

Burgos v B&H Healthcare Servs. Inc.
2022 NY Slip Op 31151(U)
April 8, 2022
Supreme Court, Kings County
Docket Number: Index No. 505308/2020
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

X

JENNIFER BURGOS,
Plaintiff,

DECISION/ORDER

-against-

**Index No. 505308/2020
Motion Seq. No. 3, 4**

**B&H HEALTHCARE SERVICES INC.,
d/b/a NURSING PERSONNEL HOMECARE,
PARK AVENUE HOME CARE, ISAAC SCHWARTZ,
C. J. CHESKEY, and SHULIM LEIFER, individually,**

Defendants.

X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion for leave to serve an amended complaint and defendants' cross motion for sanctions.

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed.....	<u>65-68</u>
Notice of Cross Motion, Affirmation and Exhibits Annexed.....	<u>70-73</u>
Reply Affirmation.....	<u>74</u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Plaintiff moves, in motion sequence #3, for leave to serve a second amended complaint, for an order “equitably tolling both plaintiff’s and the putative collective action members’ claim under the FLSA”, granting “conditional certification of a collective action” and “granting certification of this action as a class action.”

In support of the motion, plaintiff provides an affirmation of counsel and a proposed second amended complaint, filed as NYSCEF Doc. 67. After virtual oral argument, the motion is granted solely to the extent that plaintiff may serve and file a second amended complaint. However, the other branches of the motion are denied, including plaintiff’s

requests to equitably toll claims of unspecified people, and to certify this action as a collective action and a class action.

In Motion Seq. #1, plaintiff moved for an extension of time to move for class certification. The motion was granted on January 19, 2021 without opposition, and the court stated “the court has discretion pursuant to CPLR 2004 to extend the 60-day deadline, either prospectively or retroactively, upon good cause shown (*Argento v Wal-Mart Stores, Inc.*, 66 AD3d 930, 932 [2d Dept 2009]). Plaintiff’s need to conduct pre-class certification discovery to determine whether the prerequisites of a class action set forth in CPLR 901(a) may be satisfied is considered such good cause (*Rodriguez v Metropolitan Cable Communications*, 79 AD3d 841, 842 [2d Dept 2010]). Plaintiff has thus demonstrated good cause to extend the deadline for filing the class certification motion, to wit, the need to conduct class certification discovery to determine whether the prerequisites of a class action set forth in CPLR § 901(a) may be satisfied. Accordingly, it is ORDERED that plaintiff’s motion for an extension of time to seek class certification is granted, and the court directs that the motion for class certification be made before September 30, 2021, unless further extended by the court.”

On September 30, 2021, plaintiff filed a motion for discovery sanctions which motion also improperly (because in Brooklyn discovery motions do not go to the IAS judge) included a request to amend the complaint and for class certification and collective certification, sanctions against defendants and other relief. This court issued a decision on that motion on January 10, 2022, which stated, in pertinent part “Defendants oppose the motion, and claim the class cannot be certified as plaintiff’s claims are barred by the statute of limitations for the federal claims so she cannot be a class representative, and that she did not consent to be class representative for the federal claims. At virtual oral argument held on this date, plaintiff conceded this is true with regard to the proposed amended complaint, which states the wrong dates of plaintiff’s employment, and only provides her consent to be a class

representative for the state claims. Accordingly, this motion is denied in its entirety. However, as discussed on the record, plaintiff is granted a final extension of 30 days, to February 10, 2022, to move for class certification. Presumably, plaintiff will simultaneously move for leave to amend the complaint.”

On February 10, 2022, plaintiff brought this motion for leave to amend the complaint and, *inter alia*, for class certification and collective certification. The only amendment is the correction of the dates of her employment with defendant. That branch of the motion is granted. However, despite the extensions of time granted to plaintiff’s counsel, he has not identified one single additional class member. Therefore, plaintiff may amend her complaint to correct her dates of employment with defendants, but must remove all references to her status as a representative of a class. Further, the court finds that the defendants, plaintiff’s former employer, cannot be prejudiced by the correction of the dates of her employment. Thus, the amended complaint shall be deemed to have been filed *nunc pro tunc* to the date this action was commenced.

Pleadings are freely amendable, and a plaintiff is permitted to plead in the alternative (see *Lucido v Mancuso*, 49 AD3d 220 [2d Dept 2008]).

Accordingly, it is **ORDERED** that the motion is granted to the sole extent that plaintiff is permitted to amend her complaint, and within twenty days the plaintiff shall e-file a second amended complaint in the proposed form annexed to the moving papers (NYSCEF Doc 57), but removing from the caption and the body of the complaint all references to a class action or a collective action, and it shall be deemed served on the defendants by such filing.


It is further **ORDERED** that defendants shall serve an answer to the second amended complaint or otherwise respond thereto within 20 days of being served by the above-described electronic filing, pursuant to CPLR 3025 (d).

The remainder of the relief requested is denied. Defendants' cross motion (Seq. #4) for sanctions is denied in its entirety. This request consists of solely the request for sanctions, in the notice of cross motion and in the affirmation in support, with no explanation of the basis for the request. In the memo of law, counsel finally explains that the basis of the motion is plaintiff's "second attempt at a motion for leave to amend the Complaint and yet ignoring the Court's explicit direction as to what would be required for it to succeed." This does not warrant sanctions. Particularly since the court granted plaintiff's attorney an extension of time to make the motion, and he made it within the extended period of time.

This constitutes the decision and order of the court.

Dated: April 8, 2022

ENTER :



Hon. Debra Silber, J.S.C.