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EA 10/28/13 E

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH SUPREME COURT JUSTICE PART 61

Justice

Index Number : 105520/2011
WEINSTEIN, TAMMY
vs.
JENNY CRAIG OPERATIONS, INC.
SEQUENCE NUMBER : 003
ORDER MAINTAIN CLASS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum opinion.

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 10/24/13

HON. ANIL C. SINGH, J.S.C.
SUPREME COURT JUSTICE

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

5/D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 61

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TAMMY WEINSTEIN, MELISSA PALLINI, individually and on behalf of all others similarly situated who were employed by JENNY CRAIG OPERATIONS, INC.,

Plaintiffs,

INDEX NO. 105520/11

-against-

JENNY CRAIG OPERATIONS, INC.,

Defendant.

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HON. ANIL C. SINGH, J.:

Plaintiffs move to certify this action as a class action pursuant to CPLR 901 *et seq.*

Plaintiffs, former employees of defendant's weight loss centers in New York, brought this action to recover earned but unpaid wages. Plaintiffs now seek to certify a class of 751 present and former non-managerial employees whose time cards were changed by center directors from May 2005 to the present to reflect they had taken a 30-minute lunch break during their shift when they in fact had worked through that break. These deductions were allegedly made pursuant to a company policy which imposed a mandatory 30-minute lunch break, yet encouraged employees to work during that break.

The proponent of class certification bears the burden of establishing the criteria promulgated by CPLR 901(a) ..., and must do so by the tender of evidence in admissible form.... Conclusory assertions are insufficient to satisfy the statutory criteria" (*Pludeman v Northern Leasing Systems, Inc.*, 74 AD3d 420, 422 [1st Dept 2010], citations omitted). In support of their motion, the two named plaintiffs have, *inter alia*, submitted their own deposition testimony

averring that they had been required to work through their supposed 30-minute meal breaks and had personally witnessed the directors of the weight loss centers where they worked change their time records to reflect the 30-minute break even though they had not taken a break (see Leeds supporting aff, exhibits F [Weinstein] and I [Pallini]), the affidavits of two other employees making the same averments (*id.*, exhibits J [Castellano] and K [Puteri]), and the affidavit of a former center director stating that she had been ordered by her "direct and regional supervisors as well as corporate headquarters" to adjust employee records so as to reflect a 30-minute break for each shift and had done so regularly even when she knew the employee had worked through that break (*id.*, exhibit H [Wheeler], ¶¶ 4-5, 7). Plaintiffs have also offered evidence of various class actions alleging wage violations brought against defendant in California (*id.*, exhibits A [complaint in *McBride v Jenny Craig, Inc.*], B [complaint in *Cleaves v Jenny Craig, Inc.*], exhibit C [complaint in *Dibel v Jenny Craig, Inc.*] and exhibit D [complaint in *Coleman v Jenny Craig, Inc.*]), two of which (*Cleaves* and *Dibel*) have settled.

Defendant opposes plaintiffs' motion based on various elements of CPLR 901(a) which will be discussed below. The bulk of defendant's opposition, however, is to the merits of plaintiffs' action. Defendants argue that plaintiffs base their claim of a universal policy on the anecdotal evidence of a handful of employees, when defendant's time records show that center directors clocked in and out for putative class members only 28.7% of the time instead of 100%. In support of this argument, defendant has furnished the affidavit of Anthony Kocica, the computer consultant who studied and analyzed its time records for the 751 potential class members during the period in question herein. Mr. Kocica, through various mathematical calculations, attests in essence that each center and each employee had a different percentage of

automatic breaks inserted, and only one of the 23 centers had the breaks inserted for more than half of the employee shifts during the class period. Using the data produced by Kocica, defendant challenges in detail the veracity of plaintiffs' testimony and that of plaintiffs' other affiants, Wheeler, Castellano and Puteri. Defendant contends that based on such scant, conclusory and false evidence it cannot be assumed that employees worked through their breaks every time the center director clocked them in and out for that break. To support that argument, defendant has submitted nearly identical affidavits from 30 of its current hourly employees who aver that they took a full 30-minute lunch break every day and were paid for every period of time they worked even if defendant's records show that on many days the center director deducted the lunch break from their compensable time even though they did not clock in or out for that break. Defendant has also submitted affidavits from various center directors attesting that they never removed hours actually worked by plaintiffs, and placed break periods only when the employees had actually taken a break, and then only at their request.

Defendant has also submitted the affidavit of its Division Director for East Coast Sales and Service, Laura Koutris (see also Koutris EBT, exhibit E to Leeds supporting aff), who avers that defendant has scheduled mandatory 30-minute breaks since at least 2005 in the 23 centers it operates in New York (¶¶ 3-4), but employees like to work through the breaks because even if they don't get paid their small hourly wage for that time, they still earn the commissions which comprise the bulk of their compensation (¶ 5). This testimony is undercut by that of plaintiffs. Pallini testified that she regularly got paid at the rate of $7 - $7.50 an hour (Pallini EBT, pp 96-97), and only earned commissions during her lunch break if she spent the time "sitting with a client"; if she spent her lunch break "helping and answering phones" she earned nothing (*id.*,

p 121). Weinstein testified that the commissions she earned (usually $2-$3) were less than her hourly rate for the 30 minutes that were taken from her, and she only got a commission if she made a sale (Weinstein EBT, pp 100-101).

The court finds these painstaking assaults on the merits of plaintiffs' case to be futile. "In determining whether an action should proceed as a class action, it is appropriate to consider whether the claims have merit.... However this 'inquiry is limited' ... and such threshold determination is not intended to be a substitute for summary judgment or trial.... Class action certification is thus appropriate if on the surface there appears to be a cause of action which is not a sham" (*Pludeman v Northern Leasing Systems, Inc.*, *supra*, 74 AD3d at 422, citations omitted; see also *Kudinov v. Kel-Tech Const. Inc.*, 65 AD3d 481, 482 [1st Dept 2009]). The court finds that plaintiffs have submitted sufficient evidence as discussed above to satisfy this minimal threshold. To the extent defendant has challenged the credibility of plaintiffs' affiants and deponents, it has merely raised issues to be determined by the trier of facts (*cf. S.J. Capelin Associates, Inc. v. Globe Manufacturing Corp.*, 34 NY2d 338, 341 [1974]).

Finally, shortly before oral argument on this motion, defendant brought to the court's attention three out-of-state decisions rendered after defendant submitted its opposition (see Chammas July 8, 2013 letter,[1] exhibit A [*Ramirez v United Rentals, Inc.* (ND Cal)]; *id.*, exhibit B [*Hernandez v Ashley Furniture* (ED Pa)]; *id.*, exhibit C [*Creely v HCR Manor Care* (ND Ohio)]) where the court denied class certification in wage-and-hour cases involving automatic break deductions. Plaintiffs counter that those cases are factually distinguishable and that plaintiffs in

[1] To the extent counsel's letter discusses other cases, the court will disregard it since counsel did not seek leave to file a sur-reply in this motion.

those jurisdictions did not have the benefits of the liberal interpretation New York accords to CPLR Article 9 (see Klein July 9, 2013 letter). The court agrees. Furthermore, to the extent these cases might be said to support defendant's position, they are not controlling, since there are contrary decisions from this jurisdiction, discussed below, which this court is obligated to follow.

To proceed with this litigation as a class action plaintiffs must satisfy the five elements required by CPLR 901[a]:

> (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 interest of the the class; and
> (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

"Each requirement is an essential prerequisite to class action certification" (*Morrissey v Nextel Partners, Inc.*, 72 AD3d 209, 213 [3d Dept 2010]).

(1) Numerosity

"There is no bright line rule for when a group is so numerous that joinder is impracticable" (*Lewis v Alert Ambulette Service Corp.*, n.o.r., 2012 WL 170049, *8 [EDNY 2012]). Generally, "a prospective class of forty or more raises a presumption of numerosity" (*id.* at *9, citing *Consolidated Rail Corp. v Town of Hyde Park*, 47 F3d 473, 483 [2d Cir 1995], cert den 515 US 1122 [1995]). Plaintiffs herein propose a class of 751 former and current employees of defendant, and defendant has not challenged this element. Thus, the court finds that plaintiffs

have met their burden with respect to CPLR 901(a)(1).

(2) Commonality.

To satisfy this requirement, plaintiffs must show that "the nature of the claims is such as to indicate a predominance of common issues of law and fact over individual questions of damages" (*Pesantez v Boyle Environmental Services, Inc.*, 251 AD2d 11, 12 [1st Dept 1998], citations omitted). Common does not mean identical in every respect. "The statute clearly envisions authorization of class actions even where there are subsidiary questions of law or fact not common to the class" (*Weinberg v Hertz Corp.*, 116 AD2d 1, 6 [1st Dept 1986], affd. 69 NY2d 979 [1987]).

Defendant argues that plaintiffs cannot establish the commonality of their claims because there are many possible scenarios in which a center director would insert a break for an employee, and the correct one in each instance cannot be ascertained without "individual mini-trials" of each break time in question for every putative class member. Relying on *Alix v Wal-Mart Stores, Inc.* (57 AD3d 1044 [2008]), defendant argues that all those "inquiries will raise an inordinate amount of individualized issues that will overwhelm a claim-wide trial and common proof will not be capable of establishing liability." According to defendant, the need for individual investigation and proof precludes a finding that the common issues are predominant (*Wojciechowski v Republic Steel*, 67 AD2d 830, 831 [4th Dept 1979], app dism 47 NY2d 802 [1979]; *Evans v City of Johnstown*, 97 AD2d 1, 3 [3d Dept 1983]; *Sternberg v New York Water Service*, 155 AD2d 658, 659-660 [2d Dept 1989]).

Contrary to defendant's contention, the individualized inquiries will be needed only to

prove damages, not liability. To prove liability, plaintiffs must show the existence of the single corporate policy they allege was implemented at every one of defendant's 23 centers in New York. In *Alix v Wal-Mart, supra*, heavily relied upon by defendant, individual investigations were needed at the liability stage because plaintiffs' claims were premised on four separate policies rather than one. In addition, the proposed plaintiff class numbered about 200,000 rather than the 751 in this case, and the plaintiffs were employed in 110 stores, part of three different chains, and over a 12-year period. Here, plaintiffs complain of only one policy – defendant's insistence that a 30-minute meal break be deducted from employees' time records whether they worked through the break or not. Plaintiffs at bar may prove the existence of that single policy through defendant's corporate documents and the testimony of defendant's corporate employees and center directors. The differences in the deductions taken from the various potential plaintiffs do not defeat the commonality of their claims since "plaintiffs' complaint rests on a unified policy of underpayment" (*Williams v Air Serve Corporation*, n.o.r., 2013 WL 2369843 [Sup Ct, NY Co, Billings, J, 2013]).

(3) Typicality

"The central inquiry in a typicality evaluation is whether 'each class member's claims arise from the same course of events and each class member makes similar legal arguments to prove defendant's liability'" (*Espinoza v 953 Associates LLC*, 280 FRD 113, 127-128 [SDNY 2011], citing *Velez v Majik Cleaning Serv., Inc.*, n.o.r., 2005 WL 106895, *2 [SDNY 2005]). Defendant does not have any specific objection based on this requirement. "Since the typicality requirement relates to the nature of the claims and the underlying transaction, not the amount or

measure of damages, that plaintiff[s'] damages may differ from those of other members of the class is not a proper basis to deny class certification" (*Pruitt v Rockefeller Center Properties, Inc.*, 167 AD2d 14, 22 [1st Dept 1991]). Here, "plaintiffs' claim ... is typical of the claims of the class, as it arises out of the same course of conduct" (*Lamarca v Great Atlantic and Pacific Tea Company, Inc.*, 55 AD3d 487 [1st Dept 2008]).

(4) **Adequacy / Suitability**

Defendant, again relying solely on *Alix v Wal-Mart Stores, supra,* challenges the named plaintiffs' ability to "fairly and adequately protect the interests of the class" on the ground that they are in conflict with 36 of the 751 proposed class members who served as center directors during the class period. "Only a fundamental conflict will defeat the adequacy of representation requirement.... A class representative must be part of the class and possess the same interest and suffer the same injury as the class members" (*Lewis v Alert Ambulette Service Corp., supra*, 2012 WL 170049 at *11). The conflict objected to by defendant is an illusory one. If those 36 individuals choose to join the class of plaintiffs, they will be doing so in their capacity as former hourly employees, to recover wages that other center directors kept them from receiving. Even if a conflict were to develop, it could be easily resolved by the creation of a subclass (see *Super Glue Corp v Avis Rent a Car System, Inc.*, 132 AD2d 604, 608 [2d Dept 1987]). "The record indicates that plaintiff[s] possess[] an 'adequate understanding of the case' to enable [them] to serve as class representative..., and that [their] attorneys possess the requisite 'competence, experience and vigor' to serve as class counsel" (*Borden v 400 East 55th Street Associates, L.P.*, 105 AD3d 630, 631 [1st Dept 2013], citations omitted). Through the supporting affirmation of Suzanne B. Leeds (¶¶ 15-16), an associate at Virginia & Ambinder, LLP ("V&A"), and the

affirmation of Jeffrey K. Brown, a partner in Leeds Brown Law, P.C. ("LB"), plaintiffs have established the ability of LB and its co-counsel V&A, to adequately represent the putative class in this action. Defendant poses no objection to plaintiff's counsel.

(5) Superiority

The final requirement that plaintiff must meet is to show that a class action is the superior vehicle for the resolution of plaintiffs' claims. Once again relying solely on *Alix v Wal-Mart, supra*, defendant argues that since the Commissioner of Labor has the authority to pursue wage violation claims, an administrative complaint would be preferable to a class action as the method of resolving plaintiff's claims. In a case involving claims similar to those asserted herein and those asserted in *Alix*, Justice Cahn of this court held that although some similar factors were present, *Alix* was not binding or controlling and granted the motion for class certification (see *Lamarca v The Great Atlantic and Pacific Tea Company, Inc.*, n.o.r., 2008 WL 2958272 [Sup Ct, NY Co, 2008], affd 55 AD3d 487 [1st Dept 2008]; see *Krebs v Canyon Club, Inc.*, 22 Misc 3d 1125(A), *14 [Sup Ct, West Co, 2009]).

Plaintiffs' failure to pursue their administrative remedies is irrelevant, because 'the Labor Law is not the exclusive remedy to recover prevailing wages.'... Instead, a 'plaintiff class can proceed on ... claims for underpayment of wages and benefits'" (*Nawrocki v Proto Construction & Development Corp.*, 82 AD3d 534, 536 [1st Dept 2011], citations omitted). A class action also yields a public benefit which makes it superior to an administrative complaint. "The class action is seen as a means of inducing socially and ethically responsible behavior on the part of large and wealthy institutions which will be deterred from carrying out policies or engaging in activities harmful to large numbers of individuals.... Without the benefit of the class action, these institutions could act with impunity in such matters since, realistically speaking, our legal system

inhibits the bringing of suits based upon small claims [citations omitted].... Similarly, in this case, since the relatively insignificant amount of damages suffered by many members of the class makes individual actions cost prohibitive, and the large number of class members renders consolidation unworkable, a class action is not only superior but, indeed, the only practical method of adjudication" (*Pruitt v Rockefeller Center Properties, supra*, 167 AD2d at 23-24). In fact, "numerous [federal] courts have found that wage claims are especially suited to class litigation – perhaps 'the most perfect questions for class treatment' – despite differences in hours worked, wages paid, and wages due.... Similarly, New York state courts have repeatedly approved class certification of prevailing wage claims against an employer" (*Ramos v SimplexGrinnell LP*, 796 F Supp 2d 346, 359-360 [EDNY 2011], app den 2011 WL 3472341 [EDNY 2011], reconsideration den 2011 WL 4710814 [EDNY 2011]).

"Whether 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 ... that the class certification statute should be liberally construed" (*Kudinov v. Kel-Tech Const. Inc.*, *supra*, 65 AD3d at 481). "Thus, any error, if there is to be one, should be in favor of allowing the class action" (*Pruitt v Rockefeller Center Properties, supra*, 167 AD2d at 20-21, citations omitted). Based on the foregoing, the court sees no reason to deny plaintiff's motion.

Accordingly, plaintiff's motion for class certification is granted.

Settle order.

DATED: Oct 29, 2013

J.S.C.