Lewis v Hallen Constr. Co., Inc.

2019 NY Slip Op 31972(U)

July 11, 2019

Supreme Court, New York County

Docket Number: 151729/2017

Judge: Barbara Jaffe

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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

SUPPLEMENTAL 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.

I. BACKGROUND

When plaintiffs filed this motion (NYSCEF 23), defendants cross-moved pursuant to CPLR 3211 for an order dismissing the complaint for lack of subject matter jurisdiction, and, in the alternative, for summary judgment. (NYSCEF 42). By decision and order dated May 3, 2019, defendants' cross-motion was denied in its entirety, and plaintiffs' motion for class certification was held in abeyance pending the parties' submissions of supplemental briefing on the issue of venue. (NYSCEF 65).

Accordingly, only plaintiffs' motion for class certification is addressed.

II. CONTENTIONS

A. Plaintiffs (NYSCEF 33)

Plaintiffs contend that they satisfy the statutory requirements to certify the proposed class consisting of:

> All individuals employed by THE HALLEN CONSTRUCTION CO., INC. who were classified and paid as Laborers on Keyhole Service, gas-line or gas-main installation, maintenance and repair projects, as well as all work incidental thereto, contracted with public utility companies, including Consolidated Edison of New York, Inc. and Keyspan Corporate Services LLC d/b/a National Grid, from February 22, 2011 through the present.

(NYSCEF 24).

Plaintiffs identify over 60 potential class members, and reference common factual questions including whether Hallen had a policy of improperly classifying and compensating class members as laborers, instead of operating engineers, and whether it failed to pay class members the correct prevailing wage and benefit rates for work performed. Common class legal questions include whether the utility contracts require payment of prevailing wages and supplemental benefits, whether Hallen violated Labor Law § 220, whether class members are third-party beneficiaries of the utility contracts, and whether Hallen's misclassification of class members resulted in a denial of their rights as third-party beneficiaries.

Plaintiffs argue that slight differences in job duties do not defeat class certification and that the differences in damages among class members can be calculated by multiplying the number of incorrectly compensated hours a class member worked by the applicable prevailing rates of wages and supplemental benefits the class member should have been paid, and subtracting the amount paid to the class member. They thus maintain that common questions of law and fact predominate over those that only affect individual class members, and that the claims are not only typical of those of the proposed class, but identical to those of the proposed

class. Moreover, plaintiffs claim that defendants breached the utility contracts as they were paid at laborer wage rates as opposed to operating engineer pay rates.

In support of their claim that they will fairly and adequately protect the interests of the proposed class, plaintiffs allege that they fully understand the case and stand to gain a pecuniary benefit if successful. They deny any conflict of interest with proposed class members and observe that plaintiffs' counsel is experienced in wage-and-hour class action law.

A class action is superior to other available methods of adjudicating this matter, plaintiffs assert, as the only difference among the proposed class members' claims is damages. Moreover, each proposed class member seeks a likely insignificant amount of damages and thus, the cost of prosecuting an individual action may deter class members from litigating their claims. A class action will also prevent conflicting determinations among class members, and presents to manageability issue for the court.

Plaintiffs also represent that no other individual has instituted an action against Hallen premised on their asserted claims.

In support, each plaintiff submits an affidavit, as well as those of three potential class members, in which each claim to have worked for Hallen while classified as a laborer, to have been paid at a laborer's wage rate, and to have performed the work of an operating engineer. They also state that there are no less than 30 proposed class members (NYSCEF 26-30), and submit a list of over 60 compiled by the five affiants (NYSCEF 32).

B. Defendants (NYSCEF 55)

Defendants argue for the denial of class certification absent a *prima facie* case supporting plaintiffs' assertion that they performed work outside the scope of their union classification. They maintain that plaintiffs offer only boilerplate and conclusory affidavits and those of some

former Hallen employees, and offer no documentation such as a certified payroll to demonstrate the numbers of similarly situated workers. Moreover, the list of proposed class members is unauthenticated and submitted through the affirmation of counsel who lacks pertinent personal knowledge, and the affidavits do not support the list of potential claimants.

Defendants characterize as conclusory plaintiffs' assertion that the class is sufficiently numerous, and object to the unauthorized solicitation of former Hallen employees in advance of class certification. They allege that one affidavit of a former Hallen employee will be withdrawn, and that another former employee was not a member of Local 731. Moreover, the list of names submitted by plaintiffs' counsel contains unidentifiable individuals or those who are not members of Local 731 and do not want to participate in the suit. Accordingly, plaintiffs' putative class consists of only three members and is insufficiently numerous as a matter of law.

Additionally, individual issues predominate over common questions of law and fact. They observe that Lewis suffered a work-related injury, was given an opportunity to continue work on "light duty," and was fired for failing to comply with Hallen's safety protocol. Wallace, on the other hand, worked in a different crew and has never applied for membership with Local 15 in connection with his post-Hallen employment. Thus, the named plaintiffs' claims concern questions of law and fact that are unique to them.

Similarly, the claims are not typical of the proposed class members' claims given the individual issues. Some proposed class members are not part of Local 731, do not want to be part of this proposed class action or are unidentifiable.

Defendants also deny that plaintiffs will properly represent the interests of the proposed class, labeling Lewis as a "professional plaintiff" who seeks retribution for being fired by advancing baseless claims against Hallen. They ask that the court take judicial notice of Lewis's

improper notification to proposed class members of his claims prior to obtaining class certification. They also allege that Wallace is attempting to "reap a financial benefit" from Hallen, and that he had never told Hallen or Local 731 that he believed he was working outside the jurisdiction of Local 731, thereby indicating a lack of real interest in pursuing these claims.

According to defendants, a class action is not a superior method of adjudicating plaintiffs' claims, as many of the proposed class members do not seek to be a part of this action, and the class is not so numerous. Moreover, the differences between the plaintiffs' claims and those of other class members, such as different employment periods and construction projects, make a class action impractical. They also contend that plaintiffs' interests conflict with those of the proposed class members, that a class action is impracticable and inefficient, and that venue is improper as Hallen's officers, plant, and utility operations centers are located in Queens and Nassau counties, and many witnesses are in Queens, Nassau, and Suffolk counties. Defendants claim that a class action would be unmanageable for this court and that as discovery is incomplete, certification is premature.

In support, defendants submit the affidavit of Hallen's executive vice president of operations, who states therein that plaintiffs are atypical of the class and that Lewis was suspended multiple times while at Hallen, was terminated in 2016, and allegedly suffered injuries as a result of a workplace accident, but worked, at full salary and in a limited capacity until his recovery. He maintains that Wallace too suffered an injury on the job and required no medical attention. He also states that he contacted a proposed class member and affiant who now wishes to withdraw his affidavit, and that another proposed class member received workers compensation benefits, that another member was not enrolled in Local 731, and that plaintiffs' list of proposed class members contains names that could not be identified and that some names

are listed multiple times. (NYSCEF 50).

C. Reply (NYSCEF 56)

Plaintiffs assert that they need not demonstrate a *prima facie* case, as the facts alleged in the complaint are accepted as true for the purpose of class certification.

The names on the submitted list are those they "recall" as being part of the class, and that there are likely more that are currently unknown. They observe that they created the list with counsel present, and that hearsay evidence is permissible on a motion for class certification. Moreover, in their affidavits, plaintiffs contend that they recall working with no less than 50 other individuals, which suffices at this stage of the proceeding. To the extent that defendants claim that some proposed class members are not union members, plaintiffs assert that union membership is not a prerequisite to being a class member.

Plaintiffs deny that the individual issues identified by defendants are relevant to their claims. Whether Lewis suffered an injury and whether Wallace filed for membership with Local 15 has no impact on whether they were properly paid at the wage rate of operating engineers. They also deny that the differences in periods of employment and project assignments impact class certification, and that work performed on projects from decades ago has no bearing on their claims as the statute of limitations is only six years. Moreover, class representatives in prevailing wage cases may represent employees who worked at different times or on different projects.

Plaintiffs argue that defendants' contentions as to adequacy and superiority are unsupported by evidence or legal authority, and they reiterate their arguments pertaining to manageability, interests of class members, and practicability. They deny that class certification is premature absent an explanation as to what further discovery would reveal.

D. Plaintiffs' supplemental brief (NYSCEF 66)

Plaintiffs observe that not all of the factors set forth in CPLR 902 are mandatory and contend that New York County is the proper venue as most plaintiffs worked there. Moreover, they allege that Hallen consented to New York County for claims arising from the utility contracts, and observe that defendants have not moved to change venue.

In support, plaintiffs submit the affidavit of a putative class member who states therein that he worked at project locations in New York County while employed by Hallen (NYSCEF 74), and affidavits in which the plaintiffs state that they worked mostly in New York County. (NYSCEF 70, 71). They also offer Lewis's daily log books reflecting that he worked in New York County (NYSCEF 72), and an excerpt from the utility contract reflecting Hallen's consent to venue in New York County (NYSCEF 73).

E. Defendants' supplemental brief (NYSCEF 75)

Defendants contend that this forum is undesirable as Hallen's offices and personnel, contracts, and other records are in Nassau County. They argue that the affidavit of a previously undisclosed Hallen employee and should not be considered. To the extent that plaintiffs rely on the forum selection clause in the utility contract, defendants assert that it limits venue to New York County whereas other utility contracts contain no such provision.

III. ANALYSIS

On a motion for class certification, the plaintiff bears the burden of demonstrating the prerequisites therefor under CPLR article nine. (*Williams v Air Serv Corp.*, 121 AD3d 441, 441 [1st Dept 2014]). The decision to certify a class is within the court's discretion and the class certification statute is to be liberally construed. (*Kudinov v Kel-Tech Const. Inc.*, 65 AD3d 481, 481 [1st Dept 2009]). While conclusory allegations in pleadings and affidavits are insufficient to

meet the plaintiff's burden (*Rallis v City of New York*, 3 AD3d 525, 526 [2d Dept 2004]), the court should neither decide substantive issues concerning the merit of the underlying claims nor resolve credibility issues (*Genxiang Zhang v Hiro Sushi at Ollie's Inc.*, 2019 WL 699179, *6 [SD NY Feb 5, 2019] [internal quotation marks and citations omitted]).

A *prima facie* showing that the underlying claims have merit is not necessary on a motion for class certification. (*See Kudinov*, 65 AD3d at 482 [although underlying merits of claims may be considered, motion for class certification is no substitute for summary judgment or trial]). Nevertheless, class certification must be supported "by competent evidence in admissible form." (*Weinstein v Jenny Craig Operations, Inc.*, 138 AD3d 546, 547 [1st Dept 2016], quoting *Feder v Staten Island Hosp.*, 304 AD2d 470, 471 [1st Dept 2003]; *see also Dabrowski v Abax Inc.*, 2010 NY Slip Op 31981[U] [Sup Ct, NY County 2010], *affd* 84 AD3d 633 [1st Dept 2011]).

A. CPLR 901

Pursuant to CPLR 901(a), a class action may be certified if: (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) the 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

Plaintiffs' claims that they personally know of no less than 30 to 50 potential class members is sufficient to establish numerosity. (*See e.g.*, *Stecko v RLI Ins. Co.*, 121 AD3d 542, 542 [1st Dept 2014] [allegation that plaintiffs recalled working with at least 50 other workers established that class so numerous that joinder of all members impracticable]; *Dabrowski v Abax Inc.*, 84 AD3d at 634 [deeming sufficient evidence of numerosity affidavits of six laborers attesting to have worked with 50 to 100 laborers]).

Here, the proposed class members' affidavits support a finding of numerosity. (*See Galdamez v Biordi Const. Corp.*, 13 Misc 3d 1224[A] [Sup Ct, NY County 2006], *affd* 50 AD3d 357 [1st Dept 2008] [putative class members' affidavits indicating that class consists of 30 to 70 members supported finding of numerosity]).

2. Commonality

Notwithstanding the differences among class members in terms of their employment duration, duties, and damages, common questions of law and fact predominate, namely, whether defendants failed to pay prevailing wages due to their misclassification of class members, thereby breaching the utility contracts and violating the labor law. (*See Borden v 400 E. 55th St. Assocs., L.P.*, 24 NY3d 382, 384 [2014] [commonality found among current and former tenants of separate apartment buildings notwithstanding differences in damages]; *Slecko v RLI Ins. Co.*, 121 AD3d 542, 543-44 [1st Dept 2014] [commonality found as all class members alleged that defendant failed to pay required prevailing wages and supplemental benefits]).

3. Typicality

As plaintiffs' claims arise from work they performed as operating engineers and their compensation as laborers, their claims are typical, and a finding in their favor would benefit all

members. (*See Stecko*, 121 AD3d at 543 [plaintiff's claim typical as all arose from defendants' alleged failure to pay prevailing wages and supplemental benefits]).

4. Adequacy

That they performed the duties of operating engineers and were compensated as laborers, and were thereby unlawfully deprived of the correct prevailing wages, plaintiffs adequately represent the class of members seeking the same relief. (*See Nawrocki v Proto Const. & 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]). Having served as class counsel in numerous actions in this county, plaintiffs' counsel is an adequate representative for the class. (*See Morris v Alle Processing Corp.*, 2013 WL 1880919, *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 cost of prosecuting individual actions is likely to exceed the damages suffered by individual class members, the class action is a superior procedure for resolving this action. (*Nawrocki*, 82 AD3d at 536 [class action 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]).

In prevailing wage cases, the class action is appropriate given the cost of prosecuting individual actions, which outweighs the damages suffered by each individual class member. (*Weinstein*, 138 AD3d at 547; *Stecko*, 121 AD3d at 543 [class action is superior for resolving wage disputes]).

Defendants concede that no other actions pend concerning the controversy in issue here, and this prevailing wage matter is manageable, as "most of the individual differences can be resolved by the documentary evidence of payroll checks and time sheets." (*Pesantez v Boyle Envtl. Servs., Inc.*, 251 AD2d 11, 12 [1st Dept 1998]).

Plaintiffs' supplemental affidavits reflecting the undisputed claim that class members worked in New York County sufficiently demonstrate that New York County is the proper forum for this action. (*See e.g.*, *Galdamez*, 13 Misc 3d 1224[A] [forum appropriate as Public Works Projects located in New York County]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for class certification is granted.

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7/11/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:	[ ]	**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**	
	[X]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[ ] **OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**	
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ] **REFERENCE**