Xi Dong Gao v Golden Garden Chinese Rest., Inc.
2016 NY Slip Op 30252(U)
January 14, 2016
Supreme Court, Queens County
Docket Number: 700004/15
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2[1]
Justice

XI DONG GAO,

Plaintiff,

-against-

GOLDEN GARDEN CHINESE RESTAURANT, INC., GOLDEN GARDEN 516, INC., TING AN ZHENG, and XIU RONG ZHENG,

Defendants.

Index No: 700004/15

Motion Date: 10/7/15

Motion Seq. No.: 2

The following numbered papers read on this motion by defendants for summary judgment dismissing the complaint on the ground that it was untimely commenced

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Notice of Motion-Affidavits-Exhibits-Memorandum of Law	35 - 37
Answering Affidavits-Exhibits.....	38 - 43
Replying Affidavits.....	45 - 46

Upon the foregoing papers it is ordered that this motion is determined as follows.

Plaintiff commenced an action against the above named defendants in the U.S. District Court, EDNY, on August 23, 2013 seeking relief pursuant to the Federal Labor Standards Act (FLSA) and pursuant to New York Labor Law to recover, inter alia, unpaid overtime, unpaid and attorney's fees and costs for the period December, 2006 through July 2011. By Judgment dated January 7, 2015 the plaintiff's FLSA claims were dismissed with prejudice, and the Court declined to exercise jurisdiction with respect to the plaintiff's state law claims.

Apparently, in anticipation of the dismissal of the Federal

[1] Part 2 is NOT a Commercial Part and the Commercial Part procedural rules do not apply.

Court action and plaintiff's FLSA claims, plaintiff commenced this action by filing a summons and complaint on December 31, 2014 alleging causes of action based upon violations of the New York Labor Law §650 et. seq and Title 12 of New York's Codes, Rules Regulations to recover, inter alia, unpaid overtime, unpaid spread of hours premium and attorney's fees and costs for the period December, 2006 through July, 2011.

The defendants served their answer to the complaint on February 13, 2015 with setoff and counterclaim and asserting 28 affirmative defenses, including expiration of the applicable statute of limitations and lack of personal jurisdiction.

The defendants now move for summary judgment dismissing the complaint on the grounds of lack of personal jurisdiction or in the alternative, for partial summary judgment dismissing so much of the plaintiff's claims as are barred by the applicable statute of limitations.

The defendant argues that plaintiff failed to obtain personal jurisdiction over any of the defendants since the service on all defendants is void having been made on Sunday, January 25, 2015, in violation of General Business Law (GBL) § 11. Defendant further argues that defendants have not waived their personal jurisdictional defense pursuant to CPLR 3211(e) since under the rules of statutory construction, GBL §11, a specific statute, takes precedence over CPLR 3211(e) a general statute.

The primary consideration of the courts in the construction of statutes is to ascertain and give effect to the intention of the Legislature (McKinney's Cons Laws of NY, Book 1, Statutes § 92[a]). The Courts have an obligation to give effect to all acts of the legislature and to avoid interpretations which result in a conflict between statutes (see Nestor v McDowell, 81 NY2d 410, 414, [1993]). Statutes which relate to the same thing, or to the same class of things, and which are not in substance inconsistent with each other are said to be in "pari materia" and are to be construed together (see McKinney's Cons Laws of NY, Book 1, Statutes, §§ 221, 222) to effectuate the primary legislative intent and one should not be used to defeat the other (see McCutcheon v Terminal Station Commission of Buffalo, 88 Misc. 601 [1915], aff'd 168 AD 301 [1915], aff'd 217 NY 127 [1916]).

Effective January 1, 1997, CPLR 3211(e) was amended to provide that "an objection that the summons and complaint ... was not properly served, is waived if, having raised such an

objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship" (L.1996, ch. 501, sec. 1). In amending CPLR 3211(e), the Legislature intended to compel defendants with a genuine jurisdictional defense to deal with it promptly, thereby eliminating a meritless jurisdictional defense and resolving service disputes at the outset of litigation (see Abitol v Schiff, 180 Misc.2d 949 [1999] mod on other grnds and aff'd 276 AD2d 571 [2000] citing Wade v Byung Yang Kim, 250 AD2d 323, 325 [1998]; Mathieu v. Braxton, 175 Misc. 2d 771, 7731 [Sup. Ct. 1998]).

Accepting the defendants' contention with respect to statutory construction, would serve to undermine the intent of the legislature in enacting CPLR 3211(e). Contrary to defendants' claim GBL §11 and CPLR 3211(e), insofar as they both related to jurisdiction are in "pari materia" (see McKinney's Cons Laws of NY, Book 1, Statutes § 221), do not conflict and can be applied harmoniously without one negating the other by applying the laws of statutory construction contained (see McKinney's Cons Laws of NY, Book 1, Statutes §§ 71-262).

GBL §11 does not preempt, overrule or abrogate the procedures set forth in CPLR 308, CPLR 311, Bus. Corp. Law(BCL) § 306 or any other statute prescribing the method of service of process for obtaining personal jurisdiction, but merely adds an additional criteria, i.e. that service made by any method cannot be made on Sunday. The failure to comply with "all" statutory provisions applicable to the service of process on a particular defendant renders service ineffective. However, where jurisdiction over a defendant was not properly obtained, the defendant may waive the defense by, inter alia, appearing in the action, by failing to plead such a defense or by failing to move to dismiss upon such basis (see CPLR 3211[e]; In re Parkside Ltd. Liability Co., 294 AD2d 582 [2002] lv to appeal dismissed in part and denied in part 98 NY2d 762 [2002]; W.M.S. Builders, Inc. v Newburgh Steel Products, Inc., 289 AD2d 567 [2001], lv denied, 98 NY2d 603 [2002]; Biener v Hystron Fibers, Inc., 78 AD2d 162, 165 [1980]).

The Defendants, subject to the requirement of CPLR 3211(e), have chosen to appear by service of an answer asserting the jurisdictional defense, rather than defaulting or moving by pre-answer motion to dismiss. Under the circumstances, it is appropriate to place the burden upon defendants to press the defense by timely moving for judgment. Having failed to timely move, defendants have waived the defense.

In addition, it is pointed out that the defendants previously moved to strike the plaintiff's Note of Issue and to dismiss the complaint pursuant to CPLR 3216 or, in the alternative, for an order compelling plaintiffs to respond to defendants' discovery demands without asserting their jurisdictional defense. A person who participates in an action by filing with the court any writing which discusses the merits of the action, asks or consents to relief from the court and fails to assert the jurisdictional defense, appears informally and consents to the jurisdiction of the court (CPLR 320[b]; USF&G v Maggiore, 299 AD2d 341 [2002]; Yihye v Blumenberg, 260 AD2d 371 [1999], lv denied 93 NY2d 813 [1999]).

Accordingly, the branch of defendants' motion to dismiss for lack of personal jurisdiction is denied.

The branch of the defendants' motion for partial summary judgment dismissing so much of the plaintiff's claims which are beyond the six year statute of limitations applicable to his claims is granted. Thus, since the plaintiff commenced his Federal Action on August 23, 2013, and timely commenced this action(CPLR 205-b), the plaintiff's claims are limited to the period commencing August 23, 2007 through July 2011.

Dated: January 14, 2016
D# 53

J.S.C.

FILED
JAN 15 2016
COUNTY CLERK
QUEENS COUNTY