

SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: ~~FRANKLIN CANN~~

PART 49

0601973/2004

LAMARCA, BENEDETTO
VS
GREAT ATLANTIC & PACIFIC TEA
SEQ 1
DISMISS ACTION

INDEX NO. _____
ACTION DATE 12/13/04
ACTION SEQ. NO. 001
ACTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MAY - 5 2005

FILED

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS GRANTED IN ACCORDANCE
WITH RULE 120.1(b) AND WITH THE
DECISION IN MOTION SEQUENCE.....

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 5/1/05 John Cole

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

-----X

BENEDETTO LAMARCA, KENNETH PALMA, and Index No. 601973/04
DOLORES GUIDDY,

Individually, and on behalf of all others
similarly situated as Class Representatives,

Plaintiffs

-against-

THE GREAT ATLANTIC AND PACIFIC TEA COMPANY,
INC., d/b/a A&P, THE FOOD EMPORIUM, and
WALDBAUM'S,

Defendants.

-----X

CAHN, J.:

Defendants move to dismiss this action (CPLR 3211[a]{7}) for unpaid overtime wages on the ground that the Labor Law statute under which recovery is sought does not authorize a class action (CPLR 901[b]).

Plaintiffs are current and former employees of the defendants The Great Atlantic and Pacific Tea Company, The Food Emporium and Waldbaum's (collectively, the "Supermarkets"). The complaint alleges that the Supermarkets failed to pay overtime wages to full-time hourly employees that it either required or permitted to work more than 40 hours per week. Plaintiffs allege, inter alia, that defendants engaged in the regular practice of forcing or allowing employees to work "off-the-clock"

without compensation, and of making improper meal deductions from their paychecks. The complaint further alleges that defendants' conduct was part of a willful attempt to reduce payroll expenditures by understaffing stores and encouraging managers to extract uncompensated extra work from employees. Plaintiffs seek recovery on a class-wide basis under Labor Law § 650 et seq. for unpaid overtime wages at the rate of one and one-half times the regular rate of pay, plus the costs of this action, including attorneys' and expert fees.

Defendants move to dismiss on the ground that under CPLR 901(b), no class action may be maintained for the recovery of a statutory penalty, unless the relevant statute specifically authorizes class treatment. They assert that insofar as the Minimum Wage Act (Labor Law § 663) under which relief is sought contains a liquidated damages remedy but no provision for class action relief, the complaint must be dismissed.

The motion is denied. CPLR 901(b) provides, in pertinent part:

Unless 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 in a class action.

Section 663(1) of the Labor Law provides:

If any employee is paid by his employer less than the wage to which he is entitled under the provisions of this article, he may recover in a civil action the amount of any such underpayments, together with costs and such reasonable attorney's fees as may be allowed by the court, and if such underpayment was willful, an additional amount as liquidated damages equal to twenty-five percent of the total of such underpayments found to be due him and any agreement between him and his employer to work for less than such wage shall be no defense to such action.

The liquidated damages provision of Labor Law § 663 may not be the basis of a class action (see, Carter v Frito-Lay, Inc., 74 AD2d 550 [1st Dept 1980], aff'd 52 NY2d 994 [1981]). However, the complaint herein, very carefully omits any demand for liquidated damages. The fact that the Labor Law provides that remedy does not preclude plaintiffs from seeking other relief under the statute, as a class. The courts have specifically held that a class action for actual damages may be maintained under the Labor Law so long as claims for liquidated damages are waived (see, Pesantez v Boyle Environmental Svcs., Inc., 251 AD1d 11 [1st Dept 1998]; Jacobs v. Macy's East, Inc., __ AD2d __, 2005 WL 758142 [2d Dept 2005]; Noble v 93 Univ. Place, 2004 WL 944543 [SDNY 2004]; Ansoumana v Gristede's Operating Corp., 201 FRD 81 [SDNY 2001]; see also Cox v Microsoft Corp., 8 AD3d 39 [1st Dept 2004]; Weinberg v Hertz Corp., 116 AD2d 1 [1st Dept 1986]; Super

Glue Corp. v Avis Rent-a-Car Sys. Inc., 132 AD2d 604 [2d Dept 1987]; Ridge Meadows Homeowner's Assoc. v Tara Dev. Co., 242 AD2d 1997 [4th Dept 1997]).


The authorities cited by defendant do not require a different result. The rulings in Woods v Champion Courier, 10/9/1998 NYLJ 26 (Sup Ct NY Co 1998) and Foster v The Food Emporium, 2000 WL 1737858 [SDNY 2000]) each apparently disregarded the First Department holding in Pesantez, supra, and are not controlling here (see, Noble, supra at *6 ("defendant's reliance on Foster is misplaced"); Ansoumana, supra at 95 ["Pesantez states the correct rule and it is authoritative as the rule of decision to be followed"]).

Accordingly, it is

ORDERED, that the motion to dismiss is denied;

Dated: May 4, 2005

ENTER:


NEW YORK
COUNTY CLERK'S OFFICE
J.S.C.

FILED

MAY - 5 2005