

<b>Dockery v Camba, Inc.</b>
2021 NY Slip Op 32624(U)
December 9, 2021
Supreme Court, New York County
Docket Number: Index No. 161694/2018
Judge: Erika M. Edwards
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. ERIKA EDWARDS**

**PART 11**

*Justice*

-----X

DARYL DOCKERY, and PAUL TUCKER, individually and on behalf of all other persons similarly situated who were employed by CAMBA, INC., and related or affiliated entities,

Plaintiffs,

- v -

CAMBA, INC., and any related or affiliated entities,

Defendants.

-----X

CAMBA, INC., and any related or affiliated entities,

Third-Party Plaintiffs,

-against-

THE CITY OF NEW YORK, acting by and through the New York City Human Resource Administration/Department of Social Services and the New York City Department of Homeless Services and any related or affiliated agencies,

Third-Party Defendants.

-----X

INDEX NO. 161694/2018

MOTION DATE 12/24/2020

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 596071/2019

The following e-filed documents, listed by NYSCEF document number (Motion 002) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109

were read on this motion to/for AMEND/CERTIFICATION & CROSS-MTN DISMISS.

Upon the foregoing documents and oral argument held on October 14, 2021, the court grants Defendant/Third-Party Plaintiff CAMBA, Inc.'s ("CAMBA") cross-motion to dismiss the complaint filed by Plaintiffs Daryl Dockery and Paul Tucker, individually and on behalf of all other persons similarly situated who were employed by CAMBA, Inc., and related or affiliated entities ("Plaintiffs"). If still relevant in light of the dismissal of Plaintiffs' complaint, the court grants in part Plaintiffs' motion to the extent that the court grants the portion of the motion

seeking leave to correct the caption to correct the spelling of Plaintiff Daryl Dockery's name to Darryl Dockery, but denies the portion of the motion seeking class certification.

Plaintiffs brought this action on behalf of the putative class consisting of the Named Plaintiffs and all others similarly situated who were employed by CAMBA and/or its related or affiliated entities as building services workers from December 14, 2012 to present. Plaintiffs seek class certification and to recover alleged unpaid prevailing wages and/or supplemental benefits for their work performed pursuant to certain contracts with Third-Party Defendant City of New York ("City") and several of its entities and agencies. The classifications of workers include security guards, building cleaners and maintainers like porters, handypersons, concierges and superintendents, furniture movers and window cleaners. Plaintiffs allege that the type of City facilities include homeless shelters, halfway homes, transition housing facilities, multi-service centers and related social service facilities at several different locations within the City.

Plaintiffs further allege that the City agencies and entities which contracted for CAMBA's services include the New York City Department of Homeless Services; the New York City Department of Youth and Community Development; the New York City Department of Health and Mental Hygiene; the New York City Department of Social Services; the New York City Department of Education; the New York City Administration for Children's Services; the New York City Department of Housing Preservation and Development; and the New York City Department for the Aging.

CAMBA impleaded the City in a third-party action and included claims for indemnification, unjust enrichment, breach of contract, fraudulent misrepresentation and contribution.

Plaintiffs now move for leave to correct the caption to correct the spelling of named Plaintiff Daryl Dockery to Darryl Dockery and for certification as a class action. CAMBA and the City oppose the portion of the motions seeking class certification.

CAMBA cross-moves to dismiss Plaintiffs' complaint. Plaintiffs oppose the cross-motion.

Plaintiffs argue in substance that they have met all of the criteria for class certification and that the workers who furnished security and building maintenance services at CAMBA's community service facilities located within buildings owned or funded by the City were entitled to receive prevailing wages and supplemental benefits pursuant to the contracts between CAMBA and the City agencies and entities under Labor Law § 230. Plaintiffs further argue that CAMBA served as the building contractor, agent or sponsor for the City buildings which housed CAMBA's facilities and other tenants. Plaintiffs argue that CAMBA receives funding from City agencies/entities to provide social services such as housing and other supportive services and that they are obligated to pay their security and building maintenance services employees prevailing wages.

CAMBA argues in substance that the court should not only deny Plaintiffs' motion for class certification, but it should dismiss Plaintiffs' complaint for failure to state a cause of action, as to their breach of contract and prevailing wage claims since the requirements of Labor Law §§ 230 and 231 do not apply to CAMBA, based on documentary evidence, including the contracts, and because the court lacked subject matter jurisdiction in that Plaintiffs failed to exhaust their administrative remedies, pursuant to CPLR 3211(a)(7), (a)(1) and (a)(2), respectively.

In opposition to Plaintiffs' motion for class certification, CAMBA and the City argue in substance that the court should deny class certification because Plaintiffs failed to satisfy the

requirements for class certification, including describing the proposed class with the requisite specificity, commonality and typicality and CAMBA argues that the Named Plaintiffs are not representative of the putative class members and numerosity.

When considering a defendant's motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). A court may freely consider affidavits submitted by a plaintiff to remedy any defects in the complaint, but the court should not consider whether the plaintiff has simply stated a cause of action, but rather whether the plaintiff actually has one (*Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1<sup>st</sup> Dept 2009]). Normally, a court should not be concerned with the ultimate merits of the case (*Anguita v Koch*, 179 AD2d 454, 457 [1<sup>st</sup> Dept 1992]). However, these considerations do not apply to allegations consisting of bare legal conclusions as well as factual claims which are flatly contradicted by documentary evidence (*Simkin v Blank*, 19 NY3d 46, 52 [2012]).

Dismissal based on documentary evidence is warranted only where such evidence utterly refutes a plaintiff's factual allegations, conclusively establishing a defense as a matter of law (CPLR 3211[a][1]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]). Dismissal is proper where the documents relied upon definitively disposed of a plaintiff's claim (*Bronxville Knolls v Webster Town Ctr. Pshp.*, 634 NYS2d 62, 63 [1995]).

The prevailing wage requirement of Labor Law § 230 requires contractors to pay prevailing wages to their employees who perform building service work pursuant to a contract with a public agency (Labor Law §§ 230 and 231). A "building service employee" means "any



person performing work in connection with the care or maintenance of an existing building . . . for a contractor under a contract with a public agency which is in excess of one thousand five hundred dollars and the principal purpose of which is to furnish services through the use of building service employees” (Labor Law § 230[1]). As it pertains to this case, a “building service employee” includes at least some of the types of work which Plaintiffs alleged they performed, including security guards, building cleaners, porters, window cleaners and handy persons (*id.*).

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 (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 or defenses of the representative parties are typical of the claims or defenses of the class (typicality);
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 (superiority).

(CPLR 901(a); (*see Ackerman v Price Waterhouse*, 252 AD2d 179, 191 [1<sup>st</sup> Dept 1998] and *Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 421-422 [1<sup>st</sup> Dept 2010]).

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]).

Here, the court reminds CAMBA of the page limitations pursuant to the court rules, but the court considers all arguments submitted by the parties, including CAMBA's arguments which went well beyond the maximum page limit. Based on the admissible evidence and relevant case law, the court grants CAMBA's motion to dismiss and finds that Plaintiffs failed to state a cause of action and that documentary evidence demonstrates that dismissal is warranted.

CAMBA demonstrated in substance that Plaintiffs failed to sufficiently allege that Plaintiffs are entitled to prevailing wages pursuant to CAMBA's contracts with public agencies as a matter of law in that they failed to allege that any of the contracts were in excess of \$1500.00 and that they have a principal purpose to furnish services through the use of building service employees as required by Labor Law § 230(1). Additionally, CAMBA established that none of its contracts have a principal purpose of furnishing services through the use of building service employees. Such use of employees is ancillary to or incidental to CAMBA's primary services which it provides on a daily basis. Additionally, CAMBA established that several of its contracts, including one for Named Plaintiff Dockery, are zero-dollar contracts where CAMBA acts as a sponsor and receives rent from various entities, but the contract has no dollar amount. The New York City Comptroller recognized this requirement and denied Plaintiff Dockery's claims for unpaid prevailing wages in his administrative proceeding and held that he was not entitled to them.

Therefore, Plaintiffs failed to state a cause of action and based upon documentary evidence, dismissal is warranted as a matter of law.

Additionally, the court finds that Plaintiffs failed to satisfy the necessary elements for class certification, including describing the proposed class with the requisite specificity, commonality and typicality

CAMBA demonstrated that its services are varied and include shelter services, supportive housing, job training, homelessness prevention, legal services, youth employment, mental health services, adult literacy and afterschool programs. There are over 100 separate contracts with numerous distinct City agencies which provide a wide range of services, including the New York City Department for Homeless Services, the New York City Department of Social Services/Human Resources Administration, the New York City Department of Health and Mental Hygiene, the New York City Department for Youth and Community Development, the New York City Department of Housing Preservation and Development and the New York City Administration for Children's Services.

CAMBA and the City demonstrated that there is often more than one contract for different services at the same facility and that some contracts are zero-dollar contracts and others involve facilities that are privately-owned and not controlled by the City or any City agencies. The court agrees with CAMBA's and the City's arguments that Plaintiffs have simply lumped together all of CAMBA's services at all of the various facilities and their numerous contracts with multiple City agencies without identifying which types of services, which contracts and which types of workers are allegedly covered by the statute.

Also, pursuant to the terms of some of the applicable contracts, CAMBA was required to pay prevailing wages where applicable, but Plaintiffs failed to identify which contracts and for which workers the statute applies. Additionally, Plaintiffs failed to allege any contracts which specified that prevailing wages were required for specific workers or which provided a particular



hourly rate or wage schedule. Therefore, Plaintiffs' description of the purported class appears to include some, if not all, members who are not entitled to prevailing wages and it is too broad and vague to qualify for class certification.

It is difficult to determine whether Plaintiffs satisfied their burden of demonstrating that questions of law or fact common to the putative class would predominate over those of the individual members without a better understanding of the identity of the class. However, as CAMBA and the City demonstrated, since different contracts have different requirements, the court finds that each type of contract and type of services rendered may require a distinct legal analysis depending upon the individual facts.

The court also considers the spirit of the exclusion of contracts with not-for-profit organizations from the definition of a "city service contract" requiring prevailing wages to be paid to certain building service workers (New York City Administrative Code § 6-109).

The court finds the majority of Plaintiffs' arguments to the contrary and arguments that they satisfied all of the CPLR 901(a) factors to be unpersuasive based upon the evidence and applicable law.

Therefore, based upon the admissible evidence, the court finds that Plaintiffs failed to demonstrate commonality, typicality and superiority. The court finds that the types of services that CAMBA provides as a non-profit organization are much too broad to be ripe for class certification and agrees with CAMBA and the City that Plaintiffs failed to adequately describe the putative class with the requisite specificity.

As such, the court grants dismissal of Plaintiffs' complaint, denies class certification, but to the extent it is not moot, grants the portion of Plaintiffs' motion seeking leave to amend the

caption to correct the spelling of named Plaintiff Daryl Dockery to Darryl Dockery and finds that no prejudice would result from such amendment.

The court considered all additional arguments raised by the parties which are not expressly discussed herein and denies any additional requests for relief not expressly granted herein.

As such, it is hereby

ORDERED that the court grants Defendant/Third-Party Plaintiff CAMBA, Inc.'s cross-motion to dismiss the complaint filed by Plaintiffs Daryl Dockery and Paul Tucker, individually and on behalf of all other persons similarly situated who were employed by CAMBA, Inc., and related or affiliated entities; and it is further

ORDERED that the court dismisses Plaintiffs' complaint and directs the Clerk of the Court to enter judgment in favor of Defendant/Third-Party Plaintiff CAMBA, Inc. as against Plaintiffs Daryl Dockery and Paul Tucker, individually and on behalf of all other persons similarly situated who were employed by CAMBA, Inc., and related or affiliated entities; and it is further

ORDERED that the court grants in part Plaintiffs' motion to the extent that the court grants the portion of the motion seeking leave to amend the caption to correct the spelling of Plaintiff Daryl Dockery's name to Darryl Dockery, but denies the portion of the motion seeking class certification and the amended caption shall read as follows:

DARRYL DOCKERY, and PAUL TUCKER, individually and on behalf of all other persons similarly situated who were employed by CAMBA, INC., and related or affiliated entities,

Plaintiffs,

- v -

CAMBA, INC., and any related or affiliated entities,

Defendants.

-----X

CAMBA, INC., and any related or affiliated entities,

Third-Party Plaintiffs,

Third-Party  
Index No. 596071/2019

-against-

THE CITY OF NEW YORK, acting by and through the New York City Human Resource Administration/Department of Social Services and the New York City Department of Homeless Services and any related or affiliated agencies,

Third-Party Defendants.

-----X

This constitutes the decision and order of the court.

12/9/2021

DATE

  
ERIKA EDWARDS, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE