

Finn v GMC Mercantile Corp.

2024 NY Slip Op 31413(U)

April 8, 2024

Supreme Court, New York County

Docket Number: Index No. 651965/2016

Judge: Emily Morales-Minerva

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. EMILY MORALES-MINERVA PART 42M

Justice

-----X

LESLEY M FINN,

Plaintiff,

- v -

GMC MERCANTILE CORPORATION, CLIFF CHAN

Defendant.

-----X

INDEX NO. 651965/2016

MOTION DATE 01/16/2024

MOTION SEQ. NO. 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 74, 75, 76, 77, 78 were read on this motion to/for DISMISSAL.

APPEARANCES:

Filosa Graff LLP, New York, New York (by counsel, Gregory N. Filosa, Esq.), counsel for plaintiff.

Lloyd M. Eisenberg, Esq., Uniondale, New York, counsel for defendant-movant.

HON EMILY MORALES-MINERVA:

In this action for failure to pay wages and breach of contract, defendant CLIFF CHAN moves, pursuant to CPLR § 3211(a)(5),¹ for an order dismissing the amended complaint against them, arguing it is time barred. Plaintiff LESLEY M FINN submits opposition to the motion, and -- upon consent of

¹ CPLR 3211 (a) (5) provides: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: . . . 5. The cause of action may not be maintained because of . . . statute of limitations."

the parties -- the Court marked the motion submitted without oral arguments in Part 42, on March 22, 2024.

For the reasons set forth below, defendant CLIFF CHAN's motion is denied in its entirety.

BACKGROUND

Plaintiff initiated this action by filing a summons and complaint, on April 13, 2016, against defendant GMC MERCANTILE CORPORATION. The initial complaint alleged two causes of action: (1) failure to pay wages pursuant to New York Labor Law § 191(1)(c) and (2) breach of contract. Thereafter, defendant GMC MERCANTILE CORPORATION failed to file an answer.

On July 19, 2017, the Court (N. Bannon, J.S.C.) issued an order granting plaintiff default judgment against defendant GMC MERCANTILE CORPORATION. The Clerk of the Court entered default judgment against defendant GMC MERCANTILE CORPORATION, dated April 24, 2018.

On June 14, 2018, defendant GMC MERCANTILE CORPORATION moved to vacate the default judgment and to restrain plaintiff from enforcing the judgment. By Decision and Order, dated June 1, 2023, the Court (N. Bannon, J.S.C.), granted defendant GMC MERCANTILE CORPORATION's motion to vacate the default judgment,

and deemed GMC MERCANTILE CORPORATION's proposed answer served upon plaintiff.

On May 19, 2023, plaintiff moved, pursuant to CPLR 3025(b), to amend its complaint for purposes of adding defendant CLIFF CHAN. By Decision and Order, dated September 14, 2023, the Court (N. Bannon, J.S.C.), granted plaintiff's motion.

Plaintiff filed the amended complaint and, on November 30, 2023, served defendant CLIFF CHAN by substituted service, pursuant to CPLR 308 (4). Defendant CLIFF CHAN did not file an answer to the amended complaint.

The Court scheduled a preliminary conference, compliance conference and status conference, as listed, on the following dates: September 28, 2023, December 14, 2023, and February 8, 2024. Defendant GMC MERCANTILE CORPORATION failed to appear at all three conferences, and defendant CLIFF CHAN failed to appear at the conferences of September 28, 2023, and December 14, 2023.

On January 16, 2024, defendant CLIFF CHAN filed the instant motion to dismiss the causes of action against them as timed barred, pursuant to CPLR 3211 (a) (5). Plaintiff filed opposition to the motion, dated January 26, 2024, contending that defendant failed to establish plaintiff's time to sue has expired.

ANALYSIS

Pursuant to CPLR 3211 (a) (5), "[a] party may move for judgment dismissing" a cause or causes of action against them where, among other things not raised here, the statute of limitations for the cause or causes of action expired.² However, unless timely raised in a responsive pleading or pre-answer motion to dismiss, a party waives an objection or defense based on the statute of limitations (see CPLR 3211 [e]).³

To timely raise the statute of limitations objection or defense in a responsive pleading or pre-answer motion to dismiss, a defendant must comply with CPLR 320 governing their appearance. Rule 320 (a) requires the defendant to appear "by serving an answer or a notice of appearance, or by making a motion which has the effect of "extending the time to answer." ⁴

² CPLR 3211 (a) (5) provides: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: . . . 5. The cause of action may not be maintained because of . . . statute of limitations."

³ CPLR 3211 (e): "At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a) of this rule, and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) of this rule is waived unless raised either by such motion or in the responsive pleading."

⁴ Rule 320 of the CPLR provides: "The defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer. An appearance shall be made within twenty days after service of the summons, except that if the summons was served on the defendant by delivering it to an official of the state authorized to receive service in his behalf or if it was served pursuant to section 303, subdivision two, three, four or five of section 308, or sections 313, 314 or 315, the appearance shall be made within thirty days after service is complete."

Here, plaintiff executed service on defendant CLIFF CHAN, pursuant to CPLR § 308, on November 30, 2022. Defendant was mandated to appear or make a pre-answer motion "within thirty days" thereafter (CPLR 320 [a]). Instead, CLIFF CHAN untimely filed the subject motion on January 19, 2024, weeks after the requisite 30-day period. Therefore, the Court is compelled to find that defendant waived the statute of limitations objection or defense (see CPLR 3211 [e]).

In any event, defendant CLIFF CHAN fails to make a clear showing that the statute of limitations has expired on plaintiff's cause of action pursuant to article 6 of New York Labor Law or on plaintiff's cause for breach of contract (see Flintlock Constr. Servs., LLC v Rubin, Fiorella & Friedman, LLP, 188 AD3d 530, 531 [1st Dept 2020] [providing: "(o)n a motion to dismiss a cause of action . . . as barred by the applicable statute of limitations, a defendant must establish, prima facie, that the time within which to sue has expired"]; citing Quinn v McCabe, Collins, McGeough & Fowler, LLP, 138 AD3d 1085, 1085-1086, [2d Dept 2016] [internal quotation marks omitted]).

The supporting papers provide no admissible support for defendant's conclusory statement that the alleged causes of action arose in or about October 2015 and, therefore, are beyond

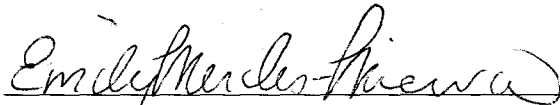
the applicable six-year statute of limitations (see generally New York Labor Law § 198 [c] [providing that the statute of limitation in an action to recover damages pursuant to article 6 of New York Labor Law is six years]; CPLR 213 [3] [setting forth the statute of limitations of six years for action based upon "contractual obligation or liability"])).

Accordingly, it is

ORDERED, that defendant CLIFF CHAN'S motion, pursuant to CPLR 3211(a) (5), is denied; and it is further

ORDERED, that this matter is scheduled for a status conference, in Part 42, via MICROSOFT TEAMS, on June 6, 2024, at 11:00am.

This is the Decision and Order of the Court.



EMILY MORALES-MINERVA, JSC

DATE: 4/8/2024

Check One:

Case Disposed

Non-Final Disposition

Check if Appropriate:

Other (Specify _____)