Kit Man Cathere Law v Kong Kee Food Corp.
2025 NY Slip Op 32579(U)
July 9, 2025
Supreme Court, New York County
Docket Number: Index No. 653631/2021
Judge: Verna L. Saunders

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**

Justice

----------X

INDEX NO. 653631/2021

KIT MAN CATHERE LAW, AHN QUAN TRUONG, and LINH YEN DUONG,

Plaintiffs,

MOTION SEQ. NO. 005

- v -

KONG KEE FOOD CORP. d/b/a Kong Kee Food, KONG KEE HOLDING CORP. d/b/a Kong Kee Food, 212 GRAND FOOD CORP. d/b/a Kong Kee Food, IP WING KONG, and YUK LAU LEUNG,

Defendants.

DECISION + ORDER ON MOTION

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 005) 37, 52, 81, 86, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 130, 131, 132, 133, 134, 135

were read on this motion to/for **SUMMARY JUDGMENT**.

In this tort action brought by plaintiffs Kit Man Cathere Law, Ahn Quan Truong, and Linh Yen Duong, defendants Kong Kee Food Corp ("Kong Kee Food"), Kong Kee Holding Corp, 212 Grand Food Corp ("212"), Ip Wing Kong, and Yuk Lau Leung[1] now move for an order (i) pursuant to CPLR 3126, dismissing the complaint against plaintiff Duang with prejudice or, in the alternative, prohibiting him from offering evidence at trial; (ii) pursuant to CPLR 3211 and 3212, dismissing or granting summary judgment in favor of all defendants and against plaintiffs Law and Truong, dismissing the Count I cause of action; (iii) pursuant to CPLR 3211 and 3212, dismissing or granting summary judgment in favor of defendant 212, and against plaintiffs dismissing the class allegations against defendant 212; (iv) pursuant to CPLR 3211 and 3212, granting summary judgment dismissing plaintiff's Count II cause of action; (v) dismissing the class allegations in the Count III cause of action; (vi) dismissing the class allegations in the Count IV cause of action; and (vii) pursuant to CPLR 3103, granting defendant a protective order denying, limiting, conditioning or regulating discovery of defendants as to Counts I and II in their entirety and as to class allegations Counts III and IV.

Although no formal notice of cross-motion was filed, plaintiffs made a request to amend their complaint to clarify that they seek penalties on behalf of themselves but would waive penalties in the event that a class is certified. After consideration of the parties' contentions and the evidence submitted, as well as a review of the relevant statutes and case law, the court decides the motion as follows:

[1] The court notes that defendant Yuet Tong Lam is here mistakenly sued as Yuk Lau Leung. For the purposes of this motion defendant Yuk Lau Leung will be referred herein as Yuet Tong Lam.

Pursuant to the complaint filed on June 7, 2021, plaintiffs Kit Man Cathere Law, Ahn Quan Truong, and Linh Yen Duong, on behalf of themselves and others similarly situated non-exempt employees who worked for defendants on or after six years before the filing of the complaint, seek to recover unpaid wages, including unpaid minimum wages, illegal tip deductions, wage notice violations, and unpaid overtime compensation for work performed in excess of 40 hours at defendants' businesses (NYSCEF Doc. No. 1 at ¶¶ 50, 51, *summons and complaint*).

Business defendants in this action are business Kong Kee Food Corp., a tofu factory located at 48-31 Van Dam Street, Long Island City, New York 11101; Kong Kee Holding Corp., a domestic business corporation organized under the laws of the State of New York with a principal address 48-31 Van Dam Street, Long Island City, New York 11101;[2] and 212 Grand Food Corp., a neighborhood grocery store located at 212 Grand Street, New York, New York 10002. (*id.* at ¶¶10-12). Individual, non-corporate defendants are Ip Wing Kong and Yuk Lau Leung. Defendants answered the complaint denying all allegations except that caption plaintiffs were once employed by defendant Kong Kee Holding Corp. They also asserted that all plaintiffs were paid the statutory minimum wage during the relevant times.

On October 23, 2021, plaintiffs brought Mot. Seq. 001, seeking an order pursuant to CPLR 2004, extending the date to file a motion for class certification. On November 5, 2021, defendants cross-moved for an order: (i) preserving their priority of discovery, written interrogatories, and depositions of plaintiffs; and (ii) limiting plaintiffs' pre-certification discovery solely for the purpose of ascertaining the numerosity or dimensions of the alleged class of employees and denying and/or restricting plaintiffs' pre-certification motion discovery of documents concerning Kong Kee Food employees. Pursuant to the Decision/Order dated May 15, 2023, this Court, *inter alia*: (i) found that, pursuant to CPLR 901 and 902, plaintiffs had sufficiently established all requirements for class certification; (ii) granted plaintiff' motion for an extension of time to complete pre-class certification discovery and move for class certification in its entirety; and (iii) granted the portion of defendants' cross-motion seeking priority of discovery, written interrogatories, and depositions of plaintiffs only (NYSCEF Doc. No. 37).

On June 27, 2023, defendants brought a notice of motion under Mot. Seq. 002, seeking an order, *inter alia*: (i) pursuant to CPLR 2221, granting defendant leave to reargue Mot. Seq. 001 and defendants' related cross-motion; and, upon granting of reargument (ii) modifying the Decision and Order by (a) withdrawing or deleting the finding that plaintiffs sufficiently established all the requirements for class certification; (b) limiting plaintiffs' pre-class certification motion; and (c) considering defendants' reply affirmation on the cross motion. This court's December 5, 2023 decision granted reargument and, upon reargument, granted: (i) defendants' underlying cross-motion seeking to limit pre-class certification discovery solely to discovery related to ascertaining the dimensions, numerosity and/or existence of the alleged class of Kong Kee Food and 212 daytime employees who share plaintiff's' grievances and did not work overtime; and (ii) the branch of defendants' cross-motion for priority of discovery solely as to priority of deposition.

[2] Defendant Kong Kee Holding Corp. is currently inactive.

On December 19, 2023, John Troy and Troy Law PLLC, counsel for plaintiffs Law, Truong, and Duong, brought Mot. Seq. 004, to be relieved as counsel of record for plaintiff Duong. Pursuant to this Court's January 24, 2024 decision and order, the court granted the motion subject to proof of compliance of the following conditions, *inter alia*: (i) service of a copy of the order granting the motion with notice of entry upon the former client at their last known address by regular mail and certified mail, return receipt requested; and (ii) a notice directing the former client to appoint a substitute attorney within thirty (30) days from the date of the mailing of the notice.

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. . . . Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers. . . ." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the moving party establishes its prima facie entitlement, in order to defeat the motion the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the court must deny the motion for summary judgment (*Genesis Merchant Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC*, 157 AD3d 479, 482 [1st Dept 2018]).

Pursuant to CPLR 3211(a)(1), "[a] party may move for judgment dismissing one or more causes of action against him on the ground that . . . a defense is founded upon documentary evidence." When it considers a motion to dismiss for failure to state a cause of action, the court accepts the facts in the complaint as true, gives plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory (*Connaughton v Chipotle Mexican Grill Inc.*, 29 NY3d 137, 141 [2017]). Accordingly, the defendant bears the burden of demonstrating that the documentary evidence refutes plaintiff's allegations, and conclusively establishes a defense as a matter of law (*Farage v Associated Ins. Mgt. Corp.*, 43 NY3d 152, 162 [2024]; *Kolchins v Evolution Mkts., Inc.*, 31 NY3d 100, 106 [2018]). The court may "freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). When such affidavits are submitted, the court considers whether the plaintiff has a cause of action, not whether he has simply stated one (*id.*).

The court will first consider that branch of the motion seeking dismissal of plaintiff Duong's claims pursuant to CPLR 3126.

CPLR 3126 provides the following:

> "If any party. . . refuses to obey an order for disclosure or willfully fails to disclose information which the court finds out to have been disclosed pursuant to this article, the court may . . . an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence

> designated things or items of testimony. . . [or] an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party."

On July 14, 2023, the parties entered into a Preliminary Conference Order which imposed certain deadlines for the exchange of discovery and written interrogatories. Defendants argue that plaintiff Duong, while under representation of counsel, did not respond to defendants' discovery demands and did not provide written interrogatory responses. Defendants state that plaintiff Duong's failure to cooperate with her former counsel John Troy and her failure to provide a Jackson affidavit, were the noted causes for his motion to withdraw as counsel of record (NYSCEF Doc. No. 86). Moreover, they argue that they still have not received any documents from plaintiff Duong, even after her counsel's withdrawal. Finally, defendants argue that since plaintiff Duong has failed to comply with court-ordered discovery she should be deemed to have abandoned her lawsuit. Plaintiff Duong has not filed formal opposition to the motion, and based on the papers submitted, it appears that she is no longer represented by counsel.

A stated, on January 24, 2024, this court granted the motion by John Troy, Esq. and Troy Law, PLLC to be relieved counsel for Linh Yen Duong. However, the withdrawal was only effective upon proof that counsel served a copy of the order granting the motion with notice of entry upon the former client at their last known address, as well as, a notice directing the former client to appoint a substitute attorney within thirty (30) days from the date of the mailing. Although counsel affirms that they served a true copy of the notice of entry with order granting Mot. Seq. 004 upon plaintiff Duong at her last known address via the United State Postal Service, counsel have not submitted any documentation on NYSCEF proving that they sent separate notice directing plaintiff Duong to appoint substitute counsel. The affirmation of service also fails to note whether the documents sent were by regular or certified mail, or whether return receipt was requested. Further, plaintiff Duong has not registered her participation in e-filing, and former counsel Troy Law, PLLC and Troy Legal, PLLC are still listed as counsel of record. Accordingly, for the purposes of these proceedings, plaintiff Linh Yen Duong is still represented by her former counsel.

Pursuant to the April 30, 2024 so-ordered stipulation, the schedule for this motion was extended and "[p]laintiff's time to file their Opposition to Defendants' Motion for Summary Judgement (Mt Seq #005) [was] extended from April 30, 2024, to until and including May 6, 2024" (NYSCEF Doc. No. 131). However, this stipulation was not sent to plaintiff Duong until May 7, 2024, after the extension for time to file opposition had passed (NYSCEF Doc. No. 133).

In consideration of the fact that plaintiff Duong's former counsel has failed to withdraw their representation, and in consideration of the fact that plaintiff Duong was served with the So-Ordered Stipulation extending the briefing schedule *after* the time to submit opposition had passed, effectively constraining her ability to take part in these proceedings, defendant's motion to dismiss the claims against them is denied at this time, with leave to renew.

Defendants seek to dismiss plaintiff Law and Truong's Count I which alleges that defendants did not pay their employees minimum wage under New York Labor Law ("NYLL") § 652 during the relevant period.

A defendant can only succeed on a pre-certification motion to dismiss "where 'it appears conclusively from the complaint and from the affidavits that there was as a matter of law no basis for class action relief'" (*Griffin v Gregory's Coffee Mgt. LLC*, 191 AD3d 600, 601 [1st Dept 2021] quoting *Downing v First Lenox Terrace Assoc.*, 107 AD3d 86, 91 [1st Dept 2013]). Pursuant to NYLL § 652, the minimum hourly wage for NYC Large Employers,[3] like KKF, is as follows: on and after December 31, 2014: $8.75; on and after December 31, 2015: $9.00; on and after December 31, 2016: $11.00; on and after December 31, 2017: $13.00; on and after December 31, 2018: $15.00.

Defendants first argue that the paycheck stubs produced by plaintiff Law and Kong Kee Food contradict plaintiff Law's allegations in the complaint and show that she was paid the lawful, hourly minimum wage during the relevant period. Other than the submission of paycheck stubs, defendants also point to plaintiff Law's written interrogatory responses to support their motion.[4] Defendants argue that plaintiff's written interrogatory response that "she was paid on an hourly basis starting from $7.25 in 2012 to $15 in 2019" per hour is consistent with the lawful minimum wage through the relevant employment period and, accordingly, is in conflict with her allegations that she was paid below $8 from 2015 through 2017 and below $13 between 2019 and 2020 (NYSCEF Doc. No. 112, ¶ 24).

Defendants also argue that plaintiff Truong was paid the legal hourly minimum wage throughout the relevant period. In support, defendants point to plaintiff's written interrogatory answers.[5] They note that plaintiff acknowledged she was paid hourly (NYSCEF Doc. No. 119 ¶ 25), and they contend that plaintiff's statement that ". . . between October 27, 2015, to December 31, 2017, [she] received a flat compensation of eight dollars and eighty five cents ($8.75) per hour and from January 01, 2018 to the end of plaintiff's employment on July 11, 2018, plaintiff was paid a flat compensation of thirteen ($13.00) per hour" is an acknowledgement that she was paid the legal minimum wage in 2015 and 2018 (*id.* at ¶ 24). They finally argue that the clear and unambiguous paycheck stubs that have been submitted to the court show that plaintiff was paid the lawful minimum wage from 2015 until the end of plaintiff's employment in 2018 (NYSCEF Doc. Nos. 120; 121; 122; and 123). Accordingly, they posit that there is no merit to plaintiff Truong's claims.

Although defendants argue that the paycheck stubs are clear, complete and unambiguous documentary evidence that demonstrates that Kong Kee Food paid plaintiffs Law and Truong the lawful minimum wage, multiple discrepancies are present across the exhibits.[6] Defendants state

---

[3] Pursuant to NYLL § 652, large employers are those that employ 11 or more employees.
[4] The written interrogatory responses that defendants submitted for plaintiff Law do not include the questions and responses for interrogatory questions two through twenty-one (NYSCEF Doc. No. 112).
[5] The written interrogatory responses that defendants submitted for plaintiff Truong do not include the questions and responses for interrogatory questions two through twenty-one (NYSCEF Doc. No. 119).
[6] The examples given in this Decision/Order are a non-exhaustive list of the discrepancies present in the exhibits submitted for this motion.

in their papers that exhibits C, D, E, F, G, and H consist of paycheck stubs that plaintiff Law produced, and that exhibits J, K, L, M, N, and O consist of paycheck stubs that Kong Kee Food produced. Defendant Kong argued in his affidavit that "[t]o the best of [his] knowledge, the pdf check stubs cannot be altered or erased without leaving visible evidence of such alteration [and that] [t]o the best of [his] knowledge, none of [the] check stubs have been altered or show any signs of tampering. . ." (NYSCEF Doc. No. 102 ¶ 9). However, multiple paycheck stubs by both plaintiffs and defendants show almost all of the same information, with the noted exception that the figure notated next to the "number" heading is different.[7] For example, across exhibits D, E, and J there are three checks dated September 9, 2015 for the pay period ranging from August 27, 2015 to September 2, 2015 (NYSCEF Doc. Nos. 107, 108, 113). Although the two checks from Exhibit D and E are identical in all aspects and note "15" under the "number" heading, the paycheck stub from exhibit J shows a "984F" under the same heading (*id.*). Similarly in exhibits F and L, two checks dated January 11, 2017, for the pay period beginning on December 29, 2016 and ending on January 4, 2017 show "38F" and "29F" respectively under the "number" heading, even though all other information remains identical (NYSCEF Doc. Nos. 109; 115).

In addition, although defendants argue that plaintiff Law was always paid the lawful minimum wage, the paycheck stub dated January 9, 2019, for the pay period ranging from December 27, 2018, until January 2, 2019, shows a pay rate of $14.37 per hour (NYSCEF Doc. No. 110). Although this meets the minimum wage standard of $13 per hour for dates on and after December 31, 2017, it is less than the minimum wage of $15 per hour on or after December 31, 2019 (*see* NYLL § 652). In their defense, defendants argue that this specific pay rate is a compounded number including both the appropriate $13 and $15 per hour legal hourly rates (NYSCEF Doc. No. 110). However, no other paycheck stub that exists between date ranges between two hourly minimum wage rates is calculated this way. For example, the check dated January 11, 2017, for the pay period between December 29, 2016, and January 4, 2017, specified that plaintiff Law worked 16 hours at the rate of $9 per hour and 24 hours at the rate of $11 per hour (NYSCEF Doc. No. 109). With this type of specificity in the paycheck stub, it is unambiguous that plaintiff law was paid the appropriate minimum wage of $9 an hour for the part of the pay period before December 31, 2016, and the appropriate minimum wage of $11 per hour after December 31, 216 in accordance with NYLL § 652. There is a similar split in the paycheck stub dated January 10, 2018, for the pay period between December 28, 2017, and January 3, 2019, which specifies that plaintiff law worked 24 hours at the rate of $11 per hour and 14 hours at the rate of $13 per hour (NYSCEF Doc. No. 116).

Other notable irregularities include, *inter alia*: (i) in Exhibit L the paycheck stubs dated June 21, 2017 and June 28, 2017 both share the same period start and end date, December 14, 2017 and December 20, 2017, respectively, which notably begins six months after the date of the paycheck stub (NYSCEF Doc. No. 115); (ii) the check dated January 4, 2017 in exhibit L shows no hourly rate or amount of hours worked (*id.*); (iii) the checks dated October 26, 2016 and November 2, 2016 in Exhibit K both share the same pay period start and end dates, October 13, 2016 and October 19, 2016, respectively (NYSEF Doc. No. 114); and (iv) in Exhibit J, the paycheck stub dated September 30, 2015 with a pay period ranging from September 17, 2015 to September 23, 2015 overlaps with the pay period of the check from the same exhibit dated October 7, 2015, which has a pay period that also begins on September 23, 2015 (NYSCEF Doc.

[7] It is unclear as to what the "number" heading refers.

No. 113). Based on the foregoing, the documentary evidence creates a material issue of fact as it relates to plaintiff Law's claims.

As for the paycheck stubs submitted for plaintiff Truong, two paycheck stubs dated October 26, 2016, and November 2, 2016, shared the same pay period (Exhibit R), and a check dated January 4, 2017 listed neither the hourly rate paid nor the number of hours worked (NYSCEF Doc. No. 122). Also, the portion of the paycheck check stubs labeled "number" changed across the exhibits for no notable reason (NYSCEF Doc. Nos. 120; 122; 123). Accordingly, there are material issues of fact present in the documentary evidence as it relates to plaintiff Truong's claims.

In light of the above, defendants have not proven their entitlement to summary judgment pursuant to CPLR 3212 or shown that the documentary evidence establishes a defense as a matter of law pursuant to CPLR 3211. Accordingly, the prong of the motion seeking the dismissal of Count I of plaintiffs' complaint against plaintiffs Law and Truong is denied.

Pursuant to CPLR 3211 and 3212, defendants move for summary judgment in favor of defendant 212. In support, defendants first argue that 212 and Kong Kee Food are not joint employers because, among other reasons, they do not share employees, labor management policies, payroll records, or payroll practices. Further, they argue that there is no common, centralized or overlapping management or control of labor and employment at Kong Kee Food and 212, and that Kong Kee Food management personnel are not involved in the labor management of 212. Defendants also allege that any joint employer claims dissipate after March 25, 2020, when Kong Kee Food laid off all factory workers and closed its doors.

Next, defendants argue that there are factual and legal questions regarding potential 212 class or subclass members that differ from the issues that potential Kong Kee Food class members may have—citing different working hours and pay methods. Defendants assert that because of these differences, plaintiffs cannot fairly and accurately represent, protect and vigorously and capably prosecute the interests of a class claiming minimum wage violations when they were properly paid the minimum wage. Conversely, defendants argue that all 212 employees, with one exception, always have been paid the lawful minimum wage and, as such, the class action factor of numerosity would not be met in a 212 class or subclass.

Although defendants make multiple claims regarding 212 and its employees to undermine the argument that Kong Kee Food and 212 are constructively one entity, these arguments are unavailing based on the information presented. The single employer doctrine and its four-factor test determines whether intertwined entities should be treated as a single employer in a labor dispute (see *Batilo v Mary Manning Walsh Nursing Home Co, Inc.*, 140 AD3d 637, 638 [1st Dept 2016]). The four-factor test analyzes: (i) interrelation of operations; (ii) centralized control of labor operations; (iii) common management, and (iv) common ownership. However, the primary focus is on the second factor, the centralized control of labor operations (*id.*). Centralized control of labor operations "requires some showing of a central human resources department" or, in the case of defendants' argument, the lack thereof (*id*).

Here, defendants themselves have previously argued that "there are issues of law and fact as to whether Kong Kee Food and 212 shared centralized control over labor operations and are part of a single enterprise." (NYSCEF Doc. 81, pg. 1). Further, 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, and that defendant Kong is a 100% shareholder of KKR, KKH, and 212, and it is involved with some part of their management (NYSCEF Doc. No. 13, ¶ 13-14). Although defendants argue that defendant Lam and employee Jian Guan Gong are the individuals responsible for the day-to-day hiring and firing of workers at 212 and Kong Kee Food respectively, defendant Kong previously conceded in the verified answer that he was the person who hired plaintiffs (*id.* at ¶ 15). Further, although defendants argue that defendant Kong "rarely visits 212 and is not involved in the day-to-day management," they fail to elaborate the purpose of defendant Kong's visits to 212, and what his role was when these visits took place. Defendants' allegation that any joint or single employer status of the companies dissipated when 212 closed its doors after March 25, 2020, are equally unavailing, as the standard requires a showing that the two were not a single integrated enterprise at the alleged time of plaintiffs' employment (see *Quino v Heburechnaya I.S., Inc.*, 230 AD3d 601, 603 [1st Dept 2024]).

Defendants' arguments regarding the differences between Kong Kee Food and 212 employees are also unpersuasive. Even if damages among potential class members vary, a class action may proceed when the important legal or factual issues involving liability are common to the class (*Maddicks v Big City Props., LLC*, 34 NY3d 116, 123 [2019]). Further, unique factual circumstances and specials needs among class members are not fatal to the certification of a class as a matter of law (*id.* at 125). In fact, the court has found that "CPLR 901(a)(2) 'clearly envisions authorization of class actions even where there are subsidiary question of law or fact not common to the class'" (*City of New York v Maul*, 14 NY3d 499, 510 [2010], quoting *Weinberg v Hertz Corp.*, 116 AD2d 1, 6 [1st Dept 1986], *aff'd* 69 NY2d 979 [1987]; see *Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 422-423 [1st Dept 2010]). As this court has found that there are issues of fact regarding whether plaintiffs were paid the minimum wage, defendants' arguments that plaintiffs cannot properly represent members of a class action alleging minimum wage violations is also unpersuasive.

Further, the courts of this State have found that it is premature to dismiss class action allegations before pre-certification discovery has been completed (e.g., *Griffin*, 191 AD3d at 600). In this court's December 5, 2023, Order, the court mandated that "pre class certification shall be limited to ascertaining the dimensions, numerosity and/or existence of the alleged class of Kong Kee and 212 daytime time employees who share plaintiffs' grievances and did not work overtime." Additionally, on April 5, 2024, this court ordered that "to the extent that Defendants have timecards and facial recognition records regarding plaintiffs and the class, they are to turn these documents over on or before April 22, 202[4][8]." Although defendants argue that all 212 employees, minus one isolated incident, were paid the legal minimum wage, they do not attach any evidence in support of this claims besides their conclusory statement. In her Jackson affidavit (NYSCEF Doc. No. 127), defendant Lam stated, in her capacity as a manager of 212, that 212 did not ever keep or maintain timecards for its employees during the relevant period, and did not use a timeclock, timecards or a face recognition system to keep track of 212

[8] The Order mistakenly stated that the deadline was April 22, 2022—a date prior to the entry of the order.

employees' time. Accordingly, she argued that there were no timecards to exchange in discovery. In contrast, defendant Lam stated in her affidavit in this motion that she "know[s] each employee's work schedule and uses time sheets to calculate the employee's total work hours and total pay each week" (NYSCEF Doc. No. 103, ¶ 10). Since the merits of defendants' claims cannot be evaluated without the production of relevant documents, and because of the contradictory statements made by defendants, this portion of the motion seeking summary judgment is denied (see *Ansah v A.W.I. Sec. & Investigation, Inc.*, 129 AD3d 538, 539 [1st Dept 2015]).

Defendants seek to dismiss Count II of the complaint, which seeks spread of hours pay. In support of their motion, they first argue that Count II only generally cites New York Labor Law and that plaintiffs incorrectly refer to 12 NYCRR § 146-1.6 in their complaint which only applies to the hospitality industry. They further argue that, based on the complaint, the maximum interval of time that any of the plaintiffs worked is, at most, about nine hours and that accordingly, none of the plaintiffs are entitled to spread of hours pay. Finally, defendants argue that Count II does not introduce any new factual or evidentiary allegations that plaintiffs were entitled to spread of hours pay and that the statements are conclusory at best. As a result, they contend that plaintiff have not stated a *prima facie* case.

Within their complaint, plaintiffs have mistakenly cited 12 NYCLL 146-1.6, which prescribes spread of hours pay for those working in the hospitality business. However, pursuant to CPLR 3026 "[p]leadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced." Defendants have not claimed they are substantially prejudiced by this error. Accordingly, this argument is unpersuasive.

Further, although defendants argue that plaintiffs have failed to make a *prima facie* case for spread of hours pay, and as such defendants should prevail on a motion for summary judgment, it is defendants' burden to establish their entitlement for summary judgment as a matter of law (see *Ferrante v American Lung Assn*, 90 NY2d 623, 631 [1997]). However, they have presented no evidence to support their argument. The paycheck stubs analyzed do not show a specific breakdown of the hours worked per day and, although defendants claim that the complaint itself establishes that no plaintiff worked more than 9 hours, the language specifically used by plaintiffs when describing their work hours included the phrase "regular hours." As defendants did not satisfy their *prima facie* burden, the burden of proof did not shift to plaintiffs. Accordingly, this court denies this prong of defendants' motion.

In Count III of their complaint, plaintiffs seek the following damages for the failure to provide a time of hire wage notice on behalf of themselves and the class: "$50 for each workday that the violation occurred or continued to occur, up to $5,000, together with costs and attorneys' fees pursuant to New York Labor Law" (NYSCEF Doc. No. 1, ¶ 72).

In Count IV of their complaint, plaintiffs sought the following damages for the failure to provide wage statements on behalf of themselves and the class: "$250 for each workday of the violation, up to $5,000 for each Plaintiff together with costs and attorneys' fees pursuant to New York Labor Law" (NYSCEF Doc. No. 1, ¶ 76).

New York Labor Law § 198 (1-b) states, in relevant part:

> "If any employee is not provided within 10 business days of his or her first day of employment a notice as required by subdivision one of section one hundred ninety-five of this article, he or she may recover in a civil action damages of fifty dollars for each work day tat the violations occurred or continue to occur, but not to exceed a total of five thousand dollars, together with costs and reasonable attorney's fees. . . ."

Defendants argue that CPLR 901(b) disallows plaintiffs' class action. Specifically, CPLR 901(b) states that "[u]nless a statute creating or imposing a penalty or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action" when the statue under which the action is brought: (i) fails to specifically authorize recovery in a class action; and (ii) imposes a penalty or minimum measure of recovery, as here. Accordingly, as NYLL § 198(1-b) and NYLL § 198(1-d) do not authorize recovery for a class action, defendants argue that the claims should be dismissed as a matter of law.

In opposition, plaintiffs argue that CPLR 3025(b) permits the amendment of pleadings at any time by leave of court. Although no formal notice of cross-motion was filed, plaintiffs made a request to amend their complaint to clarify that they seek penalties on behalf of themselves but would waive penalties in the event that a class be certified. In their opposition to the motion for summary judgment, plaintiffs argue that the decision whether to grant leave is at the discretion of the courts. In reply, defendants rearticulated their prior arguments and further assert that plaintiff did not properly cross-move for their requested relief to attach a proper proposed amended pleadings showing the changes or additions requested as required by CPLR 3025(b).

Class action allegations, or claims for class action relief, may be dismissed when there is no statutory authorization for class recovery in the language of the statute (CPLR 901[b]; see, e.g., *Leyse v Flagship Capital Servs. Corp.*, 22 AD3d 426, 426 [1st Dept 2005]). Further, the court has also held that CPLR 901(b) disallows class actions when the statute it is based on imposes a penalty (see *Sperry v Crompton Corp.*, 8 NY3d 204, 209 [2007]; *Carter v. Frito-Lay, Inc.*, 74 AD2d 550, 550 [1st Dept 1980]). This is because punitive or aggregated damages provide the same incentive as the rational for class actions: to encourage individuals to sue where the amounts involved might otherwise be too small (*see Sperry*, 8 NY3d 204, 211). However, a class representative may waive a class's claim for a statutory penalty and maintain the class action under a statute as long as "(1) the penalty is neither mandatory nor the sole measure of recovery, and (2) class members retain the right to opt out of the class to pursue the punitive relief" (*id.*). There is no dispute between the parties that the penalties under NYLL § 198(1-b) are punitive in nature.

Although plaintiff seeks to cure the deficiencies in their complaint, the court is constrained to deny this request. Here, plaintiffs move for leave to amend their pleadings in their opposition papers pursuant to CPLR 3025(b); however, they have not filed a formal motion or cross-motion. Moreover, they have not complied with CPLR 3025(b), which states, in relevant

part, that "[a]ny motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading." Accordingly, plaintiff's informal request is denied and the parts of defendants' motion which seeks to dismiss the class allegations against them in Count III and Count IV of the complaint are granted.

As the class allegations in Counts III and IV have been dismissed, those portions of motion requesting a protective order are moot. Thus, this court will address this prong solely as it relates to Counts I and II.

Pursuant to CPLR 3103(a):

> "The Court may at any time . . . on motion of any party. . . make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person or the courts."

Defendants seek a protective order denying, limiting, conditioning or regulating discovery of defendants as to Counts I and II in their entirety. They first argue that the discovery is not material and necessary in the prosecution of these causes of action. Second, defendants Kong and Lam specifically argue that "[t]his false, baseless and spurious lawsuit is subjecting me and my [spouse] who are in our 80's with medical conditions-and all [d]efendants to needless, irrelevant, unreasonable and time-consuming discovery proceedings, annoyance, expense, legal fees, embarrassment, disadvantage and prejudice (NYSCEF Doc. No. 102, ¶ 28; NYSCEF Doc. No. 103, ¶ 9).

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." While the court's wide discretion to decide whether material sought is material and necessary is not without limit, "[t]he words material and necessary. . . must 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" (*Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014][internal quotation marks and citations omitted]; see *Liberty Petroleum Realty, LLC v Gulf Oil, L.P.*, 164 AD3d 401, 402 [1st Dept 2018]). However, the need for discovery must be weighed against any special burden to be borne by the opposing party, and, as such, discovery requests "must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure" (*Forman v Henkin*, 30 NY3d 656, 662 [2018] [internal quotation marks omitted]). If disclosure would prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person or the courts, the court is empowered to deny or even limit disclosure (*see* CPLR 3103[a]; *M.P. v. Jewish Bd. of Family & Children's Servs.*, 211 AD3d 584, 584 [1st Dept 2022]).

This court rejects defendants' arguments on this issue and finds that defendants' displeasure with the proceeding is unavailing, as they merely set forth conclusory statements in support. (*Perez v Time Moving & Stor.*, 28 AD3d 326, 328-329 [1st Dept 2006]). Although

legal proceedings may include moments of discomfort and may be arduous, defendants have not demonstrated that any of the discovery would impose the burdens enumerated by CPLR 3103(a) to an unreasonable extent (see *Balsamello v Structure Tone, Inc.*, 226 AD3d 580, 582 [1st Dept 2024]). Moreover, this court already ordered the disclosure of discovery relating to Count I and Count II in its April 5, 2024 order, which directed that: "to the extent that Defendants have timecards and facial recognition records regarding plaintiffs and the class, they are to turn these documents over on or before April 22, 2022" (NYSCEF Doc. No. 126). It further, ordered that "the filing of the motion for summary judgment [NYSCEF Doc. No. 100] shall not stay the discovery herein directed" (*id.*). Accordingly, and based on the above, the portion of the motion seeking a protective order is denied. 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 the portions of defendants' motion seeking to dismiss Counts III and IV of the complaint are granted and these counts are severed and dismissed; and it is further

ORDERED that all other portions of the motion are denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiffs shall serve a copy of this decision and order, with notice of entry, upon all parties.

This constitutes the decision and order of this court.

July 9, 2025

HON. VERNA L. SAUNDERS, JSC

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