

Franco v 172 E. Holdings LLC

2013 NY Slip Op 30214(U)

January 29, 2013

Sup Ct, New York County

Docket Number: 103991/12

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

SERGIO FRANCO,

INDEX NO. 103991/12

Plaintiff,

MOTION DATE _____

-v-

FILED

MOTION SEQ. NO. 001

172 E HOLDINGS LLC, MAJA REALTY INC.,
ANA DE ROJAS and FELA WONG,
Defendants.

FEB 01 2013

MOTION CAL NO. _____

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

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, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 1/29/13

Donna M. Mills
DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

INDEX NO.
103991/12

SERGIO FRANCO,

Plaintiff,

- against -

172 E HOLDINGS LLC, MAJA REALTY INC.,
ANA DE ROJAS and FELA WONG,

Defendants.

FILED DECISION ORDER

FEB 01 2013

NEW YORK
COUNTY CLERK'S OFFICE

DONNA M. MILLS, J:

Plaintiff, Sergio Franco brings this action seeking unpaid wages and overtime pay at minimum wage, liquidated damages, interest, and attorney's fees pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 and New York State Labor Law ("NYLL"), Article 6 § 190 et seq. And Article 19 § 650, et seq. Additionally, Plaintiff seeks a preliminary and permanent injunction restraining Defendants, 172 E Holdings LLC ("172 E Holdings"), Maja Realty Inc. ("Maja"), Ana De Rojas, and Fela Wong from retaliating against him for the filing of this action to recover wages.

Defendants oppose Plaintiff's motion for a preliminary injunction, or alternatively, if this Court were inclined to issue an injunction, they seek an order setting an undertaking, and conditioning the issuance of an injunction upon Plaintiff's payment of the same; and Defendant's cross-move for an Order pursuant to CPLR 3211(a)(1) and/or (7) dismissing the Complaint because it is barred by documentary evidence and or fails to state a cause of action.

BACKGROUND

On or about August 21, 2002, Plaintiff and Maja, the managing agent for 172 E Holdings entered into an Agreement in which Plaintiff, inter alia, was hired as the part time

superintendent of the building located at 40-42 West 127th Street, New York, New York. In connection with his employment as part time superintendent, Maja permitted Plaintiff to use and occupy a below-curb level, basement apartment in the building. Plaintiff acknowledged that his use of the apartment was in conjunction with his employment and would continue as long as he was employed as part time superintendent of the building. For the first three months from August 21, 2002 through October 2002, the parties agreed that Plaintiff's employment was probationary. Thereafter, Plaintiff agreed that he could be terminated at any time upon ten days prior notice and, upon termination, Plaintiff would immediately vacate the apartment.

In his capacity as part time superintendent, Plaintiff is responsible for looking after the building and its tenants. Specifically, Plaintiff is in charge of keeping the building, roof, yards, hallways, common areas and sidewalks clean, maintaining the boiler, elevator, and equipment necessary to operate the building, and performing repairs and renovations in common areas and individual apartments. The sole compensation Defendants give Plaintiff is use of the apartment in the building. At no time during Plaintiff's more than ten year employment have Defendants paid Plaintiff wages for his work.

Plaintiff contends that starting in or about September 2009, Defendants asked him to do more and more work, including more repairs and renovations in the building. He claims that he requested financial compensation for the additional work, which was denied by Defendants.

Plaintiff now brings this action for the Defendants' failure to pay him wages in violation of federal and state labor laws. Additionally, Plaintiff alleges that the Defendants, Ana De Rojas, the building manager and Fela Wong, an employee of Maja have frequently told him that if he does not do a satisfactory job and perform all of the duties he is asked to perform without additional payment, he would be immediately fired and evicted from his

apartment.

DISCUSSION

The purpose of a preliminary injunction is to preserve the status quo until a decision is reached on the merits” (Icy Splash Food & Beverage, Inc. v Henckel, 14 AD3d 595, 596 [2005]). To obtain a preliminary injunction pursuant to CPLR 6301, plaintiff must demonstrate a probability of success on the merits, an irreparable injury in the absence of an injunction, and a balance of equities in his favor. See Post v Killian, 73 AD3d 507, 508 (1st Dept 2010).

The decision of whether to issue a preliminary injunction rests in the trial court's sound discretion (see Schweizer v. Town of Smithtown, 19 A.D.3d 682, 682, 798 N.Y.S.2d 99 [2005]; Honeywell Intl. v. Freedman & Son, 307 A.D.2d 518, 519, 761 N.Y.S.2d 745 [2003]). The existence of factual questions for a trial does not prevent a party from establishing a likelihood of success on the merits; success need not be a certainty to obtain a preliminary injunction (see Karabatos v. Hagopian, 39 A.D.3d 930, 931, 833 N.Y.S.2d 700 [2007]; Egan v. New York Care Plus Ins. Co., 266 A.D.2d 600, 601, 697 N.Y.S.2d 776 [1999]).

The grave and irreparable injury that results when someone is evicted is undeniable. Eviction from one's home is “one of the harshest decrees known to the law” (Braschi v. Stahl Associates Company, 74 N.Y.2d 201, 215, 544 N.Y.S.2d 784, 543 N.E.2d 49 (1989)). In fact, because of the irreversible harm to a family that becomes homeless, courts have consistently recognized that the mere threat of eviction constitutes irreparable harm for purposes of injunctive relief (McNeill v. New York City Housing Authority, 719 F.Supp. 233, 254 (S.D.N.Y.1989); Williams v. Barry, 490 F.Supp. 941 (D.D.C.1980), modified on other grounds, 708 F.2d 789 (D.C.Cir.1983). Additionally, the weight of the equities tips in Plaintiff's favor as Plaintiff's eviction from his home is far more burdensome than the

inconvenience on behalf of Defendants by permitting Plaintiff to stay.

Here, the plaintiff demonstrated a likelihood of success on the merits on Defendants' failure to pay wages, in violation of the federal and state law cause of action. The Plaintiff also demonstrated the prospect of irreparable injury if the preliminary injunction is withheld. Furthermore, the balance of the equities tips in the Plaintiff's favor. As such, this Court will exercise its discretion in granting the Plaintiff's motion for a preliminary injunction and enjoining the Defendants from, among other things, retaliating against him by seeking to evict him from the apartment during the pendency of the action.

Contrary to the Defendant's contention, any factual question raised as to whether Plaintiff is performing his duties as part time superintendent is not, under the circumstances of this case, a sufficient reason to deny the motion for a preliminary injunction. Moreover, nothing in this decision precludes Defendants from hiring another employee to perform the work that they allege Plaintiff is failing to do.

Recognizing that a preliminary injunction may adversely affect the rights of a defendant pending the determination of the action, CPLR 6312(b) provides:

"prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction".

Should it be "finally determined" that the plaintiff was not entitled to a preliminary injunction, CPLR 6315 provides that "[t]he damages sustained by reason of a preliminary injunction may be ascertained upon motion."

While Defendants ask this Court to set an undertaking in an amount no less than \$10,000.00, this Court finds that in light of Plaintiff's possible indigence since he has not

been paid by Defendants in more than ten years, a nominal amount for an undertaking would be more appropriate.

Accordingly, it is

ORDERED that plaintiff's motion for a preliminary injunction preventing Defendants from evicting him is granted, to the extent hereafter set forth; and it is further

ORDERED that the amount of the undertaking required to be filed by plaintiff, pursuant to CPLR 6312(b), is set in the nominal amount of \$100; and it is further

ORDERED that plaintiff shall file an undertaking in the specified amount on or before February 13, 2013; and it is further

ORDERED that Defendants' cross-motion for dismissal is held in abeyance until that branch of Plaintiff's motion to amend the complaint is fully submitted.

Dated:

1/29/13

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.

FILED
FEB 01 2013
NEW YORK
COUNTY CLERK'S OFFICE