

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE**

MINUTE ORDER

DATE: 10/28/2016

TIME: 09:00:00 AM

DEPT: 54

JUDICIAL OFFICER PRESIDING: Raymond Cadei

CLERK: D. Ahee

REPORTER/ERM: K. Sotelo

BAILIFF/COURT ATTENDANT: M. Oreschak

CASE NO: **34-2014-00163880-CU-OE-GDS** CASE INIT.DATE: 05/21/2014

CASE TITLE: **Camacho vs. Z Street Inc**

CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Motion for Judgment on the Pleadings - Civil Law and Motion - Demurrer/JOP

APPEARANCES

Galen T Shimoda, counsel, present for Plaintiff(s).

Erika R. C Sembrano, counsel, present for Plaintiff(s).

Christine H Long, counsel, present for Defendant(s).

Nature of Proceeding: Motion for Judgment on the Pleadings

TENTATIVE RULING

******NOTICE: DEPARTMENTS 53 AND 54 HAVE MOVED TO 813 6TH St., SACRAMENTO, CA, 2ND FLOOR. ALL PAPERS FOR DEPARTMENTS 53 AND 54 MUST BE FILED AT THIS NEW LOCATION AND WILL NOT BE ACCEPTED AT THE GORDON D. SCHABER COURTHOUSE. ALL HEARINGS WILL TAKE PLACE AT THIS NEW LOCATION*******

Defendants and Cross-Complainants Z Street, Inc. dba Tower Café and Jim Seyman (collectively "Defendants") Motion for Judgment on the Pleadings or, in the alternative, to Strike PAGA Claim or Portions Thereof is ruled upon as follows.

Defendants' request for judicial notice is granted as to Exhibit F. The Court need not address Defendants' remaining exhibits in their RJN, or any objections to evidence because such exhibits were not material to the Court's determination.

This is a putative class action for wage and hour claims. Plaintiffs' 7th cause of action ("COA") is for "Private Attorney General Act, Violation of Labor Code §§ 2699 *et seq.*" Plaintiffs allege that Defendants violated the following Labor Codes:

- Labor Code sections 226.7(c) and 512 (failure to provide meal periods)
- Labor Code section 226.7(c) (failure to provide rest periods)
- Labor Code section 1194 (failure to pay minimum wages and overtime wages earned)
- Labor Code section 226 (failure to provide accurate pay stubs)

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- Labor Code sections 201 -203 (failure to pay final wages)
- Labor Code section 558 (violation of provisions regulating hours and days of work pursuant to any Wage Order)
- Labor Code section 1174 (failure to keep accurate time records)

Defendants move for judgment on the pleadings on the ground that the COA should be dismissed for lack of jurisdiction because: (1) the Division of Labor Standards Enforcement ("DLSE") has already investigated violations of meal and rest period breaks and wage statements, and (2) Plaintiffs failed to exhaust their administrative remedies. Defendants alternatively move to strike portions of the COA based on the failure to provide adequate wage statements or to provide or properly compensate for meal or rest breaks.

DLSE Investigation

Defendants move for judgment on the pleadings on the ground that the DLSE has purportedly already investigated Plaintiffs' meal, rest period and wage statement violations. Defendants' motion, however, does not address all of the violations alleged in the COA. For example, Plaintiffs also allege that Defendants violated Labor Code section 558 (violation of provisions regulating hours and days of work pursuant to any Wage Order) and Labor Code section 1174 (failure to keep accurate time records). (See also Defendants' motion, p. 7, fn. 3 - seeking to only strike Plaintiffs' Violation of Labor Code §§ 226.7(c), 512, 1194, 226, and 201-203.) Like a demurrer, a motion for judgment on the pleadings must be made to the "entire complaint or cross-complaint or as to any of the causes of action stated therein." (CCP §438(c)(2).) Because the motion does not dispute of the entire complaint or an entire cause of action, the motion must be DENIED.

Defendants' alternative motion to strike is DENIED. First, the motion is untimely. CCP § 435(b)(1) states that a motion to strike must be filed and served "within the time allowed to respond to a pleading." Here, Plaintiffs' First Amended Complaint was filed and served on or about June 20, 2014, and Defendants filed their answer on or about September 25, 2014. Thus, the time to file a motion to strike has passed. Second, Defendants' reliance on CCP §435(e) is misplaced. CCP §435(e) allows a party to file a motion to strike as part of a motion made pursuant to CCP §438(i)(1)(A). CCP §438(i)(1)(A) is limited, however, to when a motion for judgment on the pleadings has been granted with leave to amend and the time to file the amended pleading has expired. The party may then move to strike the pleading and enter judgment in its favor. Here, the Court has not previously granted a motion for judgment on the pleadings. Thus, CCP §435(e) is inapplicable.

Failure to Exhaust Administrative Remedies

Defendants' motion judgment on the pleadings on the ground that Plaintiffs failed to exhaust their administrative remedies is DENIED.

On May 16, 2014, Plaintiffs sent written notice to Labor and Workforce Development Agency ("LWDA") and Defendants of the violations alleged in their complaint. (RJN, Ex. F.) Plaintiffs filed their First Amended Complaint ("FAC") on June 20, 2014. On June 25, 2014, LWDA sent a notice to Plaintiffs that it did not intend to investigate the allegations. (Id.)

Labor Code §2699.3 requires an aggrieved employee to give written notice to the Labor and Workforce Development Agency ("LWDA") and the employer of the employee's claims. In support of their motion, Defendants point to the current version of Labor Code §2699.3, which became effective on June 27,

2016. The current version provides:

The agency shall notify the employer and the aggrieved employee or representative by certified mail that it does not intend to investigate the alleged violation within 60 calendar days of the postmark date of the notice received pursuant to paragraph (1). Upon receipt of that notice or if no notice is provided within 65 calendar days of the postmark date of the notice given pursuant to paragraph (1), the aggrieved employee may commence a civil action pursuant to Section 2699.

(Labor Code §2699.3.) Defendants contend that Plaintiffs failed to exhaust their administrative remedies because Plaintiffs filed their FAC before LWDA sent their letter and before the statutory waiting period expired.

The Court disagrees because Defendants' erroneously rely on the current version of Labor Code §2699.3 rather than the prior version in place when Plaintiffs filed their FAC on June 20, 2014 - years before the current amendments became effective.

The prior version of Labor Code §2699.3 provided, in part, that if the LWDA does not provide notice that it intends to investigate the alleged violations within 33 calendar days of the postmark date of the notice given by the employee, then the employee may commence a civil action pursuant to Section 2699.

As noted above, Plaintiffs sent written notice to the LWDA on May 16, 2014. Thirty-three calendar days from May 16, 2014 is June 18, 2014. Having received no notice from LWDA within 33 days from Plaintiffs' notice letter, Plaintiffs properly filed their FAC on June 20, 2014. Additionally, Plaintiffs have alleged that they provided the requisite notice to the LWDA and that they received authorization to act on behalf of the Labor Commissioner to access civil penalties against Defendants. (FAC, ¶¶ 6, 66.)

The Court is also not convinced by Defendants' argument that because the original complaint was filed before the LWDA's letter, Plaintiffs did not exhaust their administrative remedies, and that the filing of the FAC did not cure the defect. Defendants rely only on non-binding, unpublished federal district court cases for this proposition.

The Court concludes that Plaintiffs have sufficiently shown and alleged that they exhausted their administrative remedies.

Disposition

Defendants' motion for judgment on the pleadings is DENIED. Defendants' alternative motion to strike is DENIED.

The Court declines to rule on Defendants' objections to evidence because the objected to evidence was not material to the Court's decision.

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or further notice is required.

The notice of motion does not provide notice of the Court's tentative ruling system, as required by Local Rule 1.06(A). Defendants' counsel is directed to contact Plaintiffs' counsel forthwith and advise counsel of Local Rule 1.06 and the Court's tentative ruling procedure. If Defendants' counsel is unable to contact Plaintiffs' counsel prior to hearing, Defendants' counsel shall be available at the hearing, in person or by telephone, in the event opposing party appears without following the procedures set forth in Local Rule 1.06(A).

COURT RULING

The matter was argued and submitted. The Court affirmed the tentative ruling.