UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

CAESAR OSAKAN, individually, on behalf of all other similarly situated persons, and on behalf of the California Labor Workforce Development Agency and the State of California,

Plaintiffs,

vs.

APPLE AMERICAN GROUP; APPLE NORCAL, LLC, and DOES 1-20,

Defendants.

Case No: C 08-4722 SBA

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR LEAVE TO AMEND AND DENYING PLAINTIFF'S MOTION TO CONTINUE TRIAL

Docket 54, 55

Plaintiff Caesar Osakan, a former employee of Applebee's restaurant, brings the instant wage and hour class action, under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 207, et seq., and various state statutes, against the restaurant chain's owners and operators, Defendants Apple American Group ("Apple American") and Apple Norcal, LLC ("Apple Norcal"). Plaintiff alleges that he and other Applebee's assistant managers were misclassified as exempt employees, and deprived of meal and rest breaks and overtime pay. Trial in this action is scheduled to commence on July 12, 2010.

The parties are presently before the Court on (1) Plaintiff Caesar Osakan's Motion to Amend the First Amended Complaint (Docket 54) and (2) Plaintiff Caesar Osakan's Motion to Continue Trial and All Related Deadlines Identified in the Case Management Scheduling Order Issued on June 17, 2009 (Docket 55). Having read and considered the papers submitted, and being fully informed, the Court GRANTS IN PART and DENIES IN PART the motion for leave to amend, and DENIES the motion to continue. Pursuant to Federal Rule of Civil Procedure 78(b), the Court adjudicates the instant motions without a hearing.

I. BACKGROUND

A. FACTUAL AND PROCEDURAL HISTORY

Plaintiff Caesar Osakan worked as an assistant manager for Applebee's in San Rafael, California, from May 14, 2007 until his termination for alleged performance issues on October 17, 2007. Griffen Decl. ¶ 3 (Docket 62-2). Almost a year later on September 19, 2008, Plaintiff sent a letter to Defendants complaining that he had been discriminated against based on his race, age and national origin, and demanding payment of $4,388 plus his "last bonus pay." Id. Ex. 1 at 1-2. Plaintiff indicated that he had been advised by his attorney, Yosef Peretz, to file a lawsuit, but that his preference was to resolve the matter informally. Id. He closed his letter by indicating that if payment was not received within three weeks, he would have his attorney handle the matter for him. Id. Having received no response to his demand letter, Plaintiff, through counsel, filed a class action complaint in this Court against Defendants on October 14, 2008. In his complaint, Plaintiff alleged that he and other assistant managers were misclassified as salaried exempt employees, and not paid overtime or provided with meal or rest breaks. See Compl. ¶ 26 (Docket 1).

On November 12, 2008, Plaintiff, acting on his own behalf, again contacted Defendants, apparently in response to their prior counter-offer to settle his claims for $1,000. Griffin Decl. Ex. 2. Plaintiff stated that he did not "like dealing with attorneys" and countered with a proposed settlement of $3,000 for a "full settlement." Id. On or about November 19, 2008, Defendants and Plaintiff entered into a written Settlement Agreement and Release ("Settlement Agreement") in which Plaintiff agreed to "release and any all common law and/or statutory claims he may have" in consideration for payment of $3,000. Id. Ex. 4. Despite the settlement, Plaintiff, through counsel, filed a First Amended Complaint against Defendants on December 23, 2008. The amended complaint alleges nine claims for relief under the FLSA and California labor laws and regulations for, inter alia, failure to pay overtime wages, provide meal and rest periods, and waiting time violations. Shortly thereafter, Defendants notified Plaintiff that in light of their Settlement Agreement, he could not pursue his lawsuit. Peretz Decl. ¶ 7.

On June 17, 2009, the Court conducted a Case Management Conference at which it set pretrial deadlines, including a discovery cut-off date of March 31, 2010, and a trial date of July 12, 2010. Following the Case Management Conference, on July 2, 2009, Plaintiff served extensive written discovery in Defendants. Griffin Decl. ¶ 12. A few days later, on July 7, 2009, Defendants notified Plaintiff of their position that his claims were barred by the Settlement Agreement, and therefore, the discovery requests were overbroad. Id. Exs. 10, 11. For the remainder of the year, the parties continued to dispute whether the Settlement Agreement precluded Plaintiff from pursuing his lawsuit and whether it circumscribed the scope of discovery.

On January 25, 2010, over six months after serving his discovery requests, Plaintiff filed a motion to compel, which was referred to Magistrate Judge Spero. (Docket 42.) On February 1, 2010, Magistrate Judge Spero ordered the parties to meet and confer in his courtroom on February 12, 2010. (Docket 49.) The parties complied, and were able to resolve all outstanding discovery disputes. (Docket 52.) In accordance with their agreement, Defendants provided Plaintiff with additional discovery, including the contact information for class members, between March 4 and 6, 2010. Griffen Decl. ¶ 26. After receiving this discovery, Plaintiff's counsel notified potential class members of the action, and thereafter was retained by Jennifer Lankorst ("Lankorst"), Heather Payne ("Payne"), Adam Tucker ("Tucker"), and Scott Benoit ("Benoit"). Pl.'s Mot. to Amend at 10.

B. MOTIONS PRESENTLY BEFORE THE COURT

On March 19, 2010, less than two weeks prior to the discovery cut-off, Plaintiff filed the two motions that are now before the Court. *First*, Plaintiff moves for leave to amend to file a Second Amended Complaint to: (a) join four new class representatives, i.e., Lankorst, Payne, Tucker and Benoit; (b) to limit the Class to California employees only; and (c) to add a new allegation that "Defendants had and/or have a policy and practice of instructing their assistant managers to 'adjust' their time cards to reflect that they took lunch breaks or did not work overtime." Pl.'s Mot. to Amend at 5. *Second*, Plaintiff moves to continue the trial date and related pretrial deadlines by ninety days "so that the current *ambiguity regarding the class*

representatives may be resolved prior to the dispositive motion deadline and for both parties to conduct all necessary discovery that arises from any amendments to the operative complaint." Pl.'s Mot. for Continue Trial at 4 (emphasis added). Defendants do not object to Plaintiff's request to limit the Class to California employees, but oppose the motions in all other respects. As will be set forth below, both motions turn on whether Plaintiff has demonstrated "good cause" for his requests within the meaning of Federal Rule of Civil Procedure 16(b)(4). As such, the Court discusses both motions together.

II. LEGAL STANDARD

Rule 15(a)(2) provides that leave to amend a complaint should be "freely given when justice so requires." Generally, leave to amend is to be granted with "extreme liberality." Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990). However, the court may deny leave to amend "where the amendment of the complaint would cause the opposing party undue prejudice, is sought in bad faith, constitutes an exercise in futility, or creates undue delay." Janicki Logging Co. v. Mateer, 42 F.3d 561, 566 (9th Cir. 1994) (citation and internal quotations omitted). The court's discretion to deny leave "is particularly broad where plaintiff has previously amended the complaint." Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989).

Where, as here, the motion to amend is presented after the Court has entered a pretrial scheduling order, the liberal rules governing motions to amend under Rule 15(a) are inapplicable. See Coleman v. Quaker Oats Co., 232 F.3d 1271, 1294 (9th Cir. 2000). Instead, a motion to amend is to be analyzed under Rule 16(b)(4), which requires the movant to demonstrate "good cause" for allowing the amendment. Id. "Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the amendment." Johnson v. Mammoth Recreations, 975 F.2d 604, 609 (9th Cir. 1992). "Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification…. *If that party was not diligent, the inquiry should end*." Id. (emphasis added); Zivkovic v. S. Cal. Edison Co., 302 F.3d 1080, 1087 (9th Cir. 2002) (affirming denial of motion to modify

pretrial schedule where plaintiff failed to "demonstrate diligence in complying with the dates set by the district court"). If the plaintiff demonstrates good cause under Rule 16(b), he or she must then establish that the proposed amendment is permissible under the factors germane to Rule 15. Johnson, 975 F.2d at 609.

III. DISCUSSION

A. DILIGENCE

Plaintiff contends that he acted diligently, and claims that any delay in seeking leave to amend is a result of Defendants' refusal to adequately respond to his discovery requests[1]. He further contends that information regarding class members was not disclosed until March 4, 2010, and that as soon as he was able to identify additional class representatives, he filed the instant motion. These contentions are unavailing. Plaintiff indicates that his reason for seeking the joinder of four new plaintiffs is to avoid the potential determination that he is not a proper plaintiff or class representative due to having previously waived his claims under the terms of the Settlement Agreement. Pl.'s Mot. to Amend at 5. However, Plaintiff has known of this potential standing issue since as early as July 7, 2009, when Defendants contacted Plaintiff to object to the scope his then recently-served discovery requests. Griffin Decl. Ex. 11. Indeed, Plaintiff acknowledges in his motion that "[t]hroughout the litigation of this action, Defendants have contended that Plaintiff is not an adequate class representative due to the Settlement Agreement …." Id. at 12. Given such awareness, Plaintiff should promptly have taken appropriate steps to resolve the dispute and/or seek to join or substitute himself with an appropriate class representative or representatives. Instead, Plaintiff persisted in claiming that the Settlement Agreement is irrelevant and waited until the discovery cut-off and eve of trial to join additional representatives in the event he is found to lack standing.

[1] Because Plaintiff filed his motions after the entry of a Rule 16 scheduling order and requests the modification thereof, the threshold issue is whether Plaintiff has established good cause within the meaning of Rule 16(b)(4) for his requests. See Johnson, 975 F.2d at 608. With regard to Plaintiff's motion to amend, both parties discuss only the Rule 15 factors, and fail to address the good cause requirement. Nevertheless, given the overlap between Plaintiff's motion to amend and motion to continue trial, the Court is able, upon review of the papers submitted, to make the requisite good cause assessment.

Plaintiff argues that he could not have sought to join the new class representatives sooner because of Defendants' alleged efforts "to evade responding to Plaintiff's discovery for over six months." Pl.'s Mot. to Amend at 4.[2] The Court is unpersuaded. The burden of preparing this case for trial is on Plaintiff. Thus, to the extent that Plaintiff believed that Defendants were impeding his ability to prepare his case by failing to comply with their discovery obligations, he should have promptly sought relief from the assigned discovery magistrate. Instead, Plaintiff delayed taking any action for over half a year after serving his discovery requests. Such conduct demonstrates his lack of diligence. See Claytor v. Computer Assocs. Int'l, Inc., 211 F.R.D. 665, 667 (D. Kan. 2003) (upholding magistrate's denial of request to extend discovery cut-off date on the ground that "plaintiff should have sought assistance from the court earlier than [the discovery cut-off] if he believed that defendant was obstructing the discovery process or believed that, for whatever reason, he was not going to be able to complete discovery consistent with the discovery deadline."); In re Sulfuric Acid Antitrust Litig., 231 F.R.D. 331, 337 (N.D. Ill. 2005) (motion to compel filed at close of discovery was untimely where "plaintiffs knew from the outset what [defendant]'s position was, and they had the option to do something about it," but made a "conscious decision … not to bring the matter to the court's attention."); see also Jackson, 902 F.2d at 1388 ("Relevant to evaluating the delay issue is whether the moving party knew or should have known the facts and theories raised by the amendment in the original pleading.").

Finally, Plaintiff attempts to attribute his delay in obtaining discovery to the parties' purported agreements to stay discovery pending their attempts to settle the case. Pl.'s Mot. to Continue Trial at 4. Other than an agreement to briefly stay *depositions only*, there is nothing in the record to support Plaintiff's claim that the parties had entered into such an agreement. Todd Decl. ¶ 4. While Plaintiff's desire to pursue settlement while minimizing costs is understandable, he nonetheless remained obligated to prepare his case in a diligent manner,

[2] Plaintiff indicates that he learned of Defendants' alleged practice of instructing assistant managers to alter time cards from the proposed class representatives. Pl.'s Mot. to Amend at 13.

consistent with the pretrial schedule entered by the Court in June 2009, in the event that no settlement was reached. Plaintiff's conscious decision to pursue settlement at the expense of preparing his case for trial does not demonstrate excusable neglect.

B. PREJUDICE

Entirely aside from the foregoing, the Court finds that the prejudice to Defendants also militates against granting Plaintiff's motions. Prejudice is a significant consideration under both Rule 16(b) and Rule 15(a). See Coleman, 232 F.3d at 1295 (explaining that prejudice, "although not required under Rule 16(b), supplies an additional reason for denying the motion."); Eminence Capital, LLC, 316 F.3d at 1052 (noting that prejudice is a critical consideration in determining whether the grant leave to amend under Rule 15).

Plaintiff contends that his proposed amendments "will not change not change the underlying claims" and that, at most, only "minor additional discovery" will be necessary. However, Plaintiff's proposed joinder of four new class representatives will unduly prejudice Defendants, who have been preparing their defense based on the identity of the class representative—Mr. Osakan—who is identified in the original complaint as well as the amended complaint. Allowing Plaintiffs to add new plaintiffs at this juncture would require the Defendants to conduct new and/or additional discovery. For instance, Defendants would need to ascertain whether any of the four proposed plaintiffs are subject to unique defenses, which would bear upon the typicality requirement of Rule 23. See Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992). The need to conduct additional discovery is considered prejudicial. See In re Milk Prods. Antitrust Litig.,195 F.3d 430, 438 (8th Cir. 1999) ("Granting [a motion to add class plaintiffs] would have required reopening class discovery and further delay, precisely the sort of prejudice that justifies denial of a motion to amend under Rule 15(a).").

Likewise, the inclusion of a new allegation that Defendants directed assistant managers to alter their time cards cannot be dismissed as an inconsequential change, as Plaintiff suggests. The amended complaint is based on claims by assistant managers who are classified as exempt and thus paid on a salaried basis. E.g., First Am. Compl. ¶ 31. The proposed new allegation

states that "Defendants had and/or have a *policy and practice* of instructing their assistant managers to 'adjust' their time cards to reflect that they took lunch breaks or did not work overtime." See Peretz Decl. Ex. R ¶ 33 (emphasis added). The inclusion of this allegation would expand the scope of the litigation because it implicates the practices of each of Defendants' fifty restaurants located in California, and well as those assistant managers paid on an hourly basis.

In his reply, Plaintiff does not dispute that his new time-card allegation necessarily is directed to a company-wide practice involving all of Defendants' California locations. Rather, he claims that this new allegation will require only "two or three questions" during the depositions of the proposed class representatives. Pl.'s Reply in Supp. of Mot. to Amend at 8. Plaintiff provides no authority or reasoning to support this supposition. In addition, given that Defendants allegedly engaged in such conduct as a "policy and practice," it highly unlikely that they would be able to fairly and adequately address this proposed new allegation simply by asking a few additional questions at the proposed plaintiffs' depositions. At bottom, the Court finds that permitting Plaintiff to include this new allegation and joining new plaintiffs at this late stage of the litigation would be unduly prejudicial to Defendants.

IV. CONCLUSION

Plaintiff's lack of diligence is fatal to both of his motions. In addition, permitting Plaintiff to join new parties and a new claim at this late stage of the litigation would be unduly prejudicial to Defendants. Accordingly,

IT IS HEREBY ORDERED THAT:

1. Plaintiff Caesar Osakan's Motion to Amend the First Amended Complaint (Docket 54) is GRANTED IN PART and DENIED IN PART. Plaintiff is granted leave to file a Second Amended Complaint in order to limit the Class to California employees. Plaintiff shall file his Second Amended Complaint within five days of the date this Order is filed.

2. Plaintiff Caesar Osakan's Motion to Continue Trial and All Related Deadlines Identified in the Case Management Scheduling Order Issued on June 17, 2009 (Docket 55) is DENIED.

3. This Order terminates Docket 54 and 55.

IT IS SO ORDERED.

Dated: May 3, 2010

SAUNDRA BROWN ARMSTRONG
United States District Judge