Kurovskaya v Project O.H.R. (Office for Homecare Referral), Inc.
2020 NY Slip Op 33977(U)
December 1, 2020
Supreme Court, New York County
Docket Number: 150480/2016
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

NATALYA KUROVSKAYA et al.

INDEX NO. 150480/2016

MOT. DATE

- v -

MOT. SEQ. NO. 4

PROJECT O.H.R. (OFFICE FOR HOMECARE REFERRAL), INC.

The following papers were read on this motion to/for _____

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS DOC No(s).____

Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS DOC No(s).____

Replying Affidavits ECFS DOC No(s).____

The named plaintiffs, Natalya Kurovskaya and Ruslan Domnich, commenced this action on behalf of themselves and a putative class of home health aides and/or personal care assistants in the State of New York employed by defendant Project O.H.R. (Office for Homecare Referral), Inc. ("OHR"). Plaintiffs allege that they were uniformly deprived of minimum wages, overtime compensation, spread of hours compensation, and prevailing wages and benefits while performing similar work for which they should have been compensated. Plaintiffs further allege that Defendant failed to maintain adequate records of the hours Plaintiffs actually worked, the breaks Plaintiffs were entitled to receive, and the sleeping facilities provided to Plaintiffs.

In this motion, plaintiffs seek an order: [1] granting them leave to file a Proposed Second Amended Complaint to add claims under the Living Wage Law; [2] certifying this action as a class action; [3] designating Virginia & Ambinder, LLP as class counsel; and [4] approving for publication the proposed Notice of Class Action Lawsuit and Publication Order. Defendant opposes the motion. The court's decision follows.

The court will first consider the motion to amend. Leave to amend a pleading should be freely given in the absence of prejudice or surprise to the non-moving party (*Fahey v. Ontario County*, 44 NY2d 934 [1978]; see also *Seda v. New York City Housing Authority*, 181 AD2d 469 [1st Dept 1992]). The opponent of a motion to amend bears the burden of demonstrating prejudice (*Seda*, *supra* at 470). A motion to amend should be denied where it is "clear and free from doubt" that the proposed claim lacks merit (*Hawkins v. Genesee Place Corp.*, 139 AD2d 433 [1st Dept 1988]).

Defendant argues that the proposed amendment is futile and that it will be prejudiced by the late amendment. The court disagrees with defendant on both points. Defendant claims that it met and/or exceeded the Living Wage Law, NYC Admin Code § 6-109. However, this argument is premised upon

Dated: 12/1/20

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☒**GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐**SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐**FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

its assumptions as to hours worked and what, if any, breaks were taken by its employees. Defendant has failed to come forward with proof that would render plaintiffs' proposed claim patently meritless. The court further finds that the proposed claim cannot surprise defendant, since it is merely an alternatively remedy for the same violations that were already alleged under the labor law. Accordingly, the motion to amend is granted.

The court now turns to class certification. CPLR § 901[a] sets forth five statutory prerequisites before a class action may be maintained:

> 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 interests of the class; and
>
> 5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Plaintiffs bear the burden of providing an evidentiary basis from which the court can conclude that the requirements of CPLR § 901[a] have been met (*Kudinov v. Kel-Tech Constr. Inc.*, 65 AD3d 481 [1st Dept 2009]).

Once the requirements of CPLR § 901 have been met, courts then must consider the additional factors promulgated by CPLR § 902 such as "the individual class members' interest 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. Northern Leasing Sys., Inc.*, 74 AD3d 420-422 [1st Dept 2010] [internal citations omitted]). CPLR §§ 901[a] and 902 should be liberally construed (*Englade v. HarperCollins Publs., Inc.*, 289 AD2d 159 [1st Dept 2001]) and the determination of whether a class should be certified rests within the sound discretion of the court (*Kudinov, supra*).

Here, Plaintiffs seek to certify the following class: "All individuals who performed work on behalf of Defendant as non-residential home health aides and/or personal care assistants in the State of New York at any time between January 20, 2010 and today (the "Class Period")." Plaintiffs' claims satisfy all elements of Article 9 of the CPLR, and their motion for class certification is granted for the reasons that follow.

Plaintiffs' allegations demonstrate a system-wide pattern of violating the applicable labor law affecting possibly all of defendant's home health aides and personal care assistants. Named Plaintiff Kurovskaya claims in a sworn affidavit that during the time she worked for OHR, "no fewer than 1,000 individuals also worked there." Kurovskaya further claims that approximately 25 different people showed up for each in-service training and approximately 20 to 25 attended orientation. Based on the foregoing, plaintiff has satisfying the numerosity requirement.

Contrary to defendant's contention, plaintiffs do not necessarily need "affidavits or any evidence that a common policy or plan applied to the putative class" to obtain certification. Further, even if plaintiffs had deposed defendant and defendant's witness had testified about a so-called "well-established policy on paying employees for 'live in' shift work", such testimony would not mandate denial of plaintiffs' motion but merely highlight a dispute of fact.

The proposed class of persons would include similarly situated people, specifically home health aides and/or personal care assistants who typically worked 24-hour shifts, as well as shifts of 12 hours or less. Plaintiffs allege that when they worked overnight and 24-hour shifts, they maintained their own residences and did not live in the homes of defendant's clients, were not permitted to leave the clients' residences, were required to stay overnight in the clients' homes, and to be ready and available to assist the clients as needed throughout the entire 24 hours and that Defendant did nothing to ensure that Plaintiffs who worked 24-hour shifts were provided with adequate sleeping facilities and requisite sleep and meal breaks. On this record, plaintiffs have shown that common questions of law or fact within the class predominate over any questions affecting only individual members (*see i.e. Button v. Metropolitan Club, Inc.*, 187 AD3d 630 [1st Dept October 27, 2020]). Relatedly, there is no legitimate dispute that the named plaintiffs' claims are typical of the claims to be interposed by the putative class.

The court next turns to the substance of the named plaintiffs' claims. On March 26, 2019, the Court of Appeals upheld the Department of Labor's ("DOL") regulation requiring that home health aides who perform 24-hour shifts receive regularly scheduled, uninterrupted, duty-free breaks during each shift, along with adequate sleeping accommodations (*Andryeyeva v. New York Health Care, Inc.*, 33 NY3d 152). *Andryeyeva* involved two separate putative class actions by home health care aides seeking to recover damages for minimum wage violations under the labor law. Of substantial import to the instant motion, the Court of Appeals stated:

> Plaintiffs allege, and claim there is evidence of, defendants' systemic violations of the Wage Order and Labor Law, such as defendants' failure to adequately compensate home health care aides when they did not receive the minimum time for sleep and meal breaks during their 24-hour shifts, maintain adequate records of, or compensate for, the hours actually worked, and provide appropriate sleep facilities. Claims of uniform systemwide violations are particularly appropriate for class certification.

After the Court of Appeals remanded *Andreyeyeva*, the trial court certified the class. Another putative class action involving identical claims was brought by home health aides and personal care assistants in New York County Supreme Court in an action entitled *Bernarez v. Alternate Staffing, Inc.* (Index Number 150826/17). In a decision/order dated September 17, 2020, the Honorable Paul A. Goetz certified that class as well (2020 WL 5590256, 2020 NYSlipOp 33067[U]).

Excerpts of the named plaintiff's depositions have been provided to the court. Kurovskaya testified at her deposition that she predominately worked nine-hour shifts, seven days a week. She was unsure how many sleep-in shifts she worked for defendant, but she knew "for sure that [she] had such shifts." Meanwhile Domnich testified to working both live-in/sleep-in shifts and twelve-hour work days. Domnich further testified to not being able to get more than four hours of sleep during shifts.

Kurovskaya further details in her affidavit her and the putative class' claims. She denies, *inter alia*, receiving breaks, being asked about sleeping facilities or provided with same, or additional pay if she did not receive sleep and meal breaks. She claims that her and her coworkers "typically did not get an opportunity to sleep without interruptions for five hours due to [] OHR's clients' mental and medical conditions, and constant need for supervision." Based on at least the foregoing, the named plaintiffs have established that their claims are typical of the claims to be asserted by the putative class.

Plaintiffs have shown that they are adequate representatives. Through their deposition testimony and Kurovskaya's affidavit, plaintiffs have demonstrated a sufficient understanding of the nature of their claims, the status of the action, and their willingness to represent all of the class members (*cf. Borden v. 400 East 55th Street Associates L.P.*, 34 Misc3d 1202(A) [Sup Ct NY Co 2011]; see also *Borden v. 400 East 55th Street Associates, L.P.*, 105 AD3d 630 [1st Dept 2013]). Further, their counsel, Virginia & Ambinder, LLP, has a demonstrated level of competence in both class action litigation and labor law cases and therefore can fairly and adequately represent the named plaintiffs and the putative class.

Finally, the court finds that a class action is superior to other available methods. "[A] class action is the superior vehicle for resolving wage disputes since the damages allegedly suffered by an individual class member are likely to be insignificant, and the costs of prosecuting individual actions would result in the class members having no realistic day in court" (*Stecko v. RLI Insurance Company*, 121 AD3d 542, 543 [1st Dept 2014] [internal citation omitted]; *Dabrowski v. Abax Inc.* 84 AD3d 633 [1st Dept 2011]; *see also Andryeyeva v. New York Health Care, Inc.*, *supra*). Here, given the nature of plaintiffs' claims, their employment and their relation to the defendant, the court finds that a class action is appropriate rather than mandating that the individual plaintiffs each come forward and litigate their respective claims.

Conclusion

In accordance herewith, it is hereby

ORDERED that plaintiffs' motion is granted in its entirety; and it is further

ORDERED that plaintiffs are granted leave to file and serve their Proposed Second Amended Complaint and defendant shall file and serve an answer within 30 days; and it is further

ORDERED that this action is certified as a class action with the class defined as "All individuals who performed work on behalf of Defendant as non-residential home health aides and/or personal care assistants in the State of New York at any time between January 20, 2010 and today (the "Class Period")"; and it is further

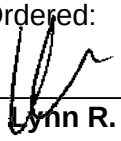
ORDERED that Virginia & Ambinder, LLP is designated as class counsel; and it is further

ORDERED that the proposed Notice of Class Action Lawsuit is hereby approved for publication pursuant to separate Publication Order signed on even date.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 12/1/20
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.