Henix v Liveonny, Inc.
2021 NY Slip Op 30102(U)
January 13, 2021
Supreme Court, New York County
Docket Number: 158222/2016
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE** ***Justice*** **PART** **IAS MOTION 12**

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AVERY HENIX, ANTHONY WARE,

Plaintiffs,

- v -

LIVEONNY, INC.,

Defendant.

---X

INDEX NO. 158222/2016

MOTION DATE

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 168-195, 206-227 were read on this motion for summary judgment.

By notice of motion, plaintiffs, on behalf of themselves and the class, move pursuant to CPLR 3212 for an order awarding them summary judgment. Defendant opposes.

I. PROCEDURAL BACKGROUND

By summons and amended complaint dated September 29, 2016, plaintiffs commenced this class action alleging that they and the class, composed of tissue recovery specialists (TRSs) who worked for defendant for the six-year before the filing of this action, were not paid proper wages, specifically for their travel and "on-call" time, and were not provided with accurate wage statements under the Labor Law. (NYSCEF 183),

By decision and order dated May 23, 2019, plaintiffs' motion for class certification was granted, and a class of the following persons was certified:

> All current and former TRSs who worked for Defendant in the State of New York during the Class Period and who (a) were not compensated for all time spent traveling to jobs and between jobs; (b) were not compensated for all time spent on-call; (c) were not paid at their straight or agreed upon rate for all hours worked under forty (40) hours in a week; (d) were not paid overtime of time and one-half their regular rate of pay for all hours

worked over forty (40) in a week; (e) were not paid spread of hours pay and/or (f) were not provided accurate wage statements.

(NYSCEF 212).

II. PERTINENT FACTS

A job description for TRSs, prepared by defendant, dated July 2003 and revised October 2008, reflects that TRSs are tasked with traveling to various hospitals and recovery facilities to aid in "tissue recovery." TRSs were classified as exempt under the Fair Labor Standards Act (FLSA). It provides, as pertinent here, that TRSs are to carry a pager during all scheduled on-call hours and respond within 15 minutes, and to arrive at the hospital on time for the scheduled recovery. (NYSCEF 171).

A New York Organ Donor Network (NYODN) standard operating procedure, which became effective on April 30, 2007, was last reviewed on July 30, 2010, and which plaintiffs' counsel affirms was adopted by defendant, reflects that mileage for commuting from home to office and vice versa is not reimbursable, whereas mileage from home to hospital and vice versa and from office to hospital and vice versa is business-related and reimbursable. (NYSCEF 179).

An undated NYODN tissue services department recovery team reimbursement schedule, which plaintiffs' counsel affirms is from before May 2016, reflects that TRSs were paid per case and which activities are compensable and by how much. The schedule reflects that tissue recovery, trainings, and "waiting, meetings, cleaning, organizing" were compensable, whereas travel time is not. (NYSCEF 175).

Defendant's per diem tissue recovery pay rules, effective May 15, 2016, reflect that TRSs were paid by the hour. TRS team leaders' start time begins "upon entry into LiveOnNY office for supplies pickup and ends at the conclusion of the case at the hospital." In addition, for non-team leaders, "start time begins when onsite in the hospital, end time recorded at the

conclusion of the case at the hospital" and "two hours travel time to each case" may be added. For all TRSs handling back-to-back cases, "the clock will continue if within two hours of the previous case" and a "[m]aximum of two hours of travel time will be paid for both cases." In addition, "[o]vertime is paid at time and a half for hours worked over 40 in a week" and "[t]ravel time add on of 2 hours does not count towards overtime." Finally, "[i]f a case takes less than 4 hours the system will automatically auto fill to 4 hours." (NYSCEF 178).

By affidavit dated February 10, 2018, plaintiff Ware states that he worked for defendant since October 2010 and was paid a flat fee per case until May 15, 2016, when his pay was changed to an hourly rate. He denies having been paid for all travel time to hospitals, between hospitals, and returning from hospitals, and that following the completion of one case, he has been assigned to another case shortly thereafter. (NYSCEF 186).

By affidavit dated February 12, 2018, plaintiff Henix states that he has worked for defendant since April 1998 to the present, and was responsible for traveling to hospitals, recovering tissue, facilitating the recovery of tissue for transplant, completing paperwork, and communicating with other members of the recovery team. He explains that there is a 24-hour recovery window for tissue recovery, and a detailed procedure to follow before tissue may be recovered. Once the hospital receives a deceased patient, it checks with the donor center to see if the patient is suitable for tissue recovery, and if so, the donor center asks the deceased's family for information and for permission to recover tissue. If the family agrees, the tissue bank is contacted to confirm that the deceased is a suitable donor. Once such confirmation is received, Henix, or other TRSs are contacted, and upon arrival at the hospital, the TRS must don surgical scrubs and awaits an available operating room. TRSs are not management and do not have office work as their primary duty.

Up until May 15, 2016, Henix was paid a flat fee per case, with no overtime, even if he worked over 40 hours in a week. Starting on May 15, 2016, he was paid hourly with no change in his duties. He denies having been paid for all his travel time to hospitals, between hospitals, and returning from hospitals. Following the completion of one case, he was frequently assigned to another case shortly thereafter. (NYSCEF 185).

By affidavits dated December 6 and 7, 2018, plaintiffs state that they were required to have a cell phone on them at all times while on call, respond within 15 minutes, and arrive at the hospital on time for the scheduled recovery. (NYSCEF 193, 194).

Affidavits from various class members reflect that up until May 15, 2016, they were paid a flat rate per case, and thereafter, hourly. The class members deny having been paid for travel time to and from hospitals and for the time spent on call. They explain that while on call, they were expected to be available for an entire 24-hour period. The amount of days spent on call per month varied per class member, but once the monthly on-call schedule was set, they could not adjust the days they were on call unless another TRS was able to cover. While on call, they were limited in their activities, as they were required to have a cellphone on them at all times. Thus, class members slept with their phones on and nearby, as they were required to respond to calls within 15 minutes of receiving them. While on call, class members were often unable to socialize, such as going to dinners, movies, ballgames, or other events, and some describe occasions when they were obliged to leave social engagements early or leave a grocery store before finishing shopping to answer a call. They state that it was presumed that they could not travel out of state or drink alcohol while on call, given the need to leave immediately to go to the hospital, and they did not know when they would be called to work. (NYSCEF 187-192).

III. CONTENTIONS

A. Plaintiffs (NYSCEF 168-195)

Plaintiffs contend that defendant, in violation of the Labor Law, failed to pay them for their travel and on-call time, and unlawfully provided them with inaccurate wage statements. They assert that defendant misclassified them and the class as exempt under the FLSA until May 15, 2016, and that before then, they were only paid a flat fee per case and no overtime. Once they were classified as non-exempt, plaintiffs argue, defendant started paying them hourly with overtime for certain hours worked over 40 in a week, but failed to consider travel time when calculating whether they worked 40 hours in a week.

Plaintiffs contend that the type of travel that TRSs undertook is compensable and that defendant's standard operating procedure and pay statements dated after May 2016 reflect that defendant agrees that travel time is compensable. They argue that given the time sensitivity and emergent nature of their job, and as their travel is not typical commuting, their travel time is compensable. Plaintiffs rely on the affidavits offered and those of class members for examples of uncompensated travel time to and from jobs and between jobs.

Plaintiffs maintain that their on-call time is compensable, observing that defendant includes on-call time as part of the job description. Moreover, plaintiffs assert, defendant places restrictions of TRSs while on call, such as by requiring them to carry a pager, to respond to the page within 15 minutes of being called, to arrive at the hospital on time, and to be available during an entire 24-hour period. These restrictions, plaintiffs contend, require them to be ensure that they are located in areas accessible by cellphone at all time. In addition, they observe that the class members felt they could not go to ballgames, movies, social gatherings, dinner or drink alcohol while on-call. Plaintiffs rely on their affidavits and those of class members for examples

of uncompensated on-call time. As TRSs were required to be available to work and be prepared to leave immediately to begin work, they argue that on-call time is compensable. Ans, as TRSs were not paid for travel time and on-call time, plaintiffs contend that defendant provided inaccurate wage statements, and cite to examples of class members.

B. Defendant (NYSCEF 206-221)

Defendant contends that TRSs were paid pursuant to their agreement that provided for piece-rate compensation and included regular, overtime, and travel pay. It argues that before May 2015, TRSs were paid at least $305 per job, which would have required them to work more than 20 hours for each job to earn below a minimum wage of $15, and it is undisputed that they never worked more than 20 hours on a job. Thus, defendant argues, plaintiffs' pre-May 2015 wage and hour claims fail. It also observes that plaintiffs voluntarily entered into the piece-rate employment agreement and that the arrangement was long-standing.

According to defendant, it properly compensated TRSs post-May 2015 and switched to hourly compensation in compliance with the Earned Sick Time Act, which requires employers with five or more employees to provide up to 40 hours of yearly sick leave. Consequently, defendant became obliged to track work hours to calculate sick leave properly. Defendant maintains that after May 2015, plaintiffs and the class were paid an hourly rate above minimum wage for travel time.

Defendant denies that plaintiffs are entitled to pay for their on-call time, as they were "waiting to be engaged" and not "engaged to wait." It argues that an employee is not entitled to compensation for time spent on-call unless required to remain available to work at or near the employer's premises and is unable to use the time productively for his own purposes. It denies that requiring an employee to carry a beeper and respond when called does not warrant

compensation for that time, and alleges that plaintiffs provided their monthly availability, were able to decline work once notified, which they did occasionally, and were free to perform their regular non-work activities. In addition, defendant asserts that there exists an issue of fact as to how class members were impacted by being on-call and how much of that time is compensable. In support, defendant submits affidavits purportedly from defendant's vice-president of human resources (NYSCEF 219) and from a class member who supervised plaintiffs (NYSCEF 220). The affidavits are, however, signed by defendant's counsel "upon consent" and are not notarized. Also offered is a signed and unnotarized statement from another class member. (NYSCEF 221).

Even though TRSs were paid for all travel time, travel was not plaintiffs' primary duty and thus, it is not compensable. Moreover, pursuant to the Portal-to-Portal Act, employees are not entitled to compensation for travel to and from the actual place of performance of their principal activities, and here, the primary activity of TRSs is the recovery of tissue from various medical centers. Once a TRS completes a job, they may voluntarily accept another assignment, and thus, travel to and from each medical center is not compensable as it is incidental to their tissue recovery duties. That defendant labels business travel as reimbursable for federal tax purposes does not mean that it is compensable under the FLSA and Labor Law.

The wage statements provided to TRSs are accurate, defendant asserts, and even if plaintiffs successfully allege that the statements are inaccurate absent travel time as a separate wage category, defendant is not rendered liable as it timely and completely paid all wages.

C. Reply (NYSCEF 222-227)

Plaintiffs deny that they were paid for travel time before May 2015 and observe that defendant offers no admissible evidence to rebut it. While defendant contends that it started paying hourly due to the Earned Safe and Sick Time Act, plaintiffs argue that the act does not

require employees to be paid for travel time, and moreover, it became effective on April 1, 2014, two years before defendant switched its payment method. They also argue that on-call time is compensable, and that while TRSs could decline on-call service and assignments, they were nonetheless entitled to compensation when they were on-call and had accepted job assignments.

Plaintiffs contend that the affidavits relied upon by defendant are unlawfully obtained, as the class has been certified and thus, members of the class are deemed to be clients of class counsel, and argue that defendant's and its counsel's contact with class members is unethical. They thus ask that the affidavits be disregarded and also observe that they are in any event, invalid absent notarization, because they are signed by defendant's counsel, and as they incorrectly provide that defendant's pay policies changed in May 2015, when they changed in May 2016. Moreover, plaintiffs assert, defense counsel's conduct constitutes a violation of the rules of professional conduct and is sanctionable. Moreover, they argue that the affidavit of defendant's vice president is self-serving and should not be considered, and to the extent she, not defendant's counsel, obtained the class member affidavits, she herself is an attorney and is subject to the rules of professional conduct.

Plaintiffs reiterate that they should be compensated for on-call time and that they were not provided with accurate wage statements.

IV. ANALYSIS

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope,

or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

A. Defendant's affidavits

As not one of the affidavits submitted by defendant are notarized, and two are signed solely by defense counsel, they are not considered. Moreover, as the proposed class has been certified, absent class members are effectively represented by plaintiffs' counsel, and thus, cannot be contacted by defendant's counsel concerning issues of this litigation. (Manual Complex Lit. § 21.33 [4th ed] ["Once a class has been certified, the rules governing communications apply as though each class member is a client of the class counsel. [...] Defendants' attorneys, and defendants acting in collaboration with their attorneys, may only communicate through class counsel with class members on matters regarding the litigation."]). Thus, while a defect in an affidavit such as a lack of notarization may be disregarded, given the prejudice from defendant's contact with class members, they are not considered. (*See Supreme Auto. Mfg. Corp. v Cont'l Cas. Co.*, 97 AD2d 700, 700 [1st Dept 1983], citing CPLR 2001 [notary's failure to sign affidavit is defect which court may permit to be corrected on such terms as are just or, if substantial right of party is not prejudiced, disregard]).

B. Is TRS travel time compensable?

Pursuant to 12 NYCRR § 142-2.1(b), an employer is required to pay minimum wage, in pertinent part,

> for the time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent

that such traveling is part of the duties of the employee.

In interpreting a DOL wage order, such as 12 NYCRR § 142.21(b), courts are to defer to an administrative agency's interpretation of its regulations, unless its interpretation is irrational or unreasonable. (*Andryeyeva v New York Health Care, Inc.*, 33 NY3d 152, 174 [2019]).

In an opinion letter dated August 10, 2010, the DOL responded to questions concerning an employer's rights and obligations in paying traveling employees pursuant to 12 NYCRR § 142.21(b), and as pertinent here, explained that "[i]n determining whether the time spent traveling is counted as time worked, the time must be considered part of the 'duties of the employee.'" (RO-09-0190). It moreover, advised that it interprets the language of the wage order "in line with the federal regulations regarding travel time under the Fair Labor Standards Act," and refers to 29 CFR § 785.33, *et seq.* (*id.*; *see also Williams v. Epic Sec. Corp.*, 358 F Supp 3d 284, 300 [SD NY 2019] [NYLL does not differ from FLSA as to compensation of commutes]).

Although 29 CFR § 785.35 provides that "[n]ormal travel from home to work is not worktime," pursuant to 29 CFR. § 785.38, "[t]ime spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked." The key inquiry is whether the employee is engaged in his "principal activity" by traveling, as

> no employer shall be liable for the failure to pay the minimum wage or overtime compensation for time spent in "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities."

(29 CFR § 785.34, quoting 29 USC § 254; *see also Steiner v Mitchell*, 350 US 247, 256 [1956] [under Portal-to-Portal Act, activities performed before or after work are compensable if integral and indispensable part of principal activities for which covered workmen are employed]).

That one must travel to a location to complete a job does not in and of itself render that travel "integral and indispensable." For example, in *Spencer v Office of Auditor, Auditor of Pub. Accounts, Com. of Ky.*, the plaintiff, an auditor, was required to travel from the vicinity of his normal work station to various locations, some more than 75 miles away, to conduct audits. His claim to entitlement to compensation for his travel time was denied. (928 F2d 405 [6th Cir 1991]). In affirming the summary dismissal of the plaintiff's claim, the Court explained that the plaintiff "simply drives" from one location to another, and "more is required of travel time than the moving of the employee from one place to another" (*id.*). Moreover, the Court expressly rejected the contention that the plaintiff's travel was "integral and indispensable" because "he cannot do the audit until he has travelled to the audit place" (*id.*).

Likewise, here, plaintiffs do not allege that they engaged in any other activity related to tissue recovery while traveling. Rather, they moved from one place to another. Thus, plaintiffs fail to meet their *prima facie* burden of establishing entitlement to compensation for travel time.

That TRSs accepted another job immediately after the conclusion of another job does not render the travel between work locations compensable. (*See e.g. McLaughlin v Gen. Elec. Co.*, 1988 WL 96583 [ND NY 1988] [security inspectors travel from site to site non-compensable, as employer did not require direct travel between sites]). It is immaterial that TRSs may have been required to travel long distances (*see Kavanagh v Grand Union Co.*, 192 F3d 269, 273 [2d Cir 1999] [determination as to whether travel compensable to be made regardless of distance, especially where extensive travel a contemplated, normal occurrence of employment]), or that they were reimbursed by their employer for mileage and gas (*id.*).

As plaintiffs fail to meet their *prima facie* burden, the sufficiency of defendant's opposition is immaterial. (*See William J. Jenack Estate Appraisers & Auctioneers, Inc. v*

Rabizadeh, 22 NY3d 470, 475 [2013] [movants failure to meet *prima facie* burden requires denial of motion, regardless of sufficiency of opposition]).

C. Is TRS on-call time compensable?

Pursuant to 12 NYCRR § 142.21(b), employers are required to compensate employees for time the employee "is required to be available for work at a place prescribed by the employer." Pursuant to 29 CFR § 785.17,

> [a]n employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call". An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call.

The pertinent question is whether the employee was "engaged to wait," for which the time would be compensable, or "wait[ing] to be engaged," for which the time would be non-compensable. (29 CFR § 785.14, quoting *Skidmore v Swift*, 323 US 134 [1944]; *see also Redzepagic v Hammer*, 2017 WL 780809, *7 [SD NY 2017], quoting *Armour & Co. v Wantock*, 323 US 126, 133 [1944] [court to examine whether time spent predominantly for employer's or employee's benefit]).

Plaintiffs' evidence reflects that they were waiting to be engaged, as the restrictions placed on them while on-call were minimal and allowed them freedom to use their time for personal activities, such as going to dinner, grocery shopping, etc. (*See Berry v Cty. of Sonoma*, 30 F3d 1174, 1182 [9th Cir 1994], *cert denied* 513 US 1150 [1995], quoting *Owens v Local No. 169, Ass'n of W. Pulp & Paper Workers*, 971 F2d 347, 350 [9th Cir 1992] [courts must examine degree to which employee free to engage in personal activities]). By opinion letter dated February 15, 2008, the DOL, citing 29 CFR § 785.17, explains that employees "required to carry a 'beeper,' remain within the beeper's range, and respond to the beeper when called" are not

considered on-call and are not entitled to compensation for that time. (RO 08-002). That plaintiffs were required to maintain access to a cellphone, to respond promptly to calls, to remain close enough to potential job sites, and to refrain from alcohol consumption are minimal and do not render their time compensable. (*See e.g. Andrews v Town of Skiatook,* 123 F3d 1327, 1329–30, 1332 [10th Cir 1997] [requirement that employee be constantly available by pager, cleanly and appropriately dressed, refrain from alcohol consumption, and able to respond to a call within five to ten minutes does not render on-call time compensable]; *Bright v Houston Northwest Med. Ctr. Survivor, Inc.,* 934 F2d 671 [5th Cir 1991], *cert denied* 502 US 1036 [1992] [holding that as matter of law, employee's off-premises on-call time not working time, as only restrictions were use of beeper, a 20 to 30 minute response time, and ban on alcohol]). Plaintiffs thus fail to demonstrate *prima facie* that their time spent on-call is compensable.

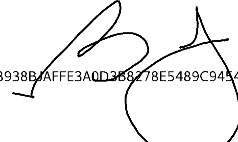
D. Inaccurate wage statements

As plaintiffs fail to demonstrate that they are entitled to compensation for their travel and on-call time, and their inaccurate wage statements claim is premised on that compensation, they too fail to demonstrate *prima facie* their entitlement to summary judgment on their inaccurate wage statements claim.

V. CONCLUSION

For all of the foregoing reasons, it is hereby

ORDERED, that plaintiffs' motion for summary judgment is denied.



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DATE	**BARBARA JAFFE, J.S.C.**

CHECK ONE:	☐ **CASE DISPOSED**		☒ **NON-FINAL DISPOSITION**	
	☐ **GRANTED**	☒ **DENIED**	☐ **GRANTED IN PART**	☐ **OTHER**
APPLICATION:	☐ **SETTLE ORDER**		☐ **SUBMIT ORDER**	
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