

<b>Kwon v SY &amp; DW LLC</b>
2021 NY Slip Op 30288(U)
January 27, 2021
Supreme Court, New York County
Docket Number: 657611/2017
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

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JAMES KWON,

Plaintiff,

- v -

SY & DW LLC, JJ DAIWON LLC, SEUNG CHANG PARK,
JIM PARK, SANG YUN PARK

Defendant.

-----X

INDEX NO. 657611/2017
MOTION DATE 01/05/2021
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for AMEND CAPTION/PLEADINGS

Upon the foregoing documents, plaintiff's instant motion, pursuant to CPLR 3025(b), to amend the complaint is granted for the reasons stated hereinbelow.

Background

The Instant Action

On December 29, 2017, plaintiff, James H. Kwon, commenced the instant action to recover (1) alleged unpaid overtime compensation for the period of December 31, 2016 to November 7, 2017; and (2) damages arising from alleged age discrimination by defendants, SY & DW LLC d/b/a JJ Daiwon; JJ Daiwon LLC d/b/a JJ Daiwon; Seung Chang Park; Jim K. Park; and Sang Yun Park (NYSCEF Doc. 1 and 41).

After various settlement discussions, on or about July 7, 2020, defendants again attempted to resolve plaintiff's overtime claims; that attempt was unsuccessful due to a dispute about plaintiff's "exempt employee status and the inclusion of the relevant working period, which would eventually be the determinative factor for calculating the total amount of damages" (NYSCEF Doc. 24, at 3).

At some point after August 8, 2020, plaintiff's counsel informed defendants' counsel that defendant(s) had misclassified plaintiff as an "exempt employee" even though plaintiff did not "customarily and regularly direct two or more employees." Indeed, plaintiff's counsel asserts that, for approximately 17 to 18 years, plaintiff "customarily and regularly" directed only one employee, namely, Jorge Ramirez (AKA "Jorge Rodriguez"). On September 22, 2020, defendants' counsel rejected plaintiff's counsel's request to amend the complaint accordingly, asserting that plaintiff did "customarily and regularly direct two or more employees," among whom were, allegedly, Assistant Managers Lenin Javier and Jorge Ramirez. (NYSCEF Doc. 24).

According to plaintiff, defendants' failure to pay plaintiff the subject overtime wages arose from this alleged misclassification of plaintiff as an "exempt employee" (NYSCEF Doc. 24). Plaintiff asserts that, should plaintiff's misclassification as an "exempt employee" be proven, defendants violated 12 NYCRR § § 137-1.3 and 146-1.4 for the entire period of plaintiff's employment with defendants (NYSCEF Doc. 24, at 5). According to plaintiff, defendants have failed to demonstrate that plaintiff regularly managed "two or more employees." Specifically, plaintiff highlights the following, among other points, from depositions in the instant matter: (1) in his deposition, Lenin Javier testified that [a] he worked in a different store (in a different state) than plaintiff, and [b] defendant Park, rather than plaintiff, managed Javier (NYSCEF Doc. 28); and (2) in her February 12, 2019 deposition, defendant Sang Yun Park stated that the number of employees that plaintiff managed varied from "one or two or three" (NYSCEF Doc. 26, at 4).

This Court's December 7, 2020 Decision and Order (Motion Seq. 001)

By Decision and Order dated December 7, 2020, this Court granted in part and denied in part plaintiff's motion to amend the instant complaint.

This Court granted plaintiff's motion to amend to the extent of:

- (1) separating plaintiff's age discrimination claims from plaintiff's hostile work environment claims under New York State Human Rights Law; (2) removing plaintiff's discrimination claims under New York City Human Rights Law; and (3) removing Jim K. Park as a defendant in the instant matter pursuant to a July 27, 2018 stipulation (NYSCEF Doc. 34) according to which the parties dismissed the instant action in its entirety as against that defendant only.

This Court denied, without prejudice, plaintiff's motion to the extent that he sought to:

- (1) enlarge the time frame for alleged unpaid overtime compensation and (2) add information pertaining to the alleged misclassification of plaintiff.

The aforementioned denials arose from this Court's finding that "plaintiff's reply papers (and the revised proposed amended complaint attached thereto as NYSCEF Doc. 36) [sought] drastically different relief from that in plaintiff's moving papers." (NYSCEF Doc. 39).

The Instant Motion to Amend the Complaint (Motion Seq. 002)

Plaintiff now moves, pursuant to CPLR 3025(b), to amend the instant complaint further to "include the total amount of Plaintiff's unpaid overtime compensation for the relevant period from November 7, 2011 to November 7, 2017 as well as the facts pertaining to the misclassification of plaintiff, in addition to the Plaintiff's requests that the Court granted on December 7, 2020" (NYSCEF Doc. 40).

Plaintiff asserts that defendants have been aware of "plaintiff's unpaid overtime compensation claims, the duration of his employment [2011-2017 as per Paragraphs 6 and 15 of the original complaint, see NYSCEF Doc. 1], the number of hours [plaintiff] worked, and the amount of his

fixed annual rate” (NYSCEF Doc. 41, at 10). Plaintiff further asserts that the parties have engaged in discovery on plaintiff’s compensation from 2013 to 2017 and discussed the subject unpaid overtime wages during settlement discussions (NYSCEF Doc. 41, at 10-11). Thus, plaintiff claims that “there is no prejudice on the nonmoving party of the amended pleading when merely requests different relief than that originally sought by the moving party,” plaintiff cites to United States Cablevision Corp., 192 AD2d 835 (NYSCEF Doc. 41, at 10).

In opposition, defendants emphasize that plaintiff asserted, for the first time, that he is entitled to overtime wages from December 29, 2011 to December 31, 2016, one year after plaintiff filed the subject Note of Issue and Certificate of Readiness for Trial (the “NOI”) (NYSCEF Doc. 16); according to defendants, plaintiff has failed to provide an excuse for said delay. Defendants claim that the addition of the subject 2011-2016 time period to the complaint would prejudice defendants at this stage in the litigation. (NYSCEF Doc. 46).

In reply, plaintiff asserts that discovery in this matter addressed plaintiff’s employment dating back to 2011; plaintiff has e-filed exhibits in which he requested documentation for the period of 2011 to 2017. In response, defendants produced document(s) from the period of 2013 to 2017. (NYSCEF Doc. 49).

#### Discussion

##### CPLR 3025(b)

CPLR 3025(b), “Amendments and supplemental pleadings by leave,” states the following:

A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.

##### The Alleged Outstanding Unpaid Overtime Compensation for Plaintiff

In its December 7, 2020 Decision and Order on motion seq. 001, this Court denied, without prejudice, plaintiff’s request to “enlarge the time frame for alleged unpaid overtime compensation” on procedural grounds (NYSCEF Doc. 39). Plaintiff states the dates of his employment with defendants as “2011 until November 7, 2017” in Paragraphs 6 and 15 of the original complaint (NYSCEF Doc. 1). This Court finds that adding the time period of November 7, 2011 to December 31, 2016 to the instant complaint’s request for overtime compensation would not prejudice defendants and that plaintiff is entitled to amend the complaint accordingly.

##### The Alleged Misclassification of Plaintiff

The subject deposition transcripts (among which is defendant Sang Yun Park’s deposition testimony that the number of employees that plaintiff managed varied from “one or two or three,” NYSCEF Doc. 26, at 4) supports plaintiff’s assertion that defendant(s) misclassified

plaintiff as an "exempt employee." This Court finds that plaintiff is entitled to amend the complaint accordingly.

As defendants have not requested that this Court strike the Note of Issue, the Court will not do so. However, defendants may make such a request within thirty days of January 27, 2021 via a simple email.

Conclusion

Thus, for the reasons stated herein, this Court hereby grants the instant motion, pursuant to CPLR 3025(b), of plaintiff, James H. Kwon, to amend the complaint to add (1) the total amount of plaintiff's unpaid overtime compensation for the period from November 7, 2011 to November 7, 2017; and (2) the facts pertaining to the subject misclassification of plaintiff. The proposed amended complaint e-filed as NYSCEF Doc. 42 is hereby deemed served and filed.

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1/27/2021  
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
		<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	OTHER