SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**

Justice

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MARIANNA DZIURA, MARIANNA DZIURA, ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED WHO WERE EMPLOYED BY HUMAN DEVELOPMENT ASSOCIATION, INC., HDA, HUMAN DEVELOPMENT ASSOCIATION, INC., AND H.D.A. INC., EMPRO, INC., HDA CDPAS, LLC, HDA NY, LLC, and JOEL ZUPNICK,

Plaintiffs,

- v -

HUMAN DEVELOPMENT ASSOCIATION, INC., HDA, HUMAN DEVELOPMENT ASSOCIATION, INC., H.D.A. INC., EMPRO, INC., HDA CDPAS, LLC, HDA NY, LLC, and JOEL ZUPNICK,

Defendants.

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INDEX NO. 159998/2018

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 172, 173, 184, 190, 191, 192, 193, 194, 197

were read on this motion to/for **DISMISS**.

In this action seeking to recover wages and benefits under the New York Labor Law, defendants Joel Zupnick and Empro, Inc. (collectively, "Empro") moves the court, pursuant to CPLR 3211(a)(7), 2201 and/or 5519(c), for an order dismissing plaintiffs' second amended complaint against it. Alternatively, Empro requests that this court stay the instant matter pending a decision on the motion to reargue filed by defendants Human Development Association, Inc.; HDA, Human Development Association, Inc.; and H.D.A. Inc. (collectively, "Human Defendants"),[1] and/or the perfection of their notice of appeal (NYSCEF Doc. No. 172, *notice of motion*).

Empro argues, *inter alia*, that it was not plaintiffs' employer under the New York Labor Law (NYLL) and that plaintiffs have proffered no other basis for liability. Empro maintains that it was owned by defendant Zupnick and that Empro is simply a third-party company that processed payroll for the Human Defendants. Accordingly, it posits that plaintiffs fail to allege any facts to show that Empro, a "fiscal intermediary", qualifies as an employer under the law. Furthermore, Empro contends that, under the NYLL, a companionship exception existed until December 31, 2014, pursuant to which home health aides such as plaintiffs were not entitled to receipt of overtime. Therefore, it is Empro's contention that the companionship exemption should apply for the liability period in which Empro paid plaintiffs and, as a result, that plaintiffs' claims against it should be dismissed (and/or limited) at this pre-answer stage. Empro

[1] To the extent Empro seeks a stay based on the pending motion to renew, that motion has since been decided and, therefore, renders that branch of the motion moot.

further argues that plaintiffs' employer was exempt from the Labor Law's overtime requirement as a matter of law because they was employed by a not-for-profit. Alternatively, Empro argues that it is entitled to a stay pending a decision on the pending renewal motion, as well as, the pending appeal. (NYSCEF Doc. No. 172, *memorandum of law*).

In support of its application, Empro submits a copy of the State of New York Public Health and Planning Council Hearing held on April 6, 2017 (NYSCEF Doc No. 191, *public health hearing*); workers' compensation database results for defendant HAD NY LLC (NYSCEF Doc. No. 192, *workers' compensation database*); a copy of the settlement agreement reached in *Dreval v Empro, Inc., et al.*, Case No. 19- cv-00091, ECF No. 20 (NYSCEF Doc. No. 193, *Drevel settlement*).

In opposition, plaintiffs argue that the motion should be denied on several grounds. They claim that the complaint is sufficiently particular and alleges viable causes of action against defendants, which complies with the liberal pleading requirements. Plaintiffs also asserts that, contrary to Empro's contention, they have alleged that Empro is an employer under the theory of single integrated employers and/or joint employers, claiming that it shares a common business, purpose, and ownership, maintain common control, oversight, and direction over the operations of the home health aide services performed by plaintiffs. Plaintiffs further argue that they need not establish an employee-employer relationship at this pleading stage. They also contend that Empro's bold claim that it is a "fiscal intermediary" or "third-party company that processed payroll" must be rejected because Empro fails to submit any documents, sworn testimony, or other support for said assertions. Additionally, plaintiff DZuria argues that she is not required to show that she worked for Empro for the entire statutory period to assert claims for unpaid wages on behalf of a class dating back to the start of the statute of limitations period. Addressing the companionship exemption, plaintiffs argue that this is a red herring insofar as they do not allege any claims under the Fair Labor Standards Act ("FLSA"). According to plaintiffs, they seek unpaid overtime wages at the minimum wage rate, which they are entitled to under NYLL, despite the FLSA. Therefore, they claim that companionship exemption is irrelevant here. Additionally, plaintiff argues that defendants have failed to establish that HDA is exempt pursuant to New York Law § 652(3)(b) and that any such defense does not justify dismissal of plaintiffs' claims on this motion to dismiss the pleadings. Moreover, plaintiffs contend that defendants have proffered no basis for a stay of this action pending the appeal (NYSCEF Doc. No. 194, *memorandum of law in opposition*).

In reply, Empro reiterates the arguments raised in its moving papers: that plaintiffs fail to satisfy the minimal pleading requirements against Empro; that the companionship exemption applies and precludes all of plaintiffs' claims alleged to have accrued prior to January 1, 2015; the non-profit exemption applies and precludes plaintiffs' claims as against Empro accruing prior to December 30, 2018; and that, in the alternative, the court should stay this action (NYSCEF Doc. No. 197, *reply affirmation*).

When considering a defendant's motion to dismiss plaintiff's complaint for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any

cognizable legal theory (see *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). On a motion to dismiss, pursuant to CPLR 3211(a)(7), the court should not be concerned with the ultimate merits of the case (see *Anguita v Koch*, 179 AD2d 454, 457 [1st Dept 1992]).

The motion is denied in its entirety. Upon a review of the pleadings, this court finds that plaintiffs have alleged sufficient facts to withstand dismissal of the action at this stage in the litigation. In determining whether an entity is an employer for purposes of the Labor Law, New York courts have adopted the economic reality test set forth by the federal courts. (See *Bonito v Avalon Partners, Inc.*, 106 AD3d 625 [1st Dept 2013].) Said determination is based on the following inquiry: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." (*Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132 [2nd Cir. 1999]; *Yang v ACBL Corp.*, 427 F Supp2d 327 [SDNY 2005].) As it relates to the claim that Empro is not an employer, plaintiffs allege that Zupnick "is the chief executive officer of Defendants Empro, Inc." and "at all relevant times had, and exercised, the power to hire, fire, and control the wages and working conditions of the [p]laintiffs." Plaintiffs also allege that Empro, along with the other defendants, "are single integrated employers and/or joint employers under the NYLL in that they share a common business purpose and ownership, maintain common control, oversight and direction over the operations of the home health aide services performed by Plaintiffs, including employment practices." Defendant has also failed to establish that the companionship exemption warrant dismissal of this action, pursuant to CPLR 3211(a)(7), because it has failed to show that said exemption under the Fair Labor Standards Act ("FLSA") bars the claims raised here (see generally *Kurovskaya v Project O.H.R. (Office for Homecare Referral), Inc.*, 2020 NY Slip Op 33977[U] [Sup Ct, NY County 2020] [rejecting the argument that the companionship exemption barred plaintiff's claims].) Moreover, although Empro maintains that plaintiffs' employer were exempt from the Labor Law's overtime requirements as a matter of law based on its status as a not-for-profit, it has failed to show, as a matter of law, that it is entitled to not-for-profit defense, especially in light of the claim that HDA has failed to pay its employees (see *Smellie v Mount Sinai Hosp.*, 2004 US Dist. LEXIS 24006, *5-6 [SDNY 2004].)

CPLR 2201 provides that "the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." Moreover, CPLR 5519(c) provides that "[t]he court from or to which an appeal is taken or the court of original instance may stay all proceedings to enforce the judgment or order appealed from pending an appeal or determination on a motion for permission to appeal in a case not provided for in subdivision (a) or subdivision (b), or may grant a limited stay or may vacate, limit or modify any stay imposed by subdivision (a), subdivision (b) or this subdivision, except that only the court to which an appeal is taken may vacate, limit or modify a stay imposed by paragraph one of subdivision (a)." Here, upon consideration of the arguments advanced and, finding defendant's arguments to be without merit, this court, in its discretion, denies defendant's motion to the extent it seeks a stay of this court's prior order. Accordingly, it is hereby

ORDERED that defendant Empro, Inc.'s motion is denied in its entirety; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon all parties.

This constitutes the decision and order of this court.

April 5, 2024

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	[ ]	**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**