

Largo v T&R Constr. Corp.

2018 NY Slip Op 32554(U)

September 27, 2018

Supreme Court, Queens County

Docket Number: 710224/16

Judge: Darrell L. Gavrin

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**
Justice

IA PART 27

LUIS LARGO,

Plaintiff,

- against -

T&R CONSTRUCTION CORPORATION and
REFIK RADONCIC,

Defendants.

Index No. 710224/16

Motion

Date June 12, 2018

Motion

Cal. No. 17

Motion

Seq. No. 2

The following papers numbered EF17 to EF45 read on this motion by defendants to dismiss counts II and III of the complaint, pursuant to CPLR §§3211[a][2] and [a][7], for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, respectively, and to grant summary judgment dismissing counts II and III, pursuant to CPLR 3212[b].

Papers
Numbered

Notice of Motion - Affirmation - Exhibits.....	EF17 - EF41
Affirmation in Opposition - Exhibits.....	EF42 - EF44
Reply Affirmation.....	EF45

Upon the foregoing papers, it is ordered that the motion is determined as follows:

This is an action for unpaid wages, overtime and for wrongful termination. Plaintiff commenced the instant action against defendant, T&R Construction (herein "T&R"), and Refik Radoncic ("Radoncic"). Count II of the complaint alleges that defendants violated various provisions of the Labor Law by failing to provide plaintiff with overtime compensation for each hour worked in excess of 40 in a workweek; and that defendants failed to provide plaintiff "and others similarly situated" with wage statements as required by Labor Law §195[3]; failed to provide plaintiff with "spread of hours" pay; failed to provide a wage statement to plaintiff "and other non-exempt employees"; and failed to provide a proper wage notice to plaintiff "and other non-exempt employees" at the beginning of employment and annually thereafter, in violation of the New York Labor Law. Count III alleges that defendants failed to pay plaintiff and "FLSA Collective plaintiffs" overtime wages as provided for by the federal Fair Labor Standards Act ("FLSA"); and that defendants failed to post notices or otherwise provide plaintiff with information as to his rights under the FLSA. Plaintiff purports to bring his claims for relief as a collective action pursuant to FLSA §16[b], 29 U.S.C. §216[b], on behalf of

himself and all other similarly situated non-exempt employee within the meaning of the FLSA, who were currently and formerly employed by defendants on or after the date that is three years before the filing of the complaint in this case.

Defendants move to dismiss Counts II and III insofar as they assert collective or class claims and for summary judgment in their favor as to the remaining claims asserted by plaintiff in his individual capacity. Plaintiff concedes that he failed to obtain court approval to assert collective or class claims and thus does not contest dismissal of the collective claims. Plaintiff opposes the remaining portions of defendants' motion.

Facts

T&R is a general contractor in the construction industry, which also performs some of the trades on its construction projects. Radoncic is the owner of T&R. Plaintiff Largo worked for T&R as a construction laborer at various times between 2005 and April 3rd or 4th, 2015, when his employment was terminated.

Largo alleges that he worked at least 57.7 hours a week, five days a week, amounting to around 11 hours per day. However, Largo alleges, he was never compensated for overtime pay or spread of hours pay. Largo testified that management of the company manipulated time cards by having management punch the cards in and out. Contrary to the assertions of defendants, Largo asserts that he did not punch his card in and out of work but rather that the time cards were punched by defendants. Largo further asserts that he was required to continue his work even after defendants had punched his time card out. Finally, Largo asserts in the complaint that he was never paid the correct hours worked and was never paid the proper overtime compensation.

Defendants, on the other hand, allege that as a construction laborer, Largo's work day consisted of eight hours of work, with a half hour unpaid lunch break and a paid 15 minute morning coffee break; that Largo did not work on Saturdays, Sundays or holidays. Defendants contend that on the days when the time clock was broken or Largo failed to punch in and or out, the on-site supervisor noted the number of hours worked by Largo by hand. On those occasions when Largo worked a full day and the time clock was not working, or when Largo neglected to punch in or out, or when the time card punch was unreadable, defendants state that the site supervisor entered the number "8" to record that Largo had worked a full work day of eight hours. In sum, defendants contend that Largo's work hours were recorded on a time card maintained at the jobsite, which Largo was required to punch in and out each day through the use of a time clock. At the end of each bi-weekly pay period, the time cards of all employees at the jobsite were delivered to T&R's office, where the finance manager, Irene Hoda, reviewed the time-cards, resolved any questions or missing items with the site supervisor, computed the number of hours worked during each workweek and prepared the paychecks for each employee for signature by Radoncic.

Defendants submitted the deposition testimony and an affidavit from Hoda, T&R's finance manager, indicating that Largo worked eight hour work days, Monday through Friday and did not work weekends or holidays. Hoda further added that Largo's work hours were recorded on a time card maintained at the jobsite. Hoda was responsible for ensuring that the time cards were completed correctly, and if there was an omission or a problem, she would contact Adil Mehovic, the site supervisor for clarification and or correction. T&R paid all of its employees by check, with withholdings and deductions take as required by law. No T&R employee is or was paid by cash, in whole or in part. Each paycheck is accompanied by a pay stub which sets forth the gross pay, withholdings and deductions and net pay for the pay period. Largo and other employees went to the T&R office to receive their checks. Notices regarding overtime and wages were posted in the T&R office, as required under the Fair Labor Standards Act (FLSA).

Mehovic testified plaintiff worked for T&R and punched a time card to record his work time. In those instances in which Largo worked a full day and the time clock was not working or where Largo failed to punch in or out or when the time card punch was unreadable, Mehovic entered the number "8" to record that plaintiff had worked a full work day of eight hours. At the end of each bi-weekly pay period, the time cards of all employees at the jobsite were delivered to T&R's office where Hoda would review them and resolve any issues concerning them. Hoda would also prepare the paychecks for signature by T&R's owner, Radoncic.

Radoncic testified that he is the sole owner of T&R; that the work schedule was generally either 7:00 a.m. to 3:30 p.m., or 8:00 to 4:30, depending upon the particular project; that workers were required to work on Saturdays in emergency situations; that workers also worked overtime; and that workers were never paid in cash.

Plaintiff testified upon examination before trial, in sum: that he worked for T&R as a construction laborer starting around May 2005, and that he worked on the 21st Street Project; that he would get paid by check and would also get paid some cash; that his salary would be paid to him, half in check, and half in cash; that in 2009, his rate of salary was \$21.00 per hour; that his time was recorded by a time clock machine and a time card; that he worked on Labor Day, Thanksgiving Day, Christmas Eve and Christmas Day in December 2014 and New Years Day in 2015; that he would punch the time card in and the supervisor "Adil" would punch the time card out; and that sometimes when he punched in and the supervisor punched the card out, he would work later.

Defendants submitted the affidavit of Anela Radoncic, the Site Safety Coordinator for T&R, in support of the motion. She avers, as follows: that the Site Safety Coordinator is responsible for monitoring compliance with the safety requirements of the Building Code and for performing all other safety duties assigned by the owner or contractor to meet legal requirements. A contractor cannot perform any construction work on a "major building" without the presence of the Site Safety Manager or Site Safety Coordinator. She maintains a daily site safety log for each day on which she is present at the job site. The daily safety log reflects the times that work commenced and ended on that day. Anela Radoncic avers that she

was present at the 21st Street Project jobsite each from the beginning of the construction until her presence was no longer required. During that time, work on the 21st Street Project commenced each day at or shortly after 8:00 a.m., and ended on or before 4:30. On a limited number of days, the site remained open beyond 4:30 p.m., and Anela Radoncic noted the end time on the daily site safety logs, copies of which were also submitted in support of the motion.

Defendants also submitted copies of Largo's time sheets and the site safety coordinator's logs, as well as photographs of the FLSA postings and a copy of the New York Wage Theft Prevention Act notice concerning wage and overtime rights signed by Largo in 2012.

Discussion

The branch of the motion which seeks to dismiss counts II and III as they pertain to any plaintiff other than Luis Largo, are dismissed on consent as plaintiff Largo conceded that he failed to move to certify this action as a collective action under the Fair Labor Standards Act (FLSA), or as a class under the New York Labor Law. A purported class does not become a class until the court certifies its status as a class (see Siegel, *New York Practice* 4th § 142; and CPLR 902, 903). CPLR 902 requires the plaintiff who commences a class action suit to move for class certification. The plaintiffs must establish that the action should be maintained as a class action (*Feder v Staten Island Hosp.*, 304 AD2d 470 [1st Dept 2003]). The penalty for failing to timely move for class certification is denial of class certification (*see Hamlet on Olde Oyster Bay Home Owners Ass'n, Inc. v Holiday Org., Inc.*, 12 Misc 3d 1182(A) [Sup Ct 2006], *on rearg sub nom. The Hamlet on Olde Oyster Bay Home Owners Ass'n, Inc v The Holiday Org., Inc.* [Sup Ct 2007], *affd sub nom. Hamlet on Olde Oyster Bay Home Owners Ass'n, Inc. v Holiday Org., Inc.*, 65 AD3d 1284 [2d Dept 2009]; *Kensington Gate Owners, Inc. v Kalikow*, 99 AD2d 506 [2d Dept 1984]). Inasmuch as both parties consent to dismissal of the parts of counts II and III which pertain to other plaintiffs, that branch of the motion is granted.

The branch of the motion which is for summary judgment dismissing the overtime claim[s] as asserted by Largo as an individual plaintiff, is denied. Plaintiff alleges in the complaint that, throughout his employment with T&R he worked overtime hours for which he did not receive overtime compensation. Plaintiff claims that he worked the said overtime while working on the 21st Street Project between May 5, 2014 and April 3, 2015. Defendants, on the other hand submitted affidavits, deposition testimony and time card purporting to establish that plaintiff did not work any overtime on the 21st Street Project at any time. Anela Radoncic avers that "on no workday between May 5, 2014 and April 3, 2015 did work continue beyond 4:30 p.m. on the 21st Street Project. On every workday between May 5, 2014 and April 3, 2015, the jobsite was closed at or around 4:30 pm. Daily site safety logs were also submitted purporting to establish that no work was performed at the 21st Street Project after 4:30 on any day plaintiff worked on that jobsite. Anela Radoncic also avers that no work was performed by plaintiff on holidays during the aforesaid time period, including Memorial Day, Labor Day, Christmas Day, the day after Christmas and New Years Day, as alleged by plaintiff. Defendants also submitted time cards for the period plaintiff worked purporting to establish that plaintiff only worked eight hours each day.

It is well-established that on a motion for summary judgment the court is not to engage in the weighing of evidence. Rather, the court's function is to determine whether "by no rational process could the trier of facts find for the nonmoving party" (*Jastrzebski v North Shore School Dist.*, 223 AD2d 677, 678 [2d Dept 1996]). It is equally well established that the motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see Tunison v D.J. Stapleton, Inc.*, 43 AD3d 910 [2d Dept 2007]; *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; *Dolitsky v Bay Isle Oil Co.*, 111 AD2d 366 [2d Dept [2d Dept 1985]). Here, in view of the parties' sharply conflicting evidence, summary dismissal of the overtime claim[s] is denied.

The branch of the motion which is to dismiss plaintiff's claim that defendants did not provide plaintiff with an accurate statement of wages with each payment of wages, is denied. The complaint alleges that defendants failed to provide plaintiff with wage statements at the time of payment of wages containing the date of work covered for that payment of wages; name of employee, name of employer, address and phone number of employer, rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece commission or other gross wages, deductions, allowances, if any claimed as part of the minimum wage, net wages, the regular hourly rate or rates of pay, the overtime rate or rates of pay, the number of regular hours worked and the number of overtime hours worked, as required by New York Labor Law §195[3]. While defendants submitted copies of pay stubs, affidavits and times cards indicating that plaintiff was properly paid the amounts set forth in the said records, plaintiff testified that he was paid partly in check form and partly in cash and that the said pay stubs and time cards do not accurately reflect what he was paid. This conflicting evidence raises issues of fact for trial (*see Tunison v D.J. Stapleton, Inc., supra; Scott v Long Is. Power Auth., supra*).

The branch of the motion which is to dismiss plaintiff's claim that defendants failed to provide proper wage notices is granted based upon undisputed evidence that the said notices were posted in T&R's office during plaintiff's period of employment. Counsel for plaintiff argues that plaintiff testified that the required labor law posters were never posted in T&R's office and that this creates a factual issue for trial. Upon review of plaintiff's testimony, however, it appears that plaintiff testified that he did not see the poster and did not know whether they were posted in the office. The undisputed affidavit of Hoda establishes that the required posters were displayed in the office of T&R in the area where employees received their paychecks. Defendants also submitted a copy of the New York Wage Theft Prevention Act notice concerning wage and overtime rights signed by plaintiff in 2012.

The branch of the motion which is to dismiss plaintiff's claim for spread of hours pay, is granted. The gravamen of this contention by plaintiff is that, in accordance with the New York State Department of Labor Wage Order for Miscellaneous Industries (12 NYCRR §142-2.4[a]), if plaintiff worked more than ten hours in any workday, he may be entitled to additional pay equal to one hour at the applicable minimum wage. Spread of hours is defined as "the interval between the beginning and end of an employee's workday" and "includes working time plus time off for meals plus intervals off duty" (N.Y. Comp. Codes R. & Regs. tit. 12 § 142-3.16).

Defendants seek dismissal of this claim on the ground that section 142–2.4 is inapplicable to an employee who makes over the minimum wage, and is therefore inapplicable to the plaintiff.

The spread of hours regulation does not apply if an employee’s total daily compensation exceed the New York State minimum (*see Sosnowy v A. Perri Farms, Inc.*, 764 F Supp 2d 457, 473 [E.D.N.Y. 2011]; *see also Almeida v Aguinaga*, 500 F. Supp.2d 366, 370 [S.D.N.Y.2007] [“The spread-of-hours provision is properly limited to enhancing the compensation of those receiving only the minimum required by law.”]; *Espinosa v Delgado Travel Agency*, 2007 WL 656271 [S.D.N.Y. March 2, 2007] [“By its plain language, section 142–2.4(a) only provides supplemental wages to workers who are paid the minimum wage required under New York law. It does not ensure additional compensation to employees whose wages sufficiently exceed that floor.”]; *Jenkins v Hanac, Inc.*, 493 F.Supp.2d 556, 558 [E.D.N.Y.2007] [“the regulation does not ensure additional compensation to employees whose wages sufficiently exceed the minimum wage floor”] [internal quotations and alteration omitted]; *Franklin v Breton Int’l, Inc.*, 2006 WL 3591949 [S.D.N.Y. Dec. 11, 2006] [holding that New York’s “ ‘spread of hours’ provision applies only to workers earning the minimum wage”]). Based on the court’s own reading of the statute, the court agrees with the cases that find that the explicit reference to the “minimum wage” in section 142–2.4 indicates that “the spread-of-hours provision is properly limited to enhancing the compensation of those receiving only the minimum required by law. In the complaint, plaintiff does not plead that he was paid the minimum wage, but rather that he was “paid on an hourly basis at a certain rate of pay.” There is no allegation, nor facts from which the court can infer, that plaintiff’s rate of pay would entitle him to spread of hours payments under section 142–2.4. Even if plaintiff did work more than 10 hours on any workday, it is undisputed that plaintiff was paid at a rate of \$20 per hour during his employment stints between October 2010 and March 2012; and at a rate of \$21.25 per hour when he was employed on the 21st Street Project. Thus, the court grants the branch of defendants’ motion which is to dismiss the spread of hours claim.

Conclusion

The branch of the motion which seeks to dismiss, pursuant to CPLR 3211, counts II and III as they pertain to any plaintiff other than Luis Largo, are dismissed on mutual consent of the parties.

The branch of the motion which is for summary judgment dismissing the overtime claim[s] as asserted by Largo as an individual plaintiff, is denied.

The branch of the motion which is for summary judgment dismissing plaintiff’s claim that defendants did not provide plaintiff with an accurate statement of wages with each payment of wages, is denied.

The branch of the motion which is for summary judgment dismissing plaintiff’s claim that defendants failed to provide and or display proper FLSA wage notices, is granted.

The branch of the motion which is for summary judgment dismissing plaintiff's claim for spread of hours pay, is granted.

Dated: September 27, 2018

DARRELL L. GAVRIN, J.S.C.