Teshabaeva v All Am. Homecare Agency, Inc.
2021 NY Slip Op 32587(U)
December 6, 2021
Supreme Court, Kings County
Docket Number: Index No. 500500/2018
Judge: Lillian Wan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

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MAKTUMMA TESHABAEVA and IRINA IRINEVA, individually and on behalf of all other persons similarly situated who were employed by ALL AMERICAN HOMECARE AGENCY, INC.,

Plaintiffs,

– against –

ALL AMERICAN HOMECARE AGENCY, INC.,

Defendant.

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Index No.: 500500/2018
Motion Date: 09/22/2021
Motion Seq.: 03

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 94-116, 118-120, and 126-130 were read on this motion for class certification.

Plaintiffs move for an Order: 1) certifying this action as a class action; 2) granting leave for plaintiffs to file a Second Amended Complaint; 3) designating Virginia & Ambinder, LLP as class counsel; and 4) approving for publication the proposed Notice of Class Action Lawsuit and Publication Order annexed as Exhibits S and T respectively. For the reasons set forth below, the motion is granted.

In this action to recover damages resulting from violations related to employment, the plaintiffs move to amend the complaint and to certify a class pursuant to CPLR § 901. In their First Amended Class Action Complaint, the plaintiffs substituted named plaintiffs Teshabaeva and Irineva in place of the previous named plaintiff, Marina Beridze. The plaintiffs state that they now seek to amend the complaint a second time so that they may include additional factual allegations to conform with the New York Court of Appeals decision in *Andryeyeva v New York Health Care, Inc.*, 33 NY3d 152 (2019).

The plaintiffs allege that the defendant engaged in systemic violations, including failures to: a) compensate plaintiffs for all hours worked; b) pay all overtime and spread of hours compensation; c) keep proper records that tracked plaintiffs' hours worked and whether plaintiffs received the requisite sleep and meal breaks; d) provide adequate sleeping accommodations; and e) comply with wages and benefits owed under the Living Wage Law and Wage Parity Act. The plaintiffs allege that despite several orders directing the defendant to respond to discovery demands, the defendant's production still remains deficient. The plaintiffs further state that a preliminary sampling has revealed approximately 101 members of the putative class.

The plaintiffs argue that this action involves claims nearly identical to those in other actions recently certified for class action treatment: *Zuparov v Best Care*, 2021 NY Misc LEXIS 319, 2021 NY Slip Op 30245[U] (Sup Ct, Kings County, Jan. 22, 2021) (Knipel, J.); *Kurovskaya v Project O.H.R. (Office for Homecare Referral), Inc.*, 2020 NY Misc LEXIS 10307, 2020 NY

Slip Op 33977(U) (Sup Ct, NY County, Dec. 1, 2020) (Kotler, J.); *Andryeyeva v N.Y. Health Care Inc., 2020 NY Misc LEXIS 2072*, 2020 NY Slip Op 31362[U] (Sup Ct, NY County, May 15, 2020) (Martin, J.). The plaintiffs, who are home health aides, contend that, like in *Kurovskaya*, their "allegations demonstrate a system-wide pattern of violating the applicable labor law affecting possibly all of the defendant's home health aides and personal care assistants." *Kurovskaya,* 2020 NY Misc LEXIS 10307 at *4.

In opposition, the defendant argues that the plaintiffs' submissions in support of this motion actually demonstrate that the defendant adequately compensated them under applicable laws. The defendant further argues that the plaintiffs' claims are subject to individualized assessment and proof to establish liability. The defendant contends that a recent New York Court of Appeals decision and several federal district court decisions make clear that similar claims are inappropriate for class and collective treatment, as they require individualized factual inquiries as to questions of liability that preclude class-wide consideration. Defendant asserts that there can be no common determination that any individual aide was unable to get the requisite amount of sleep or meal breaks during any given 24-hour shift or even during any particular period of time to establish liability.

Pursuant to CPLR § 3025(b), "a party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of the court." Furthermore, pursuant to CPLR § 3025(c), "the court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances." Although leave to amend a pleading is to be freely given in the absence of surprise or prejudice, "the determination whether to grant such leave is within the court's discretion, and the exercise of that discretion will not be lightly disturbed." *Voyticky v Duffy*, 19 AD3d 685 (2d Dept 2005); *see also Wells Fargo Bank, N.A. v Morgan*, 139 AD3d 1046 (2d Dept 2016); *Santorelli v New York City Tr. Auth.*, 121 AD2d 527 (2d Dept 1986).

Here, the defendant has failed to show that the proposed amended complaint would prejudice it, as the new allegations are consistent with the existing claims. Moreover, although some discovery has occurred, this action is still in its beginning stages. As such, the prong of the plaintiffs' motion seeking to amend the complaint is granted.

Turning to the merits of plaintiffs' motion for class certification, "[t]he proposed class representative bears the burden of establishing compliance with the requirements of both CPLR § 901 and 902." *Krobath v South Nassau Comm. Hosp.*, 178 AD3d 805, 806 (2d Dept 2019). A class action may be maintained in New York only after the five prerequisites of CPLR § 901(a) have been satisfied, and once those prerequisites are satisfied, the court shall consider the factors set forth in CPLR § 902. *Cooper v Sleepy's LLC*, 120 AD3d 742, 743 (2d Dept 2014) (internal quotation marks omitted). Pursuant to CPLR § 901(a):

> One or more members of a class may sue or be sued as representative parties on behalf of all if:

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.

The criteria to be considered in granting class action certification is to be liberally construed. *Krobath* at 806. Claims of uniform and systematic underpayment of wages "are particularly appropriate for class certifications." *Andryeyeva*, 33 NY3d at 184. The determination of whether to grant class certification is vested in the sound discretion of the trial court. *Cooper* at 743.

CPLR § 901(a)(1) requires the movant to show that the class is so numerous that the joinder of all members is impracticable. The minimum number allowed may depend on a variety of factors, and although there is no mechanical test to determine whether this number has been met, it has "been held that the threshold for impracticability of joinder seems to be around forty." *Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 137-138 (2d Dept 2008) (internal quotation marks and citations removed). Here, named plaintiff Maktumma Teshabaeva states in her affidavit that at least 40-50 other home health aides worked for the defendant and were subject to the same underpayment of wages and benefits that she experienced. The plaintiffs also submit the affidavit of Eugenia Barahona, another home health aide who worked for the defendant, who states that no fewer than 50 individuals also worked there. Under the circumstances, the numerosity requirement has been satisfied.

CPLR § 901(a)(2) requires that there be "questions of law or fact common to the class which predominate over any questions affecting only individual members." Even when individual damages may differ, Courts have consistently certified class actions where "there is uniformity in contractual agreements and/or statutorily imposed obligations." *Globe Surgical Supply* at 139. Indeed, where there is evidence of underpayment of statutorily and contractually required wages based upon an employers' uniform and systematic policy, "[a] difference in damage awards is an insufficient basis to deny certification as a matter of law where the class may rely on representative evidence of the class wide violations." *Andryeyeva*, 33 NY3d at 185.

Here, as noted above, plaintiffs allege that they and members of the putative class were, inter alia, paid a flat rate of $140 per shift for 13 hours of every 24-hour shift, regardless of the hours actually worked; that they did not receive the required uninterrupted sleep and meal breaks; that there was no system in place to track whether or not they received these breaks; and that they did not receive the prevailing wages and benefits required under the Public Health Law and New York City Administrative Code. Plaintiffs have further alleged that this illegal underpayment of wages and benefits took place in the context of the defendant's systematic and uniform policy. Under the circumstances, plaintiffs have satisfied the commonality requirement

set forth in CPLR § 901(a)(2), and though the defendant argues that class certification is inappropriate because each class member's damages will have to be individually calculated, this fact alone is insufficient as a matter of law to defeat a motion for class certification. *Andryeyeva* at 185.

CPLR § 901(a)(3) requires that the claims and defenses of the representative parties be typical of the claims or defenses of the class. "Typical claims are those that arise from the same facts and circumstances of the claims of the class members." *Globe*, 59 AD3d at 143. "Typicality does not require identity of issues and the typicality requirement is met even if the claim asserted by class members differ from those asserted by other class members." *Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 423 (2d Dept 2010). Here, as noted above, a named plaintiff alleges that she and members of the putative class provided similar care to the defendant's clients and they were subject to the same illegal and systemic pay policies instituted by their employer. Accordingly, the typicality requirement has been satisfied.

CPLR § 901(a)(4) requires that a party moving for class certification demonstrates that the representative plaintiffs "will fairly and adequately protect the interests of the class."

> The three essential factors to consider in determining adequacy of representation are potential conflicts of interest between the representative and the class members, personal characteristics of the proposed class representative (e.g. familiarity with the lawsuit and his or her financial resources), and the quality of the class counsel. *Globe*, 59 AD3d at 144.

Here, the named plaintiffs would benefit from the successful prosecution of this action and seek the same relief as the putative class members. Thus, there are no potential conflicts of interests between the named plaintiffs and putative class members. The named plaintiffs have also demonstrated in their affidavits that they are familiar with the lawsuit. Finally, it is undisputed that the named plaintiffs' attorneys are experienced in class actions and labor and employment law and have successfully represented classes in prior class action lawsuits. Accordingly, plaintiffs have satisfied the requirements of CPLR § 901(a)(4).

CPLR § 901(a)(5) states that a class action may be certified only if "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." As previously noted, the Court of Appeals has specifically stated that claims such as the ones underlying the instant action, including the systemic failure to pay statutorily required wages, provide the minimum time for sleep and meal breaks, and to maintain adequate records of the hours actually worked, "are particularly appropriate for class certifications." *Andryeyeva*, 33 NY3d at 184. Moreover, the fact that members of the putative class may have an administrative remedy under the Labor Law is not a basis for denial of class certification since an individual class member may opt out of the class sought to be certified if they wish to pursue this remedy. *Globe*, 59 AD3d at 146. Accordingly, plaintiffs have satisfied the requirements of CPLR § 901(a)(5).

Having determined that plaintiffs have satisfied the five prerequisites set forth in CPLR § 901(a), the court must consider the additional factors contained in CPLR § 902, which include:

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 the class action.

The court notes that most of the factors set forth in CPLR § 902 have already been considered by the court in its CPLR § 901 analysis, and that there does not appear to be any litigation concerning the underlying controversy that has already been commenced. In addition, this court is an appropriate forum since all of the class members were employed as home health aides in New York. Thus, plaintiffs have satisfied the requirements of CPLR § 902. Accordingly, plaintiffs' motion for class certification is granted and leave is granted for plaintiffs to prosecute their action on behalf of a class consisting of:

> 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 May 24, 2010 and the present (the "Class Period").

Furthermore, the Notice of Class Action Lawsuit and Publication Order, which are annexed as Exhibits S and T (NYSCEF Doc. Nos. 114 and 115) respectively, are approved for publication.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for class certification, for leave to file a Second Amended Complaint, to designate Virginia & Ambinder, LLP as class counsel, and to approve for publication the proposed Notice of Class Action Lawsuit is (Motion 03) is GRANTED in its entirety; and it is further

ORDERED, that plaintiffs are granted leave to file and serve their 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 May 24, 2010 and the present (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.

This constitutes the decision and order of the Court.

DATED: December 6, 2021

Lillian Wan
HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.