

Hernandez v Team Constr. Co. Inc.

2011 NY Slip Op 30497(U)

February 1, 2011

Supreme Court, Suffolk County

Docket Number: 35753-06

Judge: Peter Fox Cohalan

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RETURN DATE: 3-3-10
MOT. SEQ. # 002 & 003

**SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY**

PRESENT:
Hon. PETER FOX COHALAN

-----x
CARLOS HERNANDEZ,

-Plaintiff,

-against-

TEAM CONSTRUCTION CO. INC. & PHILIP WEBER,

-Defendants.
-----x

CALENDAR DATE: July 28, 2010
MNEMONIC: MD ; XMD

PLTF'S/PET'S ATTORNEY:
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Upon the following papers numbered 1 to 52 read on this motion and cross motion for summary judgment :
Notice of Motion/Order to Show Cause and supporting papers 1-32 ; Notice of Cross-Motion and
supporting papers 33-49 ; Answering Affidavits and supporting papers 50-52 ; Replying
Affidavits and supporting papers _____ ; Other _____ ; and after hearing counsel in support of and
opposed to the motion it is,

ORDERED that this motion by the plaintiff, Carlos Hernandez, for summary judgment pursuant to CPLR §3212 on his complaint for unpaid overtime and constructive fraud as to his time sheets and the cross-motion by the defendants, Team Construction Co., Inc., and Philip Weber, for summary judgment dismissing the plaintiff's claims and granting summary judgment on their counterclaims are both denied as there are numerous issues of fact which preclude the Court from finding as a matter of law judgment in either party's favor.

The plaintiff instituted this action for damages against his employer, Team Construction Co. Inc., and Philip Weber (hereinafter Weber) for failure to pay overtime wage compensation and fraud in connection with a claim that Weber falsified and/or altered the time sheets of the plaintiff. The plaintiff worked for the defendants as a maintenance and sweeper driver/laborer and was terminated in or about January 2006. The plaintiff claims that his job functions involved parking lot maintenance and that he would work approximately 80 to 100 hours each week, 7 days a week without any meal break. The plaintiff maintains that while he had no fixed regular schedule he would normally start work around 12:00 am and return to the shop at about 10:00 am and pick up another vehicle for the day shift. The plaintiff claims that he was not compensated for all of his overtime hours and that Weber "routinely deducted between three and four hours from plaintiff's total weekly pay for meal breaks that plaintiff did not take."

On January 29, 2007, the plaintiff served an amended verified complaint alleging violations of Labor Law §650 and §190 for failure to pay overtime. The plaintiff claims that Weber purportedly produced two separate and different sets of employee payroll records reflecting plaintiff's earnings, resulting in the additional claims of fraud. Weber however argues that poor record keeping and time card procedures are the real culprit and that

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originally there was a mere sign in/sign out card with a time clock and that time records for 2002 and 2003 were inadequately maintained. Weber also argues that during a period of time when the plaintiff was involved in child support issues, Weber issued separate checks for payroll and overtime. Finally, Weber claims that the plaintiff was terminated in 2004 when GPS devices were placed in the trucks and the plaintiff was found spending an inordinate amount of time either not moving a truck or at home during the middle of the night shift. The plaintiff sought to regain his employment in approximately the end of 2004 which was granted but he was again terminated in January 2006 when he was involved in a motor vehicle accident on the job and fled from the scene, resulting in his arrest.

At its simplest, the plaintiff's claims are that 3 hours were deducted from his paycheck each week for meal breaks which plaintiff claims he did not take. However, the defendants point out that in the plaintiff's deposition (hereinafter EBT) he testified that not only did Weber give him paid vacations and time off to travel back to El Salvador but in an exchange in the EBT the plaintiff said he believed he was paid for his overtime but stated "That he [Weber] always say that he did pay overtime always, but I wasn't sure because there were many hours which I did work." The plaintiff in his affidavit, dated January 27, 2010, states in paragraph 12: "Even though I worked while eating my meals, defendants regularly deducted between three and four hours for alleged lunch breaks, which I did not take." The plaintiff concludes therefore that he was not compensated for a total of 649 hours and one minute.

The plaintiff now moves for summary judgment for compensation and also for fraud involving the falsification and alteration of plaintiff's time and payroll records as well as striking the defendants' answer and imposition of sanctions. The defendants oppose the requested relief arguing that the question of compensation cannot be determined as a matter of law because the question of compensation requires a fact based determination of the plaintiff's claims that he worked hours in which the defendants claim he was not working but was in fact in his home during work hours. The defendants also claim that the plaintiff can not ignore company policy requiring a meal break and by working through his meal breaks believe he is entitled to compensation. Finally the defendants have submitted a cross-motion for summary judgment dismissing the plaintiff's action and granting them judgment on their counterclaim for unjust enrichment, conversion and theft of money for being paid for hours when he was not working but "cooping" on the job or spending time at home.

Whether an employee should be compensated for meal breaks is a factual issue to be resolved and it depends on whether an employee is relieved from duty during those meal breaks. The requirement of meal breaks and whether or not the plaintiff was "required to work" during his meal breaks or chose to work through his meal breaks are all issues requiring an assessment of the credibility of the parties and not as a matter of law, notwithstanding the defendants' citation to **Sexton v. BFI Waste Systems of North America**, 2002 US Dist., Lexis 26129 (ED Mich 2002).

For the following reasons, the plaintiff's motion and the defendants' cross-motion pursuant to CPLR §3212 are both denied as there are numerous factual and credibility issues between the parties which preclude a finding by this Court that, as a matter of law, either the plaintiff or the defendants have established entitlement to judgment as a matter of law. The plaintiff's alternative relief in the nature of striking the defendants' answer and/or sanctions for the time sheet issue is denied. The mere negligence in poor record keeping of time cards and records is not a basis to warrant such a severe sanction as the striking of a pleading or the imposition of sanctions.

The Court's function on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. Elzer v. Nassau County, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); Steven v. Parker, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); Gaeta v. New York News, Inc., 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the Court of Appeals noted in Sillman v. Twentieth Century Fox, 3 NY2d 395, 404 (1957):

"To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (DiMenna & Sons v. City of New York, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v. Carey, 280 App. Div. 1019), or where the issue is 'arguable' (Barnett v. Jacobs, 255 NY 520, 522); 'issue finding, rather than issue determination is the key to the procedure' (Esteve v. Avad, 271 App. Div. 725, 727)."

On a motion for summary judgment, the Court must consider all the facts in a light most favorable to the party opposing the motion, Thomas v. Drake, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and determine whether there are any material and triable issues of fact presented. The Court should not attempt to determine questions of credibility. S.J. Capelin Assoc., v. Globe, 34 NY2d 338, 357 NYS2d 478 (1974).

Here, in the case at bar, after looking at the evidentiary material presented in the light most favorable to the party opposing the motion for summary judgment as required, [Robinson v. Strong Memorial Hospital, 98 AD2d 976, 470 NYS2d 239 (4th Dept. 1983)], the Court finds readily identifiable issues of fact on the question of the plaintiff's entitlement to judgment on his wage and compensation claims. The plaintiff's analysis asserts that he was not paid for all his overtime but in determining the amounts owed and hours worked in his position he relies in no small measure on the argument that he is entitled to be paid for the 3 hours deducted by his employer for meal breaks because he didn't take meal breaks or ate his meals while performing services. However, the defendants argue that the plaintiff was required to take meal breaks and point to the plaintiff's EBT where the plaintiff indicates he was never pushed to work during meal times and that there was never a time assigned to eat and that "Whatever time in which we were hungry, we used to eat and kept working." The defendants also point out that, after a GPS was installed, the trucks' records showed that the plaintiff took time off at his residence during working hours.

There are numerous issues of fact and credibility requiring resolution by the trier of fact. These include the alleged times billed by the plaintiff and on the defendants' counterclaim for the plaintiff's alleged "cooping" on the job; whether meal breaks were required or as seems possible from the testimony the meal breaks occurred when the plaintiff employee wanted them; the calculation of the alleged amounts owed; the claims of "cooping" on the job and the poor record keeping. While plaintiff seeks to have the Court find a possible "spoliation" claim, what seems readily apparent is not a deliberate or intentional attempt to destroy evidence but just poor record keeping on Weber's part which raises another issue for the trier of fact to determine after assessing the credibility of the parties. In determining whether summary judgment is appropriate,

the Court should draw all reasonable inferences in favor of the non-moving party and should not pass on issues of credibility. Gilfus v. CSX Trans. Inc., 79 AD3d 1671, NYS2d (4th Dept 2010); Keenan v. Munday, 79 AD3d 1415, 912 NYS2d 778 (3rd Dept. 2010); Torres v. Jeremias, 283 AD2d 484, 724 NYS2d 461 (2nd Dept. 2001). Further, the conflicting statements and affidavits of the parties with regard to the meal break and wage compensation present this Court with a genuine credibility question which should not be resolved as a matter of law on a request by each party for summary disposition. See, Lipschutz v. Kiderman, 76 AD3d 178, 905 NYS2d 247 (2nd Dept. 2010).

The defendants' claim to entitlement to summary disposition suffer the same infirmities as the plaintiff's request. The Court is presented with competing claims on questions involving wage compensation and therefore the defendants' summary motion must also be denied. Summary judgment, being such a drastic remedy so as to deprive a litigant of his day in court, should only be employed when there is no doubt as to the absence of triable issues. VanNoy v. Corinth Central School District, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985).

The plaintiff asserts that the Court should strike the defendants' pleading or impose sanctions for the defendants' attempt to recreate the plaintiff's payroll records for the purposes of discovery, the implication being that the records were falsified and or "doctored" during the discovery process. The plaintiff attempts to couch the lack of or missing payroll records or the recreation of such records as fraud or deceit. The defendants paint a more innocent portrayal involving poor record maintenance, attempts to move from a sign in/sign out sheet, to a clock in system and then back to sign in/sign out system when the clock system had difficulties. However, certain automated payroll records were produced which appear to differ from the amount of hours that were worked so there are questions for the trier of fact to consider and determine on the issues between the parties as to the accuracy of time keeping. The Court in De Los Santos v. Polanco, 21 AD3d 397, 799 NYS2d 776 (2nd Dept. 2005) noted that:

"The Supreme Court has broad discretion in determining the appropriate sanction for spoliation of evidence (see Allstate Ins. Co. v. Kearns, 309 AD2d 776, 765 NYS2d 806). Because striking a pleading is a drastic sanction to impose in the absence of wilful or contumacious conduct, the prejudice that results from the spoliation must be considered in order to determine whether such drastic relief is necessary as a matter of fundamental fairness (see Favish v. Tepler, 294 AD2d 396, 741 NYS2d 910). Thus, where a party destroys key evidence such that its opponents are deprived of appropriate means to confront a claim with incisive evidence, the spoliator may be punished by the striking of its pleading " [citations omitted]... "A less severe sanction is appropriate, however, where the missing evidence does not deprive the moving party of the ability to establish his or her case or defense" [citations omitted.]

This Court finds no basis to impose any penalty for alleged spoliation or fraud. The question of accurate and timely payroll records is a credibility issue for the trier of fact to determine in assessing the claims of the parties. As previously stated, the statements and testimony of both sides contradict each other and an issue of credibility and believability is within the purview of the

trier of fact and not this Court as a matter of law.

Therefore, the plaintiff's claims that Weber wilfully or intentionally destroyed material business records is contradicted by the assertion of sloppy and poor record keeping and not intentional, wilful or negligent destruction and the payroll claims of plaintiff may be substantiated with the payroll checks issued and other evidence produced. See, *E. W. Howell & Co. v. S.A.F. LaSala Corp.*, 36 AD3d 653, 828 NYS2d 212 (2nd Dept. 2007). Accordingly, that aspect of the plaintiff's motion is also denied.

The movants' summary judgment requests pursuant to CPLR §3212 are denied as there are numerous issues of fact and credibility between the parties which preclude this Court's finding, as a matter of law, that either movant has established entitlement to judgment. The plaintiff's alternative relief in the nature of striking the defendants' answer and/or sanctions for the claims made as to record keeping and the time sheet issue is also denied.

The foregoing constitutes the decision of the Court.

Dated: February 1, 2011



J.S.C.