

Jian Feng He v Renzan Corp.

2024 NY Slip Op 31600(U)

May 6, 2024

Supreme Court, New York County

Docket Number: Index No. 656487/2018

Judge: Dakota D. Ramseur

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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. DAKOTA D. RAMSEUR PART 34M

Justice

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JIAN FENG HE, ZHU HUA CHEN, CUNMING DONG,
Plaintiff,

INDEX NO. 656487/2018

MOTION DATE 04/09/2024

MOTION SEQ. NO. 005

- v -

RENZAN CORP, GUZAN INC, GUZAN NEW INC, OPAI
THAI NEW INC., TENZAN NEW YORK CORP., TENZAN
YUAN CORP, WAGAMAMA INC, DARK BULLET CORP,
RENZAN SUSHI CORPORATION, OPAI THAI INC, WEI
XING LIN, MEI XIAN LIN, YAN BING CHEN, LEON DOE

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER .

In December 2018, plaintiffs Jian Feng He, Zhu Hua Chen, and Cunming Dong commenced this Labor Law action, alleging that defendants Renzan Corp., Guzan Inc, Guzan New Inc, Opai Thai New Inc., Tenzan New York Corp., Tenzan Yuan Corp, Wagamama Inc, Dark Bullet Corp, Renzan Sushi Corporation, Opai Thai Inc, Wei Xing Lin, Mei Xian Lin, Yan Bing Chen, and Leon Doe (collectively, “defendants”) operated a single integrated business enterprise and, as their employer, failed to pay them minimum, overtime, and spread hour, failed to provide time and hiring notices, failed to provide pay stubs to them, and illegally retained tips owed to them. (NYSCEF doc. no. 84, complaint.) Thereafter, plaintiffs moved pursuant to CPLR 901 (a) and 902 for class certification, which the Court granted by Decision and Order dated August 7, 2023. (NYSCEF doc. no. 118, Decision and Order dated 8/7/23.) In this motion sequence (005), defendants seek leave pursuant to CPLR 2221 (d) and 2221 (e) to reargue and/or renew the Court’s August 2023 Decision. Plaintiff opposes the motion and cross-moves pursuant to CPLR 904 (b) for an order directing reasonable notice of the commencement of this class action be given to potential class members. For the following reasons, defendants’ motion is granted; however, upon reargument, the Court adheres to its prior decision. Plaintiffs’ cross-motion is granted.

In support of their motion to renew under CPLR 2221 (e), defendants contend that they reached a settlement agreement with the three named plaintiffs on August 2, 2023, six days before the Court issued its August 2023 Decision. According to Chang Ming Zhou, who is defendant Yan Bing Chen’s boyfriend and had previously worked with plaintiff Jian Feng He, Ming Zhou represented defendants in settlement negotiations with plaintiffs. (NYSCEF doc. no. 128 at ¶ 5, Cheng Ming Zhou affidavit.) In that capacity, he held a phone conversation with Feng

He on July 19, 2023, during which Feng He represented that he was acting on behalf of all three plaintiffs. (*Id.* at ¶ 6-7.) The parties allegedly reached a settlement agreement on August 2, in which, in exchange for dismissing this action, plaintiffs received \$85,000. (*Id.* at ¶ 10.) On that date, Ming Zhou met with Feng He in person to have the settlement paperwork signed. To show he had the authority to negotiate on behalf of the other two named plaintiffs, Feng He forwarded a clip of Cunming Dong stating that he stated precisely that. (NYSCEF doc. no. 131, translation of video clip.) In addition, Feng He explained that Zhu Hua Chen had left the country but forwarded photos of Zhu Hua Chen's Driver's License as proof of Feng He's authority to negotiate on his behalf. (NYSCEF doc. no. 130 at 2, WeChat communication containing license.) Feng He also explained that the three plaintiffs had agreed to split the settlement money equally between them. (NYSCEF doc. no. 128 at ¶ 20.) On August 2, 2023, Yan Bing Chen paid Feng He the \$85,000 and Feng He signed the settlement agreement in witness of a notary public. (NYSCEF doc. no. 129, settlement agreement.) No other signatures appear on the settlement agreement. (*Id.*) It appears that plaintiffs' counsel was not present at the meeting since Jian Feng He also agreed to inform their lawyer that he was ceasing their suit against defendants. (NYSCEF doc. no. 128 at ¶ 21.) On September 2, 2023, Chang Ming Zhou recorded a phone call with Feng He. In said call, Feng He admitted that he had accepted \$85,000 on behalf of him, Cunming Dong, and Zhu Hua Chen in return for dismissing the case. (NYSCEF doc. no. 132, call with Feng He.)

In September 2023, defendants timely filed the instant motion seeking to reargue the Court's August 2023 Decision. Their notice of motion does include a motion to dismiss. (*See* NYSCEF doc. no. 122, notice of motion.) Nonetheless, according to their counsel's affidavit in support of the motion, defendants seek dismissal of the lawsuit with prejudice. (NYSCEF doc. no. 123, affidavit in support.) Thereafter, plaintiffs cross-moved for an order pursuant to CPLR 904 that directs notice to be given to putative class members and for defendants to produce all class members' names and last known contact information. By Letter to the Court dated December 6, 2023, plaintiffs' counsel requested leave to file a sur-reply, which the Court granted. As part of counsel's sur-reply, plaintiff Zhu Hua Chen submitted an affidavit in which he testified that (1) he gave a copy of his ID to Feng He but did not know what purpose he was using it for, (2) he did not receive any money from defendants, either directly or through Feng He, (3) he did not agree to any settlement, and (4) he wishes to continue the case and represent similarly situated class employees. (NYSCEF doc. no. 158 at ¶¶ 5, 7, 9, 11, and 12, Hua Chen affidavit.)

DISCUSSION

Defendants' Motion for Leave to Renew Under CPLR 2221 (e)

CPLR 2221 (e) provides a motion to renew must be "based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination." (*See* CPLR 221 [e] [2].) Furthermore, the party seeking renewal must proffer a reasonable excuse for failure to present the pertinent facts on the initial motion. (CPLR 2221 [e] [3]; *Ezzard v One East River Place Reality Co.*, 137 AD3d 648 [1st Dept 2010].) A motion for leave to renew should not be used to provide a second opportunity to argue the original motion to those litigants who have failed to

act diligently in making their first factual presentation. (*Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010].) Here, defendants contend that the settlement agreement constitutes new facts that change the Court's prior determination to grant class certification and that they have proffered a reasonable excuse for failing to present the pertinent facts on the initial motion, i.e., that parties agreed to settle after this motion for class certification had been marked fully submitted and just six days before the Court's August 2023 Decision. In opposition, plaintiffs contend that (1) where a settlement is reached in a putative class action, a court must approve of the settlement before the class action is dismissed, which did not happen here; and (2) the purported agreement was signed only by Jian Feng He with no indication that the other plaintiffs had agreed to it.

CPLR 908 provides, "A class action shall not be dismissed, discontinued, or compromised without the approval of the court. Notice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs." In *Derosiers v Perry Ellis Menswear, LLC* (30 NY3d 488, 493 [2017]), the Court of Appeals consolidated two appeals where the question at issue was whether CPLR 908 applies only to certified class actions or also to class actions that are settled or dismissed before class certification. In the first appeal, the Appellate Division granted the defendant's motion to dismiss based on a settlement agreement but ordered notice be given to potential class members following the discontinuance of the individual plaintiff's action; in the second, the First Department affirmed the motion court's dismissal of the complaint as well as its order requiring notice of said dismissal be given to class members. Based on the rule's statutory language, the First Department's longstanding precedent in *Avena v Ford Motor Co.* (85 AD2d 149 [1st Dept 182]), and the fact that CPLR 908 was modeled on Federal Rules of Civil Procedure rule 23, the *Derosiers* Court concluded that the Appellate Divisions correctly dismissed the complaints and required notice even though class certification had not yet been granted. As these appeals demonstrate, for the Court to dismiss plaintiffs' complaint pursuant to a purported settlement agreement, defendants are required to move separately for dismissal and give notice to potential class members; the Court cannot simply do so on a motion for leave to renew a class certification motion. Since they did not cross-move for dismissal in opposition to plaintiffs' underlying motion, at present the Court cannot grant dismissal. This finding is significant in that, short of dismissal, defendants' motion fails to identify any part of the previous decision that is undermined by the settlement agreement. (*See* NYSCEF doc. no. 123 at ¶ 20 [asserting, in conclusive fashion, that the "new facts—the pre-certification settlement—would change the prior ruling on Plaintiffs' underlying Motion for Class Action Certification"].)

Defendants' Motion for Leave to Reargue Under CPLR 2221 (d)

CPLR 2221 (d) provides that a party may seek leave to reargue a prior motion based upon matters of fact or law the Court overlooked or misapprehended. A motion to reargue is not intended to provide the unsuccessful party a second opportunity to reargue issues previously decided. (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22, 28 [1st Dept 1992].) Nor is a motion to reargue designed to afford unsuccessful parties the opportunity to present alternative positions, new theories of the case, or arguments different from those originally asserted. (*Foley v Roche*, 68 AD2d 558, 547 [1st Dept 1979], *Matter of Settlers v AI Props & Devs (USA) Corp.*, 139 Ad3d 492, 492 [1st Dept 2016].) At its sound discretion, the court that decided the prior motion retains the authority to grant or deny reargument motions, and the moving party bears the

burden of demonstrating to the Court that it misapprehended or overlooked matters of fact or law. (*Loland v City of New York*, 212 AD2d 674, 674 [2d Dept 1995].) The Court finds that plaintiff has not met his burden here.

Defendants contend that the Court overlooked caselaw prohibiting class actions based on penalty claims. However, none of plaintiffs' claims are based on statutory penalties; all are premised on actual damages. (*See* NYSCEF doc. no. 84 at 30-31, amended complaint.) Defendants contend that it is "inappropriate" for delivery drivers to represent all categories of non-exempt restaurant workers, that plaintiffs failed to set forth the number of delivery workers, which it contends is a more appropriate class definition, and that the Court overlooked the commonality element as to how the named plaintiffs were subject to the same wage-and-hour practices as other members of the class. Defendants' arguments are unaccompanied with any caselaw suggesting the Court erred in its prior decision. Nor do they produce any affirmative evidence that plaintiffs, as delivery workers, were subject to different wage-and-hour policies as other non-exempt employees. Accordingly, the Court finds no basis to disturb its underlying August 2023 Decision.

Plaintiffs Cross-Motion Under CPLR 904

Plaintiffs seek orders (1) directing defendants to produce all class members' name and last known contact information, (2) directing reasonable notice of this class action to putative members by direct mail, text message, and social media. The Court grants this cross-motion. Defendants do not dispute that the Court's previous Decision and Order granted class certification based on plaintiffs' proposed definition: "All individuals who were employed by Defendants in any non-exempt position within six (6) years before the filing of this complaint or such prior date as set by the Court due to the tolling of claims as a result of a previously filed action." Their only opposition is based on their allegation that plaintiffs' counsel unethically solicited prior and current employees through WeChat to join the class action. Plaintiffs' counsel sufficiently explained that an individual reached out to him to express interest in suing one of the defendants, ultimately nothing came of this interaction, he then reached back out after a compliance conference, and that this person who reached out in the first place used the same phone number as one of the individual defendants. Accordingly, the Court does not find such opposition to have any merit.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that defendants' motion for leave to reargue and renew pursuant to CPLR 2221 (d) and CPLR 2221 (e) is granted, and upon reargument, the Court adheres to its underlying August 2023 Decision and Order; and it is further

ORDERED that plaintiffs' cross motion for orders directing defendants to produce all class members names and last known contact information and directing plaintiff to provide putative class members with notice of this class action is granted; and it further.

ORDERED that counsel for plaintiffs shall serve a copy of this order, along with notice of entry, on all parties within twenty (20) days.

This constitutes the Decision and Order of the Court.

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5/6/2024
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: