Ivory v All Metro Health Care
2018 NY Slip Op 32311(U)
September 18, 2018
Supreme Court, New York County
Docket Number: 160341/2017
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART 12
Justice

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CHEREDA IVORY, JACQUELINE SISTRUNK, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,

Plaintiffs,

- v -

ALL METRO HEALTH CARE, OR ANY OTHER RELATED ENTITIES, ALL METRO HOME CARE SERVICES OF NEW YORK, INC., ALL METRO FIELD SERVICES WORKERS PAYROLL SERVICES CORP., ALL METRO AIDES INC., ALL METRO HOME CARE SERVICES INC., ALL METRO MANAGEMENT AND PAYROLL SERVICES CORP., ALL METRO PAYROLL SERVICES CORP.,

Defendants.

INDEX NO. 160341/2017

MOTION DATE

MOTION SEQ. NO. 1

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this application for dismissal

By notice of motion, defendants move pursuant to CPLR 3211(a) (4) for an order dismissing the complaint on the ground that another action pends between the parties. Plaintiffs Ivory and Sistrunk, individually and on behalf of other persons similarly situated, oppose.

I. BACKGROUND AND FACTUAL ALLEGATIONS

A. The instant action

Plaintiffs Ivory and Sistrunk bring this putative class action on behalf of themselves and others similarly situated who are or had been employed by defendants to provide home health aide services from November 2011 to the present at the New York State residences of defendants' clients.

Ivory has worked for defendants since 2015 as a home health aide (HHA). She alleges that from September 2017 to October 2017, she worked three 24-hour weekly shifts during her employment, did not "live in" the homes of her clients, and was required to stay overnight and be ready to aid the clients throughout her shift. Ivory also claims that she was only paid for approximately 13 out of the 24 hours in her shift, had no one-hour break for each of the three daily meals, received no benefits, was not paid the requisite additional hour for hours worked over ten hours, the so-called "spread of hours premium" (NYSCEF 15, ¶ 45), and, in violation of the New York Labor Law (Labor Law), was not paid the applicable overtime hourly rate for hours worked over 40 in one week.

Sistrunk was employed by defendants as a home and community support services aide (HCSS) from April 2014 to November 2017. She states that she generally worked five 12-hour weekly shifts and, among other things, received no spread of hours premium.

Plaintiffs commenced this action on November 21, 2017 and filed a first amended complaint on January 8, 2018. The HHA plaintiffs allege, in the first and second causes of action, that defendants violated Labor Law § 663 and 12 New York Code of Rules and Regulations (NYCRR) §§ 142-2.1 and 142-2.2 by failing to pay them statutory minimum wages

and overtime. In the third cause of action, on behalf of both classes of plaintiffs, it is alleged that defendants violated 12 NYCRR § 142-2.4 by failing to pay the spread-of-hours premium.

In the fourth cause of action, all plaintiffs claim that defendants violated Labor Law §§ 191 and 193 by failing to pay them timely all the wages to which they are entitled and by taking unauthorized deductions from their pay.

In their fifth cause of action, for breach of contract, plaintiffs allege that defendants' contracts with government agencies require that they be paid wages as required by the Public Health Law § 3614-c, also known as the Home Care Worker Wage Parity Act (Wage Parity Act). (NYSCEF 15, ¶ 113). The Wage Parity Act establishes minimum rates of compensation for home care aides and conditions Medicaid reimbursement for home health care agencies based on certification that aides are paid a minimum wage.

In the sixth cause of action, plaintiffs allege that defendants breached the "City Service Contract(s)" by not paying them the "living wages and health benefits or health benefit supplements for all labor performed" (*id.*, ¶ 122), and that Administrative Code § 6-109, which sets living wage and benefits requirements for city service contractors that provide home care services, "specifically requires . . . that language mandating compliance with [it] be included with and form a part of the City Service Contract(s)" (*id.*, ¶ 123). Plaintiffs assert that, in addition to unpaid wages, they are entitled to recover attorneys' fees, costs, and pre- and post-judgment interest due to defendants' violations of the Labor Law.

B. Federal action

On January 3, 2018, Roslyn Ruddock filed a putative class action against defendants on behalf of herself and other persons similarly situated, all of who had been employed by defendants to provide home health aide services to defendants' clients at any New York location

(FLSA plaintiffs). (NYSCEF 16). Ruddock resides in Virginia and has been employed by defendants since 2015 as a "consumer directed personal aide." (*Id.*, ¶ 9). She works 24-hour shifts and does not "live in" with her clients. While on her shift, she is required to stay overnight and assist her clients throughout her shift. She alleges that she was paid for approximately 13 of the 24-hour shifts, was not paid the applicable overtime hourly rate for hours worked over 40 in one week, received no benefits or any paid vacation time, was not provided with the spread-of-hours premium, and that although she assists clients who receive Medicaid, she is paid less than the rates required under the Wage Parity Act. Ruddock also maintains that, in violation of Labor Law § 195, she received no wage notice statements, and, like the other plaintiffs, was "subject to the same corporate practices of defendants, as alleged herein, of failing to pay overtime and failing to give proper wage notices." (*Id.*, ¶ 16).

In her first and second causes of action, Ruddock alleges that defendants failed to pay her and the FLSA plaintiffs the federal minimum wage and overtime in violation of the Fair Labor Standards Acts (FLSA). Her third, fourth, and fifth causes of action set forth violations of 12 NYCRR §§ 142-2.1, 142-2.2. 142-2.4 and Labor Law § 663, in that defendants failed to pay plaintiffs the statutory minimum wage, overtime compensation, and spread-of-hours compensation.

In the sixth cause of action, it is alleged that, in violation of Labor Law § 195, defendants failed to provide plaintiffs with the required notices, along with the allegation that the FLSA plaintiffs seek pre- and post-judgment interest, attorneys' fees and costs under Labor Law § 198 for successful wage claims. And the seventh cause of action, advancing a claim for breach of contract, contains the allegation that defendants "entered into contracts with government

agencies to pay Plaintiff and the Class members wages as required by the [Wage Parity Act], NY Public Health Law § 3614-c, and New York City's Fair Wages for Workers Act." (*Id.*, ¶ 69).

II. CONTENTIONS

Defendants move to dismiss the instant action based on the pendency of Ruddock's federal action. They allege that the amended complaint, dated January 8, 2018, was filed five days after the federal action, and that neither lawsuit has progressed beyond service of the complaint and an answer filed in the federal case. They also argue that there is a substantial identity of the parties and claims that warrant dismissal in favor of the federal action, and that in both actions, defendant All Metro Field Service Workers Payroll Services Corporation is a named defendant and employer. While the individually-named plaintiffs differ, defendants claim that the putative classes, comprised of home health care workers employed by defendants, are the same and that in the instant action, plaintiffs rely on the Labor Law to assert unpaid wage claims, and in the federal action, they rely on the same Labor Law claims as well as the "companion" FLSA claims. Moreover, defendants argue, similar relief is sought: unpaid wages, statutory liquidated damages, and attorneys' fees. According to defendants, all claims can be completely adjudicated in the federal action, and allowing the instant action to proceed could result in inconsistent judgments.

In opposition, plaintiffs argue that having filed their initial complaint before the commencement of the federal action, they should be allowed to proceed here as their designated forum. Moreover, they deny that all of their claims can be resolved in the federal action as the instant complaint contains claims not advanced in the federal action. While the federal action contains a claim for wages under the Wage Parity Act, in the state action, wages are also sought under Administrative Code § 6-109. Plaintiffs also argue that the putative state class includes

individuals employed by defendants from November 2011, which was before the March 1, 2012 effective date of the Wage Parity Act. Therefore, according to plaintiffs, being compelled to proceed solely in the federal action could result in the loss of damages for three months of work. Plaintiffs also maintain that the "companionship exemption" to the FLSA claims does not apply to the state claims. As a result, plaintiffs claim that the federal action is factually specific in ways not related to the instant action. Moreover, federal courts have stricter requirements for class action certification and have never certified a class of home care workers alleging claims for unpaid minimum wages, and plaintiffs thus argue that they will be prejudiced if required to proceed only in federal court. Additionally, they claim that this court is the more appropriate forum, and rely on recent decisions highlighting the differences between federal and state analyses of proposed class certifications of home care workers bringing claims for unpaid wages.

III. GOVERNING LAW

As relevant to plaintiffs' claims, the minimum wage order, as codified in 12 NYCRR § 142-2.1 (b) ("Basic minimum hourly rate and allowances") requires that nonresidential home care attendants like plaintiffs, be paid for every hour of their shift. By opinion letter dated March 10, 2010, the New York State Department of Labor (DOL) stated that, "live-in employees, whether or not they are residential employees, must be paid not less than for thirteen hours per twenty-four-hour period provided that they are afforded at least eight hours for sleep and actually receive five hours of uninterrupted sleep, and that they are afforded three hours for meals." (*Tokhtaman v Human Care, LLC,* 149 AD3d 476, 477 [1st Dept 2017], quoting NY St Dept of Labor, Op No. RO-09-0169 at 4 [March 11, 2010] [internal quotation marks omitted]).

Following the opinion letter, federal courts have found that such plaintiffs are entitled to be paid for 13 hours of work and that the resulting disputes regarding these claims are not subject

to class action litigation, given the necessity of individualized inquiries into such claims. (*See e.g. De Carrasco v Life Care Servs., Inc.*, 2017 WL 6403521, *5, 2017 US Dist LEXIS 206682, *14 [SD NY 2017] [2010 DOL opinion letter given deference in federal, not state courts; class certification denied for New York class who were not paid full 24 hours for 24-hour shifts]).

However, the Appellate Division, First and Second Departments, have rejected the application of the DOL opinion letter to nonresidential employees, finding that it conflicts with the minimum wage order; the Court of Appeals has not yet addressed the issue. (*See e.g. Tokhtaman v Human Care, LLC*, 2016 NY Slip Op 31606 [U], *3-4, *affd* 149 AD3d at 477]). In *Tokhtaman,* the plaintiff, a former health care attendant, alleged that she and the other putative plaintiffs had not been paid for all the hours worked in their 24-hour shifts. The defendants moved to dismiss, citing the DOL Opinion Letter, and claimed that the plaintiffs were entitled to 13 hours of pay for each 24-hour period. The lower court's denial of the motion was affirmed on appeal. The Court held that the DOL Opinion Letter conflicted with the minimum wage order, noting that if the plaintiff could establish that she was a nonresidential employee, she may recover unpaid wages in excess of 13 hours for a 24-hour period. (*Id.* [internal quotation marks and citations omitted]). The Court in *Moreno v Future Health Care Servs., Inc.*, reversed a lower court determination and found that the plaintiffs, nonresidential home health care attendants working 24-hour shifts, could establish the prerequisites for class certification. (153 AD3d 1254, 1256 [2d Dept 2017]).

IV. ANALYSIS

Pursuant to CPLR 3211(a)(4), a party may move to dismiss an action where "there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order

as justice requires." The court has "broad discretion" in considering whether to dismiss an action based on another pending action. (*Jadron v 10 Leonard St.*, LLC, 124 AD3d 842, 843 [2d Dept 2015]). Dismissal is warranted, however, "where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same." (*Id.*).

Moreover, New York courts generally follow the so-called first-in-time rule, whereby the first court to exercise jurisdiction is the court in which the matter should be determined, and "it is a violation of the rules of comity to interfere." (*Syncora Guar. Inc. v J.P. Morgan Sec. LLC*, 110 AD3d 87, 95 [1st Dept 2013] [internal quotation marks and citations omitted]). Nonetheless, courts do not mechanically apply the first-in-time rule, as "special circumstances may warrant deviation from [it] where the action sought to be restrained is vexatious, oppressive or instituted to obtain some unjust or inequitable advantage." (*L-3 Communications, Corp., v SafeNet, Inc.*, 45 AD3d 1, 7 [1st Dept 2007] [internal quotation marks and citations omitted]; *San Ysidro Corp. v Robinow*, 1 AD3d 185, 186 [1st Dept 2003] [technical priority of claim "not necessarily dispositive, particularly where both actions are at the earliest stages of litigation"]).

Here, the instant action was filed over a month before the federal action, and the litigation has not progressed beyond the filing of some of the pleadings, and defendants offer no reason to believe that plaintiffs instituted this action in a "vexatious" manner. Consequently, there is no reason to deviate from the first-in-time rule. (*Nype v Las Vegas Land Partners LLC*, 74 AD3d 497, 498 [1st Dept 2010]); *see also Allied Props. v 236 Cannon Realty*, 3 AD3d 318, 319 [1st Dept 2004] ["Defendants, in seeking to dismiss this action on the ground that there is another action pending, have failed to make the requisite showing that the other action, a federal action which they commenced, was improperly preempted by a race to the courthouse, or that the actions involve identical parties and issues"]).

Defendants must also "establish complete identity of the parties, causes of action and of the relief sought in the two actions or that a determination in the Federal action will necessarily dispose of all the issues in both actions were the . . . dismissal granted." (*Guilden v Baldwin Sec. Corp.*, 189 AD2d 716, 716 [1st Dept 1993]). Although, "[s]ubstantial, not complete, identity of parties" is sufficient for dismissal under CPLR 3211(a)(4) (*Graham v Dim-Rosy U.S.A. Corp.*, 128 AD2d 417, 418 [1st Dept 1987] [internal quotation marks and citation omitted]). Thus, that not all plaintiffs are parties to each action here does not necessarily mean that there is insubstantial identity of the parties, as all putative class members are employees who provided personal or home care services to defendants' clients.

Defendants, however, do not establish a complete identity of the causes of action and relief sought, nor do they demonstrate that a determination in the federal action would necessarily dispose of all the issues in both actions. Although both sets of plaintiffs seek unpaid wages, they allege distinct causes of action based on different statutes. (*See Montgomery Ward & Co. v Othmer*, 127 AD2d 913, 914 [3d Dept 1987] [internal quotation marks and citations omitted] ["The mere fact that two lawsuits emanate from a common transaction or occurrence is not in and of itself enough to invoke CPLR (a)(4). If the wrongs alleged are separate and independent, they may be prosecuted separately"]). While both actions contain causes of action under the Wage Parity Act, the instant action includes a cause of action based on the separate and distinct Administrative Code § 6-109. (*See e.g. Graev v Graev*, 219 AD2d 535, 535 [1st Dept 1995] [internal quotation marks and citations omitted] ["the action by one spouse for divorce on one set of grounds is not an action for the same cause of action as an action by the other spouse based on different grounds"]).

Here, plaintiffs allege that defendants breached the City Service Contract by failing to pay them the living wages or health benefits in accordance with Administrative Code § 6-109 (*see e.g. Wrobel v Shaw Environmental & Infrastructure Engineering of New York, P.C.*, 56 Misc 3d 798, 802 [Sup Ct, NY County 2017] [in initial contract between construction company and municipal agency, company agreed to comply with applicable prevailing wage requirements of "Federal, State and local laws," including payment of wages in compliance with Administrative Code § 6-109; court allowed class action plaintiffs, employees of subcontractor, to pursue breach of contract claim as third-party beneficiaries of initial contract for prevailing wages]). Whereas the Wage Parity Act references New York City's Living Wage Law as a baseline for its compensation rate, "[t]he Wage Parity [Act] regulates Medicaid reimbursement, which is a matter of state, rather than local, concern." (*Matter of Concerned Home Care Providers, Inc., v State of New York,* 108 AD3d at 155, 156). Moreover, the Wage Parity Act was not in effect until March 1, 2012, and was phased in over time; employers were not required to compensate home care aides 100 percent of the living wage until March 1, 2014. Therefore, if this action were dismissed, plaintiffs would be precluded from potentially recovering under Administrative Code § 6-109 from November 21, 2011 to March 1, 2012, as well as from recovering the full compensation rate under the Wage Parity Act until March 1, 2014.

For these reasons, defendants do not establish a complete identity of the causes of action, relief sought or that a determination in the federal action would dispose of all the issues in both actions. (*See e.g. Haller v Lopane*, 305 AD2d 370, 370 [2d Dept 2003] ["Here, each action is based on a separate theory of recovery. Thus, the court properly exercised its discretion in denying the motion to dismiss on this ground"]).

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss on the ground that another action is pending, is denied in its entirety; and it is further

ORDERED, that defendants shall answer the first amended complaint within 20 days of notice of entry of this decision and order.

9/18/2018
DATE

BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
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