Smith v Family Aides, Inc.
2007 NY Slip Op 30890(U)
March 15, 2007
Supreme Court, Queens County
Docket Number: 0005152/2006
Judge: Mary R. O'Donoghue
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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 5

SHANALEE SMITH, etc. - against - FAMILY AIDES, INC.	INDEX NO. 5152/05 BY: O'DONOGHUE, J. DATED: March 15, 2007

Plaintiff Shanalee Smith has moved for, inter alia, summary judgment on the issue of liability arising under her first and second claims for unpaid overtime and for class action certification. Defendant Family Aides, Inc. has cross-moved for summary judgment dismissing the complaint against it.

Plaintiff Shanalee Smith alleges the following: Defendant Family Aides, Inc. employed her from around February 26, 2001 to May, 2002 as a personal care aide who worked both in the homes of the sick and in places such as adult homes. The defendant paid the plaintiff $6.00 per hour for work in patient's homes and $7.50 per hour for work at the Sanford Adult Home. The plaintiff worked more than forty hours a week in patients' homes, but she was not paid at least one-and-one-half times the New York State minimum wage for hours worked in excess of forty hours. The plaintiff worked more than forty hours a week outside of patients' homes, but she was not paid at least one-and-one-half times her regular pay for hours worked in excess of forty hours. The defendant paid the plaintiff

"at a flat hourly rate for all hours worked including overtime ****." The defendant also failed to pay the plaintiff "spread of hours" compensation.

Defendant Sandra Goldstein, the Vice-President of Family Aides, Inc. alleges that the defendant is a licensed home care services agency which provides companionship services and assistance to those in need of care "in their homes." The defendant allegedly paid the plaintiff at a base rate of between $6.00 and $11.25 per hour. Goldstein further alleges that: "For all overtime hours Plaintiff worked for Defendant, she has been paid at least one and one-half times the New York State minimum wage, or $7.73 per hour." According to Goldstein, the plaintiff was also paid appropriately for "spread of hours" work.

On March 7, 2005, the plaintiff began this action, which she seeks to maintain as a class action. She essentially makes three claims, the first based on an alleged failure to compensate her with overtime pay at 1.5 times the New York State minimum wage rate for work in private homes ("the first claim"), the second based on an alleged failure to compensate her with overtime pay at 1.5 times her regular rate of pay for work in adult homes ("the second claim"), and the third based on an alleged failure to compensate her with "spread of hours" pay as required by a minimum wage order promulgated by the Commissioner of the Department of Labor (12 NYCRR 142-2.4) ("the third claim"). On April 27, 2006, the plaintiff filed a note of issue.

Pursuant to New York State Regulation (12 NYCRR 142-2.2), an employer must compensate an employee with overtime pay as required by the federal Fair Labor Standards Act (29 USC § 201, et seq.), but generally subject to the exemptions set forth in the federal act. (See, Scott Wetzel Services Inc. v New York State Bd. of Indus. Appeals, 252 AD2d 212.) 12 NYCRR 142-2.2, "Overtime rate," provides in relevant part: "An employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's regular rate in the manner and methods provided in and subject to the exemptions of sections 7 and 13 of 29 U.S.C. 201 et seq., the Fair Labor Standards Act of 1938, as amended; provided, however, that the exemptions set forth in section 13(a)(2) and (4) shall not apply. In addition, an employer shall pay employees subject to the exemptions of section 13 of the Fair Labor Standards Act, as amended, except employees subject to section 13(a)(2) and (4) of such act, overtime at a wage rate of one and one-half times the basic minimum hourly rate." (See, Horkan v Command Sec. Corp., 285 AD2d 529; Scott Wetzel Services Inc. v New York State Bd. of Indus. Appeals, 252 AD2d 212.) 29 USC § 213(a)(15) provides an exemption for "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves ***." (See, Ballard v Community Home Care Referral Service, Inc., 264 AD2d 747; Cox v Acme Health Servs., 55 F3d 1304.) Pursuant to 12 NYCRR 142-2.2, workers covered by the 29 USC § 213(a)(15)

exemption are entitled to overtime compensation at the rate of 1.5 times the New York State minimum wage. (See, Ballard v Community Home Care Referral Service, Inc., supra.)

In regard to her first claim, the plaintiff contends that when she worked in private homes, the exemption of 29 USC § 213(a)(15) applied to her, but pursuant to the express language of 12 NYCRR 142-2.2, the defendant had to pay her for overtime at the rate of 1.5 times the New York State minimum wage. In regard to her second claim, the plaintiff contends that pursuant to 12 NYCRR 142-2.2 when she worked in adult homes, the defendant had to pay her for overtime at the rate of 1.5 times her regular wage.

That branch of the plaintiff's motion which is for summary judgment dismissing the affirmative defenses raised by the defendant is granted. In regard to the first affirmative defense, the failure to state a cause of action is not properly raised in an answer to a complaint, but should be raised by way of a motion made pursuant to CPLR 3211(a)(7). (See, Platt v Portnoy, 220 AD2d 652.) In any event, the plaintiff has adequately stated causes of action based on 12 NYCRR 142-2.2. In regard to the second affirmative defense, this action is timely because an action to recover for a violation of the New York State Minimum Wage Act is controlled by Labor Law § 663(3), a six year Statute of Limitations. In regard to the third affirmative defense, the plaintiff stipulates that she is not seeking to recover a penalty or minimum measure of recovery

created or imposed by statute. (See, CPLR 901[b].)

Those branches of the plaintiff's motion which are for summary judgment on the issue of liability arising under her first and second claims are denied. "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact ***." (Alvarez v Prospect Hospital, 68 NY2d 320, 324.) In regard to her first and second claims, defendant Smith successfully carried this burden through the submission of her affidavit alleging that the defendant employed her as a health aide who worked in both private homes and adult facilities, but was not paid appropriate overtime wages. The burden on this motion shifted to the defendant to produce evidence sufficient to show that there is an issue of fact which must be tried. (See, Alvarez v Prospect Hospital, supra.) The defendant successfully carried this burden. The record does not permit the court to determine as a matter of law when the plaintiff worked in private residences, as opposed to adult facilities, and, thus, summary judgment is precluded by issues of fact pertaining to the applicability of the health care exemption. (See, Edwards v Community Enterprises, Inc., 251 F Supp 2d 1089.) The issue of the applicability of the health care exemption is generally fact-specific and must be made on a case-by-case basis. (See, Johnston v Volunteers of America, Inc., 213 F3d 559.) Moreover, the conflicting allegations of plaintiff Smith and Sandra

Goldstein concerning whether the defendant paid the former at least 1.5 times the minimum wage rate for overtime have also created issues of fact and credibility which cannot be given summary treatment. (See, Dayan v Yurkowski, 238 AD2d 541; T&L Redemption Center Corp. v Phoenix Beverages, Inc., 238 AD2d 504; First New York Realty Co., Inc. v DeSetto, 237 AD2d 219.) Finally, summary judgment on the issue of liability would serve no purpose because the issue of damages is so closely related to that of liability. (See, John Treiber Agency, Inc. v Spartan Concrete Corp., 268 AD2d 506; McManus-Tessitore Agency v Albin Const. Corp., 63 AD2d 1067; Garvey v St. Paul Fire and Marine Insurance Co., 58 AD2d 992; Harold Ohringer, Inc. v Kass, 28 AD2d 1117.)

The motion by the defendant for summary judgment dismissing the complaint against it is granted as to the plaintiff's third claim and otherwise denied. Insofar as the third claim is concerned, the plaintiff is not entitled to "spread of hours" compensation pursuant to a minimum wage order promulgated by the Commissioner of the Department of Labor (12 NYCRR 142-2.4). (Seenaraine v Securitas Security Services, USA, Inc., ___ AD3d ___, ___ NYS2d ___, 2007 WL 529686.) Plaintiff Smith was paid more than the compensation required by the spread of hours regulation (see, Seenaraine v Securitas Security Services, USA, Inc., supra), and she based her claim on a misinterpretation of the regulation. (See, Seenaraine v Securitas Security Services, USA, Inc., supra.)

Those branches of the plaintiff's motion which pertain to

class action certification and class action discovery are denied. CPLR 902 provides in relevant part: "Within sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained." (See, Meraner v Albany Medical Center, 211 AD2d 867.) "The explicit design of article 9 *** is that a determination as to the appropriateness of class action relief shall be promptly made at the outset of the litigation." (O'Hara v Del Bello, 47 NY2d 363, 368.) In the case at bar, the plaintiff served her motion for an order pursuant to CPLR 902 almost one-and-one-half years after she brought this action and almost eight months after a deadline in a stipulation extending her time to move for class action certification. Where, as in the case at bar, the plaintiff does not offer a reasonable excuse for the delay, the CPLR 902 motion will be denied. (See, Shah v Wilco Systems, Inc., 27 AD3d 169; Meraner v Albany Medical Center, 211 AD2d 867.)

Short form order signed herewith.

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J.S.C.