

<b>Lopez v Movers, Not Shakers! Inc.</b>
2026 NY Slip Op 31300(U)
March 17, 2026
Supreme Court, Kings County
Docket Number: Index No. 530633/2022
Judge: Richard J. Montelione
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At IAS Part 99 of the Supreme Court  
of the State of New York, held in and  
for the County of Kings, at the  
Courthouse located at 360 Adams  
Street, Brooklyn, NY 11201, on the  
~~17<sup>th</sup>~~ day of March 2026.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 99

**DECISION  
and  
ORDER**

-----X  
WILLIAM J. LOPEZ AND MARCUS E. LOPEZ,

Plaintiffs,

-against-

Index No.: 530633/2022  
Mot. Seq. No.: 4

MOVERS, NOT SHAKERS! INC. and MARK EHRHARDT,

Defendants.  
-----X

After oral argument, the following papers were read on this motion pursuant to CPLR 2219(a):

<u>Papers</u>	NYSCEF DOC. #
Summons and Complaint.....	1
Plaintiffs' Notice of Motion Pursuant to CPLR 3211(b) to Dismiss Defendants' Affirmative Defenses/Affirmation in Support of John E. Icklan affirmed on November 12, 2024.....	45-46
Affirmation in Opposition affirmed by Emanuel Kataev, Esq. on June 11, 2025.....	55
Affirmation in Reply affirmed by John E. Icklan on June 17, 2025.....	56
Other.....	

MONTELIONE, RICHARD J., J.

This action was commenced on October 21, 2022, by Plaintiffs William J. Lopez and Marcus E. Lopez against Defendants Movers, Not Shakers! Inc. and Mark Ehrhardt (NYSCEF Doc # 1). The Complaint alleges five causes of action: (1) Violation of the New York Labor Laws, including unpaid wages, unpaid overtime wages, spread of hours, and late payment of hours (NYSCEF Doc # 1, pg. 5, ¶¶ 34-41); (2) Failure to provide wage notices under New York Labor Law Section 195(1) (NYSCEF Doc # 1, pg. 5-6, ¶¶ 42-46); (3) Failure to provide wage statements under New York Labor Law Section 195(3) (NYSCEF Doc # 1, pg. 6, ¶¶ 47-50); (4)

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Retaliation Under New York Labor Law (NYSCEF Doc # 1, pg. 7, ¶¶ 51-58); and (5) Failure to Pay Timely under New York Labor Law Section 191 et seq. (NYSCEF Doc # 1, pg. 7-8, ¶¶ 59-63). Issue is joined.

Defendants Movers, Not Shakers! Inc. and Mark Ehrhardt filed their Verified Answer on November 9, 2024 (NYSCEF Doc # 43).

In Motion Seq. # 4, Plaintiffs William J. Lopez and Marcus E. Lopez move for an order pursuant to CPLR § 3211(b) dismissing Defendants' First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-First, Twenty-Second, Twenty-Third, Twenty-Fifth, Twenty-Seventh, and Twenty-Eighth Affirmative Defenses, together with such other and further relief as the Court deems just and proper (NYSCEF Doc # 45, Notice of Motion).

#### Background

Plaintiffs William J. Lopez and Marcus E. Lopez allege that they were employed by Defendants Movers, Not Shakers! Inc. and its owner/manager Mark Ehrhardt as manual laborers as defined by the New York Labor Law (NYSCEF Doc # 1, ¶¶ 2-4, 21). Plaintiffs further allege that their work was directly essential to Defendants' moving business and that Defendants knowingly and willfully failed to pay them lawfully earned compensation in contravention of the New York Labor Law (NYSCEF Doc # 1, ¶¶ 6-7).

Plaintiff William J. Lopez alleges that he began working for Defendants in or about November 2017 as a helper and that he was paid \$125 per day in 2017 and \$150 per day from 2018 through 2022 (NYSCEF Doc # 1, ¶¶ 8-11). Plaintiff Marcus E. Lopez alleges that he also began working for Defendants in or about November 2017 as a helper, that he was paid \$125 per day in 2017, \$150 per day in 2018, \$175 per day in 2019 after becoming a driver/foreman, \$185 per day in 2020, and \$200 per day in 2021–2022 (NYSCEF Doc # 1, ¶¶ 12-19). Plaintiffs allege that throughout their employment they worked a minimum of 10 hours per shift (NYSCEF Doc # 1, ¶ 20).

Plaintiffs further allege that New York Labor Law § 191 required Defendants to pay manual workers weekly and no later than seven calendar days after the end of the week in which wages were earned, but that Defendants failed to pay Plaintiffs with the required frequency (NYSCEF Doc # 1, ¶¶ 22-23). Plaintiffs also allege that Defendants maintained a policy of not paying them at the overtime rate for hours worked over forty in a workweek and of not paying the additional hour of pay required for working more than ten hours in a day (NYSCEF Doc # 1, ¶¶ 27-28, 36-38).

Plaintiffs allege that Defendants failed to maintain accurate and sufficient time records, failed to provide wage statements accurately accounting for hours worked and pay rates, and willfully evaded recordkeeping requirements of the New York Labor Law in order to disguise

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the actual number of hours worked (NYSCEF Doc # 1, ¶¶ 29-32, 48-50). Plaintiffs claim that Defendants failed to provide the written wage notice required by NYLL § 195(1) within ten days of the start of their employment (NYSCEF Doc # 1, ¶¶ 43-44).

With respect to retaliation, Plaintiffs allege that on or about July 18, 2022, William J. Lopez complained to Mark Ehrhardt that employees with greater seniority, including himself, were receiving fewer work shifts than newer employees, and that Defendants terminated William J. Lopez on or about that date and terminated Marcus E. Lopez shortly thereafter (NYSCEF Doc # 1, ¶¶ 52-54). Plaintiffs allege that these terminations constituted unlawful retaliation under NYLL § 215 for engaging in protected activity by complaining about work shifts, and that notice of this retaliation claim was served on the New York State Attorney General on October 21, 2022 (NYSCEF Doc # 1, ¶¶ 55-58).

### Discussion

Plaintiffs, argue that twenty-four of Defendants' twenty-eight affirmative defenses are procedurally barred and/or legally meritless and therefore should be stricken under CPLR § 3211(b). Plaintiffs contend that the First Affirmative Defense (failure to state a cause of action) must be dismissed because the Court has already denied Defendants' prior CPLR § 3211(a)(7) motion to dismiss in its entirety and thus determined that the Complaint adequately states claims under the Labor Law (NYSCEF Doc # 46, ¶¶ 4-6, 10; NYSCEF Doc # 56, ¶¶ 7-10). Plaintiffs further argue that the Second Affirmative Defense (statute of limitations) is legally meritless because all alleged misconduct occurred between November 2017 and July 2022, the action was commenced on October 21, 2022, and Labor Law claims carry a six-year statute of limitations, and that in any event Defendants waived this defense by failing to raise it in their prior pre-answer motion, citing CPLR §§ 3211(a)(5) and (e) (NYSCEF Doc # 46, ¶¶ 11; NYSCEF Doc # 56, ¶¶ 12-18).

As to the Third, Fourth, Fifth, and Sixth Affirmative Defenses (waiver, estoppel, laches, and unclean hands) plaintiffs argue that they are inapplicable to wage and retaliation claims under the Labor Law and are pleaded only as bare legal conclusions without supporting facts. They also contend that estoppel and unclean hands, to the extent treated as jurisdictional or equitable bars, were waived by not being raised in the earlier CPLR § 3211 motion and that unclean hands is unavailable because this is an action solely for money damages (NYSCEF Doc # 46, ¶¶ 12-14; NYSCEF Doc # 56, ¶¶ 19-24). Plaintiffs further assert that the Seventh, Ninth, Tenth, and Eleventh Affirmative Defenses—improper service, insufficiency of allegations to support attorneys' fees, lack of standing, and failure to give notice—are likewise legally defective and, for the jurisdictional theories, waived by omission from Defendants' pre-answer motion. Plaintiffs point to affidavits of service and the Labor Law's express attorneys'-fee and standing provisions to argue that these defenses cannot succeed (NYSCEF Doc # 46, ¶¶ 15-18; NYSCEF Doc # 56, ¶¶ 25-28).

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With regard to the Thirteenth, Fourteenth, Eighteenth, and Twenty-Second Affirmative Defenses (lack of proximate cause, bankruptcy, failure to report hours under policies, and lack of knowledge of hours worked) plaintiffs argue that they are meritless in light of the nature of Labor wage and retaliation claims, and that Defendants' bankruptcy defense fails because nothing in the Bankruptcy Code bars Plaintiffs' claims even if Plaintiffs' had filed for bankruptcy (NYSCEF Doc # 46, ¶¶ 19–21; NYSCEF Doc # 56, ¶¶ 29–33). Finally, Plaintiffs contend that the Fifteenth, Sixteenth, Seventeenth, Nineteenth, Twentieth, Twenty-First, Twenty-Third, Twenty-Fifth, Twenty-Seventh, and Twenty-Eighth Affirmative Defenses are not true affirmative defenses but merely restate denials or attempt to reserve unspecified future defenses, and thus should be stricken under CPLR § 3018(b).

In contrast, Defendants argue that Plaintiffs' CPLR § 3211(b) motion is disfavored and premature and that all of the challenged affirmative defenses should remain in the case, at least until the completion of discovery. Defendants contend that, under CPLR §§ 3013 and 3014, affirmative defenses may be pleaded in “boilerplate” form so long as they give fair notice and may be stated alternatively or hypothetically, and that courts routinely deny motions to dismiss affirmative defenses as premature, especially where discovery might develop facts supporting those defenses (NYSCEF Doc # 55, ¶¶ 6–11, 17–21).

With respect to the First Affirmative Defense (failure to state a cause of action), Defendants argue that New York practice permits this defense to be asserted in an answer and that it may be raised at any time up to and including trial. They rely on appellate authority holding that a plaintiff may not use CPLR § 3211(b) to test the sufficiency of its own pleading and that inclusion of this defense does not prejudice Plaintiffs (NYSCEF Doc # 55, ¶¶ 12–14). As to the Second Affirmative Defense (statute of limitations), Defendants assert that it must remain because, without it, Defendants could be deemed to have waived the limitations defense if Plaintiffs later testify to work performed outside the applicable limitations period (NYSCEF Doc # 55, ¶¶ 15–16).

Defendants further contend that the Third, Fourth, Fifth, and Sixth Affirmative Defenses (waiver, estoppel, laches, and unclean hands) should not be stricken because it is too early to determine whether there was any unreasonable or inexcusable delay or other equitable circumstances, and that Plaintiffs have not met their burden to show these defenses lack merit as a matter of law (NYSCEF Doc # 55, ¶¶ 16–18).

As to their remaining affirmative defenses—including those relating to bankruptcy, good-faith payment, recordkeeping, exemption from overtime, and a “catch-all” reservation of the right to assert additional defenses—Defendants argue more generally that they are properly pleaded, may be supported by facts developed in discovery, and should not be dismissed where any doubt exists as to their availability (NYSCEF Doc # 55, ¶¶ 19–24). In the alternative, Defendants request that, if any affirmative defense is stricken, they be granted leave to replead and serve an amended answer asserting any defenses supported by the evidence (NYSCEF Doc # 55, ¶¶ 25–28).

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### Legal Analysis

CPLR § 3211(b) permits a party to move to dismiss one or more defenses “on the ground that a defense is not stated or has no merit.” CPLR § 3211[b]. “When moving to dismiss, the plaintiff bears the burden of demonstrating that the affirmative defenses ‘are without merit as a matter of law because they either do not apply under the factual circumstances of the case, or fail to state a defense’” *Diversified Building Co., LLC v Nader Enterprises, LLC*, 243 AD3d 542, 543 [2d Dept 2025], citing *Shah v Mitra*, 171 AD3d 971, 974 [2d Dept 2019]. “On a motion pursuant to CPLR 3211(b) the court should apply the same standard it applies to a motion to dismiss pursuant to CPLR 3211(a)(7), and the factual assertions of the defense will be accepted as true... Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed” *Wells Fargo Bank, N.A. v Rios*, 160 AD3d 912, 913 [2d Dept 2018] [internal citations omitted].

That branch of the motion in which Plaintiffs seek to dismiss Defendants’ First affirmative defense of failure to state a cause of action is DENIED. Although Plaintiffs argue that the Court’s prior order denying Defendants’ CPLR § 3211(a)(7) motion establishes as law of the case that the Complaint states claims under the Labor Law, the Appellate Division Second Department has consistently held that “No motion by the plaintiff lies under CPLR 3211(b) to strike the defense [of failure to state a cause of action], as this amounts to an endeavor by the plaintiff to test the sufficiency of his or her own claim” *Ochoa v Townsend*, 209 Ad3d 867, 868 [2d Dept 2022].

That branch of the motion in which Plaintiffs seek to dismiss Defendants’ Second affirmative defense of statute of limitations is GRANTED. Plaintiffs have demonstrated that their Labor Law claims concern alleged underpayment and retaliation from November 2017 through July 2022, that the action was commenced on October 21, 2022, and that Labor Law § 663 provides a six-year limitations period, making all pleaded claims timely on the face of the Complaint. Plaintiffs further demonstrate that the statute-of-limitations ground, as a CPLR § 3211(a)(5) defense, was not raised in Defendants’ pre-answer motion and is therefore waived under CPLR § 3211(e).

That branch of the motion in which Plaintiffs seek to dismiss Defendants’ Third, Fourth, Fifth, and Sixth affirmative defenses (waiver, estoppel, laches, and unclean hands) is GRANTED. These equitable doctrines are inapplicable to statutory wage and retaliation claims under New York Labor Law. Plaintiffs also show that estoppel, as a CPLR § 3211(a)(5) ground, was waived by omission from Defendants’ pre-answer motion, invoking CPLR §§ 3211(a)(5) and (e). With respect to unclean hands, Plaintiffs correctly note that this doctrine is limited to equitable cases, whereas this action seeks only money damages. *See Wells Fargo v Hodge*, 92 AD3d 775, 776 [2d Dept 2012][Doctrine of unclean hands bars the grant of equitable relief to a party guilty of immoral or unconscionable conduct where the conduct is directly related to the subject matter being litigated]. In light of the inapplicability of these defenses to the facts of this case, these defenses are stricken.

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That branch of the motion in which Plaintiffs seek to dismiss Defendants' Seventh, Ninth, Tenth, and Eleventh affirmative defenses (improper service; insufficiency of allegations to support attorneys' fees; lack of standing; and failure to give proper and timely notice) is GRANTED. Plaintiffs demonstrated that service-related and standing-related objections are jurisdictional and must be raised either in a CPLR § 3211(a) motion or in the answer, and that improper service and notice-based objections were omitted from Defendants' earlier motion, thereby waiving those grounds under CPLR § 3211(e). Plaintiffs also point to affidavits of service and defense counsel's appearance, which undermines the Seventh defense factually. As to attorneys' fees and standing, New York Labor Law § 663(1)(4), expressly authorize employees to recover fees and gives private parties standing to prosecute wage claims, demonstrating that the Ninth and Tenth defenses fail as a matter of law.

That branch of the motion in which Plaintiffs seek to dismiss Defendants' Thirteenth, Fourteenth, Eighteenth, and Twenty-Second affirmative defenses (lack of proximate cause; bankruptcy; bar as to hours not reported under policies; and bar as to hours of which Defendants lacked knowledge) is GRANTED. In a case alleging violations of the New York Labor Law by Defendants as employers, it is inconsistent to assert that any proven wage loss was not proximately caused by Defendants' acts or omissions, rendering the Thirteenth defense without merit as a matter of law. Similarly, the Eighteenth and Twenty-Second defenses—seeking to bar recovery for hours not reported under “policies or procedures” or of which Defendants lacked knowledge—run counter to statutory recordkeeping obligations and do not, on their face, constitute a complete defense to claims that Defendants themselves allegedly failed to maintain accurate records. Defendants offer no specific factual or legal explanation of how these defenses could defeat Plaintiffs' Labor Law claims. As to the Fourteenth defense, it fails because nothing in the Bankruptcy Code bars plaintiffs' claims and Defendants' reliance on *Doe v Cahill*, No. 20 Civ. 3908 (KPF), 2021 WL 3501196, at \*7 (S.D.N.Y. Aug. 9, 2021), is misplaced as it merely illustrates judicial estoppel where claims were omitted from a bankruptcy petition, not any conduct attributable to these Plaintiffs.

That branch of the motion in which Plaintiffs seek to dismiss Defendants' Fifteenth, Sixteenth, Seventeenth, Nineteenth, Twentieth, Twenty-First, Twenty-Third, Twenty-Fifth, and Twenty-Seventh affirmative defenses (employee status, employer status, payment in full, good faith, lack of willfulness, recordkeeping, accord and satisfaction, and overtime exemption) is GRANTED. In *U.S. Bank N.A. v. Nelson*, 169 AD3d 110 [2d Dept 2019], the Court stated that matters that simply negate elements of the plaintiff's case are not proper affirmative defenses and should be stricken.

That branch of the motion in which Plaintiffs seek to dismiss Defendants' Twenty-Eighth affirmative defense (reservation of rights to assert additional defenses) is GRANTED. “A party cannot employ a catch-all provision in an attempt to preserve any and all potential defenses/objections for future use without affording notice to the opposing party”. *Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75 [1st Dept 2015]. Therefore, the Twenty-Eighth

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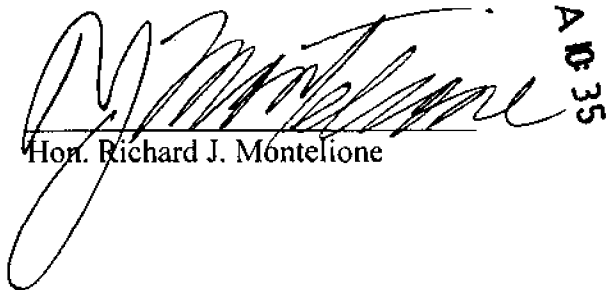
defense is stricken; Defendants may separately move to amend if discovery later justifies additional, properly articulated defenses.

For the foregoing reasons, it is hereby

ORDERED, that Motion Seq. #4 is granted to the extent that defendants' Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-First, Twenty-Third, Twenty-Fifth, Twenty-Seventh, and Twenty-Eighth affirmative defenses are dismissed, and is otherwise denied; and it is further

This constitutes the decision and order of the Court.

ENTER

  
Hon. Richard J. Montelione

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