SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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SHAWN PRESSLEY, *et al.*,

Plaintiffs,

-against-

FORD MODELS, INC., *et al.*,

Defendants.

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DECISION AND ORDER
Index No.: 653001/2016

Mot. Seq. Nos.: 002-004

O. PETER SHERWOOD, J.:

Defendants Wilhelmina Models, Inc. and Wilhelmina International Ltd. (together "Wilhelmina"), Click Model Management ("Click") and Next Model Management, LLC ("Next"), each seek dismissal of the First Amended Complaint ("FAC") under CPLR 3211. Click also moves for sanctions pursuant to 22 NYCRR § 130-1.1. For the following reasons, the motions are granted to the limited extent of dismissing count one as pleaded against Click and Next, count four as pleaded against Click, and count five in its entirety. As to whether plaintiff waived the right to pursue a class action or to a jury trial against Next, decision shall be deferred.

I. BACKGROUND

Plaintiff Mel Platzke having passed away and plaintiff Shawn Pressley having discontinued her claims, plaintiff Roberta Little (hereinafter referred to as "plaintiff") remains the sole proposed class representative in this action. Her allegations substantially mirror the claims at issue in *Shanklin v Wilhelmina Models, Inc.* (Index No. 653702/2013) ("*Shanklin*")[1]. Plaintiff asserts substantially the same claims against each defendant. Specifically, defendant exercised significant control over all aspects of Little's modeling career by (1) requiring her to enter into an exclusive contract or prohibiting her from securing assignments on her own; (2) determining where she would work, for whom, and for how much pay; (3) negotiating the terms and conditions of her assignments and presenting them to her on a take-it-or-leave it basis; (4) discouraging her from turning down any assignments; (5) issuing paychecks to her, determining the form and timing of her pay; (6) controlling her schedule, including requiring her to keep the agency apprised of any planned vacations; and (7) determining the form and content of her promotional images and

[1] In this Decision and Order, reference is made to two Decisions and Orders in the *Shanklin* case. "*Shanklin I*" is dated August 11, 2014. "*Shanklin II*" is dated May 25, 2016.

information (*see* NYSCEF Doc. No. 41, First Amended Complaint ["FAC"] ¶¶ 45, 141; 145-51 [allegations against Click], ¶¶ 26, 45, 126-31 [allegations against Next], ¶¶ 26, 45, 60, 61, 65-73 [allegations against Wilhelmina]). Further, each defendant made unapproved, unlawful deductions from Little's modelling paychecks (*see id.* ¶¶ 151, 153-154, 156, 174-189 [allegations against Click], ¶¶ 58, 131-133, 136, 174-186 [allegations against Next], ¶¶ 71, 74-75, 81, 84, 174-186 [allegations against Wilhelmina]), and (C) failed to provide plaintiff with complete, timely records of work (*see id.* ¶¶ 158-160 [allegations against Click], ¶¶ 138-139 [allegations against Next], ¶¶ 88-90 [allegations against Wilhelmina]).

Plaintiff asserts five causes of action against defendants: (1) failure to pay wages under New York Labor Law, Article 6 ("NYLL"); (2) unlawful wage deductions under NYLL, Section 193; (3) failure to furnish accurate wage statements in violation of NYLL, Section 195(3); (4) breach of contract; and (5), in the alternative to the claim for breach of contract, breach of implied-in-law contract.

II. DISCUSSION

A. *Breach of Contract Claim*

1. Arguments

All defendants argue that plaintiff's breach of contract claim fails to meet the notice pleading requirements of CPLR 3013 (*see* NYSCEF Doc. No. 73 ["Click Sup"] at 5; NYSCEF Doc. No. 62 ["Next Sup"] at 10-11; NYSCEF Doc. No. 72 ["Wilhelmina Sup"] at 7-8). Both Click and Wilhelmina urge that the court should apply the same reasoning that led to dismissal of the breach of contract claim against Elite in the *Shanklin* case (Click Sup at 5, citing *Shanklin I* at 36-37; Wilhelmina Sup at 7-8 [same]).

Wilhelmina argues that plaintiff's claim should be dismissed for failure to "allege the breach of any particular contractual provision" (Wilhelmina Sup at 7, quoting *Feld v Apple Bank for Sav.*, 116 AD3d 549, 550 [1st Dept 2014] [dismissing breach of contract claim]), and Next and Wilhelmina both contend that plaintiff has failed to allege any specific unpaid usages (*id.* at 7-8; Next Sup at 11). Next notes that, although Little specifically alleges she was not paid for a usage she discovered on the website Buzzfeed, under her contract with Next, "[Little] authorizes Next to sign [Little]'s name and to grant others the right to use [Little]'s name, picture and likeness" (Next Sup at 11, quoting NYSCEF Doc. No. 69 ["Next Agreement"] at 6). Next argues that the contract does not require Next to pay Little for such usage.

Additionally, Next argues this claim fails in that plaintiff did not plead that she complied with the notice and cure provision of her contract (Next Sup at 12, citing Next Agreement at 5 [providing that in "the event of a breach of this Agreement, the non-breaching party shall give written notice to the breaching party of the circumstances of the breach and shall provide, if feasible, at least 14 days within which the alleged breaching party may cure such breach"]). Finally, to the extent plaintiff alleges she was not paid for work performed, Next argues her breach of contract claim is duplicative of her NYLL claim and represents an "attempt at circumventing the NYLL" (*id.* at 12-13).

Plaintiff responds that she has satisfied CPLR 3013, – noting, with respect to each defendant, at least one example of a specific allegation of nonpayment (*see* NYSCEF Doc. No. 78 ["Opp to Click"] at 4-6, citing FAC ¶ 156 [alleging with respect to Click that "in 2012 Ms. Little was promised (but never received) merchandise she was to be paid in exchange for walking a runway show for designer Stephen Burrows"]; NYSCEF Doc. No. 79 ["Opp to Next"] at 5-7, citing FAC ¶¶ 132-133, 136 [alleging Next's practice of withholding payments, and improper deductions and Little's discovery on Buzzfeed of her image from shoot booked by Next and Next's failure to pay for that Usage]; and NYSCEF Doc. No. 80 ["Opp to Wilhelmina"] at 5-7, citing FAC ¶¶ 74, 78-85 [alleging Wilhelmina's practice of withholding payments, improper deductions and numerous specific instances of "belated payments"]). With respect to Next and Wilhelmina only, plaintiff also contends that this court has held that "similar allegations are sufficient to state a claim for breach of contract (Opp to Next at 6, citing *Shanklin I* at 12 [finding that plaintiffs' allegations that they discovered or suspect re-usages after they were no longer being paid by Wilhelmina raised "an inference that monies were withheld sufficient to withstand a motion to dismiss"] and *Shanklin II* at 37 [noting that the court had already held in *Shanklin I* that plaintiff Almonte sufficiently alleged specific instances of Usage for which she was not paid]).

Plaintiff also argues that, as this court held with respect to some of the *Shanklin* plaintiffs' Usage claims, since the "full details of defendant[s'] breaches are likely to be within [their] sole possession," plaintiff should not be required to plead the specific transactions for which she was not paid (*see e.g.* Opp to Click at 5-6, citing *Shanklin I* at 12-13 [noting that "specific details of the extent of any licensing of Shanklin's images are within the exclusive control of the" advertising agency defendants and allowing limited disclosure regarding re-usages] and *Shanklin II* at 3 [referencing decision in *Shanklin I*]). Plaintiff contends she sufficiently alleged facts that may

exist within defendants' control, such that, at minimum, the motions should be denied under CPLR 3211 (d) to allow her to obtain disclosure regarding unpaid usages (*see e.g. id.*, citing FAC ¶ 55[2]).

Regarding the Next Agreement, plaintiff first contends that her entitlement to payment for usage is expressly provided for through the definition of "Income," which includes amounts paid "directly or indirectly. . . as a result of arrangements for Model's services and from arrangements for the use of the Model Identification" (Opp to Next at 4-5, citing Next Agreement at 2, 3). Regarding Next's reliance on the notice provision of the agreement, plaintiff also argues that this court "has already rejected similar arguments from other defendants in *Shanklin I* and *Shanklin II*" (*id.* at 7-8, citing *Shanklin I* at 13-14 [rejecting similar argument from defendant Que on the basis that, since plaintiff had alleged that information regarding re-usages were within Que's knowledge and control, he could not be expected to give notice] and *Shanklin II* at 37 [noting that the court had already held in *Shanklin I* that plaintiff Almonte sufficiently alleged the specific usage for which she was not paid]). Plaintiff additionally argues that, at a minimum, notice would have been futile with respect to Buzzfeed's use of her photo, since Next has "repeatedly demonstrated that it does not intend to cure any of the breaches identified," by, for example, maintaining that the Next Agreement does not entitle plaintiff to usage (*id.*, citing *Special Situations Fund III, L.P. v Versus Tech., Inc.*, 227 AD2d 321, 321 [1st Dept 1996] [noting that a "party will be relieved or discharged from the performance of futile acts or conditions precedent, including the tender of payment, upon the failure or refusal by a party to honor its obligations under their contract"]).

As to Next's argument that a portion of the breach of contract claim is duplicative of Plaintiff's Labor Law claim, plaintiff (seemingly misreading this argument as contending the claim should be dismissed in its entirety) argues that Next has used "selective and misleading excerpting" of plaintiff's claims. Plaintiff contends this claim should not be dismissed as duplicative, since the "facts at issue with regard to" her breach of contract claim "differ from those underlying" her labor law claims (*id.* at 8-9, quoting *Ethelberth v Choice Sec. Co.*, 91 F Supp 3d 339, 362 [ED NY 2015] [finding that plaintiff's claims for breach of contract and unjust enrichment were not

[2] Paragraph 55, which is the only paragraph of the FAC cited on this point, states in its entirety: "It is impossible for the Plaintiffs to uncover the full extent of Defendants' nonpayments and delayed payments without judicial intervention, because each of the Defendants provided its models with inadequate records that concealed the details of the expenses for which the models were charged and the jobs and hours for which they had or had not been paid, and because each of the Defendants rebuffed Plaintiffs' inquiries regarding the non-payments and delayed payments. Defendants' conduct has prevented Plaintiffs from discovering the full extent of the non-payments, and this conduct was the cause of any delay by Plaintiffs in bringing this action to recover payments that were due."

duplicative of claims under NYLL where they were not "grounded in the same facts" but dismissing them to the extent they sought recovery of overtime wages since "such claims are premised on the same facts" as the NYLL claim]).

Finally, regarding Wilhelmina's argument that plaintiff failed to identify a specific contractual provision that was breached, plaintiff contends first that this argument "is patently incorrect, as this Court has already held" (Opp to Wilhelmina at 4, citing *Shanklin I* at 10 [finding that the complaint at issue "clearly alleges which contract term was breached: the [defendants'] obligation to pay the models for usages"]). Plaintiff also argues that Paragraph 2 of her contract with Wilhelmina provides for Wilhelmina's contractual obligation to pay plaintiff for usages (*id.* at 5, citing NYSCEF Doc. No. 82 ["Wilhelmina Agreement"] ¶ 2 ["Monies owed to Model from clients or advertising agencies, including, without limitation, monies owed for cancellation fees, expenses, and foreign billings, will be paid to Model when payment is received by Wilhelmina. Wilhelmina will take all reasonable steps to collect the amounts due from clients for Model's services."]).

In reply, Click argues that plaintiff's sole particularized allegation – that Click failed to give her merchandise she was to be paid in exchange for the Stephen Burrow runway show (*see* FAC ¶ 156) – fails because (1) neither the value of the merchandise, nor what the merchandise was to be, is alleged (NYSCEF Doc. No. 84 ["Click Reply"] at 8) (2) there is no allegation that Click was obligated to collect the merchandise for plaintiff (*id.* at 8-9) and (3) the contract provided that Click would be entitled to a 20% fee, and would have the authority to "[c]ollect and receive sums payable to Talent" (as opposed to "merchandise" payable) (*id.* at 9, citing NYSCEF Doc. No. 86 ["Click Agreement"] §§ 3, 4).

Next argues that plaintiff's attempt to rely on the discovery of her image on Buzzfeed fails in that Buzzfeed's use of her image does not demonstrate breach by Next (NYSCEF Doc. No. 83 ["Next Reply"] at 2-3). Next argues plaintiff must show she is entitled to payment from Next – presumably through allegations foreclosing the possibility that the usage was not unauthorized. On whether plaintiff's breach of contract claim is partially duplicative, defendant argues that neither the complaint nor plaintiff's opposition papers demonstrate how these claims differ (*id.* at 3). Next also notes that the court in *Ethelberth* (91 F Supp 3d at 339) dismissed a portion of a breach of contract claim on the basis that it was duplicative of the NYLL claim.

Both Click and Next contend plaintiff's attempt to rely on CPLR 3211 (d) fails on the basis that, under CPLR 3211 (d) "affidavits in opposition to the motion" must be submitted for this provision to apply (Click Reply at 9; *see also* Next Reply at 3-4). The court notes however, that none of the authorities relied on demonstrates that the plaintiff must offer an affidavit specifically, as opposed to the complaint itself (*see Copp v Ramirez*, 62 AD3d 23, 31–32 [1st Dept 2009] [looking to plaintiffs complaint and affidavits to determine whether "facts essential to justify opposition may exist, but cannot now be stated"]; *Al Rushaid v Pictet & Cie*, 28 NY3d 316, 343 n 2 [2016]).[3] Next also argues that plaintiff has failed to demonstrate that facts exist but cannot be stated (Next Reply at 3).

Wilhelmina contends that none of plaintiff's particularized allegations against it are sufficient. Regarding plaintiff's allegations of "delayed" payments (FAC ¶¶ 76-87), Wilhelmina argues that there is no "timeliness" provision in plaintiff's contract that would make this a breach (NYSCEF Doc. No. 87 ["Wilhelmina Reply"] at 2, citing Wilhelmina Agreement ¶ 2 [providing that Wilhelmina "shall remit to Model the net due to Model after deductions" with no provision regarding timeframe for payment]). Regarding plaintiff's allegations that she was not paid for bookings, castings, travel and check-ins (FAC ¶ 85), Wilhelmina argues there is no contractual provision providing for entitlement to these items (Wilhelmina Reply at 2). As to plaintiff's allegation of nonpayment of certain "Bumble and Bumble" goods she was to be paid (along with monetary compensation plaintiff admits she received) (FAC ¶ 81), Wilhelmina contends that plaintiff has failed to allege (a) that Wilhelmina, as opposed to Bumble and Bumble, agreed to give her products, (b) specifically which goods were promised, and (c) that Wilhelmina received said goods (Wilhelmina Reply at 3). The court finds that these arguments fail, particularly when plaintiff's allegations are read with the benefit of every possible inference.

Finally, Wilhelmina argues that plaintiff's allegations regarding the failure to pay for usages fails in that, as was the case with the claim against Elite in the *Shanklin II* order, plaintiff does "not provide any details about any Usage for which [s]he believes [s]he is owed payment" (*id.* at 3-4, quoting *Shanklin II* at 36-37).

[3] Click also argues that the paragraph of the FAC on which plaintiff relies has "nothing to do with breach of contract, but instead with 'delayed payments.'" This attribution misreads the paragraph, which also states that plaintiffs cannot uncover "the full extent of Defendants' nonpayment" (FAC ¶ 55)

2. Analysis

Plaintiff's breach of contract claim is based in part on certain expense deductions made in accordance with contractual clauses that "were unlawful and void for the reasons identified in the labor laws" (FAC ¶ 199). Thus, Next is correct that, in part, this claim is duplicative of plaintiff's claim for unlawful deductions. Accordingly, to the extent plaintiff seeks to base this claim on expense deductions, the claim fails.

The FAC fails to satisfy the notice pleading requirements of CPLR 3013 with respect to Click. Plaintiff's sole particularized allegation regarding nonpayment of merchandise does not comport with the terms of the Click Agreement. Accordingly, the breach of contract the claim must be dismissed as to Click.

In contrast, with respect to Next, the FAC sufficiently alleges an instance of usage for which she was not paid. As discussed in *Shanklin I*, such an allegation "raises an inference that monies were withheld sufficient to withstand a motion to dismiss" (*Shanklin I* at 12). Granting plaintiff every necessary inference, the allegations regarding Buzzfeed's usage are sufficient to demonstrate that plaintiff would have been entitled to payment. As was also the case in *Shanklin I*, the contractual notice provisions in the Next Agreement do not preclude plaintiff's claim as information regarding re-usages are within Next's knowledge and control (*see id.* at 13-14). The branch of the motion seeking dismissal of the breach of contract claim against Next shall be denied.

The FAC contains no particularized allegations regarding re-usages with respect to Wilhelmina. Plaintiff's attempt to rely on delayed payments fails in that the contract itself contains no requirements regarding the timeliness of payments. Although plaintiff alleges that the delay violated the "duty of good faith and fair dealing incorporated into the contracts" (FAC ¶ 198), the facts alleged do not show Wilhelmina sought to prevent performance of the contract or to withhold its benefits from plaintiff (*see Aventine Inv. Mgmt., Inc. v Can. Imperial Bank of Communications Inc.*, 265 AD2d 513, 514 [2d Dept 1999]). The court will dismiss the breach of contract claim as pleaded against Wilhelmina, except to the extent that claim arises out of the purported non-payment of "Bumble and Bumble" goods (*see* FAC ¶ 81).

B. *Claim for Breach of Implied-in-Law Contract*

1. Arguments

Click and Wilhelmina contend that plaintiff's claim for breach of implied-in-law contract should be dismissed as duplicative of her breach of contract claim (*see* Click Sup at 6; Wilhelmina

Sup at 15-16, citing *e.g. Shanklin II* at 33-36 [dismissing "[a]ll of the plaintiffs' . . . unjust enrichment . . . claims" as "precluded by their express written contracts").[4]

In opposition, plaintiff concedes that both claims arise out of the same facts and circumstances, but argues that the claim is duplicative only "if this Court rules that the parties' contract entitled Ms. Little to payment for usages occurring after the contract's expiration" (Opp to Click at 6-7; Opp to Wilhelmina at 7-8).

2. Analysis

The determination of whether a quasi-contractual claim such as unjust enrichment should be dismissed as duplicative looks only to whether there is "a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties" (*Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 389 [1987]; *see also Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011] [noting that "[u]njust enrichment is a quasi contract theory of recovery"]), and not whether plaintiff may recover under that contract. Each of the contracts at issue contains provisions showing that the agreements apply, not just to compensation received during the term of the contract, but afterwards as well (*see* Click Agreement at "FOURTH" [providing Click is entitled to 20% of "Talent's gross compensation, paid and/or payable, during or after the term or terms hereof"; Next Agreement at 2 ["[i]ncome shall also mean and include amounts which are payable with respect to the Management Period and with respect to any period after the Management Period, whether or not actually received during the Management Period"]; Wilhelmina Agreement ¶ 6 ["Any contracts for future usage . . . shall be handled by Wilhelmina . . ."]). Accordingly, this claim shall be in its entirety.

C. ***Claims Under New York Labor Law***

1. Arguments

Defendants contend that plaintiff's first cause of action – a NYLL claim for failure to pay wages – should be dismissed for failure to allege, among other things, the hours plaintiff worked, the amounts owed, or a specific instance of a late payment (Click Sup at 5, citing *Shanklin II* at 25-27 [dismissing similar claim "because it fails to set forth the hours that Perron, or any of the other plaintiff models worked, and the pay or salary that they received]; Next Sup at 8-9;

[4] Next's sole argument on this claim is that "based on the forgoing" arguments on plaintiff's breach of contract claim, "the breach of implied-in-fact contract must also fail" (Next Sup at 13).

Wilhelmina Sup at 9-10).[5] Wilhelmina also notes that plaintiff does not allege "when Wilhelmina received funds from its clients with respect to her alleged 'late' payments" (Wilhelmina Sup at 9-10).

Next also argues that all Labor Law claims fail because plaintiff did not specifically allege the work she did was performed in New York (Next Sup at 9). However, the authority on which Next relies establishes only that the NYLL has no extraterritorial effect, not that plaintiff must specifically plead that the work was conducted in New York (*see O'Neill v Mermaid Touring Inc.*, 968 F Supp 2d 572, 579 [SD NY 2013] [dismissing on summary judgment NYLL claim "to the extent that Plaintiff seeks recovery under the New York Labor Law for overtime work performed outside of New York"]; *Magnuson v Newman*, 21 Wage & Hour Cas 2d (BNA) 713 [SD NY Sept. 25, 2013] [same]).

Wilhelmina also argues that all NYLL claims should be dismissed because plaintiff "do[es] not allege that Wilhelmina exercised the control indicative of an employer" (Wilhelmina Sup at 8-9, citing *Shanklin II* at 21 [discussion of factors for determining whether there is an employment relationship under NYLL]). However, Wilhelmina also acknowledges that "the Court denied the defendants' motions to dismiss on these grounds in [*Shanklin II*]" and states that it "reiterates this argument to preserve it for appellate review" (*id.* at 8 n 3).

In opposition, plaintiff contends her allegations relating to defendants' control are substantially the same as the allegations this court held were sufficient to establish the requisite control in *Shanklin II* (Opp to Click at 7-8, citing *Shanklin II* at 25; Opp to Wilhelmina at 8-10). Regarding Next's argument that this court dismissed a claim based on similar allegations in *Shanklin II*, plaintiff "respectfully submits that these parts of the Court's decision in *Shanklin II* were in error, and notes that plaintiffs in that action are currently appealing that decision to the First Department" (Opp to Next at 11).

In opposition to Click's motion, plaintiff contends she has alleged Click's violations with sufficient particularity (Opp to Click at 8-9). She cites her allegations that "Click routinely waited more than one month before paying Ms. Little for work she had performed" and otherwise "failed to provide Ms. Little with payment for . . . work she performed at Click's direction or for its

[5] To the extent plaintiff seeks to base this claim on usages, Next also notes that this court has already held that usages are not wages under the NYLL (Next Sup at 8-9, citing *Shanklin II* at 16-18). In opposition, plaintiff "respectfully submits that these parts of the Court's decision in *Shanklin II* were in error, and notes that plaintiffs in that action are currently appealing that decision to the First Department" (Opp to Next at 11).

benefit" (*id.* quoting FAC ¶¶ 155-57).[6] Plaintiff contends "numerous New York courts have upheld claims under Section 191 based on substantially similar allegations or evidence of delayed payments or non-payments" (*id.* at 8-9, citing *Belizaire v RAV Investigative and Sec. Services Ltd.*, 61 F Supp 3d 336, 353 [SD NY 2014] [claim under NYLL § 652 (1) sufficiently pleaded where plaintiff alleged "(1) he was regularly unpaid, or underpaid, by Defendant (*i.e.*, that Defendant did not pay him the agreed-upon (*i.e.*, 'correct') amount for which Plaintiff was to be paid for his work); (2) Defendant often delayed in providing his paychecks; and (3) many of the paychecks provided by Plaintiff bounced, thereby causing further underpayment or delay in payment"]; *Gaughan v Rubenstein*, 261 F Supp 3d 390, 426 [SD NY 2017] [granting motion to amend where "[a]ccepting Plaintiffs allegations as true, including . . . Defendants' delay in paying Plaintiff her wages, either by failing to issue paychecks or by forward-dating her paychecks," plaintiff sufficiently alleged violations of "the prompt payment requirements of the FLSA and NYLL"]; *Qiu Hua Tan v Voyage Express Inc.*, 15CV6202RJDRML, 2017 WL 2334969, at *4 [ED NY May 25, 2017] [granting motion for default judgment on claim under NYLL § 191 (d) on allegations that "defendants withheld $1,620 in earned wages [and] wages of $4,385"][7]).

Plaintiff also contends that her pleading burden is reduced because she has alleged Click failed to maintain accurate payroll records (*id.* at 9, citing FAC ¶ 158 [alleging failure "to provide Ms. Little with complete and timely records of the work she performed" such as through wage statements which did not provide complete descriptions of the clients association with each job and failed to include work plaintiff performed "but for which Click did not pay her, including attending castings, meetings, and test shoots" and so forth] and *Carroll v Tangier, LLC*, 46 Misc 3d 148(A) [App Term, 1st Dept 2015] [finding that the record established that defendant "failed to comply with its statutory obligation to preserve complete and accurate payroll records . . . thereby entitling plaintiff to the benefit of a reduced burden of proof with regard to these unpaid wage claims"]).

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[6] Plaintiff also contends she has alleged "specific examples of non-payment" by way of her allegation of non-payment of merchandise she was to receive in exchange for the Stephen Burrows show (Click Opp at 8). This allegation fails in that, as stated above, it does not comport with the terms of the Click Agreement.

[7] Plaintiff also cites *Jara v Strong Steel Door, Inc.* (58 AD3d 600, 602 [2d Dept 2009]), but that case does not involve the NYLL.

Plaintiff also disputes Wilhelmina's argument that she need allege when Wilhelmina received funds from its clients, noting that she has alleged that one of the terms of Wilhelmina's agreement was that Wilhelmina would control all interactions relating to client payments (Opp to Wilhelmina at 10, citing FAC ¶¶ 67-70). Plaintiff argues further that these allegations raise the inference that Wilhelmina received "or with reasonable effort could have received," timely payments owed from its clients (*id.*). Accordingly, plaintiff contends "[t]hese are precisely the sort of facts covered by" CPLR 3211 (d).

In reply, Wilhelmina contends that plaintiff's attempt to rely on untimely payments fails since there is no "time requirement concerning payment in the agreement covering the parties' relationship" (Wilhelmina Opp at 7). To the extent plaintiff contends Wilhelmina "with reasonable effort could have received" timely payments, Wilhelmina contends plaintiff "ignores the provision of her modeling agreement that states Wilhelmina's obligation to disburse funds to Little arises only upon receipt of funds" (*id.* at 7, quoting Opp to Wilhelmina at 10).

In its reply, Click argues that plaintiff's only allegation of delay – that "Click routinely waited more than one month before paying Ms. Little for work she had performed" (FAC ¶ 155), falls short under the analysis this court employed in *Shanklin II* (Click Reply at 5, citing *Shanklin II* at 27). Click also distinguishes plaintiff's cases on the basis that they involved more detail allegations or evidence. As to *Carroll v Tangier, LLC* (46 Misc 3d 148[A]), the case does not apply because it involved a summary judgment motion and thus, "at this pleading stage is totally misplaced" since the employer there would have had the opportunity to negate plaintiff's conclusions (*id* at 7).

2. Analysis

As this court already held in *Shanklin II*, plaintiff's allegations regarding defendants' control are sufficient to withstand Wilhelmina's argument for dismissal of all claims under NYLL. In arriving at that determination, this court noted plaintiffs had alleged defendants' control of plaintiffs' schedules, discouraging models from turning down assignments, negotiated the terms and conditions of each modeling assignment, that the contracts were presented on a take-it-or-leave-it basis, and that the exclusive contracts the models had entered into prohibited them from working with any other manager or agency in that region (*see Shanklin II* at 23-25). As summarized above, plaintiff makes substantially the same allegations with respect to each

defendant here. Wilhelmina concedes this point, noting that it offers this argument simply to preserve it for appeal. The motion is denied in this respect.

Plaintiff's first cause of action alleges various violations of NYLL § 191 arising out of two general claims "[f]irst, [that] Defendants failed to pay the Plaintiffs and members of the Classes weekly, or in accordance with the terms of their agreements, or even semi-monthly" and "[s]econd, [that] Defendants failed to pay Plaintiffs and the other members of the Classes the wages they earned and were due for the modeling assignments by making numerous unlawful and unauthorized deductions from Plaintiffs' paychecks." Neither is sufficient to withstand dismissal.

The second basis fails in that it is duplicative of plaintiff's second cause of action for unlawful wage deductions in violation of NYLL § 193. The first basis fails for the reason described in *Shanklin II* – that plaintiff "fail[s] to allege facts from which to determine the transactions or occurrences for which plaintiff[] allege[s she was] not paid, or [was] paid late" (*Shanklin II* at 27). As discussed above, plaintiff's allegations of non-payment fails on this basis. Plaintiff's allegations of delayed payments by Next and Click are wholly conclusory and fare no better (*see* FAC ¶ 134 [alleging only that "Next routinely waited more than one month before paying Ms. Little for work she had performed for newer clients"] ¶ 155 [alleging only that "[d]uring her employment with Click, Click routinely waited more than one month before paying Ms. Little for work she had performed"]). The motion of Click and Next to dismiss the NYLL claim is granted.

Because plaintiff makes numerous particularized allegations regarding Wilhelmina's late payments (*see* FAC ¶¶ 78-85), Wilhelmina's motion is denied. The assertion that this claim is barred by the absence of any contractual provision requiring timely payment fails. Plaintiff's claim here is statutory, not contractual.

D. *Waiver of Jury Trial and Participation in a Class Action*

1. Arguments

The Next Agreement provides, in relevant portion, that:

"THE PARTIES HEREBY WAIVE ANY RIGHT TO A JURY TRIAL IN ANY ACTION COMMENCED RELATING TO THIS AGREEMENT, AND MODEL HEREBY WAIVES THE RIGHT TO PARTICIPATE IN ANY CLASS ACTION WHICH MAY BE COMMENCED AGAINST NEXT RELATING TO THIS AGREEMENT OR NEXT'S SERVICES HEREUNDER"

(Next Agreement at 5-6). Accordingly, Next requests that plaintiff's jury demand be struck (or in the alternative, severed) (Next Sup at 9), and that plaintiff's claim against Next should be severed from the class action to the extent it is not dismissed (*id.* at 7). Next also argues that plaintiff cannot maintain this action as a class action because, first, she seeks penalties, which are barred under CPLR 901(b) (Next Sup at 4-6, citing *Carter v Frito-Lay, Inc.*, 74 AD2d 550, 551 [1st Dept 1980], *affd*, 52 NY2d 994 [1981] [finding that "that liquidated damages as provided in [NYLL § 198.1-d] . . . constitute a penalty"] and NYLL § 198.1-d [failure to comply with Section 195 entitles employee to recover "in a civil action damages of two hundred fifty dollars for each work day that the violations occurred or continue to occur"]), and second, because plaintiffs' claims raise "questions of law and fact affecting the particular class members [that] would not be common to the class proposed" (*id.* at 6-7, quoting *Bay tree Capital Assoc., LLC v AT&T Corp.*, 10 Misc 3d 1053(A) [Sup Ct 2005]).

In opposition, plaintiff notes first that the First Department has held that the contractual waiver of class actions is unenforceable (Opp to Next at 12, citing *Gold v New York Life Ins. Co.*, 153 AD3d 216, 225 [1st Dept 2017], *judgment entered*, 62 NYS3d 260 [1st Dept 2017]). Regarding Next's argument under CPLR 901 (b), plaintiff argues that New York courts have repeatedly upheld class actions that do not seek disallowed damages, since class members who wish to seek those damages may opt-out (*id.* at 13, citing *e.g. Pesantez v Boyle Envtl. Services, Inc.*, 251 AD2d 11, 12 [1st Dept 1998] [affirming class certification and noting that to "the extent certain individuals may wish to pursue punitive claims pursuant to Labor Law § 198(1–a), which cannot be maintained in a class action [under CPLR 901 [b]] they may opt out of the class action"]).

Regarding Next's argument that plaintiff's claims are too individualized to be brought as a class action, plaintiff notes that dismissal on this basis, before a motion and hearing under CPLR 902, may be made only where "it appears conclusively from the complaint and from the affidavits that there was as a matter of law no basis for class action relief" (*id.* at 14, quoting *Downing v First Lenox Terrace Assoc.*, 107 AD3d 86, 91 [1st Dept 2013], *affd sub nom. Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382 [2014]). Additionally, plaintiff argues that the "overwhelming majority of case law from the First Department and from other New York courts" weighs against dismissing class action allegations at this stage (*id.* citing *e.g. Downing*, 107 AD3d at 91).

Finally, plaintiff argues that the issue of jury trial waiver should be addressed at the class certification stage, since depending on what discovery shows, plaintiffs contract may be unique in including a jury waiver clause, which will be an issue for the court to consider in determining her adequacy as a class representative (*id.* at 15). In the event discovery shows other class members' contracts contain similar clauses, plaintiff agrees that the request for a jury trial should be vacated as to the class plaintiff represents (*id.*).

2. Analysis

Although plaintiff is correct that, under First Department precedent, class action waivers are unenforceable, the Supreme Court of the United States is currently considering this very issue. Accordingly, because a decision from that court is imminent and may prove dispositive on this issue, the court will reserve decision and await a ruling of that court. For the reasons offered in plaintiff's opposition, the court will defer ruling on the request to strike the jury demand as well.

E. ***Dismissal Under CPLR 3211(a)(4)***

Click argues that dismissal is warranted under CPLR 3211(a)(4) since both this action and *Shanklin* "arise out of the same subject matter or series of alleged wrongs" (Click Sup at 4-5, quoting *Cherico, Cherico & Assoc. v Midollo*, 67 AD3d 622, 622 [2d Dept 2009]).

In opposition, plaintiff contends, first, that New York courts "have routinely denied motions to dismiss [on this basis] where substantially identical class action proceedings were already pending" (Opp to Click at 10, citing *e.g. In re NYSE Euronext Shareholders/ICE Litig.*, 39 Misc 3d 619, 623 [Sup Ct 2013]). Plaintiff also argues that since there is not yet a certified class in *Shanklin*, it would violate plaintiff's due process rights to "preemptively extinguish her capacity to sue" (*id.* citing *Hansberry v Lee*, 311 US 32, 45, 61 S Ct 115, 120, 85 L Ed 22 [1940] [class action must "afford that protection to absent parties which due process require"]). Plaintiff also argues that there are "important difference between the two cases" by way of the specific factual allegations plaintiff makes as to Click's wrongdoings (*id.*). Finally, plaintiff urges that, since dismissal under CPLR 3211(a)(4) is discretionary, to the extent this court finds overlap between the two cases, this court should consolidate the cases rather than dismiss this one.

As both parties recognize, under CPLR 3211(a)(4) "the court need not dismiss upon this ground but may make such order as justice requires." To this end, the court will address any potential overlap between the two cases upon a proper motion for consolidation.

III. CONCLUSION

For the forgoing reasons, the motions are denied except to the extent of dismissing count one, as pleaded against Click and Next, count four as pleaded against Click, and count five in its entirety. The court reserves decision on the issue of whether plaintiff waived the right to pursue a class action or to a jury trial against Next.

The court has considered defendants' remaining arguments and finds them unavailing.

This constitutes the decision and order of the court.

DATED: May 9, 2018

ENTER,

O. PETER SHERWOOD J.S.C.