SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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DEAN LEWIS and TODD WALLACE individually and on behalf of all other persons similarly situated who were employed by THE HALLEN CONSTRUCTION CO., INC.,

Plaintiffs,

- v -

THE HALLEN CONSTRUCTION CO., INC., and JOHN DOE BONDING COMPANY,

Defendants.

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INDEX NO. 151729/2017

MOTION DATE

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23-35, 43-64 were read on this motion for class certification.

By notice of motion, plaintiffs move pursuant to CPLR 901 and 902 for an order certifying this action as a class action. Defendants oppose.

By notice of cross-motion, defendants move pursuant to CPLR 3211(a)(2) and CPLR 3212 for an order dismissing the complaint in its entirety. Plaintiffs oppose.

I. BACKGROUND

On July 1, 2010, non-party members of the General Contractors Association of New York, Inc. entered into a collective bargaining agreement with non-party International Union of Operating Engineers, Locals No. 14-14B and No. 15-15A (Locals 14 & 15). (NYSCEF 52). On August 22, 2016, defendant Hallen and non-party Building, Concrete, Excavating & Common Laborers' Union Local No. 731 of Greater New York, Long Island & Vicinity of the Laborers' International Union of North America (Local 731) entered into a collective bargaining

agreement. (NYSCEF 51).

On December 1, 2015, non-party National Grid Corporate Services, LLC and Hallen entered into a utility contract agreement for "Mains & Services Installation Work in the Brooklyn, Queens and Staten Island Regions." (NYSCEF 61). On April 13, 2016, Hallen and non-party Consolidated Edison Company of New York, Inc. revised a previous utility contract by which Hallen would provide Manhattan keyhole service (NYSCEF 59) (collectively, utility contracts).

On February 21, 2017, plaintiffs filed this class action complaint in which they allege that during their employment with Hallen, they were not paid prevailing wages as required by the utility contracts. (NYSCEF 25). In affidavits offered on this motion, they claim that although they were classified and paid as laborers, they performed tasks of higher paid operating engineers. (NYSCEF 26 and 27).

II. DEFENDANTS' CROSS-MOTION

A. Contentions

1. Defendants (NYSCEF 42-55)

Defendants assert that as plaintiffs are members of Local 731, their claims are governed by the collective bargaining agreement between it and Hallen. Moreover, as plaintiffs essentially deny that the tasks they performed are covered by the agreement and that they thus should have been paid at the operating engineer rate of Locals 14 & 15 and not the Local 731 laborer rate, their claims are preempted by the federal Labor Management Relations Act (LMRA), which governs as this dispute arises from a collective bargaining agreement. Accordingly, defendants maintain that the court lacks subject matter jurisdiction.

Defendants also argue that plaintiffs do not state a prevailing wage claim given their

acknowledgment that they were paid proper Local 731 wages and supplements. Rather, this action addresses their classification given plaintiffs' claim that they should have been classified as operating engineers rather than as laborers, and a worker's classification is within the unions' discretion. Defendants additionally contend that plaintiffs' claims must be analyzed pursuant to the collective bargaining agreement that provides that Local 731 has jurisdiction over plaintiffs' work and was to be involved in reviewing and approving its laborers' scope of work. The collective bargaining agreement also provides for an exclusive grievance procedure if plaintiffs performed work which they believed was outside the scope of Local 731's jurisdiction.

According to defendants, they are entitled to summary judgment because Hallen owes no wages or fringe benefits to employees. In addition, despite the grievance provisions of the collective bargaining agreement, plaintiffs never complained to a union or to Hallen about a misclassification.

In support, defendants submit the affidavits of the President of Local 731 (NYSCEF 48), and the President and Business Manager of Local 15 (NYSCEF 49), who both deny therein having received complaints from employees of performing work outside the jurisdiction of their union, and that Hallen had made all payments as required by the collective bargaining agreements. They offer the affidavit of Hallen's Executive Vice President of Operations who states therein that he was unaware of any complaint made by plaintiffs concerning whether their work was within Local 731's jurisdiction (NYSCEF 50).

2. Plaintiffs

Plaintiffs deny having asserted a cause of action covered by the collective bargaining agreements. Rather, they claim that Hallen breached the utility contracts it had entered into with Consolidated Edison and National Grid which require that it pay prevailing wages for work they

performed as operating engineers, and thus, as third-party beneficiaries of the utility contracts, they have the right to sue in state court.

Plaintiffs explain that their claims are not covered by the collective bargaining agreements because compliance with them is not equivalent to compliance with prevailing wage laws. The two union leaders acknowledge in affidavits that laborers performed tasks identical to those performed by higher paid operating engineers as part of "composite crews," a practice that is unlawful under Labor Law § 220. Even if, as defendants contend, this practice is permissible under the collective bargaining agreement, it is unlawful under the Labor Law. Plaintiffs also observe that worker classifications are derived from the New York City Comptroller, not the collective bargaining agreement.

3. Defendants' reply

Defendants deny that Labor Law § 220 is applicable because the utility contracts were not entered into by public agencies, do not cover a public works project, and do not have a primary objective of benefiting the general public. Rather, Hallen entered into gas supply agreements with two private utility companies. To the extent that plaintiffs reference the utility contract between Hallen and Consolidated Edison, defendants allege that it contains no provision relating to the prevailing wage law. In any event, as plaintiffs offer the utility contracts for the first time in their reply papers, they should not be considered.

As classification of workers is determined by the unions through the collective bargaining agreement that provides a grievance procedure for Local 731 laborers, defendants observe that plaintiffs, inexplicably, did not file a grievance with Hallen or Local 731. They also maintain that the union representatives do not state in their affidavits that laborers and operating engineers performed the same tasks. Rather, they do not differentiate among the tasks performed and only

state that members of each union worked jointly on given tasks.

B. Analysis

1. CPLR 3211(a)(2)

Pursuant to CPLR 3211(a)(2), a party may move to dismiss a cause of action on the ground that the court lacks subject matter jurisdiction.

If a state law is preempted by federal law, there is no state claim. (*See generally Trezza v Trezza*, 104 AD3d 37, 45–46 [2d Dept 2012]). A state law claim is preempted by section 301 of the LMRA (29 USC § 185) if it is based on the interpretation of a pertinent collective bargaining agreement. (*See Pabon v Many*, 99 AD3d 773, 774 [2d Dept 2012], quoting *Harris v Hirsh*, 86 NY2d 207, 211 [1995]). However, when a public works contract requires compliance with Labor Law § 220, a common law breach of contract claim for failure to pay prevailing wages asserted by a third-party beneficiary of that contract is not preempted, as the rights conferred thereunder are independent of the collective bargaining agreement. (*Wysocki v Kel-Tech Const. Inc.*, 46 AD3d 251, 251 [1st Dept 2007]).

Here, as the National Grid utility contract contains a provision mandating compliance with all applicable federal and state laws, it, perforce, includes an agreement to pay statutorily mandated wage rates. (*See Filardo v Foley Bros.*, 297 NY 217, 225 [1948], *revd on other grounds* 336 US 281 [1949] [contract which expressly required compliance with "all applicable laws" constitutes agreement to pay statutorily mandated wage rates]), and the Consolidated Edison utility contract expressly requires compliance with Labor Law § 220. Thus, plaintiffs' right to prevailing wages is independent of the collective bargaining agreements.

Although parties are precluded from asserting new arguments or facts in reply (*Sanford v 27-29 W. 181st St. Ass'n, Inc.*, 300 AD2d 250, 251 [1st Dept 2002]), the utility contracts are

submitted by plaintiffs in opposition to defendants' cross-motion to dismiss, and defendants had an ample opportunity to respond. Thus, the contracts are considered.

Defendants cite no authority for their assertion that a claim for underpaid wages based on a misclassification is not a prevailing wage claim and requires interpretation of the collective bargaining agreements. Labor Law § 220, which is to be liberally construed, was enacted to protect workers from being forced to accept wages below the prevailing wage rate of similarly employed workers. (*Beltrone Const. Co. Inc. v McGowan*, 260 AD2d 870, 873 [3d Dept 1999]). Classifying plaintiffs as laborers when they perform the work of operating engineers would be a violation of Labor Law § 220, because laborers are paid at lower wage rates than are operating engineers. (*See e.g.*, *CNP Mech., Inc. v Angello*, 31 AD3d 925, 926 [3d Dept 2006], *lv denied* 8 NY3d 802 [2007] [upholding determination that employer violated Labor Law § 220 by misclassifying employees as building laborers as opposed to plumbers which resulted in underpayments because plumber rate is higher than laborer rate]).

Defendants also offer no authority for the proposition that the classification of workers is within the unions' discretion. Pursuant to Labor Law § 220, the New York City Comptroller is responsible for determining the prevailing wage rates for each trade classification. (*Lantry v State*, 6 NY3d 49, 54 n 5 [2005]). Although collective bargaining agreements may be relied upon by the Comptroller in determining trade classifications (*id.* at 56), the authority to do so remains solely with the Comptroller.

Accordingly, whether defendants breached the utility contracts by not paying plaintiffs the prevailing wages due to them being misclassified does not require interpretation of the collective bargaining agreements. Thus, plaintiffs' claims are not preempted by federal law and subject matter jurisdiction over this action lies properly in state court.

2. CPLR 3212

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

As discussed *supra*, at II.B.1., plaintiffs' right to the payment of prevailing wages derives from their status as third-party beneficiaries to utility contracts, and thus is independent of the collective bargaining agreements. Consequently, plaintiffs need not have exhausted the remedies provided for in the collective bargaining agreements before initiating this action. (*See e.g.*, *Dabrowski v ABAX Inc.*, 2008 NY Slip Op 32604[U] [Sup Ct, NY County 2008] [plaintiffs asserting breach of contract claim for failure to pay prevailing wage need not exhaust remedies under collective bargaining agreement before bringing plenary action]; *Cardona v Maramont Corp.*, 2008 NY Slip Op 30728[U] [Sup Ct, NY County 2008] [plaintiffs need not exhaust remedies under collective bargaining agreement as prevailing wage claim arose from City contract, not collective bargaining agreement]). Moreover, the requirements of Labor Law § 220 apply to both union and nonunion members. (*Wysocki*, 46 AD3d at 251).

The conclusory assertions of the leaders of both unions that Hallen has no outstanding or deficient payments to union workers do not establish, *prima facie*, that Hallen did not breach the utility contracts. Moreover, that each states that they received no notice from workers of the alleged misclassification is not dispositive as to whether they were misclassified and entitled to summary judgment.

Even had defendants sufficiently demonstrated, *prima facie,* entitlement to summary judgment, plaintiffs raise an issue of fact by alleging that they were misclassified, and thus, were not paid prevailing wages for the tasks they performed.

To the extent that defendants argue that Labor Law § 220 does not apply because a public agency is not part of the utility contracts and plaintiffs' work was not part of a public works project, they raise this argument for the first time on reply, and thus, it is not considered. (*Sanford*, 300 AD2d at 251).

III. CLASS CERTIFICATION MOTION

In determining whether an action may proceed as a class action, apart from the prerequisites set forth in CPLR 901, the court must consider "the desirability or undesirability of concentrating the litigation of the claim in the particular forum." (CPLR 902[4]).

For the purposes of CPLR 902, New York County is the proper venue if, *inter alia*, the events giving rise to the plaintiff's claim occurred here or if at least one member of the class resides here. (*Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 136 [2d Dept 2008] [collecting cases]).

In their summons, plaintiffs conclusorily provide that "[v]enue is based on the place where the work took place." They do not dispute that Hallen's principal place of business is located outside of New York County but contend that New York County is the appropriate venue

because "many members live in the greater New York City area." (NYSCEF 33, 56). In opposition, defendants observe that Hallen's offices, plant, and utility operations centers are located in Queens and Nassau, and many Hallen witnesses and employees reside in Queens, Nassau, and Suffolk. (NYSCEF 55).

That some class members live in "New York" or "the New York City area," as opposed to New York County, and that some work was performed in "New York and Long Island," does not establish that New York County is the proper venue. Thus, it is unclear that New York County is the proper venue for this action. Supplemental briefing on the issue is thus required.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for class certification is held in abeyance pending supplemental briefing on the issue of venue. Plaintiffs are to submit a brief, no more than five pages, plus any additional exhibits to be considered, addressing the sole issue of venue, within 20 days of the date of this decision. Defendants may file a brief in opposition, no more than five pages, plus any exhibits, within ten days thereafter. No reply papers will be accepted without leave of court; it is further

ORDERED, that upon plaintiffs' failure to submit timely the supplemental briefing, their motion for class certification will be denied; and it is further

ORDERED, that defendants' cross-motion is denied in its entirety.

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5/3/2019
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:	☐	INCLUDES TRANSFER/REASSIGN	☐	FIDUCIARY APPOINTMENT
			☐	REFERENCE