Melamed v Americare Certified Special Serv., Inc.
2014 NY Slip Op 33296(U)
December 11, 2014
Supreme Court, Kings County
Docket Number: 503171/12
Judge: David I. Schmidt
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At an IAS Term, Part 47 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 11th day of December, 2014.

P R E S E N T:

HON. DAVID I. SCHMIDT,

Justice.

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RAISA MELAMED AND GALYNA MALYARUK, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

- against -

Index No. 503171/12

Seq 2+3

AMERICARE CERTIFIED SPECIAL SERVICES, INC., AND AMERICARE, INC.

Defendants.

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The following papers numbered 1 to 11 read herein:

	Papers Numbered	
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits/Affirmations/ Memoranda Annexed	1 - 4	7 - 10
Opposing Affidavits (Affirmations)/ Memoranda	7 - 10	5 - 6
Reply Affidavits (Affirmations)/ Memoranda	5 - 6	11
Other Papers	12-15	

Upon the foregoing papers, defendants, Americare Certified Special Services, Inc., and Americare, Inc., (collectively Americare), move for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing the first amended class action complaint (amended complaint).

Plaintiffs, Raisa Melamed (Melamed) and Galyna Malyaruk (Malyaruk) cross-move for an order, pursuant to CPLR 901 and 902, granting class certification.

Background

At the outset, the court notes that there are no sworn affidavits, or affirmations of counsel, with personal knowledge, detailing the undisputed facts of this matter. According to the defendants' unsworn, unaffirmed memorandum in support of its motion to dismiss, "The facts and procedural history are taken from the accompanying [a]ffirmation of Kevin J. O'Connor, Esq. (O'Connor) dated July 2, 2013 . . . and the [a]ffidavit of Michele Falotico (Falotico) dated July 1, 2013 . . ." The O'Connor affirmation contains no facts of the underlying matter, reciting only the procedural history and listing the exhibits annexed thereto. In this regard, O'Connor's affirmation references and incorporates the allegations of the Eastern District Court complaint, dated September 27, 2011, the first amended Eastern District Court complaint, dated February 3, 2012, the Kings County Supreme Court complaint, dated October 4, 2012, and the amended Kings County Supreme Court complaint, dated January 29, 2013 (the amended complaint that the defendants are seeking to dismiss). Falotico's affidavit provides no facts of the underlying matter, attesting only to the circumstances surrounding the rate home health aides (HHA) are paid, how HHA sleep time should be reported to Americare, and that the named plaintiffs' files contain no complaints that either failed to receive "eight hours of sleep per night including at least five hours of uninterrupted sleep."

The plaintiffs, too, offer no affidavits or affirmations to establish the facts herein. Within the plaintiffs' unsworn, unaffirmed "memorandum in opposition to the motion to dismiss and in support of the plaintiffs' cross motion for class certification" (memorandum in support) there appears a section titled, "Factual Background." Introducing the facts of an action through a memorandum is improper when practicing in New York State courts, an issue that will be addressed more fully in the decision below. The affirmations of Jennifer Smith, Esq. (Smith) and Jason Rozger, submitted in support of the cross motion, fail to recite the facts of this matter as well, only acting to introduce the exhibits upon which the plaintiffs' request relies. However, as the "Factual Background" section of the plaintiffs' memorandum in support alleges "facts" gleaned from the amended complaint (incorporated by the defendants), and sworn deposition testimony[1] from Denyse Patsakos (Patsakos), Payroll Director of Care Management, Inc. (alleged to be the defendants' parent company), Nancy Hahn (Hahn), Vice President of Americare, Inc., and Falotico, Corporate Director of Human Resources for both Americare Certified Special Services, Inc., and Americare, Inc., the court adopts these facts for the purposes of the decision herein. These alleged "facts" are as follows:

Melamed and Malyaruk were HHAs formerly employed by defendants to provide personal home health care and assistance to defendants' disabled and elderly clients. Defendants are two for-profit corporations, headquartered in New York, that are jointly

[1] The deposition testimony submitted herein results from the prior federal court actions as it appears that no discovery has yet commenced within the instant supreme court matter.

managed by parent corporate entity Care Management, Inc. Defendants provide care for patients in their homes: Americare, Inc. provides HHA services and Americare Certified Special Services, Inc. provides nursing services. Americare Certified Special Services, Inc. is a certified agency that can bill Medicaid and Medicare; Americare, Inc. is a licensed agency that cannot so bill. As such, Americare Certified Special Services, Inc. contracts with Americare, Inc. to provide HHA services to Americare Certified Special Services, Inc.'s clients, and bills Medicaid or Medicare for HHA services provided through Americare, Inc.

While employed by defendants, plaintiffs' job duties allegedly included, but were not limited to: personal care services, such as assistance with walking, bathing, dressing, personal grooming, meal preparation, feeding and toileting; heaving and light cleaning, such as vacuuming, mopping, dusting, cleaning windows, cleaning bathrooms, doing laundry and taking out garbage; shopping; running errands; and escorting clients. Plaintiffs allege that, like other HHAs employed by Americare, each regularly worked more than 40 hours per week at the homes of defendants' clients. Plaintiffs also allege that each often worked 24-hour shifts which usually lasted from 8:00 a.m. one day to 8:00 a.m. the following day. Plaintiffs further allege that each regularly worked three 24-hour shifts per week, and sometimes worked as many as five 24-hour shifts in one week. Plaintiffs allege that each also worked shifts of less than 24-hours, for which they were paid by the hour. Although Plaintiffs maintained permanent residences elsewhere, they were required to stay overnight at the residences of defendants' clients during their 24-hour shifts.

HHAs who work 24-hour shifts are expected to stay with the patient for the duration of the shift – they are not permitted to leave the patient alone at any point and must be ready to provide care for the patient at any time during that shift, if required. HHAs are expected to clock in and out by telephone at the beginning and end of their shifts, which is how defendants claim to monitor their hours. According to Hahn, the "clock in/ clock out" system allows HHAs to punch in various codes to indicate various tasks performed during their shifts however, this system has no mechanism for HHAs to report how many hours of sleep – if any – an HHA gets during his or her shift. According to Falotico's affidavit, "Americare advises the HHAs during their orientation that they are to notify Americare via a 24-hour hotline, including [*sic*] if they are not receiving eight hours of sleep per night of which at least five hours of uninterrupted sleep."

Currently, Defendants pay their HHA employees who work 24-hour shifts $135.00 per 24-hour shift purporting to exclude sleeping (and meal) time from the calculation of hours "worked" from the 24-hour period.[2] Plaintiffs contend that the defendants' rationale for paying HHAs this way is based upon a New York Department of Labor Opinion Letter (opinion letter) dated March 11, 2010, which defendants have included as an exhibit to its motion.

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[2] There is no indication anywhere in the moving or response papers that any HHAs were ever paid in excess of $135.00 per 24 - hour shift because such HHA, for instance, was forced to continue working through the permitted meal or sleep breaks. Indeed, a review of all information before the court would seem to indicate that no HHA's were ever awakened or forced to stop eating by a patient who required constant care since Americare never claims to have paid any HHA more than $135.00 per 24-hour shift.

Regarding the purported class, as of April, 2012, Falotico states that the defendants employed 5,600 HHAs. Although the exact number of HHAs who performed 24-hour shifts while in Defendants' employ is unknown, the number during the class period is estimated to include at least 2000 aides.

Defendants move for dismissal based upon documentary evidence and, in the alternative, that the plaintiffs fail to state a cause of action.[3] As "documentary evidence," defendants submit a moderately redacted "Opinion Letter" purportedly from the New York State Department of Labor (DOL) dated March 11, 2010, a copy of the Minimum Wage Order for Miscellaneous Industries and Occupations (Wage Order), 12 NYCRR 142, promulgated by the DOL, and the United States Department of Labor's (USDOL) "proposed" rule for "Application of the Fair Labor Standards Act (FLSA) to Domestic Services" (USDOL proposed rule). According to the "Preliminary Statement" within defendants memorandum in support of the motion to dismiss (memorandum in support) Americare contends that the amended complaint must be dismissed because:

> "[p]laintiffs'[amended] complaint fails to state a legal claim insofar as its fundamentally flawed premise is that HHAs were and are required to be paid by Americare at an hourly rate that is 1.5 times their base rate of pay. In addition, the [c]omplaint seeks to certify a class of individuals that cannot be certified in light of applicable CPLR provisions placing limits on the use of the

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[3] Defendants allege that the provisions of CPLR 3211 (a) (7), in particular, that dismissal is warranted where the pleading fails to state a cause of action, "supports the entry of an order dismissing the [t[hird [c]ause of [a]ction of the [c]omplaint." The amended complaint the defendants seek to dismiss, has only *two* causes of action.

> class action vehicle.[4] Finally, the [c]omplaint is based on a false premise that Americare is required to pay the HHAs for every hour that they are located at a work site as opposed to the hours they actually work."

Defendants submit the USDOL proposed rule to support their contention that Americare's interpretation of the applicable laws regarding pay rates are proper.

Plaintiffs oppose the motion to dismiss contending that the defendants' submissions do not qualify as documentary evidence under CPLR 3211 (a) (1). Further, that under the New York Labor Law (NYLL), HHAs are entitled to be paid minimum wage and overtime for all hours of their 24-hour shifts because the plaintiffs contend that their definition of residential employees differs from that of the defendants such that the exclusions for sleeping and eating time do not apply. Plaintiffs proffer that, even if they are exempt employees under the FLSA (as defendants contend), they are still entitled to overtime compensation under the NYLL. Overtime compensation that, as plaintiffs argue, Americare has never paid. Plaintiffs assert that it is the defendants' burden to prove, as an affirmative defense, that the plaintiffs slept and ate such that overtime compensation was not necessary, providing the necessary evidence in support.

While opposing the defendants' motion, plaintiffs simultaneously cross-move for class certification. In support of their cross motion, plaintiffs submit, among other things, (1) motion Exhibit 2 - a seven page snippet[5] from Falotico's prior deposition (the final page of

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[4] Defendants do not move for "dismissal" under this theory. Defendants have utilized this memorandum to not only support their motion for dismissal but also to oppose the plaintiffs' cross motion for class certification.

[5] The court counts only those pages containing actual testimony. The title pages are irrelevant as evidence herein. These deposition snippets appear to have been taken in conjunction

the sample is numbered "44"), (2) motion Exhibit 3 - a two page snippet from Patsakos' prior deposition (the final page of the sample is numbered "87"), (3) motion Exhibit 4 - a thirteen page snippet from Hahn's prior deposition (the final page of the sample is numbered "120"),[6] (4) motion Exhibits 6 and 7 - copies of one "paycheck" [7] from each of the named plaintiffs, (5) motion Exhibit 8 - a "declaration" from a part-time employee of plaintiffs' counsels' firm purportedly explaining how he utilized a 188 page exhibit (motion Exhibit 5) to calculate the approximate size of the purported class, (6) motion Exhibit 9 - a copy of a Supreme Court decision allegedly on point with the instant matter, and (7) motion Exhibit 10 - a second snippet from Patsakos' prior deposition (comprised of pages 55, 59 - 62 and 67-68). Relying on these as well as the allegations within the amended complaint, plaintiffs contend that they have both prevented dismissal and satisfied the requirements of CPLR 901 and 902 such that class certification is warranted.

Americare opposes the plaintiffs' cross motion for class certification by arguing that plaintiffs are unable to meet the "commonality" and "superiority" elements of CPLR 901 due to, among other things, the extensive individual investigation necessary to establish who is

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with the prior Eastern District court action as no apparent discovery has taken place in this Supreme Court action.

[6] Providing such small samples of what are essentially much larger transcripts is troublesome with regard to gaining the proper context of such testimony in light of the fact that the prior Eastern District action, the action for which such testimony was taken, allegedly sought the same relief for the same alleged transgressions.

[7] These actually appear to be pay "stubs" and not actual checks.

a member of the class and whether or not such proposed members were under-compensated. Americare further argues that the named plaintiffs are not adequate representatives of the class, the "adequacy" prerequisite, because they waived the liquidated damages available within the statutes under which plaintiffs move. Finally, defendants allege that the plaintiffs' cross motion must be denied because plaintiffs have failed to submit an affidavit from either of the named plaintiffs.

In reply to plaintiffs' opposition, defendants make much the same argument as in their motion. Defendants now provide a copy of the "final" rule from the USDOL, which does not become effective until January 15, 2015, alleging that this rule clears up the "ambiguity" within this matter, to wit, that "during the period described in the Amended Kings complaint *and until* January 1, 2015, any HHA, like the Plaintiffs, employed by a third-party agency like Americare, is exempt. In essence, Americare's current and past practices are proper under the FLSA and NYLL law *and will remain so* until January 1, 2015"[8] (emphasis added).

In reply to the defendants opposition to class certification, plaintiffs contend that the defendants misstate their authority and that Americare's remaining arguments in opposition rest primarily on the DOL opinion letter which plaintiffs have previously addressed and discredited. With regard to the their ability to represent the class, plaintiffs argue that the recent appellate authority instructs that so long as members of the class may opt-out of a settlement, the fact that the representative plaintiffs waive liquidated damages will not be prevent moving under the class action model. As to the submission of affidavits, plaintiffs

[8] There is no explanation from defendants as to how the January 1, 2015 effective date of a regulation designed to prohibit certain actions translates into a sanction that those actions were proper before January 1, 2015.

point out that the cases cited by defendants do not support such a contention. Plaintiffs argue that the cited cases were denied class certification because of a lack of evidence, not a lack of affidavits per se. Plaintiffs proffer that the pay-stub, deposition and other submissions clearly show that the HHAs worked 24-hour shifts and were not adequately compensated for their work.

Defendants also submit a supplemental affirmation that annexes as additional "documentary evidence," a second moderately redacted "Opinion Letter" purportedly from the New York State Department of Labor (DOL) dated November 14, 2013.

In reply to the defendants' supplemental affirmation, plaintiff contends that the second opinion letter is subordinate to and in conflict with the controlling regulations and, additionally, is inapplicable to the facts at bar.

In further support of its application seeking class certification and in opposition to Defendants' motion, Plaintiffs submit a sur-reply affirmation annexing a recent decision and order of Kings County Supreme Court Justice Demarest (*Andryeyeva v New York Health Care, Inc.,* (Civil Index No. 14309/11 [Kings Sup. Ct. September 16, 2014], in which the court granted class certification based on similar claims alleged in the instant matter.

Defendants submit a sur-reply affirmation distinguishing the decision by pointing out, among other things, that unlike the plaintiffs the *Andryeyeva* matter, the plaintiffs in the instant action in a union and subject to a collective bargaining agreement and there has been no discovery in the instant matter.

Discussion

Initially, a review of the plaintiffs' amended complaint, giving the factual allegations within same their most favorable intendment (*Arrington* at 442) shows that such amended complaint sufficiently places the defendants on notice of transactions, occurrences, or series of transactions or occurrences intended to be proved at trial (*see Moore v Johnson*, 147 AD2d 621, 621 [1989], *quoting Pace v Perk*, 81 AD2d 444, 449 [1981]; *see Conroy v Cadillac Fairview Shopping Ctr. Props. [Md.]*, 143 AD2d 726 [1988]). Accordingly, the court must now determine if Americare has met its burden for dismissal herein.

Branch of Defendants' Motion Seeking Dismissal Pursuant to CPLR 3211 (a) (1)

CPLR 3211 (a) (1) provides in pertinent part that a party may move for judgment dismissing one or more causes of action asserted against him on the ground that: (1) a defense is founded upon documentary evidence. Where a defendant moves to dismiss an action asserting the existence of a defense founded upon documentary evidence, the documentary evidence must be such that it resolves all factual issues as a matter of law (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]: *Heaney v Purdy,* 29 NY2d 157 [1971]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346 [2003]). In order to be considered documentary evidence within the meaning of CPLR 3211(a)(1), the evidence "must be unambiguous and of undisputed authenticity" (*Rabos v R & R Bagels & Bakery, Inc.*, 100 AD3d 849 [2012]; *Fontanetta v John Doe 1*, 73 AD3d 78 [2010]), that is, it must be "essentially unassailable" (*Rabos, supra; Suchmacher v Manana Grocery*, 73 AD3d 1017 [2010]; *see Norment v Interfaith Ctr. of NY*, 98 AD3d 955 [2012]). Therefore, a motion to

dismiss may be granted on documentary evidence so long as the documents *alone* definitively dispose of plaintiffs' claims (*see Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180 [2006]; *Bronxville Knolls Inc. v Webster Town Center Partnership*, 221 AD2d 248 [1995] [emphasis added]). The movant may not rely on affidavits or depositions to support a motion to dismiss pursuant to CPLR 3211(a)(1) (*see Fontanetta* at 78). Moreover, with respect to the documentary evidence submitted pursuant to CPLR 3211(a)(1), since the instant motion will not be converted into one for summary judgment, the pleadings must be given "their most favorable intendment" (*Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]), and the plaintiffs' allegations which are contrary to the documentary evidence must be accepted (*see Sopesis Const., Inc. v Solomon*, 199 AD2d 491, 493 [1993]; *Scheller v Martabano,* 177 AD2d 690 [1991]). However, a complaint containing factual claims that are flatly contradicted by documentary evidence should be dismissed (*see Well v Rambam,* 300 AD2d 580, 581 [2002]; *Kenneth R. v Roman Catholic Diocese of Brooklyn,* 229 AD2d 159, 162 [1997], *cert. denied* 522 US 967 [1997]). "As a defense, it is the defendant who has the burden of showing that the document offered meets the enumerated standard for dismissal" (*Schapiro v Schmuckler*, 21 Misc.3d 1119[A], 2008 NY Slip Op 52104[U] Sup Ct, Kings County 2008]).

In support of their motion, Americare submits the Wage Order, the March 11, 2010 Opinion Letter "interpreting the Wage Order," and the USDOL "proposed" rule for "Application of the Fair Labor Standards Act to Domestic Services."

The Wage Order

According to the amended complaint:

> "At all times relevant to this action, Defendants failed to pay Plaintiffs and other class members overtime wages of not less than one and one-half times their regular rate of pay for hours worked in excess of 40 per week. *In the alternative, Defendants failed to pay overtime at the rate of one and one-half times the New York State minimum wage rate for each hour worked in excess of 40 hours per week, in violation of the New York Labor Law, Article 19, § 650 et seq. and 12 N.Y.C.R.R. § 142 - 2.2*" (emphasis added).

Americare has the burden of showing that the proffered document meets the standard to dismiss the amended complaint (*see Shapiro, supra*). Defendants have submitted a copy of the Wage Order alleging, in quite conclusory terms, that this submission "conclusively dispose[s] of the Plaintiffs' claims." Defendants misapprehend either the standard under 3211 (a) (1), or the amended complaint. Merely submitting the Wage Order does not, in and of itself, resolve all factual issues as a matter of law (*see Leon, supra; Heaney, supra*), for example, whether the plaintiffs were entitled to overtime and whether the defendants failed to pay such overtime. Despite the defendants argument to the contrary, the applicable *rate* at which such overtime may or may not be owed is not the subject of the above inquiry. Indeed, as the above quotation reads, the plaintiffs have plead, in the alternative, that they are entitled to overtime at the very rate described within the defendants' exhibit as well as under the NYLL. It has been held that a motion to dismiss may be granted on documentary evidence so long as the documents alone definitively dispose of plaintiffs' claims (*see Blonder & Co., supra; Bronxville Knolls Inc., supra*). A review of the remainder of Americare's moving papers fail to offer any further clarification as to how the Wage Order

defeats all of the plaintiffs' claims. For these reasons, this submission fails to qualify as documentary evidence such that it will support the request for dismissal.

The "Opinion Letter"

Again we address the CPLR 3211 (a) (1) status of this March 11, 2010 Opinion Letter from the DOL. As the plaintiffs highlight, Kings County Supreme Court Justice Demarest has discounted this exhibit in both *Andryeyeva v New York Health Care, Inc.,* (Civil Index No. 14309/11 [Kings Sup. Ct. February 19, 2013]) and *Kodirov v Community Home Care Referral Serv., Inc.*, (35 Misc 3d 1221 [A], 2012 NY Slip Op 50808 [U] [Sup Ct, Kings County 2012]). This court too has had occasion to discuss and discount this exhibit as part of its decision in *Moreno v Future Care,* (43 Misc3d 1202 [A], 2014 NY Slip Op 50449 [U] [Sup Ct, Kings County 2014]). As previously held, the issues with the Opinion Letter are as follows:

a. The party requesting this submission is unknown as their identity and mailing address have been redacted from the exhibit.

b. The "November 23, 2009" letter requesting this opinion, presumably containing the criteria under which the opinion applies, has not been provided in the papers. The submission reads, "[t]his opinion is based on the information provided in your letter dated November 23, 2009. A different opinion might result if the circumstances stated therein change, if the facts provided were not accurate, or if any other relevant facts were not provided." The requesting letter forms the basis for this opinion letter's applicability to the employees. Absent this letter, any connection to the plaintiffs herein is "ambiguous at best" in contravention of established authority (*see Rabos* at 1017).

c. The submission reads, "[y]our letter asks four questions for which you request that it be assumed that your client's employees are within the FLSA

> companionship exemption" with no further explanation or criteria as to *why* such exemption should apply to the aides therein, let alone the plaintiffs herein. Indeed, whether such an exemption applies forms one of the central disputes in this action.

By virtue of the foregoing, this submission, too, fails to form the documentary evidence sufficient to support dismissal (*Rabos, supra*; *Fontanetta, supra*) due to the ancillary information required to ascertain its application to the parties herein. Since such additional information is not contained within the document (*see Blonder & Co*, *supra*) same fails to resolve any factual issues (*see Leon, supra*) and actually creates additional issues not addressed within the defendants' motion. Moreover, assuming, for the sake of argument, that the court did accept this document as proper, its plain language does not definitively dispose of plaintiffs' unpaid overtime wage claims (*see Blonder & Co*, *supra*). It spells out precisely when they are due and owing (*Id.; see Bronxville Knolls Inc.*, *supra*).

The court finds that the same analysis applies to the November 14, 2013 "Opinion Letter".

USDOL Proposed Rule

With regard to defendants contentions regarding the USDOL's proposed rule (or for that matter, the Final Rule provided as part of the defendants reply), applicability of these documents is unclear insofar as the plaintiffs assert no causes of action under the FLSA. Moreover, the defendants reliance on either a "proposed" rule or the final version of same which has an effective date yet to arrive does not support their contention that Americare's

interpretation of the applicable laws regarding pay rates are proper, nor dispose of the plaintiffs' overtime claims (*Id.*).

Having failed to proffer documentary evidence to support its request for relief, that branch of Americare's motion seeking to dismiss the amended complaint, pursuant to CPLR 3211 (a) (1), is denied.

Branch of Defendants' Motion Seeking Dismissal Pursuant to CPLR 3211 (a) (7):

CPLR 3211(a)(7) provides that, "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that the pleading fails to state a cause of action." In determining whether a complaint is sufficient to withstand a motion pursuant to CPLR 3211 (a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer* at 275). The court must accept as true the facts alleged in the complaint and afford the plaintiff the benefit of every possible favorable inference in determining whether the complaint states any legally cognizable cause of action (*see International Shoppes v Spencer*, 34 AD3d 429 [2006]; *Schenkman v New York Coll. of Health Professionals*, 29 AD3d 671, 672 [2006]; *Dye v Catholic Med. Ctr. of Brooklyn & Queens*, 273 AD2d 193 [2000]). The court "is not concerned with determinations of fact or the likelihood of success on the merits" (*Detmer v Acampora*, 207 AD2d 477 [1994]; citing *Stukuls v State of New York*, 42 NY2d 272, 275 [1977]). "Whether a plaintiff can ultimately establish its allegations

is not part of the calculus in determining a motion to dismiss" (*EBCI, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]). Although a complaint may be inartfully drawn, illogical or even informal, it will be deemed to allege whatever can be implied from its statements "by fair and reasonable intendment" (*Shields v School of Law, Hofstra Univ.*, 77 AD2d 867, 868 [1980]; quoting *Lupinski v Village of Ilion*, 59 AD2d 1050 [1977]). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration" (*Garber v Board of Trustees of State Univ. of N.Y.*, 38 AD3d 833, 834 [2007], quoting *Maas v Cornell Univ.*, 94 NY2d 87, 91 [1999]).

In assessing a motion under CPLR 3211(a)(7) however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]). As to affidavits submitted by the defendant, they will almost never warrant dismissal under CPLR 3211, unless they "establish conclusively that [plaintiff] has no [claim or] cause of action" (*Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008]). "Thus, the court may not rely on facts alleged by defendants to defeat the claims unless the evidence demonstrates the absence of any significant dispute regarding those facts and completely negates the allegations against the moving defendants" (*Krause v Lancer & Loader Group, LLC*, 40 Misc3d 385 [2013]; citing *Lawrence*, *supra*). "Unless it has been shown that a material fact as claimed by the [plaintiffs] to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it ... dismissal

should not eventuate" (*Guggenheimer* at 275; *see Woss, LLC v 218 Eckford, LLC*, 102 AD3d 860 [2013]; *Sokol v Leader*, 74 AD3d 1180, 1182 [2010]).

At the outset, the defendants allege that, "[p]laintiffs' [c]omplaint fails to state a legal claim insofar as its fundamentally flawed premise is that HHAs were and are required to be paid by Americare at an hourly rate that is 1.5 times their base rate of pay." As addressed above, the plaintiffs have alternatively pled that, "Defendants failed to pay overtime at the rate of one and one-half times the New York State minimum wage rate . . . in violation of the New York Labor Law. . ." Therefore, all arguments (including those comprising Point II) seeking dismissal based upon the propriety of being paid at 1.5 times the base rate of pay are unavailing since, on this motion to dismiss, the court is not concerned with determinations of fact or the likelihood of plaintiffs' success on the merits at trial (*see Detmer*, *supra*).

Defendants repeatedly contend that,

> "Americare paid its HHAs working live-in shifts $10.38 for every hour of the 13 that *they were expected to work* or roughly $135 per shift. . . Therefore, these HHAs have received hourly wages at least $3.13 above the minimum wage for each hour worked, and no additional overtime premium *would be due* because the actual weekly wages the HHA receives by working these shifts will always equal or exceed the total statutory wages due" (emphasis added).

Similarly,

> "In this example, because the HHA's actual wages of $945 for 91 hours of work exceeds the total statutory wages due of $844.63 by $100.37, Americare would not owe this HHA any additional overtime pay. Americare has historically paid its HHA's who work sleep-in shifts a per diem rate of at least $135.00 *that excludes sleeping (and meal) time from the calculation of hours 'worked' from the 24-hour shift. See Falotico Affidavit ¶ 3. When excluding this time, Americare pays its home attendants working these shifts at a*

> *sufficient rate to satisfy the NYLL's minimum wage and overtime requirements. Consequently, the HHA's allegations are a legal impossibility"* (emphasis added).

Americare relies heavily on Falotico's affidavit. The affidavit makes allegations relating to Americare's historic procedures for paying wages, the discounted DOL Opinion Letter, how Americare allegedly notifies HHAs of the payment, sleep notification and reporting procedures, and that each plaintiff has allegedly never reported that they did not receive the proper amount of sleep as required by such procedures. However, the court may not rely on such facts alleged by defendants to defeat the claims unless the evidence demonstrates the absence of any significant dispute regarding those facts and completely negates the allegations against the moving defendants (*see Krause*, *supra*). The court is unable to review the evidence in light of these "facts" because Americare has submitted no competent evidence in support. There is no wage and time evidence, no "historic" practice evidence, no evidence of the procedures employed to notify HHAs of the reporting requirements, no evidence of any notifications signed by the plaintiffs. In short, there is no evidence of any allegation made by Falotico within her affidavit. Defendants ask the court to simply take notice of such facts, stating, "[w]hen excluding this time [for sleep and meals], Americare pays its home attendants working these shifts at a sufficient rate to satisfy the NYLL's minimum wage and overtime requirements." Under the scenario described by Americare, such a statement may ring true, however, under the 3211 (a) (7) standard above, same rings hollow as conclusory and unsupported (*see Krause* at 385). The defendants possess all pay

and time records for these two plaintiffs as well as any purported class. Had defendants actually provided any of these, they may very well have earned dismissal pursuant to CPLR 3211 (a)(1). Such is not the case. The defendants have offered only suppositions and arbitrary estimates of working hours in order to provide calculations purporting to support their position. As the movant, the defendants must provide evidence in support of their position. To this end, defendants offer no competent evidence to support their motion. Absent proof establishing that each plaintiff worked only thirteen hours of every 24-hour shift, the allegation that $135 per day "sufficiently exceeded the statutory minimum" is rendered baseless and conclusory.

Defendants argue that New York law permits deductions for sleep time, therefore the plaintiffs are not entitled to be paid for every hour they are on site. Any argument over whether or not the plaintiffs should be paid for every hour on site is irrelevant at this point since a grant of dismissal, in defendants' favor, is not hinged upon such issue. The grant of dismissal is hinged upon whether or not the defendants have shown that the plaintiffs have no cause of action. As previously stated, issue to be determined is whether the complaint states a cause of action (*see Guggenheimer* at 275). The court must accept as true the facts alleged in the complaint and afford the plaintiff the benefit of every possible favorable inference (*see International Shoppes,* at 429) except that allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see Garber*, at 834). The court is not concerned with

determinations of fact or the likelihood of success on the merits (*see Detmer*, at 477). The amended complaint contains facts sufficient to state a cause of action for unpaid wages and overtime wages. Defendants allege that overtime was not owed because the plaintiffs never contacted Americare to inform defendants they were not sleeping. "Since HHAs are alone at a client's residence at night, it is incumbent on the HHA to report to Americare whether they do not obtain five uninterrupted hours of sleep during each shift - something Americare *mandates* of its home attendants" (emphasis added). Where is the evidence of such policy or proof that the plaintiffs are aware of such policy? Whether or not such policy *may* be fact is irrelevant on this motion absent competent evidence in support of same and in support of Falotico's affidavit. "Unless it has been shown that a material fact as claimed by the [plaintiffs] to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it ... dismissal should not eventuate" (*Guggenheimer, supra*; *see Woss, LLC*, *supra*). The unsettled dispute over whether or not HHAs received the permitted sleep and meal breaks is prototypical of the dispute envisioned by *Guggenheimer*, thus, there can be no grant of dismissal herein.

Alternatively, defendants seek dismissal by alleging that, "the [c]omplaint is based on a false premise that Americare is required to pay the HHAs for every hour that they are located at a work site as opposed to the hours they actually work." A review of the amended complaint, however, reveals no such allegation from the plaintiffs, only seeking compensation for hours *worked*. For example:

> "Plaintiffs bring this case . . . on behalf of all current and former home health care workers . . . who were not paid statutorily-required compensation *for all hours worked* and/ or all statutorily required overtime pay. . ." (emphasis added).
>
> "[W]hether Defendants failed to pay Plaintiffs and the class the minimum wage *for each hour of work that is required* and permitted them to perform" (emphasis added).
>
> "Failing to pay Plaintiffs and the class members the minimum wage *for all hours worked* in each discrete work week. . ." (emphasis added).
>
> "Defendants willfully violated the rights of Plaintiffs and the class members by failing to pay them wages due and owing *for work performed* in violation of New York State Labor Law" (emphasis added).

As defendants have failed to meet their burden under 3211 (a) (7), that branch of Americare's motion seeking dismissal of the amended complaint for failing to state a claim is denied .

Plaintiffs' Cross Motion for Class Certification

The party seeking class certification bears the initial burden of establishing the criteria prescribed in CPLR 901 (a), to wit, (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members (commonality); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); (4) the representative parties will fairly and adequately protect the interests of the class (adequacy); and (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy (superiority) (*see Kudinov v Kel-Tech Constr. Inc.*, 65 AD3d 481 [2009]; *CLC/CFI Liquidating Trust v*

Bloomingdale's, Inc., 50 AD3d 446, 447 [2008]; *Rabouin v Metropolitan Life Ins. Co.*, 25 AD3d 349 [2006]; CPLR 901). To satisfy this burden, the movant must provide an evidentiary basis for class certification tendered in admissible form (*see Kudinov* at 481; *Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 422 [2010]; *Matros Automated Elec. Const. Corp. v Libman*, 37 AD3d 313, 313 [2007]; *Feder v Staten Is. Hosp.*, 304 AD2d 470, 471 [2003]). To satisfy the requirements of CPLR 901, the representative plaintiffs must make a factual demonstration, by affidavit or otherwise, that such requirements have been satisfied (*see Rife v Barnes Firm, P.C.*, 48 AD3d 1228 [2008], *lv dismissed and denied in part*, 10 NY3d 910 [2008]). Whether a lawsuit qualifies as a class action matter is a determination made upon a review of the statutory criteria as applied to the facts presented (*see Small v Lorillard Tobacco Co.*, 94 NY2d 43, 52 [1999]). Certification cannot be predicated on general, conclusory allegations, but must be supported by a factual record (*see Rallis v City of New York*, 3 AD3d 525, 526 [2004]; *Yonkers Contr. Co. v Romano Enters. of NY*, 304 AD2d 657, 658-659 [2003]; *Pludeman* at 422; *Feder* at 471; *Chimenti v American Express Co.*, 97 AD2d 351, 352 [1983]).

Once these prerequisites are satisfied, the court must next consider the factors set out in CPLR 902, to wit, (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; and (5) the difficulties likely to be encountered in the management of a class action (*see Rife v Barnes Firm, P.C.*, 48 AD3d 1228, 1229 [2008]; *Ackerman v Price Waterhouse*, 252 AD2d 179, 191 [1998]; CPLR 902). The party seeking class certification has the burden of establishing compliance with every requirement of both CPLR 901 and 902, and the determination whether to certify a class is vested in the sound discretion of the court (*see Rife* at 1229; *see also Pludeman* at 422; *Rallis* at 526).

Numerosity

"There is no "mechanical test" to determine whether the first requirement -- numerosity -- has been met, nor is there a set rule for the number of prospective class members which must exist before a class is certified. Each case depends upon the particular circumstances surrounding the proposed class and the court should consider the reasonable inferences and commonsense assumptions from the facts before it" (*Friar v Vanguard Holding Corp.*, 78 AD2d 83, 96 [1980] [internal citations omitted]). It has been recognized, however, that numerosity is satisfied where the proposed class contains around 40 members (*see Hoerger v Board of Educ. of Great Neck Union Free School Dist.*, 98 AD2d 274 [1983]; *Galdamez v Biordi Constr. Co.*, 13 Misc 3d 1224 [A], 2006 NY Slip Op 511969[U] [Sup Ct, NY County 2006], *affd* 50 AD3d 357 [2008]; *Jara v Strong Steel Door, Inc.*, 20 Misc 3d 1135[A], 2008 NY Slip Op 51733[U] [Sup Ct, Kings County 2008]).

To satisfy this prerequisite, plaintiffs' memo in support alleges that:

> "Defendants employ in excess of 5000 HHAs. (Falotico 33:9-16). A review of the partial payroll data produced by Defendants shows that in 2011, the year Defendant employed the most home attendants on 24 hour shifts, 2224 worked such shifts. (Smith Aff. ¶ 10 and [plaintiffs'] Exhibit 8). . ."

Smith's affidavit at paragraph 10 reads:

> "Attached hereto as [plaintiffs'] Exhibit 8 is the Declaration of Richard Koncicki, who reviewed and summarized [plaintiffs'] Exhibit 5 hereto."

A footnote to this paragraph reads:

> "The method used by Mr. Koncicki to review [plaintiffs'] Exhibit 5 is based on the testimony of Denyse Patsakos at page 87 of her deposition transcript, attached hereto as part of [plaintiffs'] Exhibit 3."

In the interest of clarity:

- Plaintiffs' Exhibit 3 is an incomplete sample of Patsakos' transcript consisting only of pages 1, 52, 53, and 87. Within page 87, Patsakos' deposition reads:

  > "Q. If we counted up all the groups of QTD and YTD on these pages, that would tell us the number of home health aides who at some point in 2006 worked a live-in shift; is that right?
  > A. Yes."

- Plaintiffs' Exhibit 5 is approximately 188 pages long with each page bearing the label "Earnings Report" on the upper left and "Americare Inc. HHA 200X" on the upper right where "X" represents the numbers 5 through 11, the years 2005 through 2011. The data on each page (not including those pages containing the data "totals" delineated herein as "summary pages") appear as in the table below. Row Labels 1 - 6 and Column Labels A - D have been inserted by the court to aide in understanding. The table, like the exhibit, contains no grid lines:

	A	B	C	D
1	DEPARTMENT NO:	04	Home Health Aide:	

2				
3	EMPLOYEE NUMBER	NAME	LI Live In Rate HOURS	AMOUNT
4				
5		QTD:	5.00	840.00
6		YTD:	5.00	840.00

Each data page appears as shown above with between 17 and 18 row sets formatted similarly to Rows 5,6[9] except each subsequent row set contains unique values in Columns C and D. It appears from the summary pages that field 1A and 1B are read together to indicate that this table is for "Department 4." However field 1C, "Home Health Aide," field 3A, "Employee Number,"and field 3B,"Name" are either blank or the unique identifying information contained in these fields has been redacted.

- Plaintiffs' Exhibit 8 is a "Declaration" of "part-time" employee Koncicki wherein Koncicki describes how he arrived at the 2224 number stated in the memo in support above.

While plaintiffs attempt to establish numerosity through Koncicki's declaration, this document is not sworn-to before a notary, nor does Koncicki affirm same as an attorney, duly admitted to practice before the courts of this state.

Regarding Federal Court practice, 28 USC § 1746 reads, in pertinent part:

"Wherever. . . any matter is required. . .to be supported. . . by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or

[9] Rows 5/6 within the table are the "groups of QTD and YTD" referenced on page 87 of Patsakos' prior deposition testimony.

> an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported. . . by the unsworn declaration. . . of such person. . .".

When prosecuting an action within a New York State Supreme Court, however, compliance with 28 USC § 1746 is insufficient as factual allegations must be contained in a sworn affidavit unless the party qualifies under CPLR 2106 (*see Discovision Assoc. v Fuji Photo Film Co., Ltd.*, 71 AD3d 488, 489 [2010]). Indeed, pursuant to the Uniform Rules for Trial Courts (22 NYCRR) § 202.8:

> "The moving party shall serve copies of all affidavits and briefs upon all other parties at the time of service of the notice of motion. The answering party shall serve copies of all affidavits and briefs as required by CPLR 2214. *Affidavits shall be for a statement of the relevant facts, and briefs shall be for a statement of the relevant law*" (emphasis added).

Consequently, Koncicki's declaration is not "competent evidence in admissible form" (*Feder*, *supra*), thus the plaintiffs fail to provide the evidentiary basis necessary to establish the numerosity requirement at 2224 potential class members (*see Kudinov* at 481; *Pludeman* at 422; CPLR 901 [a]).

However, the footnote to paragraph 10 of Smith's affirmation does establish that Patsakos' testimony in Smith's' Exhibit 3 is commenting on the earning's report in Smith's Exhibit 5. This fact is corroborated by Smith's Exhibit 10, wherein Patsakos' identifies the "earnings report" by reference to the deposition marking "plaintiffs' 2," the deposition marking that appears on Smith's Exhibit 5. Page 87 of Patsakos' deposition testimony reads, in pertinent part,

"Q: And so if you turn to page 3, between page 3 and page 14 is the report for 2006; is that right?
A: Three and fourteen?

Q: Yes?
A: Yes.

Q: If we counted up all the groups of QTD and YTD on these pages, that would tell us the number of home health aides who had at some point in 2006 worked a live-in shift; is that right?
A: Yes.

Q: Here's my question, if you go to page 62, that's where the report for 2011 starts, correct?
A: Yes.

Q: That report for 2011 for the home health aides goes all the way to page 186, correct?
A: Yes.

Q: Ok. It looks to me like we've got a whole lot of home health aides who have done at least one 24 hour shift in 2011 versus the whole 2005 through 2010 time period. Do you know why that is?
A: Well, I believe that there was probably a huge shift in the services we offer. . ."

So, while the exact number that may comprise the purported class is unavailable at this time, Patsakos' above testimony establishes that such number far exceeds the generally accepted number of 40 (*see Hoerger*, *supra*; *Galdamez*, *supra*; *Jara*, *supra*).

Adequacy

As a result of the issues with satisfaction of this prerequisite, the court will discuss

adequacy of representation, out of turn, at this juncture.

> "Whether the representative party "will fairly and adequately protect the interests of the class" (CPLR 901 [a] [4]) involves a number of considerations--whether a conflict of interest exists between the representative and the class members (*see Super Glue Corp. v Avis Rent A Car Sys.*, 132 AD2d 604, 607[1987]), the representative's background and personal character, as well as his [or her] familiarity with the lawsuit, to determine his [or her] ability to assist counsel in its prosecution and, if necessary, 'to act as a check on the attorneys' (*Tanzer v Turbodyne Corp.*, 68 AD2d 614, 620 [1979]) and, significantly, the competence, experience and vigor of the representative's attorneys (*Super Glue Corp.* at 607) [including] the financial resources available to prosecute the action (*Stern v Carter*, 82 AD2d 321, 340 [1981])."
> (*Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14 [1991]).

Although the above considerations have been stated within the "adequacy" section of plaintiffs' memo in support, there is no evidence provided that sufficiently satisfies such considerations, save for a footnote attesting to counsel's competence by reference to its performance in prior actions. Despite the allegations that the named plaintiffs assisted in drafting the complaints as well as provided documents to counsel, plaintiffs' reply makes the following contrary statement, "[i]ndeed, affidavits from the named [p]laintiffs here, who only have a 'worms-eye' view of [d]efendants' operations and policies, would be of little illumination." Such contradictory positions must be rectified if satisfaction of this prerequisite is to be found. While it may be true that plaintiffs may satisfy their evidentiary burden "by affidavit *or otherwise*," (*Rife* at 1228 [emphasis added]) such "other" means do not help plaintiffs show that these purported representatives will be able "to assist counsel in its prosecution and, if necessary, to act as a check on the attorneys" (*Pruitt*, *supra* [internal

citations omitted]). Moreover, plaintiffs' cross motion lacks any evidentiary support for, or discussion of, for instance, (1) the named plaintiffs' ability to afford to prosecute this action, (3) if such affordability is an issue that representative counsel will pay such costs on contingency,[10] (4) how notice is to be effected to the proposed class should certification be granted, (5) a copy of such proposed notice, and (6) a proposed order of certification.[11]

Defendants reliance on *Knowles*, a Federal Court action, as well as other Federal Court actions are unavailing herein. Defendants contend that the plaintiffs are not adequate representatives of the class as a result of waiving liquidated damages provisions of the underlying statutes. Regarding defendants' reliance on Federal Case law, the court adopts the reasoning of Justice Demarest in *Andryeyeva v New York Health Care, Inc.,* Civil Index No. 14309/11 (Kings Sup. Ct. February 19, 2013), to wit :

> "A Federal court's holdings in cases interpreting New York law "are clearly not binding precedents upon the State courts, no more than a State court's interpretation of a Federal statute would be binding upon the Federal courts" (*Feit v Emons Indus.*, 119 Misc 2d 157, 160 [Sup Ct, NY County 1983]; *see also Matter of Seltzer v New York State Democratic Comm.*, 293 AD2d 172, 174 [2d Dept 2002]). Thus, a New York state court is not bound by a federal court's decision on a matter of New York law in the absence of a federal constitutional question (*see Harnett v New York City Tr. Auth.*, 200 AD2d 27, 32 [2d Dept 1994], *affd* 86 NY2d 438 [1995]; *Baker v Andover Assoc. Mgt. Corp.*, 30 Misc 3d 1218[A], 2009 NY Slip Op 52788[U], *25 [Sup Ct, Westchester County 2009]; *Evolution Mkts., Inc. v Penny*, 23 Misc 3d 1131[A], 2009 NY Slip Op 51019[U], *15 n 12 [Sup Ct, Westchester County 2009]; *Darling v Darling*, 22 Misc 3d 343, 354 [Sup Ct, Kings County 2008]). Indeed, it has been held that "'[t]he construction by State courts of a State

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[10] *See Stern v Carter*, 82 AD2d 321 [1981]

[11] It must be stated clearly that such list is only illustrative, not exhaustive.

> statute is binding on the Federal courts, there being no Federal question involved, even though such courts disagree with the soundness of the interpretation,'" whereas "'[a] Federal decision contrary in principle is not binding upon a State court in respect of a State statute or of a domestic doctrine not involving a Federal question'" (*Harnett*, 200 AD2d at 32, quoting *Marsich v Eastman Kodak Co.*, 244 App Div 295, 296 [1935], *affd* 269 NY 621 [1936])."

As to the plaintiffs' ability to waive liquidated damages, it has been held that:

> "Pursuant to CPLR 901 (b), '[u]nless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.' However, even where a statute creates or imposes a penalty, the restriction of CPLR 901 (b) is inapplicable where the class representative seeks to recover only actual damages and waives the penalty on behalf of the class, and individual class members are allowed to opt out of the class to pursue their punitive damages claims (*see Cox v Microsoft Corp.*, 8 AD3d 39 [1st Dept 2004]; *Pesantez v Boyle Envtl. Servs.*[12], 251 AD2d 11, 12 [1st Dept 1998]; *Ridge Meadows Homeowners' Assn. v Tara Dev. Co.*, 242 AD2d 947 [4th Dept 1997]; *Super Glue Corp. v Avis Rent A Car Sys.*, 132 AD2d 604, 606 [2d Dept 1987])."
> (*Downing v First Lenox Terrace Assoc.*, 107 AD3d 86, 89 [2013]).

So, while the defendants opposition to this prerequisite is without merit, the plaintiffs have nonetheless failed to satisfy their burden under same based on a lack of admissible evidence.

Commonality, Typicality and Superiority

Commonality

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[12] Pesantez, like the instant matter, involved a claim for underpayment of prevailing wages.

CPLR 901(a)(2) requires that "[t]he predominance of questions of fact or law over questions affecting only individual members is the test which must be met, not a nice inspection of the claims of each class member" (*Branch v Crabtree*, 197 AD2d 557 [1993]; *Weinberg v Hertz Corp.*, 116 AD2d 1, 7 [1986] *affd* 69 NY2d 979 [1987]). The court should focus on "whether the use of a class action would 'achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated" (*Friar v Vanguard Holding Corp.*, 78 AD2d 83, 97 [1980]). "The rule requires predominance, not identity or unanimity, among class members" (*Friar* at 98; *Freeman v Great Lakes Energy Partners, LLC*, 12 AD3d 1170, 1170 [2004]). Similarly, the fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action" (*see Branch v Crabtree*, 197 AD2d 557 [1993]; *Friar*, *supra*). The statute clearly envisions authorization of class actions even where there are subsidiary questions of law or fact not common to the class (*see Weinberg* at 7).

After reviewing the amended complaint's allegations, the defendants' prior deposition testimony, plaintiffs' exhibits as well as defendants' admissions within its memoranda, "Issues of law and fact common to all members of the proposed class predominate over individual issues because the ultimate question in this litigation is whether or not [Americare] paid its workers prevailing wages . . .and overtime compensation or engaged in a course of conduct of underpaying its employees. The only individual peculiarities among class members relate to the amount of damages recoverable depending on the number of hours

worked and the prevailing wage rates applicable . . . Such peculiarities are not an impediment to class certification" (*see Jara* at 16 [internal citations omitted]).

Americare's opposition to class certification on commonality involves the argument that class certification is inappropriate here due to the individualized investigation necessary to ascertain the viability of membership in the class, the nature and extent of damages suffered by each class member, and the defenses available to Americare with respect to each class member. Defendants cited authority in support is unavailing and distinguished on the facts herein. Which HHAs worked twenty-four hour shifts, what tasks those HHAs performed, and how much those HHAs were paid is information all within Americare's custody and control. Moreover, there is no evidence to support the proposition that Americare's defense for the claims of the named plaintiffs would be any different to those of the purported class members who were also HHAs employed to do similar tasks.

The mere fact that proof of actual damages may differ among individual members of class is insufficient, standing alone, to defeat certification of an otherwise appropriate class (*see Vickers v Home Federal Sav. and Loan Ass'n of East Rochester*, 62 AD2d 1171 [1978]). The need for individualized proof solely on damages issues will not necessarily defeat a finding of predominance, at least if the damages can be easily computed (see *Broder v MBNA Corp.*, 281 AD2d 369 [2001]; *see also Murray v Allied-Signal, Inc.*, 177 AD2d 984 [1991]). Even if individual damage determinations may become complicated, some courts have indicated a willingness to order class litigation of liability issues leaving individual damage

issues to be tried separately by a special master (*see e.g., Godwin Realty Associates v CATV Enterprises, Inc.*, 275 AD2d 269 [2000]). Alternatively, if there is ultimately a finding of liability, the issue of individual plaintiffs damages can be resolved in any one of a number of ways, including, but not limited to, the use of "proofs of claims" as are done in other class actions, including for example, "prevailing wage" claims such as the matter at bar (*see Lamarca v Great Atlantic and Pacific Tea Co., Inc.*, 16 Misc3d 1115[A], 2007 NY Slip Op 51424[U], *4 [Sup Ct, NY County 2007], *affd* 55 AD3d 487 [2008]). Thus, the argument that individual questions as to damages would remain is not persuasive and poses no procedural difficulties at this stage (*id.*).

Typicality

To meet the burden of CPLR 901 (a) (3), plaintiffs must establish that their claims derive from the same practice or course of conduct and are based on the same legal theories as other potential class members (*see Friar v Vanguard*, 78 AD2d 83, 99 [1980]; *Freeman v Great Lakes Energy Partners*, 12 AD3d 1170 [2004]; *Ackerman v Price Waterhouse,* 252 AD2d 179, 201 [1998]). Plaintiffs allege that all claims arise out of Americare's practice of paying HHAs working a 24-hour shift a flat rate of $135, without regard to the amount of hours actually worked during that shift in violation of the NYLL. Americare admits paying this rate, making myriad arguments as to why no overtime was owed. The paramount issue is defendants' claimed conduct. Clearly, plaintiffs' claims are typical of other members of the potential class since they arise out of the same course of conduct as the potential class

members' claims and are based on the same legal theories (*see Friar*, *supra*; *Freeman*, *supra*).

Superiority

Finally, the proposed class action is superior to the prosecution of individualized claims in view of the difference in litigation costs, the HHAs' likely insubstantial means, and the potentially modest damages to be recovered by each individual HHA, if anything (*see Dabrowski v Abax Inc.*, 84 AD3d 633, 634-635 [2011]; see generally *Nawrocki v Proto Constr. & Dev. Corp.*, 82 AD3d 534, 536 [2011]; *Pesantez*, 251 AD2d at 12). There can be little doubt that a class action is the only feasible mechanism of addressing the claims of the individual members of the proposed class. The potential for a smaller recovery may discourage many of those HHAs from pursuing their claims individually and, as stated, the number of claimants which, based upon plaintiffs' exhibits, may exceed 2000 members, would render consolidation unfeasible (*see SuperGlue Corp.*, at 607). Defendants arguments to the contrary, including that such a class would be unwieldy due to the "extensive individual inquiry necessary" have been addressed above and found unavailing.

Based upon the foregoing, the court finds that the plaintiffs' request to certify the class herein is premature and unsupported by an evidentiary basis as described above (*see Kudinov* at 481; *Pludeman* at 422) However, it is understood that dismissal of such a motion with prejudice, before permitting limited discovery, is inappropriate (*see Kudinov* at 481). The plaintiffs must be afforded an opportunity to conduct the limited discovery necessary to

adduce evidence to satisfy the requirements set forth by CPLR 901 and 902. If, following such discovery, plaintiffs can satisfy their burdens, class certification may eventuate (*see Pruitt* at 22; *Friar* at 99; *Jara* at16). Therefore, the plaintiffs cross motion for class certification is denied without prejudice to renewal following limited pre-certification discovery (*see Katz* at 476; *Globe Surgical Supply* at 129).

Conclusion

In sum, the defendants' motion to dismiss the amended complaint is denied in its entirety. The plaintiffs' cross motion is denied as premature, without prejudice to renewal after limited discovery in accordance with this decision.

The court, having considered the parties' remaining contentions, finds them without merit. All relief not expressly granted herein is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. DAVID I. SCHMIDT