

Aguilar v Uncommon Grounds Enters., Inc.
2022 NY Slip Op 32827(U)
August 23, 2022
Supreme Court, New York County
Docket Number: Index No. 150552/2022
Judge: Mary V. Rosado
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33

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BRIGIDO GALVEZ AGUILAR, Plaintiff, - v - UNCOMMON GROUNDS ENTERPRISES, INC., DISHES GROUP MANAGEMENT CORP., CITY MINT, INC., MINI MINT, INC., MINT NO. 5. INC., MOSHE MALLUL, MARGARITA TALISMAN Defendant.	<table border="0"> <tr> <td>INDEX NO.</td> <td><u>150552/2022</u></td> </tr> <tr> <td>MOTION DATE</td> <td><u>03/09/2022, 03/17/2022</u></td> </tr> <tr> <td>MOTION SEQ. NO.</td> <td><u>002 003</u></td> </tr> </table> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>	INDEX NO.	<u>150552/2022</u>	MOTION DATE	<u>03/09/2022, 03/17/2022</u>	MOTION SEQ. NO.	<u>002 003</u>
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HON. MARY V. ROSADO:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 69 were read on this motion to/for ORDER MAINTAIN CLASS ACTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 60, 61, 62, 63, 64, 65, 66, 67, 68, 70, 71 were read on this motion to/for DISMISSAL

Oral argument was held on June 21, 2022, with Rony Guldman appearing for Plaintiff Brigido Galvez Aguilar (“Plaintiff”) and Ira S. Sturm appearing for all Defendants. Upon oral argument and the foregoing documents, it is decided and ordered as follows.

I. Procedural History

Plaintiff filed a Complaint on behalf of himself and a purported Class (the “Class”) on January 18, 2022 (NYSCEF Doc. 2). In the Complaint, Plaintiff alleged that Defendants collectively own and operate five restaurants as one integrated enterprise under the name “Dishes” (*id.* at ¶ 5). Plaintiff further alleged that he worked for Dishes from December 2014 to March 2020. Plaintiff alleged on behalf of himself and the class that Defendants engaged in improper time shaving, improper tip credit practices, improper meal credit practices, and a variety of other

violations of New York Labor Law (“NYLL”) (*id.* at ¶¶ 14-23; 25-26; 30-38). Plaintiff describes the proposed class as delivery persons, servers, runners, bussers, cashiers, porters, cooks, line-cooks, food preparers, and dishwashers employed by Dishes (*id.* at ¶¶ 14-23). Plaintiff also proposed a subclass of tipped employees comprised of waiters, servers, runners, delivery persons, and busboys (“Tipped Subclass”) (*id.* at ¶ 16).

Defendants did not file an Answer. Rather, Defendants filed a motion to dismiss for failure to state a claim (NYSCEF Docs. Nos. 12-13). Defendants moved to dismiss on numerous grounds. First, they argued that Plaintiff does not have standing to represent the class since he never alleges to have been a server, runner, busser, cashier, porter, cook, line-cook, food preparer, or dishwasher, but only a delivery person (NYSCEF Doc. 15). Defendants also claim that because Plaintiff does not cite to any specific section of NYLL that provides a basis for relief, the Complaint must be dismissed (*id.*). Defendants further assert that Plaintiff cannot bring a class action for record keeping violations or statutory penalties pursuant to CPLR § 901(b) (*id.*). Defendants argue dismissal is also appropriate because Plaintiff’s “off the clock allegations” are too individualized to warrant class treatment (*id.*). Defendants also produced affidavits from current employees and Plaintiff’s manager that contradict Plaintiff’s affidavit.

In response to Defendants’ motion to dismiss, Plaintiff filed an Amended Complaint (NYSCEF Doc. 17). The Amended Complaint contained the same allegations as the original Complaint. The only difference between the Complaint and the Amended Complaint was that rather than alleging Plaintiff and the Class are entitled to liquidated damages and statutory penalties, in the Amended Complaint, Plaintiff sought to recover liquidated damages and statutory penalties solely for himself (NYSCEF Doc. 17 at ¶ 58). One week after filing his Amended Complaint, Plaintiff moved for class certification.

Defendant and Plaintiff agreed to moot Defendant's first motion to dismiss (motion seq. 001) in lieu of Plaintiff's Amended Complaint (NYSCEF Doc. 73). Defendants did not file an Answer to Plaintiff's Amended Complaint. Instead, Defendants moved to dismiss the Amended Complaint. Defendants argued that Plaintiff's Amended Complaint should be dismissed pursuant to CPLR §§ 3211(a)(2) and (7) for essentially the same reasons as their original motion to dismiss (NYSCEF Doc. 60). Defendants also argued that because Plaintiff has not individually waived his own statutory penalty claims, he cannot pursue class relief (NYSCEF Doc. 68). Plaintiff opposed arguing that he has met the liberal pleading standard of the CPLR, that Defendants' affidavits are self-serving, and that failure to specify under which provision of the NYLL Plaintiff seeks relief is not fatal to his Complaint (NYSCEF doc. 70).

II. Discussion

A. Motion to Dismiss

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determines only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]).

Generally, it is "premature to dismiss class action allegations before an answer is served or pre-certification discovery has been taken" (*Griffin v Gregory's Coffee Management LLC*, 191 AD3d 600 [1st Dept 2021] quoting *Downing v First Lenox Terrace Assoc.*, 107 AD3d 86, 91 [1st Dept 2013] *affd* 24 NY3d 382 [2014]). However, as noted by the Court of Appeals, nothing in the CPLR bars a class claim from being dismissed, even at the pre-answer stage, for failure to state a cause of action (*Maddicks v Big City Properties, LLC*, 34 NY3d 116, 123 [2019]). To succeed on

a pre-certification motion to dismiss, a defendant must conclusively show that there is no basis for class action relief as a matter of law (*Griffin* at 601).

Defendants have conclusively shown that Plaintiff's Amended Complaint seeking class relief is barred as a matter of law. CPLR § 901(b) provides that "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." In its Amended Complaint, Plaintiff has not waived his right to an award of statutory penalties (NYSCEF Doc. 17 at ¶ 58). Not only does Plaintiff fail to notice Defendants what section of the NYLL he is seeking relief under, but Plaintiff has not pled that the statutory penalties he seeks for himself are specifically authorized to be recovered in a class action. (*Sperry v Crompton Corp.*, 8 NY3d 204, 213-214 [2007]; *Leyse v Flagship Capital Services Corp.*, 22 AD3d 426 [1st Dept 2005]; *see also Somerville v Usdan*, 255 AD2d 500, 501 [2d Dept 1998]). Therefore, as the Amended Complaint is currently pled, Plaintiff cannot seek class relief while also seeking statutory penalties for himself, especially when he does not state under which provisions of the NYLL he seeks relief.

However, a plaintiff can avoid application of CPLR § 901(b) by waiving her right to penalties (*Downing v First Lenox Terrace Associates*, 107 AD3d 86, 89 [1st Dept 2013]; *Cox v Microsoft Corp.*, 8 AD3d 39, 40 [1st Dept 2004]; *Divljanovic v Saks & Co.*, 2018 NY Slip Op 30236(U) at **12 [Sup Ct, New York County 2018]). Thus, Plaintiff's Complaint is dismissed without prejudice. Plaintiff is granted leave to correct the deficiencies in his Amended Complaint.

B. Motion for Class Certification

Plaintiff's motion for class certification is rendered moot as Defendant's motion to dismiss is granted. Moreover, a motion to certify a class action is premature if it is made before a

Defendant's time to serve an answer has expired (CPLR § 902; *Dabrowski v Abax Inc.*, 64 AD3d 426, 427 [1st Dept 2009]; *David v. Lee & Co., Inc. v Ryan*, 266 AD2d 811 [4th Dept 1999]; *Soriano v New York State Office of Temporary and Disability Assistance*, 2021 NY Slip Op 31351(U) [Sup Ct, New York County 2021]). Plaintiff may renew its motion for class certification if it files a second Amended Complaint.

Accordingly, it is hereby

ORDERED, that the motion sequence 003 seeking to dismiss the Amended Complaint is granted as Plaintiff's claim for statutory penalties bars the class action complaint; and it is further

ORDERED, that Plaintiff is granted leave to replead within twenty-one (21) days of the date of service of this Decision and Order with notice of entry, and it is further

ORDERED, that Defendant shall serve and file a responsive pleading within thirty-five (35) days of the date of service of the Decision and Order with notice of entry; and it is further

ORDERED, that motion sequence 002 seeking class certification is rendered moot because Plaintiff's Amended Complaint is dismissed.

This constitutes the Decision and Order of the Court.

8/23/2022
DATE

Mary V Rosado

HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE