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| Kondratyeva v VIP Health Care Servs., Inc. |
| 2021 NY Slip Op 32357(U) |
| November 18, 2021 |
| Supreme Court, New York County |
| Docket Number: Index No. 159160/2017 |
| Judge: Erika M. Edwards |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ERIKA EDWARDS

PART 11

Justice

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TATIANA KONDRATYEVA and ALEVTINA SUBBOTA on behalf of themselves and all other persons similarly situated who were employed by VIP HEALTH CARE SERVICES, INC.,

INDEX NO. 159160/2017

MOTION DATE 12/30/2020

MOTION SEQ. NO. 001

Plaintiffs,

- v -

**DECISION + ORDER ON
MOTION**

VIP HEALTH CARE SERVICES, INC.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 56, 57, 58, 59 were read on this motion to/for MISCELLANEOUS.

Upon the foregoing documents, applicable law and oral argument held on September 9, 2021, the court grants Plaintiffs' motion for class certification, designation of Virginia & Ambinder, LLP as class counsel and approval for publication of the proposed Notice of Class Action Lawsuit and the Publication Order annexed hereto.

Plaintiffs Tatiana Kondratyeva and Alavtina Subbota on behalf of themselves and all other persons similarly situated who were employed by VIP Health Care Services, Inc. ("Plaintiffs") brought this wage and hour class action on behalf of the putative class against Defendant VIP Health Care Services, Inc. ("Defendant"). The putative class includes the Named Plaintiffs and all individuals who performed work on Defendant's behalf as a non-residential home health aide and/or personal care assistant in New York between October 13, 2011 and the date of the motion, which was December 30, 2020.

Plaintiffs now move for an order certifying this action as a class action, designating Virginia & Ambinder, LLP as class counsel and approving for publication the proposed Notice of Class Action Lawsuit and Publication Order. Defendant opposes the motion.

A class action may be maintained if Plaintiffs demonstrate the following five prerequisites set forth in CPLR 901(a):

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.

(CPLR 901(a); (see *Ackerman v Price Waterhouse*, 252 AD2d 179, 191 [1st Dept 1998]).

If the court determines that Plaintiffs have satisfied the prerequisites set forth in CPLR 901, then the court must consider the following factors set forth in CPLR 902 to determine whether the action may proceed as a class action:

1. the interest of members of the class in individually controlling the prosecution or defense of separate actions;
2. the impracticability or inefficiency of prosecuting or defending separate actions;
3. the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
4. the desirability or undesirability of concentrating the litigation of the claim in the particular forum;
5. the difficulties likely to be encountered in the management of a class action.

(CPLR 902; see *Ackerman*, 252 AD2d at 191).

Courts must liberally construe these statutory class certification provisions (*Andryeyeva v New York Health Care, Inc.*, 33 NY3d 152, 183 [2019]).

The court finds that Plaintiffs met their burden of demonstrating the prerequisites for class certification under CPLR 901 and 902. The court determines that based upon the admissible evidence, Plaintiffs demonstrated numerosity, commonality, typicality, adequacy of the representatives of the putative class and superiority.

The court is not persuaded by Defendant's arguments that Plaintiffs failed to satisfy commonality, that the Named Plaintiffs' claims are not typical of the other members of the putative class, that individual issues preclude class certification and that an individualized inquiry is necessary to determine whether each home health aide who worked 24-hour shifts received the requisite sleep and meal breaks. As demonstrated by several of the cases cited by Plaintiffs, courts have repeatedly rejected these arguments under similar circumstances.

The court is persuaded by several of the cases cited by Plaintiffs, including *Andryeyeva, Lavrenyuk v. Life Care Servs, Inc.* and others (*see Andryeyeva*, 33 NY3d 152 [2019], *Lavrenyuk v Life Care Servs., Inc.*, 2021 N.Y. App. Div. LEXIS 5859, 2021 NY Slip Op 05817 [1st Dept 2021]). Simply because damages may vary by class member does not necessarily preclude class certification as long as the important legal or factual issues involving liability are common to the class (*Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 399 [2014]).

The court determines that the Named Plaintiffs and all members of the putative class sufficiently allege that they suffered damages because of Defendant's common policy and practice of failing to pay them adequate wages for all of the hours they worked, including minimum wages, overtime, spread hours pay, and wages and benefits they were lawfully entitled to receive. Such claims to the contrary go toward the amount of damages of each member of the putative class and do not preclude class certification.

Furthermore, the court determines that Defendant failed to demonstrate the adequacy of its record-keeping requirements regarding the payment to the home health care aides and their meal and sleep breaks. The court also determines that many of Defendant's arguments in opposition to class certification seek to challenge the credibility of Plaintiffs and the merits of Plaintiffs' case, which will be resolved at trial and do not preclude class certification.

Additionally, the court also finds that Plaintiffs established the adequacy of each representative, that no substantial conflicts exist, that they have a good understanding of their case and that the attorneys are more than competent and knowledgeable of the issues involved in these types of matters. Additionally, if any of the members of the putative class have concerns, then their ability to opt out of the class provides a sufficient alternative. The court also finds that class certification is the superior forum rather than having each claim litigated individually.

Finally, the court adopts the proposed Notice and Publication Order submitted by Plaintiffs. Defendant failed to object to the language in such proposed orders and the court provided Defendants an additional opportunity to submit proposed revisions in case the court granted Plaintiffs' motion to certify the class, but no such proposed revisions were received by the court.

As such, the court grants Plaintiffs' motion.

The court has considered Defendant's remaining arguments not expressly discussed herein and finds them to be unpersuasive. Additionally, the court denies all additional requests for relief not expressly granted herein.

It is hereby

ORDERED that the court grants Plaintiffs Tatiana Kondratyeva and Alavtina Subbota on behalf of themselves and all other persons similarly situated who were employed by VIP Health

Care Services, Inc.'s motion for class certification, designation of Virginia & Ambinder, LLP as class counsel and approval for publication of the proposed Notice of Class Action Lawsuit and Publication Order; and it is further

ORDERED that the court certifies the putative class and designates Virginia & Ambinder, LLP as class counsel; and it is further

ORDERED that the court adopts the proposed Notice of Class Action Lawsuit and issues the Publication Order annexed hereto; and it is further

ORDERED that the court schedules a status conference before the court on February 15, 2022, at 10:00 a.m. via Microsoft Teams (separate link to be provided).

11/18/2021
DATE


ERIKA EDWARDS, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: