SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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INDEX NO. 153397/2018

NICOLE GRIFFIN,

Plaintiff,

MOTION SEQ. NO. 002

- v -

GREGORYS COFFEE MANAGEMENT LLC and GREGORY ZAMFOTIS,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for DISMISSAL.

Defendants Gregory Coffee Management LLC f/k/a Gregorys Coffee Management Inc. f/k/a Gregorys Coffee Inc., d/b/a Gregorys Coffee and Gregory Zamfotis (collectively defendants) move, pursuant to CPLR 3211 (a) (7), for an order partially dismissing plaintiff Nicole Griffin's amended complaint.

PROCEDURAL BACKGROUD

On April 13, 2018, plaintiff filed a complaint seeking certification of a class for claims against defendants for violations of New York's Labor Law, specifically related to uniform maintenance. Plaintiff alleged that defendants failed to supply sufficient articles of uniform clothing consistent with the average number of days

worked per week. Plaintiff further alleged violations of Article 19 of the New York Labor Law and its supporting regulations in the New York Codes, Rules, and Regulations, including the New York State Hospitality Industry Wage Order (Wage Order), 12 NYCRR Part 146, and the former New York Minimum Wage Order for the Restaurant Industry, 12 NYCRR Part 137.

On May 18, 2018, defendants filed a motion to dismiss the class allegations in plaintiff's complaint. Defendants argued that plaintiff could not pursue her claims in a class action because she sought liquidated damages and because her claims were not suitable for class treatment. Following oral argument on the motion, this Court granted defendants' motion to dismiss, specifically finding that plaintiff's class claims had to fail because plaintiff requested liquidated damages. On May 21, 2019, defendants filed their answer and affirmative defenses to plaintiff's complaint.

On June 6, 2019, plaintiff filed an amended complaint, in which she alleged that she was employed by defendants as a barista and manager from July 2015 through January 8, 2018. She maintained that defendants were considered a large fast food employer in the hospitality industry, having at least 11 or more employees during the duration of her employment.

Plaintiff alleged that defendants failed to supply her with sufficient articles of uniform clothing consistent with the average number of days which she worked

per week. Plaintiff commenced the captioned action on her own behalf and as a class consisting of:

> "[a]ll current and former employees who worked for Defendants in the State of New York during the Class Period who were (a) required as a condition of their employment to wear a uniform that required daily washing and were not furnished in sufficient number or reimbursed by the employer for a sufficient number of uniforms, consistent with the average number of days per week worked by the employee, and were not provided uniform maintenance pay or reimbursement; and (b) required to purchase uniforms and were not reimbursed by Defendants for the total cost of the uniform (collectively the 'Class')."

Plaintiff's amended complaint, ¶ 13.

Plaintiff further alleged violations of Article 19 of the New York Labor Law and its supporting regulations in the New York Codes, Rules, and Regulations, including the Wage Order, 12 NYCRR Part 146, and the former New York Minimum Wage Order for the Restaurant Industry, 12 NYCRR Part 137. Plaintiff also alleged claims for malicious prosecution and abuse of process which arose out of a criminal proceeding (Docket Number 2018 NY 025320 in New York County).

DISCUSSION

Defendants move, pursuant to CPLR 3211 (a) (7), for an order partially dismissing plaintiff's amended complaint.

CPLR 3211 (a) (7) provides:

> " (a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
> 7. the pleading fails to state a cause of action . . . ."

"In assessing the adequacy of a complaint under CPLR 3211 (a) (7), the court must give the pleading a liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff the benefit of every possible favorable inference." *J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 (2013) (internal quotation marks and citation omitted).

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). Further, "[a]llegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not presumed to be true and accorded every favorable inference." *Biondi v Beekman Hill House Apt., Corp.*, 257 AD2d 76, 81 (1st Dept 1999) *affd* 94 NY2d 659 (2000) (internal quotation marks and citation omitted).

CPLR 901 provides:

> "Prerequisites to a class action
> a. One or more members of a class may sue or be sued as representative parties on behalf of all if:

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.
b. Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action."

Defendants contend that plaintiff's claims are not suitable for class treatment pursuant to CPLR 901 because they require highly individualized inquiries which are not common to the class. Defendants argue that plaintiff asserts a claim for uniform maintenance pay alleging that they failed to supply articles of a uniform consistent with the average number of days per week worked. Defendants contend that the Wage Order provides that "[w]here an employer does not maintain required uniforms for any employee, the employer shall pay the employee, in addition to the employee's agreed rate of pay, uniform maintenance pay at the weekly rate set forth ... ." *See* 12 NYCRR § 146-1.7 (a).

Defendants argue that the Wage Order provides for a wash and wear exception to the uniform maintenance pay. They maintain that section 146-1.7 (b)

provides that an employer will not be required to pay the uniform maintenance pay when required uniforms:

> "1) are made of 'wash and wear' materials;
> 2) may be routinely washed and dried with other personal garments;
> 3) do not require ironing, dry cleaning, daily washing, commercial laundering or other special treatment; and
> 4) are furnished to the employee in sufficient number, or the employee is reimbursed by the employer for the purchase of a sufficient number of uniforms consistent with the average number of days per week by the employee."

Defendants argue that the court would have to conduct an individualized inquiry because each potential class member may have unique job responsibilities or schedules which will have to be evaluated. They argue that specific inquiries would have to be made into the work environment, what uniforms each employee had, how they were laundered, if the employees were reimbursed for any expenses, and the sufficiency of the number of uniforms for each individual class member.

Defendants also argue that plaintiff's request with respect to the uniform reimbursement fails. The Wage Order states the following standard for the reimbursement of uniform costs:

> "Where the employer furnishes to employees free of charge, or reimburses the employees for purchasing, enough uniforms for an average workweek, and an employee chooses to purchase additional uniforms in excess of the number needed, the employer will not be required to reimburse the employee for the cost of purchasing additional uniforms."

12 NYCRR 146-1.8 (b).

Defendants argue that the employer's responsibility to reimburse the employee for additional uniforms requires a unique factual analysis to determine what enough uniforms for an average work week looks like for each employee, as well as what amount of additional uniforms is considered in excess of the number needed. Defendants also argue that plaintiff has no class-wide method of proving damages and that the class cannot be defined until the case is resolved on the merits.

In opposition, plaintiff argues that there are two potential classes. They argue that the first class deals with the sufficiency of the number of uniforms consistent with the numbers of days worked per week. The second class includes employees who were required to purchase uniforms and who were not reimbursed for the cost of the uniform. Plaintiff maintains that courts in New York have acknowledged classes of workers who are owed uniform maintenance pay for a hospitality establishment. Plaintiff argues that contrary to defendants' contention, plaintiff is seeking a narrowly-tailored class consistent with the alleged violation.

Plaintiff contends that the same factors and facts are involved in the analysis of what constitutes a "sufficiency" across the class. Plaintiff argues that the employees worked for the same employer, with each other at locations that performed the same function as a dining establishment, were subjected to the same conditions in each store, and worked in the same industry. Plaintiff contends that

whether each factor can be proved adequately is a task for discovery and potentially for dispositive motions at a later date. Plaintiff argues that the discovery process will yield important information with respect to defendants' requirements for the cleanliness of the uniforms and whether the uniforms are sufficient on a class-wide basis.

The Appellate Division, First Department, had held that whether a particular lawsuit qualifies as a class action rests within the sound discretion of the trial court and the class certification statute should be liberally construed. *See Kudinov v Kel-Tech Constr. Inc.*, 65 AD3d 481, 481 (1st Dept 2009); *Englade v Harper Collins Publrs.*, 289 AD2d 159, 160 (1st Dept 2001).

The Court of Appeals has held that

> "[t]he determination whether plaintiffs have a cause that may be asserted as a class action turns on the application of CPLR 901. That section provides that [o]ne or more members of a class may sue or be sued as representative parties on behalf of all where five factors — sometimes characterized as numerosity, commonality, typicality, adequacy of representation and superiority are met
> . . .
>
> With respect to the commonality question, defendants note that, where damages among class members may differ, a class action may proceed only if the important legal or factual issues involving liability are common to the class."

Maddicks v Big City Props., LLC, 34 NY3d 116, 123 (2019) (internal quotation marks and citations omitted).

Furthermore, the Appellate Division, First Department, has held that:

> "it is premature to dismiss class action allegations before an answer is served or pre-certification discovery has been taken. However, it has also been held that a motion to dismiss may be made before a motion to determine the propriety of the class and a hearing under CPLR 902 where it appears conclusively from the complaint and from the affidavits that there was as a matter of law no basis for class action relief."

Downing v First Lenox Terrace Assoc., 107 AD3d 86, 91 (1st Dept 2013) (internal quotation marks and citations omitted), *affd sub nom. Borden v 400 E. 55th St. Assoc., L.P.,* 24 NY3d 382 (2014); *see also Chimenti v American Express Co.*, 97 AD2d 351, 352 (1st Dept 1983) (holding that a plaintiff is entitled to "limited discovery to determine whether the prerequisites to class certification listed in CPLR 901 are present, and to assess the feasibility considerations listed in CPLR 902 in relation to the particular facts"); *Rodriguez v Metropolitan Cable Communications*, 79 AD3d 841, 842-843 (2d Dept 2010) (holding that plaintiff's need to conduct pre-class certification discovery to determine whether the prerequisites of a class action may be met and that the purpose of pre-class certification discovery is to ascertain the dimensions of the group of individuals who share plaintiff's grievance") (internal quotation marks and citations omitted).

Here, plaintiff has alleged a cause of action on behalf of herself and the class for a violation of the New York Labor Law for non-payment for uniform maintenance and non-payment for the cost of uniforms. Due to the lack of any discovery, it remains unclear to the court whether or not there is a lack of

commonality amongst the potential litigants to preclude a class action. It also remains unclear whether defendants are qualified for the wash-and-wear exception as it remains unknown to the court if employees were provided a sufficient number of uniforms. *See Kirkland v Speedway LLC*, 260 F Supp 3d 211, 222 (ND NY 2017) (holding that with regards to plaintiff's Uniform Maintenance Pay claim, the question of how many shirts are sufficient given the nature of plaintiff's job and the number of shifts she worked each week inherently involves a factual dispute).

Since discovery will help the court to determine whether the potential plaintiff in the class share a common interest, and eliminate factual issues which presently exist due to the lack of the exchange of relevant information, the part of defendants' motion seeking to dismiss the first and second cause of actions for reimbursement for uniform maintenance costs and the costs for additional uniform, must be denied at this time.

Defendants also contend that plaintiff's cause of action for malicious prosecution must be dismissed. "To prevail on a malicious prosecution claim, a plaintiff must establish four elements: (1) the initiation of a criminal proceeding by the defendant against the plaintiff, (2) termination of the proceeding in favor of the accused, (3) lack of probable cause, and (4) malice." *See Brown v Sears Roebuck and Co.*, 297 AD2d 205, 208 (1st Dept 2002).

"While a plaintiff need not prove actual innocence in order to satisfy the favorable termination prong of a malicious prosecution action, the absence of a conviction is not itself a favorable termination. *Martinez v City of Schenectady*, 97 NY2d 78, 84 (2001) (citations omitted). "A plaintiff need not prove actual innocence in order to satisfy the favorable termination prong of a malicious prosecution action" *id*. (citations omitted).

Defendants argue that according to the amended complaint, information was provided to the authorities who then made their own independent decision to arrest and pursue criminal charges against plaintiff. Defendants also argue that plaintiff has failed to allege "special injury." A "special injury" is an injury in which "the defendant must abide some concrete harm that is considerably more cumbersome than the physical, psychological or financial demands of defending a lawsuit." *See Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 (1st Dept 2005) (internal quotation marks and citation omitted).

In opposition, plaintiff alleges that defendants were aware that there was no probable cause to file the police report and complaint. Plaintiff contends that defendants had knowledge that they were issuing a false police report and encouraged the commencement of criminal proceedings against plaintiff by pressing charges.

In support of her opposition, plaintiff submits a sworn affidavit which is dated August 16, 2019. In her affidavit, plaintiff states that shortly prior to June 6, 2018, and after she met with her attorney about her litigation for the recovery of unpaid wages and other damages, defendants issued a police report against plaintiff stating that plaintiff unlawfully entered their premises and stole money from a cash register.

Plaintiff states that defendants knew that they were issuing a false police report. Plaintiff argues that defendants acted with malice towards her in retaliation for commencing the litigation against them. Plaintiff contends that the criminal case was dismissed outright against her once these facts were disclosed.

Plaintiff states that with regard to special damages, plaintiff was arrested, incarcerated, a mug shot was taken, and she suffered the humiliation of being arraigned on false felony charges. Plaintiff maintains that she was also terminated from her present employment as a result of missed work, and incurred the cost of coming to court from out-of-state for her single court appearance, in which her criminal case was dismissed. She states that the arrest alone is sufficient to plead special damages. *See Wilhelmina Models, Inc. v Fleischer*, 19 AD3d at 269 ("what is 'special' about special injury is that the defendant must abide some concrete harm that is considerably more cumbersome than the physical, psychological or

financial demands of defending a lawsuit") (internal quotation marks and citation omitted).

Plaintiff's amended complaint sets forth a cause of action for malicious prosecution. Plaintiff alleges that there was an initiation of a criminal proceeding by the defendant against the plaintiff; that there was termination of the proceeding in her favor; that there was a lack of probable cause; and that defendants acted with malice as plaintiff alleges that she never trespassed or stole money and suggests that the charges were filed in a retaliatory manner. The commencement of the discovery process will allow both plaintiff and defendants to further explore this cause of action. Therefore, the part of defendants' motion seeking to dismiss this cause of action for malicious prosecution must be denied.

Defendants contend that plaintiff also fails to state a cause of action for abuse of process. "A cause of action for abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective." *Matthews v New York City Dep't of Social Servs., Child Welfare Admin.*, 217 AD2d 413, 415 (1st Dept 1995) (internal quotation marks and citation omitted). "A malicious motive alone, however, does not give rise to a cause of action for abuse of process." *Curiano v Suozzi*, 63 NY2d 113, 117 (1984). "[D]efendant must be seeking some collateral advantage or

corresponding detriment to the plaintiff which is outside the legitimate ends of the process." *Board of Educ. of Farmingdale Union Free School District v Farmingdale Classroom Teachers Assn.*, Local 1889, AFT AFL-CIO, 38 NY2d 397, 403 (1975).

Defendants argue that the amended complaint alleges that defendants filed a report with the New York City Police Department and/or with the New York County District Attorney's Office. Defendants maintain that they did not issue process but provided information to the authorities who then made their own independent determination to arrest and bring criminal charges against plaintiff. Defendants argue that, even if the information that it provided to the authorities is considered issuance of process, plaintiff has failed to allege the improper use of process after it was issued.

In opposition, plaintiff contends that defendants abused process by not only filing a false police report in retaliation of plaintiff exercising her rights under the New York Labor Law, but that they further abused the process by wishing to press charges, which actively encouraged the improper prosecution against her. Plaintiff contends that filing of a criminal complaint can be considered issuance of process where the complaint is made in a manner inconsistent with the purpose for which it was designed. Plaintiff argues that a criminal proceeding was commenced alleging trespass and stolen money, that it terminated in her favor as there was no probable

cause for the proceeding, that the proceeding was brought out of malice, and that plaintiff suffered a special injury as she ended up losing her employment.

Here, plaintiff's amended complaint has set forth a cause of action for abuse of process. Plaintiff's amended complaint as well as her affidavit appears to speak to the use of the judicial process for purposes other than for which process is intended, specifically a retaliation for commencing litigation for unpaid wages. Determinations as to defendants' interactions concerning the criminal action and the objective underlying defendants' alleged conduct, cannot be disposed of in this motion and prior to the exchange of relevant discovery which will clarify the facts pertaining to initiation of the criminal action. Therefore, that branch of defendants' motion seeking to dismiss the claim for abuse of process must be denied.

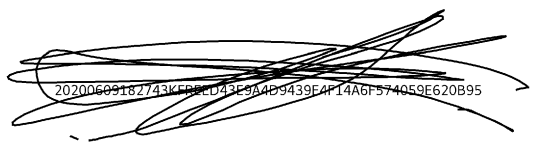
Therefore, in light of the foregoing, it is hereby:

ORDERED that defendants Gregory Coffee Management LLC f/k/a Gregorys Coffee Management Inc. f/k/a Gregorys Coffee Inc., d/b/a Gregorys Coffee and Gregory Zamfotis' motion to dismiss plaintiff Nicole Griffin's amended complaint pursuant to CPLR 3211 (a) (7), is denied; and it is further

ORDERED that a preliminary conference to be attended by all parties will be held on August 4, 2020, at 2:15 p.m. at 80 Centre Street, Room 280; and it is further

ORDERED that, within 10 days after entry of this order, plaintiff is to serve a copy of this order, with notice of entry, on defendants; and it is further

ORDERED that this constitutes the decision and order of the court.



6/9/2020
DATE

KATHRYN E. FREED, J.S.C.

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