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| <b>Carrol v Tangier, LLC</b>   |
| 2014 NY Slip Op 32615(U)   |
| October 6, 2014  |
| Sup Ct, New York County  |
| Docket Number: 158134/2014   |
| Judge: Cynthia S. Kern   |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----x  
THOMAS E. CARROL,

Plaintiff,

Index No. 158134/2014

-against-

**DECISION/ORDER**

TANGIER, LLC and PATRICK FAHEY,

Defendants.  
-----x

**HON. CYNTHIA KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

| Papers                                       | Numbered |
|--|----------|
| Notice of Motion and Affidavits Annexed..... | <u>1</u> |
| Answering Affidavits and Cross Motion.....   | <u>2</u> |
| Replying Affidavits.....                     | <u>3</u> |
| Exhibits.....                                | <u>4</u> |

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This is a case for lost wages under New York’s Lost Wage Act. Plaintiff now moves pursuant to CPLR § 3025(b) and § 325(d) to amend the *ad damnum* clause of his complaint and to remove his action from the Civil Court of New York to the Supreme Court of New York on the ground that his damages now exceed the Civil Court’s jurisdictional limits. For the reasons set forth below, plaintiff’s motion is granted.

The relevant facts and procedural history are as follows. From 2004 through 2007, plaintiff worked at the restaurant/lounge known as “Sugar” located at 311 Church Street, New York, New York, which is owned and operated by defendants. At various times throughout his employment, plaintiff alleges that defendants failed to pay him his weekly wages. Thus, on or

about December 30, 2009, plaintiff commenced an action against defendants by filing a Summons and Complaint in New York Civil Court under index number 61504-2009, seeking his alleged unpaid wages pursuant to New York Labor Law § 198. At the time the action was commenced, plaintiff sought damages in the amount of \$13,635, together with reasonable attorney fees pursuant to New York Labor Law § 198(1-a).

Plaintiff now moves this court for an order pursuant to CPLR § 3025(b) and § 325(b) to amend the *ad damnum* clause of his complaint and to transfer his action from Civil Court to Supreme Court on the ground that plaintiff has now accumulated attorney fees that are in excess of the jurisdictional limits of the Civil Court. In support of his motion, plaintiff contends that he has incurred more attorneys' fees than were initially expected as defendant has necessitated the need for multiple motions due to his lack of compliance with discovery and his failure to submit timely opposition to plaintiff's motion for summary judgment.

Pursuant to CPLR § 325(b), "[w]here it appears that the court in which an action is pending does not have jurisdiction to grant the relief to which the parties are entitled, a court having such jurisdiction may remove the action to itself upon motion." To warrant such removal on the ground that the damages sought now exceed the pending court's jurisdictional limits, "it must be shown by the moving party that there is some reasonable basis to his claim for increased damages." *Matter of Victor v. De Mazioff*, 275 A.D. 69, 75 (1<sup>st</sup> Dept 1949); *see also Platt v. Flesher*, 115 A.D.3d 468 (1<sup>st</sup> Dept 2014). Additionally, upon such motion, the court should consider whether removal will prejudice defendant. *See Matter of Jackson v. Millar Elevator Industries, Inc.*, 97 A.D.2d 714 (1<sup>st</sup> Dept 1983).

In the present case, the court finds that removal is proper as plaintiff has demonstrated

that his accumulated attorney's fees have now raised his damages beyond the Civil Court's jurisdictional limits and the court finds no prejudice to defendant upon removal. Plaintiff's attorney Frederick C. Kelly's affidavit submitted in support of plaintiff's motion, including the annexed time-sheets, clearly provides a reasonable basis to the increase in damages as Mr. Kelly attests to the unexpected motion practice that has occurred in this action causing him to spend much more time and labor on plaintiff's case than was originally expected. In opposition, defendant has failed to establish any prejudice to the removal. Indeed, it would be difficult for defendant to demonstrate prejudice as the present motion was, at least in part, necessitated by defendants' failure to timely comply with discovery demands and their failure to submit timely opposition to plaintiff's initial motion for summary judgment.

Additionally, to the extent defendants contends that this court should disregard plaintiff's proposed amended complaint as plaintiff failed to seek leave in the Civil Court in the past five years to amend his complaint, such contention is without merit. Plaintiff could not have moved in Civil Court to amend his complaint's *ad damnum* clause to an amount greater than the Civil Court's jurisdiction. Thus, it was proper procedure for plaintiff to move this court to amend his complaint and remove the action to Supreme Court.

Additionally, to the extent defendants contend that plaintiff's motion should be denied as his damages do not actually exceed the Civil Court's jurisdiction as New York Labor Law 198(1)-a provides only for "reasonable attorney's fees" and plaintiff's alleged increased attorney's fees are not reasonable, such contention is without merit. As an initial matter, defendants present absolutely no authority to support such contention. In any event, such argument is unavailing as removal pursuant to CPLR § 325(b) does not require the movant to

demonstrate that he is entitled to the increased damages as a matter of law but only that the damages he seeks now exceed the jurisdictional limits of the Civil Court. Thus, it is immaterial whether plaintiff may eventually recover the full amount of attorney's fees claimed.

Accordingly, plaintiff's motion is granted and it is hereby

ORDERED that plaintiff's motion for leave to amend the complaint herein is granted, and the 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 defendants shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that, it appearing that the Civil Court of the City of New York does not have jurisdiction to grant the full relief to which the parties are entitled in the case of *Thomas E. Carroll v. Tangier, LLC, et al.*, No. 61504-2009, the motion of plaintiff herein to remove said action of this court is granted; and it is further

ORDERED that movant is directed to serve a certified copy of this order upon the Clerk of the Civil Court, who shall upon such service and the payment of any fees, transfer to this court all of the papers heretofore filed in said action; and it is further

ORDERED that said Civil Court action shall be consolidated with this action under the index number of this action; and it is further

ORDERED that the caption of the consolidated action shall be the following:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55  
-----X  
THOMAS E. CARROL,

Plaintiff,

-against-

TANGIER, LLC and PATRICK FAHEY,

Defendants.

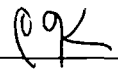
-----X

and it is further

ORDERED that the papers heretofore filed in the said Civil Court action and in this action shall stand as the papers in the consolidated action; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the County Clerk (Room 141B) and the Clerk of the General Clerk's Office (Room 119), who shall mark their records to reflect this consolidation. This constitutes the decision and order of the court.

Date: 10/6/14

Enter: \_\_\_\_\_ 

J.S.C.  
**CYNTHIA S. KERN**  
J.S.C.