

Law v Kong Kee Food Corp.
2023 NY Slip Op 31678(U)
May 15, 2023
Supreme Court, New York County
Docket Number: Index No. 653631/2021
Judge: Verna L. Saunders
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Defendants answered the complaint denying all allegations except that caption plaintiffs were once employed by defendant Kong Kee Holding Corp and that they were paid the statutory minimum wage during the relevant times.

Plaintiffs now move, pursuant to CPLR 2004, to extend their time to (1) complete pre-class certification discovery and (2) to move for class certification. (NYSCEF Doc. No. 16, *notice of motion*).

Defendants cross-motion, requesting (a) the preservation of defendants' priority of discovery and that; (b) plaintiffs' pre-certification discovery motion be limited to the purpose of ascertaining the dimensions/numerosity and/or existence of the alleged class of employees who share plaintiffs' grievance and denying and/or restricting plaintiffs' pre-certification motion discovery of documents concerning Kong Kee Food Corp. employees generally, employees who were paid at or above the hourly minimum wage, and employees who worked overtime hours. (NYSCEF Doc. No. 26, *notice of cross-motion*).

Plaintiffs oppose defendants' cross-motion on the basis that the class should encompass all workers who were employed by defendants because defendants operate as a single enterprise. Plaintiffs further argue that the individual defendants manage and operate corporate defendants and act as board of directors of same. Thus, plaintiffs maintain that since there were alleged widespread payment violations as to all workers employed by defendants, they should be entitled to contact all employees, not just day shift packers employed at Kong Kee Food Corp., that have worked with defendants for the six consecutive years before the complaint was filed. (NYSCEF Doc. No. 31, *memo in opposition*, pg. 4.)

This court notes that defendants replied to plaintiffs' opposition to the cross-motion. However, as defendants' sur-reply is not allowed as of right in the CPLR and, thus, shall not be considered when disposing of the instant motion. (see *584 Broadway, LLC v Untitled World, LLC*, 2022 NY Slip Op 34123[U] *7 [Sup Ct, NY County 2022]).

"The purpose of pre-class certification discovery is to ascertain the dimensions of the group of individuals who share plaintiff's grievance" (*Smith v. Atlas Intl. Tours*, 80 AD2d 762, 764 [1st Dept 1981].) "At the pre-class certification stage, a plaintiff is entitled to 'limited discovery to determine whether the prerequisites to class certification listed in CPLR 901 are present, and to assess the feasibility considerations listed in CPLR 902 in relation to the particular facts'" (*Troshin v Stella Orton Home Care Agency, Inc.*, 2018 NY Slip Op 30922[U]**7 [Sup Ct, NY County 2018], quoting *Chimenti v Am. Express Co.*, 97 AD2d 351, 352 [1st Dept 1983].) "CPLR 902 states that a class action can only be maintained if the prerequisites promulgated by CPLR 901(a) are met." (*Pludeman v N. Leasing Sys., Inc.*, 74 AD3d 420, 421 [1st Dept 2010], citing *Weinberg v Hertz Corp.*, 116 AD2d 1, 4 [1st Dept 1986], *aff'd* 69 NY2d 979 [1987].) "Those prerequisites are (1) that the class is so numerous that joinder of all members is impracticable (numerosity); (2) questions of law or fact common to the class predominate over questions of law or fact affecting individual class members (commonality); (3) the claims or defenses of the class representatives are typical of those in the class (typicality); (4) the class representatives will fairly and adequately protect the interests of the class [(adequacy of representation)]; and (5) a class action represents the superior method of

adjudicating the controversy (superiority)” (*Pludeman v N. Leasing Sys., Inc.*, 74 AD3d at 421-422; see *City of NY v Maul*, 14 NY3d 499, 508 [2010]; *Dugan v London Terrace Gardens, L.P.*, 186 AD3d 12, 19 [1st Dept 2020].) However, it is well-settled that CPLR 901(a) “‘should be broadly construed’ and that ‘the Legislature intended article 9 to be a liberal substitute for the narrow class action legislation which preceded it’” (*Stecko v RLI Ins. Co.*, 121 AD3d 542, 543-544 [1st Dept 2014], quoting *City of New York v Maul*, 14 NY3d at 509.) The single-employer doctrine and its four-factor test determines whether intertwined entities should be treated as a single employer in a labor dispute. (*Batilo v Mary Manning Walsh Nursing Home Co., Inc.*, 140 AD3d 637, 638 [1st Dept 2016].) The four-factor test analyzes (1) interrelation of operations, (2) centralized control of labor operations, (3) common management, and (4) common ownership, but the primary focus is on the second factor of centralized control of labor operations. (*Id.*)

CPLR 3101[a] which governs disclosure in civil actions directs that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” Courts have emphasized that “[t]he words, ‘material and necessary’, are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity” (*Forman v Henkin*, 30 NY3d 656, 661 [2018].)

Here, this court finds that plaintiff has sufficiently established all the requirements for class certification under CPLR 901 and 902. Plaintiffs provided an affidavit that lists people who were similarly situated and who may have experienced violations like those alleged in the complaint, for they sufficiently allege that, upon information and belief, such violations also occurred in defendants’ other workplaces. The discovery plaintiffs seek in this pre-certification effort is relevant and necessary to ascertain the bounds of the putative class as a whole. (see *Gibbs v Kings Harbor Health Servs., LLC*, 190 AD3d 586, 587 [1st Dept 2021]). As noted by the Court of Appeal, where, as here, plaintiff’s allegation suggests a policy or practice of the unlawful type, such is ripe for class treatment. (see *Andryeyeva v NY Health Care, Inc.*, 33 NY3d 152, 184 [2019].) Furthermore, defendants concede in their verified answer that the individual defendants are involved in some part of the management of one or more of the corporate defendants. Specifically, defendant Kong is a 100% shareholder of the corporate defendants and was involved in hiring plaintiffs. (*Answer* at ¶13-17). Defendants do not sufficiently rebut the claim that there is a centralized control of labor operations, except to say that plaintiffs worked only at the Kong Kee Food Corp. factory location in Long Island City throughout their alleged periods of employment. Defendants insist that, since plaintiffs were not employed at the 212 Grand Food Corp. store in Chinatown, they are not entitled to pre-certification discovery concerning the employees working at the 212 Grand Street store. Defendants further maintain that employees working at the 212 Grand Street store do not share the same employer and do not share the same grievance as plaintiffs. This court, however, finds that, at this stage in the litigation, before pre-certification discovery, “it is premature for defendant[s] to argue that plaintiffs’ lack of commonality precludes a class action” (*Troshin*, 2018 NY Slip Op 30922[U] at **7.)

Turning next to defendants’ request for priority of deposition, “[a]s a general rule, in the absence of ‘special circumstances’, priority of examination belongs to the defendant if a notice

therefor is served within the time to answer; otherwise, priority belongs to the party who first serves a notice of examination” (*Bucci v Lydon*, 116 A2d 520, 521 [1st Dept 1986].) “CPLR 3106[a] impliedly mandates that the party who first notices the deposition obtains priority.” (*Rapillo v St. Barnabas Hospital*, 93 AD2d 760, 760 [1st Dept 1983].) Here, defendants served demands for discovery, production of documents, written interrogatories, and notices of deposition upon plaintiffs on September 27, 2021, and on November 1, 2021, plaintiffs agreed to serve their discovery and interrogatory responses on or prior to November 15, 2021. (NYSCEF Doc. No. 27, *email exchange*). Plaintiffs do not address defendants’ request for priority of deposition in their affirmation in opposition to defendants’ cross-motion and in support of plaintiff’s motion. Hence, that branch of defendants’ motion seeking priority of discovery is granted. All other arguments have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

ORDERED that plaintiffs’ motion for an extension of time to (1) complete pre-class certification discovery and (2) to move for class certification is granted in its entirety; and it is further

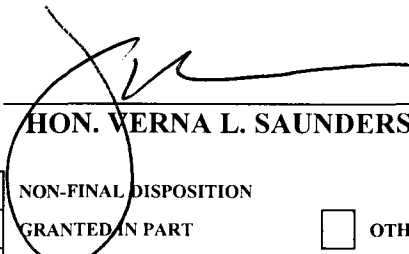
ORDERED that that branch of defendants’ cross-motion for priority of discovery, written interrogatories, and depositions of plaintiffs is granted, and it is otherwise denied; and it is further

ORDERED that within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendants; and it is further

ORDERED that the parties are directed to appear for a remote conference on June 21, 2023, details of which shall be provided no later than June 20, 2023.

This constitutes the decision and order of this court.

May 15, 2023


HON. VERNA L. SAUNDERS, JSC

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CASE DISPOSED

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GRANTED

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DENIED

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NON-FINAL DISPOSITION

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GRANTED IN PART

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OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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FIDUCIARY APPOINTMENT

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REFERENCE