of all others similarly situated,

Plaintiff,

INDEX NO. 104779/2010

-against-

MOTION SEQ. NO. 002

McMILLAN'S HOME CARE AGENCY INC.
and YVONNE McMILLAN,
Defendants.

The following papers were read on this motion by the plaintiff for class certification and cross motion by the defendants to dismiss.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ■ Yes □ No

FILED
AUG - 8 2011
COUNTY CLERKS OFFICE
NEW YORK

Plaintiff moves pursuant to CPLR 901 and 902 to certify the class, appoint herself as the class representative, and appoint plaintiff's counsel as the class counsel.

Defendants cross-move pursuant to CPLR 3211(a)(7) and 3211(e) to dismiss the complaint for failure to state a cause of action and for plaintiff's lack of standing.

Plaintiff is a home health care worker employed by defendant McMillan's Home Care Agency, Inc. (the "agency"), a provider of home health care workers for the elderly and infirm in New York City. Defendant Yvonne McMillan is the agency's principal.

Plaintiff brought this presumptive class action on behalf of approximately 450 current and former hourly workers employed by the agency from April 12, 2004 through the present, alleging that defendants violated various provisions of New York's Labor Law and related regulations by underpaying the employees. Plaintiff's six-count complaint also contains a claim for unjust enrichment. Essentially, plaintiff argues that defendants' employees, who are paid

minimum wage or little more, were required to work long hours, often 60 hours a week, in shifts of over 10 hours, without being paid overtime or additional hours for the long shifts.

Defendants contend that even if some of the alleged violations occurred with respect to some members of the prospective class, none of them occurred with respect to plaintiff, so she cannot be a proper representative of the class, and the complaint must be dismissed because plaintiff herself has not been injured by any of the alleged violations.

The threshold issue is whether plaintiffs should be certified as a class. To bring this action as representatives of a class, plaintiffs must establish that: (i) the class is so numerous it would be impractical to join all members; (ii) the questions of law or fact common to all members of the class predominate over questions of law or fact affecting individual members; (iii) plaintiffs' claims are typical of the class' claims; (iv) plaintiffs will fairly and adequately protect the interests of the class; and (iv) a class action is the best method of adjudicating the controversy (*see* CPLR 901[a]; *Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420 [1st Dept 2010]). If the prerequisites set forth in CPLR 901(a) are met, the court should then consider additional factors promulgated by CPLR 902, such as "the interest of individual class members in maintaining separate actions and the feasibility thereof; the existence of pending litigation regarding the same controversy; the desirability of the proposed class forum; and the difficulties likely to be encountered in managing the class action" (*Pludeman*, 74 AD3d at 422; *see also* CPLR 902).

It appears from the papers before the court that at the time plaintiff commenced this action, all these factors militated in favor of certifying the proposed class, and plaintiff and her counsel seemed qualified to represent the class. Indeed, controversies over underpayment of wages such as the one at bar lend themselves well to resolution as a class action (*see, e.g.*, *Pineda Herrera v. Da-Ar-Da*, * F Supp *, 2011 WL 2133825 [EDNY 2011]; *Cuzco v Orion Builders, Inc.*, n.o.r., 2010 WL 2143662 [SDNY 2010]). "There is ample precedent for certifying

a case involving a wage dispute as a class action, so long as the dispute concerns remuneration which properly falls within the definition of 'wages' contained in Labor Law § 190(1) as is the case in the instant matter" (*Jacobs v. Bloomingdale's, Inc.*, n.o.r., 2003 WL 25669372 (trial order) [Sup Ct, Queens Co, Taylor, J, 2003]).

Nonetheless, it seems that right after the action was commenced – and publicized in Crain's New York Business (*see* exhibit A to Sanier supporting affidavit) – defendants, without notifying plaintiff, voluntarily deposited funds directly into plaintiff's bank account purportedly representing payment for all the monies due to her under the complaint. Based on such belated compensation defendants are now arguing that the complaint must be dismissed because plaintiff lacks standing to represent the proposed class since she has not been injured by any of the wrongs allegedly committed by defendants. It is a strategy that could pay off. "Inasmuch as individual standing is a threshold requirement to maintain an action . . . plaintiff must show that he or she personally suffered monetary damage as a result of the transaction challenged. The procedural device of a class action may not be used to bootstrap a plaintiff into standing which is otherwise lacking" (*Murray v Empire Insurance Co.*, 175 AD2d 693, 695 [1st Dept 1991]).

What defendants overlook is that the court still has a role to play in the proceedings. "It is well established law that 'class action certification is a question vested in the sound discretion of the court.' . . . Further, the language of the class action statute was intentionally made broad to allow for judicial decision or elaboration" (*In re Colt Industries Shareholder Litigation*, 155 AD2d 154, 159 [1st Dept 1990], affd as modified 77 NY2d 185 [1991], citing *Matter of Froehlich v Tola*, 71 AD2d 824 [4th Dept 1979], lv den 48 NY2d 611 [1980]; *see also* CPLR 907).

Given this maneuvering by defendants, the court is not prepared to grant plaintiff's motion at this juncture. However, it is also not prepared to dismiss a potentially valid class action based on defendants' say-so and sharp practices. The most appropriate course of

action under the circumstances is to conduct a hearing, preceded by limited discovery, to ascertain whether defendants have in fact defeated this class action by mooting all the claims of the proposed class representative (*see Chimenti v. American Express Co.*, 97 AD2d 351 [1st Dept 1983], app dism 61 NY2d 669 [1983]). The hearing will also delve into the claims that remain to the potential class members and any settlements with them reached by defendants (*compare Simon v Cunard Line Ltd*, 75 AD2d 283, 289-290 [1st Dept 1980]). After the hearing has concluded, if plaintiff still has any viable claims, whether through a class action or individually, she may amend her complaint accordingly.

Accordingly, it is

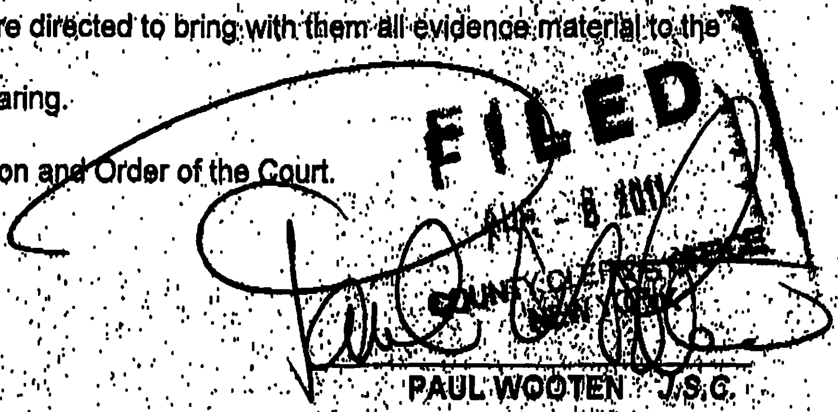
ORDERED that both plaintiff's motion and defendant's cross-motion shall be held in abeyance pending the hearing to be had hereunder; it is further,

ORDERED that the movants may restore the motions to the calendar by filing a copy of this decision with notice of entry and the hearing transcript and/or decision, on the motion support office, which is hereby directed to restore the motions to the court's motion calendar upon such filings; it is further,

ORDERED that counsel shall appear for the hearing, to be held in Part 7 (60 Centre St, Room 341), on Tuesday September 13, 2011 at 2:30 p.m; it is further,

ORDERED that counsel are directed to bring with them all evidence material to the issues to be determined at the hearing.

This constitutes the Decision and Order of the Court.



Dated: 8-2-11

PAUL WOOTEN J.S.C.

Check one: ☐ FINAL DISPOSITION ■ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE