SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** **IAS MOTION 53EFM**

Justice

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RACHEL HERMAN, RENDA GREENHILL, RANDY WILKINS

Plaintiff,

- v -

JUDLAU CONTRACTING, INC.,

Defendant.

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INDEX NO. 652249/2017

MOTION DATE 10/26/2020, 10/26/2020

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 187, 188, 189

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents, (i) the plaintiffs' motion for summary judgment (mtn. seq. no. 003) is granted as to the defendant's liability on the plaintiffs' breach of contract claims for unpaid prevailing wages on behalf of the class, and (ii) the defendant's motion for summary judgment of dismissal (mtn. seq. no. 004) of this action is denied.

Judlau Contracting, Inc. (**Judlau**) entered into contracts with the State of New York, the City of New York, their agencies and/or local governmental entities (the **Public Works Contracts**) to perform work on projects funded by these entities (the **Public Works Projects**), which Pubic

Works Contracts required the payment of prevailing wages to all laborers and workers employed on such Public Works Projects (*see also* NYLL § 220; NY Const., art. I, § 17).

The plaintiffs (named plaintiffs Randy Wilkins, Renda Greenhill, Rachel Herman and a certified class of non-union flaggers) performed flagging duties for Judlau to ensure public safety at and around the construction site, and are laborers entitled to prevailing wages (*see* NYSCEF Doc. No. 111). Judlau does not substantively dispute the plaintiffs' characterization of their work on the job sites, i.e., performing flagging to ensure public safety within close proximity to construction sites, often at construction zone barriers. Instead, Judlau argues that the plaintiffs are not entitled to prevailing wages because any prevailing wage work performed by them was *de minimus*. The argument fails.

New York courts have repeatedly affirmed that under the prevailing wage law, "when a company is working on a public project … it must pay its workers and laborers the prevailing wage rate: (*Tenalp Constr. Corp. v Roberts*, 141 AD2d 81, 84 [2d Dept 1988]). Based on the record before the court, the plaintiffs' work on the Public Works Projects here was clearly and "predominantly physical in content" and exposed them to the "attendant risks" shared by all the other construction worked due to the presence of construction, construction equipment, and public traffic" (*id.* at 86 [quoting *Austin v New York*, 258 NY 113, 116 [1932]). This qualifies the plaintiffs for prevailing wages under the guidance issued by the New York City Comptroller (*see*, e.g., NYSCEF Doc. Nos. 139-140; *see also*, NYSCEF Doc. No. 170).

The plaintiffs are entitled to summary judgment on their breach of contract claim for unpaid prevailing wages. Such damages, contrary to Judlau's position, are readily capable of calculation based on the detailed time records kept by Judlau, as produced in this action, and the prevailing wage rates established for all laborers on the Public Works Projects. Indeed, the plaintiffs have already prepared such calculations for all of the named plaintiffs in this action (NYSCEF Doc. No. 155-159) in connection with these motions and can do so for all the other members of the class as well.

Judlau has also offered no defense with respect to its failure to provide the plaintiffs with statutorily-required wage notices as required by NYLL § 195(1).

Accordingly, it is

ORDERED that the plaintiffs' motion (seq. no. 003) for summary judgment is granted as to liability in its entirety, and it is further

ORDERED that the defendants' motion (seq. no. 004) for summary judgment is denied, and it is further

ORDERED that the matter of damages is referred to a special referee to hear and determine the amount of damages owed to the plaintiff class; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the foregoing issue of damages, which are hereby submitted to the JHO/Special Referee for such purpose; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the plaintiffs shall serve a proposed accounting/pre-hearing memorandum within 24 days from the date of this order and the defendant(s)/respondent(s) shall serve objections to the proposed accounting/pre-hearing memorandum within 20 days from service of plaintiffs' papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that on the initial appearance in the Special Referees Part the parties shall appear for a pre-hearing conference before the assigned JHO/Special Referee and the date for the hearing shall be fixed at that conference; the parties need not appear at the conference with all witnesses and evidence; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly ; and it is further ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules) .

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5/11/2021
DATE

ANDREW BORROK, J.S.C.

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