

Rodriguez v KGA Inc.
2016 NY Slip Op 31282(U)
July 5, 2016
Supreme Court, New York County
Docket Number: 160931/15
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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WILLY RODRIGUEZ AND WALKIRIS ROSADO,

Plaintiffs,

-against-

DECISION AND ORDER

Index No.: 160931/15

Mot. Seq. Nos.: 001, 002

KGA Inc. and John Doe Corp. d/b/a KMR Tours a/k/a KMR Group, Simon Werner, Michael Schick a/k/a Michael Sheik, David Scharg, and John Does # 1-5, jointly and severally,

Defendants.

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KATHRYN E. FREED, J.S.C.

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

MOT. SEQ. 001

PAPERS	NUMBERED
PLTFs.' NOTICE OF MOTION AND AFFIDAVIT ANNEXED	1-2 (Exs. A-C)

PAPERS	NUMBERED
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MOT. SEQ. 002

DEFS.' NOTICE OF MOTION AND AFFIRMATION IN SUPPORT	1-2 (Ex. A)
MEMORANDUM OF LAW IN SUPPORT	3
PLAINTIFFS' AFFIRMATION IN OPPOSITION	4 (Exs. 1-2)
PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION	5
DEFENDANTS' MEMORANDUM OF LAW IN REPLY	6

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

This order resolves motion sequence numbers 001 and 002.

In motion sequence 001, defendants KGA Inc. ("KGA") and Shimon Werner i/s/h/a Simon Werner move for an order, pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state

a claim. In motion sequence 002, plaintiffs Willy Rodriguez and Walkiris Rosado move for an order, pursuant to CPLR 3215, granting them a default judgment against defendants Michael Schick (“Schick”) a/k/a Michael Sheik, and David Scharg, due to their failure to appear or answer the amended complaint. After oral argument and review of the parties’ papers and the relevant case law, plaintiffs’ motion, which is unopposed, is **denied, and defendants’ motion is granted.**

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiffs Willy Rodriguez and Walkiris Rosado commenced the captioned action on or about October 23, 2015. In their complaint, they alleged that they “were employees of defendant KGA Inc. and John Doe Corp., d/b/a KMR Tours a/k/a KMR Tours a/k/a KMR Group * * * an agency that provide[d] all-inclusive kosher tours with offices located at 403 Crown Street, Brooklyn, New York . . .” Ex. A to Pltfs.’ Mot., at par. 1.¹ They claimed that they brought the action to recover “unpaid minimum wages and unpaid overtime premiums owed to them pursuant to New York Labor Law (“NYLL”), §§ 650 *et seq.*”, as well as for “unpaid spread-of-hours premiums and for failure to provide proper wage notices and wage statements pursuant to the NYLL and the supporting regulations.” *Id.* The violations alleged by plaintiffs reportedly occurred when they worked as waiters during trips to California which defendants arranged for their customers during the Jewish holiday of Passover in 2011 and 2012. *Id.*, at pars. 32, 43.

In affidavits of service dated November 19, 2015, process server Tarrance Jackson stated that he served Schick and Scharg by serving Jeff “Smith”, a person of suitable age and discretion, at

¹Plaintiffs claimed that John Doe Corp. was a “placeholder for any entities plaintiffs may later discover in this action that conducted business as KMR, including but not limited to entities existing before KGA Inc. became active on February 28, 2012.” Ex. A to Pltfs.’ Mot., at par. 18.

defendants' "dwelling house" at 403 Crown Street, Brooklyn, New York. Exs. B and C to Pltfs.'

Mot.

POSITIONS OF THE PARTIES:

Plaintiffs' Motion for a Default Judgment

Plaintiffs argue that they are entitled to a default judgment against Schick and Scharg since the latter were both served at their principal place of business and failed to appear or answer within 20 days.

Motion by Defendants KGA and Werner to Dismiss

Defendants KGA and Werner argue that because their alleged wrongdoing occurred in California and not in New York, such was not a violation of the NYLL and the complaint must thus be dismissed against them pursuant to CPLR 3211(a)(7).

In opposition to the motion, plaintiffs argue that this Court has jurisdiction over defendants KGA and Werner. They further assert that, because New York had a greater interest than California in regulating the employment relationship between plaintiffs and defendants KGA and Werner, they should be allowed to recover under the NYLL.

In their reply memorandum of law, KGA and Werner do not dispute that this Court has jurisdiction over them; rather they reiterate that the NYLL does not apply to those employed outside of New York State.

LEGAL CONCLUSIONS:

Plaintiffs' Motion for a Default Judgment

CPLR 3215(a) provides, in pertinent part, that “[w]hen a defendant has failed to appear, plead or proceed to trial..., the plaintiff may seek a default judgment against him.” It is well settled that “[o]n a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party’s default in answering or appearing.” *Atlantic Cas. Ins. Co. v RJJNJ Servs. Inc.*, 89 AD3d 649, 651 (2d Dept 2011). Proof of the facts constituting the claim may be provided by plaintiff’s affidavit. *See* CPLR 3215(f). Where, as here, a verified complaint has been served, it may be used as the affidavit of facts constituting the claim and, in such case, the affidavit of default may be made by the party or the party’s attorney. *Id.*

Here, plaintiffs have entirely failed to establish their entitlement to a default judgment. First, they failed to prove service of the summons and complaint upon Schick and Scharg. The affidavits of service represent that defendants Schick and Scharg were served by delivering a copy of the summons and complaint to Jeff “Smith”, a person of suitable age and discretion, and a co-tenant, at their “dwelling house”, located at 403 Crown Street in Brooklyn, New York. Exs. B and C to Pltfs.’ Mot. However, plaintiffs allege in their complaint that 403 Crown Street was the office address of KGA. Ex. A to Pltfs.’ Mot., at par. 1. Further, in his affirmation in support of the motion, plaintiffs’ counsel states that 403 Crown Street was the principal place of business of Schick and Scharg. Lamadrid Aff. In Supp., at pars 3 and 4. Thus, plaintiffs’ motion papers are unclear as to

whether defendants Schick and Scharg were served at their dwelling house or place of business.²

Additionally, since the complaint is not verified, plaintiffs are required to submit an affidavit proving the facts constituting the claim. However, the affidavit of plaintiff Willy Rodriguez submitted in support of the motion for default merely states that he is one of the plaintiffs, where he resides, and that he was employed by KGA in 2011 and 2012. Ex. C to Pltfs.' Mot. He does not elaborate on any other facts giving rise to the plaintiffs' claims. Such a conclusory affidavit is clearly insufficient to entitle plaintiffs to a default judgment. *See Cohen v Schupler*, 51 AD3d 706 (2d Dept 2008); *Beaton v Transit Facility Corp.*, 14 AD3d 637 (2d Dept 2005).

In light of the foregoing, plaintiffs' motion for a default judgment (motion sequence 002) is denied.³

Defendants' Motion to Dismiss

As noted above, plaintiffs claim that they are entitled to recover damages based on violations of the NYLL arising from work they performed for defendants in California.

Under New York Law, it is a "settled rule of statutory interpretation, that unless expressly stated otherwise, 'no legislation is presumed to be intended to operate outside the territorial jurisdiction of the state . . . enacting it.'" *Goshen v Mut. Life Ins. Co. of N.Y.*, 286 AD2d 229 (1st Dept 2001) (quoting 73 Am. Jur. 2d Statutes §

²Counsel also states in his affirmation in support of the motion that Schick and Scharg failed to answer the complaint within 20 days as required by CPLR 3012(a). However, since defendants were purportedly served by substituted service pursuant to CPLR 308(2), the period to answer, if service had been proper, would have been 30 days. See CPLR 3012(c).

³Plaintiffs are not granted leave to renew upon proper papers since, as noted below, they fail to state a claim against defendants KGA and Werner, and thus Court questions how they would be able to establish the merit of a claim against Schick and Scharg.

359, at 492), *aff'd*, 98 NY2d 314 (2002); *see also* N.Y. Stat. Law § 149 (McKinney) (“The laws of one state can have no force and effect in the territorial limits of another jurisdiction, in the absence of the consent of the latter.”). Article 19 of the NYLL, which includes the minimum wage, overtime, and spread of hours provisions relevant to this case, begins with a “Statement of Public Policy” section stating that it was enacted to address the fact that “[t]here are persons employed in some occupations *in the state of New York* at wages insufficient to provide adequate maintenance for themselves and their families.” N.Y. Labor Law § 650 (McKinney) (emphasis added). In combination with the presumption against extraterritoriality, it follows that the statute does not apply to people who work outside of the State of New York. *See also Kassman v KPMG LLP*, 925 F. Supp. 2d 453, 469 (SDNY 2013) (holding that the antidiscrimination provisions of the NYLL do not apply extraterritorially and citing cases). Accordingly, [p]laintiffs’ claims under the NYLL fail as a matter of law.

Magnuson v Newman, 2013 U.S. Dist. LEXIS 138595 (SDNY, Sept. 25, 2013), *reconsideration denied Magnuson v Newman*, 2013 U.S. Dist. LEXIS 158893 (SDNY, Nov. 6, 2013).

Since New York law does not permit plaintiffs to recover under the NYLL for the claims they assert, the motion by defendants KGA and Werner is granted pursuant to CPLR 3211(a)(7) for failure to state a cause of action, and the complaint is dismissed in its entirety.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendants KGA Inc. and Shimon Werner i/s/h/a Simon Werner to dismiss the complaint insofar as asserted against them, pursuant to CPLR 3211(a)(7) (motion sequence 001), is granted; and it is further,

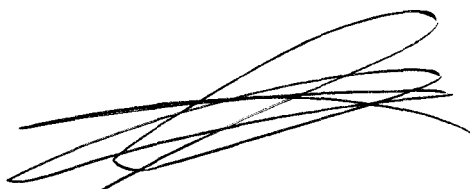
ORDERED that the motion by plaintiffs Willy Rodriguez and Walkiris Rosado for a default judgment against defendants Michael Schick (“Schick”) a/k/a Michael Sheik, and David Scharg

(motion sequence 002) is denied; and it is further,

ORDERED that this constitutes the decision and order of this Court.

Dated: July 5, 2016

ENTER:



KATHRYN E. FREED, J.S.C.

CLERK OF THE COURT