

<b>Torres v CMI Serv. Corp.</b>
2014 NY Slip Op 31873(U)
July 15, 2014
Supreme Court, New York County
Docket Number: 650825/12
Judge: Joan M. Kenney
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 8

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WILLIAM TORRES, EARL MOSES, LUIS  
FIGUEROA, and QUINNIE WILLIAMS,

Plaintiffs,

-against-

DECISION & ORDER

Index No. 650825/12

CMI SERVICES CORP. and THE CESSPOOL  
MAN, INC.,

Defendants.

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**JOAN M. KENNEY, J.:**

Plaintiffs William Torres, Earl Moses, Luis Figueroa, and Quinnie Williams move, pursuant to CPLR 3211 (e), for partial summary judgment as to liability. The first amended complaint alleges the following three causes of action on behalf of all the plaintiffs: (1) against defendant CMI Services, Corp., breach of contract; (2) against defendant The Cesspool Man, breach of contract; (3) against both defendants, violation of New York’s overtime law, 12 NYCRR § 142-2.2. Plaintiffs’ breach of contract claims allege that, as employees of defendant companies, plaintiffs are third-party beneficiaries of defendants’ contracts with various public entities, all of which require defendants to pay prevailing wages and supplements, pursuant to Labor Law § 220, and that defendants failed to pay plaintiffs the wages and supplements that were due to them. Defendants’ business is to clean cesspools, septic tanks, sewer floods, dry wells and catch basins, using, among other equipment, a Jet Vac and a Pump truck.

The court begins with two initial matters. First, each of the plaintiffs acknowledged at his deposition that he was, in fact, paid overtime wages for hours worked in excess of 40 per week. *See* Newhouse affidavit, exhibit C at 58, exhibit E at 46, and exhibit G at 22-23. Accordingly, defendants are entitled to reverse summary judgment dismissing plaintiffs’ claims

for overtime pay. Plaintiffs do not argue to the contrary.

Secondly, defendants argue, citing *Pesantez v Boyle Env'tl. Servs.* (251 AD2d 11 [1st Dept 1998]), that plaintiffs' motion for partial summary judgment must be denied, as to Williams, because Williams commenced an administrative proceeding before the Division of Labor Standards of the New York State Department of Labor to recover his allegedly unpaid wages and there has been no determination in that proceeding. Contrary to defendants' argument, *Pesantez* held that, while there is no private right of action for underpayment of wages under Labor Law 220, "until there has been an administrative determination . . . that either has gone unreviewed or been affirmed in the claimants-employees' favor[,]” a common-law breach of contract claim, such as the one here, can proceed regardless of the pendency of an administrative proceeding. *Id.* at 12; *see also Nawrocki v Proto Constr. & Dev. Corp.*, 82 AD3d 534, 536 (1st Dept 2011), citing *Pesantez*.

However, plaintiffs' motion must be denied, because they have failed to make a prima facie case of breach of contract.

Labor Law § 220 (3) (a) provides that “[t]he wages to be paid for a legal day’s work, as hereinbefore defined, to laborers, workmen or mechanics upon such public works shall not be less than the prevailing rate of wages as hereinafter defined.” In *De La Cruz v Caddell Dry Dock & Repair Co., Inc.* (21 NY3d 530 [2013]), the Court held that, in determining whether a particular project is subject to the requirement to pay prevailing wages, a three-prong test should be applied:

“First, a public agency must be a party to a contract involving the employment of laborers, workers, or mechanics. Second, the contract must concern a project that primarily involves construction-like labor and is paid for by public funds.

Third, the primary objective or function of the work product must be the use or other benefit of the general public.”

*Id. at 538.*

The thrust of plaintiffs’ papers in support of their motion is that they performed work that required defendants to pay them prevailing wages. That argument would be better presented to the Department of Labor than here. This is, after all, a breach of contract case, and plaintiffs have failed to provide copies of the contracts that they allege to have been breached., or more than a smattering of admissible evidence that those contracts, in fact, required defendants to pay prevailing wages to plaintiffs for the work that they performed. Plaintiff’s expert witness, Thomas C. Nadell, states in his report that he arrived at his assumptions and conclusions in the absence of “basic” documentation. Newhouse affidavit, exhibit U at 5.

To be sure, plaintiffs have presented evidence that they worked in furtherance of defendants’ contracts with a number of public agencies, including the New York City Department of Sanitation, the New York City Police Department, the New York City Department of Parks and Recreation, the New York City Housing Authority, and the New York State Office of General Services Administration. Plaintiffs’ identification of these agencies relies upon their own knowledge and, principally, upon an “Underpayment Report,” prepared by defendants and provided to plaintiffs in pre-trial discovery. *See* Newhouse affidavit, exhibit I. Defendants argue that plaintiffs may not rely upon that report, because it is an internal document prepared to calculate defendants’ maximum liability in the event that the court finds plaintiffs’ claims to be meritorious. Defendants do not contest the accuracy of the information in the report that describes on behalf of whom, and where and when, the plaintiffs worked.

However, although the underpayment report lists prevailing wage rates for each plaintiff, it does not, of itself, constitute evidence that all of the contracts referred to therein required defendants to pay their workers a prevailing wage for the work called for.

It is uncontroverted that plaintiffs performed some work for which they were entitled to be paid at the prevailing wage rate. *See e.g.* the affidavit of Darrin Forte, the president of both defendants, and Newhouse affidavit, exhibit N. Yet, while contending that defendants' various documents, upon which plaintiffs rely, are inconsistent and, indeed, contradictory (*see* "Memorandum in Support of Plaintiffs' Motion" at 11), plaintiffs ask this court to grant partial summary judgment as to the projects identified in any and all of those documents.

Plaintiffs have shown that, in the certified payroll reports that defendants submitted to the governmental agencies with which they contracted, pursuant to Labor Law § 220 -3-a (a) (iii), defendants listed hourly rates of pay to plaintiffs, that greatly exceed the rates of pay shown in defendants' internal payroll records. It can, accordingly, be inferred that defendants' certified payroll reports were composed to make it appear that defendants were paying contractually required prevailing wages. Thus, plaintiffs' showing would suffice to withstand a motion to dismiss for failure to state a cause of action. *See Dabrowski v Abax Inc.*, 64 AD3d 426 (1<sup>st</sup> Dept 2009). However, a nonnecessary inference does not suffice for a grant of summary judgment. Plaintiffs state that they sought copies of each of the contracts at issue here, and that defendants failed to produce any such contract until four days prior to the due date for filing the instant motion. Plaintiffs argue, citing *Anderson v Mt. Clemens Pottery Co.* (328 US 680 [1946]) that defendants' failure to produce the underlying contracts should not inure to their benefit. In *Anderson*, the Court reversed the dismissal of a claim under the Fair

Labor Standards Act, 29 USC § 201 *et seq.*, which was based upon the plaintiff-employees' inability to prove "the precise extent of uncompensated work." *Id.* at 687. The Court held that, if the employer failed to provide evidence contradicting the reasonable inferences to be drawn from the employees' evidence, "the court may then award damages to the employee, even though the results be only approximate." *Id.* at 688. Here, plaintiffs' breach of contract claims are not being dismissed. Plaintiffs remain free to pursue further discovery and to present evidence at trial.

Accordingly, it is hereby

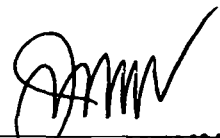
ORDERED that the third cause of action in the first amended complaint is dismissed; and it is further

ORDERED that the motion of plaintiffs William Torres, Earl Moses, Luis Figueroa, and Quinnie Williams for partial summary judgment is denied; and it is further

ORDERED that the rest of this action shall continue.

Dated:7/15/14

ENTER:

  
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JOAN M. KENNEY  
J.S.C.