

Keranen v Louis Tamis & Sons
2015 NY Slip Op 30515(U)
April 6, 2015
Supreme Court, New York County
Docket Number: 150168/2012
Judge: Ellen M. Coin
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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JUKKA KERANEN,

Plaintiff,

Index No.:
150168/2012

-against-

LOUIS TAMIS & SONS,
and JEFFREY TAMIS,

Defendants.

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ELLEN M. COIN, J.:

This action arises out of plaintiff Jukka Keranen's allegations that defendants Louis Tamis & Sons and Jeffrey Tamis (Tamis) (collectively, defendants), who are plaintiff's former employers, violated provisions of the New York Labor Law to his detriment. Defendants move, pursuant to CPLR 3212, for an order granting them summary judgment dismissing the complaint.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff, a Finnish national, is an expert jewelry designer. He obtained the equivalent of a master's degree in fine arts in jewelry and had worked as an expert jeweler for 22 years as of December 2003. Defendants manufacture fine jewelry in New York and Tamis is the company's vice president. Plaintiff responded to an employment advertisement placed by defendants. Defendants then filed an H-1B nonimmigrant visa petition with the United States Immigration and Naturalization Service so that

plaintiff could move to the United States from Finland to work for them. Defendants hired an attorney and paid the fees associated with the application process. The petition was approved and plaintiff was hired in November 2003.

The visa for plaintiff to work as a H1-B skilled worker expired in 2006. Defendants applied to renew the visa, and the renewal was approved. Plaintiff subsequently worked for defendants until he was terminated in May 2010.

After plaintiff was terminated, plaintiff's counsel sent a letter to defendants, alleging that plaintiff had been underpaid. He claimed that plaintiff should have been classified as a level 4 jewelry designer, instead of a level 2, as those terms are defined by the United States Department of Labor, Office of Foreign Labor Certification, and that plaintiff is entitled to back pay of the difference. The letter advises defendants, among other things, that their actions violated both the Immigration and Nationality Act (INA) and the employment laws of the United States. Defendants' exhibit 6 at 1.

After defendants did not meet plaintiff's demands, he commenced this action, alleging violations of the New York Labor Law. The first cause of action alleges that plaintiff has not been paid his lawful wage, in violation of the New York Labor Law § 190 et seq. Plaintiff states that defendants falsely classified him as a level 2 worker. According to plaintiff,

"[b]ased on plaintiff's experience and education at the time of hire, he was already a 'Level 4' jewelry designer in accordance with the Foreign Labor Certification Data Center." Complaint, ¶ 15. Plaintiff alleges that during his employment with defendants he was paid less than a level 4 worker under federal standards. Plaintiff calculated the difference in the levels to achieve the amount of \$150,270 owed to him, which includes overtime.

The second cause of action alleges that defendants failed to give plaintiff written notice regarding his rate of pay and the basis thereof, in violation of Labor Law § 195.1. He states,

"Defendants failed to give written notice to Plaintiff regarding his rate of pay and basis thereof; whether paid by the hour, shift, day, week, salary, piece, commission, or others, the regular pay day designated, the name of the employer, any 'doing business as' names used by Defendants, the physical address of Defendants' main office or principal place of business and a mailing address"

Id., ¶ 25. Plaintiff further alleges that defendants failed to post the laws of minimum wage and overtime in a conspicuous place in the workplace.

The third cause of action, grounded in breach of contract, alleges that defendants breached the parties' oral contract when defendants did not pay plaintiff for "all work performed in an agreed-upon amount." Complaint, ¶ 47.

Defendants argue that the first cause of action is based solely on the allegation that plaintiff was misclassified as a level 2 worker in the visa petition under federal standards. As

a result, defendants urge, this court lacks jurisdiction over this action, as the INA does not allow an employee to bring a private action claiming such a violation. When an employer allegedly submits false information to the government about its H-1B skilled worker, according to defendants, a plaintiff is required to pursue certain administrative procedures prior to commencing a court action, such as filing a complaint with the United States Department of Labor. As plaintiff has not done so, he has failed to exhaust his administrative remedies. Thus, defendants contend, this cause of action must be dismissed.

With respect to the second cause of action, Tamis states that plaintiff was given a "deposit advice" each week which provided him with all the necessary information about his paycheck. Defendants provide samples of plaintiff's weekly deposit advice statements. The comprehensive statements show information such as the employee and employer address, earnings, taxes, deductions and year to date amounts. Defendants' exhibit 8.

Tamis maintains that defendants have continually maintained, "for many years prior to, during and after Plaintiff's employment, all notices required by the Labor Law and the New York State Department of Labor" Tamis aff, ¶ 6. Defendants offer a photograph of notices on a bulletin board located next to the employee time clock. Defendants' exhibit 9.

Defendants deny breaching any contract with plaintiff for an agreed upon amount. They maintain that the oral contract plaintiff alleges is "vague, incomplete, fails to specify the amount of wages to be paid to Plaintiff or specify the duties he was to be paid [sic] or the term of the agreement." Rosenthal affirmation, ¶ 21. In addition, defendants argue that the third cause of action should be dismissed as it was not commenced within six years of the time when plaintiff began working for defendants.

Plaintiff testified at deposition that when he started working for defendants in 2003, he was not given a job title. He explains that he just thought he was being paid in accordance with the "regulations" of the Department of Labor. Plaintiff tr at 24,39. Plaintiff acknowledged that he was told he was going to make \$19 an hour, which he was then paid, and that his salary eventually rose to \$25 an hour prior to his termination after six-and-a-half years. *Id.* at 91. Plaintiff continued that he accepted the salary "in the understanding that it was the truthful representation of my salary." *Id.* at 92.

Plaintiff's Labor Law § 190 cause of action is based on his belief that he was eligible for compensation as a level 4 worker and should have been paid at that level from the outset of his employment, as opposed to the level 2 pay he received. He maintains that the salary is too low because he should have been

classified higher.

In response to defendants' motion for summary judgment, plaintiff maintains that he should not be precluded from seeking relief under the New York State Labor Law. Although some of his alleged violations are based on federal regulations, plaintiff believes that he was underpaid in violation of New York State law. Plaintiff provides lists of levels and wages for (1) artists and related workers and (2) designers, evidently from the Foreign Labor Certification Data Center, to establish his misclassification as a level 2 worker.

Plaintiff further argues that he worked more than 40 hours a week on several occasions and was not paid overtime. He provides multiple pay stubs in support of his contention. Plaintiff believes that the records defendants provide actually prove that he worked more than 40 hours and was not paid overtime.

Plaintiff does not provide an affidavit in response to defendants' motion. In the memorandum of law, for the first time, plaintiff alleges that defendants committed additional violations of the Labor Law, such as unlawfully deducting his wages from 2003-2006 to recoup the legal fees associated with his visa application process, totaling approximately \$3,500.

He further claims that defendants reduced the amount of his hours on occasion, and also closed their business for approximately 18 days in July 2009. Plaintiff was not paid when

the business was closed. Counsel alleges that plaintiff, as an H-1B worker, cannot be deprived of any wages, even if the employer is closed. Counsel states, "[e]mployers who hire workers under a H-1B visa have federally required obligations . . . [a]n employer cannot tell a H-1B worker to not work his regular work hours." Memorandum of law in opposition at 7.

Plaintiff claims that a triable issue of facts remains as to whether defendants kept proper records of his pay stubs. He claims that defendants willfully failed to disclose his rate of pay. Plaintiff further maintains that defendants did not keep proper records of his employment, as they cannot prove the existence of proper notices to employees with only a recent photograph of a notice.

Plaintiff contends that he was not paid in accordance with the law. As defendants allegedly told him that he would be paid in accordance with the proper wage level, defendants breached their oral contract with him by paying him a level 2 salary.

In brief, defendants acknowledge that in one of plaintiff's pay stubs, out of the many submitted by plaintiff, plaintiff was underpaid by \$50. Plaintiff's exhibit H at 1. In this pay stub, plaintiff worked 45.25 hours at \$19 an hour, and was paid \$19 an hour both for his regular work and his 5.25 hours of overtime. However, defendants also note that this pay stub is from March 2004, and, as such, is barred by the six-year statute of

limitations for New York Labor Law claims.

Defendants also argue that plaintiff's new claims should be precluded as they were not alleged in the complaint or in any subsequent pleadings. In any event, according to defendants, all but three weeks of the deductions from his wages that were allegedly unlawfully taken to recoup legal fees occurred before the expiration of the six-year statute of limitations. And, they continue, plaintiff's other claim with respect to being improperly benched in violation of H-1B regulations, is not a violation of the New York Labor Law.

DISCUSSION

I. Summary Judgment:

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). In considering a summary judgment motion, evidence should be

"viewed in the light most favorable to the opponent of the motion." *People v Grasso* 50 AD3d at 544 (internal citation omitted).

At the outset, defendants argue that all of plaintiff's claims are preempted as they fall under federal law. Defendants' citations, such as *Shah v Wilco Sys., Inc.* (126 F Supp 2d 641, 647-648 [SD NY 2000]), explain that "[s]ection 1182 (n) [of the INA] does not provide for a private right of action in federal court in the first instance for complaints concerning an employer's violation of the Section. However, Section 1182 (n) contemplates judicial review at the conclusion of the administrative proceedings." While plaintiff's pre-litigation letter to defendants mentions federal statutes, the present action alleges violations of the New York Labor Law, not federal law. Thus, any proper claims made involving violations of New York Labor Law would not be precluded.

Nonetheless, the court notes that the requirements of the H-1B visa program are set forth in Section 1182 (n) of the INA and not State law. 8 USCS § 1182 (n). "[T]he INA contains a comprehensive regulatory enforcement scheme that provides for the investigation of claims and for remedies for H-1B violations...." (internal quotation marks and citations omitted). *Walia v Veritas Healthcare Solutions L.L.C.*, 2014 WL 7330440, *3, 2014 US Dist LEXIS 176809, *7-8 (SD NY 2014). The Code of Federal

Regulations establishes the process for review, investigation and disposition of alleged violations of 8 USCS § 1182 (n). As a result, any claims which are not covered under the New York Labor Law, such as the claimed H-1B violations, including the purported misclassification of plaintiff at the wrong level, are not properly before this court.

Alleged Failure to Pay Wages Owed:

Plaintiff's first cause of action maintains that defendants failed to pay him the wages owed to him, including overtime. He has calculated the difference between a level 4 and level 2 worker and seeks that compensation. However, these levels have no bearing on his New York claim. Without the applicability of the federal salary structure, the designation of level 2 versus level 4 is without significance. Plaintiff's contention is merely that he was not being paid enough for his skill set. However, plaintiff has provided no evidence that he and defendants agreed upon a certain salary, such as the equivalent of a level 4 salary. Plaintiff offers vague testimony and no affidavit. The list provided to the court, from 2013, of salary ranges for artists under the federal statutes, is taken from an online wage center provided by the United States Department of Labor, Office of Foreign Labor Certification. The list does not state that a person must be paid at a certain level if he has met certain criteria, and is, in any event, irrelevant.

Setting aside the discrepancy between level 4 and level 2 payments, in support of his contention, plaintiff has provided several pay stubs. Plaintiff's hourly rate was stated on each paycheck, with plaintiff receiving pay raises throughout the years. Plaintiff was paid according to his hourly rate, and if he worked overtime, he was paid time and a half for that time. The court notes that none of the pay stubs plaintiff provides indicate any miscalculation of payment owed to plaintiff, except for one paycheck. This miscalculation of approximately \$50 is from 2004, barred by the statute of limitations. Accordingly, plaintiff has failed to raise a triable issue of fact with respect to unpaid wages, and defendants are granted summary judgment dismissing this cause of action.

Labor Law § 195(1):

Plaintiff alleges that defendants violated Labor Law § 195(1) as they failed to give plaintiff the proper written notice about his wages. Labor Law § 195(1) sets forth the record keeping requirements and notice requirements for every employer. However, contrary to plaintiff's contentions, the pay stubs provided to the court contain all of the information which plaintiff alleges is missing, including, among other things, the hours worked, hourly rate, overtime rate, deductions taken, plaintiff's address and defendants' address.

In his papers, plaintiff alleges, without any basis, that

defendants have not kept adequate records, and that they failed to post appropriate notices to the employees regarding minimum wages and overtime. Defendants provided payroll records. In response, plaintiff has not offered any evidence that the records are inadequate. As counsel for defendants stated during oral argument, "[t]here is no other evidence other than the blanket statement in the deposition by plaintiff that he didn't get paid overtime." Tr of oral argument at 5. "[A] shadowy semblance of an issue or bald conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment." *Costello v Saidmehr*, 236 AD2d 437, 438 (2d Dept 1997) (internal quotation marks and citation omitted). Plaintiff has not demonstrated that there is a triable issue of fact as to whether defendants' records are accurate.¹

Plaintiff claims that the picture provided to the court showing the employment law poster should be disregarded. However, along with the picture, Tamis has stated in his affidavit that the company has always posted appropriate employment notices on a large bulletin board next to the employee time clock. It is well settled that a motion for summary

¹ In his complaint, plaintiff states that "defendants failed to obtain a signed acknowledgment" that plaintiff received his paycheck with the information stated on them. However, evidently plaintiff received these notices by mail and via direct deposit for the nearly seven years that he worked for defendants, clearly demonstrating plaintiff's receipt.

judgment shall be supported by an affidavit from a person having knowledge of the facts. CPLR 3212 (b); see e.g. *Albert G. Ruben & Co. v Fritzen*, 101 AD2d 795, 796 (1st Dept 1984). Tamis, as vice president, has knowledge of the facts, and his affidavit is sufficient.

Breach of Contract:

The elements of a breach of contract claim are: (1) the existence of a valid contract; (2) performance of the contract by the injured party; (3) breach by the other party; and (4) resulting damages. *Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 (1st Dept 2007).

Plaintiff argues that defendants breached their employment contract with him as they did not pay him the agreed-upon amount. However, as explained above, plaintiff cannot demonstrate that defendants agreed to pay him at a specific rate, but failed to do so. In this action he cannot complain of defendants' failure to pay him at federal statutory rates. Plaintiff testified that he was aware that he was getting \$19 an hour to start, and accepted this rate upon the start of his employment. He simply believes that he should have been getting paid in accordance with federal law, which would have been, solely according to him, at a higher rate due to his qualifications. Yet plaintiff apparently did not question the rate until eight years later. Plaintiff's unilateral beliefs are too vague to form a contract between the

parties which did not exist, and defendants are granted summary judgment dismissing this cause of action.²

Plaintiff's Remaining Claims:

In his memorandum of law in opposition to this motion, via counsel, plaintiff maintains that there were other instances when his wages were improperly docked. Thus, he claims that he should not have reimbursed defendants for any legal fees in relation to his visa application. Further, he contends that as an H1-B skilled worker, he should have been paid for a 40-hour work week, even if defendants were on vacation or could not provide him with 40 hours of work a week.

Although these two additional claims were not alleged in the complaint, "[a] court may properly look beyond the allegations in the complaint and deny summary judgment where a party's papers in opposition to the motion raise triable issues of fact." *Gold Connection Discount Jewelers v American Dist. Tel. Co.*, 212 AD2d 577, 578 (2d Dept 1995). Nonetheless, other factors warrant dismissal of these claims. First, plaintiff offers no excuse for the delay in submitting these two additional claims. See e.g. *Begley v City of New York*, 111 AD3d 5, 35 (2d Dept 2013) ("here, the plaintiffs offered no excuse for their delay in asserting a nursing malpractice claim against The Forum School for the first

² Although not raised as an affirmative defense, this claim would be outside the six-year statute of limitations. CPLR 213 (2).

time in opposition to summary judgment, after discovery had been completed and their note of issue and certificate of readiness filed, which alone warrants rejection of the claim").

In addition, as defendants note, plaintiff's claim for unlawful deductions would, except for several weeks of deductions, be barred by the statute of limitations. See e.g. *Dragone v Bob Bruno Excavating, Inc.*, 45 AD3d 1238, 1239 (3d Dept 2007) ("plaintiff may recover wages that were not paid during the six years that preceded the filing of the complaint if he is successful on his claim under Labor Law article 6") (internal citation omitted).

Finally, there is no triable issue of fact with respect to plaintiff's claim that defendants violated his rights as an H-1B worker. Plaintiff has failed to set forth any provision of the New York Labor Law which addresses his status as an H-1B worker under federal law. As a result, this additional claim of being unlawfully benched would not be viable, as it initially should have been brought under the INA.

CONCLUSION

Accordingly, it is

ORDERED that the motion of defendants Louis Tamis & Sons and Jeffrey Tamis for summary judgment dismissing the complaint herein is granted, and the complaint is dismissed in its

entirety, with costs and disbursements to said defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: April 6, 2015

ENTER:



A. J. S. C.

HON. ELLEN M. COIN