Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT Justice — IA PART 14

PREMCHAN BUSGITH x

- against -

HUDSON NEWS COMPANY

x

Index Number 15087 2005

Motion Date January 15, 2008

Motion Cal. Numbers 7 & 8

Motion Seq. Nos. 2 & 3

The following papers numbered 1 to 17 read on the motion by plaintiff Premchan Busgith for an order granting summary judgment against defendant Hudson News Company on the issue of liability on his first, second and fourth causes of action for the failure to pay overtime for the two-week pay period ending January 18, 2004 and the period of August 16, 2004 to April 4, 2005; granting a sanctions order permitting plaintiff to use the average weekly overtime for the eight months prior to August 16, 2004, based upon the records produced by the defendant, as the average weekly overtime for each week between August 16, 2004 to April 4, 2005; granting as a discovery sanction summary judgment on the third cause of action for the spread of hours claim, and precluding defendant from challenging plaintiff's recollection of spread of hour days, and accepting plaintiff's recollection of the same as sufficient proof to establish damages; granting plaintiff summary judgment as to the fourth cause of action for a violation of Labor Law § 191; and setting a date for the parties to make written submissions on the assessment of damages; and awarding a sanction of attorney's fees. Defendant separately moves for an order dismissing the complaint in its entirety.

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Upon the foregoing papers these motions are consolidated for the purpose of a single decision and are determined as follows:

Plaintiff Premchan Busgith commenced work at JFK Airport as a stock associate with the Hudson News Company (Hudson News) a wholesale distributor of newspapers, magazines and periodicals, on December 10, 1998, at which time his rate of pay was $6.00 an hour. During the time Mr. Busgith was employed as a stock associate he was eligible for overtime pay at the rate of time and one-half , and was required to use a time clock to "punch in and out" or report to a supervisor when he arrived at or left work. He was paid his hourly wages, and any overtime he earned, based upon the time that was recorded on his punch cards, or had been reported to a supervisor. Mr. Busgith stated at his deposition that he believed that he was paid for all overtime during the period he was employed as a stock person. On February 26, 2001, Mr. Busgith was promoted to the position of assistant warehouse manager, and he received an increase in his hourly pay. He was still required to "punch in and out" of work, and was paid his hourly wages and overtime, based on the time recorded on his punch cards. Mr. Busgith testified at his deposition that he was paid for overtime he earned while employed as an assistant warehouse manager.

On August 2, 2004, Mr. Busgith was promoted to the position of morning warehouse manager of Hudson News' warehouse located at Terminal 6 at JFK Airport, at which time his employer informed him that he would receive a flat salary of $550.00 a week, paid bi-weekly, and that he would not be eligible for overtime. Mr. Busgith testified that he preferred to work in a position where he would be paid for overtime, but that he was "forced" to accept the position of warehouse manager. He stated that when he became the warehouse manager, he no longer was required to "punch in and out," and that he could "come and go," but would return the key at the end of his work day. Mr. Busgith testified that between August 2, 2004 and April 4, 2005 he received a flat salary of $550.00 a week; that he never requested overtime pay during this period; and that at his termination interview on April 4, 2005 he made no demand for overtime pay.

Joseph Landolfi, a general manager of Terminal 6 for Hudson News testified that plaintiff reported directly to him and that he was responsible for overseeing plaintiff's compensation during the period of August 2, 2004 to April 4, 2005. He stated

that when plaintiff accepted the position of morning warehouse manager he knew that it was a salaried position with no overtime pay, and never approached him for unpaid overtime. Mr. Landolfi further states in his affidavit that during the period plaintiff was employed as a morning warehouse manager he was not eligible for overtime and was paid a flat salary, regardless of the number of hours he worked. He further states that plaintiff never informed him that his paychecks were incorrect or that he was entitled to overtime pay. Mr. Landolfi also states in his affidavit that as plaintiff received a flat salary and was not employed as an hourly employee between August 2, 2004 and April 4, 2007, his spread-of-hours claims are not applicable to his salary structure. He further states that Hudson News is in full compliance with all applicable statutes with respect to the preservation and maintenance of plaintiff's employment records for the entire period of his employment by the company, and that all such records were produced for discovery. He states that although he documented employees' work schedules in his personal organizer, so that he could keep track of staffing needs, he did not record whether someone arrived on time or left work for the day. Mr. Landolfi states that this organizer was for his personal use and was not part of plaintiff's employment file, that he was unaware of this action until a few days before his October 24, 2007 deposition, and had discarded the organizer and cleared out the storage space where it had been stored years ago.

Plaintiff Premchan Busgith in his first cause of action seeks to recover overtime compensation for the period of August or September 2004 to April 4, 2005, pursuant to the Fair Labor Standards Act (FLSA), (29 USC § 201, et seq.), as well as liquidated damages, attorney's fees and costs. The second cause of action seeks to recover overtime compensation for the same period of time pursuant to Labor Law § 650 et seq., and 12 NYCRR § 142-2.2, as well as prejudgment interest, liquidated damages, attorney's fees and costs, pursuant to Labor Law § 663. The third cause of action seeks to recover unpaid spread of hours and split shift compensation for the period of January 1999 to July 2004, and for the period of August 2004 to April 4, 2005 pursuant to New York's Minimum Wage Act (Labor Law § 650, et seq.), and 12 NYCRR § 142-2.4, as well as prejudgment interest, liquidated damages, attorneys' fees and costs, pursuant to Labor Law § 663(1). The fourth cause of action seeks to recover damages for violations of Labor Law §§ 191 and 198 and seeks to recover prejudgment interest, liquidated damages, attorneys' fees and costs.

A. Fair Labor Standards Act (FLSA)

The FLSA requires an employer to compensate its employees "at a rate not less than one and one-half times the regular rate" for each hour worked in excess of forty during a workweek (29 USC § 207[a][1]). Any employer that violates the 29 USC § 207 overtime provision is liable to the employee affected for overtime compensation, liquidated damages, prejudgment interest, attorneys' fees and costs (29 USC § 216[b]). In order to establish a claim under the FLSA plaintiff has the burden of proving three elements: (1) the existence of an employer-employee relationship; (2) coverage under the Act; and (3) a violation of statutory standards (1-9 Wages & Hours: Law and Practice § 9.03). However, employers are exempt from this overtime pay requirement if the employee is "employed in a bona fide executive, administrative, or professional capacity" (29 USC § 213[a][1]). It is the employer's burden to demonstrate that it is entitled to a particular exemption (see Martin v Malcolm Pirnie, Inc., 949 F2d 611, 614 [1991]). Since the FLSA is a remedial statute, its exemptions are construed narrowly against the employer (see Arnold v Ben Kanowsky, Inc., 361 US 388, 392 [1960]; Kahn v Superior Chicken & Ribs, Inc., 331 F Supp 2d 115, 120 [2004]; Martin v Malcolm Pirnie, Inc., supra; Patton v Thomson Corp., 364 F Supp 2d 263, 264 [ED NY 2005]).

It is well settled that FLSA exemptions are affirmative defenses that must be raised and pleaded by the employer in litigation (see Corning Glass Works v Brennan, 417 US 188, 196-97 [1974]; Piscione v Ernst & Young, L.L.P., 171 F3d 527, 533 [1999]; Austin v CUNA Mutual Insurance Society, 240 FRD 420, 428 [2006]; Norton v Groupware International, Inc., 2007 US Dist LEXIS 294, 2007 WL 42955 [2007]). The provisions of the FLSA are litigated more frequently in the federal courts than in the state courts, and the federal courts have consistently held that FLSA exemptions may be waived by the employer if not raised in litigation in a proper and timely manner (see e.g., Magana v Northern Mariana Islands, 107 F3d 1436, 1446 [1997] [remanding case so that district court could consider whether exemption raised on summary judgment motion had been waived by failing to timely raise it as an affirmative defense]; Renfro v City of Emporia, Kan., 948 F2d 1529, 1539 [1991], cert. denied, 503 US 915 [1992] (upholding district court finding that exemption affirmative defense was waived); Norton v Groupware International, Inc, supra; [finding that exemption affirmative defense was waived]; Tripodi v Microculture, Inc., 397 F Supp 2d 1308, 1317 [2005] [waived]; Rotondo v City of Georgetown, S.C., 869 F Supp 369, 374 [1994] [waived]; see also Bergquist v Fidelity Information Services, Inc., 399 F Supp 2d 1320, 1324-26 [2005], affirmed by unpublished order, 197 Fed Appx 813 [2006] [stating n7 that exemption affirmative defense can be waived, but finding that defendant in the case did not engage in conduct that would constitute waiver because the plaintiff was not prejudiced]; Relyea v Carman, Callahan & Ingham, L.L.P.,

2006 US Dist LEXIS 63351, 2006 WL 2577829 *1 n.1 [2006] Pellerin v Xspedius Management Co. of Shreveport L.L.C., 432 F Supp 2d 657, 664-65 [2006]; Schwind v EW & Assocs., 357 F Supp 2d 691, 697-98 [2005]). In addition, to the extent all essential elements are present, estoppel or waiver can prevent an employer from raising an FLSA exemption (see Kautsch, 2007 US Dist LEXIS 35857, 2007 WL 1459694; Bell v Foster Poultry Farms, 2007 US Dist LEXIS 25328, 2007 WL 896119 [2007]). A defendant who fails to assert an exemption as an affirmative defense in their answer may be granted leave to amend its answer, when justice so requires (see Donovan v Buffalo Downtown Dump Truck Service & Supplies, Inc., 1985 US Dist LEXIS 20799 [1985]).

B. New York Labor Law and Overtime

New York Labor Law, Article 19 is New York State's Minimum Wage Act. As part of the Act, Labor Law § 653 allows the Commissioner of Labor to appoint a Wage Board to investigate the adequacy of wages and recommend appropriate wage rates (Labor Law § 653[1]; see also Ballard v Community Home Care Referral Serv., Inc., 264 AD2d 747, 747 [1999]). The Wage Board may also recommend that the Commissioner of Labor promulgate overtime rate regulations (Labor Law § 655[5][b]). In accordance with this scheme, the Commissioner of Labor enacted 12 NYCRR 142-2.2 which provides: "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." Employees paid less than the wage required by the law "may recover in a civil action the amount of any such underpayments, together with costs and such reasonable attorney's fees as may be allowed by the court, and if such underpayment was willful, an additional amount as liquidated damages ...." (Labor Law § 663[1].)

12 NYCRR § 142-2.14 defines an employee as:

> "(a)any individual employed, suffered or permitted to work by an employer, except as provided below ... (4) Executive, administrative or professional capacity. (I) Executive. Work in a bona fide executive ... capacity means work by an individual:

> (a) whose primary duty consists of the management of the enterprise in which such individual is employed or of a customarily recognized department or subdivision thereof;
>
> (b) who customarily and regularly directs the work of two or more other employees therein;
>
> (c) who has authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight;
>
> (d) who customarily and regularly exercise discretionary powers; and
>
> (e) who is paid for his services a salary of not less than:
>
> (1) $386.25 per week on and after March 31, 2000, inclusive of board, lodging, other allowances and facilities;
>
> (2) $450.00 per week on and after January 1, 2005, inclusive of board, lodging, other allowances and facilities; ....”

The above regulation is nearly identical to the FLSA exemption. The fact that the state regulation refers to an exception rather than an exemption, is of no consequence. “It is a well-settled rule in this State that a party has a right to sue on any cause of action which he holds, and any statutory exception to that right must be distinctly expressed.” (Saxe v Peck, 139 App Div 419, 420 [1910]; see also Wylie v Addoms, 243 App Div 744, 750 [1935]; Lobbett v Galpin, 228 App Div 65, 67 [1930].) A defendant therefore is required to preserve the statutory exception set forth in 12 NYCRR § 142-2.14 as an affirmative defense.

Defendant’s request to dismiss plaintiff’s FLSA and Labor Law claims:

It is undisputed that Mr. Busgith was employed by Hudson News for the period of August 2, 2004 to April 4, 2005 and that he worked a minimum of forty hours a week. Plaintiff claims that he also worked overtime during this period, but was not paid overtime. Hudson News, in opposition to the plaintiff’s motion and in support of its own motion for summary judgment dismissing the complaint, asserts that plaintiff is a “bona fide executive” and therefore is exempt under 29 USC § 213(a)(1) and 12 NYCRR § 142-2.14, and is not entitled to overtime. However, Hudson News failed to raise the FLSA

exemption and state exception as affirmative defenses in its answer and does not seek leave to amend its answer. Rather, defendant's counsel continues to argue, based upon its distinction of cases cited by the plaintiff, that it is not required to raise the statutory defenses as an affirmative defense. Defendant's counsel offers no independent research in support of its conclusion that the federal and state exemptions and exceptions are not affirmative defenses. Furthermore, defendant's counsel asserts in his memorandum of law that plaintiff's counsel is inventing the law and should be "held accountable for advancing an illegitimate legal theory that '[a]n exemption to the FLSA and NYLL (12 NYCRR § 142-2.2) is an **affirmative defense** upon which the employer has the burden of proof' and is waivable if not asserted an Answer." The court finds that it is defendant's claims, in this regard, which are untenable. In view of the fact that Hudson News cannot maintain a defense based upon an FLSA exemption or a state exception without amending its answer, and as rather than seeking to amend its answer it asserts a position that is contrary to established law, defendant has effectively waived these affirmative defenses. Therefore, those branches of Hudson News' motion which seeks summary judgment dismissing plaintiff's claims for overtime based on the FLSA and 12 NYCRR § 142-2.2, are denied.

Plaintiff's motion for summary judgment on his overtime claims

A. The pay period ending January 18, 2004

The court has examined the complaint and bill of particulars and finds plaintiff has not alleged a claim for overtime for the pay period ending January 18, 2004. Furthermore, plaintiff's reliance on paragraphs 5, 35 and 41 of the complaint in order to assert a claim for said time period is misplaced, as the general time references set forth in these paragraphs do not meet the specificity requirements of CPLR 3013. Therefore, plaintiff's request for summary judgment for overtime pay for the pay period ending January 18, 2004, is denied.

B. The claim for overtime pay for the period of August 16, 2004 to April 4, 2005

The FLSA Claim

A plaintiff generally has the burden of proving that his or her employer violated the FLSA. The FLSA requires that an employer must maintain accurate records relating to their employee's work (29 USC § 211[c]). Specifically, the statute provides, "Every employer ... shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other

conditions and practices of employment maintained by him, and shall preserve such records for such periods of time ...." (Id.) Thus, typically, a plaintiff seeking redress under the FLSA may meet his or her initial burden by submitting the work records kept by his or her employer.

Where an employer has not kept records as required by the record keeping provisions of the FLSA, the Supreme Court has held that rather than penalize an employee for the employer's failure to comply with his statutory duty, a court should apply a special burden-shifting standard. Accordingly, when an employer fails to maintain adequate or accurate records under the FLSA, "an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference" (Anderson v Mt. Clemens Pottery Co., 328 US 680, 687 [1946], superseded by statute on other grounds as stated in United States v Cook, 795 F2d 987, 990-91 [1986]; Park v Seoul Broad. Sys. Co., 2008 US Dist LEXIS 17277 [2008]; see also Reich v S. New England Telecom. Corp., 121 F3d 58, 67 [1997]). The New York Labor Law also requires that an employer maintain the name and address, wages and hours worked (12 NYCRR § 142-2.6). Courts have applied the Anderson standard to analyze overtime claims under both FLSA and New York Labor Law (see Mascol v E & L Transp., Inc., 387 F Supp 2d 87, 93-94 [2005]; Hy-Tech Coatings v N.Y. State Dept. of Labor, 226 AD2d 378 [1996]; L & M Co. v N.Y. State Dept. of Labor, 171 AD2d 795 [1991]).

Plaintiff's initial burden is minimal. To meet this burden, the employee should not speculate, but he or she may rely solely on his or her recollection (Doo Nam Yang, 427 F Supp 2d 327, 335 [2005]). If the employee presents a prima facie case, "[t]he burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence" (Anderson, 328 US at 687-88).

Plaintiff's evidence of overtime

Plaintiff states in his affidavit that during the period of August 16, 2004 to the date of his termination on April 4, 2005, to the best of his recollection he regularly worked more than 40 hours, but that he was never paid for overtime, except for the two-week pay period ending August 15, 2004. He states that during a two-week period ending August 15, 2004, he worked a total of 97.5 hours, including 17.5 hours of overtime, and was paid for 80 hours at the regular rate of $13.75 an hour, and for 17.5 hours of overtime at the rate of $20.625 an hour.

Plaintiff states that from August 16, 2004 to April 4, 2005 he generally worked more than was 40 hours a week, but was never paid for overtime, and was paid $13.75 an hour, for a gross wage of $550.00 a week. Plaintiff states that during the period of December 10, 1998 to August 2004, his work hours were recorded daily on a time sheet/timecard, and that from December 1988 to April 4, 2005, the defendant created and used written work schedules for the plaintiff and his co-workers, which showed the days of the week he worked and the start and end times for each work day. Plaintiff states that at a minimum, he worked each of the hours and days shown on these schedules.

The documentary evidence presented here establishes that as of the pay period ending August 29, 2004, plaintiff, for the year to date, had worked 420.25 hours of overtime and that the gross amount of overtime pay was $5,435.59. The documentary evidence further establishes that defendant kept records of plaintiff's hours, earnings, deductions and taxes, but that after he became the morning warehouse manager, it did not keep a record of overtime hours, as it did not consider plaintiff eligible for overtime.

Mr. Landolfi testified that he kept track of plaintiff's days and hours in his own personal organizer and that said organizer had long been discarded prior to his being aware of the lawsuit and his need to testify. As regards said personal organizer, plaintiff has failed to establish that defendant "intentionally or negligently failed to preserve crucial evidence after being placed on notice that the evidence might be needed for future litigation" (Lovell v United Skates of Am., 28 AD3d 721 [2006]; see E.W. Howell Co. v S.A.F. La Sala Corp., 36 AD3d 653 [2007]; Kelley v Empire Roller Skating Rink, Inc., 34 AD3d 533 [2006]; Goll v American Broadcasting Cos., Inc., 10 AD3d 672, 673 [2004]; see also CPLR 3126). Plaintiff has also failed to establish that the defendant destroyed any other records regarding the number of days plaintiff worked, or the hours he worked during the period in question. Therefore plaintiff's request to impose any sanctions against the defendant based upon the failure to maintain overtime records, is denied.

The court finds that the evidence presented is insufficient to establish that plaintiff worked overtime on or after August 16, 2004 through April 4, 2005. Although plaintiff may rely on his recollection he must specify the number of days and hours he worked overtime. Plaintiff may not establish his average weekly overtime for each week between August 16, 2004 to April 4, 2005 based on his average weekly overtime for the eight months prior to August 16, 2004, using records produced by the defendant, as this is clearly speculative. It is noted that Mr. Landolfi testified that plaintiff worked 40 to 50 hours a week for the period of August 2004 to April 2005. Plaintiff, however, asserts that he

worked more than 10 hours of overtime a week. Therefore, the court finds that as plaintiff's claims regarding his recollection of the amount of overtime he worked during said period raises a triable issue of fact, his request for summary judgment on the issue of liability as regards the FLSA and New York Labor Law claims is denied.

The third cause of action for spread of hours

12 NYCRR § 142-2.4(a) states in relevant part: "An employee shall receive one hour's pay at the basic minimum hourly wage rate, in addition to the minimum wage required ... for any day in which: (a) the spread of hours exceeds 10 hours; or (b) there is a split shift; or (c) both situations occur." "Spread of hours" is defined as "the interval between the beginning and end of an employee's workday" (12 NYCRR § 142-2.18). "The spread of hours for any day includes working time plus time off for meals plus intervals off duty" (Id.). The New York State Department of Labor has interpreted this to mean that the "spread of hours" regulation does not apply to an employee whose workday is in excess of ten (10) hours if his or her total daily compensation exceeds the New York State minimum wage multiplied by the number of hours he or she worked plus one (1) additional hour at the minimum wage. Stated differently, if an employee's total weekly compensation is equal to or greater than the total minimum wages due the employee for that workweek, including compensation for an additional hour for each day in which the "spread of hours" exceeds ten (10) hours, no additional payments are due the employee because the employee earns sufficiently more than the statutory minimum wage (see Seenaraine v Securitas Sec. Services USA, Inc., 37 AD3d 700 [2007]).

The New York State minium wage was below $5.15 an hour prior to March 31, 2000. Beginning January 1, 2005 to April 4, 2005 the minimum wage was $6.00 per hour (12 NYCRR § 142-3.1[a][1],[2]). Plaintiff in his third cause of action for a spread of hours claim, alleges that he worked a minimum of 40 hours a week, and that he worked overtime for some or all days for the period of January 1999 to July 2004, and for some or all days for the period of August 2004 to April 2005. The documentary evidence submitted herein establishes that in December 1998 plaintiff was paid $6.00 an hour; that his pay was thereafter increased to $6.50 an hour; that on June 23, 2000 his pay was increased to $7.00 an hour; that on February 26, 2001 his pay was increased to $8.00 an hour; that on July 20, 2003 his pay was increased to $8.35, or $8.40 an hour; and that on August 2, 2004 he was paid a flat rate of $550.00 a week, at which time he was paid on a bi-weekly basis. Plaintiff calculates the pay rate of $550.00 a week, as $13.75 an hour. The evidence presented thus establishes that during the course of his

employment by Hudson News, Mr. Busgith was paid more than the New York minimum wage. Therefore, as his total weekly compensation was already sufficiently above the minimum rate, he is not entitled to additional compensation, under the spread of hours provisions. That branch of defendant's motion which seeks to dismiss the third cause of action, therefore, is granted, and that branch of plaintiff's motion which seeks the imposition of a discovery sanction is denied.

The fourth cause of action for a violation of Labor Law § 191

Labor Law § 191, provides that "1. Every employer shall pay wages in accordance with the following provisions:
a. Manual worker.--
(I) A manual worker shall be paid weekly and not later than seven calendar days after the end of the week in which the wages are earned; provided however that a manual worker employed by an employer authorized by the commissioner pursuant to subparagraph (ii) of this paragraph or by a non-profitmaking organization shall be paid in accordance with the agreed terms of employment, but not less frequently than semi-monthly."

Plaintiff alleges in his fourth cause of action that in violation of Labor Law § 191(1)(a), "for a period believed to be within the past two years" defendant paid wages to him on a bi-weekly basis, during which time he was a manual worker or workingman within the meaning of Labor Law § 190(4).

Labor Law § 191(1)(d) provides that clerical and other workers "shall be paid the wages earned in accordance with the agreed terms of employment, but not less frequently than semi-monthly, on regular pay days designated in advance by the employer." Labor Law § 190(7) defines clerical and other workers as "all employees not included in subdivision four, five and six of this section, except any person employed in a bona fide executive, administrative of professional capacity whose earnings are in excess of six hundred dollars a week" [effective until January 14, 2008, after that date "in excess of nine hundred dollars a week"]).

Plaintiff testified at his deposition that prior to August 2, 2004, he was paid on a weekly basis, but that after he became the morning warehouse manager, he was paid $550.00 ($1100.00) on a bi-weekly basis. Therefore, the only time period at issue is that of August 2, 2004 to April 4, 2005. It is noted that although defendant failed to assert in its answer the statutory exemption of a "bona fide executive," this exemption is inapplicable here, as plaintiff's earning were not in excess of six hundred dollars a week (Labor Law § 190[7]).

Plaintiff testified that as the morning warehouse manager he continued to perform duties as a stock person, along with some clerical duties, such as checking inventory. Plaintiff also stated that he supervised up to ten laborers; that the number of people he supervised varied on a daily basis; and that at times he did not supervise anyone. Plaintiff did not state what percentage of time he spent on any of these duties. Defendant asserts that plaintiff primarily oversaw the activities at the Terminal 6 warehouse; that he was in charge of training and directing stock associates and assistant warehouse managers who were workingmen and/or laborers; and that, unlike the workingmen and laborers who unloaded deliveries, stocked the shelves in the warehouse and delivered merchandise to Hudson News' retail stores located throughout the airport, he was not required to perform these tasks. In view of the foregoing, the court finds that a triable issue of fact exists as to whether plaintiff was employed as a manual worker or workingman, or a clerical worker, or other worker within the meaning of Labor Law § 190, and whether the payment of his salary on a bi-weekly basis between August 2, 2004 and April 5, 2005 constituted a violation of Labor Law § 191 (see generally, IKEA U.S. v Industrial Bd. of Appeals, 241 AD2d 454, 455 [1997]; Tenalp Constr. Corp. v Roberts, 141 AD2d 81, 87 [1988]). Therefore, that branch of defendant's motion which seeks summary judgment dismissing the fourth cause of action is denied, and that branch the plaintiff's motion which seeks summary judgment on this cause of action is denied.

Conclusion

In view of the foregoing, those branches of defendant's motion which seek summary judgment dismissing plaintiff's first and second causes of action for a violation of the FLSA and the Labor Law are denied, and that branch of the plaintiff's motion which seeks summary judgment on these causes of action is denied. That branch of defendant's motion which seeks to dismiss the third cause of action, is granted. That branch of defendant's motion which seeks summary judgment dismissing the fourth cause of action is denied, and that branch the plaintiff's motion which seeks summary judgment on this cause of action is denied. Those branches of plaintiff's motion which seek the imposition of sanctions are denied. That branch of plaintiff's motion which seeks summary judgment for overtime pay for the pay period ending January 18, 2004, is denied.

Dated: April 8, 2008

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J.S.C.