SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

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VALENTIN GARCIA MOLINA and ROGER M. GUERRERO, individually and on behalf of those similarly situated,

Plaintiff(s),

-against-

TWO BROS. SCRAP METAL, INC.; ROCCO COLUCCI; and/or any related entities,

Defendant(s).

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TRIAL/IAS PART 12

INDEX # 604691/16
Motion Seq. 5
Motion Date 8.2.18
Submit Date 8.23.18

The following papers were read on this motion: Documents Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed	66, 78
Answering Affidavit	79, 85
Reply Affidavit	89, 92

Motion by the attorney for the plaintiffs for an order certifying this action as a class action pursuant to CPLR 901 and 902 and designating Leeds Brown Law, P.C. as class counsel is granted. The balance of relief approving for publication the proposed Notice of Wage Hour Class Action Lawsuit, and endorsing the proposed publication order is determined as hereinafter set forth.

This is an action on behalf of plaintiffs and similarly situated individuals to recover from the defendants' alleged unpaid overtime and wage violations.

Plaintiffs Valentin Garcia Molina (Molina) and Robert M. Guerrero (Guerrero) request the court certify a class action on behalf of the following class members:

> "Each and every person who worked for defendants Two Brothers Scrap Metal Inc., Rocco Colucci and/or and related

> entities (defendants or Two Brothers) as machine operators, laborers, factory workers, field workers, drivers, foremen, cutters, and other non-managerial positions employed at defendants' New York locations from June 10, 2010 to present."

The complaint alleges that during the relevant period, defendants employed the named plaintiffs and other individuals as machine operators, laborers, cutters, drivers, and in other non-managerial positions to perform work on their behalf. Plaintiffs allege that beginning in June 2010 and continuing through the present (class period), defendants have maintained a uniform policy and practice of wrongfully failing to pay plaintiffs and other similarly situated employees the proper overtime compensation for all hours worked in excess of 40 hours in a given week; paying employees a flat daily rate instead of an hourly rate; failing to issue proper written notice of plaintiffs' pay rate at the start of employment, annually, and after any change in pay; failing to issue a pay stub that accurately reflects the rate of pay, hours worked, gross wages, allowances, if any, and amounts deducted; and failing to maintain accurate records of the hours employees worked and the amount they were paid. 12 NYCRR § 142-2.2 requires that for hours worked over 40 in a week "[a]n employer shall pay an employee for overtime at a wage rate of one and one-half time the employee's regular rate." Plaintiffs assert defendants violated this provision by maintaining a uniform practice of paying employees a flat daily rate in cash regardless of the number of hours they worked, and paying employees off the books for weekend work at a flat daily rate that was lower than the proper overtime rate for hours worked over 40 hours.

Plaintiffs further allege they typically worked between 54 and 56 hours per week and were paid a flat daily rate regardless of how many hours they worked. They either received no pay stubs at all or received pay stubs that did not accurately reflect the number of hours they worked. Plaintiffs allege they uniformly were missing overtime payments and were not notified of these missing payments via a pay stub or any kind of written record. (*See* Labor Law § 195[1] [requiring written notice in employees' primary language of employees' rate and method of pay, as well as other information, at the start of an employment, annually, and upon a change in an employees' rate of pay]; Labor Law § 195[3] [requiring employers to provide employees with pay stubs that accurately reflect their hours worked, rate of pay and amount paid]).

With respect to the instant application, the proponent of a class certification bears the burden of establishing the following statutory criteria promulgated under CPLR 901(a):

> 1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
>
> 2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
>
> 3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;

> 4. the representative parties will fairly and adequately protect the interest of the class; and
>
> 5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy. . . ."

Each requirement is an essential prerequisite to class action certification and whether each factor has been established rests within the sound discretion of the trial court. (*Liechtung v Tower Air, Inc.*, 269 AD2d 363 [2d Dept 2000]; *see also Alix v Wal-Mart Stores, Inc.*, 57 AD3d 1044 [3d Dept 2008]).

Moreover, in determining whether an action may proceed as a class action, the court must consider:

> 1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;
>
> 2. The impracticability or inefficiency of prosecution 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 form; [and]
>
> 5. The difficulties likely to be encountered in the management of a class action" (CPLR 902).

A class action certification must be founded upon an evidentiary basis. General or conclusory allegations in the affirmation of plaintiff's counsel and exhibits are insufficient to sustain a plaintiff's burden of establishing compliance with statutory requirements for a class action. (*Rallis v City of New York*, 3 AD3d 525 [2d Dept 2004]).

The merits inquiry on a motion for class action certification is limited to whether on the surface there appears to be a cause of action. (*See Brandon v Chefez*, 106 AD2d 162, 168 [1st Dept 1985]). Defendants have the burden to maintain records of payroll and notices, including Wage Theft Notices, that they distributed. Defendants have not produced these notices.

Plaintiffs have satisfied all of the requirements of CPLR 901 – numerosity, commonality, typicality, adequacy and superiority – as well as the discretionary factors of CPLR 902. CPLR 901(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." In evaluating whether or not the numerosity requirement has been met, courts have held that

"[t]here is no mechanical or precise test . . . [and] courts are to consider the unique circumstances of each case, and the inferences to be drawn there from" (*Nawrocki v Proto Const. & Dev. Corp.*, 27 Misc.3d 1211[A] [Sup. Ct. N.Y. Cty., 2010]; *see also Friar v Vanguard*, 78 AD2d 83 [2d Dept 1980]; *Pino Alto Partners v. Erie County Water Auth.*, 21 Misc.3d 1114(A) [Sup. Ct. Erie Cty. 2008] ["[T]here is no set rule for the number of prospective class members. . . . 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."]). Here, the number exceeds 40. (*See, e.g.*, Deposition Transcript of Rocco Colucci (Colucci Tr.), Doc. No. 73, at 23 [admitting that defendants employed between 30-40 laborers at any one time]; *see also* Doc. No. 75, Paychex Letter]). Contrary to defendants' assertion, the Paychex letter may be considered on a motion for class certification. Indeed, while plaintiffs "bear the burden to tender admissible evidence" in support of their motion – which they have done in this case – there is no rule barring a court from considering other evidence on a motion for class certification. (*See e.g. Maor v Hornblower*, 51 Misc 3d 1231[A] [Sup Ct. 2016] [finding commonality in motion for class certification based on "both hearsay and non-hearsay evidence" and noting that "the standard of proof is clearly stricter in a summary judgment context than in a class certification context."]).

The proposed class consists of laborers, machine operators, factory workers, field workers, drivers, foremen, cutters, and other non-managerial positions at defendants' New York locations from June 10, 2010 to the present. Defendants do not dispute that they employed over 40 employees in these positions during the relevant period. Defendants assert that only those workers who have held the exact same job titles as the named plaintiffs may be counted for purposes of numerosity. Defendants cite no support for the proposition that the class must be so limited, nor do they explain why defendants' other non-exempt, non-managerial workers in positions such as factory workers, drivers, cutters, field workers, and similar positions are not similarly situated with laborers and machine operators and cannot be part of the class. It is alleged that all of these employees worked at or were based in the same location, worked the same or similar hours, and were subject to the same policies of paying a flat rate per day, received inaccurate pay stubs or no pay stubs at all, were not being paid overtime for all hours worked over 40 per week, and were not receiving the required Wage Theft Notices under Labor Law § 195. Courts routinely certify classes of workers in different positions where, as here, such workers are allegedly subject to common employment policies and practices. (*See, e.g., Maor,* 51 Misc 3d 1231[A]) [certifying class of servers, bartenders and bar-backs seeking to recover unpaid gratuities, even though both named plaintiffs worked as servers]).

Prior to moving for class certification, plaintiffs requested, and defendants refused to provide, information regarding putative class members, including their positions and job duties. Having refused to provide information relevant to the numerosity inquiry, it is now disingenuous for defendants to defeat class certification by arguing that plaintiffs have failed to specify how many workers held each position.

On a motion for class certification, CPLR 901(a)(2) requires a "predominance, not identity of unanimity" of common questions of law or fact among class members (*Friar,* 78 AD2d 83). Here, the named plaintiffs seek the same relief as the members of the class – namely

to receive the unpaid wages and damages for notice violations owed to them by defendants – for the same wrongs. Commonality is satisfied because there are common questions of both law and fact regarding whether defendants (1) paid plaintiffs and other similarly situated employees the proper overtime compensation for all hours worked in excess of 40 hours in a given week; (2) violated the notice provisions of Labor Law § 195, and (3) failed to maintain complete and accurate records of the hours employees worked and the amount they were paid. All of these questions are capable of resolution on a class wide basis, and these common questions predominate over individual ones in this action. Defendants employed common pay notice and timekeeping practices for the named plaintiffs and putative class members.

Plaintiffs do not assert that defendants' practice of paying cash was by itself unlawful. Plaintiffs allege defendants violated Labor Law § 195(3) by failing to provide pay stubs or by failing to include all hours worked on plaintiffs' pay stubs; and defendants' practice of omitting hours from plaintiffs' pay stubs and paying a flat daily rate made it difficult, if not impossible, for plaintiffs to determine whether they were being paid overtime for all hours worked over 40 per week. The legality of defendants' pay and record keeping practices, such as omitting hours from employees' pay stubs and paying a flat rate per day, is a question common to the entire class. Plaintiffs assert defendants failed to maintain accurate pay and time records. On a motion for class certification, plaintiffs' testimony is typically credited despite any minor discrepancies (*See Anderson v Mt. Clemens Pottery Co.*, 328 U.S. 680 [1946]; *Romero v Rung Charoen Sub. Inc.*, 2017 U.S. Dist. LEXIS 165494 at *8 [E.D.N.Y. Sep. 30, 2017] ["the employer is required to maintain records of wages and hours, and if he fails to do so, a plaintiff 'will not be penalized due to [his] employer's record keeping default' " [quoting *Reich v S. New England Telecomm. Corp.*, 121 F3d 58, 69]]).

Plaintiffs need not prove a negative, particularly prior to adjudication on the merits. Labor Law § 195 unequivocally places the burden on the employer, not the employee, of demonstrating compliance with its requirements. (*See* Labor Law § 195(1) ["the employer shall obtain from the employee a signed and dated written acknowledgment, in English and in the primary language of the employee, of receipt of this notice, which the employer shall preserve and maintain for six years."]); Labor Law § 195(4) [requiring employers to "establish, maintain and preserve for not less than six years contemporaneous, true, and accurate payroll records showing for each week worked the hours worked, the rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other gross wages; deductions; allowances, if any, claimed as part of the minimum wage; and net wages for each employee."]). The proposed class consists of workers who worked at the same location under the same supervisors and were subjected to uniform pay, timekeeping and notice practices. (*Compare* Alix, 57 AD3d 1044). The plaintiffs' claims are thus typical of the class claims.

Defendants repeat the same argument regarding liquidated damages this court has already rejected. (*See Molina*, 59 Misc. 3d at 1232[A]). Plaintiffs' willingness to waive liquidated damages makes them adequate class representatives. Plaintiffs also propose to advise class members they are free to opt out if they wish to pursue liquidated damages.

Defendants assert class members have a "significant interest" in "individually controlling the prosecution or defense of separate actions" because they could theoretically recover liquidated damages in such proceedings. Class members who wish to pursue liquidated damages are free to opt out and pursue individual actions. However, for individual plaintiffs whose actual damages are relatively small, the liquidated damages are also likely to be relatively small, and the prospect of recovering such damage is unlikely to provide significant incentive for plaintiffs to bring individual claims or for attorneys to represent individual plaintiffs in this case. This is true given the additional burden of proving willful conduct on the part of defendants that must be met in order to recover liquidated damages. The inability to recover liquidated damages on a class wide basis does not mean that class members have an interest in controlling the prosecution of individual actions and does not bar class certification. Otherwise, no wage and hour case could ever be certified in New York, yet in reality, New York courts have routinely found class certification appropriate in wage and hour cases. (*See e.g., Pesantez v Boyle Environmental Services, Inc.*, 251 AD2d 11 [1st Dept 1998]) [class actions are the "best method of adjudicating" wage and hour disputes]).

Defendants' argument that the lack of affidavits from putative class members means that no other individuals are aggrieved is without merit. Individuals are "aggrieved" for purposes of the Labor Law if they were not paid properly or did not receive the required notices, regardless of whether or not they "feel" aggrieved or "believe they were aggrieved." (Def. Mem at 36). Moreover, the lack of testimony from other class members supports plaintiffs' position that maintaining individual actions would be inefficient and impractical, as most class members, whose individual damages are small, even with liquidated damages, are unlikely to pursue their claims on an individual basis.

Further, courts, including this one, have held that the immigration status of the named plaintiffs is not relevant and not discoverable in a wage and hour case. None of the cases defendants cite in support of their argument regarding immigration status were wage and hour cases. Contrary to defendants' interpretation, New York courts are not "fractured" on this issue, and have almost universally rejected the argument that immigration status is relevant to employees' ability to recover unpaid wages or to serve as class representatives. (*See Molina, s*59 Misc. 3d at 1232[A]) ["Even if defendants' speculation about plaintiffs' immigration status is correct, numerous New York state and federal district court cases have found that any laborer may maintain an action pursuant to New York's Labor Law for unpaid wages, regardless of immigration status or the documentation relied on in obtaining employment."]; *Garcia v Pasquareto*, 11 Misc.3d 1 [App Term, 2d Dept 2004] ["Where, as here, an employee seeks to bring a wages and hours claim against an employer, the public policy of the State of New York and federal government is that the interest in enforcing wages and hours laws on behalf of all workers is paramount."]; *Dabrowski v ABAX Inc.*, 2010 N.Y. Misc LEXIS 3507, 2010 WL 3016782 ["Even if any of the plaintiffs [representative or proposed] are undocumented, defendants are obligated to pay them wages. There is a clear public policy of paying all workers the wages they are entitled to regardless of their legal status."]; *Jara v Strong Steel Doors, Inc.*, 16 Misc 3d 1139[A] [Sup. Ct. Kings Cty. 2007] [noting prevailing recognition that the IRCA "was not intended to undermine or diminish in any way labor protections in existing law," including New York law] [*aff'd Jara v Strong Steel Door, Inc.*, 58 AD3d 600 [2d Dept 2009];

Pineda v Kel-Tech Constr., Inc., 15 Misc 3d 176, 832 NYS 2d 386 [Sup. Ct. New York Cty. 2007] ["This court therefore prefers to extrapolate from federal and New York State public policy . . . a basis for undocumented workers to claim unpaid wages for work they have already performed, even if, like plaintiffs here, they allegedly proffered fraudulent documents to obtain employment."]).

The court finds that the representative parties, through counsel with extensive experience in this area, will fairly and adequately represent the class. Class counsel has affirmed that they will advance costs associated with litigation of this matter. Moreover, in a case such as this, a class action is superior to other methods of adjudication. (*Pesantez*, 251 AD2d 11). Finally, the court finds that the facts set forth in CPLR 902 favor certification of this action.

Accordingly, this action is certified pursuant to CPLR 901 and CPLR 902 and Leeds Brown Law, P.C. is designated as class counsel.

The proposed Notice of Wage and Hour Class Action Lawsuit (Notice of Pendency) shall be modified as set forth below.

The court concurs with all counsel that the Notice of Pendency shall be translated to Spanish. Although the Notice of Pendency advises class members that they have the right to opt out if they wish to pursue liquidated damages, the Notice of Pendency (¶ 5) must explain in plain terms the meaning of liquidated damages in contrast to other damages with specific hypothetical examples. In all other respects, the Notice of Pendency is adequate.

Settle Notice of Wage and Hour Class Action Lawsuit and Publication Order on notice and submit to the court for signing within 14 days of service of a copy of this order with notice of entry.

Counsel familiar with this matter shall appear in the Trial Part 12 courtroom on **October 16, 2018 at 9:30 a.m.** for a conference.

This decision is the order of the court.

Dated: Mineola, New York
September 24, 2018

ENTER:

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