

<b>Wallace v Attentive Home Care Agency, Inc.</b>
2018 NY Slip Op 33369(U)
November 16, 2018
Supreme Court, New York County
Docket Number: 157441/2017
Judge: Anthony Cannataro
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 41EFM

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SAIDA WALLACE, INDIVIDUALLY AND ON  
BEHALF OF ALL OTHER PERSONS  
SIMILARLY SITUATED,

Plaintiff,

INDEX NO. 157441/2017

MOTION DATE N/A

MOTION SEQ.  
NO. 001

- v -

ATTENTIVE HOME CARE AGENCY, INC.,  
DOING BUSINESS AS, ALWAYS HOME CARE,

Defendant.

**DECISION AND  
ORDER**

-----X

HON. ANTHONY CANNATARO:

The following e-filed documents, listed by NYSCEF document number (Motion 001)  
5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 46, 47, 49, 50, 51, 52, 53

were read on this motion DISMISS.

Plaintiff Saida Wallace commenced this action on behalf of herself and a putative class against defendant Attentive Home Care Agency, Inc., (Attentive Home Care) for unpaid wages, overtime wages, spread of hours compensation, and breach of contract. Defendant now moves, pursuant to CPLR 3211 (a) (4), to dismiss the action or, in the alternative, to stay the action pursuant to CPLR 3211 (a) (4) and CPLR 2201 on the grounds that there is a federal action brought on behalf of an identical, or nearly identical, class pursuing the same claims.

Plaintiff Wallace alleges that while she was employed by defendant as a home health attendant, she was assigned to work 24-hour shifts but was only paid for 13-hour

shifts. She commenced this action on August 18, 2017 on her own behalf and on behalf of a purported class of all New York resident home health attendants who worked for Attentive Home Care from August 2011, seeking damages under the New York Labor Law, Public Health Law § 3614-c and New York City Administrative Code § 6-109.

Defendant argues that plaintiff seeks the same relief here as that previously asserted on behalf of an essentially identical putative class in an action pending in federal court in the Eastern District of New York, in *Nasimova v Attentive Home Care Agency Inc.*, No. 16-1005 (EDNY). The *Nasimova* case was commenced on February 29, 2016 by a different former Attentive Home Care home health aide. Asserting that the federal action was filed first and is further along in the litigation process, defendant argues that this action should be dismissed pursuant to CPLR 3211 (a) (4) or, in the alternative, stayed because there “is another action pending between the same parties for the same cause of action.” According to defendant, the dismissal or staying of this action would preempt the possibility of conflicting rulings and the wasting of resources by both the Court and the parties.

Pursuant to CPLR 3211 (a) (4), a court has broad discretion in determining whether an action should be dismissed on the ground that there is another action pending between the same parties for the same cause of action (*see Whitney v Whitney*, 57 NY2d 731, 732 [1982]; *Matter of Janet L.*, 200 AD2d 801, 803 [1994]; *Barringer v Zgoda*, 91 AD2d 811 [1982]; 6 Weinstein-Korn-Miller, NY Civ Prac ¶ 3211.18). A court may dismiss an action pursuant to CPLR 3211 (a) (4) where there is a substantial identity of the parties and causes of action (*see Montalvo v Air Dock Sys.*, 37 AD3d 567 [2007]; *Certain Underwriters at Lloyd’s, London v Hartford Acc. & Indem. Co.*, 16 AD3d 167 [2005]; *Lopez v Shaughnessy*, 260 AD2d 551 [1999]; *Proietto v Donohue*, 189 AD2d 807 [1993]). CPLR 3211 (a) (4) does not require a court to dismiss or stay a case on the ground of the pendency of another action, but rather gives the court broad discretion to

make such order as justice requires (*Ackerman v. Vertical Club Corp.*, 94 AD2d 665 [1983]; *see also Whitney*, 57 NY2d 731). Further, “[t]here should be some measure of certainty that the original action will be prosecuted to judgment...before a second action is stayed or dismissed in the exercise of judicial discretion” (*Dresdner v Goldman Sachs Trading Corp.*, 240 App Div 242 [1934]).

In the instant case, the balance of the equities requires allowing plaintiff’s case to go forward. In comparing this case to the federal action, it is not clear that there is “substantial identity of the parties and causes of action.” The two cases each name different individuals, who are represented by different attorneys, as plaintiffs, and the federal court declined to certify the purported class in the case before it. Instead, that court “terminated” plaintiff Nasimova’s motion to certify the class pending clarification from the New York Court of Appeals as to whether home health aides who work 24-hour shifts must be compensated for their meal and sleep breaks. Also, it is not clear that the claims asserted in the two cases are identical, as the complaint in the case before this Court contains a potentially unique claim seeking damages dating back to August 18, 2011 pursuant to New York City Administrative Code § 6-109.

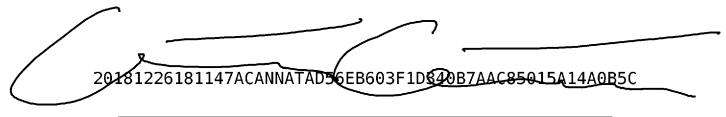
Further, there is no compelling “measure of certainty that the original action will be prosecuted to judgment.” The federal court has effectively stayed the action before it pending clarification from the New York Court of Appeals. Additionally, the federal courts have denied class certification in several similar unpaid wage claims cited in plaintiff’s memorandum of law. Even if the federal court were to ultimately certify the *Nasimova* class, a second class action by another member of a class is not necessarily barred by the pendency of an earlier class suit (*see* 2A Carmody-Wait 2d § 12:21, citing *Dresdner*, 240 AD 242 [1934]).

Accordingly, it is

**ORDERED** that defendant's motion to dismiss or stay this action is denied and counsel are directed to appear for a status conference in Room 490, 111 Centre Street on January 9, 2019 at 2:15PM.

11/16/2018

DATE



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ANTHONY CANNATARO, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE