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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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MARISSA McGIVNEY, et al.,

Plaintiffs,

- against -

Index No. 10544/2011

UNION TURNPIKE RESTAURANT LLC d/b/a TWO STEAK AND SUSHI DEN, et al.,

Defendants.

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LAWRENCE K. MARKS, J.

Defendants Union Turnpike Restaurant LLC, d/b/a Two Steak & Sushi Den ("Two Steak"), 515 Restaurant LLC, d/b/a Four Food Studio ("Four Food"), and Jay Grossman seek dismissal of the Complaint filed against them by plaintiffs Marissa McGivney, Danielle Brooke Murry, and Christina Suthakar.

BACKGROUND

This action involves allegations of violations of the labor laws and regulations, as it pertains to wages paid to employees of the two defendant restaurants. Defendant Grossman is alleged to have been an officer, director and/or owner of Two Steak and Four Food. Compl, ¶ 16. The three plaintiffs assert that they have initiated this action

for themselves, and on behalf of all similarly situated employees of the defendants. *Id.*, ¶ 9.[1]

In their complaint, plaintiffs allege that defendants: failed to pay them, and other members of the putative class, minimum wage compensation, in violation of New York Labor Law Article 19 § 663 and 12 NYCRR §§ 137-1.2 & 1.5 (the first cause of action); withheld and personally retained portions of gratuities earned by service employees, in violation of New York Labor Law Article 6 § 196-d (the second cause of action); withheld wages and overtime payments for time worked over forty hours per week, in violation of New York Labor Law §§ 191, 193 (the third cause of action); and failed to pay "spread of hours" compensation when plaintiffs, and other members of the putative class, worked more than ten hours in a day, in violation of 12 NYCRR § 137-1.7 (the fourth cause of action). *Id.*, ¶¶ 46, 55, 67, 69, 76. The fourth claim has been withdrawn by plaintiffs. Opp Br at 2.

In the instant motion, defendants seek dismissal of all claims, pursuant to CPLR 3211(a)(7), for failure to state a claim. Additionally, with regard to the claims against Four Food Studio and Grossman, defendants seek dismissal, pursuant to CPLR 3211(a)(1), based on documentary evidence.

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[1] Defendants assert that the individual plaintiffs were all former employees of Four Food, and plaintiff Murry is a current employee of Two Steak. Mot Br at 4; Mot Br at 4 n1.

DISCUSSION

Failure to State a Claim

On a motion for dismissal, pursuant to CPLR § 3211(a)(7), the court must evaluate whether the plaintiff has a legally cognizable cause of action, rather than analyzing whether the pleadings in the action are proper. *Well v. Yeshiva Rambam*, 300 A.D.2d 580, 580-81 (2d Dep't 2002). The complaint should be liberally construed, granting plaintiff the benefit of every favorable inference. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994); *Paterno v. CYC, LLC*, 8 A.D.3d 544, 544 (2d Dep't 2004). Dismissal should be granted only if the court then determines that the plaintiff does not have a cognizable cause of action upon which relief can be granted. *Delta Electric, Inc. v. Ingram and Greene, Inc.*, 123 A.D.2d 369, 370-71 (2d Dep't 1986); *see also Sokol v. Leader*, 74 A.D.3d 1180, 1181 (2d Dep't 2010). Indeed, the "motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" *511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 151-52 (2002) (internal citations omitted).

Defendants argue that, under CPLR § 3013, a pleading shall consist of statements "that are sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." Mot Br at 5, *citing DiMauro v. Metropolitan Suburban Bus Auth.*, 105 A.D.2d 236, 239 (2d Dep't 1984), *citing* CPLR §

3013. Defendants contend that the complaint in the instant action consists of little more than bare conclusions, and that the factual allegations therein are merely made "upon information and belief." Mot Br at 3. They argue that the complaint contains no "ultimate facts" and does nothing more than "parrot the terminology of the referenced statutory claims." *Id.* at 6. Defendants cite, *inter alia*, plaintiffs' assertion, upon information and belief, that they "did not always receive minimum wage compensation for hours worked." *Id.*, *citing* Compl, ¶ 45. Defendants aver that the complaint lacks any facts "whatsoever which would tend to support this vague conclusion." *Id.* at 7.

Plaintiffs oppose the instant motion, asserting that the complaint is more than clear enough to apprise the court and the parties of the subject matter of the controversy. Opp Br at 3.[2] They argue that the information that defendants fault for being absent from the complaint is information plaintiffs are not required to have at the pleadings stage. *Id.* at 9. Plaintiffs do not dispute that they will, ultimately, have the burden of proving that they performed work for which they were not properly compensated. *Id.* at 10. Rather, they assert that they have met the requirement at the pleadings stage. *Id.* In this, plaintiffs are correct.

Defendants claim that, due to plaintiffs "pleading deficiencies," they "are prejudiced because, among other reasons, they are unable to prepare a defense due to lack

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[2] In the alternative, plaintiffs request leave to replead. Opp Br at 3, 16-17.

of adequate notice." Reply Br at 3. This claim is unsupported. Defendants appear to have more than adequate notice of the causes of action, law relied upon and issues raised by plaintiffs. Defendants have failed to indicate why, or in what way, they would be unable to request documents and interrogatory answers, or not have ample bases for asking questions at depositions. Moreover, there is no basis for the Court to determine at this time that the defendants would be unable to prepare their defenses, both now and following discovery.

Defendants also argue that plaintiffs did not adequately oppose their arguments with regard to plaintiffs' second and third causes of action and that, as a result, these causes of action must be dismissed as against all defendants. *Id.* at 2. The Court, however, does not find that plaintiffs abandoned or failed to oppose dismissal of these claims. Rather, it is clear from the papers submitted that plaintiffs view their opposition with regard to these claims as not significantly distinct from their opposition to dismissal of their first cause of action; in all, plaintiffs are asserting that they have provided defendants with sufficient information regarding the nature of their claims, given that this case is only at the pleadings stage.[3] Again, plaintiffs are correct.

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[3] For example, defendants argue that plaintiffs have not alleged they ever received less than the "proper 'tipped minimum wage' rate." Reply Br at 8. They assert that plaintiffs "do not even suggest that they could assert a claim that they were paid at rates below the New York tipped minimum wage." Reply Br at 9. While it is certainly true that this precise language is not found in the complaint, plaintiffs do clearly assert the different minimum wages, when tips are and are not included, and that they "did not always receive minimum wage compensation for hours worked." Compl, §§41, 45.

Documentary Evidence

Defendants also argue that, with respect to defendants Four Food and Grossman, the claims should also be dismissed pursuant to CPLR § 3211(a)(1). Mot Br at 15.

Under CPLR § 3211(a)(1), dismissal of a complaint is warranted only where "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). However, "such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 326 (2002); *see also Nisari v. Ramjohn*, 85 A.D.3d 987, 988 (2d Dep't 2011).

Defendants contend that plaintiffs allegations, made upon information and belief, are belied by documentary evidence, and the claims should therefore be dismissed. Mot Br at 4. Defendants assert that the timekeeping and payroll records clearly establish that each of the plaintiffs was properly paid in accordance with New York law. Mot Br at 15. For example, defendants assert that each of the plaintiffs received the proper tipped minimum wage rate, earned sufficient tips to ensure they received at least the standard minimum wage rate and, when adding in the tips they received, at times earned in excess of twenty to thirty dollars per hour. *Id.* at 16.

Plaintiffs argue, however, that their very allegations stem from claims that the hours reflected on plaintiffs' paychecks did not accurately reflect the hours they worked.

Opp Br at 12-13. Plaintiffs assert that, as such, defendants' "documentary evidence" does not resolve the issues but creates, or perhaps reflects, a question of fact. *Id.* at 13. Plaintiffs note that it "is hardly 'inherently incredible' to believe than an employer's payroll records may be inaccurate." *Id.*.

Plaintiffs again are correct. Inaccuracies in records created and maintained by an employer can certainly form the basis for causes of action. *L&M Company v. NYS Dep't of Labor*, 171 A.D.2d 795 (2d Dep't 1991); *John Schepanski Roofing & Gutters v. Roberts*, 133 A.D.2d 757 (2d Dep't 1987) (both involving proceedings by the Department of Labor). At this time, the accuracy of such records is a question of fact, not yet determined. Accordingly, the Court cannot use them as a basis for the dismissal of any claims, whether sounding in wage rates, the withholding of wages, the timeliness of payment, or anything else.

Class Action

Defendants argue that, where plaintiffs fail to state a claim, the class action must be dismissed. Mot Br at 20. They contend that plaintiffs' "conclusory allegations" are deficiencies that are fatal not only to their own claims, but to their putative class action claims as well. *Id.*; Reply Br at 10.

Plaintiffs correctly note that this is defendants' only basis for seeking dismissal of plaintiffs' class claims. Opp Br at 16. Inasmuch as the Court has not found that any of plaintiffs' causes of action should be dismissed for failure to state a claim, the Court finds

that defendants have failed to establish their entitlement to dismissal of the class action claims at this time.[4]

The Court has considered the parties' other arguments, and finds them unavailing.

Accordingly, it is

ORDERED that the motion to dismiss of defendants Union Turnpike Restaurant LLC, d/b/a Two Steak & Sushi Den, 515 Restaurant LLC, d/b/a Four Food Studio, and Jay Grossman, motion sequence #1, is denied in full; and it is further

ORDERED that the remainder of the action shall continue.

This constitutes the Decision and Order of the Court.

Dated: April 6, 2012

ENTER:

J.S.C.

[4] The Court notes that the question of class certification is not currently before it.