

Tortorella v Postworks N.Y. LLC

2011 NY Slip Op 32014(U)

July 13, 2011

Sup Ct, NY County

Docket Number: 112686/10

Judge: Joan A. Madden

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

PRESENT: How JOAN A. Madden

PART 11

Index Number : 112686/2010
TORTORELLA, ROCCO
VS.
POSTWORKS NEW YORK LLC
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE 4-14-11
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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 in accordance with the annexed Memorandum Decision + Order.

FILED

JUL 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 13, 2011

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

-----X
ROCCO TORTORELLA,
Plaintiff,

-against-

Index No. 112686/10

POSTWORKS NEW YORK LLC,
DAVID ROSEN and ROBERT DeMARTIN,
Defendants.

FILED

-----X
Joan A. Madden, J.

JUL 19 2011

In this action to recover unpaid compensation, defendants PostWorks New York LLC
NEW YORK COUNTY CLERK'S OFFICE
("PostWorks"), David Rosen ("Rosen"), and Robert DeMartin ("DeMartin") (together,
"Defendants") move pursuant to CPLR 3211(a)(1) and (7) to dismiss the first count of the
complaint against them, which alleges violations of the New York Labor Law ("Labor Law").
Plaintiff Rocco Tortorella ("Tortorella") opposes the motion, and seeks sanctions. The motion is
granted in part and denied in part for the reasons stated below.

Background

The following description is based on the facts asserted in the complaint and exhibit
thereto, except as stated otherwise.

PostWorks is a company which provides post-production services to the film and
television industries and owns multiple post-production facilities. In or about July 2007,
Tortorella signed an agreement (the "Agreement") with PostWorks, which is attached as an
exhibit to the complaint, pursuant to which he was to be employed as an "audio producer" with
an annual salary of \$90,000.00. While the Agreement states that Tortorella was to be employed
as an "audio producer" at PostWork's Soho Facility (the "Soho Facility"), the complaint alleges
that Tortorella was employed as "Director of Sound Services" pursuant to the Agreement, and
this title is consistent with various evidence submitted in connection with this motion.

Pursuant to the terms of the Agreement, Tortorella was to be responsible for “managing the workflow of the audio rooms at the Soho [F]acility,” coordinating scheduling issues, and was expected to be the “voice and face for the audio department.” Agreement ¶1. The Agreement further provides that if PostWorks develops an audio transfer department (a “Transfer Department”), Tortorella will have additional responsibilities and increased compensation for assuming these additional responsibilities. *Id.*

PostWorks did develop a Transfer Department and Tortorella and his superior, Joe Caterini (“Caterini”), agreed that Tortorella would be paid 10% of the annual revenue of the Transfer Department as the additional compensation contemplated in the Agreement (the “Additional Compensation”). Complaint, ¶¶11-12. Tortorella was “intimately involved in the formation and operation of the Transfer Department.” *Id.* at ¶13.

In or about August 2008, Tortorella was advised by a superior that PostWorks would need to defer payment of the Additional Compensation to the following year due to cash flow constraints. *Id.* at ¶14. The superior requested that Tortorella agree to defer the Additional Compensation and assured Tortorella that in 2009 he would be paid the Additional Compensation for both his work in 2007-08 and 2008-09, which totaled about \$60,000.00. *Id.* at ¶15. Upon this assurance, Tortorella agreed to defer the payment of the Additional Compensation.

Some months later, the superior advised Tortorella that Rosen, PostWorks’ President, and DeMartin, the Chief Operating Officer, had decided not to pay Tortorella the Additional Compensation for his work in 2007-08 and 2008-09. Rosen and DeMartin’s responsibilities included the hiring and firing of employees as well as determining the rates and methods of compensation payments.

On or about June 1, 2009, Tortorella attended a meeting with Rosen and DeMartin to discuss the Additional Compensation. Rosen and DeMartin acknowledged that PostWorks owed Tortorella the Additional Compensation, but indicated that they believed it was more than Tortorella deserved to be paid.

Tortorella requested a second meeting with Rosen and DeMartin, which took place on June 12, 2009. At this meeting, Rosen and DeMartin again acknowledged that PostWorks owed Tortorella the Additional Compensation and “reiterated their refusal to make the required payment, and offered \$1,500 in exchange for Tortorella waiving his claims.” Complaint, ¶23. Later on that day, Tortorella returned to Rosen’s office and was offered \$7,500 in exchange for waiving his claims. At that time, Rosen advised Tortorella that he could either accept the \$7,500 or quit. It appears that at sometime after this meeting, Tortorella either quit his job at PostWorks or PostWorks terminated his employment.

The moving papers and related exhibits submitted by Defendants show that Tortorella testified at a hearing (the “Benefits Hearing”) on July 21, 2010, before Hon. Nicole Beason, an administrative law judge, regarding his entitlement to unemployment benefits.

Tortorella commenced this action by filing a summons and complaint asserting causes of action against PostWorks, Rosen, and DeMartin for violations of the Labor Law, breach of contract, unjust enrichment, quantum meruit, and estoppel. At issue in this motion is the viability of the Labor Law claim pursuant to Labor Law Section 191 (“Section 191”) and Labor Law Section 193 (“Section 193”).

Section 191 provides requirements for the frequency of payment for certain kinds of employees enumerated in the statute, including “clerical and other workers.”¹ Section 193

¹ Section 191, entitled “Frequency of payments,” provides in relevant part, that
1. “Every employer shall pay wages in accordance with the following provisions:
a. Manual worker....

provides in relevant part that an employer is prohibited from making any deductions from the wages of an employee except as authorized by applicable law, rules, or regulations, or as authorized by the employee in writing for the employee's benefit.²

The first count of the complaint, which seeks recovery under Sections 191 and 193, alleges that Tortorella is an employee and PostWorks is an employer within the meaning of Labor Law Section 190 ("Section 190"), and that Rosen and DeMartin also qualify as employers under Section 190 and can be held personally liable. It further alleges that in exchange for working in (and helping to create) the Transfer Department, Tortorella was entitled to receive the Additional Compensation, which constitutes a wage under Section 190. Complaint ¶29. It is further alleged that, in violation of Sections 191 and 193, Defendants "have willfully and without justification failed to pay [the Additional Compensation] due to Tortorella," and that Defendants "deducted and refused to pay those portions of Tortorella's compensation, including wages and bonuses, not in accordance with any law or rule or regulation... and not as expressly authorized by Tortorella in writing and for Tortorella's own benefit." Complaint ¶¶30-32.

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- b. Railroad worker....
 - c. Commission salespersons....
 - d. Clerical and other worker.--A clerical and other worker 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."

² Section 193, entitled "Deductions from wages," provides in relevant part, that:

1. "No employer shall make any deduction from the wages of an employee, except deductions which:
 - a. are made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency; or
 - b. are expressly authorized in writing by the employee and are for the benefit of the employee; provided that such authorization is kept on file on the employer's premises....
2. No employer shall make any charge against wages, or require an employee to make any payment by separate transaction unless such charge or payment is permitted as a deduction from wages under the provisions of subdivision one of this section."

The complaint further alleges that by reason of Defendants' willful breach of these provisions of the Labor Law, Tortorella has been damaged in excess of \$60,000 in unpaid wages and seeks liquidated damages equal to 25% of the payments owing as well as attorneys' fees costs and disbursements.

Defendants argue that the first count of the complaint, seeking recovery under the Labor Law Section 191 and Section 193, must be dismissed for failure to state a cause of action. Defendants additionally argue that to the extent that the complaint alleges a violation of Section 191 of the Labor Law, such claim must be dismissed pursuant to CPLR 3211(a)(1) as contrary to documentary evidence, including the Affirmation and Supplemental Affirmation of Sarah M. DeFranco ("DeFranco"), an attorney associated with Akermann Senterfitt LLP, attorneys for Defendants, the Affidavit of Joe Caterini, and the transcript of Tortorella's testimony at the Benefits Hearing.

In her Affirmation and Supplemental Affirmation, DeFranco states that she reviewed the file from the Benefits Hearing, and describes portions of the tape which concern Tortorella's job responsibilities and asserts that these portions support the Defendants' position that Tortorella worked in an executive or administrative capacity. DeFranco also attaches a transcript of Tortorella's testimony at the Benefits Hearing with her Supplemental Affirmation and states that Tortorella testified that he was employed by PostWorks as Director of Sound Services, and the transcript from the Benefits Hearing shows that Tortorella stated, "I was the director of sound services. I was not an audio producer." DeFranco Supp. Aff. ¶4; Benefits Hearing Tr. 23. DeFranco also states that Tortorella indicated that he supervised three PostWorks employees (DeFranco Aff. ¶5), and this is reflected in the transcript of the Benefits Hearing (Benefits Hearing Tr. 45-46; 50-51). However, certain portions of the transcript of the Benefits Hearing

on which DeFranco relies are largely described as “inaudible” in the transcript (See Benefits Hearing Tr. 23-28), as is a significant portion of Tortorella’s testimony.

In his affidavit, Joe Caterini (“Caterini”), who was formerly employed by PostWorks as the “Executive Vice President, Sales,” states that Tortorella was hired as the Director of Sound Services and that Tortorella reported to the General Manager of PostWorks’ Audio Department, Bill Ivie who in turn reported to Caterini and DeMartin. Caterini Aff. ¶¶2-3. Caterini further states that Tortorella was responsible for managing the workflow of the audio rooms within the audio department at the Soho Facility, creating and managing the audio transfer function within the audio department, overseeing quality control related to the audio transfer work performed, and ensuring that all client needs relating to audio work performed at the Soho Facility were fulfilled. Id. at ¶4. Additionally, Caterini states that Tortorella customarily and regularly exercised discretion and independent judgment in performing his duties, and that he “customarily and regularly directed the work of two or more employees in the audio department.” Id. at ¶6.

Defendants argue that the complaint fails to state a cause of action under Section 191 as Tortorella does not belong to any of the categories of workers to which Section 191 applies, including the category of “clerical and other worker.” The term “clerical and other worker,” which is defined under Labor Law Section 190(7), excludes any person employed in a “bona fide executive, administrative or professional capacity whose earnings are in excess of nine hundred dollars [(\$900)] per week.” Defendants assert that Tortorella falls within this exclusion since he worked in an executive or administrative capacity and earned more than \$900 per week.³

³In support of their contention that Tortorella worked in an executive or administrative capacity, the Defendants also cite the definitions of work in an executive or administrative capacity as set forth in 12 NYCRR 142-2.14(c)(4). However, the court need not reach whether this standard is applicable as the cases interpreting the meaning of executive and administrative capacity are

As for Section 193, Defendants argue that this Section is inapplicable to claims for failure to pay wages, but applies only to specific deductions alleged by an employee. Thus, Defendants argue that Tortorella's claim under Section 193 must be dismissed.

Tortorella opposes the motion, arguing that his claim sufficiently alleges that he is an employee entitled to collect improperly withheld and/or deducted wages under the Labor Law, and the complaint does not allege that he performed executive or administrative job functions which would exclude him from coverage under Section 191. Tortorella also asserts that the argument that he was an executive involves an intensive factual inquiry, which should not be resolved prior to discovery. Tortorella's opposition papers also provide that Tortorella had little or no control over the employees that he was allegedly supervising and that he did not hire them and could not fire them.

With respect to Defendants' assertion that Tortorella cannot make out a claim under Section 191 based on documentary evidence, Tortorella argues that the affirmations and affidavit submitted by Defendants are not documentary evidence which may be considered under CPLR 3211(a)(1) and that, in any event, the "documentary evidence" presented does not conclusively establish a defense as a matter of law. Furthermore, Tortorella asserts that DeFranco's statements as to the testimony that Tortorella gave at the hearing is not documentary evidence and is inadmissible hearsay. Additionally, Tortorella argues that the transcript of his testimony does not conclusively establish a defense as a matter of law as large portions of it are "inaudible."

In opposition to the motion to dismiss his Labor Law claim in so far as it asserts a violation of Section 193, Tortorella argues that case law establishes that Section 193 can be

sufficient to resolve whether Tortorella falls within the exclusion from coverage under Section 191.

applicable to circumstances involving a failure to pay wages, citing, *inter alia*, Tuttle v. George McQuesten Co. Inc., 227 A.D.2d 754 (3rd Dep't 1996); Carlson v. Katonah Capital, L.L.C., 10 Misc.3d 1076(A)(Sup. Ct. N.Y. County 2006).

In reply, with respect to alleged violations of Section 193, Defendants argue that case law supports the proposition that Section 193 is inapplicable to circumstances involving a refusal to pay as opposed to a deduction from wages which is covered by the Section, citing, *inter alia*, In re Apkon, 236 A.D.2d 225 (1st Dep't 1997), *lv. denied*, 89 NY2d 815 (1997); Kletter v. Fleming, 32 A.D.3d 566 (3rd Dep't 2006); Kane v. Waterfront Media, Inc., 2008 WL 3996234 (Sup. Ct. N.Y. County 2008), Ireton-Hewitt v. Champion Home Builders Co., 501 F.Supp.2d 341 (N.D.N.Y. 2007), Monagle v. Scholastic, Inc., 2007 WL 766282 (S.D.N.Y. 2007).

Discussion

On a motion pursuant to CPLR 3211(7) to dismiss a pleading for legal insufficiency, the court "accept[s] the facts alleged as true and determine[s] simply whether the facts alleged fit within any cognizable legal theory." Morone v. Morone, 50 N.Y.2d 481, 484 (1980) (citation omitted). The pleading is to be liberally construed, accepting all the facts alleged therein to be true, and according the allegations the benefit of every possible favorable inference. See Goshen v. Mutual Life Ins. Co. of NY, 98 N.Y.2d 314 (2002). Where the allegations are ambiguous, the court resolves the ambiguities in plaintiff's favor. Snyder v. Bronfman, 13 N.Y.3d 504 (2009). However, claims consisting of bare legal conclusions, with no factual specificity, are insufficient to survive a motion to dismiss. Godfrey v. Spano, 13 NY3d 358 (2009).

On a motion to dismiss pursuant to CPLR 3211(a)(1), "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). The movant may not rely on

affidavits to support a motion to dismiss pursuant to CPLR 3211(a)(1). See Seigel, Practice Commentaries, McKinney's Cons Laws of NY, CPLR 3211(a)(1); see generally Juliano v. McEntee, 150 A.D.2d 524, 525 (2nd Dep't 1989); Demas v. 325 West End Ave. Corp., 127 A.D.2d 476, 477 (1st Dep't 1987).

Here, even assuming arguendo that the affidavit, affirmations, and other evidence submitted are not a basis for dismissal, the court finds that the allegations in the complaint are insufficient to state a cause of action under Section 191. Section 191 applies to four categories of workers: manual workers, railroad workers, commission salespersons, and clerical and other workers. Tortorella does not assert that he was a manual worker, a railroad worker, or a commission salesperson, and the facts in the complaint provide no basis for such a finding. The issue here is whether Tortorella falls into the category of "clerical and other workers."

The term "clerical and other worker" is a catchall and is defined in Section 190(7). The term encompasses any employee not included in the categories of manual workers, railroad workers, or commission salespersons, except those "employed in a bona fide executive, administrative or professional capacity whose earnings are in excess of nine hundred dollars [(\$900.00)] a week." It is undisputed that Tortorella earned more than \$900.00 per week, thus, the only question is whether Tortorella worked in an administrative or executive capacity. In resolving this issue, the courts look to whether the employee's duties involve the exercise of independent judgment. See Dean Wjttter Reynolds, Inc. v. Ross, 75 A.D.2d 373 (1st Dep't 1980) (account executive exercised "independent judgment in determining for himself which customers to solicit and the extent to which he should advise them and accept their order to 'buy' and 'sell'"); Connolly v. IsoSpace, Inc., 18 Misc.3d 1123(A) (Sup. Ct. N.Y. Co. 2008) (as the individual responsible for business development, employee would clearly have been required to

exercise a degree of independent judgment in performing his duties). Other factors, including salaries, job titles, and job responsibilities, are also use to determine whether an employee works in a bona fide executive, administrative or professional capacity. See Lauria v. Heffernan, 607 F.Supp.2d 403 (E.D.N.Y. 2009). While the issue is factual intensive, contrary to Tortorella's argument, the issue of whether an employee was employed in an executive or administrative capacity may properly be determined on a motion to dismiss. See Schuit v. Tree Line Management Corp., 46 A.D.3d 405 (1st Dep't 2007).

Here, the complaint fails to state a cause of action under Section 191 based on the allegations therein, including those in the attached Agreement, as Tortorella is excluded from coverage under Section 191 because he worked in an executive or administrative capacity, exercising independent judgment. Specifically, the Agreement provides that Tortorella was to be responsible for "*managing* the workflow of the audio rooms at the Soho facility" as well as being responsible for coordinating scheduling issues and being the "voice and face for the audio department." Agreement ¶1 (emphasis added).⁴ Such responsibilities involve the exercise of independent judgment. Furthermore, the complaint establishes that Tortorella was "intimately involved in the formation and operation of the Transfer Department" and the Agreement contemplates that Tortorella would be "instrumental in the design and operation [of any audio transfer department that was formed]." Complaint ¶13, Agreement ¶1. Thus, Tortorella has failed to show that he was not acting in an executive or administrative capacity, even without consideration of Tortorella's job title(s), which is described as that of "audio producer" in the

⁴ Indeed, that Tortorella exercised management and supervisory responsibilities is arguably supported by Tortorella's opposition papers which show that Tortorella "was involved in overseeing sound services for PostWorks." Opposition Memo. of Law, 14.

Agreement, referenced in the complaint in relation to Tortorella's job title,⁵ and "Director of Sound Services" in the complaint and elsewhere. Since Tortorella was working in an executive or administrative capacity and earned more than \$900.00 per week, he did not fit into the category of "clerical and other workers" under Section 191.

Thus, Tortorella's complaint fails to state a cause of action under Section 191 since the facts alleged, even when liberally construed, are insufficient to demonstrate an essential element of a cause of action under Section 191, namely, that Tortorella fit into a category of workers to which Section 191 applies. As such, the merits of Defendants' assertion that the claim under Section 191 must be dismissed pursuant to CPLR 3211(a)(1) need not be considered.

On the other hand, Tortorella's complaint is sufficient to state a cause of action under Section 193. Unlike Section 191, Section 193 applies to employees notwithstanding their positions as executives or managers. Pachter v. Bernard Hodes Group, Inc., 10 N.Y.3d 609 (2008). Section 193 provides that an employer may not "make any deduction from the wages of an employee," except deductions authorized by applicable law, rules, or regulations, or deductions authorized by the employee in writing for the employee's benefit. Pursuant to Section 190(1), the term "wages" is defined as "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis."

The complaint alleges that Defendants "deducted and refused to pay" the Additional Compensation, a specific portion of Tortorella's total compensation, for each of the years in question.⁶ Complaint ¶¶30-31. The complaint also alleges that the amount of the Additional

⁵ Tortorella's opposition papers state that, "Plaintiff signed an agreement with PostWorks pursuant to which he was employed...as an 'audio producer' and/or Director of Sound Services." Memo. of Law in Opposition, 2.

⁶ The meaning of "those portions of Tortorella's compensation" in Paragraph 31 of the complaint, stating that "Defendants deducted and refused to pay those portions of Tortorella's

Compensation was fixed as 10% of the annual revenues of the Transfer Department for each year in question (approximately \$60,000.00) and that payment of the Additional Compensation was not discretionary and thus constituted "wages." These allegations are sufficient to state a claim under Section 193 which prohibits the withholding of wages and not simply a specific deduction as argued by the plaintiffs. See Wachter v. Kim, 82 A.D.3d 658 (1st Dep't 2011)(holding that complaint states a cause of action under Section 193 based on allegations that defendants' failure to pay balances of minimum guaranteed cash compensation was an unlawful deduction of wages); Tuttle v. George McQuesten Co. Inc., 227 A.D.2d 754 (3rd Dep't 1996)(summary judgment granted in favor of an employee on his claim under Section 193 based on his employer's withholding of to deferred payments which he had earned); Carlson v. Katonah Capital, L.L.C., 10 Misc.3d 1076(A) (Sup. Ct. N.Y. County 2006)(denying motion to dismiss Section 193 claim based on employer's refusal to pay incentive compensation).

Finally, the cases that Defendants cite in support of their argument that Section 193 is inapplicable to circumstances involving a failure to pay an employee's wages are inapposite. See e.g. In re Apkon, 236 A.D.2d 225 (holding that monies due as a result of mutually agreed upon equity participations by an employee in an employer's investments are not wages); Kletter v. Fleming, 32 A.D.3d 566 (3rd Dep't 2006)(holding that dispute regarding calculation of the net amount of wages does not state a claim under Section 193);⁷ Ireton-Hewitt v. Champion Home compensation, including wages and bonuses...for an improper and unlawful reason," appears to refer at least in part to the Transfer Department Compensation (a.k.a. the Additional Compensation) which is discussed to in Paragraph 30 of the complaint.

⁷ While the court in Kletter v. Fleming found that the plaintiff failed to state a cause of action because no specific deduction was alleged, it appears that this determination was based on a finding that the plaintiff failed to allege sufficient facts to support a cause of action under Section 193, as opposed to finding that failure or refusal to pay wages does not constitute a violation of Section 193. In its decision, the Kletter court cites Slotnick v. RBL Agency Ltd., 271 A.D.2d 365 (1st Dep't 2000) which did not involve a discussion of Section 193, and which held that the plaintiff failed to allege sufficient facts to demonstrate entitlement to relief under

Builders Co., 501 F.Supp.2d 341 (concerning the nonpayment of unused vacation and severance pay which was found by the court not to be wages).⁸ Finally, to the extent that the holding in Kane v. Waterfront Media, Inc., 2008 WL 3996234, is to the contrary, it not binding upon this court and is inconsistent with the First Department's recent decision in Wachter v. Kim, 82 A.D.3d 658.

Thus, Defendants' motion to dismiss Tortorella's Section 193 claim is denied.

Conclusion

In view of the above, it is

ORDERED that the motion by defendants PostWorks New York LLC, David Rosen, and Robert DeMartin to dismiss the first count of the Amended Verified Complaint is granted to the extent of dismissing that part of the first count seeking recovery under New York Labor Law Section 191 and is otherwise denied; and it is

ORDERED that plaintiff Rocco Tortorella's request for sanctions is denied; and it is further

ORDERED that within twenty (20) days of the date of this decision and order, defendants Postworks New York LLC, David Rosen, and Robert DeMartin shall serve and file an Answer to the complaint; and it is further

ORDERED that the preliminary conference scheduled for June 30, 2011, is hereby adjourned to July 28, 2011, at 9:30 a.m.

Dated: July 13, 2011

FILED

JUL 19 2011

J.S.C.

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⁸ Monagle v. Scholastic, Inc., 2007 WL 766282 (S.D.N.Y. 2007), like Ireton-Hewitt v. Champion Home Builders Co., concerned nonpayment of severance.