

Lozano v Rugfrit 1350 LLC

2015 NY Slip Op 30679(U)

April 27, 2015

Supreme Court, New York County

Docket Number: 159570/2014

Judge: Donna M. Mills

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

-----X
ROBERTO LOZANO, on behalf of himself and
others similarly situated,

Plaintiff,

Index No.:
159570/2014

- against-

RUGFRIT 1350 LLC d/b/a BISTRO MILANO,
STEFANO FRITTELLA and FRANK TANCREDI,

Defendants.

-----X

DONNA MILLS, J.:

In this proposed class action alleging violations of the New York Labor Law, defendants Rugfrit 1350 LLC d/b/a Bistro Milano, Stefano Frittella (Frittella) and Frank Tancredi (Tancredi) (collectively, defendants) move, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing plaintiff Roberto Lozano's complaint as against them. In the complaint, plaintiff alleges, among other things, that defendants invalidly took a tip credit from him and that they violated the New York Wage Theft Prevention Act.

BACKGROUND AND FACTUAL ALLEGATIONS

In October 2012, plaintiff was employed by defendants to work as a bus boy in the Bistro Milano restaurant, located in New York, New York. He was terminated in May 2013. Fritella was the owner and Tancredi was the general manager of the restaurant.

Plaintiff's action is a proposed class action complaint, brought on behalf of himself and other similarly situated employees of Bistro Milano.

At all times relevant, plaintiff was a tipped employee who participated in a tip pool. He received a Restaurant Employee Policy Package (Policy Package) from defendants, which set forth that plaintiff would be receiving \$5.00 an hour from the restaurant, plus his tips, to bring him up to at least \$7.25 an hour.

Plaintiff alleges that defendants engaged in an illegal tip pool because the employees did not voluntarily participate in it. He claims that the bus boys received only a portion of credit card tips while the cash tips could be split among the waiters. Plaintiff alleges, "[p]laintiff and other tipped employees did not initiate nor agree to such tip-pool." Complaint, ¶ 19.

Plaintiff further alleges that defendants were not entitled to take a tip credit because they purportedly failed to comply with the notice requirements for such tip credit. Plaintiff argues that he should have, among other things, received this notice in Spanish, and that there is no explanation as to how the overtime rate is calculated. In addition, plaintiff contends that he did not receive adequate wage statements explaining the tip credit, as required under the New York Labor Law. He maintains that "the wage statement does not clearly state the

amount of tip credit allowance claims as part of the minimum wage" Complaint, ¶ 19.

Plaintiff's first cause of action sets forth that plaintiff and other tipped subclass members were not paid the correct minimum wage since defendants were not eligible to take a tip credit under the New York Labor Law. Plaintiff seeks damages in unpaid minimum wages.

Plaintiff's second cause of action states that plaintiff is also owed overtime, as defendants were not entitled to take a tip credit. Due to the alleged lack of notice of the overtime rate and tip credit, plaintiff seeks unpaid overtime for himself and other class members.

In plaintiff's third cause of action, he alleges that defendants failed to pay him and other members the "call-in" pay premium. Plaintiff avers that he was occasionally sent home immediately upon arriving for his scheduled shift when the restaurant was slow, and he did not receive any compensation. This happened to plaintiff approximately five times a month and he is seeking to recover his unpaid call-in premium.

In his fourth cause of action, plaintiff claims that defendants violated the New York Wage Theft Prevention Act, as the wage statements provided to him and the other class members did not properly itemize the tip deduction, nor did they provide the employer's trade name and address.

In support of their motion to dismiss, defendants provide the signed Policy Package, which states, in pertinent part:

"By signing I have read, fully understood and received a copy of the above-mentioned Bistro Milano's entire Restaurant Employee Policy Package.

"TIP CREDIT: this establishment is allowed by the federal law to apply a portion of the tips you receive against the minimum wage and intends to treat tips as satisfying part of our minimum wage obligation. This allowance is called a "Tip credit." The formula for this is: Federal Minimum Hourly Wage (\$7.25) minus Tip Credit (\$2.25) equals your hourly wage (\$5.00)."

Defendants' exhibit F.

Defendants provide a signed notice and acknowledgment of pay rate and payday (pay rate notice), pursuant to Labor Law § 195.1. The pay rate notice, given to plaintiff in English and Spanish, was dated February 1, 2013, and included the information that the employee's pay rate is \$5.00 an hour, net of tip credit, and that the overtime pay rate is \$8.625 an hour. Defendants' exhibit E.

Defendants further provide payroll records from defendants' payroll provider. They claim that plaintiff received these records in his wage statements and that the statements provide documentary evidence demonstrating that defendants supplied the required information regarding the tip credit and wage notice. The wage statements, as set forth in the payroll records, identify the hours worked, the rate of pay, the restaurant name, taxes withheld, meal deductions, and definitions of certain terms, including ones for REGTIP and OT TIP. Defendants' exhibit

B.

With respect to overtime pay rate, defendants maintain that plaintiff was notified of this rate in both his wage statements and the pay rate notice. In any event, even if the overtime rate was somehow omitted, defendants maintain that plaintiff identifies no basis under the law to invalidate the tip credit in those circumstances.

Defendants argue that the tip pool is valid, as restaurants may set up a tip pool and require employees to participate. Defendants did not address plaintiff's claim for unpaid call-in pay. In summary, through counsel, defendants allege the following, in pertinent part:

"Plaintiff does not allege that the tip credit was ever improperly applied to reduce his wages. Plaintiff does not allege he was ever paid below the minimum wage. Plaintiff does not allege that ineligible participants took part in the tip pool. Plaintiff does not allege that management withheld his tips. And Plaintiff's Complaint concedes that if not for his (specious) allegations regarding notice, Defendants appropriately applied the tip credit and paid Plaintiff every penny he was owed as a tipped employee participating in the tip pool."

Defendants' memo of law at 11.

Plaintiff argues that the Policy Package and the pay rate notice do not satisfy the notice requirement for tip credit allowance, as these printed materials are not documentary evidence. In addition, plaintiff is confused by the \$5.00 net of tip credit, and does not believe that any employee would be able

to understand his prospective wages from reading the pay rate notice.

Plaintiff argues that the payroll records are also not sufficient to demonstrate defendants' compliance with notice, as they do not qualify as documentary evidence and defendants have not proven they were provided to plaintiff with every pay check. Even if the wage statements were provided to plaintiff with every pay check, plaintiff alleges that the statements are confusing.

Plaintiff argues that defendants' tip credit should be invalidated as they created an improper tipping pool. As, allegedly, there is no evidence that the employees voluntarily participated in the tipping pool, it should be invalidated. Also, according to plaintiff, as defendants were not entitled to the tip credit, his overtime rate should be higher and he needs to be compensated for this.

Prior to this action, plaintiff commenced an action in federal court, based on the same claims, as well as other federal claims. The court granted defendants' motion to dismiss the complaint. Honorable George Daniels held the following in a written order, in pertinent part, "[f]or the reasons articulated on the record at the September 3, 2014 oral argument, Defendants' Motion to Dismiss is GRANTED. The Complaint is DISMISSED." Defendants' exhibit A. The order afforded plaintiff an opportunity to amend his complaint, yet he declined to do so.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211, the facts as alleged in the complaint are accepted as true, the plaintiff is given the benefit of every possible favorable inference, and the court must determine simply whether the facts alleged fit within any cognizable legal theory. *Mendelovitz v Cohen*, 37 AD3d 670, 671 (2d Dept 2007); see also *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 375 (1st Dept 2003). Under CPLR 3211 (a) (1), a dismissal is appropriate only "if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v Martinez*, 84 NY2d 83, 88 (1994). "[U]nder CPLR 3211 (a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one [internal quotation marks and citations omitted]." *Id.*

First Cause of Action:

Tip Pool

12 NYCRR § 146-2.16 (b) specifically states that "[a]n employer may require food service workers to participate in a tip pool and may set the percentage to be distributed to each occupation from the tip pool." See e.g. *Matter of Marzovilla v*

New York State Indus. Board of Appeals, ___ AD3d___, 2015 WL 1724727, 2015 NY App Div LEXIS 3162, 2015 NY Slip Op 03219, *1-3, (3d Dept 2015) (for the Court's explanation of employer-mandated tip splitting in a restaurant and who is eligible). Plaintiff concedes that there was a tip-sharing agreement in place at the restaurant prior to his joining the staff. Therefore, plaintiff's allegations that his lack of voluntarily agreeing to the tip pool should somehow invalidate the tip pool and the tipping credit, are without merit.

Tip Credit

12 NYCRR 146-1.3 sets forth in pertinent part:

"An employer may take a credit towards the basic minimum hourly rate if a service employee or food service worker receives enough tips and if the employee has been notified of the tip credit as required in section 146-2.2 of this Part. Such employees shall be considered 'tipped employees.'

"(b) Tip credits for food service workers.

(1) On and after January 1, 2011, a food service worker shall receive a wage of at least \$5.00 per hour, and credit for tips shall not exceed \$2.25 per hour, provided that the total of tips received plus the wages equals or exceeds \$7.25 per hour."

The notice provision provides the following, in pertinent part:

"(a) Prior to the start of employment, an employer shall give each employee written notice of the employee's regular hourly pay rate, overtime hourly pay rate, the amount of tip credit, if any, to be taken from the basic minimum hourly rate, and the regular payday. The notice shall also state that extra pay is required if tips are insufficient to bring the employee

up to the basic minimum hourly rate. The employer must provide notice in: (1) English; and (2) any other language spoken by the new employee as his/her primary language"

12 NYCRR § 146-2.2.

Plaintiff's pay rate of \$5.00 an hour and his overtime rate of \$8.625 hour, plus up to \$2.25 in tips, is only wrong if defendants' tip credit is somehow invalid via inadequate notice. However, defendants provide the Policy Package, in English, signed by plaintiff, where the tip credit was explained to plaintiff. He was told the formula which would allow him to maintain a \$7.25 minimum wage, in accordance with the law. Plaintiff does not argue that he does not understand English or that he did not sign the packet.

Plaintiff then allegedly received pay checks, whereby the hours worked were multiplied by his pay rate and the tip credit was applied. Then, on February 1, defendants provided plaintiff with his pay rate notice, in English and Spanish, signed by plaintiff, explaining the various rates of pay.

Nonetheless, plaintiff maintains, for various reasons, that the evidence presented does not qualify as documentary evidence. For instance, plaintiff claims that the earnings record is just printed material and does not resolve all factual issues. Although not all printed materials qualify as documentary evidence under CPLR 3211 (a) (1), the materials submitted by

defendants are "unambiguous, authentic, and undeniable [internal quotation marks and citation omitted]," and qualify as documentary evidence. *Attias v Costiera*, 120 AD3d 1281, 1282 (2d Dept 2014). There is no date attached to the Policy Package, but it is signed by plaintiff acknowledging that he received it when he commenced his employment. The pay rate notice has a signature and date, and is in Spanish and English. It is the form provided by the State of New York Department of Labor. Lastly, the payroll records are provided by a third-party payroll provider and include every check received by plaintiff.¹

Plaintiff conceded during oral argument in his federal case that he did receive wage statements and that the only issue with the tip credit is with respect to notice and whether or not the tip pool was legal. Federal tr at 19 and 22. Plaintiff further conceded that he did receive notice of his pay rate, but that it was inadequate. *Id.* at 35. Although plaintiff claims that his actual paycheck did not contain enough information, he does not provide a copy of the paycheck and does not support his contention. Most importantly, plaintiff is not claiming that he is owed any unpaid wages at all. Accordingly, defendants have satisfied their burden of providing payroll records that contain all the requisite information demonstrating that their tip credit

¹ Plaintiff did not receive his first pay check until December 2012 and the earnings record reflects this.

allowance was valid, that plaintiff was receiving the correct wages and tip credit, and that plaintiff had notice of such.

Second Cause of Action:

Plaintiff contends that, as defendants have failed to provide him notice of the tip credit, their calculations of plaintiff's overtime rate is incorrect. 12 NYCRR § 146-1.4 states, in pertinent part, "[a]n employer shall pay an employee for overtime at a wage rate of 1 ½ times the employee's regular rate for hours worked in excess of 40 hours in one workweek." The notes further provide an example of a "food service worker regularly paid \$ 7.25 per hour minus a tip credit of \$ 2.25 per hour, for a wage rate of \$ 5.00 per hour, who works 50 hours in a workweek . . . Wage rate for 10 hours . . . \$ 8.625 per hour." 12 NYCRR § 146-1.4.

Plaintiff received this rate of pay for every hour that he worked overtime. As defendants have satisfied their notice requirement with respect to the tip credit, plaintiff was paid the correct overtime rate, and this cause of action is dismissed.

Third Cause of Action:

Plaintiff argues that he was sent home approximately five times a month immediately after arriving for his work shift, and without any compensation. As a result, he is allegedly owed call-in pay premium for those days. Defendants have not

addressed these claims and this cause of action is not dismissed.

Fourth Cause of Action:

The Wage Theft Prevention Act (the Act), implemented in Labor Law § 195, as explained by the New York Department of Labor, "amends the notice of wage rate requirements and expands the civil and criminal remedies that are available when employers fail to comply"

Under the Act, among other things, "an employer must, at the time of an employee's hiring, and then annually on or before the first of February, provide an employee with a wage notice containing, inter alia, allowances, including tip allowances, claimed as part of the minimum wage." *Inclan v New York Hospitality Group, Inc.*, ___ F Supp 3d ___, 2015 WL 1399599, *7, 2015 US Dist LEXIS 39342, *20-21 (SD NY 2015). See Labor Law § 195 (1) (a). The Act also requires employers to provide wage statements calculating the "gross wages; deductions; allowances, if any, claimed as part of the minimum wage; and net wages." Labor Law § 195 (3).

Defendants have provided evidence to demonstrate that they provided plaintiff with adequate notice regarding his wages and the tip credit. Although plaintiff may have desired the information in a different format, the only issue is whether or not defendants satisfied their legal requirement for notice,

which they have. However, even if defendants somehow left a box unchecked or engaged in another trivial mistake, plaintiff was not harmed by this and was fully paid. Plaintiff conceded that he received full compensation for every hour worked. As noted during oral argument for the federal action, "[w]age statement requirements even under the New York Labor Law do not require this kind of calculation and expression . . . This is just extra stuff he would like there to be." Federal tr at 55.

Plaintiff argues that his entire complaint should survive a motion to dismiss. Even though on a motion to dismiss plaintiff is given every favorable inference, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration [internal quotation marks and citation omitted]." *Silverman v Nicholson*, 110 AD3d 1054, 1055 (2d Dept 2013)). Plaintiff cannot sustain a viable cause of action that, due to his alleged confusion about the notices he received, defendants violated the Act, and plaintiff's fourth cause of action is dismissed.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of defendants Rugfrit 1350 LLC d/b/a Bistro Milano, Stefano Frittella and Frank Tancredi to dismiss the complaint is granted with respect to the first, second and


fourth causes of action, and is denied with respect to the third cause of action; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that a conference will be held on June 12, 2015 in Room 574 at 10:00 (A.M.) / P.M.

Dated: 6/27/15

ENTER:



J.S.C.

JONNA M. MILLS, J.S.C.