Melamed v Americare Certified Special Servs., Inc.
2022 NY Slip Op 33390(U)
October 6, 2022
Supreme Court, Kings County
Docket Number: Index No. 506155/2016
Judge: Ingrid Joseph
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At an I.A.S. Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6th day of October 2022.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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RAISA MELAMED, GALYNA MALYARUK, TAMARA BADZIO and LARYSA SALO, individually and on behalf of all others similarly situated,

Index No.: 506155/2016

Plaintiffs,

-against-

AMERICARE CERTIFIED SPECIAL SERVICES, INC. and AMERICARE, INC.,

Defendants.

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The following e-filed papers considered herein:

	Papers Numbered
Notice of Motion/Affidavit/Affirmations/Exhibits	13 - 18
Opposing Affidavit/Affirmation	20 - 34; 36

In this matter, Plaintiffs, RAISA MELAMED, GALYNA MALYARUK, TAMARA BADZIO and LARYSA SALO, individually and on behalf of members of the proposed class, move by Notice of Motion (Motion Sequence 11), for Class Certification pursuant to CPLR §§ 901 and 902 for all Home Health Aides ("HHA's") who worked twenty-four (24) hour shifts from September 27, 2005 to present.

Plaintiffs, and the putative class members, who were employed as home health aides, for Defendants, AMERICARE CERTIFIED SPECIAL SERVICES, INC. and AMERICARE, INC., seek to recover damages for underpayment of minimum, overtime, and spread-of-hours wages

pursuant to the New York Labor Law and New York Department of Labor wage orders and regulations for work performed during twenty-four hour shifts.

The court, by order dated December 5, 2019, consolidated the instant matter, initially captioned *Tamara Badzio, et al v. Americare Certified Special Services, Inc. et al.*[1], with a previously filed action, *Melamed, et al. v. Americare, et al.*, (Index No. 503171/2012).

Prior to consolidation, Defendants in the *Melamed* matter moved to dismiss Plaintiffs' amended complaint, and Plaintiffs cross moved for an order granting class certification. The court (Schmidt, J.), by order dated December 11, 2014 ("2014 decision"), denied the Defendants' motion in its entirety and denied Plaintiff's cross motion as premature with leave to renew upon further discovery (NYSCEF Doc. No. 24).

Also pre-consolidation, the Defendants in this matter moved to dismiss Plaintiffs Tamara Badzio and Larysa Salo causes of action, as time-barred by the six-year statute of limitations under Section 198(3) of the Labor Law. A predecessor justice rendered a decision and order denying the Defendants' motion (Solomon, J., June 15, 2017). On appeal, the Appellate Division, Second Department affirmed the Supreme Court's June 15, 2017 decision and order, holding that Plaintiffs Badzio and Salo's claims prior to April 18, 2010 and January 30, 2011, respectively, were tolled in accordance with a culmination of tolling rules set forth in *American Pipe & Constr. Co. v Utah*, 414 US 538 [1974], *Crown, Cork & Seal Co. v Parker*, 462 US 345, 350 [1983], and *China Agritech, Inc. v Resh*, 138 S.Ct. 1800 [2018].

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[1] As amended to include causes of action for the recovery of damages for underpayment of wages for plaintiff, Larysa Salo.

The parties requested varied relief thereafter, including Defendants request for an order temporarily staying the instant action, or, alternatively a protective order, pending the outcome of other, unrelated class action lawsuits[2] that were appealed and awaiting determinations from the Appellate Division, Second Department. Plaintiffs, in the interim, sought orders compelling the Defendants to provide class-wide payroll data and other discovery. These matters, among other issues, were addressed in multiple orders that initially imposed temporary stays, then addressed outstanding discovery-related matters (NYSCEF Document Numbers 28, 44, 47, 105, 134, 135, 137, 138, 193, and 220).

On November 20, 2020, the presiding justice in the Centralized Compliance Part (Knipel, J.) issued an order addressing Plaintiff's motion to compel and for the imposition of sanctions as follows:

> "Defendant shall provide the payroll records sought, with personal identifying information (employees name, address and social security numbers only) redacted. Defendants request for representative sampling is denied. Said documents to be served by February 11, 2021, or the issue of class certification shall be deemed resolved in plaintiffs favor, pursuant to 3126(1), without the need for a further motion. This is a self executing order." (NYSCEF Doc. No.

In the instant motion, neither party discloses whether Defendants provided payroll records in accordance with the November 20, 2020 order, and there is no evidence that the order

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[2]Andryeyeva v New York Health Care, Inc., 153 AD3d 1216 [2d Dept 2017] *revd*, 33 NY3d 152 [2019] (Supreme Court, Kings County, Index No. 14309/2011) and Moreno v Future Care Heath Servs., Inc., 153 AD3d 1254, revd

has been reversed, vacated or modified. Consequently, the issue of class certification would already be resolved in Plaintiffs' favor, if Defendants failed to comply with the the self-executing, November 2020 order.

If the issue of class certification is outstanding, the decision and order on Plaintiff's motion is as follows:

It is Plaintiffs' burden to establish that the requirements of CPLR article 9 are satisfied (*Maddicks v Big City Props.*, LLC, 34 NY3d 116, 123 [2019]; *Cooper v Sleepy's, LLC*, 120 AD3d 742, 743 [2d Dept 2014]). The five prerequisites are numerosity, commonality, typicality, adequacy of representation and superiority (CPLR 901; *City of New York v Maul*, 14 NY3d 499 [2010]). Such requirements are to be liberally construed in keeping with the goals of CPLR article 9 (*Andryeyva v New York Health Care, Inc.*, 33 NY3d 152 [2019] *citing City of New York v Maul*, 13 NY3d 499, 506 [2010]), "so as to allow for the adjudication of claims that would not be economically litigable except by means of a class action (*Andryeyva*, at 184 *quoting* 82 NY Jur 2d, Parties § 254).

In this matter[3], the criteria for class certification was previously discussed in the 2014 decision, wherein it was determined that five of the six statutory requirements set forth in CPLR § 901 were satisfied, despite scant discovery and the limited information that was available to Plaintiffs' counsel at the time. The predecessor justice found that

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[3]The case captioned *Melamed, et al. v. Americare, et al.*, (Index No. 503171/2012) was consolidated with the instant matter.

adequacy of representation was the only element lacking. While the 2014 decision is not binding, this court, after consideration of the documents submitted and the arguments presented, concurs with the predecessor justice's reasoning.

There is no bright line test for determining whether the requirement of numerosity has been met; rather, each case depends on the particular circumstances of the proposed class (*Friar v Vanguard Holding Corp.*, 78 AD2d 83, 96 [2d Dept 1980]). The court of Appeals has noted that the Legislature contemplated classes with as few as 18 members (*Borden v 400 E. 55 St. Assoc., L.P.*, 24 NY3d 382, 399 [2014]). Consistent with the findings in the 2014 decision and evidence submitted in support of the instant motion, this court finds that the number of home health aides who performed 24-hour shifts during the requisite period may exceed 2,000 members, well beyond the numerosity threshold.

In the 2014 decision, it was also determined that the elements of commonality and predominance were satisfied, notwithstanding the Defendants' argument that the issues of liability and damages varied too widely among class members. This court rejects the same argument as presented by Defendants in opposition to the instant motion. The Court of Appeals, in *Andryeyeva v New York Health Care, Inc.*, 33 NY3d 152 [2019], held that the fact that damages may vary by class member is not dispositive on the issue of commonality. The Court reiterated that the legislature enacted CPLR § 901 with a specific allowance for class actions in cases where damages differed among plaintiffs (*Id.*). The *Andryeyeva* Court also recognized that "the amount of damages suffered by each class member typically varies from individual to individual but determined that fact

will not prevent a class action from going forward if the important legal or factual issues involving liability are common to the class (*Andryeyeva v New York Health Care, Inc.*, 33 NY3d at 184-185 [2019]). Here, the legal and factual issues common to members of the class have not changed since the 2014 decision. The ultimate issue is whether the Defendants paid its home health aides in accordance with New York law. This issue predominates over the variances among individual class members. This court recognizes that the claims among class members may differ; however, "the commonality rule requires predominance, not identity or unanimity" (*Freeman v Great Lakes Energy Partners, LLC*, 12 AD3d 1170 [2004] *quoting Friar v Vanguard Holding Corp.*, 78 AD2d 83, 98 [2d Dept 1980]). Thus, the court finds that the elements of commonality and predominance are satisfied.

The typicality element requires a showing that the "claims and defenses of the representative parties are typical of the claims or defenses of the class (*Globe Surgical Supply v Geico Ins. Co.*, 59 AD3d 129 [2d Dept 2008]). This court finds that the representative parties' claims arise out of the same course of conduct that is typical of the entire class. That is, the Defendants allegedly engaged in a practice of paying 24-hour shift, home health aides a flat rate, as opposed to paying such workers in accordance with the pay provisions outlined under New York law.

Superiority considerations also enure in favor of certifying the class. In order to satisfy this element, Plaintiffs must establish that a class action is superior to other available methods for the fair and efficient adjudication of the controversy (*Globe*

Surgical Supply v Geico Ins. Co., 59 AD3d at 145 - 146 [2d Dept 2008]). The putative class consists of thousands of home health aides who Defendants allegedly failed to properly compensate. It is obvious that a class action is the better vehicle by which to prosecute the claims of so many individuals, who, on an individual basis, may not be entitled to a significant sum in damages.

In order to be found adequate in representing the interests of the class, class counsel should have some experience in prosecuting class actions (*Galdamez v. Biordi Constr. Corp.*, 13 Misc.3d 1224(A), 2006 WL 2969651 [Sup Ct, New York County 2006, *affd.* 50 AD3d 357 [1st Dept 2008]). This court, having reviewed the information provided by Plaintiffs' counsel, is satisfied that counsel is competent and has amassed significant experience prosecuting wage and hour class action law suits. Additionally, Plaintiffs' counsel, who was retained on contingency, has incurred costs, attended depositions, appeared in court, engaged in discovery, and extensive motion practice.

In the 2014 decision, the prior court denied Plaintiffs previous motion for class certification for the stated reason that Plaintiffs failed to proffer sufficient admissible evidence concerning the class representatives. That is not the case here. The 2014 decision has since been consolidated with the instant case, which increased the number of proposed representatives from two to four. The class representatives, Raisa Melamed, Tamara Badzio, Larysa Salo, and Gaylyna Malyaruk, have since been deposed. They also submitted affidavits, wherein each person demonstrated familiarity and awareness of the central issues in this case. Additionally, there is no showing of an existing, or potential,

conflict of interest among the proposed representatives, or that any such representative is pursuing an issue unique to herself but discordant with the dispute common to all class members. These factors weigh in favor of finding that the proposed representatives will fairly and adequately represent the interests of each member of the class.

Based upon the foregoing, it is hereby

ORDERED, that the motion (Motion Sequence 11) of Plaintiffs, Raisa Melamed, Galyna Malyaruk, Tamara Badzio and Larysa Salo, individually and on behalf of member of the proposed class, for class certification is granted, and it is further

ORDERED, that the class is certified to the extent that it includes Home Health Aides who worked 24-hour shifts for Defendants Americare Certified Special Services, Inc. and Americare, Inc. between September 27, 2005, and the date Defendants ceased failing to pay those individuals the minimum, overtime, and spread-of hour wages required under the New York Labor Law and wage regulations, and it is further

ORDERED, that Plaintiffs are authorized to serve notice of the instant action to the individual class members by first class mail, and it is further

ORDERED, that Plaintiffs shall serve a copy of this order upon Defendants with Notice of Entry within twenty (20) days of such entry.

This constitutes the decision and order of the court.

ENTER,

HON. INGRID JOSEPH, J.S.C.

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