Brewster v Career & Educ. Consultants, Inc.
2018 NY Slip Op 32066(U)
February 27, 2018
Supreme Court, New York County
Docket Number: 162567/2015
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ **PART 13**
Justice

JOSEPH BREWSTER,
Plaintiff,
-against-

CAREER AND EDUCATIONAL CONSULTANTS, INC., WARREN L. RICHMAN, and SUSAN R. MELOCCARO, *individually and in their official capacities*,
Defendants.

INDEX NO. 162567/2015
MOTION DATE 02/14/2018
MOTION SEQ. NO. 004
MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion to renew/reargue.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits	4
Replying Affidavits	5 - 6

Cross-Motion: ☐ Yes X No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Upon a reading of the foregoing cited papers, it is Ordered that Plaintiff's motion to modify or renew/reargue that portion of this Court's Order dated December 8, 2017 that denied summary judgment on his First Cause of Action against the Defendants, and the portion that denied holding Individual Defendants Mr. Richman and Ms. Meloccaro (hereinafter together the "Individual Defendants") jointly and severally liable, is granted. The Order is modified to grant Plaintiff summary judgment on liability on his First Cause of Action, and grant judgment against the Individual Defendants holding them jointly and severally liable on Plaintiff's First, Second, and Third Causes of Action (hereinafter these Causes of Actions are the "NYLL causes of action").

On December 8, 2017 this Court granted Plaintiff's motion for partial summary judgment to the extent of granting his Second, and Third Causes of Action on liability against Defendant Career and Educational Consultants, Inc. ("CEC"). Plaintiff now moves for leave to modify and reargue the portion of this Court's Order dated December 8, 2017 that denied summary judgment on his First Cause of Action against the Defendants, and the portion that denied holding the Individual Defendants jointly liable for his NYLL causes of action. First, Plaintiff argues the Court made a typographical error by granting Plaintiff's partial summary judgment on liability only. Second, Plaintiff argues that Plaintiff should have been considered a "clerical worker" pursuant to NYLL §190[7] because he was paid less than the $900 per week threshold 72% of the time, and thus, entitled to judgment on his First Cause of Action for a violation of NYLL §191. Finally, the Plaintiff argues that judgment against the Individual Defendants should have been granted on his NYLL causes of action because they are jointly and severally liable as "joint employers."

CPLR §5019(a) gives trial courts the discretion to cure mistakes, defects, and irregularities that do not affect substantial rights of parties (CPLR §5019; Johnson v Societe Generale S.A., 94 AD3d 663, 943 NYS2d 74 [1st Dept. 2012]). The Court modifies the sentence in the sixth paragraph that states: "Plaintiff is expressly excluded from the protections of Labor Law 191 even if he alleges, and Defendants have admitted, that he was *not* paid less than the $900 threshold 72% of the pay periods during the Relevant Time Period"

(Moving Papers Ex. A, ¶ 6, emphasis added). Without the Court's typographical error, the sentence should have stated: "Plaintiff is expressly excluded from the protections of Labor Law 191 even if he alleges, and Defendants have admitted, that he was paid less than the $900 threshold 72% of the pay periods during the Relevant Time Period."

CPLR §2221[d] states that a motion for leave to reargue (i) shall be identified specifically as such, (ii) shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion, and (iii) shall be made within thirty (30) days after service of a copy of the order determining the prior motion and written notice of its entry.

The Court has discretion to grant a motion to reargue upon a showing that it "overlooked or misapprehended any relevant facts, or misapplied any controlling principle of law" (Kent v 534 East 11th Street, 80 AD3d 106, 912 NYS2d 2 [1st Dept. 2010]. Reargument is not intended to afford an unsuccessful party successive opportunities to reargue issues previously decided, or to present arguments different from those originally asserted (Kent, *supra*). The movant cannot merely restate previous arguments (*Id*). Successive motions for reargument are generally denied (McGill v Goldman, 261 AD2d 593, 691 NYS2d 75 [2nd Dept. 1999]).

Plaintiff points out that this Court misapplied the law stating that the Plaintiff was not a "clerical worker" as defined by NYLL §190[7], and thus, not entitled to NYLL §191 protection. The Plaintiff also points out this Court misapplied the law stating that the Individual Defendants could not be held jointly and severally liable as to Plaintiff's NYLL causes of action because he did not originally move to pierce the corporate veil against them.

Plaintiff is correct. The Court misapplied the law as to holding that the Plaintiff was not a "clerical worker." Defendants admitted that he was paid less than the $900 per week threshold 72% of the time. The Court should have held that he is a "clerical worker" as defined by NYLL §190[7] since the Defendants could not affirmatively establish that he is a bona fide executive, administrative or professional, whose earnings are in excess of $900 per week (NYLL §190[7]). Despite Defendants promising Plaintiff an intended salary of $80,000 per year, New York law requires an assessment of what an employee is actually paid, rather than what he was promised to be paid (Bongat v Fairview Nursing Care Ctr., Inc., 341 F. Supp.2d 181 [E.D.N.Y. 2004]). With Plaintiff defined as a "clerical worker," Plaintiff should have been granted summary judgment on liability on his First Cause of Action against the Defendants for a violation of NYLL §191.

The Court misapplied the law as to holding that the Individual Defendants could not be held jointly and severally liable as to Plaintiff's NYLL causes of action because the Plaintiff did not originally move to pierce the corporate veil against them. Under NYLL, the Plaintiff need not pierce the corporate veil to hold individual defendants liable, but need only establish that they are "joint employers" for purposes of holding them jointly and severally liable for any judgment resulting from Plaintiff's NYLL claims (Drozd v Vlaval Constr., Inc., No. 09 CV 5122 (SJ), 2011 U.S. Dist. LEXIS 156415 [E.D.N.Y. Oct. 18, 2011]).

New York Court's use the "economic reality" test to analyze whether a person is an employer under the NYLL (Herman v RSR Sec. Servs., 172 F3d 132 [2d Cir.

1999]). The "economic reality" test comprises of 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" (*Id*). In addition to these "nonexclusive and overlapping" factors, courts also consider "the scope of an individual's authority or operational control over a company" (Irizarry v Catsimatidis, 722 F.3d 99 [2d Cir. 2013]).

The record before this Court, including Defendants' admissions, establishes that the Individual Defendants are the sole shareholders of CEC, exercise day-to-day control over the business, exercise the ability to hire and fire all CEC employees, exercise control over Plaintiff's employment, and controlled the payment of Plaintiff's wages. This makes the Individual Defendants "joint employers" under NYLL §190[3], and jointly and severally liable for any judgment resulting from Plaintiff's NYLL causes of action.

The Court therefore grants Judgment on liability on Plaintiff's First, Second, and Third Causes of Action and orders a trial on damages for these causes of action.

Accordingly, it is ORDERED, that Plaintiff's motion to modify or renew/reargue this Court's December 8, 2017 Order is granted, and it is further,

ORDERED, that this Court's Order is modified to the extent of vacating that portion of the Order that denied Plaintiff's motion for summary judgment on his First Cause of Action, and summary judgment for his First, Second, and Third Causes of Action against the individual Defendants Warren L. Richman and Susan R. Meloccaro, and it is further,

ORDERED, that the Plaintiff is granted summary judgment on liability on his first cause of action for a violation of New York Labor Law Section §191 against the Defendants, and it is further,

ORDERED, that the Individual Defendants Warren L. Richman and Susan R. Meloccaro are jointly and severally liable as "joint employers" on Plaintiff's First, Second, and Third Causes of Action, and it is further,

ORDERED, that Plaintiff is granted Judgment on Liability against the Individual Defendants Warren L. Richman and Susan R. Meloccaro, on the First Second, and Third Causes of Action, jointly and severally, and it is further,

ORDERED, that a trial on damages on these causes of action is Ordered, and it is further,

ORDERED, that the Clerk of Court enter Judgment accordingly.

Enter: MANUEL J. MENDEZ
J.S.C.

Dated: February 27, 2018 MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE