SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
HALL OF JUSTICE
TENTATIVE RULINGS - December 09, 2009

EVENT DATE: 12/11/2009 EVENT TIME: 01:30:00 PM DEPT.: C-72

JUDICIAL OFFICER:Timothy Taylor

CASE NO.: 37-2008-00083992-CU-OE-CTL

CASE TITLE: SMITH VS. CALIFORNIA PIZZA KITCHEN INC

CASE CATEGORY: Civil - Unlimited CASE TYPE: Other employment

EVENT TYPE: Motion Hearing (Civil)
CAUSAL DOCUMENT/DATE FILED: Notice of Motion and Supporting Declarations, 11/13/2009

I. Motion for Class Certification.

"Under Code of Civil Procedure section 382, a class action is permitted 'when the question is one of a common or general interest, or many persons, or when the parties are numerous, and it is impracticable to bring them all before the court. . . .' Class certification requires both an ascertainable class and a well-defined community of interest among class members." *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 575 (2007) . " 'The 'community of interest' requirement embodies three factors: (1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.' " *Id.*

"A class may be certified when common questions of law and fact predominate over individualized questions. As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages. . . . [T]o determine whether common questions of fact predominate the trial court must examine the issues framed by the pleadings and the law applicable to the causes of action alleged." *Hicks v. Kaufman & Broad Home Corp.*, 89 Cal.App.4th 908, 916 (2001), fns. omitted. A class action " 'will not be permitted . . . where there are diverse factual issues to be resolved, even though there may be many common questions of law.' " *Block v. Major League Baseball,* 65 Cal.App.4th 538, 542 (1998). " 'The burden is on the party seeking certification to establish the existence of both an ascertainable class and a well-defined community of interest among the class members.' " *Lockheed Martin Corp. v. Superior Court,* 29 Cal.4th 1096, 1104 (2003).

Here, plaintiffs seek to certify a class of about 500 current and former intermediate restaurant managers employed by defendant California Pizza Kitchen (CPK) in California. The proposed class period is May 19, 2004 to the present. The plaintiffs propose six subclasses, but all of the alleged wrongdoing is based upon the alleged misclassification of the intermediate managers as exempt employees. In other words, all of the alleged Labor Code and other violations (e.g. failure to pay overtime, failure to allow rest and meal periods) flow from the alleged misclassification.

CPK's main contention is that individualized proof issues predominate, rendering the case not amenable to class treatment. At the end of its opposition brief, the defendant adds short arguments regarding absence of typicality and the inadequacy of representation, but these arguments are neither well developed nor well supported. CPK contends in classic "straw man" fashion that plaintiffs argue that the Supreme Court's decision in *Sav-On Drug Stores v. Superior Court*, 34 Cal. 4th 319 (2004), "is dispositive of the issue of certification in this case" (Oppo. at 16:10). Plaintiffs make no such argument; they rely on *Sav-On* in a fairly modest way (see text accompanying footnote 24 of the moving papers), and the court thinks CPK doth protest too much. A fair reading of *Sav-On*, along with the myriad of misclassification and other Labor Code cases cited by plaintiffs, supports certification here.

In *Sav-On*, drugstore managers filed a class action against the store, arguing that *Sav-On* had misclassified them based on their job title and descriptions, without reference to their actual work. They claimed that they performed nonexempt work for over half of each workday. *Sav-On* defended by arguing that exempt status turned upon the tasks performed by each employee, and the time actually spent performing them, factors which varied among the class members. The Supreme Court determined that substantial evidence supported the conclusion that the employees had been deliberately misclassified. *Sav-On*, *supra*, 34 Cal.4th at 324-325, 329.

The Supreme Court emphasized the deference given to a trial court's certification order and concluded that substantial evidence supported its decision to certify the class. *Sav-On*, *supra*, 34 Cal.4th at 329. In reaching its conclusion, the Supreme Court noted that the trial court could properly have relied on a single declaration to support class treatment. *Id.* at 334. Here, there are more than 20 declarations offered in support of certification, and nearly 50 in opposition.

A comparison of this case and the very recent decision of the Second District Court of Appeal, Division 6 in *Keller v. Tuesday Morning, Inc.*, No. B210787 (slip op. 12/4/09) is perhaps illustrative. There, appellants were managers employed by respondent, Tuesday Morning, Inc. (TM). The managers filed a class action against TM, alleging that TM misclassified them and failed to pay overtime wages. The trial court denied certification. The Supreme Court subsequently issued the *Sav-On* decision. In light of the *Sav-On* decision, the trial court reversed its position and granted the managers' motion to certify the class. Two years later, after substantial discovery, TM filed a motion to decertify the class. A different trial judge granted the motion on the ground that individual issues predominated over common issues, thus a class action was not the appropriate mechanism by which to litigate the managers' claims. The Second DCA affirmed. The court relied on two cases in affirming the trial court's decision to decertify, both decided after *Sav-On*: *Walsh v. IKON Office Solutions, Inc*, 148 Cal.App.4th 1440 (2007)(*Walsh*), and *Dunbar v. Albertson's Inc.*, 141 Cal.App.4th 1422 (2006)(*Dunbar*). Not surprisingly, *Walsh* and *Dunbar* feature prominently in CPK's opposition brief.

In *Walsh*, two account managers filed a class action against their former employer, IKON Office Solutions. IKON had classified the account managers as exempt from overtime wage laws under the outside salesperson exemption. This exemption requires that the employees spend more than half of their work time outside the work place. *Walsh*, *supra*, at 1455.

IKON moved to decertify the account manager subclass, contending that common questions of law and fact did not predominate over individual issues. It argued that the account manager positions were designed to be outside sales positions in which account managers were paid a commission on their transactions. Their performance was determined by sales quotas and accomplishing specific sales activity requirements. *Walsh*, *supra*, 148 Cal.App.4th 1454. IKON presented evidence that the

performance of the managers' primary functions varied significantly, depending upon territory, number of customers, job orders, support from customer service representatives and the personal approach of each manager. *Id.*

The trial court granted the motion, noting that individualized analyses of each subclass members' work circumstances would be required. As a result, individual hearings on both liability (time spent on exempt versus nonexempt tasks) and damages (number of overtime hours worked) would be necessary for each of the class members. *Walsh, supra*, 148 Cal.App.4th at 1452. The reviewing court determined that the trial court's order was supported by substantial evidence. *Id.* at 1456.

Dunbar concerned unpaid overtime of grocery store managers. Albertson's defended a motion for class certification by asserting that individual issues predominated. It contended that store operations vary depending upon store size, hours and location. The proportion of time spent on various tasks depends upon the type of departments (florist, photo lab, bakery, Starbucks, butcher shop), the demographic makeup of the community, incidence of criminal activity, and management style. 141 Cal. App. 4th at 1427.

The trial court relied on evidence that the work performed by the managers varied significantly from "store to store and week to week," and concluded that individual issues predominated. *Dunbar, supra*, 141 Cal.App.4th at 1429. The trial court acknowledged that there were common issues, such as whether stocking shelves and operating cash registers are managerial tasks. However, it indicated that the tasks performed by the managers were so dissimilar that it could not "reasonably extrapolate findings from the named plaintiff to the absent class members." *Id.* at 1430.

The court in *Keller* noted that the record it was reviewing "contained the declarations of four managers, TM's expert, its vice-president of Store Operations, and five of TM's attorneys. All asserted in detail the wide disparity in store location, size, configuration, management duties and styles. They also established that managers routinely exercise their independent judgment. In his written ruling, [the trial judge] noted the varying characteristics of the stores and identified matters he believed were susceptible to class-wide proof (mandated management policies) and those that were individual inquiries (time spent performing exempt duties and exercising discretion)."

Here, by contrast, the court is persuaded that there is substantial, if disputed, evidence of carefully designed uniformity in the operation of the CPK restaurants, which suggests the predominance of common questions which in turn favors class-wide evidence-taking and determination. CPK's uniform, intense training for intermediate managers is susceptible to class-wide proof, as are CPK's uniform menu selection, precise, detailed and uniform recipes, uniform and minutely detailed operating policies and procedures, uniform labor "phasing" requirements, uniform written financial and operational reports, and uniform "self appraisal" forms (and other written forms). It may be, as CPK argues, that a fact-finder will ultimately conclude that no misclassification occurred; if so, CPK will have the benefit of a class-wide adjudication of that key issue. But it is not appropriate for this court to rule upon the merits at this stage. *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 438-40 (2000).

Notwithstanding the Supreme Court's guidance in *Linder* (repeated in *Sav-On*, 34 Cal. 4th at 326) that merits are not to be decided at the class certification stage, CPK seeks to have the court do precisely that. Two examples from page 5 of the opposition brief will suffice. In response to the Piscitelli Declaration, CPK offers the declarant's unsworn statements in her "self appraisal." This is a classic attack on the merits, *i.e.* impeachment. Moreover, the GM's comment that "she needs to remember that

she is their superior" actually supports plaintiffs' position (because it suggests Piscitelli saw herself as not superior to the staff that were paid hourly). Similarly, CPK seeks to attack the Stice Declaration with an unsworn out of court statement in which he says he "stepped up as a leader among his peers." This, too, supports plaintiff's theory because it suggests Stice thought himself a "peer" of the hourly, non-exempt staff. Both of these examples demonstrate the dangers associated with arguing the merits at the class certification stage.

In light of the foregoing, Plaintiffs' Motion to certify the case as a class action is granted. In granting the motion, the court makes no ruling on plaintiffs' proposed trial "road map," as it would be premature at this early stage to adopt that plan or any other. All that is required at this stage is that the court find that individual issues are manageable, and the court does so find. The court appoints Michael D. Singer of Cohelan, Khoury & Singer (Cal. Bar No. 115301) as lead counsel for the class, and charges him with principal responsibility to see to it that the several lawyers representing the class are utilized in an efficient and cost-effective manner. The court finds that plaintiffs' showing of the adequacy of class counsel representation is both strong and unrebutted.

CPK's objection to the Declaration of Phillip C. Gorman is overruled. Representative sampling is not an inappropriate methodology in the class certification context. CPK's objections to the compendium of class member declarations is ruled upon as follows: 1: overruled; 2: sustained as conclusory ("forced") but overruled on other grounds; 3 - 24: overruled. Plaintiffs' objections to CPK's compendium of declarations is ruled upon as follows: II and III: overruled, as the stated objections do not affect the admissibility of the declarations; IV1: sustained; IV2: sustained; IV3 - 7: overruled.

II. Case Management Conference.

The case is set for a CMC at the same hour as the hearing of this motion; counsel shall be prepared to address the setting of a trial date in November, 2010, and the setting of other benchmark dates as well.

III. Motion for Summary Judgment.

Summary judgment may only be granted when a moving party establishes the right to the entry of judgment as a matter of law. CCP § 437c, subd. (c). A "party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." *Aguilar v. Atlantic Richfield Co.,* 25 Cal.4th 826, 850 (2001). Once the moving party meets this initial burden, the burden then shifts to the party opposing summary judgment to establish, by means of competent and admissible evidence that a triable issue of material fact still remains. *Id.* at 850-851.

"A party cannot avoid summary judgment based on mere speculation and conjecture [citation], but instead must produce admissible evidence raising a triable issue of fact. [Citation.]" *Crouse v. Brobeck, Phleger & Harrison,* 67 Cal.App.4th 1509, 1524 (1998). "An issue of fact can only be created by a conflict of evidence. It is not created by '... imagination or guess work.' [Citation.] Further, an issue of fact is not raised by 'cryptic, broadly phrased, and conclusory assertions' [citation], or mere possibilities [citation]. 'Thus, while the court in determining a motion for summary judgment does not "try" the case, the court is bound to consider the competency of the evidence presented.' [Citation.]" *Sinai Memorial* Chapel v. Dudler, 231 Cal.App.3d 190, 196-197 (1993).

A defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action if that party has shown that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. CCP§ 437c, subds. (o)(2), (p)(2). Once the defendant has met that burden, the burden shifts to plaintiff to show that "a triable issue of one or more material facts exists as to that cause of action or a defense thereto." CCP§ 437c, subd. (p)(1).

Under the case law, a three-step analysis is required of the trial court. *Bono v. Clark,* 103 Cal.App.4th 1409, 1431-1432 (2002). After identifying the issues framed by the pleadings, the court must determine whether the moving party has negated the opponent's claims, then decide whether the opposition has demonstrated the existence of a triable, material factual issue. *Silva v. Lucky Stores, Inc.,* 65 Cal.App.4th 256, 261 (1998) The court must strictly construe the moving party's evidence and liberally construe the opposing party's evidence, *Binder v. Aetna Life Ins. Co.,* 75 Cal.App.4th 832, 838-839(1999), and may not weigh the evidence or conflicting inferences. *Aguilar*, 25 Cal. 4th at 856; CCP§ 437c, subd. (c). A triable issue of material fact exists if the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. *Aguilar*, 25 Cal. 4th at 850.

Defendant California Pizza Kitchen, Inc.'s Motion for Summary Judgment or in the alternative, summary adjudication of each c/a (#s 1-6, respectively, failure to pay overtime wages; failure to pay wages of terminated or resigned employees; failure to provide meal periods, failure to provide rest periods; knowing and intentional failure to comply with itemized employee wage statements; and violation of the Unfair Competition Law) are each denied. Abundant material issues of fact exist whether the class of about 500 current and former intermediate restaurant managers employed by defendant California Pizza Kitchen (CPK) in California from May 19, 2004 to the present was properly classified as exempt employees. In particular, a material issue of fact exists whether these managers spent more than 50% of their time while employed engaged in non-management tasks. (CCP 437c(p)(2); UF # 28, see supporting evidence in the Smith depo at 112:21-113:11; RFJN of Ps' Motion for Class Certification and all supporting documents [declarations, exhibits, Compendium and Notice of Lodgment, filed on 11/13/09]). All of the alleged Labor Code and other violations (e.g. failure to pay overtime, failure to allow rest and meal periods) flow from this alleged misclassification.

The moving papers wrench snippets of the class representatives' depositions from context, and then claim that these purported admissions establish the absence of any triable issue of fact. CPK now acknowledges in its "Response to Plaintiffs' Separate Statement of Disputed Facts" filed 12/04/09 that several of CPK's purportedly "Undisputed Facts" were not supported by the deposition testimony relied upon (e.g. UF #s 4,18,32,52,54,55,67,81). The court finds that several other purportedly "Undisputed Facts" can only be deemed "undisputed" if the court adopts CPK's argument regarding the inference to be drawn (e.g. UF #s 2,40,43,50,60,65,68,and 69). Only with the context of trial can the finder of fact determine whether CPK's inference is fair, or whether plaintiffs' is.

The plaintiffs' request for judicial notice, filed 11/25/09, is granted.