Moore v Jay-Jay Cabaret
2019 NY Slip Op 30754(U)
March 20, 2019
Supreme Court, New York County
Docket Number: 158992/2017
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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INDEX NO. 158992/2017

OLIVIA MOORE,

Plaintiff,

MOTION SEQ. NO. 002

- v -

JAY-JAY CABARET, INDIVIDUALLY AND D/B/A FLASHDANCERS NYC, BARRY LIPSITZ, BARRY LIPSITZ JR.

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 11, 12, 13, 14, 15, 17, 19, 20, 21, 22, 23, 24, 28

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is ordered that the motion is decided as follows.

In this action by plaintiff Olivia Moore alleging wage and hour violations pursuant to the New York Labor Law ("the Labor Law"), defendants Jay-Jay Cabaret, Individually and d/b/a Flashdancers NYC, Barry Lipsitz ("Lipsitz"), individually, and Barry Lipsitz, Jr. ("Lipsitz, Jr."), individually (collectively "defendants"), move, pre-answer: 1) pursuant to CPLR 3013 and 3211(a)(7) to dismiss plaintiff's first amended complaint ("the amended complaint") in its entirety, with prejudice; 2) dismissing plaintiff's sixth cause of action, for conversion, pursuant to CPLR 3211(a)(5); and 3) for such other relief as this Court deems just and proper. Plaintiff opposes the motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff worked as an exotic dancer at Flashdancers, a gentlemen's club located on Broadway in New York County ("the club"), from July 2008 until July 2014. Doc. 8 at par. 25. She claimed that, from the inception of her employment, she was not paid a wage and only worked for tips. Doc. 8 at par. 26. Although she worked 40 hours per week, she claimed that she did not receive any salary or hourly pay. Doc. 8 at par. 27. Rather, plaintiff had to pay defendants $160 per shift to work. Doc. 8 at par. 28. She also claimed that defendants improperly collected fees from the tips she earned to pay themselves or other staff members, such as the "house mom", who kept the dressing room organized, or the deejay. Doc. 8 at pars. 29, 33-36.

On October 9, 2017, plaintiff commenced the captioned action by filing a summons and complaint in which she alleged that, by engaging in the foregoing activity, defendants violated the New York State Labor Law ("the Labor Law"). Doc. 1. Defendants thereafter moved to dismiss the complaint pursuant to CPLR 3013 and 3211(a)(7) (motion sequence 001), arguing that plaintiff failed to adequately plead her causes of action and that her complaint failed to set forth a claim upon which relief could be granted. Docs. 3-6. After plaintiff filed the amended complaint on February 1, 2018 (Doc. 8), defendants withdrew their motion to dismiss. Doc. 10.

As a first cause of action in her amended complaint, plaintiff claimed that defendants violated Labor Law § 652(1) by failing to pay her the required minimum hourly wage. Doc. 8 at pars. 46-50. As a second cause of action, plaintiff alleged that defendants violated Labor Law § 661 and 12 NYCRR 142-2.6 by failing to maintain records regarding hours worked and violated 12 NYCRR 142-2.7 by failing to provide her with statements containing pay and hour information. Doc. 8 at pars. 52-53. Plaintiff's third cause of action alleged a violation of Labor Law § 196-d, which prohibits an employer from withholding gratuities. Doc. 8 at pars. 55-56. As her fourth

cause of action, plaintiff alleged that defendants violated Labor Law Article 6, par. 193, for intentionally and unlawfully deducting money from her wages in order to, inter alia, pay other employees. Doc. 8 at pars. 58-62. As a fifth cause of action, plaintiff claimed that defendants violated Labor Law § 195 by, inter alia, failing to give her notice of her regular rate of pay, her overtime rate of pay, how she was to be paid, what day of the week she was to be paid, or the official identity of her employer. Doc. 8 at pars. 64-65. As a sixth cause of action, plaintiff alleged conversion. Doc. 8, at pars. 67-68. Finally, plaintiff alleged unjust enrichment as her seventh cause of action. Doc. 8 at pars. 70-72.

On February 21, 2018, defendants filed the instant pre-answer motion (motion sequence 002) seeking: 1) to dismiss the amended complaint in its entirety, pursuant to CPLR 3013 and 3211(a)(7), with prejudice; 2) dismissal of plaintiff's sixth cause of action, for conversion, pursuant to CPLR 3211(a)(5); and 3) for such other relief as this Court deems just and proper. Docs. 11-15.[1] In support of the motion, defendants argue that, since plaintiff's allegations improperly refer to all of the defendants as a group without distinguishing their respective conduct, the complaint must be dismissed because it lacks the specificity required by CPLR 3013. Defendants further argue that the complaint must be dismissed pursuant to CPLR 3211(a)(7) because they are conclusory and fail to state a cause of action. Additionally, defendants argue that Lipsitz and Lipsitz Jr. cannot be sued in their individual capacities under the Labor Law since they were not plaintiff's employers within the meaning of the Labor Law § 190(3).

In opposition to the motion, plaintiff argues that she has pleaded specific facts, including, inter alia, defendants' failure to pay her wages and unlawfully deducting money from her tips,

[1] As addressed below, plaintiff's sixth cause of action, for conversion, was withdrawn in plaintiff's memorandum of law in opposition to the motion. Doc. 24 at 11.

which properly allege Labor Law violations. She also asserts that, since she alleged that Lipsitz and Lipsitz Jr. controlled her work, she has adequately pleaded that they were her "employers" within the meaning of the Labor Law. Finally, plaintiff withdrew her claim for conversion.

In opposition to the motion, plaintiff submitted an affidavit (Doc. 21) in which she attests, inter alia, as follows:

1. She was hired by Lipsitz on or about July 14th, 2008 (Doc. 21 at par. 2);

2. A hostess named Mona told her that she would not be paid any wages and would pay a house fee of $160 per night of work, and she believed that the information given by Mona came from Lipsitz and Lipsitz Jr. (Doc. 21 at par. 3);

3. She began working at the club on July 27, 2008 (Doc. 21, at par. 4);

4. Lipsitz was present at the club 3 or 4 nights per week and, when he was present, he gave instructions to whichever house mom or manager was present (Doc. 21, at par. 5);

5. During the course of her employment at the club, she was "forced to pay $160 per night to work." She was never paid a wage and worked for tips. Doc. 21, at par. 7.

6. While working for defendants she worked five days per week from 8 p.m. until 4 a.m. (Doc. 21, at par. 8);

7. From the tips she earned, she had to pay a house mom $12 and a deejay $20 for each night she worked (Doc. 21, at par. 9);

8. She had to share tips she earned with the club (Doc. 21, at par. 10);

9. If plaintiff was tipped in "funny money", which the club used instead of cash, the club kept 20% of the tips for itself when she cashed in the funny money (Doc. 21, at par. 12);

10. The club's managers and house moms directed her regarding what to wear, and these instructions came from Lipsitz (Doc. 21, at pars. 13-15). On occasion, she saw Lipsitz talk to a manager or house mom, who would then instruct her to change her outfit (Doc. 21, at par 16);

11. In or about 2011, Lipsitz Jr. was promoted to manager and began interviewing and hiring dancers. (Doc. 21, at par. 17). Once he became a manager, he began entering the employee dressing room and telling plaintiff and her co-workers to "make rounds" if they were resting (Doc. 21, at par. 18);

12. Lipsitz and Lipsitz Jr. both fired employees or had the ability to tell others to do so (Doc. 21, at par. 19);

13. In or about March 2011, Lipsitz conducted a meeting with all of the dancers at the club and told them how to dress and how to approach customers (Doc. 21, at par. 20);

14. Plaintiff believed that Lipsitz and Lipsitz Jr. owned the club and they "directly impacted [her] working conditions" (Doc. 21, at par. 21);

15. Lipsitz supervised and controlled her during the course of her tenure at the club, whereas Lipsitz Jr. only began when he became a manager (Doc. 21, at par. 22-23); and

16. Defendants never provided her with written notice regarding her "regular rate of pay, overtime pay, how [she] was to be paid, [her] 'regular' pay day, the official name of [her] employer, and any other names used for business, the address and phone number of the employer's main office of principal location, nor allowances taken as part of the minimum wage" (Doc. 21, at par. 24).

In their reply memorandum of law, defendants reiterate their argument that the amended complaint must be dismissed pursuant to CPLR 3013 because plaintiff fails to allege any specific wrongdoing by each of them. Defendants further assert that plaintiff has failed to plead any facts which would give rise to a claim that Lipsitz and Lipsitz Jr. were employers pursuant to the Labor Law.

LEGAL CONCLUSIONS:

On a CPLR 3211 motion to dismiss a complaint, "the pleading is to be afforded a liberal construction. [The court is to] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87–88 (1994). A motion to dismiss a cause of action for failure to state a claim pursuant to CPLR 3211(a)(7) "test[s] the facial sufficiency of the pleading in two different ways." *Basis Yield Alpha Fund (Master) v*

Goldman Sachs Group, Inc., 115 AD3d 128, 134 (1st Dept 2014). First, "the motion may be used to dispose of an action in which the plaintiff has not stated a claim cognizable at law." *Id.* Second, the court may dismiss a claim where the plaintiff has identified a cognizable cause of action but has nevertheless failed to plead a material allegation necessary to establish it. *Id.* "[A] complaint should not be dismissed on a pleading motion so long as, when the plaintiff is given the benefit of every possible favorable inference, a cause of action exists." *Rovello v. Orofino Realty Co., Inc.*, 40 N.Y.2d 633, 634 (1976). Further, it is well settled that "[i]n assessing a motion under CPLR 3211(a)(7), . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint." *Leon v Martinez*, 84 NY2d at 88; *see also Ray v Ray*, 108 AD3d 449, 452 (2013) ("sworn affidavits [can be considered to] remedy any defects in the complaint and preserve a possibly inartful pleading that may contain a potentially meritorious claim. [internal citation omitted])."

Here, defendants' principal ground for dismissal is that plaintiff's claims are asserted against them as a group and, since the allegations are not specific as to each of them, they cannot meaningfully respond to the amended complaint. Although defendants are correct that plaintiff, in her amended complaint, makes the same allegations against each of them, this Court finds that, in her affidavit in opposition to the motion, plaintiff does not set forth identical allegations of wrongdoing as against each defendant.[2] When combined with plaintiff's affidavit, the complaint is not, as defendants allege, a "group pleading" which fails to set forth the precise conduct charged to each defendant. *See People v Marolda Props., Inc.*, 2017 NY Slip Op 32497(U), *8 (Sup Ct, NY County 2017). Thus, defendants' motion to dismiss for failure to state a cause of action is denied.

[2] Although the affidavit, executed in Texas, lacks the requisite certificate of conformity, this is merely an irregularity which can be corrected nunc pro tunc. *See Donsimoni v Fall*, 154 AD3d 467 (1st Dept 2017).

Although defendants rely on the case of *Aetna Cas. & Sur. Co. v Merchants Mut. Ins. Co.*, 84 AD2d 736 (1st Dept 1981) for the proposition that causes of action pleaded identically against all defendants, without specification as to the precise wrongdoing of each, must be dismissed, that case is distinguishable herein, where plaintiff's affidavit remedied this defect by setting forth the alleged acts of wrongdoing committed by each defendant.

Further, this Court finds that the allegations against Lipsitz and Lipsitz Jr. in their individual capacities are not subject to dismissal insofar as they may have been the employer or employers of plaintiff, in which case they would have been required to comply with the Labor Law.

> "Labor Law art. 6 regulates the payment of wages by employers" (*Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 614 [2008]). The term "employer" under the Labor Law "includes any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]). The test for determining whether a person is an employer under Article 6 is the same "economic reality" test courts use in analyzing employer status under the Fair Labor Standards Act [FLSA] (*Lauria v Heffernan*, 607 F Supp 2d 403, 409 [ED NY 2009]; *see Herman v RSR Servs. Ltd.*, 172 F3d 132, 139 [2d Cir 1999]). This test "looks to 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; (4) and maintained employment records (*id.* [internal quotation marks and citations omitted]) (*Herman*, 172 F3d at 139). Further, the type of control possessed by an employer need not be absolute; it "may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA, since such limitations on control do[] not diminish the significance of its existence" (*Herman*, 172 F3d at 139 [internal quotation marks and citations omitted]). In addition, "[n]o one of the four factors is dispositive, and the question of employer status turns upon the totality of the circumstances" (*Lauria*, 607 F Supp 2d at 409 *id.*). Thus, "any relevant evidence may be examined so as to avoid having the test confined to a narrow legalistic definition" (*Herman*, 172 F3d at 139). In sum, "the overarching concern is whether the alleged employer possessed the power to control the workers in question, with an eye to the economic realities presented by the facts of each case" (*Lauria*, 607 F Supp 2d at 409 [internal quotation marks and citations omitted]).

Altamirano v Omni Childhood Ctr., Inc., 51 Misc 3d 1213(A) (Sup Ct, Kings County 2012).

Here, plaintiff, in her amended complaint, as amplified by her affidavit, has alleged that Lipsitz, whom she believed was an owner of the club, had the power to hire and fire; determined the amount of pay; and supervised and/or directed her work. She further alleged that Lipsitz Jr., whom she also believed was an owner of the club, had the ability to hire and fire and to supervise and/or direct her work. This Court rejects defendants' argument that the complaint must be dismissed given the lack of precision of the complaint, since "further specificity may be sought in the context of a bill of particulars and discovery." *Lippett v The Education Alliance*, 14 AD3d 430, 432 (1st Dept 2005) (citations omitted).

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of the motion seeking to dismiss plaintiff's sixth cause of action in the amended complaint, sounding in conversion, is denied as moot because plaintiff withdrew this claim; and it is further

ORDERED that the sixth cause of action in the amended complaint is severed and dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant's motion to dismiss the amended complaint is otherwise denied, and the remainder of plaintiff's claims, as set forth in the amended complaint, shall continue; and it is further

ORDERED that, within 20 days of the entry of this order, plaintiff's counsel shall serve this order, with notice of entry, on counsel for defendants, as well as on the County Clerk and the Clerk of the General Clerk's Office; and it is further

ORDERED that service on the County Clerk and Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the following address: www.nycourts.gov/supctmanh); and it is further

ORDERED that defendants are directed to serve an answer to the amended complaint within 20 days after a service of a copy of this order, with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in this matter on May 28, 2019 at 80 Centre Street, Room 280, at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

3/20/2019
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE