# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

***Justice***

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**INDEX NO.** 651136/2019

OLIVER MORAN, JAIME DE LEON, INDIANA MOTA, JOSE OSCAR PERDOMO, on behalf of themselves and all others similarly situated,

**MOTION DATE** N/A

**MOTION SEQ. NO.** 001

Plaintiff,

- v -

JLJ IV ENTERPRISES, INC. D/B/A JLJ ENTERPRISES, PED PROTECT, INC.,K. G. P. INC.,LIBERTY MUTUAL INSURANCE COMPANY,

**DECISION + ORDER ON MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 83

were read on this motion to/for ORDER MAINTAIN CLASS ACTION.

The motion by plaintiffs for class certification is granted.

**Background**

Plaintiffs seek to recover purportedly unpaid prevailing wages on behalf of themselves and all non-union workers for PED Protect Inc. (“PED”) and K.G.P. Inc. (“KGP”) who worked as flaggers, flag persons, or crossing guards on construction sites operated by defendant JLJ IV Enterprises, Inc. (“JLJ”) between January 1, 2014 and February 8, 2019. Flaggers direct pedestrian and car traffic with cones, barrels and signs. Plaintiffs allege that they were also directed to guide construction equipment around the worksites. Plaintiffs assert that JLJ supervisors and foremen directed flaggers to do work that entitled them to prevailing wages but did not pay them those wages.

These projects all involved public works in New York City, including such projects as reconstructing portions of the Brooklyn Navy Yard and a water main connection in Washington Square Park. Plaintiffs argue that the contracts awarded to JLJ by various city agencies required JLJ to comply with Labor Law § 220, which provides that workers are to be paid prevailing wages. They point out that defendant Liberty Mutual Insurance Company ("Liberty") served as JLJ's bond holder in connection with these public contracts. Plaintiffs contend that in addition to using some of its own union employees for flagging duties, JLJ used approximately 43 to 96 flaggers employed by KGP from 2014 to 2017 and then switched to PED for flagging work beginning in January 2017.

Plaintiffs allege that they sent demand letters to defendants concerning the alleged failure to pay them prevailing wages and were subsequently terminated. They claim that they had no contact with KGP (except for getting paychecks) and instead were directed in their work by JLJ foreman and managers. Plaintiffs contend that PED (once it took over) required flaggers to sign a document containing rules for flaggers that directed them not to direct construction vehicles or do any construction-related tasks although they claim that these rules were not followed and flaggers continued to do this work under JLJ's direction. Plaintiffs insist that defendants billed for work done by the flaggers at the prevailing wage rate and point to a bill sent to ConEd in 2018 that charged the prevailing wage for non-unionized flaggers' work.

Plaintiffs contend that they meet all the requirements for class certification under CPLR 901 and CPLR 902. They argue it would make no sense to prosecute over 100 separate actions on behalf of the flaggers who worked on these projects. Plaintiffs' counsel maintains they have extensive experience litigating wage and hour class actions and that the proposed notice satisfies the requirements under CPLR 904. Plaintiffs also demand that defendants should produce a list

of the potential class members' full name, last known address, telephone number, email address, employment dates and job title so that these individuals can receive the proper notice.

In opposition, defendants contend that JLJ does work primarily with the New York City Department of Design and Construction and does mainly water, sewer and private utility work. They point out that JLJ is a signatory to certain collective bargaining agreements that set out hundreds of categories of covered work, including flagging work. Defendants stress that plaintiffs signed (as a condition of employment) an agreement acknowledging the scope of their work and this included only certain traffic control duties. They contend that plaintiffs were full-time crossing guards and now seek the benefits of union laborer jobs without having done these jobs. Defendants contend that a pedestrian crossing guard is not a prevailing wage position under the contracts between the city and JLJ.

Defendants point to two memoranda drafted by the New York City Comptroller which states that a worker classified as a flag person whose duties are not primarily on the construction work site and instead mostly works to alleviate vehicular congestion does not fall under Labor Law § 220.

Defendants contend that common questions of law and fact do not predominate in this action and that individuals would only be entitled to the prevailing wages for the "covered" work that he or she actually performed (which defendants do not concede occurred) and that requires an individualized assessment. Defendants also demand, in the alternative, that if the Court grants plaintiffs' motion the proposed order and notice must be amended to deny production of the information sought by plaintiffs about other workers. They argue that it implicates privacy concerns and the issue can be revisited if the class notices come back as undeliverable.

Defendants also ask the Court to change the proposed notice's characterization of defendants' position.

In reply, plaintiffs contend that defendants only challenged plaintiffs' establishment of the predominance requirement under CPLR 901 and have abandoned any claims with respect to the other factors under CPLR 901 and 902. Plaintiffs insists that they have met the predominance inquiry because the questions to consider are the same for all class members: whether defendants classified flaggers as not entitled to prevailing wages and whether JLJ staff regularly told flaggers to do work that would have entitled them to prevailing wages.

With respect to the Comptroller's memoranda, plaintiffs contend that defendants have misinterpreted the word primarily and attempted to insert the term "majority" instead. They claim that primarily means chiefly while majority connotes that the task would be the most time consuming. Plaintiffs argue that their primary responsibility was to ensure safety of construction workers, including machine operators and the general public, and this work entitled them to prevailing wages.

Plaintiffs argue that the disclosure of potential class members' contact information is appropriate and it will only seek a member's social security number as a last resort if an initial effort is unsuccessful. Plaintiffs do not object to defendants' proposed amendment to the section in the class notice describing defendants' position.

**Discussion**

"The determination whether plaintiffs have a cause that may be asserted as a class action turns on the application of CPLR 901. That section provides that one or more members of a class may sue or be sued as representative parties on behalf of all where five factors – sometimes characterized as numerosity, commonality, typicality, adequacy of representation and superiority

are met" (*Maddicks v Big City Props., LLC*, 34 NY3d 116, 123, 114 NYS3d 1 [2019] [internal quotations and citation omitted]).

"Courts have recognized that the criteria set forth in CPLR 901(a) should be broadly construed not only because of the general command for liberal construction of all CPLR sections, but also because it is apparent that the Legislature intended article 9 to be a liberal substitute for the narrow class action legislation which preceded it" (*City of New York v Maul*, 14 NY3d 499, 509, 903 NYS2d 304 [2010]).

"[C]ommonality cannot be determined by any 'mechanical test' and that the fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action. Rather, it is predominance, not identity or unanimity, that is the linchpin of commonality" (*id*. at 514). In considering a motion for class certification, a Court is "not expressing an opinion on the merits of plaintiffs' causes of action. Their resolution must await further proceedings" (*id*.).

Here, as plaintiffs point out in reply, the only issue in dispute is commonality. Plaintiffs contend that this factor is satisfied because certain factual and legal questions are common to the proposed class and that these inquiries predominate over any individual inquiry. They contend this includes an assessment of whether JLJ's foreman and supervisors directed the daily work done by flaggers, whether defendants kept accurate records of the numbers of hours worked and wages paid to flaggers, whether flaggers were required to sign the rules about the scope of their work, whether defendants misclassified flaggers as pedestrian crossing guards not entitled to receive prevailing wages, whether JLJ required flaggers to do work that required them to be paid prevailing wages. They claim these questions are identical among the class members and plaintiffs.

Defendants' retort to these arguments is to focus on the Comptroller's opinion that a person is properly classified as a pedestrian crossing guard if that is his or her primary function. They contend that the only existing guidance comes from the Comptroller and they emphasize that even regular "incidental" performance of such duties would not require a reclassification of these workers that would enable them to receive prevailing wages.

The first comptroller memo from 1998 states that "When the worker assigned to those duties is not on a construction work site and is being utilized to alleviate vehicular congestion by directing the flow of traffic away from the vicinity of the construction site, that worker is performing traffic control duty. Accordingly, the worker does not fall within the purview of Labor Law Section 200" (NYSCEF Doc. No. 37).

"However, when a worker is utilized on, adjacent to, or in close proximity to the construction work site, protecting the public from the inherent dangers on and about that site, safeguarding the work crew from street traffic, directing public traffic from the site, and directing the movement of construction equipment in, on, and off the site, that worker is performing flagging duties which fall within the job specifications of the construction laborer" (*id.*).

In 2001, the Comptroller added that "When a worker is assigned as a full-time "flag person" and his/her duties are not primarily on a construction work site, but such person is primarily assigned to alleviate vehicular congestion by directing the flow of the street traffic away from the vicinity of the construction site, the worker is performing traffic control duty. Accordingly the worker does not fall within the purview of Labor Law Section 220. An exception exists where the trade practice is that the trade performing the underlying work does its own flagging, e.g., bridge painters. In that event, the flagger receives the same wages as the underlying trade" (*id.*).

"However, when a worker is utilized on the construction work site, protecting the public from the inherent dangers on and about that site, safeguarding the work crew from the street traffic, and directing the movement of construction equipment in, on, and off the site, that worker is performing flagging duties which fall within the job description of laborer" (*id.*).

The Court finds that plaintiffs have satisfied the commonality requirement under CPLR 901 and grants the motion. Certainly, the tasks that each individual flagger might have been required to perform might differ at each site, but the overarching questions are similar enough to warrant class certification. The same basic inquiry is present is every case: did defendants utilize these workers in roles that would have entitled them to prevailing wages or did they perform purely traffic control as defined by the Comptroller? That is a common question of fact that predominates the inquiry into plaintiffs' claims.

And plaintiffs attached evidence that purportedly demonstrates that they were tasked with duties that might fall under the definitions provided by the Comptroller (*e.g.*, NYSCEF Doc. No. 53 [a video depicting what appears to be a flagger assisting the movement of a construction vehicle]; NYSCEF Doc. No. 57 [video also depicting assistance with the movement of construction vehicle]; NYSCEF Doc. No. 41, ¶ 14 [discussing job duties in affidavit from a purported flagger]). The statements and videos submitted by plaintiffs support their claim that they share common questions of law and fact regarding whether they should have received prevailing wages as set forth in the criteria described by the Comptroller.

The Court also grants the motion to the extent it seeks contact information (except for the social security numbers) of potential class members. Plaintiffs are entitled to discovery about workers who could be entitled to participate in the instant action. If plaintiffs desire the social

security numbers of the potential class members, then the issue may be revisited at a future discovery conference if notices come back as undeliverable.

The Court also approves the proposed class notice but directs plaintiffs to draft a new proposed notice that reflects the changes (and wording) urged by defendants in response to question 4 (NYSCEF Doc. No. 66 at 20). Plaintiffs assented to these changes in reply (NYSCEF Doc. No. 79 at 22).

**Summary**

The Court stresses that the instant motion is merely about whether plaintiffs may maintain a class action. It is not an assessment of the validity of plaintiffs' claims. It may be, as defendants suggest, that these workers were not primarily tasked with job duties that required the payment of prevailing wages. But that is a separate analysis from whether they can pursue a class action. The merit of plaintiffs' claims has yet to be decided.

Accordingly, it is hereby

ORDERED that plaintiffs' motion for class certification is granted, and the Court certifies a class composed of all non-union employees of PED Protect, Inc., and/or K.G.P. Inc. who worked as flaggers, flagpersons, and/or pedestrian crossing guards on any of JLJ IV Enterprises, Inc.'s public work sites in New York City at any point between January 1, 2014 and February 8, 2019; and it is further

ORDERED that plaintiffs are appointed class representatives for the above-described class and Pechman Law Group PLLC is appointed class counsel; and it is further

ORDERED that defendants must produce to plaintiffs (via electronic means) the names, telephone numbers, and last known mailing address of potential class members within 60 days from service of a copy of this order with notice of entry; and it is further

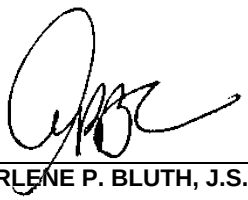
ORDERED that plaintiffs' proposed class action notice (NYSCEF Doc. No. 34) is approved except that the changes requested by defendants must be included before it is disseminated by mail and email; and it is further

ORDERED that plaintiffs shall send the notice to class members via email and mail within 30 days after receiving the contact information mentioned above; and it is further

ORDERED that the question of whether plaintiffs shall be entitled to potential class members' social security numbers shall be revisited at a future conference if plaintiff still desires this information; and it is further

ORDERED that class members may exclude themselves from the class by mailing a written request to be excluded from the class within 45 days from the mailing of the class action notice.

Conference: September 15, 2020 at 10 a.m. The parties are directed to check the docket and the part's rules to confirm whether the conference will take place virtually. They are also encouraged to submit a discovery order signed by both parties via e-filing for the Court's approval.



06/16/2020
DATE

ARLENE P. BLUTH, J.S.C.

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