

**Ribbler v Chicksation Inc.**

2018 NY Slip Op 31814(U)

July 31, 2018

Supreme Court, New York County

Docket Number: 159716/2016

Judge: Melissa A. Crane

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----X  
ANGELA RIBBLER, and RACHEL FRIEDMAN,

Plaintiffs,  
  
-against-

Index No.: 159716/2016  
  
Mot. Seq. No. 002

CHICKSATION INC. D/B/A THE CHICKSTARTER,  
and ANDREA HORBLITT,

**DECISION and ORDER**

Defendants.

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

On November 17, 2016, the plaintiffs filed the initial complaint in this action (the "Original Complaint"). On October 18, 2017, this court, on the record, dismissed the Original Complaint without prejudice after hearing oral arguments on defendants' motion to dismiss under CPLR § 3211(a)(7) (Mot. Seq. No. 001). On November 17, 2017, plaintiffs filed an amended complaint. Plaintiffs' amended complaint (the "Amended Complaint") alleges eight causes of action: unpaid minimum wages in violation of the New York Labor Law (the "NYLL") ("Count 1"); unpaid compensation in violation of the NYLL ("Count 2"); unpaid overtime wage in violation of the NYLL ("Count 3"); violation of NYLL 195(1) and its notice requirements ("Count 4"); violations of NYLL 195(3) and its wage statement requirements ("Count 5"); breach of oral contracts ("Count 6"); quantum meruit ("Count 7"); and unjust enrichment ("Count 8"). On December 20, 2017, defendants moved pursuant to CPLR § 3211(a)(7) to dismiss all causes of action in the Amended Complaint with prejudice. Once briefing was complete, on March 13, 2018, this court heard oral argument and reserved decision on defendants' motion to dismiss. For the following reasons, the court denies the motion to dismiss.

## BACKGROUND

In 2016, plaintiffs Angela Ribbler (“Ribbler”) and Rachel Friedman (“Friedman”) (collectively, “plaintiffs”) began working for Chicksation, Inc. d/b/a The Chickstarter (“Chicksation”) and Andrea Horblitt (“Horblitt”) (collectively, “defendants”) (Amended Complaint, ¶ 18, 22). Horblitt is the founder and owner of Chicksation, that is incorporated in Delaware and operates in New York (*Id.*, ¶ 7-8).

On or about May 22, 2016, Horblitt hired Ribbler as Chicksation’s Director of Marketing and Strategic Partnerships (*Id.*, ¶ 10, 18). Ribbler’s compensation was to include \$68,000 in annual salary, and fringe benefits, including a \$10,000 signing bonus and five (5) percent equity in Chicksation (*Id.*, ¶ 20). Ribbler’s job responsibilities included, *inter alia*, “composing and designing sponsorship decks, sponsorship outreach and relationship management, creating product spreadsheet for distributor, creating product deck, curating web series concepts with Daphne (a producer), consulting on brand and marketing strategy, and attending marketing meetings and phone calls” (*Id.*, ¶ 19). For the roughly 58 days Ribbler worked for Chicksation, she worked approximately 56 and 70 hours per week (*Id.*, ¶ 19). On July 19, 2016, Ribbler resigned from her Chicksation position (*see infra*; *Id.*, ¶ 36).

On or about June 3, 2016, Horblitt hired Friedman to serve as Chicksation’s President (*Id.*, ¶ 10, 18). Friedman was promised an annual salary of \$150,000, and fringe benefits, including a \$15,000 signing bonus and ten (10) percent equity in Chicksation (*Id.*, ¶ 24). Friedman’s job responsibilities included “shaping business infrastructure, finance and operations, building financial models, constructing business plans, drafting NDAs, investor relations, and attending meetings and phone calls” (*Id.*, ¶ 23). For approximately 46 days Friedman, in her role as Chicksation’s President, “worked between 70 and 105 hours per week for [d]efendants,” and she

lost sleep because her copious duties required her to work into the early hours of the morning (*Id.*, ¶ 25-27). On July 19, 2016, Friedman resigned from her Chicksation position (*see infra; Id.*, ¶36).

While working for defendants, plaintiffs performed work on Saturdays and Sundays for at least twelve (12) to fourteen (14) hours each day (*Id.*, ¶ 28). However, plaintiffs never received any wages or compensation during their employment. Nor did they receive the signing bonuses or equity in Chicksation as defendants had promised (*Id.*, ¶ 29-31). Plaintiffs demanded Horblitt fulfill her contractual obligations, as founder and owner of Chicksation, and compensate them for their work performed (*Id.*, ¶ 32). They received nothing (*Id.*, ¶ 32). On July 19, 2016, plaintiffs informed Horblitt of their decisions to resign from their employment with defendants (*Id.*, ¶ 36-37). Plaintiffs quit Chicksation because of defendants “non-payment of wages, bonuses, and other employment compensation owed to them” (*Id.*).

In addition to their contractual claims and other labor law claims, plaintiffs maintain that defendants violated the Labor Law and its regulations by failing to keep time records for plaintiffs (*Id.*, ¶ 33). Additionally, plaintiffs note that defendants, *inter alia*, never provided them with a document in compliance with the notice requirements of the Wage Theft Prevention Act (the “WTPA”) identified in Labor Law § 195(1), and defendants never produced wage statements in accordance with the WTPA identified explicitly in Labor Law § 195(3) (*Id.*, ¶ 34-35).

### DISCUSSION

When a party moves to dismiss a complaint for failure to state a cause of action, the court affords the “pleading[s] ... a liberal construction,” accepts the facts as alleged in the complaint as true, “accord plaintiffs the benefit of every possible favorable inference,” and thus “determine[s] only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Plaintiffs have sufficiently pled their status as NYLL article 6 “employees.” To make out any claim under Article 6 of the Labor Law, a claimant must first establish that she is an “employee” as the statute defines that term (Labor Law § 190[2]). Labor Law § 190 delineates four categories of covered “employees.” “Clerical or other worker” includes all employees not included in subdivisions four (manual workers), five (railroad workers) and six (commission salesmen), except any person employed in a bona fide executive, administrative or professional capacity whose earnings are in excess of . . . nine hundred dollars a week” (Labor Law § 190). Thus, “clerical and other worker” under NYLL Article 6 category includes individuals employed in a bona fide executive, administrative or professional capacity whose earnings are less than nine hundred dollars per week (*Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 616 [2008]).

For the purposes of determining whether a plaintiff earns too much to invoke the protections of the statute, “New York law requires an assessment of what an employee is actually paid, rather than what he was promised to be paid” (*Brewster v Career and Educ. Consultants, Inc.*, 2018 WL 1143392 [Sup Ct. New York County 2018]; citing *Bongat v Fairview Nursing Care Ctr., Inc.*, 341 F Supp 2d 181 [EDNY 2004]). “Earnings” of zero dollars is less than nine hundred dollars. Thus, it is not appropriate to dismiss plaintiffs’ NYLL claims (*Allison v Clos-ette Too, L.L.C.*, 2015 WL 9591500 at 7 [SDNY Apr. 20, 2015] [plaintiff employee could maintain NYLL claims where she did not receive any compensation whatsoever despite the promise of a \$200,000 annual salary]).

Alternatively, defendants argue that plaintiffs were “freelance” contractors because they worked from home, used their personal computers and cell phones, worked discretionary hours, and never disclaimed that they both had other full-time jobs. “The critical inquiry in determining whether an employment relationship exists pertains to the degree of control exercised by the

purported employer over the results produced or the means used to achieve the results” (*Bynog v Cipriani Group*, 1 NY3d 193, 198–199, [2003] [internal citations omitted]). In *Bynog*, the Court of Appeals found that the plaintiffs were independent contractors, rather than employees of the defendant catering company under Labor Law §§ 191 and 196(d). The Court’s analysis relied on evidence that that the plaintiffs worked at their own discretion, furnished their personal uniforms, contemporaneously worked for the defendants’ competitors, and were under the “exclusive direction and control” of the temp service that hired and paid them (*Id* at 198–199). *Bynog* outlined five non-exhaustive factors relevant to assessing control. These “include whether the worker (1) did the plaintiff work at his own convenience, (2) was plaintiff free to engage in other employment, (3) did plaintiff receive fringe benefits, (4) was plaintiff on the employer’s payroll and (5) was plaintiff on a fixed schedule” (*Id*).

Defendants maintain that the *Bynog* factors compel this court to hold that plaintiffs were independent contractors and not employees of defendants. However, here, unlike *Bynog*, plaintiffs allege that they had a fixed work schedule and were often required to work on weekends and into the late evening because of the defendants’ strict work deadlines (Amended Complaint, ¶ 26-32). In further contrast to *Bynog*, plaintiffs alleged the heavy workload defendants assigned required them to work weekends and often “until anywhere from 2 a.m. to 5 a.m.” This does not support a conclusion that plaintiffs worked at their own convenience or were on a fixed schedule (*see also, Mumin v Uber Tech., Inc.*, 239 F Supp 3d 507, 532 [EDNY 2017]).

Moreover, plaintiffs allege that they were to be salaried employees on defendants’ payroll (see Counts 3-5), were promised fringe benefits, and defendants dictated their work assignments. Thus, at this early pleading stage, the court cannot conclusively determine that plaintiffs were

freelance contractors (*Bhanti v Brookhaven Mem. Hosp. Med. Ctr., Inc.*, 260 AD2d 334, 335 [2d Dept 1999]).

Finally, plaintiffs do not need to deny that they both had other full-time jobs to state a claim under the NYLL (*Agerbrink v Model Serv. LLC*, 2017 WL 933095, at 7 [SDNY 2017]). “The fact that a worker reports to multiple employers does not definitively prove that she is not an employee of any of them for labor law purposes; a part-time employee may have time to work for other employers without running afoul of requirements indicative of the primary employer's degree of control” (*Id.*).

To state a claim under Article 6 of the Labor Law, a claimant must also plead that the defendant meets the statutory definition of “employer” (Labor Law § 190[3]). Plaintiffs adequately plead that Chickstation qualifies as an “employer,” that the NYLL defines as “any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service” (Labor Law § 190). A corporate officer or owner may be classified as an “employer” if she generally controls an enterprise’s day-to-day operations, including hiring and firing employees, supervises and controls employees' work schedules, and determines the method and rate of pay (*Gortat v Capala Bros., Inc.*, 257 FRD 353, 368 [EDNY 2009]; *Bonito v Avalon Partners, Inc.*, 106 AD3d 625, 626 [1st Dept 2013]). Here, plaintiffs allege Horblitt hired them, supervised their work, assigned work that dictated their schedules, and negotiated their rate of pay (Amended Complaint, ¶ 10, 18, 19, 23, 25-28). Thus, plaintiffs sufficiently allege Horblitt’s status as an “employer” under Labor Law § 190.

Defendants argue that plaintiffs cannot state a claim under the NYLL’s minimum wage provisions because plaintiffs are exempt executives (*Id.*, p. 7). Defendants further maintain that “even assuming plaintiff alleged an employer-employee relationship” their minimum wage claims

fail because plaintiffs did not allege the number of hours they worked per week. Employees are exempt from NYLL's minimum wage provisions if they are employed in executive or administrative capacities (12 NYCRR 142-2.14). An "executive employee", *inter alia*, must receive a salary of \$675.00 per week (as of May 2016), customarily and regularly direct the work of two or more other employees, possesses authority to suggest or directly carry out hiring or firing, and regularly exercise discretionary powers (12 NYCRR 142-2.14). An "administrative employee" must (1) receive a salary basis of \$675.00 per week (as of May 2016), (2) perform, as "nonmanual field work directly related to management policies or general operations of such individual's employer," (3) "customarily and regularly exercise discretionary powers," and (4) "regularly and directly assist an employer...or...perform, under only general supervision, work along specialized or technical lines requiring special training, experience, or knowledge" (*Id*; 2013 NY REG TEXT 339656 [NS]).

At this juncture, it would be premature to categorize plaintiffs as employees with earnings over \$900 per week. Here, there is no conclusive evidence, that plaintiffs, *inter alia*, worked under only general supervision, supervised two or more employees, possessed the authority to hire or fire other employees, or were afforded the opportunity to exercise discretion or independent judgment in their Chickstation roles (12 NYCRR 142-2.14). Even if plaintiffs performed executive or administrative duties, executive and administrative employees can assert minimum wage claims (*Allison*, 2015 WL 9591500 at \*2, 7; *Mikhaylov v Y & B Transportation Co.*, 2017 WL 1048071 at 7 [EDNY Mar. 17, 2017] [plaintiffs sufficiently stated a NYLL minimum wage claim because the "plaintiffs claim that they did not receive any compensation for the time worked" thus, "the hourly wages for each during this period was \$0.00"]; *see also, Rodriguez v Almighty Cleaning, Inc.*, 784 F Supp 2d 114, 122 [EDNY 2011]). This limited record does not indicate that plaintiffs job

responsibilities comport with the statutory definition of executive or administrative employees. Moreover, plaintiffs were paid absolutely nothing. Therefore, the court declines to dismiss plaintiffs' minimum wage claims on this basis.

Finally, defendants argue that the claim for unpaid minimum wages is overly broad, because plaintiffs do not specify the number of hours they worked in any particular week. However, the court cannot dismiss the NYLL minimum wage claims simply because defendants' object to plaintiffs alleged work schedule (*Allison*, 2015 WL 9591500). Additionally, dismissal is inappropriate because defendants fail to "offer their own estimate" of plaintiffs' hours (*Id* at 3).

An employee pleads a claim for unpaid compensation under NYLL where she alleges that her employer did not pay her promised wages, including guaranteed salary, bonuses, and fringe benefits (Labor Law §§ 190 and 193; *Wachter v Kim*, 82 AD3d 658, 663 [1st Dept 2011]; *Ryan v Kellogg Partners Institutional Services*, 19 NY3d 1, 16 [2012]; *Cohen v Finz & Finz, P.C.*, 131 AD3d 666 [2d Dept 2015]; *Excavators Union Local 731 Welfare Fund v Zurmuhlen*, 68 AD2d 816 [1st Dept 1979]). A dispute "as to the calculation of the net amount does not reflect a deduction from wages within the meaning" of the NYLL (*193 Kletter v Fleming*, 32 AD3d 566, 567 [3d Dept 2006]).

Plaintiffs can maintain their NYLL claim for unpaid compensation. Defendants argue the limited holding of *Perella Weinberg Partners LLC v Kramer* (2016 NY Slip Op 31387[U], 2 [Sup Ct, New York County 2016], *affirmed as modified on other grounds by, Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443 [1st Dept 2017]) requires the dismissal of Count 2 because "complete non-payment based on a dispute over whether any of the funds are owed under a contract is not considered a deduction". In *Perella*, the plaintiffs' claim for unpaid wages was insufficient because the plaintiffs failed to allege that their employer made specific deductions in

violation of Labor Law § 193 (*Perella Weinberg Partners LLC*, 153 AD3d at 449). Here, unlike *Perella*, plaintiffs allege that defendants withheld all compensation, specifically plaintiffs': annual salary, fringe benefits, and signing bonuses (*Fleming*, 32 AD3d at 567; Amended Complaint, ¶ 20). Thus, plaintiffs' claims are also not a dispute over the calculation of the net payment amount.

To support a claim for unpaid overtime wages, the plaintiff must allege that she was (1) an employee of the defendant, (2) she worked more than 40 hours per week, and (3) defendant failed to pay her certain overtime compensation to which she was entitled (*V. Groppa Pools, Inc. v Massello*, 106 AD3d 723, 724 [2d Dept 2013]; Labor Law § 193; Labor Law § 190[1]; *Mumin v Uber Tech., Inc.*, 239 F Supp 3d 507, 532 [EDNY 2017], *reconsideration denied sub nom. Ortega v Uber Tech. Inc.*, 2017 WL 1737636 [EDNY May 2, 2017]). The Amended Complaint alleges that Ribbler typically worked between "56 and 70 hours per week for defendants", and that Friedman "typically worked between 70 and 105 hours" (Amended Complaint, ¶ 21, 25). Additionally, plaintiffs maintain that they were employees of defendants and that defendants failed to remit certain overtime compensation (*Id.*, ¶ 48-52; *Mumin*, 239 F Supp 3d at 531-32). Here, like in *Mumin*, defendants' contention that Ribbler and Friedman functioned in a freelance role is not dispositive of plaintiffs' unpaid overtime claims at the motion to dismiss stage (*Mumin*, 239 F Supp 3d at 515). Again, defendants failed to establish that plaintiffs were independent contractors because plaintiffs sufficiently alleged that defendant "exercised control over their wages, their hours, and their working conditions" (*Id.*). Finally, defendants fail to proffer any evidence to support their claims that plaintiffs were "freelance" independent contractors (*Mumin*, 239 F Supp 3d at 515). For these reasons, plaintiffs' second and third causes of action survive.

New York Labor Law § 195(1) requires employers to provide employees a written statement containing the rate and measure of pay, allowances, designated regular payday, and the

name, address, and phone number of the employer at the time of hire (Labor Law § 195[1][a]).

Plaintiffs allege that defendants failed to furnish the above-listed information at the time defendants hired plaintiffs (Amended Complaint, ¶ 34, 53-56). Defendants do not demonstrate anything to refute this assertion. Therefore, plaintiffs have adequately pleaded a violation of Labor Law § 195(1).

Labor Law § 195(3) requires employers to provide statements with each payment of wages. This statement must list the dates covered by the payment, the rate and measure of pay, address and phone number of employer, gross wages, deductions, allowances, and net wages (Labor Law § 195[3]). Plaintiff alleges that defendants failed to furnish the above-listed information despite defendants' alleged agreement to remit salary payments to plaintiffs (Amended Complaint, ¶ 35, 57-60). Defendants extend no evidence to the contrary. Therefore, plaintiffs have adequately pled a violation of Labor Law § 195(3).

Despite their Notice of Motion, defendants have raised no substantive grounds to dismiss the sixth cause of cause for breach of oral contract. Indeed, defendants conceded that plaintiffs' have stated a claim for breach of oral contract (Chicksation Memorandum of Law, p. 6). Accordingly, to the extent defendants sought dismissal of the breach of contract claim, the court denies the motion.

Plaintiffs seventh and eighth causes of action seek to recover damages based upon the quasi-contractual theories of quantum meruit and unjust enrichment. To state a cause of action to recover in quantum meruit, a plaintiff must allege that (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefore, and (4) the reasonable value of the services allegedly rendered (*Tesser v Allboro Equip. Co.*, 302 AD2d 589 [2d Dept 2003]). To state a cause of action

to recover damages for unjust enrichment, a plaintiff must allege that “(1) the other party was enriched, (2) at that party’s expense and (3) that ‘it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered’” (*AHA Sales, Inc. v Creative Bath Products, Inc.*, 58 AD3d 6, 19 [2d Dept 2008], quoting *Cruz v McAneney*, 31 AD3d 54, 59; *Paramount Film Distrib. Corp. v State*, 30 NY2d 415, 421 [1972]).

“It is impermissible...to seek damages in an action sounding in quasi-contract where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties” (*Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 389 [1987]). Where, as here, “there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi-contract as well as breach of contract, and will not be required to elect remedies” (*Goldman v Simon Prop. Group, Inc.*, 58 AD3d 208, 209 [2d Dept 2008]; *Scarola Ellis LLP v Padeh*, 116 AD3d 609, 611 [1st Dept 2014]).

Plaintiffs, *inter alia*, seek to recover the value of the work they allegedly performed for defendants without payment. Defendants argue that plaintiffs’ “supposed oral contracts with [Chicksation] for management positions” at most “describe a freelance relationship” (Chicksation Memorandum of Law, p. 1, 5, 8). Chicksation’s arguments concerning the scope, terms, and existence of the alleged oral agreement evince a disagreement as to the existence of a governing contract (*Goldman*, 58 AD3d at 208, 209). Finally, plaintiffs note that they expected to receive compensation for the work they performed for defendants (*Zentz v Intl. Foreign Exch. Concepts, L.P.*, 33 Misc 3d 1212(A) [Sup Ct 2011], *affd*, 106 AD3d 904 [2d Dept 2013]; *Scaglione v Castle Restoration & Const., Inc.*, 2009 NY Slip Op 31257[U] [Sup Ct, Queens County 2009]).

Therefore, plaintiffs may proceed on both legal and equitable causes of action because of the

parties' dispute over the existence of an enforceable agreement (*LoGerfo v Trustees of Columbia Univ. in City of New York*, 35 AD3d 395 [2d Dep't 2006]).

Accordingly, it is,

**ORDERED** that the court DENIES the motion to dismiss in its entirety; and it is further

**ORDERED** that the court directs defendants 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 compliance conference in Room 304, 71 Thomas Street, on September 25, 2018, at 9:30 AM.

Dated: New York, New York  
July 31, 2018

ENTER



Hon. Melissa A. Crane

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