SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**

Justice

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ANGEL JIMENEZ, PRISCILLA PIERVINCENTI, WYKEEM MURRAY

Plaintiff,

- v -

SUMMIT SECURITY SERVICES, INC.,ABC CORPORATIONS 1-10, ROBERT AULETTA,

Defendant.

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INDEX NO. 151516/2023

MOTION DATE 09/01/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for ORDER MAINTAIN CLASS ACTION.

In February 2023, plaintiffs Angel Jimenez, Priscilla Piervincenti, and Wykeem Murray commenced this class action against their former employer, defendant Summit Security Services Inc. (hereinafter, "Summit Security"), its subsidiary ABC Corporations 1-10, and one of its executive officers, Robert Auletta. Plaintiffs allege that defendants' wage policies violate several provisions of the New York Labor Law, Connecticut Wage Age, and Jew Jersey Wage Payment Act. In this motion sequence (001), plaintiff moves pursuant to CPLR 901 and 902 for pre-discovery class certification. The proposed class consists of "all hourly non-exempt employees, (including but not limited to security guards, patrol drivers, and site supervisors) employed by Defendants in every State where Defendants employ Class members." (NYSCEF doc. no. 2 at ¶ 19, complaint.) Defendants oppose class certification. For the following reasons, plaintiffs' motion is granted.

BACKGROUND

Defendant Summit Security owned and operated a security guard business with operations in New York, Connecticut, and New Jersey. (*Id*. at ¶ 1.) It employed Jimenez as a security guard at sites throughout New York from June 2018 through June 2019, (*id*. at 29; NYSCEF 21 at ¶1, Jimenez affidavit); Piervincenti at sites in Manhattan, Queens, and Brooklyn from May 2016 through April 17, 2019 (NYSCEF doc. no. 22 at ¶ 1-2, Piervincenti affidavit); and Murray at its George Washington Bridge and Bayonne Bridge sites from May 2016 through October 2018 (NYSCEF doc. no. 23 at ¶1.) Plaintiffs allege that defendants would assign them a shift for a set number of hours; at the same time, defendants required them to stay on duty until security guards in the next shift arrived. Ordinarily, these guards would arrive as the previous shift was ending, but occasionally, they would appear at the sites sometime after the first shift was scheduled to end. When this occurred, plaintiffs allege, they were only compensated for

their scheduled hours, not for the additional number of hours worked. (NYSCEF doc. no. 2 at ¶¶ 3, 41-42.) According to plaintiffs, defendants were able to shave this time by using an accounting system that rounded down the number of hours their employees worked to the nearest half hour, and, as such, defendants often under compensated plaintiffs in violation of the New York Labor Law. (*Id*. at ¶3, 42.)

Additionally, plaintiffs allege that defendants often required them to work double shifts, resulting in workdays lasting more than ten hours and workweeks lasting more than 40. However, they were not paid a spread of hours or overtime as required by New York, New Jersey, and Connecticut state law. (*Id*. at, respectively, ¶ 46, ¶ 59.) They contend that defendants' overtime compensation violated Title 12, New York Code, Rules and Regulation ("NYCRR") § 142-2.2, Connecticut General Statutes §31-76c, and New Jersey Administrative Code § 12:56-6.1. These statutes require employers to pay an overtime wage rate of one and one-half times the employee's regular salary for all hours worked in excess of forty per week. Lastly, plaintiffs allege that defendants did not reimburse them for costs associated with maintaining their employment-issued uniforms in violation of 12 NYCRR §146-1.7 (which requires, under certain circumstances, an employer to provide its employees "uniform maintenance pay"). (*Id*. at ¶¶ 44, 60.)

In February 2023, plaintiff commenced the instant suit individually and on behalf of a class for violations of New York, Connecticut, and New Jersey labor laws. As described above, plaintiffs define the proposed class as "all hourly non-exempt employees (including but not limited to security guards, patrol drivers, and site supervisors) employed by Defendants in every State where Defendants employ Class members." (NYSCEF doc. no. 2 at ¶ 19.) In their complaint, plaintiffs assert that class members are readily ascertainable and so numerous that joinder of all members is impractical, and that questions of fact and law common to the class predominate over those pertaining to individual class members. To support these contentions, the three plaintiffs rely on alleged conversations with other co-workers who complained about similar pay disputes with defendants. Piervincenti alleges that she discussed defendants' wage policies with five such co-workers (NYSCEF doc. no. 22 at ¶ 5) while Murray identifies two others who similarly experienced defendants' alleged underpayment (NYSCEF doc. no 23 at ¶4).

In the instant motion, which defendants oppose in its entirety, plaintiffs move pursuant to CPLR 901 and 902 with them as class representatives.

DISCUSSION

CPLR 902 provides that a class action may only be maintained if the five prerequisites promulgated by CPLR 901 (a) are met. (*Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 421 [1st Dept 2010]; CPLR 902.) These prerequisites are: (a) (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) questions of law or fact common to the class predominate over questions of law or fact affecting individual class members (commonality); (3) the claims or defenses of the class representatives are typical of those in the class (typicality); (4) the class representatives will fairly and accurately protect the interest of the class; and (5) a class action represents the superior method of adjudicating the controversy (superiority). (*Id*.; CPLR 901 [a].) The party seeking class certification bears the burden of

establishing the prerequisites provided by CPLR 901 (a) by tendering evidence in admissible form. (*Weinstein v Jenny Craig Operations, Inc.*, 138 AD3d 546, 547 [1st Dept 2016]; *Kudinov v Kel-Tech Constr. Inc.*, 65 AD3d 481, 481 [1st Dept 2009].) Conclusory allegations are insufficient to satisfy the moving party's burden. (*Feder v Staten Island Hosp.*, 304 AD2d 470, 471 [1st Dept 2003]; *Pludeman*, 74 AD3d at 422.) Whether these prerequisites have been met and, thus, whether a lawsuit qualifies as a class action, rests within the sound discretion of the trial court. However, the Court must be mindful that class certification should be liberally construed. (*Kudinov*, 65 AD3d at 481.)

Before addressing whether the five CPLR 901 prerequisites have been satisfied, the Court must address defendants' argument that class certification is inappropriate because plaintiffs' claims lack merit. In assessing whether certification is appropriate, courts do consider whether the plaintiff's claims have merit; however, the inquiry is minimal and limited to whether, on the surface, there appears to be a cause of action that is not a sham. (*See Weinstein v Jenny Crai Operations, Inc.*, 138 AD3d 546, 547 [1st Dept 2016], *Brandon v Chefetz*, 106 AD2d 162, 168 [1st Dept 1985].) The sample pay records (NYSCEF doc. no.'s 27, 28, and 29, Jimenez, Piervincenti, and Murray sample wage statements) that defendants attach to their opposition quite clearly do not demonstrate that plaintiffs' claims are a sham. First, defendants do not explain how the wage statements, even in theory, could show that no wage violations occurred when the gravamen of plaintiffs' complaint is that plaintiffs worked hours in excess of those documented on the statements. Second, the wage statements are labeled "sample" pay records, and even assuming these wage statements do *not* contain violations of any state's labor laws, they are, nonetheless, a selective portion of plaintiffs' wage statements and a minimal portion at that. But, as plaintiffs' point out, these sample pay records appear to contain at least one of the violations that plaintiffs have alleged herein: on Murray's sample pay statement, during the week of May 6, 2018, he worked 41 hours that week, but there is no indication that he was compensated at one and one half overtime pay for the additional hour. (*See* NYSCEF doc. no. 29.) Further, plaintiffs submit a second wage statement from Piervincenti for the week of November 6, 2017, and October 19, 2018. In the first, Piervincenti appears to be compensated for only 3.75 hours of overtime, not the five hours to which she was entitled. (NYSCEF doc. no. 37) and in the second, she appears not to have been compensated a spread of hours for working 10 hours on October 29th and 30th. (NYSCEF doc. no. 36.) Since defendants' wage records do not show plaintiffs' claims to be a sham, the Court is not foreclosed from granting class certification.

Numerosity—CPLR 901 (a) (1)

The first prerequisite that plaintiffs must demonstrate to obtain class certification is that the proposed class "is so numerous that joinder of all members, whether otherwise required or permitted, is impractical." (*See* CPLR 901 [a] [1].) Courts recognize that there is neither a mechanical test to determine whether a proposed class is so numerous to satisfy CPLR 901 (a) (1) nor a set rule defining the minimum number of prospective class members that must exist before certifying a class; rather, "each case depends upon the particular circumstances surrounding the proposed class and the court should consider the reasonable inferences and commonsense assumptions from the facts before it." (*Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 137-138 [2d Dept 2008]; *Pesantex v Boyle Environmental Services, Inc.*, 251

AD2d 11 [1st Dept 1998]; *Florez v Anjost Corp*., 284 F.R.D. 112, 123 [SDNY 2012] [recognizing courts are permitted to rely on reasonable inferences drawn from the available facts in analyzing whether a plaintiff has provided an estimate of the number of class members].) In *Globe Surgical Supply*, the Appellate Division, Second Department found the numerosity requirement satisfied where the proposed class was "at a minimum between 10 and 100 [class members]." (*Id*.) In so holding, the Second Department observed that, in *Klakis v Nationwide Leisure Corp*. (73 AD2d 521, 522 [1st Dept 1979]), the First Department denied class certification where the putative class consisted of only 21 individuals, while the Court of Appeals, in *Caesar v Chemical Bank*, affirmed a lower court's grant of class certification in a class consisting of 39 bank employees (66 NY2d 698, 700 [1985].) In *Borden v 400 E. 55th St. Assoc., L.P.* (24 NY3d 382, 399 [2014]), the Court of Appeals acknowledged that the legislature envisioned, however remotely, a properly certified class containing as few at 18 members. (*Id*.) Nonetheless, the court adopted the rule, used in federal courts to assess class certification under Federal Rule of Civil Procedure 23, that "numerosity is presumed at a level of 40 members." (*Id*. citing *Consol Rail Corp. v Town of Hyde Park*, 47 F3d 473, 483 [2d Cir. 1995].)

Applying these principles, the Court finds that plaintiffs have satisfied the numerosity requirement. In their affidavits, while plaintiffs identify only seven other guards who, based on personal conversations, are potential class members, the complaint and affidavits suggest the number of potential class members is significantly higher. Plaintiffs collectively attest to working at approximately 20-25 different sites throughout New York City during their respective employments. (While Jimenez does not list the sites he was assigned to, Piervincenti, in a non-exhaustive list, identifies 18 different locations over three years and Murray another two.[1] *See* NYSCEF doc. no. 22 at ¶ 2 and doc. no. 23 at ¶1, 4.) They also aver that they worked in eight-hour shifts of three, meaning, even if defendants only scheduled two shifts back-to-back at a particular site (as opposed to 24-hour security with three 8-hour shifts), defendants had at least six security guards per location on a particular day. Further, plaintiffs submit a copy of an invoice that defendants attached to their complaint in the unrelated action *Summit Security Services Inc. v Fordham University* (NYSCEF index no. 603409/2022, Sup. Ct. Nassau County, 2022). This invoice, for which defendant seeks payment from Fordham University, indicates that during the week of June 23, 2019, it employed as many as 25 different security guards at the Fordham site alone. (NYSCEF doc. no. 35.) Moreover, the invoice Summit Security sent Fordham University appears consistent with the accounting practice that plaintiffs allege defendants used with them, i.e., rounding down the number of hours worked instead of listing precise arrival and exit times. (*Id*.)

The Court's finding, then, not only aligns with *Globe Surgical Supply*'s instruction to consider the particular circumstances, reasonable inferences, and commonsense assumptions in plaintiffs' moving papers, but with a minimum of 35 potential class members, it also adheres to *Borden*'s recognition that approximately 40 members in a class are presumed to satisfy the numerosity requirement. That the upper bound of the class is not precisely known at this stage in the litigation is immaterial so long as the class is reasonably defined and the minimum threshold is met. (*See Kudinov*, 65 AD3d at 481 ["While it is true the exact number of the putative class

[1] Whereas it appears Jimenez and Murray were principally assigned to a single site, Piervincenti was considered a "floater" and would work at many different sites throughout New York City.

has not been determined … the number of workers alleged to have been underpaid was high enough to justify the court's exercise of its discretion in certifying the class."])

Predominance of Common Issues—CPLR 901 (a) (2)

Plaintiff contends that essential questions of law and fact common to all members of the class predominate over questions particular to each individual member, namely, whether defendants failed to pay class members all wages earned, including for all hours worked and at the appropriate compensation levels. (NYSCEF doc. no. 20 at 19-20, plaintiffs' memo of law; NYSCEF doc. no. 2 at ¶ 28.) The Court agrees. In opposition, defendants contend that the proposed class consists of both union and non-union members, which would require the Court to conduct individualized assessments as to the applicability of dispute resolution provisions in the relevant collective bargaining agreements for each putative class member. Additionally, in defendants' view, the individualized assessments would be complicated by the existence of "floating" security guards who often worked at various union sites, though not as members of the union; accordingly, not only would the Court be required to analyze whether (and how often) each member worked past their scheduled shifts and whether they received the appropriate level of compensation, but it would have to make a fact-specific inquiry into whether each individual was considered a "floater" and, apparently, whether that subjects them to union dispute resolution procedures. (NYSCEF doc. no. 25 at 15.)

In support, defendants produced the 2016 New York City Collective Bargaining Agreement ("CBA") between it and the Service Employees International Union, Local 32BJ. (NYSCEF doc. no. 30, CBA.) Entitled "Grievance & Arbitration," Article XXV, Section 3 provides as follows:

> In any case, where the Union or the Employer is not satisfied [with a consultation], with respect to the disposition of a matter regarding the meaning or application of any provision of this Agreement, the Union or the Employer may submit the complaint as a grievance within the time set forth in paragraph 2 above. (*Id*. at 34)

Crucially, Section 2 of the same Article defines a "grievance" as "any dispute between the Employer and the Union regarding only the meaning or application of or performance of the Employer under this Agreement." (*Id*.) Section 4 (b) further states, "All grievances not settled at a grievance meeting shall be subject to arbitration before a rotating panel of arbitrators." Section 2 and Section 4 are significant because they make clear that *only* disputes arising *under the Agreement* are subject to mandatory arbitration. Put differently, these sections require contractual disputes to be arbitrated but are silent as to claims arising from statutory violations. Where a collective bargaining agreement does not clearly and unmistakably waive the employees' statutory right to a judicial forum, plaintiff-employees are not obligated to arbitrate their statutory claims. (*Conde v Yeshiva Univ.*, 16 AD3d 185, 186 [1st Dept 2005], citing *Wright v Universal Mar. Serv. Corp*., 525 US 70, 80 [1998]; *Lawrence v Sol G Atlas Realty Co., Inc.*, 841 F3d 81, 83 [2d Cir 2016] [holding that the "clear and unmistakable" standard requires "specific references in the CBA either to the statutes in question or to statutory causes of action generally."]) Here, neither Section 2 nor Section 4 contains language requiring employees

seeking to vindicate their statutory rights to submit to mandatory arbitration. Rather, the opposite is true. Unlike in *Conde,* where the CBA did not meet the "clear and unmistakable" standard because, to the Court, the language "any dispute, difference, or controversy related to wages, hours, and working conditions" could conceivably mean only disputes under the contract were arbitrable (*Conde*, 16 AD3d at 186), here, the CBA leaves no room for interpretation: only disputes "under the Agreement" that are subject to arbitration. And though class members' contractual rights under the CBA may be coextensive with state labor law rights, the rights being vindicated are distinct, such that plaintiffs are not precluded from bringing this action in a judicial forum. (*See Lawrence*, 841 F3d at 85, citing *Wright*, 525 US at 76.) Since the CBA does not preclude union members from asserting their statutory rights in this action, there is little risk of questions affecting individual members predominating over those common to the class. Accordingly, the Court finds this prerequisite satisfied.

Typicality, Representative, and Superiority—CPLR 901 (a) (3) - (a) (5)

The typicality prerequisite is satisfied where a plaintiff's claim derives from the same practice or course of conduct that gave rise to the claims of the other class members and is based on the same legal theory. (*Pludeman*, 74 AD3d at 423, citing *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 99 [2d Dept 1980]; *Ackerman v Price Waterhouse*, 252 AD2d 179, 201-202 [1st Dept 1998].) Here, the same wage policies underlie both plaintiffs' claims and the claims of all class members. As such, plaintiffs' causes of action are plainly typical of the entire class. Though defendants argue there are differences between the three plaintiffs—that Murray was a union member where the other two were not; that Piervincenti was considered a floater where the other two were not—the typicality prerequisite does not require an identity of issues. (*Pludeman*, 74 AD3d at 423.) As to CPLR 901 (a) (4), since defendants do not contest that plaintiffs will fairly and adequately represent the interests of the class, the Court considers this prerequisite conceded. Lastly, plaintiffs have also shown that class action is a superior method for the fair and efficient adjudication of this matter. (*See* CPLR 901 [a] [5]; As demonstrated by the wage statements both parties have submitted, the amount of earnings that defendants allegedly retained in violation of this state's labor law was relatively insignificant. (*See* NYSCEF doc. no. 29 [single unpaid hour of overtime]; NYSCEF doc. no. 37 [two hours of unpaid overtime]; NYSCEF doc. no. 36 [unpaid spread of hours for two 10-hour work days].) As such, given the insignificant sums involved and the relatively high cost of litigation, requiring defendants' employees to individually litigate their claims risks depriving them of a forum to assert their rights. (*See Stecko v RLI Ins. Co.*, 121 AD3d 542, 544 [1st Dept 2014] ["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 have no realistic day in court."]) Accordingly, the Court is persuaded that class litigation is the superior method for adjudicating plaintiffs' claims.

Nonetheless, the Court recognizes that, as defendants argue, none of plaintiffs ever worked in New Jersey or Connecticut and that they have submitted no evidence of defendants' wage policies in those states. Accordingly, plaintiffs are not entitled to certification of a class that includes employees working in those states. (*See Pensantex v Boyle Envtl. Servs., Inc.*, 51 AD2d 11, 11 [1st Dept 1998] [finding IAS court should have limited class definition where the

plaintiffs "failed to establish the existence of any employees of a subcontractor…much less one who was paid less than the 'prevailing rate' of wages."].)

Accordingly, for the foregoing reasons, it is hereby

ORDERED that plaintiffs Angel Jimenez, Priscilla Piervincenti, and Wykeem Murray's motion for class certification pursuant to CPLR 901 and 902 is granted; and it is further

ORDERED that this action is certified as a class action, with the class being defined as follows:

> All hourly non-exempt employees (including but not limited to security guards, patrol drivers, and site supervisors) employed by Defendants in New York on or after the date that is six (6) years before the filing of the Complaint in this case;

and it is further

ORDERED that plaintiffs Angel Jimenez, Priscilla Piervincenti, and Wykeem Murray are appointed Lead Plaintiffs and Class Representatives; and it is further

ORDERED that Lee Litigation Group, PLLC shall serve as class counsel; and it is further

ORDERED that counsel for the Class submit to the Court for its approval the text of a proposed Notice to the Class, including an opt-out provision, that adheres to the class definition described above within thirty (30) days; and it is further

ORDERED that counsel for the parties shall appear at 60 Centre Street, Courtroom 341, New York, New York at 9:30 a.m. on December 19, 2023, for a preliminary conference with the Court; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days of entry.

This constitutes the Decision and Order of the Court.

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11/13/2023
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE