Fearon-Gallimore v Gottlieb
2017 NY Slip Op 32822(U)
March 5, 2017
Supreme Court, New York County
Docket Number: 155133/2017
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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CAROLINE FEARON-GALLIMORE,

Plaintiff,

-against-

STEVEN GOTTLIEB and AMY GOTTLIEB,

Defendants.

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DECISION AND ORDER

Index No.: 155133/2017

Mot. Seq. 001

KATHRYN E. FREED, J.S.C.:

In this action alleging violations of the New York Labor Law (NYLL or Labor Law), defendants Steven and Amy Gottlieb move, pursuant to CPLR 3211 (a) (7), for partial dismissal of plaintiff Caroline Fearon-Gallimore's complaint, for failure to state a cause of action. In addition, defendants move, pursuant to CPLR 4101 and 4102, to strike plaintiff's request for a jury trial. After oral argument, and after a review of the parties' motion papers and the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Defendants are married and reside in New York, New York. Until May 2017, defendants had employed plaintiff for 30 months as a "domestic worker (non live-in) to perform manual household services." Complaint, ¶ 10. Plaintiff received an hourly salary. Plaintiff alleges that, although she worked 50 hours per week during the course of her employment by defendants, she was not paid an overtime rate of 1.5 times her normal rate for the hours worked in excess of 40 hours a week. In

addition, plaintiff maintains that she was not provided with required statutory notices or statements relating to her employment, in violation of Labor Law § 195 (1) and (3). In the complaint, plaintiff demands a jury trial.

In the first cause of action, for unpaid overtime, plaintiff alleges that she is entitled to recover "her unpaid overtime wages, maximum liquidated damages, reasonable attorneys' fees, and costs of the action, pursuant to [Labor Law] §§ 170, 191, 198." *Id.*, ¶ 23.

The second cause of action, brought pursuant to Labor Law §§ 190, 191, 193, 195 and 198, alleges that defendants violated plaintiff's rights when they failed to pay her overtime wages she was owed. Further, plaintiff asserts that defendants violated Labor Law § 195 (1) when they failed to provide her with the "notice(s) required by NYLL § 195 (1)." *Id.*, ¶ 27. Plaintiff is seeking an injunction directing defendants to comply with Labor Law § 195 (1). Similarly, plaintiff contends that defendants violated Labor Law § 195 (3) when they failed to provide her with the "statement(s) required by NYLL § 195 (3)" and is seeking an injunction directing them to comply. *Id.*, ¶ 28.

The relief demanded is set forth as follows:

> "Due to Defendants' New York Labor Law Article 6 violations including violation of sections 191, 193 and 198, Plaintiff is entitled to recover from Defendants, individually and/or jointly, her entire unpaid wages, including her unpaid overtime wages, wage deductions, maximum liquidated damages, prejudgment interest, maximum recovery for violations of NYLL 195 (1) and NYLL 195 (3), reasonable attorneys' fees, and costs of the action, pursuant to [NYLL] 190 et seq. including 198."

Defendants move, pursuant to CPLR 3211, for an order granting dismissal of plaintiff's claims made pursuant to Labor Law §§ 191, 193 and 195 (1).

Labor Law § 191

Labor Law § 191 sets forth the frequency with which an employer must pay an employee. Defendants argue that plaintiff fails to state a claim under Labor Law § 191, in either of her causes of action, because she alleges that she was not paid all of the wages to which she was entitled, and not that defendants failed to pay her in a timely manner.

Plaintiff argues that, for manual workers like herself, there is a weekly deadline for payment. According to plaintiff, she claimed a violation of Labor Law § 191 because defendants allegedly failed to pay her for the overtime wages. Plaintiff maintains that the Court of Appeals has "reaffirmed . . . the availability of a private right of action under NYLL § 198 to recover for a violation of a substantive provision of Article 6 such as failure to pay wages under NYLL § 191." Plaintiff's mem of law at 5-6. In addition, citing an opinion letter from the New York State Department of Labor (DOL), plaintiff asserts that defendants violated Labor Law § 191 each week they failed to pay her the overtime she was owed. The letter advised, in relevant part, that, pursuant to Labor Law § 191 (a) (1), manual workers must be paid all wages, including overtime wages, on a weekly basis. Plaintiff's exhibit 1 at 2.[1]

Labor Law § 193

Plaintiff's complaint consists of allegations that, although she worked over 40 hours per week, defendants failed to provide her with overtime compensation. According to defendants, to state a cause of action under Labor Law § 193, plaintiff must allege an unlawful deduction from

[1] The DOL letter was written in response to a question as to whether hairdressers and pizzeria workers are considered manual workers and whether they are entitled to be paid overtime on a weekly basis.

wages, not just a failure to pay wages. Defendants maintain that, since plaintiff fails to allege an actual deduction from her wages, that portion of the second cause of action alleging a violation of Labor Law § 193 must be dismissed.

In opposition, plaintiff argues that she has stated a cause of action against defendants under Labor Law § 193 for withholding wages in the form of unpaid overtime wages. According to plaintiff, paying her less than what she was entitled to must be considered a deduction from her full wages. She further asserts that this Court should adopt her interpretation of Labor Law § 193 and allow her to recover her unpaid wages, in the form of overtimes wages, pursuant to that statute.

Striking of Jury Demand

Defendants move to strike plaintiff's request for a jury trial. Defendants argue that plaintiff has requested both damages and injunctive relief in the same cause of action by requesting damages for the failure to comply with Labor Law § 195 (1) and an injunction seeking compliance. According to defendants, plaintiff waived her right to request a jury trial by "deliberately joining legal and equitable causes of action arising out of the same transaction." Defendants' mem of law at 7 (citations omitted).

In opposition, plaintiff claims, among other things, that she did not waive her right to a jury trial because monetary damages would afford her a full and complete remedy. Plaintiff urges that, since she no longer works for defendants, the requested injunctive relief directing them to comply with the wage notice provision will not benefit her. Plaintiff also argues that "given the public's interest in the wage laws," defendants should comply with the wage notice requirement. Plaintiff's mem of law at 15. Further, plaintiff asserts that she did not join legal and equitable causes of action

arising out of the same transaction, because the request for injunctive relief is incidental to the request for damages.

LEGAL CONCLUSIONS:

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). "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." *Leon v Martinez*, 84 NY2d 83, 88 (1994) (internal quotation marks and citations omitted).

Claims Alleged Pursuant to Labor Law § 191

Plaintiff claims that she is considered an employee who is covered under Article 6 of the Labor Law and is entitled to its protections.[2] Specifically, plaintiff claims that she is a "manual

[2] Article 6 of the Labor Law governs the payment of wages and is comprised of Labor Law §§ 190-199 (a). Labor Law § 190 provides the definitions under Article 6 for, among other things, wages, employees and employers. Labor Law § 191 governs frequency of payments and Labor Law § 191 (1) (a) (i) sets forth that a manual worker should be paid on a weekly basis. Labor Law § 198 provides the remedies available for successful wage claims made pursuant to Article 6.

worker" covered under Labor Law § 191 (1) (a) (i). Even assuming, for purposes of this motion to dismiss, that plaintiff is a manual worker, none of the cases cited by plaintiff squarely holds that an employee may recover under Labor Law § 191 for unpaid overtime wages. For instance, the Court in *Pachter v Bernard Hodes Group, Inc.* (10 NY3d 609, 616-617 [2008]) addressed the questions of whether an executive was considered an employee who was entitled to the protections of Article 6 of the Labor Law, and whether commissions were considered wages. In addition, as noted above, the DOL letter advised that manual workers are entitled to be paid wages, including overtime wages, on a weekly basis. While the letter addressed the frequency of payments pursuant to Labor Law § 191 (a) (1), it did not suggest that this was the statute pursuant to which one may recover for unpaid overtime compensation.

To the contrary, case law specifically provides that Labor Law § 191 pertains to prompt payment requirements and is not "the correct vehicle for collecting allegedly unpaid overtime wages." *Perez-White v Advanced Dermatology of N.Y.*, 2016 WL 4681221, *11, 2016 US Dist Lexis 120642, *29 (SD NY 2016) (internal quotation marks and citations omitted); *see also Niyazov v Park Fragrance, LLC*, 2014 NY Slip Op 30610[U], *7 (Sup Ct, NY County 2014) (dismissing plaintiff's claims under Labor Law § 191 because plaintiff alleged that he was not paid the correct amount "in September and October 2009, not that he was not otherwise paid on time . . . ").

Furthermore, as the Court held in *Perez-White v Advanced Dermatology of N.Y.*:

> "Labor Law § 191 by its terms only involves timeliness of wage payments . . . . Although [plaintiff] frames her claim as one for failure to pay timely wages [under Labor Law § 191], it is clear that the gravamen of her claim is that Defendants failed to provide [her] with full payment. . . . New York courts have suggested that plaintiffs may not use Labor Law § 191 to seek unpaid wages to which they claim to be entitled under a statute; rather § 191 guarantees only that the wages the employer and employee have agreed upon be paid in a timely manner . . . according to the

terms of [the employee's] employment."

2016 WL 4681221, *11, 2016 US Dist Lexis 120642, *28 (internal quotation marks and citations omitted).

Plaintiff alleges that she was not paid all of the wages to which she is entitled. She does not claim that she was not paid in a timely manner in violation of Labor Law § 191. *See e.g. Kone v Joy Constr. Corp.*, 2016 WL 866349, *4, 2016 US Dist Lexis 26981, *13-14 (SD NY 2016) (internal quotation marks and citation omitted) ("Here, Plaintiffs have not identified any purported violation of this section beyond Defendants' alleged failure to pay proper wages and overtime payments, namely the wages and overtime to which Plaintiffs contend they were entitled by statute rather than the amounts that the employer had in fact agreed to pay").

Accordingly, that branch of defendants' motion seeking dismissal of plaintiff's claims pursuant to Labor Law § 191 is granted.

Claims Alleged Pursuant to Labor Law § 193

Plaintiff alleges that defendants violated Labor Law § 193 when they unlawfully took deductions from her salary during her employment. She contends that she suffered an unlawful deduction when she worked overtime hours but did not receive overtime compensation. Specifically, plaintiff maintains that she "has stated a claim under NYLL § 193 against Defendants for withholding part of her wages in the form of the unpaid overtime wages." Plaintiff's mem of law at 7.

Pursuant to Labor Law § 193 (1) (a) and (b), "[n]o employer shall make any deduction from the wages of an employee, except deductions which . . . are made in accordance with the provisions

of any law . . . or . . . are for the benefit of the employee." The statute lists examples of authorized deductions, such as for insurance premiums or transit passes. Labor Law § 193 (1) (b) (i), (vii); *see also Gold v American Med. Alert Corp.*, 2015 WL 4887525, *5, 2015 US Dist Lexis 108122, *11 (SD NY 2015) ("'[D]eductions' are better understood as, and limited to, things like fines, payments, or other forms of pay docking. The list of authorized deductions in section 193 itself offers further support for that reading, since each permissible deduction is for a discrete purpose such as payment for insurance premiums, gym membership, tuition, and day care").

The failure to pay overtime wages under Labor Law § 193, urges plaintiff, can be interpreted as a deduction as contemplated under the statute. This argument is unavailing, however, since courts have specifically held that Labor Law § 193 "has nothing to do with failure to pay wages . . . , governing instead the specific subject of making deductions from wages." *Komlossy v Faruqi & Faruqi, LLP*, 2017 WL 722033, *14, 2017 US Dist Lexis 25490, * 37 (SD NY 2017), *affd* 2017 WL 4679579, 2017 US App Lexis 20330 (2d Cir 2017) (internal quotation marks and citation omitted).

Additionally, since plaintiff fails to "allege any specific deduction in violation of section 193 . . . . This dispute as to the calculation of the net amount [of pay] does not reflect a deduction from wages within the meaning of Labor Law § 193." *Miles A. Kletter, D.M.D. & Andrew S. Levine, D.D.S., P.C. v Fleming*, 32 AD3d 566, 567 (3d Dept 2006).

Plaintiff's allegedly outstanding overtime wages are not considered a deduction under Labor Law § 193 (1) because "[a] 'deduction' literally is an act of taking away or subtraction." *Matter of Angello v Labor Ready, Inc.*, 7 NY3d 579, 584 (2006); *see also Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 449 (1st Dept 2017) (internal quotation marks and citations omitted) ("A wholesale withholding of payment is not a deduction within the meaning of Labor Law § 193").

While these allegations may form the basis of a viable claim for failure to pay, Labor Law § 193 is inapplicable since a deduction of wages was not alleged. Accordingly, that branch of defendants' motion seeking dismissal of plaintiff's second cause of action alleging a violation of Labor Law § 193 is granted. *See e.g. Miles A. Kletter, D.M.D. & Andrew S. Levine, D.D.S., P.C. v Fleming,* 32 AD3d at 567 (internal quotation marks and citation omitted) ("The statutory remedies are unavailable where, as here, the claim for unpaid work is a common-law contractual remuneration claim and no substantive violation of article 6 is alleged").

Claims Alleged Pursuant to Labor Law § 195 (1)

Labor Law § 195 provides the record keeping and notice requirements for every employer. Pursuant to Labor Law § 195 (1) (a), at the time of hire, employers are required to provide their employees a written notice of, "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).

In the complaint, plaintiff broadly alleges that defendants "did not provide Plaintiff with the notice(s) required by NYLL § 195 (1)." Complaint, ¶ 27. However, plaintiff's conclusory claims do not put defendants on notice that they failed to provide her with written notice of her rates of pay at the time of hire or at any specified time during her employment. Plaintiff does not reference any of the statutory requirements, nor does she provide any additional information about her claim, including whether she failed to receive certain wage notices at the time of hiring. *See e.g. Kone v Joy Constr. Corp.*, 2016 WL 866349, *5, 2016 US Dist Lexis 26981, *17 (Court found that plaintiffs

failed to adequately plead a violation of Labor Law § 195 (1), holding that "[t]he Complaint provides no further support for their Section 195 (1) claim and, furthermore, makes no allegation that this failure occurred at the time of hiring, which is required to establish a violation of NYLL § 195 (1) (a)").

Since plaintiff fails to sufficiently state a claim under Labor Law § 195 (1), that branch of defendants' motion seeking dismissal of the claims brought pursuant to this statute is granted.[3]

Motion to Strike Jury Demand

Defendants move to strike plaintiff's request for a jury trial on the basis that she deliberately joined legal and equitable causes of action arising out of the same transaction. Pursuant to CPLR 4101, issues of law are entitled to be tried in front of a jury while matters of equity are not. In general, if "the complaint either joins legal and equitable causes of action arising out of the same alleged wrong or seeks both legal and equitable relief, there is no right to a jury trial." *Zimmer-Masiello, Inc. v Zimmer, Inc.*, 164 AD2d 845, 846 (1st Dept 1990). *See* CPLR 4102 (c).

However, a plaintiff does not waive the right to a jury upon joinder of legal and equitable causes of action when the action is legal in nature and plaintiff will be afforded a complete remedy with money damages. *See e.g. Ossory Trading v Geldermann, Inc.*, 200 AD2d 423, 423 (1st Dept

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[3] This Court notes that, in her memorandum of law, plaintiff informally requests that, if any part of defendants' motion to dismiss is granted, then she should be permitted to amend her complaint to elaborate on her NYLL claims. However, this request is denied. First, plaintiff did not seek such relief by formal notice of motion or cross motion. See CPLR 2214; 2215. Further, plaintiff failed to annex to her papers a proposed amended complaint in accordance with CPLR 3025. *See Chu v Klatskin*, ___ AD3d ___ , 2018 NY Slip Op 01036, 2018 NY App Div LEXIS 1021, 2018 WL 828978 (1st Dept February 13, 2018).

1994) ("[N]evertheless, where, as here, monetary damages would afford a full and complete remedy, the action is one at law, and the plaintiff did not waive the right to a jury trial merely by inclusion of a demand for equitable relief"); *see also Phoenix Garden Rest. v Chu*, 234 AD2d 233, 234 (1st Dept 1996) ("[I]t must be determined whether the main thrust of the action is for legal damages or for equitable relief").

Here, it is undisputed that plaintiff alleged both legal and equitable claims in the same cause of action when she sought to recover damages in the form of unpaid overtime wages, among other damages, and also requested an injunction compelling defendants to comply with the wage notice requirements under Labor Law § § 195 (1) and (3). However, as shown in the complaint and the relief demanded, "the primary demand" in plaintiff's action is to be compensated for the overtime hours that she worked, and these monetary damages "would afford a full and complete remedy." *Ossory Trading v Geldermann, Inc.*, 200 AD2d at 423.

While plaintiff alleges that defendants should comply with the wage notice requirement given the public's interest in the wage laws, plaintiff's primary demand clearly is to be compensated by money damages arising from defendants' alleged Labor Law violations. The injunctive relief, in the form of receiving wage notices from defendants, is merely incidental to the damages sought for wages owed. *See e.g. Decana Inc. v Contogouris*, 45 AD3d 363, 363 (1st Dept 2007) ("All the equitable relief sought by plaintiffs in addition to RPAPL article 15 rescission is incidental to the latter, and thus did not result in a waiver [of jury trial]. More particularly, the requested injunctive relief, which seeks to prevent the mortgagees from commencing foreclosure proceedings, is incidental to the RPAPL article 15 relief . . . "). Further, being provided with a wage notice will have no impact on plaintiff's employment with defendants, as plaintiff is not currently working for

defendants, nor is she seeking to be reinstated to employment. Thus, the money damages alone, if awarded, would provide "the opportunity for full relief . . . under the facts alleged." *Bressler v Kalow*, 13 AD3d 70, 70 (1st Dept 2004).

In light of the above, this Court denies that branch of defendants' motion seeking to strike plaintiff's jury demand.

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

ORDERED that the branch of defendants' motion seeking partial dismissal of the complaint is granted in its entirety, and plaintiff's claims pursuant to sections 191, 193 and 195 (1) of the New York Labor Law are dismissed; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that plaintiff's remaining claims shall continue; and it is further

ORDERED that the branch of defendants' motion seeking to strike plaintiff's request for a jury trial is denied; 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 preliminary conference will be held in this matter on June 12, 2018 at 80 Centre Street, Room 280, at 2 p.m.; and it is further

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

Dated: March 5, 2017

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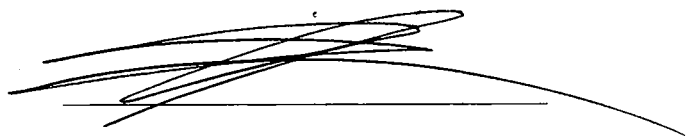

KATHRYN E. FREED, J.S.C.