



Ortiz et al v. Eskina 214 Corp. et al

2021 | Cited 0 times | S.D. New York | November 2, 2021

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

-----X RICARDO ORTIZ, HENRY FLORES, AND
MARIO FLORES, on behalf of themselves and all others similarly situated,

Plaintiffs, -against- ESKINA 214 CORP. d/b/a CAFÉ TABACO & RON, ISMAEL GARCIA, AND
WILLIAM SEGURA,

Defendants. -----X KATHARINE H. PARKER,
United States Magistrate Judge:

Plaintiffs Ricardo Ortiz, Henry Flores, and Mario Flores, individually and on behalf of all others
similarly situated, brings this action against Defendants Eskina 214 Corp. d/b/a Café ‘ Defendants
currently own and operate a restaurant called Café Tabaco located at 501 West

214 th

Street in New York City. Plaintiffs claim that Defendants violated the Fair Labor Standards et seq
Plaintiffs and other non-managerial employees all wages due, including overtime, failing to pay

their wages within the statutorily prescribed period, and failing to comply with other requirements
of the NYLL. (ECF No. 1.)

Plaintiffs have moved for conditional certification of their FLSA claims as a collective action and
leave to disseminate notice to the putative FLSA collective, pursuant to 29 U.S.C. § 216(b). They
-exempt employees, (including but not

21-CV-01537(ALC) (KHP)

ORDER & OPINION ON CONDITIONAL CERTIFICATION

limited to delivery persons, waiters, servers, hosts, bartenders, barbacks, bouncers, porters, runners,
busboys, food preparers, chefs, cooks, and dishwashers) employed by Defendants on (ECF 1 ¶ 19.)
Plaintiffs propose a form of notice and ask for production of identifying information so that their
proposed notice may be sent to all putative members of the collective. Plaintiffs also move for
equitable tolling of the FLSA claims in conjunction with their motion for conditional certification.



Ortiz et al v. Eskina 214 Corp. et al

2021 | Cited 0 times | S.D. New York | November 2, 2021

Defendants have failed to submit an opposition to the motion, and the time for a response has passed. As discussed below, Plaintiffs' part.

BACKGROUND Ortiz worked as a cook for Defendants from in or about January 2010 to about March 2020. (Ortiz Decl. ¶ 1.) Henry Flores worked for Defendants as a chef from in or about May 2010 to around March 2020. (Henry Flores Decl. ¶ 1.) Mario Flores worked as a cook for Defendants from in or around January 2014 to around March 2020. (Mario Flores Decl. ¶ 1.) In support of their motion for conditional certification, Plaintiffs submitted sworn affidavits addressing the factual basis for their claims and appending payroll statements and earning describe the pay practices of Defendants and state that they spoke with other employees of Defendants who were in other non-exempt positions about the wages they were paid and learned that their co-workers also were improperly paid. Their affidavits specify the names and positions of the co-workers who shared information

about their wages. These co-workers held positions such as food preparer, waitress, server, busser, dishwasher, hookah prep, bartender, and valet parking attendant. In sum, the Plaintiffs attest to working more than forty hours per week, being paid a fixed salary regardless of hours worked and never being informed that the salary was intended to cover overtime hours. They also attested to paychecks bouncing and being paid late. They each attested to discussing employees also were not paid overtime.

DISCUSSION

I. Collective Action Certification Legal Standard

Section 216(b) of the FLSA provides that parties suing under Sections 206 and 207 may 29 U.S.C. § 216(b). A proceeding brought under Section 216 is traditionally referred to as a

See, e.g., *Myers v. Hertz Corp.*, 624 F.3d 537, 555 n.10. (2d Cir. 2010). Although the statute itself does not prescribe the process for collective action approval, see, to implement 29 U.S.C. § 216(b) . . . by *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 169 (1989); accord *Myers*, 624 F.3d at 554-55. Orders authorizing notice to potential collective

even though the FLSA itself does not mandate certification. See, e.g., *Myers*, 624 F.3d at 555 n.10; *Guillen v. Marshalls of MA, Inc.*, 750 F. Supp. 2d 469, 475 (S.D.N.Y. 2010). The dissemination of notice in an FLSA collective action is in fact a case management tool that

economic justice. See *Myers*, 624 F.3d at 555 n.10. The United States Court of Appeals for the Second Circuit has endorsed a two-stage process for certification of a collective action under Section 216(b) of the FLSA. *Myers*, 624 F.3d at 554- first step involves the court making an initial determination to send notice to potential opt- *Id.* at 555. Plaintiffs can meet this burden by making a



Ortiz et al v. Eskina 214 Corp. et al

2021 | Cited 0 times | S.D. New York | November 2, 2021

modest factual showing sufficient to demonstrate that they and potential plaintiffs together Lijun Geng v. Shu Han Ju Rest. II Corp., No. 18-cv-12220 (PAE) (RWL), 2019 WL 4493429, at *6 (S.D.N.Y. Sept. 9, 2019) (quoting Hoffman v. Sbarro, Inc., 982 F. Supp. 249, 261 (S.D.N.Y. 1997)). The modest factual showing can, or the affidavits and Hallissey v. Am. Online, Inc., No. 99-cv-3785 (KTD), 2008 WL 465112, at *1 (S.D.N.Y. Feb. 19, 2008) (citing, 2007 WL 1552511 at *4 (S.D.N.Y. Apr. 26, 2007)). Plaintiffs and the other putative collective Martin v. Sprint/united Mgmt. Co., No. 15-cv-5237 (PAE), 2016 WL 30334, at *5

(S.D.N.Y. Jan. 4, 2016) (citation omitted).

If the Court finds that the potential plaintiffs appear to be similarly situated, it will issue notice and permit the case to proceed through discovery as a collective action. See, e.g., id; Lynch v. United Servs. Auto. Ass., 491 F. Supp. 2d 357, 368 (S.D.N.Y. 2007). However,

conditional certification is not mandatory and lies within the discretion of the Court. See, e.g., Schucker v. Flowers Foods, Inc., No. 16-cv-3439 (KMK), 2017 WL 3668847, at *5 (S.D.N.Y. Aug. 24, internal quotation marks omitted); Auffray v. FXFL, LLC, No. 15-CV-9379 (GHW), 2016 WL

t a motion for conditional certification of an FLSA collective action lies within the discretion of the district court. . . . [C]conditional certification . . . is not mandatory, even where named plaintiffs are able to show that they are similarly situated to potential opt- See, e.g., Lynch, 491 F. Supp. 2d at

Michael v. Bloomberg L.P., No. 14-cv-2657 (TPG), 2015 WL 1810157, at *2 (S.D.N.Y. Apr. 17, 2015). It merely determines whether the plaintiff has made the minimal showing necessary for court-authorized notice. See, e.g., id. at *1; Damassia v. Duane Reade, Inc., No. 04-cv-8819 (GEL), 2006 WL 2853971, at *3 (S.D.N.Y. Oct. 5, 2006) (collecting cases). In keeping with the minimal showing standard, FLSA collective actions have been See, e.g., Bhumithanarn v. 22 Noodle Mkt. Corp., No. 14-cv-2625 (RJS), 2015 WL 4240985, at *4 (S.D.N.Y. July 13, 2015); Hernandez v. Bare Burger Dio Inc., No. 12-cv-7794 (RWS), 2013 WL 3199292, at *3-4 (S.D.N.Y. June 25, 2013) (granting conditional certification and collecting cases). However, certification is not automatic.

See, e.g., Guillen, 750 F. Supp. 2d at 476-80 (denying certification at the first stage); see also Zeledon v. Dimi Gyro LLC, No. 15-cv-7301 (TPG) (DF), 2016 WL 6561404, at *1, *8 12 (S.D.N.Y. Oct. 13, 2016) (conditionally certifying a class of salaried delivery persons who worked at a single location based on the plaintiff's affidavit, but denying certification as to other categories of employees). A plaintiff cannot meet his or her burden through unsupported assertions or conclusory allegations. See, e.g., Myers, 624 F.3d at 555; Morales v. Plantworks, Inc., No. 05-cv-2349 (DC), 2006 WL 278154, at *2-3 (S.D.N.Y. Feb. 2, 2006).

At the second stage, the district court conducts a more stringent analysis, based on the record developed through discovery, to determine whether the collective action should proceed. Myers - the



Ortiz et al v. Eskina 214 Corp. et al

2021 | Cited 0 times | S.D. New York | November 2, 2021

the opt- Id. This second stage inquiry is

the actual plaintiffs brought into *Cunningham v. Elec. Data Sys. Corp.*, 754 F. Supp. 2d 638, 645 (S.D.N.Y. 2010) (emphasis in original) (quoting *Gortat v. Capala Bros., Inc.*, No. 07-cv-3629 (ILG), 2010 WL 1423018, at *10 (E.D.N.Y. Apr. 9, 2010)); accord *Myers*, 624 F.3d at 555.

II. Application of Conditional Certification Standard to this Case Having carefully reviewed the information submitted by Plaintiffs, this Court finds that Plaintiffs have met the minimal burden necessary for conditional certification of their FLSA claims as to -managerial 1

employees who include, but are not limited to

1 The Court uses the term non-managerial rather than non-exempt because non-exempt is a legal term that may be confusing to individuals who receive notice.

delivery persons, waiters, servers, hosts, bartenders, barbacks, bouncers, porters, runners, busboys, food preparers, chefs, cooks, and dishwashers. They have listed various other employees in various positions who also complained about not being paid overtime or being paid a fixed salary regardless of hours worked. They have stated in general when and where have provided copies of pay records that do not break out overtime hours from regular hours

or that fail to include the amount of hours worked in a pay period and that even appear to treat This is a sufficient showing to demonstrate that the non-managerial employees at the restaurant may be similarly situated as to an FLSA violation and to obtain conditional certification. III. Time Period

Plaintiffs request a six-year notice period. The statute of limitations applicable to a claim for unpaid wages and/or overtime compensation under the FLSA is two years from the date that the claim accrued or three years for a cause of action arising out of a willful violation. 29 U.S.C. § 255(a); *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 141 (2d Cir. 1999). At the conditional certification stage, allegations of willful FLSA violations are sufficient to apply the three-year statute of limitations for purposes of sending a notice to putative members of the collective. *Francis v. A & E Stores, Inc.*, No. 06-cv-1638 (CLB) (GAY), 2008 WL 2588851, at *3 (S.D.N.Y. June 26, 2008), adopted as modified, 2008 WL 4619858 (S.D.N.Y. Oct. 16, 2008).

The New York Labor Law provides for a six-year statute of limitations. N.Y. Labor Law § 198(3). Although the Complaint in this action asserts violations of both federal and state law,

the conditional certification procedure is specific to the FLSA. 29 U.S.C. § 216(b). It notifies others of their right to opt-in to a collective action. There is no similar procedure under the New York Labor Law. Rather, to certify a class under the state law, the requirements of Fed. R. Civ. P. 23 must be met, and once certified, class members are bound by the determinations of the court unless they opt-out.



Ortiz et al v. Eskina 214 Corp. et al

2021 | Cited 0 times | S.D. New York | November 2, 2021

Pino v. Harris Water Main & Sewer Contractors Inc., 2021 WL 3675148 (E.D.N.Y. Aug. 19, 2021) (discussing different standards for collective certification under FLSA and class certification of New York Labor Law claims under Rule 23); Martinez v. JVA Industries Inc., 2021 WL 1263133 (S.D.N.Y. Apr. 6, 2021) (nothing that the analysis for certifying common questions of law and) (quoting Myers, 624 F.3d at 556).

Sending notice to all non-managerial employees employed at any time in the six-year period preceding the filing of the complaint to the date of the notice could lead to confusion, as some individuals may not have timely claims under the FLSA and the opt-in notice does not relate to state claims. See, e.g., Nelson Duran v. R&L Interior Renovations and Construction Corp., 2021 WL 4847074 (S.D.N.Y. Oct. 18, 2021) (declining to approve six-year notice period in connection with conditional certification of FLSA claims); Benavides v. Serenity Spa NY Inc., 166 F. Supp 3d 474, 484 (S.D.N.Y. 2016) (same). Accordingly, the Court declines to authorize a six- year notice period. Instead, a three-year notice period will be approved because the Plaintiffs have alleged a willful violation. The Complaint in this action was filed on February 19, 2021, so the three-year statute of limitations period extends back to February 19, 2018.

IV. Notice Form

Plaintiffs provide a form of Notice which reflects a six-year period for the proposed - - rulings above, the form must be revised to reflect the three-year notice period and substitute

- - submit a revised form of proposed notice within two weeks of this Order. Plaintiffs have requested that the notice be translated to Spanish because many of the employees at the restaurant were Spanish speakers. The Court agrees that the goals of notice would be best served if the final notices is also provided in Spanish and approves sending of the notice in both English and Spanish. See Cuzco v. Orion Builders, Inc., 477 F. Supp. 2d 628, 634 (S.D.N.Y. 2007). V. Production of Contact Information and Scope of Notice

Plaintiffs have requested that Defendants be ordered to provide putative collective titles, compensation rates, date of employment, last known mailing addresses, email addresses, and phone numbers. Courts in this district routinely allow Plaintiffs to receive contact information of putative collective members, including last known addresses, telephone numbers, and emails. See, e.g., Martin, 2016 WL 30334, at *20 (ordering the production of names, mailing addresses, telephone numbers, email addresses, and dates of employment); In re Penthouse Exec. Club Comp. Litig., No. 10-cv-1145 (NRB), 2010 WL 4340255, at *5 (S.D.N.Y. Oct. 27, 2010) (ordering the production of names, mailing addresses, telephone numbers, and dates of employment). This Court is not aware of authority supporting disclosure of compensation rates in connection with conditional certification notices. Thus, Defendants shall only be required to produce the



Ortiz et al v. Eskina 214 Corp. et al

2021 | Cited 0 times | S.D. New York | November 2, 2021

following information for all non-managerial employees employed by them at any time from February 19, 2018 to the present: names, titles, date of employment, last known mailing addresses, email addresses, and phone numbers. This information shall be provided within 30 days of the date of this Order. VI. Tolling of Statute of Limitations

Plaintiff seeks equitable tolling of the statute of limitations for potential members of the collective who have not yet opted-in. exceptional circumstances . . . where a plaintiff has been prevented in some extraordinary way

Vasto v. Credico (USA) LLC, No. 15-cv-9298 (PAE), 2016 WL 2658172, at *16 (S.D.N.Y. May 5, 2016) (citations and internal quotation marks omitted). This case does not present any such rare and exceptional circumstances. Accordingly, Plaintiffs request for equitable tolling is denied.

However, this Court recognizes that equitable tolling issues may arise as to individual opt-in plaintiffs, and that other courts in this district sometimes entertain challenges to the See Hamadou v. Hess Corp., 915 F. Supp. 2d 651, 668 (S.D.N.Y. 2013). Should equitable tolling issues arise in this case as to particular plaintiffs, the Court will timely address those issues as necessary.

CONCLUSION For the reasons set forth above, Plaintiffs motion for conditional certification of their FLSA claims is GRANTED in part and DENIED in part. The Court conditionally certifies a collective of potential plaintiffs who were employed as non-managerial at any time between

February 19, 2018 and the present. Within 30 days of this Order, Defendants shall produce the following information for all non-managerial employees employed by them at any time from February 19, 2018 to the present: names, titles, date of employment, last known mailing addresses, email addresses, and phone numbers. Within 14 days of this Order, Plaintiffs shall submit a revised proposed form of Notice consistent with this Order to the Court for approval. SO ORDERED DATED: New York, New York

November 2, 2021

KATHARINE H. PARKER United States Magistrate Judge

