

Flores v Dinosaur Rests., LLC
2023 NY Slip Op 30180(U)
January 10, 2023
Supreme Court, New York County
Docket Number: Index No. 656614/2022
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH **PART** **14**

Justice

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DEANNA FLORES, ASHLEYANN BERRIOS,

Plaintiff,

- v -

DINOSAUR RESTAURANTS, LLC, ABC CORPS. 1-10, XYZ
COMPANIES. 1-10, JANE & JOHN DOES 1-20

Defendant.

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INDEX NO. 656614/2022

MOTION DATE 01/06/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

were read on this motion to/for DISMISS.

Defendant’s motion to dismiss is denied and plaintiffs’ cross-motion for an extension of time for move for class certification is granted in part.

Background

Plaintiffs bring this putative class action against defendants arising out of purported Labor Law violations. They contend that defendants, who run a chain of restaurants, failed to pay overtime wages. Plaintiffs argue that before and after each shift, they were assigned tasks for which they were not properly compensated. They also argue that they were forced to share tips with employees who were not eligible to receive tips.

Defendants move to dismiss on the ground that plaintiffs failed to timely move for class certification. They observe that the deadline to make such a motion is 60 days after the time to serve a responsive pleading has expired and that deadline has long passed. Defendants argue that

they served their answer on August 31, 2022 and that the deadline for plaintiff to move was November 1, 2022. The instant motion was filed on December 19, 2022.

In opposition and in support of their cross-motion for an extension of time to file a class certification motion, plaintiffs contend they were waiting for discovery from defendants. They point out that gave plaintiffs an initial three-week extension of the deadline to respond to outstanding discovery requests and, eventually, gave two more extensions (which pushed back the deadline to December 9, 2022). Plaintiffs maintain that the responses submitted by defendants were incomplete.

They insist they have a good faith reason for not making a timely motion—defendants’ delay in responding to discovery requests—and that caselaw in this area compels this Court to grant their cross motion. Plaintiffs emphasize that there is no prejudice to defendants.

In reply, defendants insist that the class certification deadline is mandatory and plaintiffs have not met their burden for an extension, especially where the deadline passed before plaintiffs sought the instant relief.

Discussion

CPLR 902 provides that “Within sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained.” “A court may in its discretion deem a late-filed class certification motion timely upon a showing of good cause” (*Gerard v Clermont York Assoc. LLC*, 143 AD3d 478, 38 NYS3d 194 [1st Dept 2016]). “A plaintiff’s need to conduct pre-class certification discovery to determine whether the prerequisites of a class action set forth in CPLR 901(a) can be satisfied constitutes good cause for the

extension of the 60-day time period fixed by CPLR 902” (*Lomeli v Falkirk Mgt. Corp.*, 179 AD3d 660, 664, 116 NYS3d 332 [2d Dept 2020]).

Here, the Court finds that the timeline of events relating to discovery constitutes good cause for the delay in making the motion for class certification. The fact is that the parties agreed to provide defendants with additional time to respond to plaintiffs’ discovery demands and defendants timely responded on December 9, 2022. Of course, plaintiffs should have sought to extend the deadline to move for class certification along with that stipulation or, if defendants refused, then plaintiffs should have promptly made the appropriate motion. In any event, the Court finds that dismissal is simply too harsh an outcome where defendants moved to dismiss just ten days after serving discovery responses. Moreover, there is no prejudice to defendants and plaintiffs properly responded to the instant application by making a cross-motion for an extension of time.

However, although the Court grants plaintiffs’ cross-motion, that does not mean that plaintiffs have free reign to conduct discovery on whatever timeline they wish. As defendants point out, plaintiffs were supposed to provide discovery responses on the same date (December 9, 2022) and defendants contend that plaintiffs failed to respond. The Court finds that plaintiffs must respond to these discovery demands by January 18, 2023.

And although plaintiffs insist that defendants’ discovery responses were insufficient, they have not yet served anything, such as a deficiency letter, on defendants or their counsel reflecting that position. Instead, plaintiffs include a footnote in their opposition papers that they “intend” to follow up with defendants but have not yet done so. Of course, intending to do something is not the same as actually sending a deficiency letter about discovery. Given the time sensitive

requirement that plaintiffs must move for class certification, they should have already followed up with defendants.

The Court also observes that plaintiffs did not utilize the typical steps to move a case or compel defendants to respond to discovery demands. Despite commencing this action in June 2022, plaintiffs did not file an RJI—defendants filed it in connection with the instant motion. Therefore, this matter was not assigned to this Court and so no conferences were scheduled to handle discovery disputes.


Accordingly, while the Court grants the cross-motion for an extension of time to make the class certification motion, that time is extended until February 3, 2023. The Court must be mindful that the statute provides 60 days to make such a motion; extending the deadline another few weeks provides plaintiffs with more than enough time. No more extensions will be granted absent good cause shown.

Accordingly, it is hereby

ORDERED that the motion by defendants to dismiss is denied; and it is further

ORDERED that plaintiffs’ cross-motion is granted to the extent that the time to move for class certification is extended until February 3, 2023; and it is further

ORDERED that plaintiffs must respond to any outstanding discovery demands on or before January 18, 2023.

<p style="text-align: center;">1/10/2023</p> <hr style="border: 0.5px solid black;"/> <p style="text-align: center; margin: 0;">DATE</p>	 <hr style="border: 0.5px solid black;"/> <p style="text-align: center; margin: 0;">ARLENE P. BLUTH, J.S.C.</p>													
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