

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #: \_\_\_\_\_  
DATE FILED: 4/07/2015

----- X  
WEN BIN HUANG, :  
 :  
 :  
 Plaintiff, :  
 :  
 :  
 -against- :  
 :  
 :  
 WCJ SEAFOOD RESTAURANT INC. d/b/a WCJ :  
 SEAFOOD RESTAURANT, LIN ZHENG, LI :  
 MING WU a/k/a LILY WU a/k/a LILY JIANG, :  
 SHAN DONG CHEN, AI QIN LIN a/k/a AI KIN, :  
 "JOHN DOE 1-10," and "XYZ CORP. 1-10," :  
 :  
 Defendants. :  
----- X

14-CV-653 (VEC)

ORDER

VALERIE CAPRONI, United States District Judge:

Plaintiff Wen Bin Huang ("Plaintiff") filed the Complaint in this action on February 3, 2014 alleging violations under the Fair Labor Standards Act ("FLSA") and the New York Labor Law ("NYLL"), along with various state tort claims. Dkt. 1. On June 27, 2014, Plaintiff filed a First Amended Complaint, withdrawing her state tort claims. Dkt. 21. On July 10, 2014, Defendants WCJ Seafood Restaurant Inc. and Li Wu filed a Motion to Dismiss. Dkts. 29-30. During a status conference on September 12, 2014, the Court granted Defendants' Motion to Dismiss Plaintiff's First Amended Complaint for failure to adequately plead Plaintiff's hours and wages, while granting Plaintiff leave to amend. Dkt. 43. At that time, the Court warned Plaintiff that her amended complaint should include "adequate allegations that tie the individuals that you are suing in as managers or owners of the company, or they will be dismissed" based on Defense counsel's representation that Plaintiff's allegations with respect to "who the employers are" were "very, very thin." Dkt. 53 at 4:13-15, 10:13-16.

On October 21, 2014, Plaintiff filed a Second Amended Complaint ("SAC"), adding Lin Zheng as a Defendant and asserting an additional claim for punitive damages. Dkt. 57. On

November 26, 2014, Defendants Li Wu and Ai Qin Lin (the “Moving Defendants”) moved to dismiss Plaintiff’s SAC, arguing that punitive damages are unavailable to Plaintiff and that the SAC fails to adequately allege that the Moving Defendants were Plaintiff’s “employers” under applicable law. Dkts. 65-66. On December 24, 2014, Plaintiff filed an Affirmation opposing the Moving Defendants’ Motion to Dismiss and seeking leave to file a Third Amended Complaint (“Plaintiff’s Affirmation”). Dkt. 69.<sup>1</sup> The Moving Defendants’ Motion to Dismiss is GRANTED; Plaintiff’s request for leave to file a Third Amended Complaint is GRANTED.

## DISCUSSION

### **I. Plaintiff’s Minimum Wage, Overtime and Spread-Of-Hours Claims are Dismissed Without Prejudice**

To be liable under the FLSA, one must be an “employer,” which has been broadly defined as “any person acting directly or indirectly in the interest of an employer in relation to an employee.” 29 U.S.C. § 203(d). To limit the broad language of the statute, which “taken literally would support liability against any agent or employee with supervisory power over [other] employees,” *Diaz v. Consortium for Worker Educ., Inc.*, No. 10 CIV. 01848 (LAP), 2010 WL 3910280, at \*2 (S.D.N.Y. Sept. 28, 2010) (quotation omitted), courts have examined “whether the alleged employer possessed the power to control the workers in question . . . with an eye to the ‘economic reality’ presented by the facts of each case.” *Herman v. RSR Security Services Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999) (citations omitted). While courts have considered various factors under the economic reality test, it is well settled that “mere boilerplate allegations that an individual meets the various prongs of the economic reality test . . . without

---

<sup>1</sup> Inexplicably, counsel for Plaintiff swore in the first paragraph of her Affirmation in Opposition to Defendants’ Motion to Dismiss that she is an associate of the law firm that “serves as the attorneys of record for *Defendants* in this action” (emphasis added). Plaintiff’s counsel is cautioned to read more carefully her written work produce prior to filing.

any supporting details—essentially ‘a formulaic recitation of the elements of a cause of action’—are insufficient to raise plaintiffs’ right to relief ‘above a speculative level’ with respect to that individual’s liability as an employer under the FLSA”. *Tracy v. NVR, Inc.*, 667 F. Supp. 2d 244, 247 (W.D.N.Y. 2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Here, Plaintiff appears to concede that the SAC is inadequate. *See* SAC ¶¶ 11-14, 21, 29-35; Pl.’s Aff. ¶ 24 (“Plaintiff did not cure her deficiency in her allegations of ‘employer’ status because Moving Defendants did not move to dismiss the complaint based on this deficiency...”). Thus, the Court reads Plaintiff’s Affirmation as acknowledging that her claims are subject to dismissal for failure to state a claim but requesting leave to file a Third Amended Complaint to cure the deficiencies. The Moving Defendants oppose Plaintiff’s request for leave to amend, arguing that Plaintiff’s SAC should be dismissed with prejudice because (1) Plaintiff had prior notice from Defense counsel and the Court regarding the inadequacy of her allegations as to Defendants’ status as employers; (2) Plaintiff failed to follow Rule 3(E) of this Court’s Individual Practices, which requires amended pleadings to be filed within twenty-one days of a motion to dismiss; and (3) other courts have dismissed FLSA claims with prejudice under similar circumstances. Defs.’ Mem. at 17-18; Defs.’ Reply at 3, 8-10. While sympathetic to the Moving Defendants’ frustration, the Court finds that dismissal with prejudice is not appropriate.

Rule 15(a)(2) of the Federal Rule of Civil Procedure provides that courts should “freely give leave” to amend “when justice so requires.” The Second Circuit has clarified that “district courts should not deny leave unless there is a substantial reason to do so, such as excessive delay, prejudice to the opposing party, or futility.” *Friedl v. City of N.Y.*, 210 F.3d 79, 87 (2d Cir. 2000). Nowhere do the Moving Defendants argue that leave to amend should be denied because of “excessive delay,” that amendment would be futile, or that it would cause the Moving Defendants to suffer prejudice. The Moving Defendants do not deny that they are “employers”

under the FLSA, and they have been on notice of the substance of Plaintiff's allegations since at least the filing of her Second Amended Complaint. The Moving Defendants have also had a copy of the proposed Third Amended Complaint since December 24, 2014, when Plaintiff attached it to her Affirmation. Moreover, because Defendant WCJ Seafood Restaurant Inc. is no longer in business, if the Court were to dismiss Plaintiff's claims with prejudice, Plaintiff could potentially be left without further remedy.<sup>2</sup> Finally, the cases cited by the Moving Defendants in support of their argument that courts often dismiss FLSA cases under similar circumstances are either inapposite or distinguishable.<sup>3</sup> Therefore, the Moving Defendants' Motion to Dismiss is granted to the extent it seeks to dismiss Plaintiff's FLSA and NYLL claims but denied to the extent it seeks to dismiss those claims with prejudice.

## II. Plaintiff's Claim for Punitive Damages is Dismissed With Prejudice

The Moving Defendants also argue that Plaintiff's claim for punitive damages should be dismissed because punitive damages are only available in connection with claims of employer retaliation, which Plaintiff has not alleged here. Defs.' Mem. at 15-17. *See also Solis v. SCA Rest. Corp.*, 938 F. Supp. 2d 380, 2013 WL 1401396, at \*20 (E.D.N.Y. Apr.5, 2013) (punitive damages available for violation of the anti-retaliation provisions under FLSA); *Sines v. Serv.*

---

<sup>2</sup> The Court notes that counsel has yet to appear for Defendants Shan Dong Chen and Lin Zheng. Counsel for Defendants Li Wu and Ai Qin Lin has noted that service was not properly effected on Defendant Lin Zheng, an assertion Plaintiff denies. Because Lin Zheng has not made an appearance or joined in the Moving Defendants' Motion to Dismiss, the Court does not view that issue as having been presented for decision.

<sup>3</sup> *See Bai v. Zhuo*, No. 13 Civ. 05790 (ILG) (SMG), 2014 WL 2645119, at \*4 (E.D.N.Y. June 13, 2014) (dismissed without prejudice); *Gisomme v. Healthex Corp.*, No. CV 13-2541, 2014 WL 2041824, at \*4 (E.D.N.Y. May 15, 2014) (same). *See also Bravo v. Established Burger One, LLC*, No. 12 Civ. 9044, 2013 WL 5549495, at \*7 (S.D.N.Y. Oct. 8, 2013) (dismissed with prejudice where Plaintiff did not seek leave to amend); *Nakahata v. New York-Presbyterian Healthcare Sys.*, Nos. 11 Civ. 6658, 11 Civ. 6657, 11 Civ. 6366, 2012 WL 3886555, at \*12 (S.D.N.Y. Sept. 6, 2012) (dismissed with prejudice where complaint was time-barred and plaintiff lacked standing); *Sampson v. MediSys Health Network, Inc.*, No. CV 10-1342 (SJF) (ARL), 2012 WL 3027850, at \*15-\*16 (E.D.N.Y. Feb. 9, 2012) (dismissed with prejudice where plaintiff's counsel had initiated 15 nearly identical cases and failed to cure deficiencies after being cautioned by multiple courts in different districts as to the inadequacy of the pleadings); *Tracy*, 667 F. Supp. 2d at 247 (W.D.N.Y. 2009) (dismissed with prejudice where amendment would be futile).


*Corp. Int'l*, No. 03 CIV. 5465 (SC), 2006 WL 3247663, at \*2 (S.D.N.Y. Nov. 8, 2006) (same). Neither Plaintiff's SAC nor her proposed Third Amended Complaint includes a claims for retaliation, and Plaintiff entirely fails to address this argument in her opposition to the Motion to Dismiss. By failing to respond, Plaintiff has abandoned her claim for punitive damages. *See Rivera v. Balter Sales Co. Inc.*, No. 14-CV-1205 (LTS), 2014 WL 6784384, at \*3 (S.D.N.Y. Dec. 1, 2014) ("A plaintiff's failure to respond to contentions raised in a motion to dismiss . . . constitutes an abandonment of those claims.") (citations omitted). Plaintiff's claim for punitive damages is therefore dismissed with prejudice.

### CONCLUSION

For the foregoing reasons, the Moving Defendants' Motion to Dismiss is GRANTED as to Plaintiff's claim for punitive damages, which is dismissed with prejudice. The Moving Defendants' Motion to Dismiss is otherwise GRANTED but without prejudice to Plaintiff's ability to file a Third Amended Complaint. Plaintiff shall file the Third Amended Complaint by April 24, 2015, and shall thereafter promptly serve the Third Amended Complaint on all Defendants. The Clerk of Court is respectfully requested to terminate the open motion at docket number 65.

**SO ORDERED.**

**Date: April 7, 2015**  
New York, NY

  
**VALERIE CAPRONI**  
United States District Judge