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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIDNEY F. STRAUSS
Justice

IA Part 11

DAVID RODRIGUEZ, Individually and on Behalf of All Other Persons Similarly Situated,

Plaintiffs,

-against-

METROPOLITAN CABLE COMMUNICATIONS, INC. and TIME WARNER CABLE OF NEW YORK CITY, a division of Time Warner Entertainment Company, L.P.,

Defendants.

X

Index Number 21517 / 2008

Motion Date June 1,2011

Cal. Number 13

Motion Seq. No. 5

The following papers numbered 1 to 8 read on this motion by defendant Metropolitan Cable Communications, Inc. (MCC) for summary judgment dismissing the complaint against it

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Answering Affidavits - Exhibits	5-7
Reply Affidavits	8

Upon the foregoing papers it is ordered that the motion is denied.

Plaintiff David Rodriguez seeks to maintain this action as a class action against defendant MCC and defendant Time Warner Cable of New York City (TWNY), companies which he alleges were his joint employers from June, 2004 to May, 2005. The plaintiff

alleges that MCC and TWNY failed to compensate him in compliance with the overtime provisions of the New York State Labor Law and made illegal deductions from his paycheck in violation of the state Labor Law.

Defendant TWNY, a Delaware corporation with its principal place of business at One Time Warner Center, New York, New York, provides digital telephone, cable television, and internet services to customers in the State of New York. Defendant MCC, a New York corporation with its principal place of business at 26-58 Borough Place, Woodside, New York, distributes, installs, and services equipment for TWNY.

Plaintiff Rodriguez, an employee of MCC and allegedly also an employee of TWNY, claims that he often worked more than 40 hours per week, but the defendants did not pay him at least one and one-half times his regularly hour rate. He began this action on or about August 26, 2008 by the filing of a summons and a complaint which asserts one cause of action under New York Labor Law Article 19.

Plaintiff Rodriguez is a member of the International Brotherhood of Electrical Workers, Local 3, and his wages are controlled by the terms of a collective bargaining agreement entered into between MCC and the union. The collective bargaining agreement contains a clause concerning overtime which provides, inter alia: “Any time worked in excess of the regular work day shall be paid for at the rate of time and one-half.”

The union contract also contains a grievance and arbitration clause which reads as follows: “ All complaints and disputes involving the interpretation or application of this Agreement or disciplinary penalty (including discharge) must be filed by the grievant within fifteen (15) working days from the occurrence or knowledge of the occurrence. The respondent has five (5) working days to reply. Failure for either side to abide by this time frame shall render either the grievance or defense null and void. If said grievance cannot be settled directly by the parties it may, upon application by either party, be submitted to the American Arbitration Association for binding arbitration in accordance with its Expedited Arbitration Procedure.”

MCC is a union shop, and all of its cable installation technicians, including plaintiff Rodriguez, joined the union. Plaintiff Rodriguez admits that he did not follow the grievance procedure specified in the collective bargaining agreement, but instead resorted directly to this action. No other members of the purported class filed a grievance pertaining to the wrongs alleged by Rodriguez.

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

demonstrate the absence of any material issues of fact ***." (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324.) Defendant MCC successfully carried this burden. "As a general proposition, when an employer and a union enter into a collective bargaining agreement that creates a grievance procedure, an employee subject to the agreement may not sue the employer directly for breach of that agreement but must proceed, through the union, in accordance with the contract." (*Board of Educ., Commack Union Free School Dist. v. Ambach,* 70 NY2d 501, 508; *Cummings v. Board of Educ. of Sharon Springs Cent. School Dist.,* 60 AD3d 1138; *Ambrosino v. Village of Bronxville*, 58 AD3d 649.) The collective bargaining agreement between MCC and Local 3 requires the filing of a grievance within fifteen working days from the occurrence or knowledge of the occurrence, and plaintiff Rodriguez admittedly failed to invoke his remedies under the contract. Defendant MCC established prima facie that, having failed to exhaust his remedies under the collective bargaining agreement, plaintiff Rodriguez cannot maintain this action against MCC. (*See*, *Ambrosino v. Village of Bronxville*, *supra*; *Mitchell v. New York City Transit Authority*, 44 AD3d 543.)

The burden shifted to the plaintiff to demonstrate that defendant MCC is not entitled to summary judgment. The plaintiff successfully carried this burden by defeating the defense of failure to exhaust contractual remedies.

In the case at bar, it is true that the requirement that a union member resort to the grievance procedure for disputes arising under the collective bargaining agreement is set forth in clear language, and the language is mandatory, unlike that for the next step, arbitration. The collective bargaining agreement between MCC and Local 3 contains an express clause concerning overtime, and the contract obviously contemplates that wage disputes are within the scope of its grievance procedure. It is also true that plaintiff Rodriguez does not allege that his union failed in its duty of fair representation, thereby permitting him to resort to the courts. (*See*, *Board of Educ., Commack Union Free School Dist. v. Ambach, supra; Hickey v. Hempstead Union Free School Dist.,* 36 AD3d 760.)

However, the federal courts have drawn a distinction between an employee's right to minimum and overtime pay as required by the federal Fair Labor Standards Act (29 U.S.C. § 207) (FLSA) and his rights under a collective bargaining agreement. (*See*, *Gordon v. Kaleida Health,* 2008 WL 5114217[W.D.N.Y.,2008 [nor]; *Andrako v. U.S. Steel Corp*., 2008 WL 2020176, [W.D.Pa., 2008] [nor].) "When the dispute involves the violation of statutory rights under the FLSA, absent a 'clear and unmistakable waiver, *** an employee is not required to exhaust the grievance procedure prior to bringing a federal lawsuit ***." (*Hoops v. KeySpan Energy* 2011 WL 846198 [E.D.N.Y,2011] [nor]; *see*, *Wright v. Universal Mar. Serv. Corp*., 525 US 70; *Tran v. Tran*, 54 F.3d 115.) In *Tran v. Tran* (*supra*), the Court of Appeals for the Second Circuit held that a plaintiff covered by a

collective bargaining agreement containing an arbitration clause applicable to any disputes concerning the interpretation or application of the contract could, nevertheless, pursue his individual statutory rights under the FLSA. The rule permitting a union employee to bring an action based on a violation of the FLSA without first following the grievance procedure established by a collective bargaining agreement (or even after following that procedure) rests on the distinction between the employee's individual rights under the statute and his union rights under the collective bargaining agreement. (*See*, *Barrentine v. Arkansas-Best Freight System, Inc*., 450 U.S. 728, 737.) The Supreme Court stated in *Barrentine*: "While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers ***." (*Barrentine v. Arkansas-Best Freight System, Inc*. *supra*, 737.) Contrasting the Labor Management Relations Act with the FLSA, the Supreme Court further stated that the former " was designed to minimize industrial strife and to improve working conditions by encouraging employees to promote their interests *collectively*," while " the FLSA was designed to give specific minimum protections to *individual* workers and to ensure that *each* employee covered by the Act would receive[a] fair day's pay for a fair day's work and would be protected from the evil of overwork as well as underpay." (*Barrentine v. Arkansas-Best Freight System, Inc*., *supra*, 739 [italics in the original] [internal quotation marks omitted].)

The plaintiff has cited one federal case which rests on a similar distinction drawn between a worker's rights under a union contract and his statutory rights under the New York State Labor Law. In *Mascol v. E & L Transp., Inc.* (387 F.Supp.2d 87), a case decided by the federal district court for the Eastern District of New York, the court held, inter alia, that plaintiffs covered by a collective bargaining agreement were not required to arbitrate their dispute before bringing an action asserting claims based on, inter alia, the New York State Labor Law. The court wrote: "A collective bargaining agreement cannot preclude a lawsuit concerning individual statutory rights unless the arbitration clause in the agreement was clear and unmistakable that the parties intended to arbitrate such individual claims. *** This arbitration clause does not expressly cover individual statutory claims for unpaid overtime under the FLSA, for example, or the individual state statutory claims under New York state law." (*Mascol v. E & L Transp., Inc.* , *supra*, 105.)

While the plaintiff cites no cases decided by the courts of New York State which draw a distinction between an employee's rights under a collective bargaining agreement and his individual statutory rights under the state's Labor Law, there are state labor cases which allow the maintenance of an action despite an arbitration clause upon a finding that the agreement to arbitrate did not clearly include statutory claims . For example, in *Crespo v. 160 West End Ave. Owners Corp.* (253 AD2d 28), the Appellate Division, First Department, held

that a mandatory arbitration clause in a collective bargaining agreement did not require the dismissal of an action for age discrimination. The appellate court noted that the contract prohibited age discrimination, but stated : "It follows that since there is no clear and unequivocal agreement to arbitrate *statutory* claims of age discrimination, the claim asserted by plaintiff does not fall within the terms of the arbitration agreement and arbitration of the present dispute is not required." (*Crespo v. 160 West End Ave. Owners Corp. ,supra* [Italics added].)

In deciding whether a grievance clause in a collective bargaining agreement must be complied with by an employee before he can bring an action, the federal courts have long drawn a distinction between his rights as a union member under a collective bargaining agreement and his individual rights under the FLSA. In harmony with the long line of federal cases decided under the FLSA, this court draws a similar distinction between the rights of plaintiff Rodriguez under the collective bargaining agreement between MCC and Local 3 and the individual, statutory rights under the New York State Labor Law which he asserts here. The grievance clause in the collective bargaining agreement covering plaintiff Rodriguez does not clearly include within its scope the individual, statutory claims asserted in this action, and Rodriguez was not required to follow the grievance procedure before commencing this action.

Dated: July 27, 2011 ----------

SIDNEY F. STRAUSS, J.S.C.