

Markasevic v 241 E. 76 Tenants Corp.

2017 NY Slip Op 30493(U)

March 13, 2017

Supreme Court, New York County

Docket Number: 650710/2016

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

-----X
ELJAZ MARKASEVIC, on behalf of himself
and others similarly situated,

Plaintiff,

Index No.:
650710/2016

- against -

241 EAST 76 TENANTS CORP.,

Defendant.

-----X

ELLEN M. COIN, J.:

In this proposed class action complaint, plaintiff Eljaz Markasevic, on behalf of himself and other similarly situated superintendents, doormen and handymen, alleges that he was not paid the wages that he is entitled to while working for his employer, defendant 241 East 76 Tenants Corp. Defendant now moves pursuant to CPLR 7503 (a) for an order compelling arbitration and staying prosecution of this action. In the alternative defendant moves pursuant to CPLR 3211 (a)(1), (2) and (7) for an order dismissing those claims which fail as a matter of law.

BACKGROUND AND FACTUAL ALLEGATIONS

In May 2003, plaintiff was hired by defendant's predecessor to work as a handyman in its apartment building located at 241 East 76th Street, New York, New York (the Building). Plaintiff alleges that he would also work the

overnight shift as a doorman. In March 2011, plaintiff was promoted to permanent superintendent. Plaintiff is currently employed by defendant as a superintendent and doorman. Plaintiff states that some of his duties include "making repairs around the Building, coordinating and fulfilling tenant requests, overseeing repairs and construction, checking the utilities around the building, taking out the garbage and sitting at the doorman's desk, welcoming tenant and their guests while providing security." Plaintiff's aff, ¶ 7.

Plaintiff alleges that while he has been employed by defendant and its predecessor, although he worked approximately 60-80 hours a week, he was not paid for all the hours worked, nor was he paid for overtime. Plaintiff provides an example of the work week of September 17, 2013. Plaintiff contends that although he worked 80 hours that week, he was paid for 60 hours at straight time. As a result, he was unpaid for 20 hours and was not paid at the overtime rate for hours worked over 40 hours.

In this proposed class action, brought by plaintiff pursuant to CPLR 901, plaintiff seeks to include himself and other similarly situated superintendents, doormen and handymen employed by defendant and who also have also been subjected to defendant's policies. These policies include the alleged "willful failure and refusal to pay them the proper minimum wage and overtime premium at the rate of one and one-half times the

regular rate for work in excess of forty (40) hours per workweek." Complaint, ¶ 11. In plaintiff's first and second causes of action, he claims that these policies are a violation of federal and state law, as both the Fair Labor Standards Acts (FLSA) and the New York Labor Law (NYLL) indicate that the lawful overtime rate is time and one-half for all hours in excess of 40 hours per week.

In the third cause of action, plaintiff further contends that in violation of the New York State Wage Theft Prevention Act (WTPA), defendant failed to provide him and the other class members with adequate wage statements and wage notices. He also alleges that defendant failed to maintain records that accurately reflect his wages and hours worked.

Defendant moves to compel arbitration of the claims alleged in plaintiff's complaint. Defendant argues that as plaintiff is a union member of the SEIU Local 32BJ (Union), the terms of his employment are governed by his collective bargaining agreement (CBA). The CBA provides that claims must first be grieved through his union, and then, if unresolved, arbitrated. According to defendant, as the CBA provides that arbitration is the sole and exclusive remedy, plaintiff's claims must be arbitrated.

In support of its motion, defendant provides a copy of the CBA between the Union and the Realty Advisory Board on Labor

Relations, the Building's bargaining agent. Defendant points to the relevant provisions in the CBA that allegedly demonstrate that plaintiff's wage and hours claims must be arbitrated. For example, in Article III, the CBA discusses the "wages, hours, terms and conditions of employment." Defendant's exhibit C at 11. In addition, Article XV (A), which addresses wages and hours, provides for wage increases every April for building service employees other than working superintendents. *Id.* at 58. The terms for overtime, lunch and days off are discussed at length. Article XV (B) also addresses working superintendents, providing for annual weekly wage increases. *Id.* at 63. The standard work-week of 40 hours a week and 2 days off in each work-week is also discussed. Article XV (B) (2) (d) states the following with respect to superintendents, in pertinent part:

"When an obvious inequity exists by reason of a Superintendent's regular application of highly specialized abilities in his/her work, or where this work imposes special or substantial additional responsibilities, the Union may question the amount of the Superintendent's wage once during the term of this Agreement through grievance and arbitration."

Id. at 65.

The CBA provides for a grievance procedure. A grievance must first be brought by a Union representative to a representative of management. If the claim cannot be settled, the CBA provides that it may be filed for arbitration. Article V(3). The CBA addresses the issue of grieved overtime as

follows:

"7. Any grievance, except as otherwise provided herein and except a grievance involving basic wage violations and Pension, Health, Training, Legal and SRSP contributions shall be presented to the RAB (Realty Advisory Board) in writing within 120 days of its occurrence, except for grievances involving suspension without pay or discharge which shall be presented within 45 days, unless the Employer agrees to an extension. The Arbitrator shall have the authority to extend the above time limitations for good cause shown.

8. Where a failure to compensate overtime work can be unequivocally demonstrated through employer payroll records, the Union may grieve the failure to compensate such overtime work for the three (3) year period prior to the filing of the grievance."

Id. at 15.

Article VI of the CBA addresses arbitration at length, including what matters are to be arbitrated and the logistics of the arbitration hearing process. For example, the CBA states that a "Contract Arbitrator shall have the power to decide all differences arising between the parties to this Agreement as to interpretation, application or performance of any part of this Agreement" *Id.* at 15.

Defendant argues that plaintiff entered into a valid arbitration agreement and that his claims fall within the scope of that agreement. Defendant notes that while certain disputes are excluded from arbitration, such as termination of a superintendent who has worked for less than six months, FLSA or New York Labor Law (NYLL) claims are not specifically excluded.

Moreover, according to defendant, any questions of arbitrability should be left for the arbitrator, not the court.

Defendant adds that even if arbitration is not compelled under the terms of the CBA, Section 301 of the Labor Management Relations Act (LMRA) would necessitate arbitration. Defendant argues, "LMRA 301 preempts FLSA claims where the resolution of these disputes will require interpretation of the CBA."

Defendant's memorandum of law (MOL) at 14; internal quotation marks and citations omitted.

Alternatively, defendant urges that even if plaintiff cannot be compelled to arbitrate, his claims should be dismissed. Defendant argues, among other things, that by broadly stating that he has worked more than 40 hours without providing specific details, plaintiff has not alleged the degree of specificity required for a statutory claim under either the FLSA or the NYLL. In addition, defendant maintains that plaintiff is considered a "janitor" under NYLL and is not entitled to overtime pay.

In opposition, plaintiff argues that although he is a member of the Union, he is not a party or signatory to the Union CBA and thus is not required to pursue the arbitration process set forth in the CBA. Further, he contends that if he is bound by the CBA, his wage and hour claims are not subject to arbitration. In support of his contention, plaintiff notes that in the Section regarding wages and hours the CBA states, "[n]othing herein shall

be construed to affect any rights a Superintendent may have under the Fair Labor Standards Act." *Id.* at 64. As the FLSA allows employees to maintain an action against their employer in Federal or State court, plaintiff argues that the CBA does not preclude him from seeking the instant relief.

Nor, plaintiff argues, does the CBA require him to pursue arbitration, as there is no language which makes arbitration mandatory for his wage and hour claims. Thus, he notes that the CBA provides that the Union may grieve the failure to pay overtime, not that the Union must pursue arbitration. Further, plaintiff points to a provision in the CBA that expressly requires arbitration of discrimination claims:

"There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, sexual orientation, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act..., or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI) as sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based on claims of discrimination."

Id., Art XIX, § 23(A) at 106-107.

Plaintiff argues that if the drafters of the CBA intended to require arbitration as the sole process for wage and hour claims, they could have done so.

The Union did not attempt to commence arbitration on behalf of plaintiff for his claims. Plaintiff argues that it is within the court's power, not the arbitrator's, to resolve whether plaintiff is bound by the CBA and whether the wage and hour claims are required to be arbitrated.

In addition, plaintiff alleges that the LMRA does not preclude him from seeking relief in the judicial forum. He maintains that the CBA is irrelevant, as the amount owed to plaintiff can be assessed using defendant's payroll records.

Plaintiff further argues that he has satisfied the pleading standards of both the FLSA and the NYLL, as he is only required to allege that he worked in excess of 40 hours a week. He notes that it is premature to apply the "janitorial exemption" in this case. Plaintiff seeks sanctions against defendant for making allegedly frivolous arguments in its motion.

DISCUSSION

Motion to Compel Arbitration:

On a motion to compel arbitration pursuant to CPLR §7503(a), the court must address "whether the parties have entered into a valid arbitration agreement and, if so, whether the issue sought to be submitted to arbitration falls within the scope of that agreement." *Edgewater Growth Capital Partners, L.P. v Greenstar N. Am. Holdings, Inc.*, 69 AD3d 439, 439 (1st Dept 2010) (internal quotation marks and citation omitted). Both sides reference the

Federal Arbitration Act (9 USC § 1 et seq.) (FAA) in their papers. The FAA is an expression of a strong federal policy favoring the enforcement of arbitration agreements. *Ragone v Atlantic Video at Manhattan Ctr.*, 595 F3d 115, 121 (2d Cir 2010). As with New York law, a court asked to compel arbitration under the FAA must "first determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement." See e.g. *National City Golf Fin. v Higher Ground Country Club Mgt. Co., LLC*, 641 F Supp 2d 196, 202 (SD NY 2009) (internal quotation marks and citation omitted).

It is the court, not the arbitrator, which has the initial authority to determine whether or not the parties are bound to arbitrate pursuant to the agreement. *Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 45 (1997). "[W]hile the FAA creates a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act, in evaluating whether the parties have entered into a valid arbitration agreement, the court must look to state law principles." *Cap Gemini Ernst & Young, U.S., LLC v Nackel*, 346 F3d 360, 364 (2d Cir 2003) (internal quotation marks and citation omitted). When deciding whether a dispute is arbitrable, "the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute." CPLR 7501. Although there is a strong

federal policy favoring arbitration, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Tech., Inc. v Communications Workers of Am.*, 475 US 643, 648 (1986) (internal quotation marks and citation omitted).

Plaintiff argues that he is not subject to the CBA because, among other reasons, he is a non-signatory. However, plaintiff concedes that he is a Union member, and "[u]nder the National Labor Relations Act, a designated bargaining representative has exclusive authority to bargain over rates of pay, wages, hours of employment, or other conditions of employment." *Mendez v Starwood Hotels & Resorts Worldwide, Inc.*, 345 Fed Appx 602, 603 (2nd Cir 2009) (citation and internal quotation marks omitted).

Plaintiff also argues that he should not be required to arbitrate his claims because the terms of the CBA do not require the arbitration of wage and hour claims. For the reasons set forth below, the court agrees with plaintiff that a mandatory grievance and arbitration process does not apply to his wage and hour claims and he cannot be compelled to arbitrate these claims.

To determine the issue of whether the parties intended to arbitrate the dispute, the court must first assess whether the CBA contains a "clear and unmistakable" waiver by plaintiff of his rights to pursue his FLSA and NYLL claims in a judicial forum. *Alderman v 21 Club Inc.*, 733 F Supp 2d 461, 469 (SD NY

2010). A clear and unmistakable waiver is established where either one of the following requirements are met: "(1) if the arbitration clause contains an explicit provision whereby an employee specifically agrees to submit all causes of action arising out of his employment to arbitration; or (2) where the arbitration clause specifically references or incorporates a statute into the agreement to arbitrate disputes." *Id.*

Courts have found that statutory claims, including FLSA and NYLL claims, are not necessarily limited to arbitration, absent contractual language making these claims subject to mandatory arbitration. Thus, for example, in *Ambrosino v Village of Bronxville* (58 AD3d 649 [2nd Dept 2009]), the court held that plaintiff did not have to pursue the grievance process provided in his CBA for his discrimination claims, as "the CBA did not contain any provisions regarding the resolution of disputes involving employment discrimination, let alone any clear and unmistakable language waiving an employee's right to a judicial forum for such claims." 58 AD3d at 652.

In the instant case defendant relies on the district court decision in *Lawrence v Sol G. Atlas Realty Co.* (2015 WL 5076957 [ED NY 2015]), together with other district court decisions examining the very CBA at issue here, insisting that this CBA requires that an employee's wage and hour claims be arbitrated. However, after argument of this motion, the Court of Appeals for

the Second Circuit vacated the district court's grant of defendant's motion to compel arbitration in the *Lawrence* case (841 F3d 81 [2nd Cir 2016]). The Second Circuit found that the language in the CBA did not contain a "clear and unmistakable" waiver. Thus, it held that Lawrence could pursue his statutory claims in federal court. Lawrence's complaint alleged discrimination and retaliation, in violation of Section 1981, Title VII of the Civil Rights Act, the New York State Human Rights Law, FLSA and the NYLL. While finding that the CBA "No Discrimination" provision unmistakably created a contractual right of employees to be free from unlawful discrimination, subject to arbitration, "a contractual dispute is not the same thing as a statutory claim, even if the issues involved are coextensive." 841 F3d at 85.

Here, the CBA does not effectuate a "clear and unmistakable" waiver as to plaintiff's FLSA and NYLL claims, because the terms of the CBA do not specifically provide that FLSA and NYLL claims are subject to arbitration. Although the arbitration provision could be interpreted to offer arbitration as an option for a wide range of disputes, including those arising from wage and hour discrepancies, there is no language requiring mandatory arbitration of plaintiff's statutory claims.

The FLSA statute requires payment of minimum wages and mandates that an "employee engaged in interstate commerce be

compensated at a rate of no less than one and one-half times the regular rate of pay for any hours worked in excess of forty per week." *Nakahata v New York-Presbyterian Healthcare Sys.*, 723 F 3d 192, 200 (2d Cir 2013); see 29 USC §§ 206, 207(a)(1). The standard for overtime wages is the same under NYLL. 12 NYCRR § 142-2.2. Section 652 of the NYLL sets forth a mandatory minimum wage that an employee must receive for every hour worked.

Although both the CBA and the federal and state laws give rights to employees for overtime wages, plaintiff is not alleging that defendant failed to pay him in accordance with the CBA wage provision. As the court will further address below, whether or not defendant complied with the FLSA and NYLL and its resolution does not necessarily require interpretation of the CBA. Plaintiff in this case may prevail on his state law claims regardless of whether defendant paid him in the manner provided in the CBA. See e.g. *McLean v Garage Mgt. Corp.*, 2011 WL 1143003, *4, 2011 US Dist LEXIS 32760, * 10 (SD NY 2011).

As arbitration does not clearly and unmistakably apply to plaintiff's statutory claims, defendant's motion to compel arbitration is denied. See *Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.*, 44 AD3d 581, 583 (1st Dept 2007) ("proponent of arbitration has the burden of demonstrating that the parties agreed to arbitrate the dispute at

issue"). Without a valid and compulsory arbitration provision, plaintiff cannot be compelled to do so. *Id.* at 583.

Section 301 of the LMRA:

Defendant argues that even if arbitration is not compelled under the terms of the CBA, plaintiff's claim is preempted by LMRA § 301 (29 USC § 185(a)).

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. The Supreme Court has interpreted section 301 as a congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts."

Vera v Saks & Co., 335 F3d 109, 114 (2d Cir 2003) (internal quotation marks and citations omitted).

Section 301 also preempts state law claims "[w]here the resolution of a state-law claim depends on an interpretation of the collective bargaining agreement." *Salamea v Macy's East, Inc.*, 426 F Supp 2d 149, 153 (SD NY 2006) (internal quotation marks and citation omitted). However "[n]ot every suit concerning employment or tangentially involving a CBA...is preempted by Section 301." *Vera v Saks & Co.*, 335 F3d at 114. Courts have routinely noted that "claims pursuant to N.Y. Labor Law are truly independent of rights under the [CBA]." *Kaye v*

Orange Regional Med. Ctr., 975 F Supp 2d at 422 (internal quotation marks and citation omitted).

Defendant argues that plaintiff's claims are preempted by section 301 because it is necessary to interpret the CBA to determine whether plaintiff is entitled to relief. However, as referenced briefly above, defendant's argument is without merit. The complaint alleges, among other things, that defendant did not provide him with overtime pay and other pay for hours worked, and did not keep accurate payroll records, in violation not of the wage provisions of the CBA, but in violation of the FLSA and NYLL. "[A]s long as the state-law claim can be resolved without interpreting the [CBA] itself, the claim is independent of the agreement for 301 preemption purposes [internal quotation marks and citations omitted]." *Tamburino v Madison Sq. Garden, LP*, 115 AD3d at 221.

In sum, section 301 of the LMRA does not preempt plaintiff's claim, as reference to the CBA is not required in order to determine whether plaintiff received the statutorily mandated hourly or overtime wage rate for every hour worked. As the First Department stated in *Tamburino v Madison Sq. Garden, LP*, "[a]t least on these facts...the claims...do not require an interpretation of the CBA. Indeed, plaintiffs may prevail on their claims regardless of whether MSG distributed the gratuities

to its employees in the manner provided by the CBA." 115 AD3d at 222.

Dismissal:

On a motion to dismiss pursuant to CPLR 3211, "the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference," and the court must determine simply "whether the facts as alleged fit within any cognizable legal theory." *Mendelovitz v Cohen*, 37 AD3d 670, 671 (2d Dept 2007). However, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration." *Silverman v Nicholson*, 110 AD3d 1054, 1055 (2d Dept 2013) (internal quotation marks and citation omitted). Dismissal is warranted under CPLR 3211 (a) (1) "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). "In assessing a motion under 3211 (a) (7)...the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Id.* (internal quotation marks and citations omitted).

Defendant argues that the complaint should be dismissed because plaintiff did not allege with specificity the length and frequency of his unpaid work. However, the court finds that plaintiff has satisfied the FLSA and NYLL pleading standards. Pleading requirements are the same under the FLSA and the NYLL.

Lundy v Catholic Health Sys. of Long Island, Inc., 711 F 3d 106, 117 (2d Cir 2013).

"To plead a plausible FLSA overtime claim, Plaintiffs must provide sufficient detail about the length and frequency of their unpaid work to support a reasonable inference that they worked more than forty hours in a given week." *Nakahata v New York-Presbyterian Healthcare Sys*, 723 F3d at 201; see also *Lundy v Catholic Health Sys. of Long Island, Inc.*, 711 F3d at 114. Here, plaintiff has generally alleged that he was not paid for all the hours worked and that he was not paid for overtime at the requisite rate. Plaintiff has satisfied the pleading standards, as he then provides an example of a specific work week in which, he alleges, he worked for 80 hours and was paid for 60, but did not receive the overtime rate for those hours worked after 40 hours.

An employee bringing an action for unpaid minimum wages under the FLSA and the NYLL "has the burden of proving that he performed work for which he was not properly compensated." *Li v Leung*, 2016 WL 5369489, *12, 2016 US Dist LEXIS 76817, *32 (ED NY 2016). Using the example work-week provided above, plaintiff further states that he was not paid for all of the hours that he worked. Although plaintiff's allegations contain little specificity, at this stage courts in other wage-protection actions have noted, "Given [FLSA's] remedial purpose and its

broader public policy goals, a plaintiff can meet this burden through estimates based on his own recollection." *Jemine v Dennis*, 901 F Supp 2d 365, 376 (ED NY 2012) (internal quotation marks and citations omitted). Viewed in the light most favorable to plaintiff, his allegations that he worked compensable time for which he was not properly paid are adequate.

Wage Theft Prevention Act:

Plaintiff alleges that defendants violated the Wage Theft Prevention Act ("WTPA") because defendant did not provide him with an accurate written statement that properly accounted for his hours worked and rate of pay. Labor Law § 195 sets forth the record-keeping requirements and notice requirements for every employer. The WTPA, effective April 9, 2011, amended the Labor Law to increase requirements for employee wage statements. Employers are required to provide, "among other things, the rate of pay, allowances, the regular pay day, the name of the employer, the physical address of the employer's main office, and a mailing address and telephone number for the employer." *Salomon v Adderley Indus., Inc.*, 960 F Supp 2d 502, 511 (SD NY 2013) (internal quotation marks and citations omitted).

CPLR §3211(a)(2) authorizes the Court to dismiss a cause of action where "the court has not jurisdiction of the subject matter of the cause of action." CPLR §3211(a)(2). For the reasons provided above, as the court has the authority to

determine whether the parties should arbitrate pursuant to the agreement, defendant's motion to dismiss the complaint pursuant to CPLR §3211(a)(2) is denied.

Dismissal of Claims Based on the Janitorial Exemption:

Defendants allege that plaintiff is considered to be a "janitor" under New York law and is therefore exempt from overtime requirements. A "janitor" is defined as:

"[a] person employed to render any physical service in connection with the maintenance, care or operation of a residential building. Where there is only one employee, such employee shall be deemed the janitor. Where there is more than one employee in the building, the employer shall designate an employee who lives in the building as the janitor. No building may have more than one janitor."

12 NYCRR § 141-3.4.

The Department of Labor regulations "do not provide for either minimum wages or overtime wages for janitors, who are instead paid based on the number of units in the building in which they worked." *Koljenovic v Marx*, 999 F Supp 2d 396, 399 (ED NY 2014) (internal quotation marks and citation omitted); see also 12 NYCRR § 141-1.4 ("An employer shall pay an employee, except a janitor in a residential building, for overtime at a wage rate of 1½ times the employee's regular rate for hours worked in excess of 40 hours in a workweek"). A building superintendent is commonly referred to as the "resident janitor" in New York. *Ortiz v Arthur T. Mott Real Estate, LLC*, 2016 US Dist LEXIS 127597, *15 (ED NY 2016).

Here, defendant alleges that plaintiff is a janitor because he is the only live-in employee performing janitorial responsibilities. Plaintiff claims that he may have performed these duties while he was employed as a handyman and that, at this time, defendant has not submitted enough evidence to demonstrate that plaintiff engaged in the requisite janitorial activity while he was the live-in superintendent. In *Koljenovic v Marx, supra*, cited by defendant, the court found that the plaintiffs fit within the statutory exemption of janitor. However, as the Court noted in *Gjoni v Orsid Realty Corp.*, 2015 WL 4557037, *7, 2015 US Dist LEXIS 97687 at *18, this was based on "undisputed facts in the record that supported that conclusion."

It is defendant's burden to prove that the work plaintiff provides for defendant qualifies for the janitorial exemption. The "statutory exemption is narrowly construed against the employer." *Koljenovic v Marx*, 999 F Supp 2d at 399. In addition, "[t]ypically, statutory exemptions should be asserted as affirmative defenses" *Gjoni v Orsid Realty Corp.*, 2015 WL 4557037, *7, 2015 US Dist LEXIS 97687 at *17. On this motion defendant has not established that plaintiff is the only employee who lives in the Building; that he is compensated with a flat salary, rent-free apartment, and free utilities; that he received written notice that his compensation would depend on the number

of units at the Building. *Almonte v 437 Morris Park, LLC*, 2015 WL 7460019 (SD NY 2015). Moreover, "superintendent" is not defined as "janitor" in the building staff handbook. In viewing the factual allegations in the light most favorable to plaintiff, the court finds that dismissal of the complaint based on the janitorial exemption would be premature.

Sanctions

As plaintiff failed to cross-move for sanctions, his request for such relief against defendant is denied. 22 NYCRR § 130-1.1(d).

CONCLUSION AND ORDER

Accordingly, it is hereby

ORDERED that the motion of defendant 241 East 76 Tenants Corp. to compel arbitration or to dismiss the complaint herein is denied in its entirety; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

Dated: March 13, 2017

ENTER:



Ellen M. Coin A.J.S.C.