SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD PART 61
Justice

ALFRED PIRRI, JR.,

Plaintiff,

-against-

MANHATTAN LUXURY AUTOMOBILES, INC. d/b/a LEXUS OF MANHATTAN,

Defendant.

INDEX NO. 115480/08

MOTION DATE March 15, 2010

MOTION SEQ. NO. 001

MOTION CAL. NO. ____

The following papers, numbered 1 to 4 were read on this motion for leave to amend the complaint

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, plaintiff's motion for an order pursuant to CPLR § 3025 granting leave to amend the complaint to add two new causes of action is decided in accordance with the accompanying decision and order.

Dated: 4/14/10

O. PETER SHERWOOD, J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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ALFRED PIRRI, JR.,

Plaintiff,

-against-

MANHATTAN LUXURY AUTOMOBILES, INC. d/b/a LEXUS OF MANHATTAN,

Defendant.

----------X

DECISION AND ORDER

Index No. 115480/2008

O. PETER SHERWOOD, J.:

Plaintiff Alfred Pirri ("plaintiff") moves for an order pursuant to CPLR § 3025 granting him leave to amend his complaint to assert two additional causes of action under the Fair Labor Standards Act ("FLSA") (29 USC §§ 201 *et seq.*) and New York's Labor Law (Labor Law §§ 190 *et seq.*) For recovery of unpaid overtime wages. Defendant opposes the motion. For the reasons that follow, plaintiff's motion is granted.

The facts as alleged in the complaint are as follows: Plaintiff was employed by defendant Manhattan Luxury Automobiles, Inc. d/b/a Lexus of Manhattan ("Lexus") from December 17, 2007 until his employment was terminated on August 9, 2008 on the ground "he let his personal life interfere with his job" (Berke-Weiss Aff., Ex. "A" Complaint, ¶¶ 4, 13). He commenced this action against Lexus by filing the summons and complaint on November 18, 2008, alleging that Lexus had discriminated against him because of his sexual orientation in violation of the New York City and New York State Human Rights Law (New York City Administrative Code §§ 8-102 *et seq.*; Executive Law §§ 290, *et seq*) and seeking, *inter alia,* to recover compensatory and punitive damages for lost income and benefits, including pension and health benefits and bonuses, and for injuries including emotional distress, mental anguish and humiliation, and an award of attorney's fees.

On September 23, 2009, the Court held a preliminary conference, set a disclosure schedule and ordered that a note of issue and certificate of readiness be served and filed by February 26, 2010. At a compliance conference on January 27, 2010, an order was entered permitting plaintiff to file a motion by February 5, 2010 for leave to amend the complaint to add two new causes of action for

wage and hour and overtime violations pursuant to FLSA and New York's Labor Law. Plaintiff now moves for such relief (Berke-Weiss Aff. Ex. "B" Proposed Amended Complaint, ¶¶ 28-33, 34-39). Plaintiff's counsel, Laurie Berke-Weiss,Esq., asserts in her affirmation in support of the motion that the facts of the proposed additional claims came to light during the depositions of defendant's witnesses Peter Silletti, Lexus' general sales manager, Roger Doobraj, Lexus' sales manager, and Ignazio Iacono, Lexus' general manager, all of whom testified that plaintiff was not a manager (Berke-Weiss Aff. ¶ 4). Ms. Berke-Weiss contends that the proposed additional claims for unpaid overtime wages is timely made within the applicable statute of limitations and that granting leave to amend to assert such claims will avoid the waste of judicial resources attendant upon interposing such claims in a second action and will, thereby, promote efficient litigation. The allegations of the proposed amended complaint specific to the proposed new causes of action state that beginning in March 2008 plaintiff was promoted from his salesperson position to the position of Business Development Manager and scheduled to work approximately 40 hours per week. However, plaintiff worked beyond the 40 hours scheduled and defendant failed to pay plaintiff overtime wages in violation of the FLSA and the Labor Law

Defendant opposes the motion with an affirmation of its attorney, David J. Reilly, Esq. of the law firm McElroy, Deutsch, Mulvaney & Carpenter, LLP. Mr. Reilly contends that plaintiff's proposed new claims lack merit as plaintiff's position was part of the Lexus Sales Department and, as such, it was an exempt occupation within the meaning of the FLSA and the Labor Law. In addition, defendant contends that plaintiff was compensated for more than one and one half times the minimum wage for hours worked as required by the Labor Law. On that basis, defendant avers that leave to amend the complaint to add the two causes of action should be denied.

In her reply affirmation, plaintiff's counsel contends that defense counsel misstates the law and the facts. She asserts that the deposition testimony of Peter Seletti, specifically that with plaintiff's March 2008 promotion his responsibilities changed from selling cars to making appointments for potential customers to come into the dealtership, makes clear that plaintiff did not come within the exemption for car salesmen set forth in the FLSA (*see* 29 USC § 216 [b][10][A]). That statutory provision states that FLSA's overtime requirements shall not apply to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm

implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." Plaintiff further argues that defendant's statement regarding the calculation of overtime under the Labor Law and supporting regulations is incorrect. Contrary to defendant's position that overtime for non-exempt employees be calculated at one and one-half times the minimum wage rate of $7.25 for hours worked in excess of 40 hours per week, plaintiff claims that the Labor Law requires non-exempt employees to be paid overtime at one and one-half times the employee's regular rate. In plaintiff's case, such calculation would be made by taking his weekly salary and dividing it by 40 hours to determine his hourly rate and then calculating any hours worked in excess of 40 at one and one-half times such hourly rate.

DISCUSSION

It is well settled that leave to amend shall be freely granted provided the amendment is not plainly lacking in merit and does not cause prejudice or surprise to the non-moving parties (*see,* CPLR § 3025 [b]; *McCaskey, Davies and Assocs. v New York City Health & Hosps. Corp.*, 59 NY2d 755 [1983]; *Fahey v County of Ontario,* 44 NY2d 934 [1978]). Mere lateness in seeking such relief is not in itself a barrier to obtaining judicial leave to amend (*see, Ciarelli v Lynch,* 46 AD3d 1039 [3d Dept. 2007]). Rather, when unexcused lateness is coupled with significant prejudice to the other side, denial of the motion for leave to amend is justified (*see, Edenwald Contracting Co. v City of New York,* 60 NY2d 957, 958 [1983]).Prejudice in this context is shown where the nonmoving party is "hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (*Loomis v Civetta Corinno Const. Co.*, 54 NY2d 18, 23 [1981]).

Here, plaintiff's delay in seeking leave to amend the complaint is not particularly lengthy and defendant has not claimed that it would suffer meaningful prejudice if leave to amend is granted. Nevertheless, even if there is no prejudice resulting from the proposed amendments, the underlying merits of the proposed amendments must be reviewed in order to conserve judicial resources (*see, Spitzer v Schussel*, 48 AD3d 233 [1st Dept. 2008]).

Under §7 of the FLSA, non-exempt employees are entitled to overtime premium pay at one and one-half times their regular rate (*see* 29 CFR 778.14; *Anderson v. Ikon Office Solutions,* 38 AD3d 317 [1st Dept 2007]) unless they are covered by an exemption in the statute. 29 USC §213(b)(10) of the Act provides an exemption applicable to some workers employed in automobile dealerships. The exemption applies to:

> any salesman, partsman or mechanic primarily engaged in selling or servicing automobiles ... if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to the ultimate customer.

Plaintiff was a Business Development Manager in the Lexus Sales Department. His job entailed telephone and internet communication with potential purchasers for the purpose of getting them to come into the dealership. Plaintiff received a commission for each appointment he arranged. His commission did not depend on actual sales. As a member of the sales force who was engaged in the promotion and sale of vehicles sold by defendants, it would appear that the position is within the exception (*see Brennan v. Deel Motors, Inc.*, 475 F2d 1095, 1098 [5th Cir 1973]). However, at this stage of the case, plaintiff is entitled to assert that the position is sufficiently attenuated from the sale of cars so as to fall outside the exception provided for automobile sales personnel.

Under the New York State Labor Law, non-exempt workers must be paid a minimum wage fixed by the Legislative and premium pay for overtime work. The law does not apply to classifications exempted from sections 7 and 13 of the FLSA. Regarding jobs to which the law applies, the New York Labor Commissioner's Minimum Wage Order for Miscellaneous Industries and Occupations, 12 NYCRR §142-2.2 states that:

> [a]n employer shall pay an employee for overtime at a wage of 1½ times the employee's regular rate in the manner and methods provided in and subject to the exceptions of section 7 and 13 of 29 USC 201, *et seq.*, the Fair labor Standards Act of 1988 ...

The regulations under the FLSA provide the "manner and methods" for payment of overtime of non- exempt employees who are paid a fixed weekly salary. In such cases, the salary must be converted to an hourly rate that is determined by dividing the number of hours it is intended to compensate for (*see* 29 CFR §§778.109, 778.113). If the parties have a clear understanding that the salary covers a fluctuating workweek *(i.e.*, that it covers whatever number of hours are worked), 29 CFR §778.14 sets forth a formula for calculating overtime pay. Otherwise the formula set forth in 29 CFR §§778.109, 778.113 apply. In this case the parties dispute the hours plaintiff's salary was intended to cover.

Accordingly, plaintiff's motion to amend the complaint shall be granted.

Based upon the foregoing discussion, it is hereby

ORDERED, that plaintiff's motion for leave to amend the complaint to add a third and fourth cause of action for overtime wages and benefits based upon the Fair Labor Standards Act and the New York State Labor Law is granted and the amended complaint in the proposed form annexed to the moving papers as Exhibit "B" shall be deemed served as to defendant upon service of a copy of this order with notice of entry and defendant shall serve an answer to the amended complaint within ten (10) days from the date of said service; and it is further

ORDERED that the status conference scheduled for April 14, 2010 shall be adjourned to May 5, 2010.

This constitutes the decision and order of the court.

DATED: April 14, 2010

ENTER,

O. PETER SHERWOOD
J.S.C.