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| Commisso v Pricewaterhouse Coopers LLP |
| 2014 NY Slip Op 31979(U) |
| July 11, 2014 |
| Supreme Court, New York County |
| Docket Number: 650273/13 |
| Judge: Saliann Scarpulla |
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA
Justice

PART 39

Index Number : 650273/2013
COMMISSO, VINCENT
VS.
PRICEWATERHOUSECOOPERS LLP
SEQUENCE NUMBER : 001
AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

decided per the memorandum decision dated 7/11/14
which disposes of motion sequence(s) no.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 7/11/14


_____, J.S.C.
HON. SALIANN SCARPULLA

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE:MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

----- X
VINCENT COMMISSO, individually and on behalf of
all others similarly situated,

Index Number: 650273/13
Submission Date: 3/27/14

Plaintiff,

- against -

DECISION and ORDER

PRICEWATERHOUSECOOPERS LLP,

Defendant.

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For Plaintiff:
Outten & Golden LLP
3 Park Avenue, 29th Floor
New York, NY 10016

For Defendant:
Gibson, Dunn & Crutcher LLP
200 Park Avenue
New York, NY 10166

Papers considered in review of the plaintiff's motion to amend (motion seq. no. 001):

| | |
|----------------------------|---|
| Notice of Motion | 1 |
| Affs. in Supp | 2 |
| Memo in Supp | 3 |
| Opposition | 4 |
| Aff in Reply | 5 |
| Memo in Reply | 6 |

HON. SALIANN SCARPULLA, J.:

Plaintiff Vincent Commisso commenced this putative class action against defendant PricewaterhouseCoopers LLP (“PWC”) to recover unpaid overtime wages under Labor Law § 650 et. seq. Commisso now moves for leave to file a second amended complaint to add Peter Vicario and Barry Viator as named plaintiffs pursuant to CPLR § 3025(b).

Commisso worked for PWC as an associate in its Assurance line of service between approximately August 2005 to October 2007. Commisso alleges that, as an associate, he primarily performed routine tasks such as “data entry, basic document review, counting, comparing data among client documents and records, photocopying, and organizing.” Commisso describes his associate position as an entry-level job that did not require a CPA license or any advanced level training.

Commisso further alleges that he regularly worked 55 hours per week, but that PWC never paid him any overtime wages. Commisso asserts that PWC improperly classified him as an “exempt” employee to avoid paying him overtime wages in violation of Labor Law § 650 et. seq.

In this action, Commisso seeks, *inter alia*, to recover unpaid overtime wages on behalf of himself and others similarly situated, and a declaratory judgment that PWC’s practices with respect to overtime pay are unlawful. He proposes a class consisting of “all persons who have worked for Defendant as ‘Unlicensed Associates’ in PWC’s Assurance line of service in New York from August 16, 2005 to the filing of this Class Action Complaint, and the date of final judgment in this matter.”

Commisso initially asserted his unpaid overtime claims in a class action complaint filed with the U.S. District Court for the Southern District of New York on August 16, 2011. Judge Naomi Reice Buchwald dismissed that action based on lack of subject matter jurisdiction. *Commisso v. Pricewaterhouse Coopers LLP*, 11 Civ. 5713 (NRB)

(S.D.N.Y. July 27, 2012). Judge Buchwald further denied Commisso's motion to amend the complaint to add Vicario as a named plaintiff and to assert a Fair Labor Standards Act ("FLSA") claim on behalf of Vicario and a nationwide collective of associates because he was already a member of a pending FLSA collective action against PWC, *Kress v. PricewaterhouseCoopers LLP*, No. 2:08-cv-00965 (E.D. Cal.), and not similarly situated to the proposed class. *Id.* Commisso then commenced this action on January 25, 2013.

In the current motion, Commisso seeks leave to amend the complaint to add Vicario and Viator as named plaintiffs. Commisso submits a proposed second amended complaint, which alleges that Vicario and Viator were both employed by PWC as associates in New York from approximately September 2007 to December 2009, and September 2009 to May 2011, respectively.

Commisso argues that he should be granted leave to amend the complaint because: (1) Vicario and Viator's claims relate back to the filing of the original complaint pursuant to CPLR § 203(f); (2) the addition of Vicario and Viator as named plaintiffs should not affect the proposed class period because Commisso timely filed his complaint pursuant to CPLR § 205(a); and (3) all class members' claims are considered timely if the complaint was timely filed based on the tolling rule enunciated in *American Pipe & Const. Co. v. Utah*, 414 U.S. 538 (1974). Commisso further contends that PWC will not be prejudiced by the amendment because Vicario and Viator assert the same type of claims as Commisso, with the exception of the locations and dates of their employment.

PWC opposes Commisso's motion to amend because they claim that Commisso is planning to withdraw from this case, and Vicario and Viator could not maintain the same class period pleaded by Commisso dating back to August 16, 2005. PWC argues that only Commisso may benefit from the six-month grace period provided by CPLR § 205(a) to maintain a proposed class dating back to 2005. According to PWC, Vicario and Viator can only represent a proposed class dating back to January 25, 2007, six years prior to the filing of the complaint in this action. PWC does not object to a proposed class dating back to January 25, 2007.

PWC submits an affirmation from its counsel, Lauren J. Elliott, in support of its contention that Commisso plans to withdraw as named plaintiff. Elliott states that she was contacted by Commisso's attorney, Ossai Miazad, regarding Commisso's intention to withdraw from this action and to amend the complaint to add Peter Vicario and Barry Viator as the named plaintiffs. Elliott further states that Miazad sent her a proposed complaint, which did not include Commisso and listed Vicario and Viator as the only named plaintiffs.

PWC also claims that Commisso has abandoned this case because he has not responded to any discovery demands, and PWC urges the Court to deny this motion as premature pending Commisso's deposition regarding his status as plaintiff. Alternatively, PWC argues that the Court should deny this motion to the extent that it seeks to substitute Vicario and Viator as representatives of a proposed class dating back to August 2005.

Lastly, PWC argues that *American Pipe* tolling and CPLR § 203(f) are irrelevant to the issue of whether Vicario and Viator could serve as representatives for the proposed class pleaded by Commisso.

In reply, Commisso contends that he has not abandoned this action and that he may seek to withdraw after this motion is decided.

Discussion

CPLR § 3025(b) provides that a party may amend a pleading at any time by leave of court. If an amendment is sought, leave must be freely granted unless the proposed amendment is wholly devoid of merit or the delay is prejudicial to the opposing party.

Fleming v. Barnwell Nursing Home & Health Facilities, 309 A.D.2d 1132, 1133 (3d Dep't 2003); *Valdes v. Marbrose Realty Inc.*, 289 A.D.2d 28, 29 (1st Dep't 2001).

Commisso seeks leave to amend the complaint to add Vicario and Viator as named plaintiffs. In opposing this motion, PWC raises, in essence, a statute of limitations defense. PWC argues that, once Commisso withdraws from this action, Vicario and Viator would be barred by the six-year statute of limitations from maintaining a proposed class dating back to August 16, 2005. According to PWC, Vicario and Viator have no legal right to benefit from the six-month grace period provided by CPLR § 205(a) to maintain a proposed class dating back to August 2005, and only Commisso may benefit from this grace period because he is the plaintiff that filed the complaint within six months of dismissal of the federal action.

PWC's argument is based on the premise that Commisso is withdrawing from this action. While PWC submits evidence to show that Commisso previously intended to withdraw and substitute Vicario and Viator as named plaintiffs, Commisso has not yet moved to withdraw. Instead, Commisso moves to amend the complaint to add two named plaintiffs, and he submits a proposed amended complaint to that effect. Until Commisso withdraws, PWC's statute of limitations defense is not ripe for judicial review. As PWC's statute of limitations defense is not ripe, no determination can be made that the proposed amendment is "clearly devoid of merit."

PWC does not offer any argument that it will suffer prejudice as a result of the amendment. Indeed, the addition of Vicario and Viator as named plaintiffs will not prejudice PWC because they assert the same type of Labor Law claims as Commisso and are currently unnamed members of the proposed class. PWC cannot therefore claim any unfair surprise. *Duling v. Gristede's Operating Corp.*, 265 F.R.D. 91, 102 (S.D.N.Y. 2010). In class actions, it is common for plaintiffs to add or modify class representatives during the pre-class certification phase. *Gilliam v. Addicts Rehabilitation Center Fund*, 2006 WL 1049352, No. 05 Civ. 3452, at * 2 (S.D.N.Y. April 19, 2006).

On a motion to amend, a plaintiff is not required to establish the merit of its proposed amendment, but must "simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit." *MBIA Ins. Corp. v. Greystone & Co. Inc.*, 74 A.D.3d 499, 500 (1st Dep't 2010). Because the proposed amendment is not

palpably insufficient or prejudicial to PWC; Commisso's motion for leave to file a second amended complaint to add Vicario and Viator as additional named plaintiffs is granted.

In accordance with the foregoing, it is hereby

ORDERED that plaintiff Vincent Commisso's motion for leave to file a second amended complaint to add Peter Vicario and Barry Viator as named plaintiffs pursuant to CPLR § 3025(b) is granted; and it is further

ORDERED that the second amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the defendant shall serve an answer to the second amended complaint or otherwise respond within 20 days from the date of said service; and it is further

ORDERED that the action shall bear the following caption:

VINCENT COMMISSO, BARRY VIATOR, and PETER VICARIO,
individually and on behalf of all others similarly situated,

Plaintiffs,

v.

PRICEWATERHOUSECOOPERS LLP,

Defendant.

And it is further

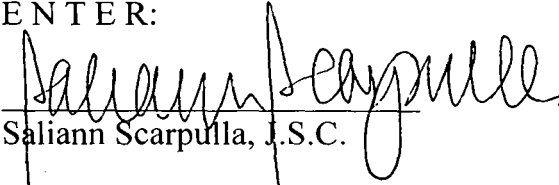
ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158) who are directed to mark the court's records to reflect the additional parties;

ORDERED that counsel are directed to appear for a preliminary conference at 60 Centre Street, Room 208, on August 20, 2014 at 2:15pm.

This constitutes the decision and order of the Court.

Dated: New York, New York
July 11, 2014

ENTER:


Saliann Scarpulla, J.S.C.