SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 14

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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

Defendants.

INDEX NO. 656614/2022

MOTION DATE 03/09/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for ORDER MAINTAIN CLASS ACTION.

The motion by plaintiffs for class certification is denied.

Background

This putative class action involves claims for failure to pay accurate wages during plaintiffs' employment at defendant Dinosaur Restaurants, LLC ("Dinosaur"). Plaintiffs allege that they repeatedly performed work prior to clocking in for their shifts and that Dinosaur distributed tips to employees who performed work that was ineligible for tips—tips that should have gone to plaintiffs. Plaintiffs further allege that Dinosaur required plaintiffs to reimburse the restaurant for losses when customers did not pay for their meal and failed to pay plaintiffs overtime.

Plaintiffs move to certify a class to include all persons employed by Dinosaur "at any of its New York locations in any tipped position on or after the date that is six years before the

filing of the Complaint, between June 3, 2016 and February 3, 2023," (NYSCEF Doc. No. 30 at 6). They claim that the proposed class meets all of the statutory requirements under CPLR 901 and 902 to certify a class action.

In opposition, Dinosaur cross-moves for a stay of this action and claims it is appealing (though has not perfected the appeal) a decision made by this Court allowing plaintiffs an extension of time to move for class certification. Dinosaur contends this action should be stayed pending its appeal. Dinosaur further asserts if a stay is not granted, class certification should be denied because plaintiffs failed to prove they meet the requirements for certification. Dinosaur argues that because the potential class members were employed at various Dinosaur locations and under different managers with different managing styles, common questions of fact do not predominate. Additionally, Dinosaur claims plaintiffs' position that this matter is suited for a class action is not based on facts – it is based on presumptions by the plaintiffs about events they believe they witnessed. Finally, Dinosaur argues that plaintiffs' class definition is overbroad because plaintiffs have not provided proof that employees were subjected to wrongful conduct at any location other than the Harlem location, where both plaintiffs worked.

In opposition to Dinosaur's cross-motion, plaintiffs contend the Court had the discretion to allow plaintiffs to file their motion after the 60-day deadline. Regardless, plaintiffs assert that until Dinosaur perfects its appeal, any potential prejudice alleged is speculative and the cross-motion to stay is premature. Furthermore, in reply to Dinosaur's opposition to class certification, plaintiffs argue that Dinosaur did not provide any evidence or testimony that the alleged different managers followed different practices, nor does it deny that each putative class member was subjected to the same conduct. Dinosaur argues that because the documentary evidence only shows how the named plaintiffs were treated, the damages are too individual for class action.

Plaintiffs claim that simply is not true as plaintiff provided numerous instances of other employees subjected to the same conduct.

Dinosaur offered no reply to plaintiffs' opposition to the cross-motion for a stay of this action.

Discussion

Pursuant to CPLR 2309(c), "an oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation."

Even without considering defendant's opposition, plaintiffs failed to make a prima facie case for certification. As an initial matter, they submitted affirmations from Ms. Flores and Ms. Berrios (NYSCEF Doc. Nos. 28 and 29). There is no indication that either plaintiff is qualified to submit an affirmation (*see* CPLR 2106) instead of an affidavit. In other words, plaintiffs (who are not attorneys, physicians, osteopaths or dentists) needed to submit affidavits rather than affirmations.

Of course, this Court could overlook the title of these documents if they were otherwise treated like affidavits. But they were not. Neither "affirmation" was notarized and neither contained a certificate of conformity (*see* CPLR 2309[c]) despite the fact that both were apparently signed in New Jersey.

The lack of sworn testimony is not merely procedural. On these papers, this Court cannot ignore that the only factual evidence submitted by plaintiffs is not in admissible form. Because

the affirmations are faulty, there is no competent evidence in admissible form and therefore the Court denies the motion for class certification. The plaintiffs, however, still have their personal claims.

Even though the Court denies plaintiffs' motion for class certification, the Court must also consider Dinosaur's' cross-motion, which seeks a stay pending appeal. The Court, in its discretion, denies that request. Dinosaur did not meet its burden to establish that a stay is warranted. That Dinosaur has filed a notice of appeal of a previous decision is not a reason to delay this case indefinitely. Plaintiffs will certainly suffer prejudice if they are forced to wait for the resolution of an appeal that has yet to be perfected. This is not a situation in which an appellate decision is imminent; the appeal has not even been perfected. In the meantime, plaintiffs may pursue their claims individually and a conference shall be set to draft a discovery schedule pertaining to the individual plaintiffs' claims.

Accordingly, it is hereby

ORDERED that plaintiffs' motion to certify the class is denied; and it is further

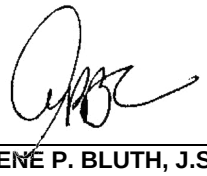
ORDERED that defendant's cross-motion for a stay is denied.

Next conference: May 22, 2023 at 11:30 a.m.

By May 15, 2023, the parties shall upload 1) a stipulation about discovery signed by all parties, 2) a stipulation of partial agreement that identifies the areas in dispute or 3) letters explaining why no agreement about discovery could be reached. The Court will then assess

whether a conference is necessary (i.e., if the parties agree, then an in-person conference may not be required).

If nothing is uploaded by May 15, 2023, the Court will adjourn the conference.



3/23/2023
DATE

ARLENE P. BLUTH, J.S.C.

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