

**Wai Kam Wong v Zhiqing Activity Ctr. Inc.**

2016 NY Slip Op 32062(U)

September 16, 2016

Supreme Court, Queens County

Docket Number: 711905/2015

Judge: Thomas D. Raffaele

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS D. RAFFAELE IA Part 13  
Justice

**FILED**  
SEP 22 2016  
COUNTY CLERK  
QUEENS COUNTY

WAI KAM WONG,	x	Index
		Number <u>711905</u> 2015
Plaintiff		
-against-		Motion
		Date <u>May 6,</u> 2016
ZHIQING ACTIVITY CENTER INC. and		Motion Seq. No. <u>2</u>
HENRY WANG,		
Defendants.		
	x	

The following papers numbered 1 to 8 read on this motion by the defendants, Zhiging Activity Center, Inc. and Henry Wang, to dismiss the plaintiff's pursuant to CPLR 3016 (b), 3211 (a) (3), 3211 (a) (7) and CPLR 3212.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-5
Answering Affidavits - Exhibits.....	6-7
Reply Affidavits.....	8

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is an action, inter alia, to recover unpaid wages and related damages. In her complaint, the plaintiff alleges that from approximately July 2013 through December 2013, she was employed as a restaurant waitress by defendant Zhiging Activity Center, Inc. and its owner defendant Henry Wang. According to the plaintiff, defendant Wang had the power to hire and fire employees, set wages and schedules, and maintain employee records. He was also allegedly involved in the day-to-day operations of Zhiging Activity Center and played an active role in managing the business. The plaintiff alleges that she regularly worked for defendants seven days per week and for a total of approximately 78 hours per work week. During the weekday and weekend nights, when there were reserved banquet

events, Ms. Wong was required to work an additional eight hours. Defendants allegedly did not provide a time clock, sign-in sheet or any other method for employees to track their time worked. The plaintiff was paid a fixed rate of \$3000.00 per month regardless of the number of hours she worked. The plaintiff claims that she was paid only for the first month she worked for defendants but did not receive a paystub or wage statement with her pay. The complaint further alleges that Ms. Wong allegedly did not receive any pay for the period of July 3, 2013 to December 16, 2013.

In all, the complaint alleges five causes of action. The first cause of action alleges a violation of the minimum wage requirement of Labor Law §663. The second cause of action alleges a violation of Labor Law §§ 650 et seq and its supporting regulations for failing to pay the plaintiff overtime wages for each hour worked in excess of forty hours per week. The third cause of action alleges that the defendants violated the plaintiff's rights by failing to pay her an additional hour's pay at the minimum wage for each day she worked shifts lasting in excess of ten hours, or the spread of hours, in violation of the New York State Labor Law §§ 650 et seq and its supporting regulations. The fourth cause of action alleges that defendants violated the plaintiff's rights by failing to pay her on a weekly pay basis as required by the frequency of pay requirements of the New York Labor Law §191. The fifth cause of action alleges that the defendant violated the Labor Law's Wage Theft Prevention Act contained in Labor Law § 185(3) by failing to provide her with weekly wage statements with her pay.

Defendants move for summary judgment dismissing the complaint against it on summary judgment grounds. Defendants further move to dismiss the complaint pursuant to CLR 3211(a)(3) and CLR 3211 (a)(7) based upon a lack of standing and failure to state a cause of action, respectively, on the ground that the plaintiff was not an employee, but rather a shareholder and manager of the defendant company, and CLR 3016 (b) for failing to state the circumstances constituting the wrong in detail.

That branch of the defendants' motion which seeks to dismiss the complaint pursuant to CLR 3211(a)(3) on the ground that the plaintiff lacks standing because she was a shareholder/manager of the corporation, and not a kitchen employee, is denied. A determination of whether a party has standing requires an inquiry into whether a party has "an interest ... in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request" (*Caprer v Nussbaum*, 36 AD3d 176, 182 [2006]). The court believes that the plaintiff does.

Moreover, the claim that the plaintiff lacks standing to bring this action because she was not an employee of the defendants is squarely belied by the December 23, 2015 letter, submitted as an exhibit by the defendants, from the New York State Department of Labor wherein it indicated that it awarded the plaintiff unpaid wages for her work as a cook at defendant Zhiqing Activity Center from July 3, 2015 to December 15, 2015 (cf. *Bynog v Cipriani Group, Inc.*, 1 NY3d 193 [2003]).

That branch of the defendants' motion which seeks dismissal of the plaintiff's complaint, pursuant to CLR 3211 (a)(7), for failure to state a cause of action is also denied. On a motion to dismiss the complaint for failure to state a cause of action, the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see *Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83 [1994]).

"Article 6 of the Labor Law sets forth a comprehensive set of statutory provisions enacted to strengthen and clarify the rights of employees to the payment of wages...Section 190 of the Labor Law defines the term 'wages' as the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis" (*Ackerman v New York Hospital Medical Center of Queens*, 127 AD3d 794 [2015]). "Employee" is defined as "any person employed for hire by an employer in any employment" (Labor Law 190[2]). An "employer includes any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service" (Labor Law §190 [3]). Section 191 [1][a] of the Labor Law requires an employer to pay wages to manual workers, such as the plaintiff, on a weekly basis unless otherwise authorized by the commissioner of labor. Here, the plaintiff's complaint alleges that she was an employee of the defendants; the defendants failed to pay her the minimum wage, overtime and spread of hours pay; her wages were scheduled to be paid on a monthly basis in violation of Labor Law §191[1][a]) and she received only one such payment; and defendants failed to provide her with required wage statements in violation of Labor Law. Upon accepting the facts alleged in the complaint as true and according the plaintiff the benefit of every possible favorable inference as it must do on a motion to dismiss for failure to state a cause of action, the court finds that the complaint adequately sets forth causes of action to recover unpaid wages, overtime and spread of hours pay allegedly withheld from the plaintiff, as well as a failure to pay her

weekly and provide her with wage statements as required by the Labor Law (see generally *Jacobs v Macy's East, Inc.*, 262 AD2d 607 [1999]; see also *Konidaris v Aeneas Capital Mgt., L.P.*, 8 AD3d 244 [2004]).

Contrary to the defendants' further contention, the circumstances constituting the wrongs alleged in the complaint are stated in sufficient detail to meet the requirement of CPLR 3016[b] (see generally, *Chaudrey v Abadir*, 261 AD2d 499 [1999]).

Finally, that branch of the motion which seeks summary judgment is also denied in light of the defendants' failure to submit a copy of all the pleadings as required by CPLR 3212(b). No copy of the answer was submitted in support of the defendants' motion.

The defendants' remaining contentions are without merit.

Dated: September 16, 2016

  
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Thomas D. Raffaele, J.S.C.

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