

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 49

-----X

BENEDETTO LAMARCA, DOLORES GUIDDY, and :  
STEPHEN TEDESCO, individually, and on behalf of all :  
others similarly situated, :

Plaintiffs, :

-against-

Index No. 601973/04

THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, :  
INC., d/b/a A&P, THE FOOD EMPORIUM, and :  
WALDBAUM'S, :

Defendants. :

-----X

**CAHN, J.:**

Plaintiffs move for class certification, CPLR 901.

**Background:**

Plaintiffs are current and former employees of defendants The Great Atlantic and Pacific Tea Company (“A&P”), The Food Emporium, and Waldbaum’s.

The Second Amended Complaint submitted on behalf of the class, (the “complaint”) alleges that defendants failed to pay overtime wages to full-time hourly employees, who were either required or permitted to work more than 40 hours per week. Although defendants are store chains, with different names, plaintiffs allege, and defendants do not dispute, that they are owned by the same parent company, A&P, and all follow the same policies and practices regarding overtime pay.

Plaintiffs allege, inter alia, that defendants engaged in a regular practice of forcing or permitting employees to work “off-the-clock” without compensation, and of making improper

“meal deductions” from their paychecks. The complaint further alleges that defendants’ conduct was part of a willful attempt to reduce payroll expenditures by understaffing stores and encouraging managers to extract uncompensated extra work from employees. Plaintiffs seek recovery on a class-wide basis under Labor Law § 650 et seq. for unpaid overtime wages.

Defendants previously moved to dismiss, (CPLR (a) (7)), on the grounds that recovery was sought under a Labor Law statute that does not authorize class actions. The Court denied the motion, on May 4, 2005, (Order and Opinion, *German Aff*, Ex N), finding that the complaint very carefully omitted any demand for liquidated damages, which may not be the basis for a class action (*citing Carter v Frito-Lay, Inc.*, 74 AD2d 550 [1st Dep’t 1980], *aff’d* 52 NY2d 994 [1981]), but that plaintiffs were not precluded from seeking other relief under the statute, as a class. Order and Opinion, *German Aff*, Ex N at 3.

Plaintiffs now move for class certification, designating a class of

All regular full-hourly employees of Defendant who have been, or will be employed in Defendant’s supermarkets located in the State of New York, from June 24, 1998 through the date of the final disposition of this action, whom Defendant has required or permitted to perform work in excess of 40 hours per week without overtime wages.

Pl’s Br, at 1.<sup>1</sup> Plaintiffs also move for an order appointing plaintiffs’ counsel as class counsel, which defendants have not opposed.

**Discussion:**

To qualify for class certification, a plaintiff must show: (1) that the class is so numerous as to make joinder impracticable; (2) questions of law or fact common to the class predominate

---

<sup>1</sup> “Defendant,” as used here, refers to defendant A&P, which plaintiffs allege owned and operated approximately 140 stores in New York State, under the banner names A&P, Food Emporium and Waldbaum’s. Pl’s Br, at 3-4.

over individual questions; (3) the claims or defenses of the class representatives are typical of those of the class; (4) the class representatives will adequately protect the interests of the class; and (5) class action litigation is superior to individual litigation. CPLR § 901 (a). Simply put, the prerequisites are: “numerosity, commonality, typicality, adequacy of representation and superiority.” *Weinberg v Hertz Corp.*, 116 AD2d 1, 4 [1st Dep’t 1986].

Defendants oppose certification. They assert, first and foremost, that plaintiffs’ claims are nothing more than a “rehash” of the wage claims previously asserted in federal court. Further, defendants raise a series of objections regarding the class certification requirements and the fairness of proceeding with this claim as a class action.

#### The Previous Action

Defendants argue that the wage claims asserted in the federal court action, (*Foster v Food Emporium, et al*, 99 Civ. 3860 (CM)), addressed and disposed of these class action claims under New York law. Defendants note that *Foster* was a class action and that the claims in *Foster* were filed by the same counsel who are bringing this action. They further note that those claims were brought on behalf of the full-time and part-time employees of the Food Emporium and A&P stores in the Metropolitan New York area<sup>2</sup> and that two of the plaintiffs in this action, Lamarca and Guiddy, were employed by stores covered in that action. Defendants also note that the same factual allegations comprise the foundation to both actions.

Defendants aver that although the federal court did certify a class, it specifically denied the relief requested in this motion. In particular, the federal court found that the plaintiffs in that

---

<sup>2</sup> Plaintiffs note in response that the largest group of potential class members in this action, the employees of Waldbaum’s, was not covered in *Foster*. Thus, this proposed class includes potential members who not only could not assert their rights under New York State Labor Law in *Foster*, but who were ineligible to join the *Foster* class with regards to the federal claims.

action were not permitted to represent a class of employees with regard to claims under New York Labor Law. Indeed, the *Foster* court specifically denied plaintiffs' motion for leave to amend the complaint to include a class action claim under New York State Labor Law. *Foster, et al. v The Food Emporium, et al.*, 2000 WL 1737858, at \*2 [SDNY 2000] (although the claim was permitted individually, for the named plaintiffs).

However, what defendants do not address, and what is most important on this point, is that the rationale for this determination was the federal court's view that the facts alleged, in both cases, did not support a basis for a class action under New York law. The court in *Foster* noted that it "would be improper to bring persons" into that action "so that they can pursue State law claims that they can only bring on their own and not collectively." *Id.*, at \*3. The *Foster* court in *Foster* based that determination on its assessment that it was "well settled that there is no collective action . . . under the wage and overtime provisions of the New York State Labor Law" and that New York CPLR "§ 901 (b) provides that a plaintiff may not seek class-wide relief that includes statutorily prescribed liquidated or punitive damages unless the statute in questions [sic] explicitly authorizes its enforcement by class actions."

Here, the allegations in the complaint are drafted and seek recovery so as to permit a class action under New York State Labor Law. This Court previously ruled on the issue in deciding defendants' motion to dismiss. The Court noted that the "fact that the Labor Law provides that remedy [of liquidated damages] does not preclude plaintiffs from seeking other relief under the statute, as a class. The courts have specifically held that a class action for actual damages may be maintained under the Labor Law so long as claims for liquidated damages are

waived.” Order and Opinion, *German Aff, Ex N* at 3.<sup>3</sup> In fact, in the decision on defendants’ motion to dismiss, the Court specifically included *Foster* as one of the authorities cited by defendant, that is not controlling. Order and Opinion, *German Aff, Ex N* at 4. With all due deference to the *Foster* court, its view of New York State Labor Law is not binding (*see Maro Leather Co. v Aerolineas Argentinas, et al.*, 161 Misc2d 920, 923 [App Term, 1st Dep’t 1994], *cert denied* 514 US 1108 [1995]), particularly against the weight of state cases holding to the contrary.<sup>4</sup>

### Class Certification Requirements

Defendants further assert that plaintiffs have failed to meet the requirements for class certification. Specifically, they aver inadequacies in the requirements of commonality (CPLR § 901 (a) (2)), typicality (CPLR § 901 (a) (3)), and adequacy of representation (CPLR § 901 (a) (4)). Each of these objections are unavailing.

### Commonality and Typicality

The objections that defendants raise with regard to commonality and typicality are unpersuasive. With regard to both requirements, defendants assert that the disparate claims made by class members would be “too individualized to warrant collective action treatment.” Def’s Opp Br, at 35 (*citing Lawrence v City of Philadelphia, Pa.*, 2004 WL 945139, at \*2 [ED

---

<sup>3</sup> *Citing Pesantez v Boyle Environmental Svcs., Inc.*, 251 AD2d 11 [1st Dep’t 1998]; *Jacobs v. Macy’s East, Inc.*, 17 AD3d 318 [2d Dep’t 2005]; *Noble v 93 Univ. Place*, 2004 WL 944543 [SDNY 2004]; *Ansoumana v Gristede’s Operating Corp.*, 201 FRD 81 [SDNY 2001]. *See also Cox v Microsoft Corp.*, 8 AD3d 39 [1st Dep’t 2004]; *Weinberg v Hertz Corp.*, 116 AD2d 1 [1st Dep’t 1986]; *Super Glue Corp. v Avis Rent-a-Car Sys. Inc.*, 132 AD2d 604 [2d Dep’t 1987]; *Ridge Meadows Homeowner’s Assoc. v Tara Dev. Co.*, 242 AD2d 1997 [4th Dep’t 1997].

<sup>4</sup> *See cases cited, supra*, note 3.

Pa Apr. 29, 2004]). However, by that logic, there could be no class actions in overtime and wage disputes, unless each plaintiff was treated in an identical manner.

In this case, plaintiffs do not contend that each member of the proposed class will have been underpaid by the same dollar amount, or by the same supervisor, or on the same day. Nor do they need to. Rather, plaintiffs' argument is that the defendants' stores are run and managed in the same ways and that this created "a company pandemic of uncompensated work." Pl's Reply Br, at 7. Whether plaintiffs can prove this, is a question for another day. *Eisen v Carlisle & Jacquelin*, 417 US 156, 177 [1974] (holding that an analysis of the merits is not appropriate on the issue of class certification). It does not bear on the issue of commonality. Indeed, the "fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action." *Friar v Vanguard Holding Co.*, 78 AD2d 83, 98 [2d Dep't 1980]. The paramount issue is defendants' claimed conduct. *Id.* Plaintiffs' claims are "typical of other members of the class since [they] arise out of the same course of conduct as the class members' claims and [are] based on the same cause of action." *Pruitt v Rockefeller Center Properties, Inc., et al.*, 167 AD2d 14, 22 [1st Dep't 1991]. To "be typical, it is not necessary that the claims of the named plaintiff[s] be identical to those of the class . . . the requirement is satisfied even if the class representative[s] cannot personally assert all the claims made on behalf of the class." *Id.*

Moreover, if there is ultimately a finding of liability, the issue of damages for each plaintiff can be addressed with regards to the plaintiffs individually. Following a determination of liability, the question of calculating amounts due individual plaintiffs can be resolved in any one of a number of ways, including by the use of proofs of claims, etc. as are done in other class

actions, including for example, “prevailing wage” claims. Thus, the argument that individual questions would remain is not persuasive and poses no procedural difficulties.

Further, defendants’ conclusory assertions, such as “it is exceedingly rare that an employee would be required to work beyond 40 hours in a week, as there are numerous other employees, mostly part time employees, who are capable of performing any work that is needed to be completed” (Def’s Opp Br, at 34), or that because of the number of cashiers in a store, “no cashier need ever stay, therefore, beyond the conclusion of his or her shift” (*Id.* at 35), address the questions of fact and are pertinent only to the merits and proof of the claims. Such statements do not reveal any inadequacy in the commonality or typicality of the claims.

It is notable, given how defendants have argued that the facts asserted in this action are all but duplicative of those at issue in *Foster*, that defendants have not suggested any way in which the proposed class differs from that class, which was certified by the federal court and which defendant argues should be controlling. *O’Hare v Del Bello*, 47 NY2d 362, 368 [1979].

#### Adequacy of Representation

Defendants detail, at some length, their arguments as to why the named plaintiffs are not adequate representatives under CPLR § 901 (a) (4). This includes specifics on how all three of the named plaintiffs have violated, at a minimum, the time and attendance policies of the defendants. They further note that Tedesco and Guiddy have been disciplined by their employers. However, the essence of this complaint is that the proposed class was forced to work overtime without compensation and were under substantial pressure to complete their work without being paid overtime. Thus, instances of just such behavior and short-cuts taken to attempt to avoid the need for overtime do not support a view of the named plaintiffs as inadequate representatives of the proposed class. Although such instances may go to the issue of

the merits and equities of plaintiffs' claims, they are unlikely to be specific to the named plaintiffs and are alleged to be common to a very large percentage of the proposed class. Indeed, here there "is not even a hint of any adverse interest" between the named plaintiffs and the proposed class. *Pruitt v Rockefeller Center Properties, Inc., et al.*, 167 AD2d, at 22. *See also Marisol A v Giuliani*, 126 F3d 372, 378 [2d Cir 1997] (noting that adequacy of representation of the proposed class requires that there be "no conflict of interest between the named plaintiffs and other members of the plaintiff class").

#### Fairness

Finally, defendants argue that there are fairness and procedural considerations that derive from the potential class members not being "similarly situated" and, thus, requiring that a large number of individual issues be resolved and, consequently, failing to save significant time or effort. Def's Opp Br, at 38. This argument is merely an attempt to cloak defendants' arguments regarding commonality, typicality and adequacy of representation into an additional argument. As it is not distinct from the commonality, typicality and adequacy of representation arguments addressed above, the Court refers to its review of those issues and, again, finds defendants' argument unpersuasive.

#### Class Designation

Plaintiffs' proposed language for the designation of a class for class certification lacks adequate specificity. For example, their proposed language would include employees not yet hired by any of the stores. *See* Pl's Br, at 1. Nor does the language make it clear that it is referring to employees of the stores themselves, rather than also including employees of the corporate entity. *Id.* As such, the Court will certify the following class:

All full-time hourly employees of Defendants who were employed in Defendants' supermarket stores located in the State of New York, for any of the period from June 24, 1998 through the date of the commencement of the action, whom Defendants required or permitted to perform work in excess of 40 hours per week without being paid overtime wages.

The issue of whether to include an "opt-in" or "opt-out" provision is premature. It need not be decided now, but can be decided after discovery has been had.

Plaintiffs argue against an opt-in provision as favored by defendants, based on concern that potential class members will have reluctance to join the class and the litigation out of fear of retaliation. Certainly "[c]oercion of potential class members by the class opponent may exist if both parties are involved in an ongoing business relationship." *EEOC v Morgan Stanley & Co., Inc.*, 206 FSupp2d 559, 562 [SDNY 2002] (internal citations omitted). However, in this case, virtually all of the employees in defendants' stores, and all of the potential class members, are represented by unions. Should there be any retaliation, or threat of retaliation, the members can complain to the Court or to the unions in place at the defendants' stores, either of whom can address and deal with the issue.

Accordingly, it is

ORDERED, that the motion to certify the class is granted; and it is further

ORDERED, that plaintiffs' counsel are appointed as class counsel.

Dated: July 3, 2007

ENTER:

\_\_\_\_\_  
/s/  
J.S.C.