Rodriguez v SW Pub. Relations, LLC
2016 NY Slip Op 31439(U)
July 26, 2016
Supreme Court, New York County
Docket Number: 156571/14
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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KRISTINA RODRIGUEZ, individually and on behalf of
Other persons similarly situated,

Plaintiffs,

Index No. 156571/14

-against-

DECISION/ORDER

5W PUBLIC RELATIONS, LLC, RONN TAROSSIAN
Or any other entities affiliated with or controlled by 5W
PUBLIC RELATIONS, LLC and RONN TAROSSIAN,

Defendants.

---x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for
:____________________________________

Papers	Numbered
Notice of Motion and Affidavits Annexed..................................	1
Affirmations in Opposition	2
Replying Affidavits..	3
Exhibits...	4

Plaintiffs Kristina Rodriguez, individually and on behalf of others similarly situated, bring the instant motion for an Order pursuant to CPLR § 901 certifying this action as a class action. For the reasons set forth below, plaintiffs' motion is denied.

The relevant facts are as follows. This action is brought on behalf of Kristina Rodriguez and a putative class of individuals who provided uncompensated labor to defendants 5W Public Relations, LLC and its founder and CEO Ronn Torossian (hereinafter referred to as "defendants" or "5W") at defendants' headquarters in New York seeking to recover unpaid wages which plaintiff and members of the putative class were allegedly entitled to receive for work they performed for defendants since 2008 on the ground that they were actually defendants' employees and not interns.

5W is a for-profit public relations agency servicing national corporations, start-up technology companies, high-profile individuals, various brands and consumer companies and is one of the twenty largest public relations firms in the United States, with revenues exceeding $19 million.

Plaintiffs allege that they are a group of workers, employed by defendants, who provided uncompensated labor to 5W and claim that (1) defendants failed to pay plaintiff and other members of the putative class minimum wages for all hours worked, in violation of New York Labor Law ("Labor Law") § 663 and 12 NYCRR 142-2.1; and (2) defendants failed to pay plaintiff and other members of the putative class any wages for their hours worked, in violation of Labor Law § 198. Plaintiffs now move for an Order pursuant to CPLR § 901 certifying the following class as a class action: all individuals engaged in 5W's internship program from July 2008 through the present.

"A class action may be maintained in New York only after the following five prerequisites of CPLR 901(a) have been met: (1) the class is so numerous that joinder of all members is impracticable: (2) common questions of law or fact predominate over any questions affecting only individual members; (3) the claims of the representative parties are typical of the class as a whole; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) the class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 188 (1st Dept 1998). *See also* CPLR § 901(a). "Once these prerequisites are satisfied, the court must consider the factors set out in CPLR 902, to wit, the possible interest of class members in maintaining separate actions and the feasibility thereof, the existence of pending litigation regarding the same controversy, the desirability of the proposed class forum and the difficulties likely to be encountered in the management of a class action." *Ackerman*, 252 A.D.2d at 188. "Plaintiff bears the burden of establishing compliance with the requirements of both CPLR 901 and 902, and the determination is ultimately vested in the sound discretion of the trial court." *Id.* "Appellate courts in this State

have repeatedly held that the class action statute should be liberally construed. Thus, any error, if there is to be one, should be in favor of allowing the class action." *Pruitt v. Rockefeller Center Properties, Inc.*, 167 A.D.2d 14, 21 (1st Dept 1991)(internal citations omitted).

In the instant action, this court finds that plaintiffs' motion for an Order certifying this action as a class action must be denied on the ground that they have not established that common questions of law or fact predominate over any questions affecting only individual members as required by CPLR § 901(a)(2). Whether common questions of law or fact predominate "should not be determined by any mechanical test, but rather, whether the use of a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated." *Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 97 (2d Dept 1980). "[T]he rule requires predominance, not identity or unanimity, among class members. Similarly, the fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action." *Id.* at 98 (internal citations omitted). However, "[t]he predominance requirement is [only] satisfied if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 538 (2d Cir. 2015), citing *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 118 (2d Cir. 2013).

Here, this action may not be certified as a class action as the court finds that common questions of law or fact do not predominate over any questions affecting only individual members because the question of whether defendants' internship program created employment relationships can only be answered with individualized proof as opposed to generalized proof. The issue of what test this court will adopt in order to determine whether an individual is an employee or an intern under the Labor Law is not presently before the court. However, whichever test the court adopts, it

will be a test that balances a number of factors and one that takes into consideration both the benefit of the work to the employer and the experiences of the individual intern, similar to the test adopted by the Second Circuit in *Glatt*, 811 F.3d 528, and will not be the Department of Labor's six-factor test which focuses solely on whether the employer receives an immediate advantage from the interns' work. Some of the factors that the court might consider in making such a determination include, *inter alia*, whether the intern received college credit for his or her work; whether the intern had an expectation of compensation; the skills learned by the intern; and the extent to which those skills pertained to that intern's academic and career goals. Assuming that the court adopts such factors, it finds that it will need individualized proof from each individual making a claim as opposed to generalized proof in order to determine whether such individual is an intern or an employee as each factor will vary from individual to individual. Indeed, defendants have provided evidence that each intern had different experiences during his or her internship depending on what department he or she was interning in and who his or her supervisor was and that while some interns received academic credit for the internship, the number of which varied from intern to intern, some interns received no academic credit at all.

Plaintiffs have failed to offer any evidence that establishes that common questions of law or fact predominate among the putative class members or that any of the above factors can be determined with merely generalized proof. In support of their assertion that common questions of law and fact predominate, plaintiffs provide evidence that Rodriguez and the putative class members all signed and were bound by defendants' universal employment agreement; that they all performed similar work; that they were all subject to identical policies, as set forth in a company handbook; and that they were all uniformly misclassified as exempt from minimum wages. However, such evidence does not establish that common questions of law and fact predominate as this court has already explained that a determination as to whether an intern is actually an employee

under the Labor Law will focus on the experience of the individual intern and not just the uniform policies implemented by the employer.

Plaintiffs' assertion that any inquiry into whether plaintiff and the putative class members can be considered employees under the Labor Law is inappropriate on a motion for class certification as it goes to the merits of the action and is thus only appropriate on a motion for summary judgment is without merit. While the court agrees that it may not look to the merits of the action when determining whether to certify the proposed class, the court cannot determine whether common questions of law and fact predominate over any questions affecting only individual members without looking into whether it can be determined, through generalized proof, that the named plaintiff and the putative class members are either interns or employees and the factors that will be considered in making such a determination.

Accordingly, plaintiffs' motion for an Order certifying this action as a class action is denied. This constitutes the decision and order of the court.

Dated: 7/26/16

Enter: CSK
J.S.C.

HON. CYNTHIA S. KERN