Wen Lin Liu v Tony Sushi, Inc.
2025 NY Slip Op 34711(U)
November 17, 2025
Supreme Court, Kings County
Docket Number: Index No. 537547/2023
Judge: Ingrid Joseph

At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 17th day of November, 2025.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

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WEN LIN LIU,

Plaintiff,

-against-

Index No.: 537547/2023
Motion Sequence: 3, 5

TONY SUSHI, INC., ET AL.,

Defendant.

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The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion, Affirmations, and Exhibits Annexed	27-45, 49
Affirmation in Opposition, Notice of Cross Motion, Affirmations and Exhibits Annexed	55, 56, 68-69
Affirmation in Reply and Affirmation in Opposition to Cross-Motion	58, 59
Affirmation in Reply to Cross-Motion	

In this action for unpaid wages, Wen Lin Liu ("Plaintiff"), on his own behalf and on behalf of others similarly situated, moves, pursuant to CPLR 2004, for an extension of time to move for class certification and for collective action status under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 216 (b), pre-class certification discovery, and for leave to further amend the complaint to include claims for potential opt-in plaintiffs (motion [mot.] sequence [seq.] 3). Defendants TONY SUSHI, INC. d/b/a Tony's Fusion West; TONY'S SUSHI & STEAKHOUSE d/b/a Chen Liu (NY) Inc. d/b/a Tony's Sushi d/b/a Tony's Sushi 2; and TONY'S ASIAN FUSION CORP d/b/a Asian Nation Cuisine Inc. d/b/a Tony's Asian Fusion; TONY ASTA a/k/a Antonio Asta a/k/a Antonino Asta, ZHIYU LIU a/k/a Zhi Yu Liu, and QUM MEI CHEN a/k/a QUMMEI CHEN a/k/a QUM M CHEN (collectively, referred to as "Defendants") oppose the motion and cross-move for an order striking the amended complaint filed on December 16, 2024, on the grounds that it was untimely pursuant to this Court's November 12, 2024 Order (mot. seq. 5).

According to Plaintiff's Collective Action and Class Action Complaint, dated June 25, 2024, Plaintiff was employed by Defendants as a sushi chef at Defendants' restaurant located at 23 Sunset

Avenue, Westhampton Beach, New York ("the Restaurant") from on or about July 4, 2023 to November 14, 2023. He claims that he was also dispatched, on a needed basis, to work at Defendants' other restaurants located at 466 East Main Street, East Moriches, New York and 337 Montauk Highway, East Quogue, New York. Plaintiff alleges that he worked between six (6) and seven (7) days a week, between 69.5 to 81 hours a week, and received a flat weekly rate of $1,200.00 in cash. He further alleges that, throughout his employment, he "was not paid overtime for the weeks that he worked more than forty (40) hours that week" and that his "flat compensation did include at least one and one half his promised hourly wage for all the weeks that he worked more than forty (40) hours in that week." (complaint, ¶¶ 51-52). Plaintiff further alleges that, "[t]hroughout his employment, [he] was not compensated for New York's "spread of hours" premium for shifts that lasted longer than ten (10) hours at his promised rate" (*id.* at 53), and that he "was not given a statement with his weekly payment reflecting employee's name, employer's name, employer's address and telephone number, employee's rate or rates of pay, any deductions made from employee's wages, any allowances claimed as part of the minimum wage, and the employee's gross and net wages for each pay day in Chinese, Plaintiff's native language." (*id.* at 54). Plaintiff states that during his time of employment, the Restaurant staff included two sushi chefs, four waiters, and four kitchen staff members, including a chef, oil wok chef, fry wok chef, and dishwasher. Plaintiff alleges that all full-time employees regularly worked overtime hours, which he personally observed and discussed with his coworkers. He further claims that employees were required to work at various restaurants owned by Defendants, depending on staffing shortages at each location.

Plaintiff commenced the within action individually and as class representative "on behalf of all non-exempt personnel employed by Defendants on or after the date that is six years before the filing of the Complaint in this case"[1] (*id.* at 56), alleging that the Defendants engaged in unlawful practices in violation of the Fair Labor Standards Act and various provisions of the New York Labor Law. Specifically, plaintiff alleges that Defendants violated 29 U.S.C. § 207 (a) (1) by failing to pay overtime wages, and New York

[1] Plaintiff commenced this action on December 22, 2023, with the filing of the summons with notice (NYSCEF Doc No. 1).

Labor Law [12 N.Y.C.R.R.] § 142-2.2 (failing to pay overtime); § 142-2.4 (failing to pay "Spread of Time Pay"); § 146-2.1(failing to keep payroll records); §195-1(a) (failing to provide time of hire wage notices); and § 195-1(d) (failing to provide wage statements).

Defendants interposed an Answer on or about July 15, 2024. On or about September 14, 2024, plaintiff moved to amend the complaint (mot. seq. 2) which was granted unopposed by Order of this Court dated November 12, 2024. Plaintiff simultaneously filed the instant motion (mot. seq. 3). Pursuant to the Order dated November 12, 2024, and entered via NYSCEF on November 14, 2024, Plaintiff was directed to file an Amended Summons and First Amended Complaint within 21 days of entry of the Order. Plaintiff filed his First Amended Complaint on December 16, 2024. Thereafter, on January 9, 2025, Defendants cross-moved (mot. seq. 5) to strike the First Amended Complaint, asserting that Plaintiff failed to comply with the filing deadline set forth in the November 12, 2024 Order.

As an initial matter, Defendants' cross-motion to strike Plaintiff's First Amended Complaint (filed on December 16, 2024) on the ground that it was untimely filed in violation of the Court's November 12, 2024 Order, is denied. Generally, leave to amend a pleading should be freely given when there is no significant prejudice or surprise to the opposing party and where the evidence submitted in support of the motion indicates that the proposed amendment may have merit (*see* CPLR 3025 [b]; *Edenwald Contr. Co. v City of New York,* 60 NY2d 957, 959 [1983]; *Pike v New York Life Ins. Co.,* 72 AD3d 1043, 1047 [2d Dept 2010]). Plaintiff's original motion to amend was granted without opposition, and the First Amended Complaint, although filed after the deadline, contains the same allegations as the proposed amendment previously submitted. Since Defendants have neither demonstrated prejudice nor alleged any surprise resulting from the delay, their cross-motion is denied (*see Hothan v Mercy Med. Ctr.,* 105 AD3d 905, 906 [2d Dept 2013]).

Pursuant to CPLR 2004, a court may extend the time fixed by any statute upon a showing of good cause, except where otherwise expressly prescribed by law. CPLR 902 requires plaintiff to move for class certification within sixty days after the time to serve a responsive pleading has expired for all named

defendants. "While class certification is an issue that should be determined promptly (*see* CPLR 902), a trial court has discretion to extend the deadline upon good cause shown" (*Chavarria v Crest Hollow Country Club at Woodbury, Inc.*, 109 AD3d 634 [2d Dept 2013]). "A plaintiff's need to conduct pre-class certification discovery to determine whether the prerequisites of a class action set forth in CPLR 901 (a) can be satisfied constitutes good cause for the extension of the 60–day time period fixed by CPLR 902" (*Lomeli v Falkirk Mgt. Corp.*, 179 AD3d 660, 664 [2d Dept 2020]).

Here, both Plaintiff and the Defendants concede that the time to move for class certification expired on September 13, 2024. Plaintiff filed the instant motion on September 14, 2024, one day after the deadline. Plaintiff alleges the existence of "similarly situated" individuals, specifically naming former co-workers and describing their pay schedules, observed work hours, and absence of pay notices. Plaintiff has demonstrated a need to conduct pre-class certification discovery to determine whether the prerequisites of a class action may be satisfied. Courts have extended the time to move for class certification when there has been a showing that there is a need for class certification discovery (*see Lomeli v Falkirk Mgt. Corp.*, 179 AD3d at 664; *see also Burgos v B&H Healthcare Services, Inc.*, 239 AD3d 585 [2d Dept 2025]). Therefore, that branch of Plaintiff's motion seeking to extend the time to move for class certification is granted.

Plaintiff moves for conditional certification of this lawsuit as a collective action under the FLSA. Pursuant to 29 U.S.C. § 216 (b), an employer engaged in commerce or in the production of commerce who fails to comply with minimum wage or maximum hours requirements is liable to the affected employee(s) for their unpaid minimum wages or unpaid overtime compensation, plus an additional amount as liquidated damages. "The FLSA's limitations period for minimum wage and overtime claims is two years, unless the employer's violation is willful, in which case the period is three years" (*Inclan v New York Hosp. Grp., Inc.*, 95 F Supp 3d 490, 503 [SD NY 2015]). FLSA, 29 U.S.C. 216 (b) also allows similarly situated claimants to opt-in as a plaintiff in an already commenced action. "At the conditional certification stage of an FLSA action, wherein the court makes an initial determination to send a notice to potential opt-in plaintiffs, the plaintiff's burden is minimal" (*Burgos v B&H Healthcare Services, Inc.*, 239 AD3d 585, 586 [2d Dept

2025]). "The threshold issue in deciding whether to authorize class notice in an FLSA action is whether plaintiffs have demonstrated that potential class members are "similarly situated."' (*Realite v Ark Restaurants Corp.*, 7 F Supp 2d 303, 306 [SD NY 1998]; *see* 29 U.S.C. 216 [b]). Courts have held that plaintiff must demonstrate "a modest factual showing sufficient to demonstrate that they and potential plaintiffs ... were victims of a common policy or plan that violated the law" (*Zhong v August August Corp.*, 498 F Supp 2d 625, 630 [SD NY 2007]). "The purpose of preclass certification discovery is to ascertain the dimensions of the group of individuals who share plaintiff's grievance" (*Rodriguez v Metro. Cable Communications*, 79 AD3d 841, 842 [2d Dept 2010]).

However, certification is not automatic. "The modest factual showing cannot be satisfied simply by unsupported assertions" (*Vecchio v Quest Diagnostics Inc.*, 2018 WL 2021615, *3 [SD NY 2018] [internal quotation marks omitted]). Plaintiff may satisfy the similarly situated "requirement by relying on their own pleadings, affidavits, declarations, or the affidavits and declarations of other potential class members" (*Hallissey v America Online, Inc.*, 2008 WL 465112, *1 [SD NY 2008]). "[A]n FLSA collective action may be conditionally certified upon even a single plaintiff's affidavit." (*Escobar v Motorino E. Vil. Inc.*, 14 Civ 6760 [KPF], 2015 WL 255599 [SD NY 2015], citing *Bhumithanarn v 22 Noodle Mkt. Corp.*, 14 Civ 2625 [RJS], 2015 WL 4240985, *4 [SD NY 2015]; *Gonzalez v Scalinatella, Inc.*, 13 Civ 3629 [PKC], 2013 WL 6171311, *3 [SD NY 2013]; *Hernandez v Bare Burger Dio Inc.*, 12 Civ 7794 [RWS], 2013 WL 3199292, *3 [SD NY 2013]; *see also Salomon v Adderley Indus., Inc.*, 847 F Supp 2d 561, 563 [SD NY 2012], citing *Moore v Eagle Sanitation, Inc.*, 276 FRD 54, 59 [ED NY 2011]). While plaintiffs cannot rely on unsupported assertions to satisfy the modest factual showing, courts regularly rely on plaintiffs' affidavits and hearsay statements in determining the propriety of sending notice (*see Hussein v Headless Widow LLC, No.* 24-CV-04658 [LJL], 2024 WL 5078317, at *5 [SD NY 2024] ["Courts in this Circuit regularly conditionally certify a FLSA collective brought by a single named Plaintiff and supported by a single affidavit relaying conversations with only a small handful of other employees]; *see also Lorenzo v Dee Mark Inc.*, 702 F. Supp. 3d 194, 203 [SD NY 2023]).

Plaintiff seeks to certify a collective comprised of the front staffers and helpers, including all non-exempt and non-managerial positions, at all of Defendants' restaurants who are employed or were employed from December 22, 2020, three years prior to the filing of this instant action, to the present date. In his affidavit, Plaintiff names and identifies several coworkers and alleges he observed his coworkers work hours in excess of forty (40) hours a week, that he had discussions with them about their flat weekly or monthly pay despite varying work hours, that they worked at different restaurants owned by defendants depending on staffing needs, and that they never received notices regarding regular and overtime rates of pay or paystubs with their pay (NYSCEF Doc No. 33). The Court finds that Plaintiff has made the requisite modest factual showing sufficient to conditionally certify the class, demonstrating that the alleged policies affected other employees who are "similarly situated" (*see Hernandezv Bare Burger Dio Inc.*, 2013 WL 3199292, at *3 [SD NY 2013]; *Ramos v Platt*, 2014 WL 3639194, at *2 [SD NY 2014]). Accordingly, the Court conditionally certifies a collective action of the front staffers and helpers, including all non-exempt and non-managerial positions, current and former employees, of all of Defendants' restaurants who were employed at any time from December 22, 2020 to the present.

Finally, Plaintiff seeks leave to amend the complaint pursuant to CPLR 3025 to include the claims of any opt-in plaintiffs who may join this action. However, plaintiff neither provides nor can presently provide a proposed amended complaint, as it is unknown what amendments would be necessary at this stage. Accordingly, plaintiff's motion for leave to amend, pursuant to CPLR 3025, is denied as premature, with leave to renew upon the joinder of any opt-in plaintiff (*see Chang v First American Title Ins. Co. of New York*, 20 AD3d 502, 502 [2d Dept 2005] ["The Supreme Court providently exercised its discretion in denying the plaintiff's motion for leave to serve an amended complaint since she did not provide a copy of her proposed amended complaint, and the proposed amendment was palpably insufficient"]; *He v Apple, Inc.*, 189 AD3d 1984, 1987 [3rd Dept 2020]; *see also Ding v Mask Pot Inc.*, 347 F.R.D. 417, 438 [ED NY 2024]).

Accordingly, it is

ORDERED that the branch of Plaintiff's motion (mot. seq. 3) seeking to extend the time to move for class certification is granted, and it is further

ORDERED that the branch of Plaintiff's motion (mot. seq. 3) seeking conditional class certification and pre-class discovery, is granted, and it is further

ORDERED that the branch of Plaintiff's motion (mot. seq. 3) seeking to amend the complaint to include potential opt-in plaintiffs' claims is denied as premature with leave to renew, and it is further

ORDERED that within fourteen (14) days of this order, Defendants shall produce a computer-readable data file containing the names, last known mailing addresses, all known home and mobile telephone numbers, all known email addresses, and dates of employment of all potential opt-in plaintiffs. If Defendants do not possess such information, Defendants shall file (within 14 days of this order) a declaration from their records custodian that no such information exists; and it is further

ORDERED that the parties are to appear for a Conference on January 5, 2026 to discuss the form, substance, and dissemination of the notice to be sent to potential opt-in plaintiffs, and set forth a schedule for pre-certification discovery as well as plaintiff's time for moving for class certification; and it is further

ORDERED that Defendant's cross-motion (mot. seq. 5) to strike the December 16, 2024 Amended Complaint is denied in its entirety, and it is further

ORDERED that Plaintiff's counsel is directed to electronically serve a copy of this decision/order with notice of entry on the Defendants' respective counsel and to electronically file an affidavit of service with the Kings County Clerk.

This constitutes the Decision and Order of this Court.

Hon. Ingrid Joseph JSC

Hon. Ingrid Joseph
Supreme Court Justice

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