Rojas v Hi-Tech Metals, Inc.
2019 NY Slip Op 32755(U)
September 9, 2019
Supreme Court, Queens County
Docket Number: 702847/2019
Judge: Cheree A. Buggs

Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

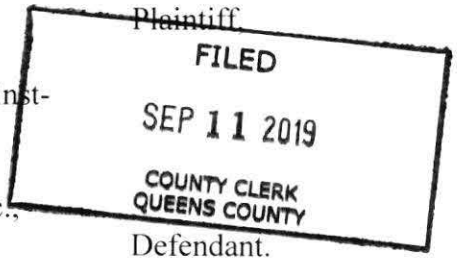
Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

Jose Rojas, Individually, and on behalf of all others similarly situated,

Index No. 702847/2019

Plaintiff,

-against-



Hi-Tech Metals, Inc.,

Defendant.

Motion
Date: August 7, 2019

Motion Cal. No.: 42

Motion Sequence No.: 1

The following e-file papers numbered 10-19, 23-24 and 26-27 submitted and considered on this motion by defendant Hi- Tech Metals, Inc., (hereinafter referred to as "Defendant") seeking an Order pursuant to Civil Practice Law & Rules (hereinafter referred to as "CPLR") 3211 (e), (a) (1) and (7) partially dismissing plaintiff Jose Rojas's (hereinafter referred to as "Plaintiff") Verified Complaint.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	EF 10-19
Affirmation in Opposition-Affidavits-Exhibits.	EF 23-24
Reply Affirmation-Memorandum of Law.....	EF 26-27

This action arises out of an employment relationship between Plaintiff and Defendant. Plaintiff was a manual worker for the Defendant performing physical duties including packing, unpacking and handling construction materials throughout his workday. Plaintiff alleges that he and a class of persons similarly situated, were paid on a bi-weekly basis.

Plaintiff's causes of action are as follows: violation of Article 6 of the New York Labor Law ("NYLL") §§ 191, 195 and 198 for unpaid wages, unlawful wage deduction, and violation of NYLL § 195 for failing to send notices and statements.

Legal Standard

"To succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." (*Hoeg Corp. v Peebles Corp*, 153 AD3d 607 [2d Dept 2017]; *Teitler v Pollack & Sons*, 288 AD2d 302 [2d Dept 2001]; *see also Held v Kaufman*, 91 NY2d 425 [1998]). "To qualify as documentary evidence, the evidence 'must be unambiguous and of undisputed authenticity' " (*Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010]). "Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other paper, the contents of which are essentially undeniable,' qualify as documentary evidence in proper cases..." (*Hartnagel v FTW Contr.*, 147 AD3d 819 [2d Dept 2017]). "On a motion to dismiss pursuant to CPLR 3211 (a) (7), the claim must be afforded a liberal construction, the facts therein must be accepted as true, and the plaintiff must be accorded the benefit of every favorable inference" (*Sawitsky v State*, 146 AD3d 914 [2d Dept 2017]; *see also Leon v Martinez*, 84 NY2d 83 [1994]).

NYLL § 191 (1)(a) (i) and NYLL § 198 (1-a)

NYLL § 191 (1)(a) (i) states:

> a. Manual worker.--- (i) A manual worker shall be paid weekly and not later than seven calendar days after the end of the week in which the wages are earned; provided however that a manual worker employed by an employer authorized by the commissioner pursuant to subparagraph (ii) of this paragraph or by a non-profitmaking organization shall be paid in accordance with the agreed terms of employment, but not less frequently than semi-monthly.

NYLL § 198 (1) states:

> 1. In any action instituted upon a wage claim by an employee or the commissioner in which the employee prevails, the court may allow such employee in addition to ordinary costs, a reasonable sum, not exceeding fifty dollars for expenses which may be taxed as costs. No assignee of a wage claim, except the commissioner, shall be benefited by this provision.

NYLL § 198 (1-a) states in part:

> In any action instituted in the courts upon a wage claim by an employee or the commissioner in which the employee prevails, the court shall allow such employee to recover the full amount of any underpayment, all reasonable attorney's fees, prejudgment interest as required under the civil practice law and rules, and, unless the employer proves a good faith basis to believe that its underpayment of wages was

> in compliance with the law, an additional amount as liquidated damages equal to one hundred percent of the total amount of the wages found to be due, except such liquidated damages may be up to three hundred percent of the total amount of the wages found to be due for a willful violation of section one hundred ninety-four of this article.

Plaintiff claims Defendant's failure to pay Plaintiff on a weekly basis in accordance with NYLL § 191 (1)(a)(i) resulted in a claim for unpaid wages, underpayment, wages due or wage claim. Defendant argues that Plaintiff's claim fails because there is no private right of action for this violation, furthermore, while Plaintiff was paid on a bi-weekly basis the payments were made. Defendant relies on *Azher Hussain v Pakistan International Airlines Corp.* (2012 WL 5289451,*1, [ED NY, October 23, 2012, No. 11-CV-932(ERK)(VVP)]) where plaintiff worked as a chef for defendant's company. Upon the firing of defendants co-worker plaintiff alleges his work load increased and his work day became longer. (2012 WL 5289451,*1). Despite promises that his pay would increase plaintiff neither received an increase in pay nor overtime for his extended hours. Plaintiff brought this action with claims including NYLL §§ 191(1)(a) and 198(1-a) defendant moved for summary judgment. (2012 WL 5289451,*2) The court granted summary judgment in favor of defendant dismissing plaintiff's two NYLL claims finding that NYLL contains no provision for private recovery for violation of its provisions regarding frequency of payment and record keeping. (2012 WL 5289451,*3).

Defendant also cites, *David Hunter v. Planned Building Services, Inc.* (2018 WL 3392476, *1, [Sup Ct, NY County, June 20, 2018, No. 715053/2017]) where plaintiff, a manual laborer for defendant was paid bi-weekly. Defendant moved to dismiss arguing NYLL § 191 does not provide the plaintiff with a private cause of action under the frequency of payment provision because plaintiff does not allege unpaid wages (2018 WL 3392476, *2). Plaintiff claimed NYLL § 198 entitled him to liquidated damages, interest, cost and attorney fees. The court held plaintiff had no private right of action under NYLL § 198 (1-a) for a frequency of payment violation where the complaint does not allege unpaid wages (2018 WL 3392476, *3). The court acknowledges that there is no dispute that plaintiff was paid on a bi-weekly basis, nonetheless the court held NYLL § 198 provides for recovery of nonpayment of wages (2018 WL 3392476, *2).

This Court respectfully disagrees with the holdings in *Hussain* and *Hunter*. The Court of Appeals in *Seymour Gottlieb v Kenneth D. Laub & Company, Inc.* (82 NY 2d 457 [1993]) discussed the applicability of NYLL § 198 to "substantive provisions" of Article 6 of the NYLL. In *Gottlieb*, plaintiff a broker sought to recover under claims of common law contract and NYLL § 198 against defendant, his employer, for unpaid commission (*id* at 460). The court ultimately held the remedies set forth in NYLL § 198 are inapplicable where there is no claim that defendant violated NYLL Article 6, but rather a common law contract claim (*id* at 464). The court referenced the legislative history of NYLL § 198 (1-a) stating "the *sole* purpose of the bill: 'To assist the *enforcement of the wage payment* and minimum wage payment *laws* by imposing greater sanction on employers *for violation of those laws*" (*id* at 463). The court further noted "... all of the remaining provisions of Labor Law § 198 strongly suggest that the entire section was intended merely to afford procedural

rules, including costs and cost related remedies, to apply in actions brought for wage claims created under the substantive provisions of Labor Law Article 6" (*id* at 464).

Plaintiff cites *Irma Vega v CM Associates Construction Management LLC.* (2018 WL 236761, *1, [Sup Ct. Bronx County, May 15, 2018, No. 23559/2016E]) where plaintiff brought the action individually and on behalf of a class of others similarly situated against the defendant employer for violation of NYLL § 191(1)(a). Specifically, plaintiff alleges that defendant paid plaintiff, a manual laborer, on a bi-weekly basis (2018 WL 236761, *1). Plaintiff contended she was entitled to recovery pursuant to NYLL § 198. Defendant argued the plaintiff had no private right of action and moved to dismiss pursuant to CPLR 3211(a)(7) (2018 WL 236761, *1). The court denied defendant's motion to dismiss plaintiff's NYLL § 191(1)(a) claim because it was undisputed that plaintiff was paid on a bi-weekly basis (2018 WL 236761, *2). Next, the court considered defendant's allegation that plaintiff had no private right of action within the context of the factors set forth in *Margaret A. Sheehy v Big Flats Community Day, Inc.* (73 NY 2d 629, 633 [1989]) "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose: and, (3) whether creation of such a right would be consistent with the legislative scheme" (2018 WL 236761, *2). The court found plaintiff alleged facts sufficient to satisfy all three factors and a private right of action exists under NYLL § 191(1)(a). The court reasoned plaintiff is a manual worker as classified under NYLL § 190; a private right of action under NYLL § 191 (1)(a) would promote the legislative purpose and be consistent with the legislative intent of NYLL Article 6 . Also the terms of NYLL § 198 (1-a) indicate that wage claims (including retroactive recovery) are permissible if asserted either individually or by the commissioner; finally, in the past recovery has been permitted pursuant to various provisions within NYLL Article 6 (2018 WL 236761, *2). The court held plaintiff stated a cause of action for relief pursuant to NYLL §§ 191 and 198 (2018 WL 236761, *3).

In light of the sentiments set forth in *Gottlieb* by the Court of Appeals and the holding in *Vega*. Defendant's motion to dismiss Plaintiff's NYLL §§ 191(1)(a) and 198 (1-a) claims is denied.

NYLL § 195(1)(a)

NYLL § 195(1)(a) states:

> Every employer shall:
>
> 1. (a) provide his or her employees, in writing in English and in the language identified by each employee as the primary language of such employee, at the time of hiring, a notice containing the following information: the rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; allowances, if any, claimed as part of the minimum wage, including tip, meal, or lodging allowances; the regular pay day designated by the employer in accordance with section one hundred ninety-one of this article; the name of the employer; any "doing business as" names used by the employer; the physical address

> of the employer's main office or principal place of business, and a mailing address if different; the telephone number of the employer; plus such other information as the commissioner deems material and necessary. Each time the employer provides such notice to an employee, the employer shall obtain from the employee a signed and dated written acknowledgment, in English and in the primary language of the employee, of receipt of this notice, which the employer shall preserve and maintain for six years. Such acknowledgment shall include an affirmation by the employee that the employee accurately identified his or her primary language to the employer, and that the notice provided by the employer to such employee pursuant to this subdivision was in the language so identified or otherwise complied with paragraph (c) of this subdivision, and shall conform to any additional requirements established by the commissioner with regard to content and form. For all employees who are not exempt from overtime compensation as established in the commissioner's minimum wage orders or otherwise provided by New York state law or regulation, the notice must state the regular hourly rate and overtime rate of pay;

Defendant moves to dismiss Plaintiff's claim pursuant to NYLL § 195 (1) on the grounds that the annual wage notice provision was repealed prior to the beginning of Plaintiff's employment. Plaintiff alleges that he is not alleging defendant failed to provide annual wage notices. Plaintiff's claim pursuant to NYLL § 195(1) is dismissed only to the extent that it is based upon language that was repealed prior to Plaintiff's employment with Defendant. Otherwise, Plaintiff's claim pursuant to NYLL § 195(1) properly states a cause of action.

NYLL § 195(3)

NYLL § 195(3) states:

> 3. furnish each employee with a statement with every payment of wages, listing the following: the dates of work covered by 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; and net wages. For all employees who are not exempt from overtime compensation as established in the commissioner's minimum wage orders or otherwise provided by New York state law or regulation, the statement shall include 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. For all employees paid a piece rate, the statement shall include the applicable piece rate or rates of pay and number of pieces completed at each piece rate. Upon the request of an employee, an employer shall furnish an explanation in writing of how such wages were computed;

Defendant moves to dismiss Plaintiff's NYLL § 195(3) claim pursuant to CPLR 3211 (a)(1).

Defendant attached to its motion papers Exhibit 1 a document entitled "Earning Statement" purportedly sent to Plaintiff. The document contains Plaintiff's and Defendant's name, hourly rate, deductions, etc. However, Plaintiff alleges the document falsely states Plaintiff was paid by direct deposit ant that discovery will indicate Plaintiff never received the alleged wage statements.

Defendant's motion to dismiss Plaintiff's NYLL § 195(3) claim is granted. Plaintiff's allegation that the statements were to be provided weekly due to the frequency of Payment rules set forth in NYLL § 191 (1)(a) is not supported by a plain reading of NYLL § 195 (3). Therefore it is,

ORDERED, that the branch of Defendant's motion seeking to dismiss Plaintiff's NYLL §§ 191 and 198 claims is denied; and it is further,

ORDERED, that the branch of Defendant's motion seeking to dismiss Plaintiff's NYLL § 195 (1) claim to the extent that Plaintiff's claim is based upon language that has been appealed is granted in part; and it is further,

ORDERED, that the branch of Defendant's motion seeking to dismiss Plaintiff's NYLL § 195 (3) claim pursuant to CPLR 3211 (a)(1) is granted.

The foregoing constitutes the decision and order of this Court.

Dated: September 9, 2019

Hon. Thereé A. Buggs, JSC

FILED
SEP 11 2019
COUNTY CLERK
QUEENS COUNTY