

<b>Bonilla v A-1 First Class Viking Moving &amp; Stor., Inc.</b>
2013 NY Slip Op 31645(U)
July 17, 2013
Supreme Court, New York County
Docket Number: 151136/2013
Judge: Eileen A. Rakower
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER  
*Justice*

PART 15

Index Number : 151136/2013  
BONILLA, SCOTT  
vs.  
A-1 FIRST CLASS VIKING  
SEQUENCE NUMBER : 001  
DISMISS DEFENSE

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). 1, 2, 3  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 4, 5  
Replying Affidavits \_\_\_\_\_ | No(s). 6

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 7/17/13

  
\_\_\_\_\_, J.S.C.

**HON. EILEEN A. RAKOWER**

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X

SCOTT BONILLA and ROBERT AVELA,  
individually and on behalf of all other  
persons similarly situated who were employed by  
A-1 FIRST CLASS VIKING MOVING & STORAGE, INC. ,  
A-1 FIRST CLASS MOVING & STORAGE, INC.,  
MICHAEL LABY and SHER-DEL TRANSFER  
AND RELOCATION SERVICES, INC.,  
and/or other entities affiliated or controlled by  
A-1 FIRST CLASS VIKING MOVING & STORAGE, INC. ,  
A-1 FIRST CLASS MOVING & STORAGE, INC., and  
SHER-DEL TRANSFER AND RELOCATION SERVICES, INC.,  
MICHAEL LABY,

Index No.  
151136/3013

Plaintiff,

- against -

**DECISION  
and ORDER**

Mot. Seq. 001

A-1 FIRST CLASS VIKING MOVING & STORAGE,  
INC., A-1 FIRST CLASS MOVING & STORAGE, INC.,  
MICHAEL LABY, and SHER-DEL TRANSFER  
AND RELOCATION SERVICES, INC.

Defendants.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

This action was commenced on February 5, 2013 as a class action to recover unpaid wages and benefits that Plaintiffs allege they were statutorily and contractually entitled to for the labor they furnished to Defendants, including defendant Sher-Del Transfer and Relocation Services, Inc. (“Sher-Del”), pursuant to contracts that Defendants entered into with government entities. A First Amended Complaint was filed on March 29, 2013. Defendant Sher-Del interposed an answer to the First Amended Complaint and Counterclaims on April 9, 2013.

The Amended Complaint alleges that, “Defendants are a single and/or joint

employer under NYLL [New York Labor Law] in that they share a common business purpose and ownership, maintain common control, oversight and direction over the operations of the work performed by Plaintiffs, including employment practices. Upon information and belief, each Defendant has had substantial control of Plaintiffs' working conditions and over the unlawful policies and practices alleged herein." The Complaint asserts the following of actions: breach of contract (first cause of action), failure to pay wages (second cause of action), violation of New York Overtime Compensation Law (third cause of action), and failure to pay call in pay (fourth cause of action).

Plaintiffs now move to (1) dismiss Sher-Del's counterclaims pursuant to CPLR § 3211(a)(7) and to (2) extend the date to file their motion for class certification until such time that a preliminary conference has been convened, and the Court has set dates to: (i) complete pre-class certification discovery; (ii) for Plaintiffs to move for class certification, and; (iii) such other actions that the Court may direct. Plaintiff submits the attorney affirmation of Brian S. Schaffer in support of its motion.

Sher-Del's Amended Answer asserted the following four counterclaims against Plaintiffs seeking: (i) sanctions for frivolous conduct; (2) damages for tortious interference with existing business relations; (3) damages for tortious interference with prospective business relations; and (4) damages for malicious prosecution.

Sher-Del cross moves for an Order pursuant to CPLR §3211(a)(1) and (7) dismissing the complaint filed in this action as against Sher-Del or in the alternative, converting the motion to one for summary judgment pursuant to CPLR §3211(c) and granting dismissal in favor of Sher-Del. Sher-Del withdraws its counterclaims for sanctions and malicious prosecution.

### Plaintiffs' Motion

Plaintiffs seek to dismiss, pursuant to CPLR §3211(a)(7), Sher-Del's remaining second and third counterclaims, which assert claims for tortious interference with existing business relations and with prospective business relations, respectively. In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

"To prevail on a claim for tortious interference with business relations in New York, a party must prove (1) that it had a business relationship with a third party; (2)

that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party.” *Amaranth LLC v. J.P. Morgan Chase & Co.*, 71 A.D. 3d 40, 47 [1<sup>st</sup> Dept 2009].

Sher-Del’s second counterclaim alleges that, “Plaintiffs at all times knew or should have known that neither Bonilla nor Avela worked for Sher-Del. Plaintiffs at all times knew or should have known that Sher-Del was not a party to Government Contracts. Plaintiffs have used wrongful means by commencing this action against Sher-Del and have interfered with Sher-Del’s business relations with existing clients and former customers. On account of the foregoing, Plaintiffs are liable to Sher-Del for tortious interference with business relations.” Based on the same facts as its second counterclaim, Sher-Del’s third counterclaim asserts that Plaintiffs interfered with Sher-Del’s prospective business relations with potential customers.

Even accepted Sher-Del’s allegations as true, Sher-Del’s counterclaims fail to state a claim because they fail to allege a third-party that Shre-Del had, has, or may have a relationship with; that Plaintiff knew of that relationship between a third-party and Sher-Del, and intentionally interfered with it, or that Plaintiffs’ commencement of its action against Sher-Del constituted a crime of independent tort. In its opposition, Sher-Del does not cure this deficiency in its pleading. Although Sher-Del requests the opportunity to amend if the counterclaims are dismissed, Sher-Del failed to cross move for such relief or provided a proposed amended pleading.

#### Sher-Del’s motion

Sher-Del cross moves for an Order pursuant to CPLR §3211(a)(1) and (7) dismissing the complaint filed in this action as against Sher-Del or in the alternative, converting the motion to one for summary judgment pursuant to CPLR §3211(c) and granting dismissal in favor of Sher-Del.

CPLR §3211 provides, in relevant part:

- (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
  - (1) a defense is founded upon documentary evidence;  
[and]

(7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]). On a motion to dismiss pursuant to CPLR §3211(a)(1) “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted) “When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

“The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage.” (*Flomenbaum v New York Univ.*, 71 A.D. 3d 80, 91 [1st Dept. 2009]).

Accepting all allegations of the Complaint as true, the four corners of the Complaint state a claim for breach of contract against Defendants, including Sher-Del. The Complaint alleges that Defendants, including Sher-Del entered into government contracts that set forth certain prevailing rates and supplemental benefits to be paid to Plaintiffs and for the benefit of Plaintiffs, that Defendants breached those contracts by failing to pay those rates and benefits, and that Plaintiffs were damaged. Additionally, the four corners of the Complaint state claims for failure to pay wages pursuant to New York Labor Law, violation of New York Overtime Compensation Law, and failure to pay call in pay. Moreover, Sher-Del does not submit documentary evidence that flatly contradicts the complaint.

Plaintiffs also seeks to extend the time to move for class certification to: (i) allow reasonable time for all parties to serve and respond to pre-class certification discovery demands; and (ii) to schedule a preliminary conference with the Court as soon as conveniently possible so that the parties may resolve any discovery issues, and; (iii) to set a Court authorized briefing schedule for the class certification motion, and for any cross-motions that the Defendants may wish to bring. Sher-Del does not oppose Plaintiff's request.

Wherefore it is hereby

ORDERED Plaintiffs' motion is granted and Shre-Del's counterclaims are dismissed; and it is further

ORDERED that the deadline for Plaintiffs to file their motion for class certification is extended for 60 days from the date of this Order; and it is

ORDERED that all parties are reminded that they must appear for their scheduled conference at 80 Centre Street, Room 327, on September 24, 2013 at 9:30 a.m.; and it is further

ORDERED that defendant's cross motion is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated:

7/7/13

  
\_\_\_\_\_  
EILEEN A. RAKOWER, J. S.C.