

<b>DeSouza v Vernon Hills Contr. Corp.</b>
2020 NY Slip Op 35025(U)
March 2, 2020
Supreme Court, Westchester County
Docket Number: Index No. 55040/2018
Judge: Terry Jane Ruderman
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
DERLY DESOUZA,

Plaintiff,

DECISION and ORDER

-against-

Motion Sequence No. 1  
Index No. 55040/2018

VERNON HILLS CONTRACTING CORPORATION,  
VERNON HILLS LAND DEVELOPMENT CORP.,  
and SAM SCAVONE,

Defendants.

-----X  
RUDERMAN, J.

The following papers were considered in connection with the motion by plaintiff for partial summary judgment:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Exhibits A - H and Memorandum of Law	1
Affirmation in Opposition, Affidavits, Exhibits A - L and Memorandum of Law	2
Reply Affirmation and Reply Memorandum of Law	3

Plaintiff Derly DeSouza filed the summons and complaint in this action on April 6, 2018, against his former employers, pursuant to various provisions of the Labor Law for unpaid overtime compensation, liquidated damages and civil penalties, and related relief. Plaintiff alleges that he was employed as a mechanic by defendants Vernon Hills Contracting Corporation, Vernon Hills Land Development Corp., and Sam Scavone (collectively, "VHCC") from February 2010 to December 2013. According to the complaint, his job entailed arriving at

defendants' yard at about 7:00 a.m. to open the yard for the employees, then inspecting and maintaining the trucks and machines to ensure that they were in proper working order prior to leaving the yard. If one of the trucks or machines was not functioning properly, plaintiff repaired it that morning. During the day, he performed routine maintenance to the vehicles and cleaned the yard. Additionally, as the only mechanic, plaintiff was also responsible for repairing any equipment that broke down at any worksite, so that he was also required to travel to individual worksites to perform necessary maintenance. At the end of the day, it is asserted, plaintiff cleaned the yard and waited for all of the trucks and machines to return from the worksites. If any machinery was not functioning at that time, he stayed at work to repair it for the next day.

Plaintiff's complaint claims that he typically worked 9½ hours per day, 6 days per week, for a total of approximately 57 hours per week, with occasional additional hours when the employees returned to the yard after 4:30 PM or when machinery required maintenance at the end of the day. Notwithstanding this, plaintiff asserts, defendants paid him only at his regular rate of pay for all hours worked, including hours worked in excess of forty per week, violating the overtime provisions under the Labor Law. He further asserts that defendants failed to accurately record his hours worked, and paid him in cash for hours worked beyond forty each week. As a result, his pay stubs inaccurately reflected the information required by Labor Law § 195(3).

In the present motion, plaintiff seeks partial summary judgment (1) finding defendants liable to plaintiff for unpaid overtime compensation; (2) finding defendants liable for failing to furnish accurate wage statements for each pay period; (3) awarding actual unpaid overtime wages; (4) awarding liquidated damages under the Labor Law; (5) awarding statutory damages

for violation of Labor Law § 195(3) pursuant to NYLL § 198 in the amount of \$2,500.00; along with pre-judgment interest; post-judgment interest; and an award of attorneys' fees, costs and expenses. Plaintiff asserts that it is undisputed that defendants failed to pay overtime compensation and did not provide accurate wage statements, which entitles him to the damages he seeks. He submits a portion of the deposition testimony of defendants' comptroller, Irene De LaPena, in which she stated that she obtained from plaintiff the number of days he worked and then simply recorded eight hours of work per day, and did not ascertain the number of hours he actually worked.

In opposition, defendants dispute plaintiff's claim that he worked more than eight hours per work day. They rely on the deposition testimony of defendant Scavone, that plaintiff never came into work earlier than 8:00 a.m. and left by 4:00 p.m., for the period from April 6, 2012 through December 13, 2013, which is the portion of plaintiff's period of employment with defendants for which he is entitled to bring a claim. Scavone denied that plaintiff was ever paid in cash. In addition, Scavone testified that either he or employee Jose Tejada, not plaintiff, unlocked the gate to defendants' yard in the morning and locked up at 4:30 p.m. He also testified first that the company does not work on Saturdays (Scavone EBT p. 12), but thereafter acknowledged that plaintiff did work some Saturdays (Scavone EBT p. 24). In addition, defendants submitted an affidavit by Scavone in which he states, inter alia, that defendants paid plaintiff solely by check accompanied by a paystub for each period, and that plaintiff received those checks/paystubs without complaint or objection. Defendants also submit time records for two weeks in 2011 reflecting that plaintiff was compensated in those weeks for overtime based on work performed on Saturdays (NYSCEF Doc. No. 32).

Defendants further submit the complete deposition of comptroller De LaPena, who explained, inter alia, that plaintiff reported his days worked either to her or to Scavone, who conveyed the information to her, and that when plaintiff had worked overtime by working on a Saturday, he reported those hours to her; otherwise, he just informed her of the number of eight-hour days he had worked.

An affidavit of Jesus Tejada is also submitted by defendants. Although plaintiff asserted that he reported to Tejada that he worked overtime, and complained to him about defendants' failure to pay him overtime, Tejada disputes many of plaintiff's claims. Specifically, he states that either he or Scavone, and no one else, unlocks the gate to the yard at 6:30 a.m. and locks it at 4:30; he never discussed hours and wages with plaintiff, and he never observed plaintiff working overtime. He also denies plaintiff's claim that he complained to Tejada that he was not being paid for overtime.

#### Analysis

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 [1978]). The court's task on a motion for summary judgment is issue finding rather than issue determination (*see Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]), and it must view the evidence in the light most favorable to the party opposing the motion (*see Gardella v Remizov*, 144 AD3d 977, 979 [2d Dept 2016]). Once the movant has presented a prima facie showing of its entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), the burden shifts to the party opposing the motion to produce competent evidence demonstrating the existence of triable issues of fact (*see*

*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Assuming that plaintiff's assertions, in his verified complaint and his deposition, regarding his work hours and the manner in which he was paid, suffice to make a prima facie showing that he worked overtime without proper payment for the extra hours, and without proper reporting of those hours, summary judgment must still be denied. The portion of the testimony of comptroller De LaPena that plaintiff submitted in support of his summary judgment motion, merely establishes that she assumed eight-hour days when he reported to her the number of days he worked. That testimony is not sufficient to establish defendants' liability as a matter of law.

Moreover, plaintiff has not established the assertion he makes in his moving papers that defendants do not dispute his assertions against them regarding payment of overtime or providing accurate wage statements. Scavone's testimony, Tejada's affidavit, and the totality of De LaPena's testimony, along with Savone's affidavit, create issues of fact as to whether plaintiff worked more than 40 hours per week during the actionable period, and whether his time was properly tracked and compensated. There can be no determination as a matter of law regarding whether and how plaintiff was properly compensated for overtime hours and whether defendants kept accurate records and provided accurate wage statements that reported his overtime, until the question of fact regarding whether plaintiff worked overtime is answered.

Notably, defendants established a prima facie showing that they keep time and wage records; plaintiff is only entitled to relief if he establishes that the information in those records regarding his employment is inaccurate. This Court cannot, on this record, make such a determination. Defendants' failure to use a time clock or sign-in sheets for plaintiff does not in itself establish as a matter of law either that defendants' records are inaccurate, or that plaintiff's

compensation is inadequate, and their calculation of plaintiff's daily pay based on a standard eight-hour workday is not improper in itself, absent a determination that the amount of hours he was required to work was greater than eight hours.

The other forms of relief plaintiff seeks under the Labor Law hinge on a finding that he worked overtime as he claims during the relevant period. They cannot be awarded at this juncture.

For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion for partial summary judgment is denied, and it is further

ORDERED that all parties are directed to appear at 9:15 a.m. on Tuesday, April 21, 2020, in the Settlement Conference Part, room 1600 of the Westchester County Courthouse located at 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York, 10601, to schedule a trial.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York  
March 2, 2020

  
HON. TERRY JANE RUDERMAN, J.S.C.