

To commence the 30-day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS**

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SUSAN SCHMIDT, as ADMINISTRATOR OF
the ESTATE OF REGINA PINKALL, individually
and on behalf of all others similarly situated,

Plaintiff,

-against-

SAPPHIRE NURSING AT WAPPINGERS, LLC;
MACHLA ABRAMCZYK; ESTHER
FARKOVITS; RICHARD PLATSCHEK;
ROBERT SCHUCK; and DOES 1-25,

Defendants.
-----X

ACKER J.S.C.

DECISION AND ORDER

Index No.: 2019-52328

Motion Seq No.: 6

NYSCEF documents numbered 211-220 and 224-228 were considered in Plaintiff's motion for an order requesting the following relief:

1. Leave to renew the motion on class certification, and
2. Upon renewal, reversing this Court's prior decision on class certification, and certifying this action as a class action with the class defined as all residents of Sapphire Nursing at Wappingers ("Sapphire at Wappingers") from April 27, 2017 through the date of judgment, and
3. Appointing Plaintiff Susan Schmidt as class representative, and
4. Directing Defendants to provide Plaintiffs with a class list and approving the proposed notice provided by Plaintiffs, and
5. Appointing the law firm of Finkelstein, Blankinship, Frei-Pearson and Garber, LLP as class counsel.

Defendants oppose the motion.

“A motion for leave to renew is the appropriate vehicle for seeking relief from a prior order based on a change in the law” which would change the prior determination. *Dinallo v. DAL Elec.*, 60 AD3d 620, 621 [2d Dept. 2018]. Granting or denying such a motion is within the motion court’s discretion. *See Flanagan v. Delaney*, 194 AD3d 694 [2d Dept. 2021].

Plaintiff Susan Schmidt, as administrator of the estate of Regina Pinkall, seeks leave to renew her motion for class certification. Plaintiff commenced this Public Health Law (“PHL”) section 2801-d action on June 21, 2019.¹ Plaintiff alleges that the Defendants Sapphire Nursing at Wappingers, LLC, Machla Abramczyk, Esther Farkovits, Richard Platschek and Robert Schuck (collectively referred to as the “Defendants”) deprived residents of the Sapphire Nursing Home and Rehab Center (the “Facility”) of their statutorily guaranteed rights under the PHL.

On April 13, 2023, this Court denied Plaintiff’s application for class certification. Thereafter, by Decision and Order dated November 2, 2023, the Appellate Division, Second Department, issued a decision certifying a class in *Jenack v. Goshen Operations, LLC*, 22AD3d 36 [2d Dept. 2023]. In the instant application, Plaintiff argues that the *Jenack* case requires renewal of her certification motion and, upon renewal, the granting of class certification.

The Court agrees that the recent *Jenack* decision compels this Court to reconsider its decision as to class certification. In *Jenack*, the Second Department distinguished the case of *Olmann v. Willoughby Rehab. & Health Car Ctr, LLC*, 186 AD3d 837 [2d Dept. 2020], a case relied on by this Court in the determination of some of the factors relevant to a class certification. Therefore, renewal is granted and the Court will analyze the factors in light of *Jenack*.

¹ It was originally commenced by Susan Schmidt as Attorney-in-Fact for Regina Pinkall. Ms. Pinkall passed away on April 27, 2021 and by So-Ordered Stipulation dated June 6, 2022, Susan Schmidt, as Administrator of the State of Regina Pinkall, was substituted as Plaintiff herein.

An application for class certification is governed by CPLR §901(a) which sets forth the following five factors:

1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
4. the representative parties will fairly and adequately protect the interests of the class; and
5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

“The proponent of a class action has the initial burden of establishing the prerequisites of class-action certification.” *Osarezuk v. Associated Universities, Inc.*, 82 AD3d 853, 855 [2d Dept. 2011]. “The determination whether to grant a motion for class certification ‘is ultimately vested in the sound discretion of the trial court.’ [citation omitted].” *Olmann v. Willoughby Rehab. & Health Care Ctr., LLC, supra*. The criteria set forth in CPLR 901(a) should be “broadly construed.” *Jenack*, 222 AD3d at 41; *see also Globe Surgical Supply v. GEICO Ins. Co.*, 59 AD3d 129 [2d Dept. 2008].

Plaintiff alleges that Ms. Pinkall and the proposed class members sustained personal injuries due to Defendants’ failure to meet their contractual, statutory and regulatory obligations, focusing primarily on the obligation to adequately staff the facility.

In support of the application, Plaintiff submits, *inter alia*, affidavits from twelve (12) individuals, two of whom were residents at the Facility during the proposed class period, while others include family members, partners and companions of former residents. Plaintiff also provides the expert affidavit and report of Elizabeth Halifax, PhD and RN (“Halifax Report”).

Halifax opines that inadequate and inappropriate nurse staffing negatively impacts and harms all residents of a nursing home on a systemic, class-wide basis. She further maintains that understaffing can be determined on a facility-wide basis without individual inquiry and details the methodology through which she determines this in the Halifax Report.² It is her expert opinion that the Facility was insufficiently staffed from April 2017 through September 2019 and that such understaffing negatively affected all residents on a class-wide systemic basis. She cites to the submitted Affidavits and Decedent's medical records to support her conclusions regarding the negative effects of understaffing.³

On renewal, Plaintiff further submits her own affidavit. Her attorney submits an affirmation stating that Plaintiff's affirmation was not submitted with the original motion because he was unaware of any requirement to submit such an affidavit.

Defendants oppose Plaintiff's application. In their original opposition to the certification motion, they submitted the expert affidavit of Diane J. Yastrub, PhD, FNP, APRN-BC, MSC, MSN, CWCN, CDE. Based upon her review of Plaintiff's expert's submissions, Yastrub concludes that Defendants did not deviate from the appropriate standard of care as concerns nurse staffing levels. She further states that it is her expert opinion that the evidence presented by Plaintiff, and the documents relied upon therein, are flawed and do not reflect the applicable standard of care in New York.

² The Court's inquiry in a class action application "'vis-à-vis the merits is limited to a determination as to whether on the surface there appears to be a cause of action which is not a sham.' [citations omitted]." *Matter of Long Island Power Auth. Hurricane Sandy Litig.*, 200 AD3d 1040 [2d Dept. 2021]. Therefore, it is unnecessary at this point for the Court to evaluate the methodology used by Halifax and will focus, instead, on her conclusions.

³ Although Plaintiff often refers generally to "understaffing," it is important to note that Plaintiff's expert report speaks specifically to nurse staffing rather than overall staffing at the Facility.

DISCUSSION

Numerosity

The *Jenack* decision does not change this Court's determination as to numerosity in that Plaintiff meets the numerosity requirement.

Predominance/Commonality

“In order to certify a lawsuit as a class action, the court must be satisfied that questions of law or fact common to the class predominate over any question affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” *Jenack*, 222 AD3d at 41, quoting *Apra v. Hazeltine Corp*, 247 AD2d 564, 565 [2d Dept. 1998]. Commonality cannot be determined by any “mechanical test” and the fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action. Rather, it is “predominance, not identity or unanimity,” that is the linchpin of commonality. *City of New York v. Maul*, 14 NY3d 499, 514 [2010].

In *Jenack*, like here, the plaintiffs alleged the violation of statutes, rules and regulations requiring residential facilities to maintain sufficient staff. Also as in *Jenack*, the instant Plaintiffs' expert provides an opinion that the Facility is understaffed in violation of statutes and regulations and that the understaffing resulted in inadequate care and unsafe conditions, which caused injuries to the putative class. The *Jenack* court concluded “it is sufficient for a plaintiff to prove that questions regarding violations of contract, statute, regulation, code or rule predominate to satisfy the commonality requirement in a case alleging a violation of Public Health Law § 2801-d.” *Jenack*, 222 AD3d at 45-46 (*citations omitted*).

Accordingly, based on *Jenack*, the Court finds that Plaintiff has satisfied the commonality requirement.

Typicality

Plaintiff must also show that the claims or defenses of the representative parties are typical of the claims or defenses of the class. “Typical claims are those that arise from the same facts and circumstances as the claims of the class members.” *Globe Surgical Supply v. GEICO Ins. Co.*, 59 AD3d at 143. “Typicality can overlap with the predominance of common questions of law or fact . . . and the adequacy of representation [citations omitted].” *Id.* at 144.

This factor, *inter alia*, places emphasis on the proposed class representative. This Court had noted in the original decision that Plaintiff had not submitted an affidavit from the representative and the Complaint was not verified. Plaintiff now submits her affidavit and her attorney avers that he was not aware that affidavit from her was necessary. On renewal, the Court will consider the affidavit of the class representative. *See Cupka v. Remik Holdings LLC*, 202 AD3d 473, 475 [1st Dept. 2022] (Court permitted plaintiff to submit affidavit on renewal of certification motion, even though not submitted on initial motion, noting that plaintiffs were not “precluded from making successive motions for class certification, particularly where the motion was intended to rectify the deficiencies in the initial motion.”).

The Schmidt affidavit sufficiently establishes that her claims regarding her mother arise from the same facts and circumstance as the claims of the proposed class members. *Globe Surgical Supply v. GEICO Ins. Co. supra*. In any event, “[t]ypicality does not require identity of issues and the typicality requirement is met even if the claims asserted by class members differ from those asserted by other class members.” *Pludeman v Northern Leasing Sys., Inc.*, 74 A.D.3d 420,

423 [1st Dept. 2010]. Moreover, given the determination as to predominance/commonality discussed above, Plaintiff has satisfied the Typicality requirement.

Adequacy of Representation

“The three essential factors to consider in determining adequacy of representation are potential conflicts of interest between the representative and the class members, personal characteristics of the proposed class representative (e.g., familiarity with the lawsuit and his or her financial resources), and the quality of the class counsel.” *Globe Surgical Supply v. GEICO Ins. Co.*, 59 AD3d at 144.

As with the Typicality factor, the Court noted in the original decision that, *inter alia*, there was no sworn statement in the record⁴ for the Court to assess whether Plaintiff had established adequacy. Plaintiff now submits an affidavit from the proposed class representative, Ms. Schmidt.

In her affidavit, Ms. Schmidt provides sufficient information that she has no conflict of interest as well as her familiarity with the lawsuit. In addition, it is not disputed that class counsel is qualified to represent the class as they have represented numerous classes in PHL section 2801-d matters.

Superiority

The *Jenack* decision squarely addresses this factor stating, *inter alia*, the “very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action in prosecuting his or her rights.” *Jenack*, 222 AD3d at 42 (*quotations omitted*). This Court had found that the varying nature of the claims by

⁴ Plaintiff did not verify the Complaint.

the proposed class required individual investigations so “it would not be fair or efficient to litigate these claims in a class action” citing to *Olmann, supra*. In *Jenack*, the Second Department held “as the putative class members were all resident of the defendants nursing home facility during the time at which the alleged decline in services occurred,” the superiority factor was satisfied. *Jenack*, 222 AD3d at 46. The same facts are present here. Thus, Plaintiff has established superiority.

Discretionary factors

Given the foregoing, the Court must then analyze the discretionary factors of CPLR 902.

These factors are:

1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;
2. The impracticability or inefficiency of prosecuting or defending separate actions;
3. The nature and extent of any litigation concerning the controversy already commenced by or against members of the class;
4. The desirability or undesirability of concentrating the litigation of the claim in the particular form;
5. The difficulties likely to be encountered in the management of a class action.

CPLR 902(1-5).

These factors also weigh in favor of the Plaintiff. In *Jenack*, the Second Department found the first factor met by citing a Third Department case, *Fleming v. Barnwell Nursing Home & Health Facilities*, 309 AD2d 1132 [3d Dept. 2003], which held “aged and infirm nursing home residents are not interested in individually controlling the prosecution of the action.” *Fleming*, 309 AD2d at 1134. The Second Department also found class action lawsuits pursuant to PHL §2801-d to be more practical and efficient for nursing home patients who allege statutory violations, while specifically rejecting the primary argument made by the defense here that individual claims must be tailored to each resident. Defendants do not argue that there is any

other litigation concerning the controversy already commenced or that it would be undesirable to concentrate the litigation in Dutchess County, where the facility is located.

Lastly, after the last conference, the Court asked for further submissions as to the date of the defined class to be certified. The Court will issue a decision as to that issue after review of those submissions.

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the Court, it is hereby denied.

Therefore, it is hereby

ORDERED that the motion to renew is granted; and it is further

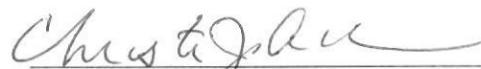
ORDERED that upon renewal, the motion for class certification is granted; and it is further

ORDERED that Plaintiff Susan Schmidt is appointed as class representative; Defendants shall provide Plaintiffs with a class list of residents from April 27, 2017 through March 16, 2020, and as further modified by this Court; the proposed notice provided by Plaintiffs is approved, and the law firm of Finkelstein, Blankinship, Frei-Pearson and Garber, LLP is appointed class counsel.

ORDERED that this matter is scheduled for an in-person conference on **September 12, 2024 at 9:30 a.m.**

The foregoing constitutes the Decision and Order of the Court.

Dated: May 14, 2024
Poughkeepsie, New York



CHRISTI J. ACKER
JUSTICE OF THE SUPREME COURT

To: All Counsel via ECF