McClendon v Urban Space Works LLC
2018 NY Slip Op 31072(U)
May 31, 2018
Supreme Court, New York County
Docket Number: 153586/2017
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

----------X

CRAIG MCCLENDON, individually and on behalf of all other persons similarly situated who were formerly or are presently employed by URBAN SPACE WORKS, LLC, URBANSPACE GRAND CENTRAL LLC, URBAN SPACE 230 PARK LLC, and ELDON SCOTT and/or any other entities affiliated with or controlled by URBAN SPACE WORKS LLC, URBANSPACE GRAND CENTRAL LLC, URBAN SPACE 230 PARK LLC, and ELDON SCOTT,

Plaintiff,

- v -

URBAN SPACE WORKS LLC, URBANSPACE GRAND CENTRAL LLC, URBAN SPACE 230 PARK LLC, and ELDON SCOTT and/or any other entities affiliated with or controlled by URBAN SPACE WORKS LLC, URBANSPACE GRANT CENTRAL LLC, URBAN SPACE 230 PARK LLC, and ELDON SCOTT,

Defendants.

----------X

INDEX NO. 153586/2017

MOTION DATE _____

MOTION SEQ. NO. 1

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 1, 22, 23, 24, 25, 26 and 27 were read on this application to/for preliminary approval of his proposed settlement and conditional class certification

HON. BARBARA JAFFE:

Plaintiff, individually and on behalf of a putative class of approximately 60 similarly situated people who work or have worked for defendants, brings this purported class action lawsuit against them for their alleged failure to pay appropriate overtime compensation. He

moves unopposed, pursuant to CPLR 901(a), 902 and 908, for preliminary approval of his proposed class action settlement procedure and conditional class certification of the action.

I. BACKGROUND

Between April 11, 2011, and August 8, 2017, defendant retail and food markets in New York allegedly failed to pay some of their workers overtime wages. (NYSCEF 24). On April 18, 2017, plaintiff, who worked for defendants as a security employee, cleaner, and maintenance worker from February 2012 to March 2016, commenced this action against them and their operators, alleging a violation of 12 NYCRR § 142-2.2, which governs overtime rates, and seeking an order granting (1) approval of the parties' settlement agreement (NYSCEF 25), (2) approval of their proposed settlement procedure, (3) approval of their proposed notice of settlement and claim form, and directing its distribution (NYSCEF 27), (4) conditional class certification, and (5) interest, attorney fees, and costs (NYSCEF 24).

The parties attended a mediation at which plaintiff presented a detailed audit of the alleged class damages. They reached an agreement, settling for $265,000, and in the settlement agreement, they define the class as follows:

> The Named Plaintiff and a Class of all individuals employed by Urban Space Works, LLC, Urban Space Grand Central LLC, Urban Space 230 Park LLC, and Eldon Scott, and their related affiliates and subsidiaries who performed work as security guards, porters, maintenance workers, and janitorial workers, and all work incidental thereto from April 11, 2011 through August 8, 2017. The Class shall not include any clerical, administrative, professional, or supervisory employees.

(NYSCEF 24, 25).

Pursuant to the agreement, the conditional certification sought is for settlement purposes only. (NYSCEF 25). In addition, plaintiff will receive a list of class members from defendants, and will notify the people on that list via email, where possible, and regular mail. Each notice will include, *inter alia*, a description of the material terms of the settlement, including

instructions on how to opt-out of it, how to object, and the date of a fairness hearing at which objections may be heard in court. The $265,000 will be held in a fund overseen by a settlement claims administrator selected by the parties. After deduction of court-approved fees and costs, which may include, as relevant here, attorney fees of up to $88,334 for plaintiff's counsel and an incentive award of up to $5,000 for McClendon, each class member will receive a distribution based on the time they worked for defendants, as measured against the time other class members worked for defendants. (NYSCEF 15, 27).

II. DISCUSSION

A. CPLR 901

Pursuant to CPLR 901(a), a lawsuit may qualify as a class action if the following criteria are met: (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 of the representative parties are typical of the claims of the class (typicality); (4) the representative parties will fairly and adequately protect the class's interests (adequacy of representation); and (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy (superiority). (*City of New York v Maul*, 14 NY3d 499, 508 [2010]). The moving party bears the burden of establishing each criterion. (*Matter of Colt Indus. Shareholder Litig.*, 155 AD2d 154, 159 [1st Dept 1990], *affd as mod* 77 NY2d 185).

1. Numerosity

The approximately 60-member class is so numerous that joinder of all its members would be impracticable. (*See Borden v 400 E. 55th St. Assocs., L.P.*, 24 NY3d 382, 399 [2014] [thirteen-member class sufficiently numerous in tenant class action]; *Consol. Rail Corp. v Town*

of Hyde Park, 47 F3d 473, 483 [2d Cir 1995], *cert denied* 515 US 1122 [whether 300 or 700 members in class irrelevant, as numerosity presumed at 40 members])

2. Commonality

Notwithstanding the difference among class members in terms of their specific jobs and damages, common questions of law and fact predominate, namely, whether defendants failed to pay the class overtime wages and thereby violated state labor laws. (*See Borden*, 24 NY3d 382, 384 [2014] [commonality found among current and former tenants of separate apartment buildings notwithstanding differences in damages among class members]; *Stecko v RLI Ins. Co.*, 121 AD3d 542, 543–44 [1st Dept 2014] [commonality found as all members of class alleged defendant failed to pay required wage and benefits]).

3. Typicality

Plaintiff's claim is typical of the claims of the class, as it arises from overtime work performed for which he was not compensated; a finding in his favor would result in all members of the class obtaining relief. (*See Stecko*, 121 AD3d at 543 [plaintiff's claim typical as all arose from defendants' alleged failure to pay prevailing wages and benefit]).

4. Adequacy of representation

As plaintiff alleges that he worked for defendants as a security employee, cleaner, and maintenance worker, and that they unlawfully deprived him of overtime wages during that period, he adequately represents the class, as he and other members seek the same relief. (*See Nawrocki v Proto Constr. & Dev. Corp.*, 82 AD3d 534, 535 [1st Dept 2011]) [representation adequate as plaintiff sought same relief as class members, to receive wages and benefits allegedly owed; defendants did not dispute commonality]).

Having served as class counsel in numerous actions in this county, plaintiff's counsel are adequate representatives for the class. (*See Morris v Alle Processing Corp.*, 2013 WL 1880919, at *12 [ED NY 2013] [Virginia & Ambinder LLP are "experienced labor and employment litigators who have successfully represented employees in numerous wage and hour class and collective action lawsuits").

5. Superiority

As the costs of prosecuting individual actions are likely to exceed the damages suffered by one class member, the class action is a superior vehicle for resolving this claim. (*Nawrocki*, 82 AD3d at 536 [class action was best vehicle to recover damages incurred by construction workers deprived of wages]).

B. CPLR 902

Pursuant to CPLR 902, the court must consider "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 v N. Leasing Sys., Inc.*, 74 AD3d 420, 422 [1st Dept 2010]).

The impracticability of prosecuting separate actions has already been **addressed ( ),** and plaintiff does not represent that there are any actions commenced by or against members of the class concerning this controversy. Moreover, the forum is suitable, as this is the residence of all defendants, and as the claims of the class members arise under New York law. The difficulties of managing this action need not be addressed, as this class is being certified for settlement purposes only. (*See Amchem Prod., Inc. v Windsor*, 521 US 591, 593 [1997] [potential management problems not considered as certification was requested only for settlement]).

C. CPLR 908

1. Settlement agreement

Plaintiff seeks approval of his proposed settlement agreement pursuant to CPLR 908, which states the following, as relevant here: "[a] class action shall not be . . . discontinued or compromised without the approval of the court." In determining whether approval is appropriate, the court looks to whether the proposed settlement is fair, adequate, reasonable, and in the best interests of the class members. (*Gordon v Verizon Communications, Inc.*, 148 AD3d 146, 151 [1st Dept 2017]; *Rosenfeld v Bear Stearns & Co.*, 237 AD2d 199, 199 [1st Dept 1997], *lv dismissed* 90 NY2d 888, *lv denied* 90 NY2d 811). The following factors are considered:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

(*In re Initial Pub. Offering Sec. Litig.*, 226 FRD 186, 190 [SD NY 2005]).

Preliminary approval is typically granted where the proposed settlement appears to be "the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval." (*Oladapo v Smart One Energy, LLC*, 2017 WL 5956907, at *7 [SD NY 2017]).

Here, the settlement agreement appears to be the product of serious, informed negotiations, as the parties attended a mediation at which plaintiff presented a detailed accounting of damages incurred. Plaintiff's request for attorney fees, however, requires a

detailed breakdown of the reasonable value of services provided. (*See Matakov v Kel-Tech Const., Inc.*, 84 AD3d 677, 678 [1st Dept 2011] [remanded to trial court for evidentiary hearing on attorney fees, as class counsel failed to establish fees were customary for those with like experience and reputation, or reasonable]; *Flemming v Barnwell Nursing Home & Health Facilities, Inc.*, 56 AD3d 162, 166 [3d Dept 2008], *affd* 15 NY3d 375 [2010] [refusing to award attorney fees without breakdown]).

Although incentive awards for named plaintiffs in class actions are permitted under federal law, they are not expressly provided for by state statute. (*Saska v Metro. Museum of Art*, 57 Misc 3d 218, 229-230 [Sup Ct, New York County 2017]). The court in *Saska*, however, permitted further argument on the issue at the "final approval stage." (*Id.* n 16). Counsel is free to do so here as well.

2. Notice of proposed settlement and claim form

As relevant here, CPLR 908 provides that notice of the proposed dismissal, discontinuance, or compromise must be given to all members of the class in such manner as the court directs. The notice should at least inform the potential members of the class of the pending action, composition of the class, the issues, proposed terms of settlement, the methods of and time to object to the settlement and the date of a fairness hearing, and afford due process protections. (*Matter of Colt Industries Shareholder Litigation*, 155 AD2d 154, 154 [1st Dept 1990], *affd as modified* 77 NY 2d 185 [1991]).

Here, the proposed settlement procedure provides for two forms of notice to the class, each meeting the above requirements.

D. Class action settlement procedure

The typical proposed settlement procedure requires preliminary approval of the proposed settlement, dissemination of the notice of settlement to the class, and a fairness hearing at which class members may be heard as to the fairness, adequacy, and reasonableness of the settlement. Where preliminary approval is granted, the court must direct the date of the fairness hearing, at which class members and non-settling defendants may present their views of the proposed settlement before the court makes its final determination. (*In re Initial Pub. Offering Sec. Litig.*, 226 FRD at 190).

Based on plaintiff's proposed order, I hereby adopt the following settlement procedure:

1) Within 20 days of the date of this order, plaintiff must modify the proposed settlement notice in accordance with this decision.

2) Within 20 days of the date of this order, defendants must provide the claims administrator with a list, in electronic form, of the names, and last known mailing addresses and email addresses of all the putative class members.

3) The claims administrator must mail the modified settlement notice to class members within 20 days of receipt of the class list.

4) Class members have 60 days from the date the notice is mailed to opt out of or object to the settlement.

5) Class members have 60 days from the date the notice is mailed to qualify as an authorized claimant by filing a claim form.

6) The parties must file any papers in support of settlement approval seven days prior to the fairness hearing.

7) The fairness hearing will be conducted on August 2, 2018, at 10:00 a.m.

8) Within 30 days of the fairness hearing, plaintiff must file a motion for judgment and final approval of settlement, along with detailed affidavits as to the reasonableness of the requested attorney fees and costs, and incentive award.

9) If plaintiff's motion for judgment and final approval of settlement is granted, a final judgment and order will be issued. If no party appeals the final order and judgment, the effective date of the settlement will be 30 days after entry of the final order and judgment.

As the settlement claims director is, pursuant to the settlement agreement, to be jointly selected by both parties, I decline to designate one.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the proposed class action settlement is preliminarily approved and the settlement class is conditionally certified; it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

5/31/2018
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED			[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[ ]	DENIED	[ ]	GRANTED IN PART	[X] OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	DO NOT POST			[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE