SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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LISA BROWN, individually and on behalf of all other persons similarly situated,

Plaintiffs,

-against- Index No. 159289/18

SOUTH NASSAU COMMUNITIES HOSPITAL and related or affiliated entities, DECISION and ORDER MOT. SEQ. 001

Defendants.

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Nancy M. Bannon, J.:

In this putative class action, plaintiff Lisa Brown (Brown) commenced this action on behalf of herself and other similarly situated employees of defendant South Nassau Communities Hospital (the Hospital) to recover earned but unpaid wages and overtime compensation pursuant to New York Labor Law (Labor Law) Articles 6 and 19. The Hospital moves the dismiss the complaint, pursuant to CPLR 3211 (a) (7)[1] urging that the Labor Law does not support a claim for unpaid straight wages, and the claim for unpaid overtime fails to meet the required specificity for pleading such a claim. It also moves to dismiss, contending that the complaint fails to satisfy the requirements of CPLR 901 (a). For the reasons set forth below, the motion to dismiss is denied.

BACKGROUND

The following facts are taken from the complaint and accepted as true for the purposes of this motion to dismiss. Plaintiff Brown was a certified nurse's aide (CNA) employed by the

[1] While the Hospital argues both CPLR 3211 (a) (1) and (7), the notice of motion only seeks relief pursuant to (a) (7). However, since the parties address both bases, this court will determine the motion under both provisions of the CPLR.

Hospital from April 2017 to August 2, 2018, and was paid an hourly wage. She typically worked eight-hour shifts, five days a week. Her agreed upon regular rate of pay was between $18.00 to $20.00 per hour. She alleges that she was not paid for all the hours that she worked because while she and her co-workers would regularly work through their "lunch" break because they were too busy, the Hospital maintained a policy and practice of automatically deducting a half-hour "lunch" break from their hours, even though such a break was not taken. The complaint further alleges that the Hospital also maintained a policy and practice of not paying plaintiff and her co-workers overtime pay for time worked beyond the end of their scheduled shift. Brown and her co-workers would typically work 15 minutes after they clocked out at the end of their shifts about twice per week, but this time was uncompensated. As a result of these policies and practices, the complaint asserts that plaintiff Brown and members of the putative class were not paid for all the hours they worked at their regular rates of pay, or for all the overtime hours when they worked over 40 hours per week.

The complaint alleges two causes of action. The first is for failure to pay wages pursuant to Labor Law Article 6. The second claim is for failure to pay overtime compensation, pursuant to 12 NYCRR § 142-2.2, the overtime regulations under Labor Law Article 19.

The Hospital moves to dismiss the complaint based on documentary evidence and for failure to state a cause of action. It argues that there is no right to relief under the Labor Law for allegedly unpaid straight wages. It contends that plaintiffs' conclusory allegations of the Hospital's policy and practice fails to establish the existence of an enforceable agreement giving the plaintiffs the right to the timely payment of wages. It urges that the allegations for deductions from the number of hours worked, or the failure to pay for all hours, does not fall

within Labor Law § 193. On the second cause of action, the Hospital urges that the complaint fails to meet the pleading standard under CPLR 3013, and that overtime claims must meet a heightened pleading standard. Finally, it contends that the complaint demonstrates that plaintiffs cannot establish the prerequisites for class certification under CPLR 901 (a).

DISCUSSION

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), "the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Ackerman v New York Hosp. Med. Ctr. of Queens*, 127 AD3d 794, 795 [2d Dept 2015]; *see Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Leon v Martinez*, 84 NY2d 83, 87–88 [1994]). Dismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted conclusively establishes a defense as a matter of law (*see Leon v Martinez* , *supra* at 87-88). In other words, to prevail, the movant must submit evidence which "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." *Fortis Financial Services, LLC v Fimat Futures USA*, 290 AD2d 383, 383 (1st Dept. 2002); *see*; *Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431 (1st Dept. 2014); *Fontanetta v John Doe 1,* 73 AD3d 78 (2nd Dept. 2010).

Labor Law §§ 191, 193 Claim (First Cause of Action)

Labor Law Article 6 "sets forth a comprehensive set of statutory provisions enacted to strengthen and clarify the rights of employees to the payment of wages" (*Truelove v Northeast*

Capital & Advisory, Inc., 95 NY2d 220, 223 [2000]; *see Kolchins v Evolution Mkts., Inc.*, 31 NY3d 100, 109 [2018]). Labor Law §190 defines wages as "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis" (Labor Law § 190 [1]). Section 190 also sets forth various categories of workers to which Labor Law § 191 applies, including, as relevant here, "clerical or other worker," which is defined under section 190 (7) to include employees not included as manual workers, railroad workers, or commissioned salesmen (subsection four, five and six) but to exclude any person employed in a "bona fide executive, administrative or professional capacity whose earnings are in excess of nine hundred dollars [$900] per week" (Labor Law § 190[7]). Section 191, titled "Frequency of Payments," guarantees timely payment to "clerical and other worker" of wages "earned in accordance with the agreed terms of employment, but not less frequently than semi-monthly, on regular pay days designated in advance by the employer" (Labor Law § 191[1][d]). It provides that employees are entitled to full wages for all hours worked within the time period specified therein, and the failure to pay them for all time worked violates Section 191 (*see* NYSCEF Doc # 15, New York Department of Labor Opinion Letter [NYDOL], dated Nov 25, 2009 at 1; *see also Barenboim v Starbucks Corp.*, 21 NY3d 460, 470 [2013] [NYDOL's "interpretation of a statute it is charged with enforcing is entitled to deference"] [internal quotation marks and citation omitted]).

Labor Law § 193 provides, in relevant part, that "[n]o employer shall make any deduction from the wages of an employee, except deductions which" are made in accordance with certain laws, rules and regulations, or "are expressly authorized in writing by the employee and are for the benefit of the employee," and limits such deductions to payments for specific items such as

insurance premiums, pension and health benefits, charitable contributions, and payments for United States bonds (*id.*, § 1 [a], [b]; *see Ryan v Kellogg Partners Inst. Servs.*, 19 NY3d 1, 16 [2012]; *see also Kolchins v Evolution Mkts., Inc.*, 31 NY3d at 109 [section 193 prohibits employers from making any deductions from the earned wages of an employee unless authorized by employee or permitted by law]). To state a claim under section 193, a plaintiff must allege a specific deduction, and not merely a "wholesale withholding" of the payment of wages" (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 449 [1st Dept 2017]; *see Lord v Marilyn Model Mgt., Inc.*, 173 AD3d 606 [1st Dept 2019] [severance pay may be recovered as unpaid wages under Labor Law Article 6]; *Wachter v Kim*, 82 AD3d 658, 663 [1st Dept 2011] [compensation that was a "sum certain" that defendant was required to pay without discretion, constituted wages the nonpayment of which gave rise to a claim under Labor Law § 193]). Labor Law § 198 provides for the remedies available to a prevailing employee for substantive violations of Article 6 (*see Slotnick v RBL Agency*, 271 AD2d 365, 365 [1st Dept 2000]).

Here, plaintiff alleges that she was an employee of the Hospital, and that her wages were determined on the basis of time (*see* Labor Law §190 [1]). She maintains that she was a certified nurse's aide, earning $18.00 to $20.00 per hour (complaint, ¶¶ 12, 19), which is less than $900 per week. Thus, she clearly falls within the definition of an employee within the meaning of Labor Law § 190 (7) as a "clerical or other worker," and, as such, she is entitled to the protections of Labor Law § 191 (*Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 616 [2008]). The Hospital's assertion that some of the proposed class members are registered nurses who are professionals and, thus, are exempt, is unavailing. Plaintiff Brown specifically alleges that she is a CNA, and even if she was engaged in an administrative or professional capacity,

since her earnings are less than $900 per week, she still qualifies as a "clerical or other worker" (*see id.* at 616). Consideration as to whether the class can include others such as registered nurses is more appropriate on a class certification motion.

The first cause of action, however, fails to allege that plaintiffs were not paid in a timely manner in accordance with their agreed terms of employment as required under section 191. Rather, it alleges that the Hospital simply failed to pay (*see Jara v Strong Steel Door, Inc.*, 20 Misc 3d 1135[A], * 14 [Sup Ct, Kings County 2008], *affd in* part 58 AD3d 600 [2d Dept 2009]). Thus, it fails as a claim under that section (*Thomas v Meyers Assoc., L.P.*, 39 Misc 3d 1217[A], * 5-6 [Sup Ct, NY County 2013]).

However, plaintiff is entitled to the protection of Labor Law § 193, which applies to all employees as defined in section 190 (*see Pachter v Bernard Hodes Group, Inc.*, 10 NY3d at 614). The complaint, here, alleges that the Hospital maintained a policy and practice of "automatically deducting a half-hour per day for a 'lunch break'" (*id.*, ¶¶ 35-38), and that this was an improper deduction in violation of Labor Law § 193(1). She asserts that she worked during this time and did not take a "lunch hour," and, therefore, was entitled to be paid for such work (complaint, ¶¶ 12, 18, 20). Further, she asserts that she was required to clock out at the end of her shift, and that she would normally work 15 minutes beyond the end of her shift twice per week, but was not paid for this overtime (*id.*, ¶¶ 13-16, 21-22, 37). These allegations support plaintiff's contention that the Hospital did not just fail to pay her wages *ab initio*, which would not violate section 193 (*see Perella Weinberg Partners LLC v Kramer*, 153 AD3d at 449; *Stec v Passport Brands, Inc.*, 2018 NY Slip Op 32052[U], **6 [Sup Ct, NY County 2018]), but, rather, that it deducted the "lunch hour" from her wages, which would violate section 193 (*see Gelmann*

v Trustees of Columbia Univ. in the City of N.Y., 2019 NY Slip Op 31004[U], **8-9 [Sup Ct, NY County 2019]; *Ribbler v Chicksation, Inc.*, 2018 NY Slip Op 31814[U] at *4 [Sup Ct, NY County 2018]; *see also Wachter v Kim*, 82 AD3d 658). As such, they are sufficient to state a claim under section 193 (*see Ackerman v New York Hosp. Med. Ctr. of Queens*, 127 AD3d at 795 [paramedic's allegations that hospital employer withheld wages by always rounding down to the nearest quarter-hour when employees worked past their scheduled shift stated claim for withheld wages and overtime under Labor Law § 193]; *V. Groppa Pools, Inc. v Massello*, 106 AD3d 723, 724 [2d Dept 2013] [allegations of failure to pay certain wages and overtime compensation adequately assert claim]; *Wachter v Kim*, 82 AD3d 658 [complaint stated claim under Labor Law §193 based on allegations that defendants unlawfully deducted wages by failing to pay balances of minimum guaranteed compensation]; *Konidaris v Aeneas Capital Mgt., LP*, 8 AD3d 244, 244 [2d Dept 2004] [complaint adequately stated Labor Law article 6 claim for unpaid and improperly withheld wages]; *Jacobs v Macy's E.*, 262 AD2d 607, 609 [2d Dept 1999] [Labor Law § 193 claim adequately stated]).

The Hospital's reliance on *Perella Weinberg Partners LLC v Kramer* (153 AD3d 443) is misplaced as that case is factually distinguishable. In *Perella*, the employees deferred $10 million in compensation that was due them. The employer terminated them without paying the deferred compensation, and commenced an action against them. The employees counterclaimed, alleging the employer violated Labor Law § 193 for withholding and refusing to pay the employees' deferred compensation wages. The trial court found that the counterclaims turned on whether any of the funds were owed under the parties' contracts, and held that this was "the classic type of dispute [that] is not covered by § 193" (*Perella Weinberg Partners LLC v*

Kramer, 2016 NY Slip Op 31387[U], * 34 [Sup Ct, NY County 2016], *affd as mod*, 153 AD3d 443). The First Department affirmed that the counterclaims were properly dismissed because "a wholesale withholding of payment is not a 'deduction' within the meaning of Labor Law § 193" (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d at 449).

Here, unlike *Perella*, the non-payment at issue does not arise from a dispute over whether plaintiff was entitled to payment pursuant to her employment agreement or according to the terms and conditions of her employment. Rather, plaintiffs seek to recover earned wages that were deducted due to a policy and practice of automatically deducting meal breaks regardless of whether the plaintiffs took their breaks or, instead, performed compensable work (*see Ackerman v New York Hosp. Med. Ctr. of Queens*, 127 AD3d at 795; *Gelmann v Trustees of Columbia Univ. in the City of N.Y.*, 2019 NY Slip Op 31004[U], **7-9; *Ribbler v Chicksation, Inc.*, 2018 NY Slip Op 31814[U], *4).

Contrary to the Hospital's contention, the complaint is sufficiently particular to give both the court and the parties notice of the transactions and occurrences intended to be proven and the material elements of the claims (CPLR 3013; *see Ackerman v New York Hosp. Med. Ctr. of Queens*, 127 AD3d at 795-796; *Jimenez v Concepts of Independence, Inc.*, 2018 NY Slip Op 30257[U], *4 [Sup Ct, NY County 2018]). The Hospital's reliance on *East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.* (66 AD3d 122, 125 [2d Dept 2009], *affd* 16 NY3d 775 [2011]) to urge that the complaint fails to give notice, is unpersuasive. That case involved determining if a complaint contained sufficient allegations to support piercing the corporate veil where it lacked any allegation of the corporate owner's conduct, which is completely

distinguishable from the complaint at issue here. Therefore, the first cause of action survives this motion to dismiss.

Overtime Claim (Second Cause of Action)

The second cause of action alleges a claim for overtime under the Labor Law regulations (12 NYCRR 142-2.2). Pursuant to Labor Law § 663, an employee may bring a civil action for failure to pay overtime wages in accordance with Labor Law regulation 12 NYCRR 142–2.2 (Labor Law § 663 [1]; 12 NYCRR 142–2.2; *see also Ballard v Community Home Care Referral Serv.*, 264 AD2d 747 [2d Dept 1999]). Under this regulation, non-exempt employees must be paid at a rate of not less than one and one-half times the employee's regular rate for any hours worked in excess of 40 hours in a given week (12 NYCRR 142–2.2 [adopting provisions of Federal Labor Standards Act [FLSA] and implementing New York Labor Law]; *see Thomas v Meyers Assoc., L.P.*, 39 Misc 3d 1217[A]).

To plead a claim for unpaid overtime, 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" (*Ribbler v Chicksation, Inc.*, 2018 NY Slip Op 31814[U], *4; *see V. Groppa Pools, Inc. v Massello*, 106 AD3d at 724).

Plaintiff, here, alleges that she was an employee, she worked 8-hour shifts, five days a week (40 hours), and that she would "normally work approximately 15 minutes beyond her regularly scheduled shift time," two times per week (complaint, ¶¶ 13-15), and during the lunch period (*id.*, ¶¶ 17-18, 20), but that she was not paid overtime wages for this additional time. These allegations are sufficiently concrete to state a claim for overtime wages at this early stage

of the litigation. The complaint clearly states that she worked 40 hours per week, she was a nonexempt employee, earning only $18.00 to $20.00 per hour, and was uncompensated at the overtime rate for this specific time (*see e.g. Ribbler v Chicksation, Inc.*, 2018 NY Slip Op 31814[U] at *4 [complaint sufficient where alleges plaintiffs "typically worked" between 56 and 70 hours, and between 70 and 105 hours and defendant failed to remit overtime]; *Leon v Port Washington Union Free School Dist.*, 49 F Supp 3d 353, 357 [ED NY 2014] [plaintiff's allegations that she regularly worked a 40-hour work week, estimated additional overtime each week of 1 ½ to 2 hours, and did not take her bona fide meal period except 1 in 20 days during the school year, sufficiently states claim for overtime violation under parallel Fair Labor Standards Act (FSLA)]; *DiSimone v CN Plumbing, Inc.*, 2014 WL 1281728, * 4 [ED NY 2014] [complaint sufficiently alleges plaintiff typically worked over 40 hours per week and was not compensated for overtime hours]; *Perry v City of New York*, 2013 WL 6641893, * 3 [SD NY 2013] [claim sufficient where plaintiff was assigned to work 40 hours per week for 35 weeks per year, and worked uncompensated time on a daily basis]; *see also Lundy v Catholic Health Sys. of Long Island Inc.*, 711 F3d 106, 114 & n 7 [2d Cir 2013] ["an approximation of overtime hours worked may help draw a plaintiff's claim closer to plausibility"]).

The Hospital raised an exemption from overtime pay on the ground that some of the putative class members, like the registered and licensed nurses, are professional employees exempt under 12 NYCRR 142-2.14 (c)(4)(iii). Under that regulation, to qualify for the "professional exemption," the job must require "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from general academic education . . ." or be "original and

creative in character in a recognized field of artistic endeavor" (12 NYCRR 142-2.14 [c][4][iii]). The Hospital, however, failed to meet its burden of showing that plaintiff Brown comes within this exemption. Its submission of its own job descriptions for registered and licensed practical nurses does not satisfy that burden, nor does it conclusively establish a defense to the asserted claim as a matter of law (CPLR 3211 [a] [1]; *see Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651 [1st Dept 2011]). As discussed above, plaintiff Brown, as a CNA, does not have the same academic qualifications, job description or duties as such nurses (*see Thomas v Meyers Assoc., L.P.*, 39 Misc 3d 1217[A]). To the extent that the Hospital asserts in its brief that plaintiff Brown "is not employed as a Certified Nurse Aide," it completely fails to support that claim (defendant's memorandum in support at 14). Moreover, this exemption argument is raised by the Hospital in connection with its challenge to class certification, which as discussed below, is premature.

The Hospital's reliance on various federal caselaw to urge that there is a heightened pleading requirement for failure to pay overtime claims, is misplaced. New York Labor Law claims are subject to the notice pleading requirements of CPLR 3013, and, while plaintiff's complaint is not overly detailed, it clearly provides notice of her claims as required by CPLR 3013, clearly pleading that she worked 40 hours per week as well as some uncompensated time in excess of the 40 hours (*Menga v Clark Dodge & Co., Inc.*, 2012 NY Slip Op 33062[U] [Sup Ct, NY County 2012] [Bransten, J.]). Moreover, contrary to the Hospital's contention, plaintiffs have satisfied even the pleading requirements under federal caselaw which requires that the complaint alleges facts that the employee worked 40 hours in a given work week, and gives an approximation of the overtime hours worked (*see Lundy v Catholic Health Sys. of Long Island*

Inc., 711 F3d at 114; *see Dejesus v HF Mgt. Serv., LLC*, 726 F3d 85, 89 [2d Cir 2013], *cert denied* 571 US 1128 [2014] [no requirement to plead with mathematical precision, so long as there are enough facts to make it plausible that plaintiff worked at least one given work week of more than 40 hours]; *Bowen v Baldwin Union Free School Dist.*, 2018 WL 4560726 at * 5-6 [ED NY 2018]).

To the extent that plaintiff seeks recovery on behalf of herself and the class of unpaid, earned compensation for the "lunch" break, referred to as gap-time, pursuant to Labor Law § 663, they have stated a claim. Section 663 allows an employee to recover where she is paid "less than the wage to which he or she is entitled" (Labor Law § 663[1]; *see Nakahata v New York Presbyt. Healthcare Sys., Inc.*, 723 F3d 192, 201-202 [2d Cir 2013] [gap-time claims are consistent with the language of Labor Law § 663]; *Lundy v Catholic Health Sys. of Long Island Inc.*, 711 F3d at 118 [same]). Plaintiff is seeking to be paid the regular hourly rate for previously uncompensated time, alleging that she and the class members worked 40 hours per week but that they were only paid for 37 ½ hours after the "lunch" break was deducted (compl, ¶¶ 18, 20, 35-36).

Further, the allegations in the complaint sufficiently set forth factual allegations to arguably establish the prerequisites for a class action as set forth in CPLR § 901(a), and to survive this motion to dismiss (*see D'Emidio v Williamsbridge Rest. Inc.*, 136 AD3d 406, 406 [1st Dept 2016]; *Ackerman v New York Hosp. Med. Ctr. of Queens*, 127 AD3d at 796). The complaint includes factual allegations addressing the five prerequisites to class certification pursuant to CPLR 901(a) (compl, ¶¶ 5-11).

To the extent that the Hospital seeks dismissal of the class action allegations for failure to state a claim (CPLR 3211 [a] [7]) on the ground that plaintiff failed to actually demonstrate the prerequisites for class certification under CPLR 901 (a), that branch of the motion also is denied. A motion to challenge whether a class action may be maintained is to be made within 60 days after the time to serve the responsive pleading has passed (*Ackerman v New York Hosp. Med. Ctr. of Queens*, 127 AD3d at 796; *Bernstein v Kelso & Co.*, 231 AD2d at 323). Here, the Hospital's motion to dismiss was made prior to service of the answer, and, thus, the issue of whether class certification is appropriate "is not properly raised in the context of such a motion" (*Ackerman v New York Hosp. Med. Ctr. of Queens*, 127 AD3d at 796; *see Bernstein v Kelso & Co.*, 231 AD2d at 323).

Accordingly, it is

ORDERED that the defendant's motion to dismiss is denied, and it is further

ORDERED that the parties shall appear for a preliminary/settlement conference on September 26, 2019, at 2:30 p.m..

This constitutes the Decision and Order of the court.

Dated: July 22, 2019

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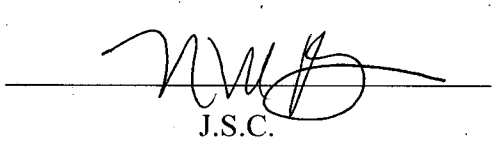

J.S.C.

HON. NANCY M. BANNON