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

PRESENT: EMILY JANE GOODMAN Justice

PART 17

MENG L. JI, YING ZHU

- v -

BELLE WORLD BEAUTY, INC., KOK LIM TSUN, PUI F. CHANG

INDEX NO. 603228-08

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided per attached

FILED
AUG 16 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 8/12/10

EMILY JANE GOODMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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MENG L. JI, YING ZHU,

Plaintiffs,

Index No.:
603228/2008

-against-

BELLE WORLD BEAUTY, INC., KOK LIM TSUN, PUI F. CHANG,

Defendants.

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EMILY JANE GOODMAN, J.S.C:

This action arises out of plaintiffs Meng L. Ji and Ying Zhu's allegations that defendants Belle World Beauty, Inc., Kok Lim Tsun (Tsun) and Pui F. Chang (Chang), who are plaintiffs' former employers, violated provisions of the New York Labor Law and the Federal Fair Labor Standards Act. Motions with sequence numbers 001 and 006 are hereby consolidated for disposition.

In motion sequence 001, plaintiffs move by order to show cause, pursuant to CPLR 6313 and 6312, for a temporary restraining order and a preliminary injunction seeking to restrain defendants from transferring or dissipating any interest in Belle World Supply, Inc.; restraining defendants from transferring or assigning any interest in their home, which is located at 55 Old Pine Drive, Manhasset, New York, and ordering defendants to hold the corporate assets of Belle World Beauty, Inc. in escrow, pending the outcome of the litigation.

In motion sequence 006, defendants move, pursuant to CPLR 3211 (a) (7), for an order dismissing plaintiffs' first cause of action for failure to state a claim.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiffs are former employees of Belle World Beauty, Inc. located in New York, New York. Defendant Tsun was the owner and operator of Belle World Beauty, Inc., and his wife, defendant Chang, also helped operate the entity. At the time of plaintiffs' employment, Belle World Beauty, Inc. was a combination of a beauty supply retail store located on the ground floor and a beauty salon located in the basement. The beauty salon was a nail salon which provided manicures, pedicures, waxing and other beauty services to its clientele.

Plaintiff Ji worked as a nail technician for the beauty salon from approximately March 2007 until October 2007. Plaintiff Zhu worked as a nail technician at the beauty salon from approximately July 2007 until September 2007. The facts of the underlying dispute are contested. According to plaintiffs, they were required work six days a week. Although their shifts were technically from 10 A.M. to 8 P.M., they generally arrived a half an hour earlier to set up the salon and stayed a half an hour later to finish up with clients and to clean up. Plaintiffs stated that Tsun set up the schedule and drove them to and from work every day. They allege that, as a condition of their

employment, they were required to purchase their own manicure and pedicure tools, at a cost of approximately $500. Plaintiffs contend that defendants did not maintain a record of the hours that plaintiffs worked and plaintiffs were not provided with an accurate statement of their hours and wages. Plaintiffs allege that the nail salon did not have a conspicuous posting regarding the defendants' responsibility to provide their employees with minimum wage and also overtime pay at a rate of one and one-half times their regular rate. They also state that defendants refused to give them breaks, even rushing them out of the bathroom when the salon was busy.

Plaintiffs state that they were paid $100 a day for wages, and did not receive overtime payments for their extra hours worked. Zhu allegedly complained to Tsun in August 2007 about the failure to receive overtime wages. Both plaintiffs allegedly complained to the manager of the store about the long hours and the failure to receive overtime. Zhu was terminated in late September 2007 and Ji was terminated in October 2007. According to plaintiffs, they were terminated in retaliation for their complaints regarding failure to receive overtime wages. They claim that, at all times during their employment, they performed their duties in a satisfactory way.

Defendants state that plaintiffs worked approximately 10 hours per day. They contend that their employees never worked

more than 10-hour shifts. According to defendants, there were at least six other workers who worked the same shifts as plaintiffs, none of whom report working more than 10-hour shifts. They maintain that they provided all the beauty tools for their employees, including plaintiffs. Plaintiffs were given breaks every shift, and defendants state that they even provided a break room for their employees. Defendants state that plaintiffs were paid $100 per day, and that plaintiffs also received tips from their customers. According to defendants, plaintiffs were terminated for poor performance and insubordinate behavior. Zhu was allegedly terminated because she was very "slow with her work and not a very skilled nail technician." Tsun Affirmation, ¶ 17. Ji was allegedly terminated because she was "constantly talking on her cellular telephone while attending to customers." *Id.*, ¶ 15. Both plaintiffs are accused of being rude to the clients and speaking Chinese in front of non-Chinese speaking clients, after Tsun asked them not to. Prior to their termination, defendants claim that plaintiffs never complained to Tsun or any other employees that their compensation violated any laws.

According to Tsun, Chang, his wife, should not be named as a defendant in this action since she had no authority to hire or fire employees. Tsun also maintains that he was the sole shareholder and director of Belle World Beauty, Inc., before it dissolved, and is currently the sole shareholder and director of

Belle Beauty Supply, Inc.

Belle Beauty Supply, Inc., a separate legal entity, was incorporated on February 12, 2008.

On April 1, 2008, plaintiffs' attorney wrote to defendants advising them that plaintiffs intended to pursue a law suit to enforce defendants' purported employment violations. The letter indicated "FOR SETTLEMENT PURPOSES ONLY." Plaintiffs' Order to Show Cause, Exhibit B, at 1.

In April 2008, plaintiffs picketed outside of the beauty salon and vocalized their legal claims against defendants to the media and to the community. Plaintiffs state that, shortly after, Tsun called Zhu and made threats such as "I won't pay you back" and "I will ignore you." Boop Affirmation in Support of TRO, ¶ 25. Defendants deny threatening either plaintiff.

According to defendants, as a direct result of the picketing, they lost a substantial amount of business and were forced to close down the beauty salon. Defendants allege that, had plaintiffs not made slanderous statements, the beauty salon would still be open. In August 2008, Belle World Beauty, Inc. was officially dissolved as a corporate entity and the nail salon shut down, and is allegedly still closed. The beauty supply store did not shut down, and, upon information and belief, is still operating. Plaintiffs contend that they should have been given notice of the dissolution. Plaintiffs also note that,

according to Belle World Beauty, Inc.'s 2008 corporate tax return, defendants claim that they stopped paying wages to all employees and also closed their business on February 28, 2008. Plaintiffs' Exhibit C. Plaintiffs also submit a copy of the unemployment application filled out by defendants in February 2008, on behalf of Ji, in which defendants cite that Ji "left of own accord" due to not being satisfied by the gratuities or with the quality of the customers. Plaintiffs' Exhibit B, at 1-2.

On November 6, 2008, plaintiffs filed a complaint containing six causes of action, alleging that defendants violated numerous labor law provisions and the Fair Labor Standards Act (FLSA).

In motion sequence 001, plaintiffs move by order to show cause pursuant to CPLR 6313 and 6312, for a temporary restraining order and a preliminary injunction. On September 10, 2009, the court granted the temporary restraining order, which restrained defendants from transferring or dissipating any interest in Belle World Supply, Inc., and restrained defendants from transferring or assigning any interest in 55 Old Pine Drive, Manhasset, New York. Defendants were also ordered to hold the corporate assets of Belle World Beauty, Inc. in escrow, pending the outcome of the litigation. Plaintiffs were required to furnish an undertaking of $2,500.00.

Plaintiffs argue that there is a threat of imminent harm as defendants seek to defraud plaintiffs by their past actions of

dissolving Belle World Beauty, Inc. and closing down the nail salon. Plaintiffs assert that, as soon as they vocalized their legal claims, defendants closed the salon and registered the beauty supply store under a different name. Plaintiffs also believe that they will be successful in their legal claims, as plaintiffs worked 66 hours per week, yet were not paid overtime. Plaintiffs also argue, among other things, that defendants, in violation of New York Labor Law § 195, did not furnish an explanation of the wages. Plaintiffs also assert that, if the defendants sell the business or their private home, there is no possibility of a monetary recovery. As such, according to plaintiffs, the loss to plaintiffs is great and the prejudice to defendants is "virtually non-existent." Boop Affirmation, ¶ 75.

Defendants contend that Belle Beauty Supply, Inc. was incorporated in February 2008, four months before plaintiffs verbalized any claims. They also state that, it was due to plaintiffs' false accusations that the nail salon had to close down, and remains closed. If plaintiffs are successful in their claims, according to defendants, they would still be able to recover any profits from the business or assets sold by Tsun. Defendants also argue that plaintiffs cannot prove any employment violations committed by defendants.

In their first cause of action, plaintiffs seek compensatory damages in the amount of no less than $200,000.00, as well as

punitive damages, back pay, front pay and attorneys' fees, as a result of defendants' alleged illegal retaliation under Labor Law § 215. Plaintiffs allege in their second cause of action that defendants failed to pay plaintiffs their overtime wages under the FLSA. In their third cause of action, plaintiffs maintain that defendants violated the New York Labor Law, specifically, the New York Minimum Wage Act, when they did not pay overtime wages to plaintiffs. Plaintiffs' fourth cause of action alleges that defendants failed to pay plaintiffs for all of their hours worked. In their fifth cause of action, plaintiffs contend that defendants violated the New York Labor Law provisions when defendants failed to pay plaintiffs spread-of-hours wages of an additional hour of pay at the minimum wage for every day plaintiffs had a spread in excess of 10 hours per day. Plaintiffs maintain in their sixth cause of action that they were illegally required to obtain their own beauty supplies while performing their duties at the defendants' salon, and they seek a return of their expenses paid.

In motion sequence 006, defendants move, pursuant to CPLR 3211 (a) (7), for an order dismissing plaintiffs' first cause of action for failure to state a claim.

I. Preliminary Injunction:

In plaintiffs' order to show cause, they seek to restrain defendants from transferring or dissipating any interests in the

beauty supply business and defendants' home. Plaintiffs also seek to have the corporate assets of Belle World Beauty, Inc. held in an escrow account pending the outcome of litigation. Plaintiffs claim that they will suffer irreparable harm if the court does not grant this injunctive relief since the ability to collect a potential judgment will be stymied if the defendants close the supply store or transfer any assets. Plaintiffs continue that these assets will not be available to them and they will have no recourse despite defendants' alleged violations. Plaintiffs also assert that defendants made threats to them that plaintiffs would not be able to collect on the money owed to plaintiffs.

"The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor." *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 (2005), citing CPLR 6301. As evidenced by their complaint, plaintiffs seek monetary damages as their relief. They are not seeking to be reinstated as employees, for example, or any other recourse. The Appellate Division, First Department, has held that "monetary harm which can be compensated by damages does not constitute irreparable injury [internal quotation marks and citations omitted]." *OraSure Technologies, Inc. v Prestige Brands Holdings, Inc.*, 42 AD3d 348, 348 (1st Dept 2007); *see also*

Di Fabio v Omnipoint Communications, Inc. (66 AD3d 635, 636-637 [2d Dept 2009]), holding that, "[i]rreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient [internal quotation marks and citations omitted]."

In the present case, damages may be calculated.[1] Notably, plaintiffs have not sought an attachment under CPLR 6201, although their reference to defendants' frustrating plaintiffs' ability to collect on a judgment, and defendants' encumbering and secreting of assets, are elements of an attachment. Accordingly, the Court will not address whether an attachment would be appropriate under the circumstances.[2]

II. Dismissal

Defendants move to dismiss the complaint against them pursuant to CPLR 3211 (a) (7). On a motion to dismiss pursuant to CPLR 3211, the facts as alleged in the complaint are accepted

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[1] Although defendants seek to have plaintiffs' dispute recognized as a labor dispute and have the preliminary injunction dismissed as under Labor Law § 807, these criteria, which create even a higher standard than CPLR 6301, do not have to be discussed at this time, as a result of this decision.

[2] Given plaintiffs' allegations (which were not refuted by affidavit) and defendants' tax returns for Belle World Beauty Inc., which indicate that the salon stopped doing business February 28, 2008 only two weeks after the beauty supply store was incorporated, defendants are directed to notify plaintiffs in writing, at least 14 business days prior to transferring assets, or dissipating any interest in Belle World Supply, Inc., of such intent, other than regarding payments made in the ordinary course of business.

as true, the plaintiff is given the benefit of every possible favorable inference, and the court must determine simply whether the facts alleged fit within any cognizable legal theory. *P.T. Bank Central Asia v ABN AMRO Bank N.V.*, 301 AD2d 373, 375 (1st Dept 2003); *see also Mendelovitz v Cohen*, 37 AD3d 670, 671 (2d Dept 2007). Under CPLR 3211 (a) (7), "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one [internal quotation marks and citations omitted]." *Leon v Martinez*, 84 NY2d 83, 88 (1994).

Defendants argue that plaintiffs' first cause of action should be dismissed since plaintiffs failed to serve the Attorney General pursuant to the requirements of filing a claim under Labor Law § 215. Labor Law § 215 states the following, in pertinent part:

> § 215. Penalties and civil action; employer who penalizes employees because of complaints of employer violations
>
> 1. No employer or his agent, or the officer or agent of any corporation, shall discharge, penalize, or in any other manner discriminate against any employee because such employee has made a complaint to his employer, or to the commissioner or his authorized representative, that the employer has violated any provision of this chapter, or because such employee has caused to be instituted a proceeding under or related to this chapter, or because such employee has testified or is about to testify in an investigation or

proceeding under this chapter.[3]

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2. An employee may bring a civil action in a court of competent jurisdiction against any employer or persons alleged to have violated the provisions of this section. The court shall have jurisdiction to restrain violations of this section, within two years after such violation, and to order all appropriate relief, including rehiring or reinstatement of the employee to his former position with restoration of seniority, payment of lost compensation, damages, and reasonable attorneys' fees. At or before the commencement of any action under this section, notice thereof shall be served upon the attorney general by the employee.

Defendants maintain that plaintiffs have failed to satisfy the service requirement on the Attorney General prior to commencing this proceeding. Plaintiffs argue that, as of May 5, 2010, the Attorney General was served. They also contend that, similar to other provisions, such as General Business Law (GBL) § 340 (5), failure to timely serve the Attorney General does not render the complaint defective. GBL § 340 (5) states the following, in pertinent part:

An action to recover damages caused by a violation of this section must be commenced within four years after the cause of action has accrued. The state, or any political subdivision or public authority of the state, or any person who shall sustain damages by reason of any violation of this section, shall recover three-fold the actual damages sustained thereby, as well as costs not exceeding ten thousand dollars, and reasonable attorneys' fees. At or before the commencement of any civil action by a party other than the attorney-general for a violation of this section, notice thereof shall

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[3]This is the language as the statute existed at the time of plaintiffs' claims. The statute was amended in 2009.

be served upon the attorney-general.

Plaintiffs cite to *Columbia Gas of New York, Inc. v New York State Electric & Gas Corp.* (28 NY2d 117, 129 [1971]), in which the Court of Appeals decided that, despite the language in GBL § 340 (5), the plaintiff's failure to give notice of the commencement of the action to the Attorney General did not render the complaint defective. The Court stated, "[t]he requirement that notice be given is designed solely to apprise the Attorney-General that such an action was commenced so that he would be aware of the circumstances. It may not be considered a condition precedent to the plaintiff's cause of action [internal quotation marks and citation omitted]." *Id.* at 129. Plaintiffs also discuss other unrelated statutes, such as General Municipal Law (GML) § 50-e (5), in which plaintiffs can seek and obtain permission to file a late notice of claim.

According to Labor Law § 214, the Attorney General

> may prosecute every person charged with the commission of a criminal offense in violation of this chapter, or of any rule, regulation or order made thereunder, or in violation of the laws of this state, applicable to or arising out of any provision of this chapter or any rule, regulation or order made thereunder.

As such, the Attorney General may investigate plaintiffs' claims, however, this does not impede plaintiffs' ability to pursue their own litigation. Accordingly, based on the language and the

intent of the statute, coupled with the late service of notice of the action, the court will not dismiss the action based on late service to the Attorney General.

Moreover, defendants' argument, that the first cause of action for retaliation under Labor Law § 215 fails to state a cause of action, is unpersuasive. Labor Law § 215 provides, in relevant part, that no employer shall discharge an employee after the employee complained that the employer violated "any provision of this chapter." A chapter refers to any provision of the Labor Law. *Kelly v Xerox Corp.*, 256 AD2d 311, 312 (2d Dept 1998); Labor Law § 1 ["This Chapter shall be known as the 'Labor Law'"]).

Citing *Epifani v Johnson* (65 AD3d 224, 236 [2d Dept 2009]), defendants complain that plaintiffs have failed to identify any provision of the Labor Law in their first cause of action for retaliation, which was violated, even though plaintiffs allege that they complained to defendants about the defendants' failure to pay overtime wages, and, as a result, were terminated. However, *Epifani*, which defendants acknowledge need not be followed (although they argue it should be) mistakenly construes a prior Appellate Division, Second Department case, which noted that "[t]here are no provisions governing overtime compensation in the New York State Labor Law." *Ballard v Community Home Care Referral Service*, 264 AD2d 747, 747 (2d Dept 1999). *Ballard*,

however, also noted that "[i]n accordance with these empowering statutes, the Commission of Labor determined that some form of overtime compensation was appropriate and issued the Miscellaneous Wage Order found at 12 NYCRR 142-2.2." *Id.* Although the plaintiff, a home health aide, was not entitled to overtime compensation under the Labor Law, it was because her right was defined by the Miscellaneous Wage Order (based on the FLSA) and federal law had exempted overtime compensation for those providing companionship services for the elderly or infirm. Thus, *Ballard* merely recognized what the First Department recognized--which is that a plaintiff can state a cause of action for overtime wages based on a violation of 12 NYCRR §142-2.2. *See Anderson v Ikon Office Solutions, Inc.*, 38 AD3d 317 (1st Dept 2007).

By giving undue weight to the lack of specific criteria governing overtime in the Labor Law, *Epifani*, which is the sole appellate authority the Court has found on this issue, glossed over that 12 NYCRR §142-2.2 was enacted pursuant to the authority granted to the Commissioner under the Labor Law to investigate the minimum wage and overtime rates and appoint a wage board to recommend regulations safeguarding minimum wage, overtime and part-time rates. *See e.g.* Labor Law §§ 653, 655 (5) (b). "Although there are no explicit provisions governing overtime compensation under the New York Minimum Wage Act, New York state

courts have recognized a cause of action for unpaid overtime wages against corporations pursuant to the 'Minimum Wage Order for Miscellaneous Industries and Occupations'...issued by the New York State Department of Labor." *Robles v Copsac Sec, Inc.*, US Dist LEXIS 112003 [SDNY 2009]; *see also Diaz v Electronics Boutique of America, Inc.* (US Dist LEXIS 30382 [WD NY 2005, *30] ["the Second Circuit Court of Appeals and other New York District Courts have verified that overtime claims may be brought pursuant to NYLL 650 et seq. and that implementing regulation 12 NYCRR § 142-2.2 carries the force of the law])."

While the above cases did not involve Labor Law § 215, *Higueros v New York State Catholic Heath Plan* (526 F Supp 2d 342 [EDNY 2007]) did, and is well reasoned. In that case, the court denied the defendant's motion to dismiss the plaintiff's sufficiently plead cause of action for retaliation under Labor Law §215, based on violations of Labor Law §190 and §650 and their implementing regulations regarding overtime compensation. In concluding that plaintiffs state a cause of action for retaliation here, this Court is further persuaded by the fact that NYCRR §142-2.2 indicates that the regulation's enabling authority includes Labor Law § 21, which in relevant part, directs the Commissioner to "enforce all provisions of this chapter" and "issue such regulations governing any provision of this chapter as he finds necessary and proper." NYCRR §142-2.2

(1) and (11). It is senseless to conclude that the legislature directed the Commissioner to enforce the Labor Law, and empowered the Commissioner to do so through regulation, yet did not also intend that such regulations would be given the full force of law, including the full force and effect of Labor Law § 215.

Despite defendants' informal arguments that Chang should be dismissed as a defendant since she is allegedly not liable as an employer, an issue of fact remains with regard to Chang's role in hiring and firing employees, determining rates of pay, scheduling and other significant business decisions.

CONCLUSION

Accordingly, it is

ORDERED that plaintiffs' motion for a preliminary injunction is denied; and it is further

ORDERED that defendants are directed to notify plaintiffs' counsel in writing, at least 14 business days prior to transferring assets, or dissipating any interest in Belle World Supply, Inc., of such intent, other than regarding payments made in the ordinary course of business; and it is further

ORDERED that defendants' motion to dismiss the first cause of action in the complaint is denied.

Dated: August 12, 2010

This Constitutes the Decision and Order of the Court.

ENTER:

J.S.C.

EMILY JANE GOODMAN