

<b>Perez v Anejo, LLC</b>
2022 NY Slip Op 33758(U)
November 4, 2022
Supreme Court, New York County
Docket Number: Index No. 150980/2020
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ PART 47

Justice

-----X

AMANDO PEREZ,

Plaintiff,

- v -

ANEJO, LLC, ANEJO TRIBECA, LLC, DAVID FEIT, ANGELO SOSA, JOHN PAUL VALENTI, JOHN A. DIEHL, RICARDO CAMACHO, CHARLIE DOE

Defendants.

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INDEX NO. 150980/2020

MOTION DATE 08/05/2022, N/A

MOTION SEQ. NO. 005 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 98, 99, 100, 101, 102, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116

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

The following e-filed documents, listed by NYSCEF document number (Motion 007) 94, 95, 96, 97, 135, 136, 137

were read on this motion to/for DISMISS.

In this putative class action, plaintiff Amando Perez (Perez) alleges that, pursuant to the New York Labor Law (NYLL), he and others similarly situated are entitled to recover from his former employer, defendants Anejo, LLC, Anejo Tribeca, LLC, (collectively, the corporate defendants) as well as the restaurants' owners, defendants David Feit, Angelo Sosa, John Paul Valenti, John A. Diehl, Ricardo Camacho, and Charlie Doe (individual defendants): (1) unpaid minimum wages due to an invalid tip credit deduction; (2) unpaid spread of hours premium; and (3) attorneys fees and costs.

Plaintiff moves for leave to amend his complaint (seq. no. 005) to allege entitlement on an individual basis to statutory penalties and liquidated damages, which he expressly waives the right to pursue should a class be certified in this action. Furthermore, plaintiff seeks to amend the complaint to assert, pursuant to CPLR § 901(b), that no claims as to statutory penalties or

liquidated damages are being advanced on a class-wide basis. Defendants oppose the motion arguing that the proposed amendment is devoid of merit.

By separate motion (seq. no. 007), the defendants move to dismiss plaintiff's class action claims in their entirety, regardless of plaintiff's amended complaint, as violative of CPLR § 901(b). CPLR § 901(b) prohibits class actions where plaintiff seeks penalties under a statute (here, NYLL) which does not explicitly authorize a party to recover penalties in a class action. Defendants specifically assert that precedent prohibits plaintiff from seeking statutory penalties and liquidated damages individually that the class members may not recover. Plaintiff opposes the motion as untimely as well as void considering the amended complaint. The motions are consolidated for purposes of disposition.

With regard to plaintiff's motion to amend, under CPLR § 3025(b), "[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." "[T]he decision whether to grant leave to amend a complaint is committed to the discretion of the court." (*Davis v. S. Nassau Cmty. Hosp.*, 26 NY3d 563, 580 [2015] [internal quotation marks and citation omitted]; see *Edenwald Contr. Co. v. City of New York*, 60 NY2d 957, 959 [1983]). A party moving for leave to amend a pleading must submit sufficient support to show that "the proffered amendment is not palpably insufficient or clearly devoid of merit." (*MBIA Ins. Corp. v. Greystone & Co.*, 74 AD3d 499, 500 [1st Dept 2010]; see *Guzman v. Americare, Inc.*, 175 NYS3d 202 [1st Dept 2022]). Therefore, "[t]he party opposing the motion to amend must overcome a heavy presumption of validity in favor of the moving party." (*Otis Elevator Co. v. 1166 Ave. of Am. Condo.*, 166 AD2d 307, 307 [1st Dept 1990]; see also *O'Halloran v. Metro. Transp. Auth.*, 154 AD3d 83, 86 [1st Dept 2017]).

Defendants contend that plaintiff's proposed amendments, which waive statutory penalties and liquidated damages for the entire class yet retain those claims for plaintiff individually are facially deficient and fail as a matter of law. Defendants' argument is in contravention of plaintiff waiving these claims if and when the class is certified.

Under CPLR § 901(b), "[u]nless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty. . . created or imposed by statute may not be maintained as a class action." Here, plaintiff's claims are based on violations of NYLL § 198, which does not authorize the recovery of statutory penalties and liquidated damages in a class action (*see Carter v. Frito-Lay, Inc.*, AD2d 550 [1st Dept 1980] *aff'd* 52 NY2d 994 [1091]; *see also Downing v. First Lennox Terrace Assoc.*, 107 AD3d [1st Dept 2013], *aff'd sub nom. Borden v. 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382 [2014]).

However, the amended complaint seeks statutory and liquidated damages for plaintiff individually and expressly waives the right to pursue these claims should the class be certified. As a result, plaintiff's claims in the proposed amended complaint are distinguishable from the cases proffered by defendants, which only prohibit a plaintiff from bringing statutory and liquidated damages individually as well as waiving them for the rest of the class (*see Cushnie v. B & H Foto & Elecs. Corp.*, 2011 NY Slip Op 33861[U], \*2 [SC Bx Co 2011] ["Plaintiffs may not avail themselves of the benefits of class action litigation while, at the same time, pursuing punitive and/or liquidated damages that the class members they seek to represent may not recover."]; *see also Krebs v. Canyon Club, Inc.*, 22 Misc 3d 1125(A), \*11 [SC NY Co 2009] ["the correct rule' is that, if the named plaintiff waives the statutory penalty, the action may be maintained as a class action"]. Plaintiff pleading statutory penalties and liquidated damages

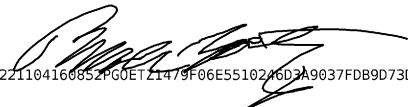
individually while waiving them if and when a class is certified does not require dismissal “because a plaintiff may plead alternative, [and indeed] inconsistent theories.” (*Kerzhner v. G4S Govt. Sols., Inc.*, 138 AD3d 564,565 [1st Dept 2016]; *see also Sorge v. Gona Realty, LLC*, 188 AD3d 474, 474-75 [1st Dept 2014] [“CPLR § 3014 specifically authorizes pleading of inconsistent theories and defenses.”]). Therefore, plaintiff’s amended complaint is not devoid of merit and the motion to amend must be granted.

Defendants’ motion to dismiss, which is based on the same arguments as their opposition to plaintiff’s motion to amend, must be denied. Accordingly, it is

ORDERED that plaintiff’s motion to amend (seq. no. 005) is granted; and it is further

ORDERED that defendants’ motion to dismiss (seq. no. 007) is denied; and it is further

ORDERED that, within 30 days of entry of this order, plaintiff shall serve and file an Amended Complaint in the form of Dkt. No. 116 that comports with this order.



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11/4/2022  
DATE

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PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION  
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE