Hernandez v Team Constr. Co.
2013 NY Slip Op 30463(U)
February 25, 2013
Supreme Court, Suffolk County
Docket Number: 35753/2006
Judge: Ralph T. Gazzillo
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Index No: 35753/2006

SHORT FORM ORDER

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

POST TRIAL DECISION

PRESENT:
Hon. RALPH T. GAZZILLO
A.J.S.C.

Carlos Hernandez, Plaintiff(s), - against - Team Construction Co. and Philip Weber, Defendant(s).	Frank & Associates 500 Bi-County Boulevard, Suite 112N Farmingdale, N.Y. 11735 James P. Clark, P.C. 256 Main Street, Suite 202 Northport, N.Y. 11768

Although the plaintiff's complaint originally alleged four causes of action, three were withdrawn. What remains is a claim which, essentially, alleges that the defendants failed to pay the plaintiff the full and complete wages he was due. In addition to a number of defenses, the defendants have interposed two counter-claims, the first of which alleges the plaintiff's negligence in causing damage to a vehicle and the second, sounding in conversion, contends that he purportedly accepted wages for work he did not perform.

On November 7th, 2012, the non-jury trial of those allegations was conducted before the undersigned. As indicated within the trial record, after submission of the documentary evidence and exhibits as well as completion of the testimony, both sides rested. Each, however, was afforded the opportunity to submit written arguments in lieu of summations as well as its memorandum of law. Those memoranda having since been received and reviewed, the decision of the Court is as follows:

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THE PROOF

This trial was, as noted, very brief. Indeed, prior to opening statements, each side had submitted certain documents, all of which were pre-marked and received into evidence by mutual consent. Testimony came from but two witnesses: the plaintiff Carlos Hernandez and defendant Phillip Weber. Each was called by the plaintiff and then examined by the defendant. Both sides rested immediately after the plaintiff's presentation of his case, the defense opting not to call any additional witnesses.

As to the facts, after reviewing the testimony, it appears that a number of the relevant matters are not subject to serious dispute. For example, Weber is the owner/operator of the defendant corporation. The plaintiff was employed by that corporation for approximately 14 years and was finally terminated in 2006. Initially, he had been assigned to nightly maintenance and cleaning of a number of malls/parking lots. He worked with another employee but neither of them was under any direct managerial supervision. He worked the same route for eight to ten years, seven days a week, from the early morning hours until 10 a.m. His duties required him to tend to a number of parking lots at various locations within Nassau and Suffolk counties[1]. The time he spent at each location might vary from as little as 15 minutes to as much as an hour[2]. After finishing a night's assignment, he was typically re-assigned to maintenance duties such as cutting grass and mulching until mid-afternoon. When he began employment with the corporation his hourly rate was $9.00 (later raised to $10.00) plus "time-and-a-half" for overtime. In 2004 he was terminated for going home during his shift but he was re-hired sometime later and reassigned other duties and less hours. In 2006, due to an accident with a vehicle owned by the defendant, he was finally terminated.

The prime focus of the contest is the plaintiff's contention that during the course of his employment he worked through his daily half-hour meal period but

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[1] The plaintiff claims there were twelve (12), the defendant contends there were no more than six (6) to eight (8).

[2] The defendant contended that both the minimum and maximum times at each location were longer.

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was not compensated. Instead, he further contends, three (3) hours a week were improperly deducted from his weekly time compilation and he received payment only for the balance.[3] It is stipulated by both sides that the accumulated time that was allegedly wrongfully deducted (and the purported basis for his claim) total 626.25 hours.

Beyond those undisputed facts and predicate, there are markedly different accounts and contested issues.

Indeed, an examination of the plaintiff's testimony reveals that questions of fact, consistency and credibility accompany certain aspects of his presentation. For example, within the space of six questions, he denied then admitted having a regular route (Tr. 43-44). It might be argued that is a result of a language issue. That cannot, however, satisfactory explain, much less forgive, more detailed and expanded factual accounts which are clearly irreconcilable and inconsistent while being manifestly more central to the issue upon which his complaint pivots: whether lunch periods were rightfully deducted from his wages. For example, he initially claimed that he never stopped work for a meal. He did, however, subsequently contend that he would stop in a convenience store and pick up something he'd eat while working or driving. Thereafter, however, he further indicated that he would stop two to three times a week for ten minutes for lunch. During other portions of his testimony, that became thirty to fifty minutes. During still other portions, he admitted that he went home, ate, and rested.

His proffered reason for not taking his lunch period was simple: he had too much work to do, and didn't have the time to stop. He also alleged that he always completed all of his stops. On a number of occasions, however, he testified that he was told to take as many breaks as he needed if he was tired and that he did not have a specific time to complete his work. He also admitted he had been paid for the times he had been resting; relatedly, he indicated that Weber had told him to go home when he was tired but "not to punch in or out." He stated that he was never told to work through his lunch breaks; he was unsupervised and any decision regarding his meal was his. He also indicated Weber did not know if he

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[3] The defendant Weber testified that he should have deducted three-and-one-half hours (7 x .5 hours per tour) but did not.

and his partner were taking breaks. He claims he spoke with Weber several times about breaks, but also indicated that he continued to work through his lunch break even after he was advised of the corporation's contrary policy.

With respect to Weber's testimony, he began with some of the business' background and that he had established it 15 years ago and has had 10 to 12 employees. As to the litigation at bar, he vehemently denied the allegations much less any wrongdoing. He also indicated that in the 14 years of employment, the plaintiff never questioned or complained about the payroll practice *vis-a-vis* lunch breaks. Moreover, after complaints from clients, Weber installed a GPS in the company vehicle assigned to the plaintiff. That device revealed that the plaintiff was spending time away from his assignments, including extended (eight-to-nine hour) stops at his residence and a fifty minute stop at what apparently was an unauthorized location. This led to the plaintiff's initial termination. Weber also repeatedly contended that he told the plaintiff to take his half-hour meal periods.

ANALYSIS

First and foremost, having observed the witnesses, "the very whites of their eyes," on direct as well as cross-examination, the so-called "greatest engine for ascertaining the truth," *Wigmore on Evidence*, Sec 1367, the Court is satisfied that the exercise has been fruitful and more than sufficient to determine the credible information as well as to simultaneously filter out that which is less than reliable. Secondarily, it should go without saying that in evaluating each witness' contributions to the resolution of the controversies in this matter—as well as all such determinations—it is hornbook law that the quality of the witnesses, not the quantity, is determinative. *See, e.g., Fisch on New York Evidence,* 2d ed., Sec 1090. That is not to imply, however, that the unexplained failure to call some witnesses is to be completely overlooked as the absence of a normally expected witness may undermine the strength of a case. *See, e.g., Nassau County Dept. of Social Servs. on Behalf of Dante M. v. Denise J.,* 87 NY2d 73 (1995). As to the quality of any given witness, the flavor of the testimony, its quirks, a witness' bearing, mannerisms, tone and overall deportment cannot be fully captured by the cold record; the fact-finder, of course, enjoys a unique perspective for all of this, and the ability to absorb any such subtleties and nuances.

Also worthy of examination is any witness' interest in the litigation. *See, e.g.,* 1 NY PJI2d 1:91 *et seq.*, at p.172. In this case, obviously they both have an interest.

The length of time taken (or in this case not taken) by either side's case or any witness' testimony is, however, clearly non-conclusive.

Lastly, it should be underscored and acknowledged that during the course of gauging a witness' credibility as well as conducting the fact-finding analysis, the undersigned's continuous tasks also included, of course, segregating the competent evidence from that which was not, an undertaking for which the law presupposes a court's unassisted ability. *See, e.g., People v. Brown*, 24 NY2d 168 (1969); *Matter of Onuoha v. Onuoha*, 28 AD3d 563 (2d Dept 2006).

Those tasks and duties aside, even in the limited inquiry of this proceeding, there remains the purpose and goal of the trial, *viz.*, to try or test the case. It is hornbook law that the yardstick for measuring causes of actions such as the matter at bar is the same whether the trial is by bench or jury: The burden of proof rests with the plaintiff who must establish the truth and validity of his claim by a fair preponderance of the credible evidence. Stated otherwise, in order for the plaintiff to prevail on his claim, the evidence that supports that claim must appeal to the fact-finder as more nearly representing what took place than the evidence opposed to it. If the evidence does not, or if that evidence weighs so evenly that the fact-finder is unable to indicate that there is a preponderance on either side, then the question is decided in favor of the defendant. Only when the evidence favoring this plaintiff's claim outweighs the evidence opposed to it may he prevail.

As regards to the law more specifically applicable to cases such as this, a case relied upon by both sides, *Reich v. S. New England Telecom. Corp.*, 121 F.3d 58 (2d Circuit 1997), is instructive. As noted therein, the "central issue in mealtime cases is whether employees are *required* to 'work' as that term is understood under the" Fair Labor Standards Act (FLSA), 29 USC §§ 207, 211, subd. c, 215(a)(2) and 215(a)(5). *Id.* at 64 (emphasis supplied). "Work" under FLSA "must be interpreted to require compensation for a meal break during which a worker performs activities predominantly for the benefit of the employer." *Id.*

As was stated elsewhere, compensation for a meal period is not required,

> "as long as the employee can pursue his or her mealtime adequately and comfortably, is not engaged in performance of any substantial duties, and does not spend time predominantly for the employer's benefit, the employee is relieved of duty and not entitled to compensation under the FLSA."

Sexton v. BFI Waste Sys. of N. Am., ___ F.Supp.___, 2002 U.S. Dist. LEXIS 26129 (E. Dist. Michigan 2002) at 11 (citation omitted).

Moreover, as noted therein, despite a showing that the employee was *required* to take a meal break, he was did not demonstrate that he was *unable* to take a lunch break. As a result, his complaint was dismissed. The *Reich* decision also underscores that prior to triggering a judicial review of the employee's record keeping, the employee must first prove that he has performed the work for which he alleges the improper compensation.

DETERMINATION

Focusing initially on the witnesses, an objective review of the plaintiff Hernandez' presentation reveals it to be less than worthy of belief and failing to portray either a credible or logical account of the relevant facts, events, and issues. Indeed, his overall account made precious little sense and was woefully inconsistent. Moreover, it finds little—if any—support elsewhere in the record.[4] Also, he was as unconvincing as he was inconsistent on a number of key points. For example, while he expressed his great concern for finishing his tasks, it is clear that he was not, however, reluctant to spend time freely frolicking away from his assignments.[5] Additionally, his demeanor and testimony on cross-examination

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[4] The fact that he - or for that matter, the defendant - failed to call any additional witnesses is not an issue; the predicate demonstration for a "missing witness" inference is lacking.

[5]Besides that inconsistency, such a practice cannot be viewed as a favorable reflection of his character

were disappointing and underscored his inability to paint a cohesive, credible claim. Stated otherwise, his account was often at odds with itself, qualifying if not directly contradicting itself. Also, and as if his credibility were not already *in extremis*, he is clearly an interested witness.

Not only is his presentation very far from convincing, it falls of its own weight. For example, he acknowledged he was unsupervised and essentially left to his own devices. That admission leads to the obvious, logical conclusion that no one in authority directed him to work through his meal period, much less observed him doing so. Indeed, his testimony provided another blow to his contentions when he indicated that he was given freedom to take breaks as needed. Moreover, there was no demonstration that he was under any "standing"orders or policy requiring him to work without or through a meal break. Therefore, if he chose to work through his meal period—in whole or in part—apparently it was entirely a result of his decision as he was not compelled, expected, nor authorized to do so.

Simultaneously, the testimony of the defendant Weber did not provide any support to the plaintiff's case. Clearly he is also an interested witness. Equally clearly, his testimony is replete with occasions where he was adamantly in disagreement with either the plaintiff's contentions or his account of the facts. (Indeed, even a casual passerby would note that he was at times combative; that alone, however, does not render him incredible nor require rejection of his account.) All things considered and taken as a whole, however, his account seemed consistent and efforts to discredit him and his version, albeit valiant, failed to gain any appreciable traction. Notably, however, while his defense prevailed against the plaintiff's claims, he totally failed to support either of his counter-claims. Indeed, his testimony, at best, merely contains a passing reference to them.

In summary, the plaintiff's presentation is manifestly insufficient and woefully unable to sustain his burden of proof. To find for him would require overlooking, pruning, or outright amputating those parts of his testimony which negate his allegations. Stated otherwise, for him to prevail, the testimony from his own mouth must be initially discarded as it undermines his cause of action and/or is inconsistent with other portions of his testimony. Moreover, even if, *arguendo,*

those portions were surgically removed, the balance of his testimony is factually insufficient to support his claim, much less worthy of belief.

It is, therefore, the determination of the undersigned that the plaintiff has failed to establish by a preponderance of the credible evidence either the factual or legal merits of his claim, much less the defendants' liability. As was indicated above, the plaintiff's proof falls woefully short of his contentions and it does not satisfactorily supply a credible, consistent account of any culpable acts or omissions of either or both of the defendants. *Inter alia*, there is a total absence of proof to satisfactorily support an affirmative answer to the question raised by this Court (Cohalan, J.) in its February 1, 2011decision denying summary judgment, *viz,* whether or not the plaintiff was *"required to work"* during meal breaks. Indeed, the undersigned is satisfied that the question must be answered in the negative as there was no satisfactory proof of either the *requirement* or the *work.* He has failed to satisfy the law in that he did not demonstrate, in the words of *Reich, supra*, that in lieu of a meal period he "performed activities predominately for the benefit of [his] employer."

Moreover, the evidence indicates that if, *arguendo*, he ever did work through his meal period, he chose to do so. At the risk of being redundant, it bears noting that he was told of the meal policy, he worked without any direct supervision or control, never directed to forsake his meal period, and given almost unfettered freedom to take whatever time he needed. Lastly, the evidence also suggests that on occasion he was neither eating nor working during his meal breaks—he was sleeping. In the words of *Sexton, supra*, it appears that by occasionally going home and sleeping he "pursue[d] [his] mealtime adequately and comfortably . . .not engaged in performance of any substantial duties, and [did] not spend time predominately for the employer's benefit" and is thus thereby not entitled to compensation.

Finally, and for the sake of completeness, is the issue raised by the plaintiff *vis-a-vis* the defendants' record keeping. First of all that issue appears to have been resolved in the defendants' favor by the above-noted order of this Court dated February 1, 2011. Secondarily, the predicate required by *Reich, supra*, for that issue's review - satisfactory evidence that the work had been performed - has not been demonstrated.

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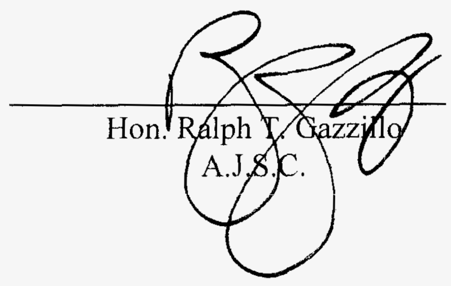
The plaintiff's complaint is, therefore, dismissed in all respects. Similarly, the defendants' counter-claims are also dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: 2/25/13
Riverhead, N.Y.



Hon. Ralph T. Gazzillo
A.J.S.C.