Gonzalez v Penn State Shoe Repair, Inc.

2023 NY Slip Op 30914(U)

March 24, 2023

Supreme Court, New York County

Docket Number: Index No. 652599/2021

Judge: Verna L. Saunders

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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. VERNA L. SAUNDERS, JSC** **PART** **IAS MOTION 36**
Justice

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INDEX NO. 652599/2021

MOTION SEQ. NO. 001

JOSEFINA GONZALEZ, EDGAR FERNANDO VELICELA, EDGAR PATRICIO VELICELA, JOHN JAIRO VELICELA, MARCO TULIO SALDANHA, JOSE ARMANDO SAMBULA, and VICTOR MANUEL DISLA,

Plaintiffs,

- v -

PENN STATE SHOE REPAIR, INC. d/b/a DRAGO SHOE REPAIR, and VADIM KHAIMOV, individually,

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6,7,8,9,10,11,13,14,15,16

were read on this motion to/for **DISMISS**.

On April 19, 2021, plaintiffs, who worked as shoe shiners and shoe repairers in Penn Station, commenced this action seeking to recover unpaid wages pursuant to New York Labor Law. (NYSCEF Doc. No. 1, *Summons and Complaint*). Defendants now move, pre-answer, pursuant to CPLR 3211(a)(1), (5) and (7), seeking dismissal of the complaint on the grounds that the complaint is "unanswerable" as plaintiffs fail to allege the number of hours worked for any relevant period, failed to allege who their employer was, and failed to provide a specific time period for the causes of action asserted. (NYSCEF Doc. Nos. 4, 6; *Notice of Motion, Memorandum of Law in Support*). Additionally, defendants argue plaintiffs previously sued Charles Drago and Drago Shoe Repair in the Southern District of New York for unpaid wages and entered into a settlement agreement with respect to said claims. Accordingly, defendants assert that plaintiffs' claims which accrued prior to the June 2019 settlement should be dismissed and that any of plaintiffs' claims beyond the six-year statute of limitations must also be dismissed.

In opposition, plaintiffs aver that their complaint contains claims asserted against both defendants and sets forth the time period for the work they performed for defendants, their rate of pay, the hours they worked, and the positions they held. Plaintiffs argue that, insofar as pleadings are afforded a liberal construction, the motion to dismiss should be denied. (NYSCEF Doc. No. 13, *Memorandum of Law in Opposition*). Furthermore, plaintiffs contend that the action commenced in the Southern District of New York was dismissed without prejudice.

In reply, defendants contend that the complaint is unclear as the facts as asserted in the complaint refer to plaintiffs working for "defendants" for several years dating back as far as 2006, however, defendant Khaimov purchased Penn Station Drago Shoe Repair from Charles Drago in October 2018 and therefore, plaintiffs could not have worked for him prior to that date.

Furthermore, defendants maintain that a settlement agreement was reached by the plaintiffs and prior owner Drago with respect to the wage claims asserted here and that the plaintiffs have since been paid. (NYSCEF Doc. No. 16, *Reply*).

In determining a motion to dismiss pursuant to CPLR 3211, "the pleading is to be afforded a liberal construction. [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [internal citations omitted].) Pursuant to CPLR 3211(a)(1), a motion to dismiss a complaint may be granted only when the documentary evidence submitted utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law. (see *Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]; (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 [1st Dept 2014]; *Ladenburg Thalmann & Co. v Tim's Amusements,* 275 AD2d 243, 246 [1st Dept 2000].)

With respect to a motion to dismiss pursuant to CPLR 3211(a)(5) on the ground that the action is time barred by the applicable statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired and the court must take all allegations in the complaint as true and resolve all inferences in favor of the plaintiff (see *Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011].) Then, the burden shifts to the plaintiff to establish that the statute of limitations should have been tolled or that the defendant should have been estopped from asserting a statute of limitations defense (*see Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 552-553 [2006]; *Zumpano v Quinn*, 6 NY3d 666, 673 [2006].)

For motions to dismiss under CPLR 3211(a)(5) on the "ground that . . . the cause of action may not be maintained because of . . . res judicata," the Court of Appeals has held that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred even if based upon different theories or if seeking a different remedy." (*O'Brien v Syracuse*, 54 NY2d 353 [1981].) Thus, "[a] stipulation of settlement, which discontinues a claim with prejudice, is subject to the doctrine of *res judicata*." (*Matter of State of New York v Seaport Manor A.C.F.*, 19 AD3d 609, 610 [2nd Dept 2005].)

Finally, a pleading may be dismissed if plaintiff fails to identify a claim cognizable at law or where the plaintiff has identified a cognizable cause of action but has nevertheless failed to plead a material allegation necessary to establish it. (see CPLR 3211[a][7]; *Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 [1st Dept 2014].)

As an initial matter, any and all claims for unpaid wages which accrued on or before April 19, 2015 are dismissed as they are beyond the six-year statute of limitations for such claims. (See generally, *Agudelo de Ocampo v Kurtz*, 55 Misc 3d 127[A] [App Term 2017].)

Turning next to claims alleged to have accrued after April 20, 2015, this court examined defendants' exhibit C which is a letter dated September 4, 2020 addressed to Hon. James L. Cott regarding the Southern District of New York action styled *Macancela et al v Port Drago Corp.et al* 19-cv-05856, seeking approval of the settlement agreement between plaintiffs, Marco Tulio

Saldanha, Victor Disla, Jose DeSousa, Jose Sambula, Edgar F. Velicela, Edgar Sr. Velicela, and John Velicela, and defendants, Post Drago Corp. and Charles Drago. According to the settlement agreement, plaintiffs' claims of unpaid wages would be settled for $200,000.00, minus attorney's fees. (NYSCEF Doc. No. 9). The settlement agreement contains a release which states that:

> "Plaintiffs, individually and collectively, fully and forever release, relieve, waive, relinquish, and discharge the Defendants, any affiliated companies, subsidiaries (including but not limited to any grandchild entities, great grandchild entities, great grandparent entities and so on), affiliates, successors, related entities, assigns, heirs, executors, trustees, administrators and attorneys and all of their present and former directors, officers, partners, shareholders, members, employees, representatives, agents, attorneys, owners, and insurers (collectively "Releasees") from all actions, causes of action, suits, debts, dues, liabilities, obligations, costs, expenses, sums of money, controversies, accounts, reckonings, liens, bonds, bills, specialties, covenants, contracts, agreements, promises, damages, judgments, executions, claims and demands, at law or in equity, direct or indirect, known or unknown, discovered or undiscovered which the Plaintiffs, each had, now has or hereafter can, shall or may have against the Defendants and other Releasees, from the beginning of the world through the date of the execution of this agreement, arising out of, by reason of, or relating in anyway whatsoever [to] any of the allegations contained in plaintiffs causes of action including any wage and hour claim…" (NYSCEF Doc. No. 9, *Settlement Agreement*).

The court notes that all plaintiffs in the *Macancela* action are named in the case at bar except for Josefina Gonzalez and, upon a review of the papers submitted with respect to this motion, the named defendants in the *Macancela* action — Post Drago Corp. and Charles Drago — owned and operated Penn Station Shoe Repair, Inc. prior to October 2018 when the current defendant Vadim Khaimov purchased the business. In their opposition, plaintiffs argue that the action before the Southern District of New York was dismissed without prejudice. However, plaintiffs were addressing a separate action filed in the Southern District styled *Josefina Gonzalez et al., v Penn Station Shoe Repair, Inc, et al*, 20 Civ 1222, which was commenced in February 2020. This court finds it troubling that plaintiffs failed to address the alleged Settlement Agreement in the *Macancela et al v Port Drago Corp., et al* action which appears to have been filed before the *Josefina Gonzalez et al., v Penn Station Shoe Repair, Inc., et al* action. Plaintiffs, in opposition, do not deny that the settlement agreement was executed, they do not argue that the agreement was rejected by the court,[1] nor do they argue that the agreed upon settlement amount remains unpaid. Consequently, plaintiffs silence amounts to a failure to refute the allegation that the claims brought by plaintiffs in this action have been previously settled and thus barred by res judicata. Therefore, it appears that all the plaintiffs, except for Josefina Gonzalez, settled their unpaid wages claims which arose between April 2015 and September 2019 with Charles Drago, owner of the business at that time. As such, the motion is granted in part and denied in part as follows and it is hereby

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[1] The court notes that the so-ordered Settlement Agreement executed in the *Macancela et al v Port Drago Corp. et al*, 19-cv-05856, action was not annexed to the moving papers. However, the joint letter sent on behalf of the plaintiffs and defendants in the *Macancela* action clearly indicated that the parties reached an agreement for $200,000.00 in satisfaction of all claims which arose before the settlement was reached.

ORDERED that defendant's motion to dismiss is granted to the extent that any and all claim asserted which arose before April 19, 2015 are barred by the statute of limitation and thus, dismissed, with prejudice; and it is further

ORDERED that defendant's motion to dismiss is granted to the extent that any and all claims asserted by Marco Tulio Saldanha; Victor Disla; Jose DeSousa; Jose Sambula; Edgar F. Velicela; Edgar Sr. Velicela; and John Velicela which arose between April 20, 2015 and September 4, 2020 are dismissed as barred by res judicata; and it is further

ORDERED that defendant's motion to dismiss is denied with respect to any claims asserted by Josefina Gonzalez which arose after April 19, 2015, and such claims are reserved for trial; and it is further

ORDERED that, within thirty (30) days after this decision and order is uploaded to NYSCEF, defendants shall interpose an answer in this action; and it is further

ORDERED that, the parties shall appear for a preliminary conference on June 7, 2023, details of which shall be provided by the court no later than June 5, 2023.

This constitutes the decision and order of this court.

March 24, 2023

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	[ ]	**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[ ] **DENIED**	[X]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**