

Jimenez v Concepts of Independence, Inc.
2018 NY Slip Op 30257(U)
February 14, 2018
Supreme Court, New York County
Docket Number: 653161/2016
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----X
JANETH JIMENEZ, on behalf of herself and all others
similarly situated

Plaintiffs,

Index No.: 653161/2016

-against-

Mot. Seq. No. 001

CONCEPTS OF INDEPENDENCE, INC.,

Defendant.

-----X
MELISSA A. CRANE, J.S.C.:

Defendant Concepts of Independence, Inc. moves, pursuant to CPLR 3211 (a) (7), to dismiss plaintiff Janeth Jimenez’s complaint for failure to state a cause of action.

Background

Defendant is a not-for-profit enterprise that employs aides to care for elderly and disabled people in New York through the Consumer Directed Personal Assistance Program (“CDPAP”) (class action complaint, ¶ 1). Plaintiff alleges that she is a home care aide whom defendant employs. Defendant contracts with Independence Care Systems, Inc. to provide human resources and payroll services for the aides (*id.*, ¶ 2). Plaintiff alleges that she and other aides work 24-hour shifts and earn roughly \$5.71 per hour, approximately half the minimum wage in New York (*id.*, ¶ 3). Moreover, they also work more than 40 hours per week without receiving any overtime pay (*id.*, ¶ 5). These shifts take place at the homes of individual elderly or infirm persons, defined as consumers (18 NYCRR 505.28 [b] [1]), but the aides live in their own homes, where they return after each shift (class action complaint, ¶ 4).

CDPAP is a statewide Medicaid program that allows consumers to choose their own aides, and how care will be provided (*id.*, ¶¶ 12-14). These services include “personal care services, home health aide tasks, or skilled nursing tasks” (*id.*, ¶ 16). More specifically, plaintiff

alleges that her duties included assistance with practically every facet of day to day living, scheduling appointments, acting as emotional support, and staying awake and alert during overnight shifts (*id.*, ¶¶ 25-30). Defendant then arranged for plaintiff's wages, taxes, other withholdings, and benefits. Defendant also maintained relevant records and coordinated reimbursement from the New York State Department of Health ("DOH"). Plaintiff received her pay and other various administrative assignments from DOH (*id.*, ¶¶ 31-37).

Plaintiff alleges that, from July 18, 2015 through August 28, 2015, she generally worked between three and five 24-hour shifts every week, for which she was only paid for 12 of the 24 hours, plus a per diem payment of \$16.95 (*id.*, ¶¶ 10, 42, 44-45). Plaintiff further alleges that defendant under-paid her and other putative class members, despite requiring them to be present at each consumer's house to provide services for the entire 24-hour shift (*id.*, ¶ 41). Plaintiff claims that the entirety of each shift were compensable work hours (*id.*, ¶ 46). Moreover, she alleges that defendant had a policy and practice of not paying overtime for any hours over 40 worked in a given week (*id.*, ¶ 48). These practices allegedly violate various statutory and regulatory provisions (*id.*, ¶¶ 51-53, 59). Plaintiff claims that she attempted to discuss these discrepancies with defendant by phone, to no avail (*id.*, ¶ 50).

On June 15, 2016, plaintiff brought this class action on behalf of all individuals defendant employed as home care aides in New York City since March 1, 2012, and in Westchester, Nassau, and Suffolk Counties since March 1, 2013 (*id.*, ¶ 56). The complaint alleges six causes of action: failure to pay minimum wage, pursuant to Labor Law § 652 and 12 NYCRR § 142-3.1 (first cause of action); failure to pay overtime, pursuant to Labor Law § 650, *et seq.*, and 12 NYCRR § 142-3.2 (second cause of action); failure to pay spread-of-hours pay, pursuant to Labor Law § 650, *et seq.*, and 12 NYCRR § 142-3.4 (third cause of action); failure to pay wages

due and owing, pursuant to Labor Law § 663 (fourth cause of action); breach of contract for failure to comply with Public Health Law § 3614-c (the Wage Parity law) (fifth cause of action); and, unjust enrichment (sixth cause of action). Defendant now moves to dismiss the complaint for failure to state a cause of action.

Discussion

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). “[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory” (*id.* at 87-88). “[W]here . . . the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration” (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

For the most part, defendant does not direct its motion at the individual causes of action themselves. Instead, defendant raises broader arguments that apply to multiple individual claims. In order to address these arguments, it is necessary to analyze the wage scheme under which the parties operated.

Under the Labor Law, an employee is “any person employed for hire by an employer in any employment” (Labor Law § 190 [2]). An employer is “any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service” (Labor Law § 190 [3]). Employment is not defined. However, the Labor Law does define “employed” quite broadly as “permitted or suffered to work” (Labor Law § 2 [7]).

During the time that plaintiff worked for defendant, employers were required to pay their employees a minimum wage of \$8.75 per hour (Labor Law § 652 [1]). In addition, and subject to certain provisions of the Fair Labor Standards Act, employers must pay employees one and one-half times their regular rate for any hours worked over 40 hours per week (12 NYCRR 142-3.2), and an additional hour's worth of pay where the "spread-of-hours" worked exceeds 10 hours (12 NYCRR 142-3.4).¹ Not-for-profit entities, such as defendant, may exempt themselves from the statutory minimum wage and related regulations, provided they certify that their employees are paid "a wage, exclusive of allowances, of not less than the minimum wage" (Labor Law § 652 [3] [b]). This exemption lasts either until 60 days after the entity informs the Commissioner of the Department of Labor that it wishes these provisions to apply to it, or "immediately upon the issuance of an order by the commissioner finding that such institution has failed to pay" these wages (*id.*, § 652 [3] [c]).

In addition to the statutory and regulatory provisions cited above, the parties reference an opinion of the Counsel for the New York State Department of Labor regarding the number of hours for which live-in employees must receive payment. Specifically, live-in employees, whether residential or, like plaintiff, living off the premises,

must be paid not less than for thirteen hours per twenty-four hour period provided they are afforded at least eight hours for sleep and actually receive five hours of uninterrupted sleep, and that they are afforded three hours for meals. If an aide does not receive five hours of uninterrupted sleep, the eight-hour sleep period exclusion is not applicable and the employee must be paid for all eight hours. Similarly, if the aide is not actually afforded three work-free hours for meals, the three-hour meal period exclusion is not applicable

(NY St Dept of Labor, Op No. RO-09-0169 at 4 [Mar. 11, 2010]). The Appellate Division, First

¹ "The spread of hours is the interval between the beginning and end of an employee's workday. The spread of hours for any day includes working time plus time off for meals plus intervals of duty" (12 NYCRR 142-3.16)

and Second Departments, have recently considered the application of this opinion letter to the minimum wage law. In *Tokhtaman v Human Care, LLC* (149 AD3d 476 [1st Dept 2017]), the court affirmed the trial court's denial of the defendant's motion to dismiss. The plaintiff, a home health care attendant, had alleged similar Labor Law violations to those in this case (*id.* at 476). The court held that the opinion letter, in failing to distinguish between residential and non-residential employees, conflicted with the Labor Law (*id.* at 477). Further, the court held that the plaintiff, as a non-residential employee, could recover unpaid wages for hours worked in excess of 13 hours, and that the defendant was not entitled to dismissal of her minimum wage, overtime, spread-of-hours, and failure to pay wages claims (*id.*). Similarly, in *Andryeyeva v New York Health Care, Inc.* (153 AD3d 1216 [2d Dept 2017]), the Second Department upheld class certification of home health care attendants raising similar claims. The court found that, because the plaintiffs, who were non-residential employees, had to remain at their clients' residences and perform services if necessary, "they were entitled to be paid the minimum wage for all 24 hours of their shifts, regardless of whether they were afforded opportunities for sleep and meals" (*id.* at 1219).²

After these appellate decisions, the Department of Labor issued an Emergency Rule amending the minimum wage orders, effective October 6, 2017 (2017 NY REG TEXT 471959 [NS]). Specifically, the Department of Labor amended 12 NYCRR 142-3.1 [b] as follows:

Notwithstanding the above, this subdivision shall not be construed to require that the minimum wage be paid for meal periods and sleep times that are excluded from hours worked under the Fair Labor Standards Act of 1938, as amended, in accordance with sections 785.19 and 785.22 of 29 C.F.R. for a home care aide who works a shift of 24 hours or more

(12 NYCRR 142-3.1 [b] [2]). 29 CFR 785.22 provides that an employer and employee may

² On the same day, the Second Department also reversed the denial of a motion for class certification in *Moreno v Future Care Health Servs., Inc.* (153 AD3d 1254 [2d Dept 2017]) on similar grounds.

agree to exclude bona fide meal and sleeping periods from the required wage, provided that sleeping facilities are “furnished by the employer” and that “the employee can usually enjoy an uninterrupted night’s sleep” (29 CFR 785.22 [a]). In the absence of an agreement, meal and sleeping periods “constitute hours worked” (*id.*).

Against this backdrop, defendant makes three broad arguments. First, it argues that it has made the required certification, pursuant to Labor Law § 652 (3) (b), that it pays at least minimum wage and is therefore exempt from the statutory and regulatory minimum wage and related provisions. Second, it asserts that plaintiff is only entitled to thirteen hours of pay per day, pursuant to the Department of Labor’s opinion that the eleven hours set forth for meals and sleep are not working hours, and, therefore, the court must dismiss plaintiff’s claims based on 24 hours of work. Third, it claims that it is not plaintiff’s employer, but rather the consumer is, and, accordingly, cannot be liable for plaintiff’s allegedly unpaid wages.

Regarding the election under Labor Law § 652 (3) (b), defendant argues that because it has elected to exempt itself from the minimum wage requirements, plaintiff’s claims, for failure to pay the minimum wage and overtime, are not viable. Moreover, 14 NYCRR 142-3.4 (a), that provides the spread-of-hours requirement, does not apply to nonprofits that have made the election. In opposition, plaintiff argues that defendant has not, in fact, paid her “not less than the minimum wage,” pursuant to Labor Law § 652 (3) (b). Thus, defendant has not complied with the conditions of the election. Accordingly, plaintiff asserts that the requirements of minimum wage must apply.

Defendant attaches a copy of its request to be exempt from the minimum wage orders (Mischke Aff dated 10/7/16, exhibit 1, Statement of Non-Profitmaking Institutions dated 1/14/80 [election form]). The Labor Law is clear that its provisions and related wage orders apply to

entities like defendant under two circumstances: (1) sixty days after the entity notifies the commissioner that it wishes these provisions to apply to it, or (2) immediately upon the commissioner finding that the entity has failed to pay “a wage, exclusive of allowances, of not less than minimum wage” (Labor Law §§ 652 [3] [b], [c]). Plaintiff has not alleged that defendant requested that the wage orders apply to it, or that the commissioner has found that defendant has failed to pay the required wage. Thus, unlike the defendants in *Tokhtaman* and *Andryeyeva*, defendant here is not subject to the minimum wage regulations and related wage orders. Accordingly, the court dismisses plaintiff’s second and thirds causes of action, for failure to pay overtime and spread-of-hours pay, respectively.

However, that defendant may not be required to pay overtime or spread-of-hours pay does not mean that plaintiff is not entitled to her regular pay for every hour that she works. While plaintiff argues that she is making below minimum wage, her argument is better understood as defendant was simply not paying her for her full day’s work. Plaintiff’s own allegations show that defendant paid \$10 per hour on weekdays and \$11.10 per hour on the weekend, respectively \$1.25 and \$2.35 more than the minimum wage in effect during plaintiff’s employment with defendant (class action complaint, ¶ 44). Thus, the hourly rate is, in fact, not less than the minimum wage. However, the issue remains whether plaintiff has been paid for the correct number of hours, and that issue stands regardless of whether defendant’s election remains in effect (*see Andryeyeva*, 153 AD3d at 1218-1219; *Tokhtaman*, 149 AD3d at 477 [allowing plaintiff’s minimum wage claims to proceed]).

Defendant argues that the opinion letter and, by extension, the regulations it interprets, limit plaintiff to thirteen hours of pay per shift. Defendant points out that the client for whom plaintiff cared was only approved for “live-in 24-hour consumer directed personal assistance,”

that the regulations define as “the provision of care . . . for a consumer . . . whose need for assistance is sufficiently infrequent that an [aide] would be likely to obtain, on a regular basis, five hours daily of uninterrupted sleep” (18 NYCRR 505.28 [b] [12]). This is as opposed to “continuous consumer directed personal assistance,” which is “the provision of uninterrupted care . . . for a consumer who, . . . needs assistance with such frequency that a live-in 24-hour [aide] would be unlikely to obtain, on a regular basis, five hours daily of uninterrupted sleep” (18 NYCRR 505.28 [b] [4]). Accordingly, defendant claims that plaintiff is only entitled to thirteen hours of pay per shift under the regulations, because she was not providing continuous care. Moreover, defendant asserts that plaintiff has not sufficiently pleaded that she was required to work during her breaks. In opposition, plaintiff states that she had to be present in the consumer’s home for the entirety of her 24-hour shift, on call, awake and able to provide services. Accordingly, she asserts that she is entitled to pay for all of those hours, as she did not in reality receive any meal or sleep breaks.

Both the opinion letter and the current regulations require certain conditions before it is possible to exempt time set aside for meals and for sleeping from required wages. The opinion letter requires setting aside time for meals, and for at least five hours of regularly uninterrupted sleep, in order to qualify as “breaks” (NY St Dept of Labor, Op No., RO-09-0169 at 4 [Mar. 11, 2010]). The newly amended regulation requires that the employer and employee must agree to exclude sleep and meal periods from regular pay, and, in the case of sleeping periods, the employer must furnish “adequate sleeping facilities” (12 NYCRR 142-3.1 [b]; 29 CFR 785.22 [a]). Moreover, *Tokhtaman* and *Andryeyeva* both hold that a non-residential employee, such as plaintiff, is entitled to a full day’s pay if she is required to be at the consumer’s residence (*Andryeyeva*, 153 AD3d at 1218-1219; *Tokhtaman*, 149 AD3d at 476). Here, plaintiff has

adequately alleged that she was a nonresidential employee, that the consumer required her presence at the consumer's home for the entirety of each 24-hour shift, and that she was required to remain alert and be prepared to render service throughout her shift (complaint, ¶¶ 4, 30, 41).

Relying on federal case law, defendant argues that plaintiff must plead wage and hour claims under the Labor Law with particularity. Accordingly, defendant claims that plaintiff's allegations are insufficient to show the extent that she was required to work during her breaks. Defendant, however, misapplies case law interpreting the Fair Labor Standards Act and the Labor Law. Regardless of whether the analysis is the same under either statute, defendant cites no New York State authority that Labor Law claims in state court are evaluated under the federal standard for purposes of a motion to dismiss. With the exception of fraud, defamation, and certain other claims and actions, a pleading need only "give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense" (CPLR 3013). The federal standard for pleadings derives from *Bell Atlantic Corp. v Twombly* (550 US 544, 570 [2007]) and *Ashcroft v Iqbal* (556 US 662, 678 [2009]). Subsequent to those two decisions, the New York courts have adhered to New York's lower notice pleading standard (e.g. *MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011]; *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 144 [1st Dept 2009]; see also *Torchlight Loan Services, LLC v Column Fin., Inc.*, 42 Misc 3d 1236[A], 2014 NY Slip Op 50376[U], *5 [Sup Ct, NY County 2014] ["At the outset, the court notes that *Torchlight* only asserts breach of contract claims, which are subject to New York's notice pleading standards, not CPLR 3016(b), the Federal Rules of Civil Procedure, or *Iqbal* and *Twombly*"]. Thus, the court finds defendant's argument that plaintiff insufficiently pleaded its remaining Labor Law claims unavailing. Regardless, the factual issues surrounding

plaintiff's work schedule are "not suited to resolution on a motion to dismiss" (*see Williams v Citigroup, Inc.*, 104 AD3d 521, 522 [1st Dept 2013]).

Defendant argues that, pursuant to the "economic reality" test (*Irizarry v Catsimatidis*, 722 F3d 99, 105 [2d Cir 2013]), defendant cannot have been plaintiff's employer because in the CDPAP, the consumer controls the hiring, scheduling, training, supervision, and termination of plaintiff and the other putative class members. Defendant argues its role as fiscal intermediary is primarily administrative. If it were an employer, defendant asserts that nonprofits would fuel the CDPAP, such as defendants, rather than the consumers. Nonprofits would then intrude upon consumer decision-making to avoid the kind of liability that plaintiff seeks to impose.

In opposition, plaintiff argues that whether defendant was her employer is a fact intensive question, ill-suited to resolution on a motion to dismiss. Moreover, she asserts that the complaint adequately alleges, at minimum, a joint employer relationship between defendant and the consumers that is sufficient to hold defendant liable for the alleged Labor Law violations.

In determining whether an entity is an employer for purposes of the Labor Law, New York courts have adopted the economic reality test set forth by the federal courts (*see Bonito v Avalon Partners, Inc.*, 106 AD3d 625, 626 [1st Dept 2013]; *Ponce v Lajaunie*, 2015 NY Slip Op 31216[U], *4-5 [Sup Ct, NY County 2015]). The test has four factors: "whether the alleged employer (1) had the power to hire and fire the 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*, 722 F3d at 105).

Courts will also consider whether an entity is a joint employer under the "immediate control" test (*Brankov v Hazzard*, 142 AD3d 445, 445-46 [1st Dept 2016]). "[A] joint employer relationship may be found to exist where there is sufficient evidence that the defendant had

immediate control over the other company's employees, and particularly the defendant's control over the employee in setting the terms and conditions of the employee's work" (*id.* at 446 [internal quotation marks omitted]). Relevant factors include "commonality of hiring, firing, discipline, pay, insurance, records, and supervision" (*id.* [internal quotation marks omitted]; see *Sanchez v Brown, Harris, Stevens*, 234 AD2d 170, 170 [1st Dept 1996]). "A complaint will survive a motion to dismiss in this context as long as the facts set forth in the Complaint plausibly suggest a degree of control and involvement by [the defendant] in Plaintiff's employment" (*Zuccarini v PVH Corp.*, 2016 NY Slip Op 30350[U], *4 [Sup Ct, NY County 2016] [internal quotation marks and citations omitted]). Indeed, whether a joint employer relationship exists is "essentially [a] factual question[s] that cannot be disposed of on a motion to dismiss" (*Dias v Community Action Project, Inc.*, 2009 WL 595601, at *6, 2009 US Dist LEXIS 17562, at *20 [EDNY, Mar. 6, 2009, No. 07-CV-5163 (NGG)(RER)]).

Here, plaintiff alleges that defendant established her wages, processed payroll and deductions (class action complaint, ¶¶ 24, 32-34), and maintained personnel records (complaint, ¶ 36). However, the CDPAP's governing regulations provide that the consumer is responsible for hiring, firing, training, supervision, and scheduling (18 NYCRR 505.28 [g] [1]). Thus, plaintiff has not adequately alleged that defendant was her sole employer (*Irizarry*, 722 F3d at 105).

However, plaintiff has alleged enough to suggest that a joint employer relationship is plausible. As set forth above, the complaint alleges, and the regulations confirm, that while the consumer is responsible for hiring, retention, training, and supervision (18 NYCRR 505.28 [g] [1]), defendant is responsible for maintaining records for both aides and consumers (*id.* at [i] [1] [iii-iv]), for monitoring aides' health statuses and aides' compliance with applicable regulations

(*id.* at [i] [1] [ii]), for monitoring the abilities of consumers or their designated representatives to comply with the CDPAP requirements (*id.* at [i] [1] [v]), and for establishing appropriate wages (*id.* at [i] [1] [i]). A similar division of responsibility existed in *Sanchez* where the plaintiff concierge was paid by the condominium in which she worked, but was hired, supervised, and fired by the condominium's managing agent (*Sanchez*, 234 AD2d at 170). The Appellate Division, First Department, denied summary judgment to the managing agent, holding that there was sufficient evidence to raise an issue of fact about whether the condominium and its managing agent employed the plaintiff, especially given the "evidence of the managing agent's day-to-day control over both plaintiff and the [condominium] superintendent" (*id.*). Here, there is a similar division of authority, and defendant's responsibilities under the governing regulations suggest the necessary "degree of control and involvement" with plaintiff's employment to survive this motion (*Zuccarini*, 2016 NY Slip Op 30350[U] at *4). Whether defendant is plaintiff's employer, and what that means for plaintiff, are fact intensive questions that the court cannot readily decide on a motion to dismiss. Further, if the consumer assumes responsibility, rather than the employer, for plaintiff's unpaid hours, plaintiff is left with no recourse for the alleged underpayment because the consumer is not responsible for plaintiff's wages.

Finally, defendant alleges that the Wage Parity Act (the "Act") does not apply to it, and, therefore, the court must dismiss the fifth cause of action (*see* NY Public Health Law 3614 [c]). Defendant asserts that, because the Act does not cover it, defendant is not part of any contract requiring compliance with the Act. Therefore, defendant cannot claim to be a third-party beneficiary of a contract under the Act. In opposition, plaintiff argues that she has sufficiently alleged that defendant was party to contracts requiring compliance with the Act, that plaintiff was a third-party beneficiary, and that defendant breached those contracts.

At the time defendant allegedly employed plaintiff, the Wage Parity Act forbade government agencies from making payments to “certified home health agencies, long term home health care programs or managed care plans” for care that home care aides provide who are compensated at less than an established minimum rate (former Public Health Law § 3614-c [2]). The CDPAP was only included in the statute as of July 1, 2017 (Public Health Law § 3614-c [2], as amended by L 2017, ch 57). Where a statute expressly provides a list of items to which it applies, a court can infer anything not on that list has been purposefully excluded (*e.g. Matter of Awe v D'Alessandro*, 154 AD3d 932, 932 [2d Dept 2017]). Because the Wage Parity Act did not cover CDPAP at the time that plaintiff worked for defendant, defendant cannot be liable for breaching any contractual requirement to comply with it.

Accordingly, the court grants that branch of defendant’s motion to dismiss the fifth cause of action for breach of contract for failure to comply with the Wage Parity Law. The court has examined the remaining contentions of the parties and found them without merit.

Accordingly, it is hereby

ORDERED that the court grants the motion to dismiss to the extent that the second, third, and fifth causes of action of the complaint are dismissed; and it is further

ORDERED that the court directs defendant 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 the court directs counsel to appear for a preliminary conference in Room 304, 71 Thomas Street, on February 15, 2018, at 10:00AM.

Dated: February 14, 2018

ENTER:


HON. MELISSA A. CRANE, J.S.C.