Ponce v Lajaunie
2015 NY Slip Op 31216(U)
July 15, 2015
Supreme Court, New York County
Docket Number: 152551/2014
Judge: Cynthia S. Kern

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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ARTURO PONCE, NABOR HERNANDEZ and JOEY PEREA,

Plaintiffs,

Index No. 152551/2014

-against-

DECISION/ORDER

PHILIPPE LAJAUNIE, 15 JOHN CORP., FIRST ADMIN, INC. a/k/a LES HALLES DOWNTOWN,

Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affirmations in Opposition.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiffs commenced the instant action seeking, among other things, unpaid overtime wages and spread-of-hours pay. Plaintiffs now move for an Order pursuant to CPLR § 3212 granting them partial summary judgment against defendants. For the reasons set forth below, plaintiffs' motion is granted in part and denied in part.

The relevant facts are as follows. Defendant 15 John Corp. ("15 John") owns the restaurant known as Les Halles Downtown. At all relevant times, plaintiffs worked as cooks in Les Halles Downtown's kitchen. Defendant First Admin, Inc. ("First Admin") is an administrative company that is responsible for handing all financial matters for 15 John,

including payroll. The individual defendant Philippe Lajaunie ("Lajaunie") is the sole shareholder of both 15 John and First Admin.

Plaintiffs commenced this action alleging that during their tenure with Les Halles Downtown they worked in excess of 40 hours per week regularly and routinely worked longer than ten hours per day but were not compensated in accordance with applicable provisions of the New York Labor Law ("NYLL"). Thus, in their complaint, plaintiffs assert claims for unpaid overtime wages and spread-of-of hours pay under the NYLL as well as an award of liquidated damages as provided for in the NYLL. Plaintiffs have subsequently amended their complaint to also include two additional claims for discrimination and retaliation.

On the present motion, plaintiffs seek partial summary judgment against defendants on their claims under the NYLL for overtime wages and spread-of-hours pay, including an award of liquidated damages. In opposition, defendants do not contest corporate defendants 15 John and First Admin's liability but contend that an inquest is necessary to determine the amount of damages plaintiffs may recover against these defendants. Additionally, defendants contend that plaintiffs' motion should be denied as plaintiffs failed to include all pleadings in their initial moving papers. Furthermore, defendants contend that individual defendant Lajaunie cannot be held liable under the NYLL as he was not plaintiffs' employer.

As an initial matter, defendants' contention that plaintiffs' motion should be denied as plaintiff failed to include all pleadings with its initial moving papers is without merit. "Although CPLR 3212(b) requires that a motion for summary judgment be supported by copies of the pleadings, the court has discretion to overlook the procedural defect of missing pleadings when the record is 'sufficiently complete.'" *Washington Realty Owners, LLC v. 260*

Washington Street, LLC, 105 A.D.3d 675 (1st Dept 2013). "The record is sufficiently complete when, although the movant has not attached all of the pleadings to the motion, a complete set of the papers is available from the material submitted." *Id.* Indeed, the moving party can remedy the procedural defect by submitting the pleadings in reply. *See Pandian v. New York Health and Hospitals Corp.*, 54 A.D.3d 590, 591 (1st Dept 2008). Here, plaintiffs have annexed the entire pleadings to their reply papers. Thus, the court will exercise its discretion to overlook plaintiffs' initial procedural defect and will now turn to the merits of the motion.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the present case, plaintiffs' motion for partial summary judgment as to liability on their claims for unpaid overtime and spread-of hours wages and liquidated damages against corporate defendants 15 John and First Admin is granted as plaintiffs have made a *prima facie* showing of their right to judgment as a matter of law and defendants have presented no opposition thereto.

However, plaintiffs' motion for partial summary judgment against Lajaunie is denied as there exists a material issue of fact as to whether Lajaunie is plaintiffs' employer under the NYLL. Pursuant to the NYLL, an employee may bring a claim against his or her employer for

their failure to lawfully pay overtime wages and spread-of-hours pay. In determining who is an "employer" for purposes of the NYLL, courts utilize an "economic reality" analysis, where "the overarching concern is whether the alleged employer possessed the power to control the workers in question." *Herman v. RSR Sec. Services Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999); *see also Yu Y. Ho v. Sim Enterprises, Inc.*, 2014 WL 1998237, at *10 (S.D.N.Y. May 14, 2014); *Birnbaum LLC v. Park*, 2013 WL 317578, at *11 (Sup. Ct. N.Y. Co. Jan. 24, 2013). This analysis includes evaluating such factors as "whether the alleged employer (1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Irizarry v. Catsimatidis*, 722 F.3d 99, 105 (2d Cir. 2013) (quoting *Barfield v. New York City Health and Hospitals Corp.*, 537 F.3d at 132, 142 (2d Cir. 2008)).

In addition to these "nonexclusive and overlapping" factors, courts also consider "the scope of an individual's authority or 'operational control' over a company." *Id.* at 106. "[T]o be an 'employer,' an individual defendant must possess control over a company's actual 'operations' in a manner that relates to a plaintiff's employment." *Irizarry*, 722 F.3d at 109. An individual exercises such control "if his or her role within the company, and the decisions it entails, directly affect the nature or conditions of the employees' employment." *Id.* at 110. In the end, no single factor is dispositive, and courts must consider the "totality of the circumstances." *Id.* at 104.

In applying the above factors to the instant case, the court finds that summary judgment is not appropriate as the parties' submissions establish that there is a genuine issue of fact regarding whether Lajaunie is an employer under the economic reality test. First, although there is

evidence that Lajaunie had some power to fire and promote employees, there is a dispute as to the extent of overall control Lajaunie exerted over the plaintiffs' conditions of employment. Lajaunie concedes that he promoted employees Carlos Uzcha ("Chef Uzcha") to chef and Chad Combs ("Combs") to general manager. Moreover, Lajaunie testified that he, on one occasion, fired an employee named "Larabi." However, there is a genuine dispute as to whether Lajaunie supervised and controlled plaintiffs' work schedules or conditions of employment. Plaintiffs have offered documentary evidence wherein Lajaunie wrote to the general manager Combs, in an e-mail dated November 4, 2014, "WHAT DON'T YOU UNDERSTAND IN: 'NO OVERTIME'???? HIRE MORE STAFF AND TRAIN THEM AND RETAIN THEM. Office: when you see overtime flag it immediately." While this email suggests Lajaunie had some degree of control over employees' work hours, it, by itself, is not dispositive as to whether Lajaunie controlled plaintiffs' conditions of employment.

Further, there is no evidence that Lajaunie controlled the rate or method of plaintiffs' pay. Rather, the record reveals that plaintiff's wages were determined by the chef and other staff at First Admin. Although plaintiffs claim that Chef Uzcha had to get approval from Lajaunie in order to give kitchen employees a raise, Chef Uzcha never testified to such fact. Rather, Chef Uzcha testified that he had to speak with Mayumi or Yoko, employees at First Admin, not Lajaunie, to obtain such approval. Further, Lajaunie testified that he was not consulted prior to the kitchen staff being changed from salary to hourly.

Additionally, the record reveals that Lajaunie did not maintain any employment records. Plaintiffs offer only that Lajaunie works in the same office where employment records are kept. However, working in the same office where records are kept is not sufficient to demonstrate that

Lajaunie himself maintained employment records. Indeed, this exact argument was offered and rejected by the Second Circuit in *Irizarry*. *See Irizarry*, 722 F.3d at 116. Accordingly, based on the foregoing, the court cannot say that, as a matter of law, Lajaunie is an employer under the NYLL. Rather, such determination must be left to the trier of fact.

To the extent defendants contend that the plaintiffs cannot maintain this action against Lajaunie as the NYLL does not permit plaintiffs to recover from owners, officers, mangers, or employees of a corporation citing to *Patrowich v. Chemical Bank*, 63 N.Y.2d 541 (1984) and *Stoganovic v. Dinolfo*, 92 A.D.2d 729 (4th Dept 1983), such contention is unavailing as the courts have continuously limited the holding in these cases to claims for unpaid wages against officers or shareholders "who do not qualify as employers" under the NYLL. *See Schear v. Food Scope America, Inc.*, 297 F.R.D. 114, 135 (S.D.N.Y. 2014). Here, plaintiffs are not suing Lajaunie in his capacity as a corporate officer or shareholder but directly as an employer. Thus, the holdings in *Patowich* and *Stoganovic* do not bar plaintiffs' claims against Lajaunie in this action.

Accordingly, plaintiffs' motion for partial summary judgment as to liability on their first two causes of action and an award of liquidated damages against 15 John and First Admin is granted. However, plaintiffs' motion for partial summary judgment as to liability against Lajaunie is denied. Additionally, to the extent plaintiffs also seek an award of damages against 15 John and First Admin at this time, such relief is denied as the amount of damages plaintiff may recover against said defendants will be determined at the time of trial with the remainder of the action. This constitutes the decision and order of the court.

Dated: 7/15/15

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C