Vega v CM & Assoc., Constr. Mgt. Ltd. Liab. Co.
2018 NY Slip Op 30979(U)
May 14, 2018
Supreme Court, Bronx County
Docket Number: 23559/2016E
Judge: Ruben Franco
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART 26

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Irma Vega, Individually and on behalf of all others similarly situated,

Plaintiff,

Index No: 23559/2016E

-against-

DECISION/ORDER

CM and Associates Construction Management Limited Liability Company,

Defendant.

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HON. RUBEN FRANCO:

This is a wage claim action brought by plaintiff on behalf of herself and putative class members to recover liquidated damages for untimely wage payments. Defendant seeks dismissal of the action pursuant to CPLR § 3211(a)(7), claiming that the Complaint fails to state a cause of action.

Plaintiff Irma Vega ("Vega") commenced this action on behalf of herself and "a class of other similarly situated current and former employees who were employed by [defendant] as manual workers, within the six-year period preceding the filing of this action to the date of disposition of this action." Vega was employed by defendant from May 2014 through September 2015, as a construction worker/laborer performing manual and physical work (*see* Labor Law § 190[4]; see generally People v. Interborough Rapid Transit Co., 169 AD 32 [1st Dept 1915]). Plaintiff alleges that although defendant was statutorily obligated to pay all wages, including overtime, on a weekly basis, plaintiff and the purported class members she represents were paid on a bi-weekly basis, in violation of Labor Law § 191(1)(a). She further claims that she (and the class members) is entitled

to recover from defendant "maximum liquidated damages . . . , and interest on wages paid later than weekly, plus attorneys' fees, and costs of the action, pursuant to Labor Law § 198." She also asserts that she and the purported class are entitled to declaratory judgment relief: a declaration that defendant's "conduct . . . including its policy/practice of paying its manual workers later than weekly, to be in violation of the rights of Plaintiff and the class, under the New York Labor Law § 190 et. seq., including § 191, and [seeks to] enjoin Defendant from continuing these violations."

Defendant contends that there is no private right of action for alleged violations of Labor Law § 191 and/or 198 et. seq., therefore, plaintiff's Complaint must be dismissed for failure to state a cause of action.

The black letter law on a motion to dismiss pursuant to CPLR § 3211(a)(7), as enunciated by the Court of Appeals and the Appellate Division of this Department is as follows: The court must afford the pleadings a liberal construction (see Simkin v. Blank, 80 AD3d 401 [1st Dept 2011]. Importantly, the court must accept the facts alleged in the pleading as true and accord the opponent of the motion, here plaintiffs, the benefit of every possible favorable inference to determine only whether the facts as alleged fit within any cognizable legal theory (Leon v. Martinez, 84 NY2d 83 [1994]). The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law (511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 NY2d 144 [2002]). The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (see Siegmund Strauss, Inc. v. E. 149th Realty Corp., 104 AD3d 401[1st Dept 2013]). However, where a defendant submits evidence in support of its motion to dismiss, and that evidence establishes that plaintiff has no cause of action (i.e., that a claim is flatly rejected by the evidence), dismissal is appropriate (see Basis

Yield Alpha Fund v. Goldman Sachs, 115 AD3d 128 [1st Dept 2014]).

Inasmuch as plaintiff seeks a judgment declaring that defendant's policy of paying manual workers less frequently than as required by Labor Law § 191, the Court notes that "*[a] motion to* dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration. As such, where a cause of action is sufficient to invoke the court's power to render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy, a motion to dismiss that cause of action should be denied" (N. Oyster Bay Baymen's Ass'n v. Town of Oyster Bay, 130 AD3d 885, 890 [2nd Dept 2015][internal citations omitted]; see Jacobs v. Cartalemi, 156 AD3d 635, 640 [2nd Dept 2017]; Kaplan v. State, 147 AD3d 1315 [4th Dept 2017]).

Labor Law § 191[1][a] requires that manual workers be "paid weekly and not later than seven calendar days after the end of the week in which wages are earned." It is undisputed that defendant failed to pay plaintiff (and possibly putative class members) on a weekly basis, as required by statute. Defendant admits wages were in fact paid to plaintiff on a bi-weekly basis. Further, plaintiff, in opposition, submits pay stubs as evidence to support her claim that wages were not paid earlier than the two weeks after the end of the period in which those wages were earned (see IKEA U.S. Inc. v. Indus. Bd. of Appeals, 241 AD2d 454 [2nd Dept 1997]; Wing Kwong Ho v. Target Const. of NY, *Corp.*, 2011 WL 1131510 [E.D.N.Y. 2011]; Cuzco v. Orion Builders, Inc., 2010 WL 2143662 [S.D.N.Y. 2010]).

Labor Law § 198(1-a) provides that: "[i]n any action instituted in the courts upon a wage claim by an employee or the commissioner in which the employee prevails, the court shall allow

such employee to recover the full amount of any underpayment, all reasonable attorney's fees, prejudgment interest as required under the civil practice law and rules, and, unless the employer provides a good faith basis to believe that its underpayment of wages was in compliance with the law, an additional amount as liquidated damages equal to one hundred percent of the total amount of wages found to be due . . ."

Defendant contends that a private right of action under the statute is not cognizable (see Sheehy v. Big Flats Community Day, Inc., 73 NY2d 629, 633 [1989]). In determining whether a private right of action may be implied, courts must consider three factors: "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and, (3) whether creation of such a right would be consistent with the legislative scheme" (*Id*).

First, it is undisputed that plaintiff is a manual worker as classified under Labor Law § 190. As to the second and third requirements set forth in Sheehy, a private right of action under Labor Law § 191[1][a] would promote the legislative purpose, and would be consistent with the legislative intent of Labor Law Article 6. The terms of the statute indicate that wage claims are permissible whether they are asserted by an individual, or by the Commissioner. Labor Law § 198 pertains to costs and remedies, permitting for the recovery of costs and legal fees "[i]n any action instituted upon a wage claim by an employee or the commissioner" (Labor Law § 198[1], [1–a]). Moreover, the statute allows retroactive recovery of wages "whether such action is instituted by the employee or by the commissioner" (Labor Law § 198[3]). Under Labor Law § 196, the Commissioner has discretion, but is not required to, consider a claim. Finally, courts have permitted individual employees to recover on wage claims prosecuted under various provisions within Labor Law Article

6 (see e.g. Bonito v. Avalon Partners, Inc., 106 AD3d 625, 626 [1st Dept 2013]; Nawrocki v. Prot Const. & Development Corp., 82 AD3d 534 [1st Dept 2011]; AHA Sales, Inc. v. Creative Bath Prod., Inc., 58 AD3d 6, 16–17 [2nd Dept 2008]; Dwyer v. Burlington Broadcasters, 295 AD2d 745 [3rd Dept 2002]; Slotnick v. RBL Agency, 271 AD2d 365 [1st Dept 2000]; Wing Wong v. King Sun Yee, 262 AD2d 254, 255 [1st Dept 1999]; Lauria v. Heffernan, 607 F.Supp.2d 403, 409 [E.D.N.Y. 2009]). Accordingly, the second and third factors of the Sheehy test have been satisfied thus, a private right of action under Labor Law § 191 is cognizable.

The court need not determine whether there is evidentiary support for the Complaint, but rather, whether the plaintiff has alleged a cognizable cause of action. Nor must the court evaluate the merits of the case on a motion to dismiss for legal insufficiency (see, Parekh v. Cain, supra; Leon v. Martinez, 84 NY2d 83 [1994]; 219 Broadway Corp. v. Alexander's Inc., 46 NY2d 506 [1979]; Carbillano v. Ross, 108 AD2d 776 [2d Dept 1985]).

The court finds that plaintiff has sufficiently stated a cause of action for relief pursuant to Labor Law §§ 191 and 198.

Accordingly, defendant's motion is denied.

This constitutes the decision and order of the court.

Dated: May 14, 2018

Ruben Franco, J.S.C.

HON. RUBÉN FRANCO