

**Aguilar v Uncommon Grounds Enters., Inc.**

2023 NY Slip Op 30884(U)

March 23, 2023

Supreme Court, New York County

Docket Number: Index No. 150552/2022

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. MARY V. ROSADO PART 33M

*Justice*

-----X  
BRIGIDO GALVEZ AGUILAR,  
Plaintiff,  
- v -  
UNCOMMON GROUNDS ENTERPRISES, INC., DISHES  
GROUP MANAGEMENT CORP., CITY MINT, INC., MINI  
MINT, INC., MINT NO. 5. INC., MOSHE MALLUL,  
MARGARITA TALISMAN  
Defendant.  
-----X

INDEX NO. 150552/2022  
MOTION DATE 10/03/2022  
MOTION SEQ. NO. 004

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115 were read on this motion to/for DISMISSAL.

Upon the foregoing documents, and after oral argument, which took place on January 24, 2023, where C.K. Lee, Esq. appeared for Plaintiff Brigido Galvez Aguilar (“Plaintiff”) and Ira Strum, Esq. appeared for all Defendants, the Defendants’ motion to dismiss pursuant to CPLR § 3211(a)(1) and (a)(7) is denied, Defendants are directed to serve an answer, and the parties are directed to appear for a preliminary conference.

**I. Factual and Procedural Background**

Plaintiff is asserting claims based on violations of New York’s Labor Law (NYSCEF Doc. 80). This action was commenced on January 18, 2022 (NYSCEF Doc. 2). In the Complaint, Plaintiff alleged that Defendants collectively own and operate five restaurants as one integrated enterprise under the name “Dishes” (*id.* at ¶ 5). Plaintiff alleged that he worked for Dishes from December 2014 to March 2020. Plaintiff alleged that Defendants engaged in improper time shaving, improper tip credit practices, improper meal credit practices, and a variety of other

violations of New York Labor Law (“NYLL”) (*id.* at ¶¶ 14-23; 25-26; 30-38). Plaintiff described the proposed class as delivery persons, servers, runners, bussers, cashiers, porters, cooks, line-cooks, food preparers, and dishwashers employed by Dishes (*id.* at ¶¶ 14-23). Plaintiff also proposed a subclass of tipped employees comprised of waiters, servers, runners, delivery persons, and busboys (“Tipped Subclass”) (*id.* at ¶ 16).

Defendants did not file an Answer. Rather, Defendants filed a motion to dismiss (NYSCEF Docs. Nos. 12-13). Defendants moved to dismiss on numerous grounds. First, they argued that Plaintiff does not have standing to represent the class since he never alleges to have been a server, runner, busser, cashier, porter, cook, line-cook, food preparer, or dishwasher, but only a delivery person (NYSCEF Doc. 15). Defendants also claim that because Plaintiff does not cite to any specific section of NYLL that provides a basis for relief, the Complaint must be dismissed (*id.*). Defendants further asserted that Plaintiff cannot bring a class action for record keeping violations or statutory penalties pursuant to CPLR § 901(b) (*id.*). Defendants argued dismissal is also appropriate because Plaintiff’s “off the clock allegations” are too individualized to warrant class treatment (*id.*). Defendants also produced affidavits from current employees and Plaintiff’s manager that contradict Plaintiff’s affidavit.

In response to Defendants’ motion to dismiss, Plaintiff filed an Amended Complaint (NYSCEF Doc. 17). The Amended Complaint contained the same allegations as the original Complaint. The only difference between the Complaint and the Amended Complaint was that rather than alleging Plaintiff and the Class are entitled to liquidated damages and statutory penalties, in the Amended Complaint, Plaintiff sought to recover liquidated damages and statutory penalties solely for himself (NYSCEF Doc. 17 at ¶ 58). One week after filing his Amended Complaint, Plaintiff moved for class certification.

Defendants did not file an Answer to Plaintiff's Amended Complaint. Instead, Defendants moved to dismiss the Amended Complaint. Defendants argued that Plaintiff's Amended Complaint should be dismissed for essentially the same reasons in their original motion to dismiss (NYSCEF Doc. 60). Defendants also argued that because Plaintiff has not individually waived his own statutory penalty claims, he cannot pursue class relief (NYSCEF Doc. 68). Plaintiff opposed arguing that he has met the pleading standard of the CPLR and that failure to specify under which provision of the NYLL Plaintiff seeks relief is not fatal to his Complaint (NYSCEF Doc. 70).

By Decision and Order dated August 22, 2022, this Court granted Defendants' motion to dismiss, without prejudice, and granted Plaintiff leave to replead to correct certain procedural infirmities (NYSCEF Doc. 76). Specifically, pursuant to CPLR § 901(b), Plaintiff could not seek statutory penalties for himself while also seeking relief on behalf of a class. The Court directed Plaintiff to correct this deficiency should he decide to replead. The Court did not address Plaintiff's motion for class certification as Defendants' motion to dismiss was granted.

On September 1, 2022, Plaintiff filed his Second Amended Complaint (NYSCEF Doc. 80). In the Second Amended Complaint, Plaintiff alleges that he is entitled to statutory penalties individually, but he states he will waive these penalties in the event class certification is granted. Plaintiff also cited to specific provisions of the New York Labor Law which he believes were violated in his Second Amended Complaint.

On September 21, 2022, instead of filing an Answer, Defendants filed their third motion to dismiss (NYSCEF Doc. 90). Defendants argue that Plaintiff's alleged waiver of his individual claims in the event of class certification is insufficient (NYSCEF Doc. 106). Further, Defendants argue that the proposed class is untenable and therefore the Complaint should be dismissed.

Defendants also assert that the documentary evidence contradicts Plaintiff's allegations, thereby warranting dismissal.

Plaintiff opposes Defendants' motion (NYSCEF Doc. 107). Plaintiff argues that Defendants confuse the standard on a motion to dismiss with a summary judgment motion. Further, Plaintiff cites to trial court decisions where plaintiffs who allege that they will waive their individual statutory penalty claims in the event class certification is granted are allowed to engage in discovery. Plaintiff also argues that in the event the Court finds the proposed class is untenable, the Court has the power to revise the class definition, which is the more appropriate remedy than dismissing the complaint. Finally, Plaintiff argues that Defendants' motion, to the extent it argues in opposition to class certification, is not ripe for consideration at this procedural juncture.

In reply, Defendants concede that no appellate authority exists on the sufficiency of a plaintiff's waiver of statutory penalties when seeking claims on behalf of a class. Instead, Defendants argue that the CPLR § 901(b) does not allow for alternative theories of pleading. Defendants assert that the matter is ripe for treatment of this motion as a summary judgment motion on class issues.

## **II. Discussion**

### **A. Standard**

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determines only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]).

A motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1) is appropriately granted only when the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). The documentary evidence must be unambiguous, of undisputed authenticity, and its contents must be essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]). A court may not dismiss a complaint based on documentary evidence unless the factual allegations are definitively contradicted by the evidence (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

Generally, it is “premature to dismiss class action allegations before an answer is served or pre-certification discovery has been taken” (*Griffin v Gregory's Coffee Management LLC*, 191 AD3d 600 [1st Dept 2021] quoting *Downing v First Lenox Terrace Assoc.*, 107 AD3d 86, 91 [1st Dept 2013] *affd* 24 NY3d 382 [2014]). However, as noted by the Court of Appeals, nothing in the CPLR bars a class claim from being dismissed, even at the pre-answer stage, for failure to state a cause of action (*Maddicks v Big City Properties, LLC*, 34 NY3d 116, 123 [2019]). To succeed on a pre-certification motion to dismiss, a defendant must conclusively show that there is no basis for class action relief as a matter of law (*Griffin* at 601).

#### **B. Plaintiff's Conditional Waiver and CPLR § 901(b)**

The Court finds Plaintiff's conditional waiver of his individual claims for statutory penalties in the event the class is certified to be in compliance with CPLR § 901(b). Defendants themselves concede there is no Appellate case law which supports their assertion that a Plaintiff needs to assert an unconditional waiver, prior to class certification, that he will not bring any individual claims regarding statutory penalties in order to be entitled to conduct discovery on his class action claims (*see* NYSCEF Doc. 106).

While Defendants assert that it is the “law of the case” that Plaintiff must assert an “unconditional” waiver, the Court disagrees and finds that Defendants misconstrue the Court’s prior decision. Indeed, the Court simply found that Plaintiff impermissibly sought both statutory penalties and class action remedies at the same time in contravention of CPLR § 901(b). Plaintiff has remedied this defect by asserting a conditional waiver in the event class certification is granted.

Moreover, as conceded by Defendants, multiple trial courts allow Plaintiffs to reserve the right to pursue statutory penalties in the event class certification is not granted (*see Mera v Milos HY, Inc.*, 2022 N.Y. Slip Op. 33462[U] [Sup. Ct. NY Co. 2022]; *Chaney v Hermes of Paris, Inc.*, 2018 N.Y. Slip Op. 33255[U] [Sup. Ct. NY Co. 2018]). There has not been a motion for class certification based on the Second Amended Complaint, no discovery has yet taken place, and Plaintiff has explicitly made a conditional waiver of his individual claims in the event class certification is granted. Therefore, Defendants’ motion to dismiss, to the extent it is based on the sufficiency of Plaintiff’s waiver of his individual statutory claims, is denied.

### **C. Defendant’s Opposition to Plaintiff’s Proposed Class**

Defendants further argue that the documentary evidence produced in prior motion practice warrants dismissal of the Complaint because Plaintiff’s proposed class is untenable. As a preliminary matter, the Court notes the Defendants’ “documentary evidence” consists of boilerplate and self-serving affidavits from multiple individuals who are currently employed by Defendants in their capacities as delivery persons (NYSCEF Doc. 103). On a pre-answer motion to dismiss, granting Plaintiff the benefit of all favorable inferences, and accepting as true all of Plaintiff’s factual allegations, the Court cannot find that these affidavits definitively contradict all of Plaintiff’s allegations to the point of warranting dismissal. Rather, the inconsistencies between Plaintiff’s allegations and the testimony of these delivery people employed by Defendants are

better tested through discovery. The same arguments apply to the affidavit of Mohamed Kimo Farrag, who is employed by Defendants as a general manager (NYSCEF Doc. 104).

While the affidavit of Moshe Mallul introduced an amendment to the employee manual dated January 2022 which contains a dispute resolution clause calling for arbitration, this too does not definitively dispose of Plaintiff's claims on this pre-answer motion to dismiss (NYSCEF Doc. 105). While this arbitration clause may impact the size of the class, without discovery or a current motion for class certification, the Court is unable to definitively opine on (a) the enforceability of this arbitration clause and (b) if enforceable, how many employees may potentially be excluded from the class based on this clause. Moreover, the clause does not bar Plaintiff's individual claims as he ceased working prior to the amended handbook going into effect.

The Court reiterates that generally, it is "premature to dismiss class action allegations before an answer is served or pre-certification discovery has been taken" (*Griffin v Gregory's Coffee Management LLC*, 191 AD3d 600 [1st Dept 2021] quoting *Downing v First Lenox Terrace Assoc.*, 107 AD3d 86, 91 [1st Dept 2013] *aff'd* 24 NY3d 382 [2014]). To succeed on a pre-certification motion to dismiss, a defendant must conclusively show that there is no basis for class action relief as a matter of law (*Griffin* at 601). At this juncture, and given Defendants' heavy burden, the Court finds that Defendant has not conclusively shown that there is no basis for class action relief as a matter of law. Rather, Defendants have presented a series of factual discrepancies between affidavits of current employees and Plaintiff's allegations. However, on a pre-answer motion to dismiss, the Court cannot resolve factual disputes. Therefore, the Defendants' motion is denied. Defendant is directed to serve an Answer, and upon service of the Answer, the parties are directed to attend a Preliminary Conference.

Accordingly, it is hereby,

ORDERED that Defendants' motion to dismiss pursuant to CPLR §§ 3211(a)(1) and (a)(7) is denied; and it is further

ORDERED that within twenty (20) days of entry of this Decision and Order, Defendants' shall serve an Answer to Plaintiff's Second Amended Complaint; and it is further

ORDERED that on or before April 26, 2023, the parties are directed to submit a proposed preliminary conference order to the Court via e-mail to SFC-Part33-Clerk@nycourts.gov. In the event the parties are unable to agree to a proposed preliminary conference order, the parties shall appear for a preliminary conference at 9:30 a.m. on May 3, 2023 in 60 Centre Street, Room 442; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order with notice of entry on Defendants; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

<u>3/23/2023</u> DATE					<u>Mary V Rosado</u> HON. MARY V. ROSADO, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/> OTHER
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