UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALAN B. KRICHMAN and JAMES C. HOWELL, Individually, and on behalf of all other similarly situated,	:	
Plaintiffs,	:	MEMORANDUM DECISION
	:	AND ORDER
- against -	:	06 cv 15305
J. P. MORGAN CHASE & CO., CHASE INVESTMENT SERVICES CORP., sometimes d/b/a "JPMORGAN", JOHN DOES 1-50 (said names being fictitious individuals), and ABC CORPORATIONS 1-50 (said names being fictitious companies, partnerships, joint ventures and/or corporations),	:	
Defendants.	:	

GEORGE B. DANIELS, United States District Judge:

Plaintiffs Alan B. Krichman and James C. Howell bring this action against defendants J. P. Morgan Chase & Co. and Chase Investment Services Corporation, contending that while in defendants' employ, defendants: (1) violated the Fair Labor Standard Act ("FSLA"), 29 U.S.C. § 207(a)(1) (2005) and 12 N.Y.C.R.R. § 142-2.2 (2002) by failing to pay plaintiffs and other similarly situated employees appropriate overtime wages; (2) made impermissible deductions from plaintiffs' wages in violation of New York Labor Law; and (3) breached their employment contract with plaintiffs. Plaintiffs intend to pursue their federal claim as an opt-in collective action pursuant to § 216 of the FSLA and their state law claims as an opt-out class action under

Federal Rule of Civil Procedure 23. Defendants move to dismiss plaintiffs' state law causes of action for failure to state a claim upon which relief may be granted. They maintain that: (a) New York's Civil Practice Law and Rules ("CPLR") § 901(b) prevents the maintenance of class actions where penalties, such as the liquidated damages potentially available here, are sought; (b) the certification of a class action under Fed. R. Civ. P. 23 would, for various reasons, conflict with the FLSA; and (c) plaintiffs' breach of contract claim is both preempted by federal law and is otherwise duplicative of plaintiffs' claims under the FLSA and New York Labor Law. Defendants also argue that the creation of an opt-out class under Rule 23 is not superior to other methods of adjudicating plaintiffs' claims. Defendants' motion to dismiss plaintiffs' fourth cause of action for breach of contract is granted. Defendants' motion to dismiss is denied with respect to plaintiffs' other claims.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff Krichman was employed as a securities broker-inside sales person at defendant Chase Investment Services Corporation ("Chase") between July 2004 to September 2005. Plaintiff Howell was similarly employed from August 2002 to April 2003. Compl. ¶¶ 8-9. Their primary duties included selling securities and other financial products to customers across the country. Id. at ¶ 19-20. Allegedly, plaintiffs' compensation was awarded "on a commission basis," and plaintiffs did not receive payment for hours worked beyond the forty-hour work week. Id. at ¶ 20. When customers challenged transactions plaintiffs executed, defendants deducted the amount of the customers' losses from plaintiffs' commissions. Id. at ¶ 23. Plaintiffs seek compensation, as a federal class, for unpaid overtime wages pursuant to FLSA §§ 207 and 216(b). Plaintiffs also seek compensation for commission deductions under New York

Labor Law § 193 and damages for breach of contract as a class action under Fed. R. Civ. P. 23.

In considering a motion to dismiss, this Court accepts as true the factual allegations set forth in the complaint and draws all reasonable inferences in plaintiffs' favor. Zinermon v. Burch, 494 U.S. 113, 118, 110 S.Ct. 975, 979 (1990); In re NYSE Specialists Securities Litigation, 503 F.3d 89, 91 (2d Cir. 2007). Only if this Court is satisfied that "the complaint cannot state any set of facts that would entitle the plaintiff to relief" will it grant dismissal pursuant to Fed. R. Civ. P. 12(b)(6). Hertz Corp. V. City of New York, 1 F.3d 121, 125 (2d Cir. 1993).

PRECLUSION UNDER NEW YORK CIVIL PRACTICE LAW AND RULES § 901

CPLR § 901 sets forth the prerequisites for class certification and prohibits the maintenance of a class action "to recover a penalty, or a minimum measure of recovery created or imposed by statute." CPLR § 901(b). The remedies which may be available for violations of New York Labor Law are outlined in New York Labor Law § 198 and include "reasonable attorney's fees and, upon a finding that the employer's failure to pay the wage required by this article was willful, an additional amount as liquidated damages equal to twenty-five percent of the total amount of the wages found to be due." N.Y. Lab. Law § 198 (McKinney 2004). Defendants correctly note that the liquidated damages authorized under that provision may constitute a penalty which, if sought by putative class action plaintiffs, would preclude class certification under CPLR § 901. See Carter v. Frito-Lay, Inc., 74 A.D.2d 550, 551, 425 N.Y.S.2d 115, 116-17 (N.Y. App. Div. 1980), aff'd, 52 N.Y.2d 944, 438 N.Y.S.2d 80 (1981).

The availability of statutory penalties does not, however, serve as an absolute bar to the formation of a class. The statutory annotations to CPLR § 901 clearly explain, "Even if a

statutory penalty or minimum recovery" is available, "most courts hold that it can be waived, thus confining the class recovery to actual damages and eliminating the bar of CPLR § 901(b)." McKinney C901:11 (2004). Thus, CPLR § 901(b) only bars use of the class action device when a plaintiff "actually seeks to recover the penalty that a relevant statute allows." Id. Accordingly, New York appellate courts have repeatedly affirmed the right of plaintiffs to form a class after waiving statutory penalties available to them. See, e.g., Cox v. Microsoft Corp., 8 A.D.3d 39, 40, 778 N.Y.S.2d 147, 148 (N.Y. App. Div. 2004) (finding CPLR § 901(b) "inapplicable" where plaintiffs sought only actual damages and waived statutory minimum penalty); Super Glue Corp. v. Avis Rent A Car System, Inc., 132 A.D.2d 604, 606, 517 N.Y.S.2d 764, 767 (N.Y. App. Div. 1987) (holding that class action not barred by CPLR 901(b) and opt-out class maintainable when representative plaintiff waives right to recover statutory minimum or penalty); see also Klein v. Ryan Beck Holdings, Inc., No. 06 Civ. 3460, 2007 WL 2059828, at *3 (S.D.N.Y. Jul. 20, 2007) (argument that § 901(b) prevents class certification where penalties are waived "has been repeatedly rejected by the courts") (citing Brzychnalski v. Unesco, Inc., 35 F. Supp. 2d 351, 354 (S.D.N.Y. 1999)).

In this action, plaintiffs allege that defendants violated New York Labor Law § 193. However, plaintiffs allege willful violations of the FLSA, not of New York Labor Law. See Compl. ¶ 39 ("In committing the wrongful acts alleged to be in violation of the Fair Labor Standards Act, defendants acted willfully"); but see id. at ¶ 47 (claim under New York law alleging only that plaintiffs "received no premium pay for hours worked in excess of 40 hours per week"). Thus, the pleadings do not allege a basis for imposing liquidated damages for willful violations under New York law. Moreover, plaintiffs in this action expressly waive all rights to

recover statutory penalties and liquidated damages available as compensation for their state law claims. See Compl., Prayer for Relief at 19 ("no penalties (statutory or otherwise), liquidated damages or punitive damages of any kind under New York law are sought in this action and are expressly waived"). Therefore, since plaintiffs waived their rights to recover statutory penalties, their state law claims are not barred by CPLR § 901.

"IRRECONCILABLE CONFLICT" BETWEEN FLSA AND FED. R. CIV. P. 23 CLASSES

Section 216 of the FLSA provides, "No employee shall be a party plaintiff to any such action [under the FLSA] unless he gives his consent in writing to become such a party and such consent is filed in the court in which the action is brought." 29 U.S.C. §216(b). Defendants urge this Court to find that the FLSA's opt-in requirement "inherently conflicts" with the opt-out procedures of Fed. R. Civ. P. 23 such that plaintiffs' state law claims should be dismissed under Fed. R. Civ. P. 12(b)(6). Defendants contend that plaintiffs' state law claims are impliedly preempted by § 216(b) of the FLSA.

"There is no legal doctrine ... that permits the Court to dismiss a cause of action solely on the grounds that it is 'inherently incompatible' with another action before it." See Westerfield v. Washington Mutual Bank, No. 06 civ 2817, 2007 WL 2162989, at *2 (E.D.N.Y. July 26, 2007). Moreover, New York labor law is not preempted by the FLSA. Overnite Transportation Company v. Tianti, 926 F.2d 220, 222 (2d Cir. 1991); see also Malinguez v. Joseph, 226 F. Supp. 2d 377, 388 (E.D.N.Y. 2002) ("FLSA does not, however, preempt state regulation of wages and overtime if the state's standards are more beneficial to workers"). In fact, there is a reasoned line of authority in this circuit supporting the conclusion that separate FLSA and state law classes can be simultaneously certified. See, e.g., Gardner v. Western Beef Properties, Inc.,

No. 07 civ 2345, 2008 WL 2446681, at *4 (E.D.N.Y. June 17, 2008) (there is "no support in the legislative history of [the FLSA's opt-in requirements] for defendant's view that, while expressly allowing state overtime regulation to coexist with the federal scheme, Congress intended ... to undermine those coexisting state rights by denying employees access to the tools of the modern class action of today"); Gonzales v. Nicholas Zito Racing Stable, Inc., No. 04 civ 22, 2008 WL 941643, at *8 (E.D.N.Y. Mar. 31, 2008) ("There is no reason why the [FLSA and New York Labor Law] claims should be separately litigated in two different courts") (citing Brzychnalski, 35 F. Supp. 2d at 354 (certifying state law and FLSA classes))); Iglesias-Mendoza v. La Belle Farm, Inc., 239 F.R.D. 363, 374 (S.D.N.Y. 2007). Defendants have not demonstrated that plaintiffs' second, third, and fifth causes of action are insufficient as a matter of law.[1]

COMMON LAW BREACH OF CONTRACT

Plaintiffs allege that defendants breached "the promise of the Chase defendants to pay plaintiffs and members of the Classes all amounts due to them and to members of the Classes in exchange for performance of the duties of their employment ... in compliance with state and/or federal law." Compl. ¶ 59. However, a plaintiff cannot recover under a contract theory for a defendants' failure to comply with existing statutes. See Goncalves v. Regent International Hotels, Ltd., 58 N.Y.2d 206, 220, 460 N.Y.S.2d 750, 757 (1983) ("[A] statutory obligation cannot be transformed into a contractual performance ... nor may [a] statutory right be transformed into a contractual privilege"); see also Murray v. Northrop Gruman Information

[1] Defendants also maintain that plaintiffs' state claims should be dismissed because "as a matter of law, the Rule 23 class action procedure is inferior to the FLSA opt-in collective action mechanism." Reply. Mem. at 17-18. That issue can properly be determined in the context of deciding a class certification motion, rather than on a motion to dismiss at this early stage of the proceedings.

Tech, Inc., 444 F.3d 169, 178 (2d Cir. 2006) ("[a] promise to perform a pre-existing legal obligation does not amount to consideration"); Petras v. Johnson, 92 civ 8298, 1993 WL 228014, at *3 (S.D.N.Y. June 22, 1993) (dismissing causes of action amounting to "nothing more than a claim that defendants intentionally frustrated the overtime laws").

In their complaint, plaintiffs rely on various provisions of the New York Labor Law to supply the terms of the alleged contract (Compl. ¶¶ 62, 63, 65-71, 73) and state, in entirely conclusory terms, that the "contract was supported by good and adequate consideration." Id. at ¶ 61. Thus, plaintiffs identify no specific consideration, contractual terms or obligations independent of the federal and state statutory obligations underlying their other statutory causes of action. The allegations of the complaint do not demonstrate the existence of an independent, enforceable agreement. On the contrary, they amount to nothing more than an attempt to cloak statutory claims in contract theory. Accordingly, plaintiffs' fourth cause of action for breach of contract is insufficient as a matter of law.

CONCLUSION

Defendants' motion to dismiss plaintiffs' breach of contract claim is GRANTED. The motion to dismiss is DENIED in all other respects.

Dated: December 8, 2008
New York, New York

George B. Daniels
GEORGE B. DANIELS
United States District Judge