

Vargas v Citi Parking, Inc.

2021 NY Slip Op 31210(U)

April 12, 2021

Supreme Court, New York County

Docket Number: 150671/2019

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

-----X

NOEL VARGAS, individually and on behalf of other persons
similarly situated,

Plaintiff,

- v -

CITI PARKING, INC.; CITI PARKING SERVICES LLC;
BATTERY 17 PARKING LLC; RONALD MASSIE; and or any
other related entities or individuals,

Defendants.

-----X

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12,
13, 14, 15, 17

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the motion of defendants Citi Parking, Inc., Citi Parking Services LLC, Battery 17 Parking LLC, Ronald Massie, and/or any other related entities or individuals (together, “Defendants”) to dismiss is granted in part, in accord with the following memorandum decision.

Background

This case is a putative class action brought by plaintiff Noel Vargas (“Vargas” or “Plaintiff”), on behalf of himself and other persons similarly situated who are presently or were formerly employed by the Defendants, pursuant to New York Labor Law Article 6 (§§ 191, 193, 195, 198) and Article 19 (§ 663), for unpaid overtime wages, failure to give wage theft notice, and other wage violations (Complaint ¶ 1). The complaint alleges that, beginning in January 2013 and continuing through the present, Defendants have maintained a policy and practice of failing to pay all wages owed to the named plaintiff, Noel Vargas, and all other similarly situated

employees in violation of the New York Labor Law (*id.* ¶ 2). Vargas alleges that he worked as a driver, attendant, and valet at Defendants’ 17 Battery Place parking garage from March 2018 to December 2018 (*id.* ¶ 26).¹ He typically worked five or six days per week and approximately nine hours each day or about 52 to 56 hours per week (*id.* ¶ 27). He was paid \$13 to \$14 an hour regardless of the number of hours worked, and his biweekly paychecks typically reflected approximately \$700 to \$800 for 80 hours of work regardless of the total number of hours worked (*id.* ¶ 28-29). He was then compensated in cash at the same flat hourly rate for some of the remaining hours worked, without being paid a time and a half premium (*id.* ¶ 30). By way of example, the complaint alleges that “if Plaintiff Vargas worked 112 hours in a biweekly period, his paycheck would reflect 80 hours of pay at his regular rate and some portion of the 32 overtime hours would be compensated at his regular hourly rate” (*id.* ¶ 31). Finally, Vargas alleges that “he was missing hours from his pay – both from his paychecks and his cash payments,” and that “Defendants failed to pay Plaintiff Vargas overtime compensation, despite Plaintiff Vargas typically working between 52 and 56 hours per week” (*id.* ¶¶ 32-33).

The complaint asserts three causes of action. The first cause of action for unpaid overtime compensation alleges violations of Labor Law §§ 663, 193, *et eq.*, and 12 NYCRR § 142.2.2, and alleges that Defendants failed to pay overtime compensation as required by said law. The second cause of action for wage theft notice alleges violations of Labor Law § 195 (1) (a) for failure to notify members of the putative class in writing of required wage information; for violation of Labor Law § 195 (3) for failure to provide required wage statements and information; and for violation of Labor Law § 198 for failure to provide proper paystubs and wage theft notices. Finally, the third cause of action for failure to pay wages alleges violations

¹ Unless otherwise indicated, all facts set forth here are as alleged in the complaint and are accepted as true, as required on a motion to dismiss.

of Labor Law § 191 for failure to timely pay earned overtime, and violation of Labor Law § 193 for unlawful deductions to wages for failure to pay earned overtime. Plaintiffs also seek an award of attorneys' fees pursuant to Labor Law § 198.

By this pre-answer motion, Defendants move pursuant to CPLR § 3211 (a) (7) to dismiss the second cause of action on the ground that CPLR 901 (b) provides that an action to recover a penalty may not be maintained as a class action and, therefore, Vargas cannot proceed under Labor Law §§ 195 (1) and (3) on a class-wide basis, as he seeks statutory penalties. Defendants also so move to the extent Plaintiff seeks liquidated damages pursuant to Labor Law § 198 because he cannot proceed on a class-wide basis for damages that are in the nature of statutory penalties.” Defendants also move to dismiss the third cause of action on the ground that the failure to pay wages is not a “deduction” for the purposes of Labor Law § 193, and the frequency of payment requirements set forth in Labor Law § 191 is not the proper vehicle for asserting a claim for unpaid wages.

Plaintiffs oppose the motion to dismiss and argue that all those claims can be pled in a class action, provided that the plaintiff consents to strike those portions of the complaint seeking relief that would constitute a penalty under CPLR 901 (b) upon certification of the class. On reply, Defendants clarify their position as follows: “Defendants do not contest that Plaintiff can seek these statutory penalties on his own behalf and waive those damages if a class action is certified. However, any class-wide allegations concerning statutory penalties on behalf of putative class members must be dismissed as a matter of law” (NYSCEF Doc. No. 17 at 1).

Standard of Review

On a motion to dismiss brought under 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” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Ambiguous allegations must be resolved in the plaintiff’s favor (*see JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). “The motion must be denied if from the pleadings’ four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]), but a pleading consisting of “bare legal conclusions” is insufficient (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *aff’d* 9 NY3d 836 [2007], *cert denied sub nom Spiegel v Rowland*, 552 US 1257 [2008]) and “the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupported based upon the undisputed facts” (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

Discussion

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]). “Wages” are defined 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]). Labor Law § 198 sets forth the remedies available to a prevailing employee for substantive violations of Article 6 (*see Slotnick v RBL Agency Ltd.*, 271 AD2d 365, 365 [1st Dept 2000]). Section 198 provides for the award of

various liquidated and statutory damages for violations of the statute, including *inter alia*, liquidated damages up to 100% of the total amount of wages due (§ 198 [1-a]), fifty dollars a day up to \$5000 for violations of § 195 (1) (§ 198 [1-b]), and \$250 a day up to \$5000 for violations of § 195 (3) (§ 198 [1-d], [4]).

A. Statutory and Liquidated Damages

CPLR 901(b) provides that an action to recover a penalty may not be maintained as a class action, unless explicitly authorized by statute. Liquidated damages pursuant to Labor Law § 198 constitute a penalty (*see Carter v Frito-Lay, Inc.*, 74 AD2d 550, 425 NYS2d 115 [1st Dept 1980]; *see also Griffin v Gregory's Coffee Management LLC*, 2019 WL 1877207, 2019 NY Slip Op 31125 [U] [Sup Ct, NY County, April 26, 2019]). Labor Law § 198 allows a plaintiff to recover liquidated damages but does not specifically authorize a class action. Therefore, a cause of action asserted in a class action that seeks liquidated damages must be dismissed (*Ballard v Community Home Care Referral Service, Inc.*, 264 AD2d 747, 748 [2d Dept 1999]).

Here, though, the complaint, as drafted in this action, does not specifically seek liquidated damages – simply, “damages” (*see* Complaint ¶ 53) – and Plaintiff’s submissions in opposition to the motion manifest Plaintiff’s intent to waive penalties if the class is certified (NYSCEF Doc. No. 13 at 5). Courts have permitted class action wage cases to proceed under these circumstances (*Super Glue Corp. v Avis Rent A Car Sys., Inc.*, 132 AD2d 604, 606 [2d Dept 1987]); *Ridge Meadows Homeowners’ Assn., Inc. v. Tara Dev. Co., Inc.*, 242 AD2d 947 [4th Dept 1997]; *See also Cohen v. Gerson Lehrman Grp., Inc.*, 686 F Supp 2d 317, 323 [SDNY 2010] [motion to dismiss denied where “plaintiffs do not seek liquidated damages, and in their submissions have disclaimed any possible right to liquidated damages under the NYLL”]). On reply, Defendants represent they “do not contest that Plaintiff can seek these statutory penalties

on his own behalf and waive those damages if a class action is certified” (NYSCEF Doc. No. 17 at 1). As such, the second cause of action, and those portions of Plaintiff’s class claims that seek an award of statutory and liquidated damages, are dismissed, with leave to file an amended complaint which makes it clear that Plaintiff seeks statutory and liquidated damages only to the extent that he asserts an individual claim, which will be waived upon such event as certification of the class might ensue at a later stage of this case.

Labor Law §§ 191, 193

Defendants next move to dismiss Plaintiffs’ third cause of action on the grounds that Plaintiff fails to state a claim under Labor Law § 191 or 193. Labor Law § 191, titled “Frequency of Payments,” guarantees timely payment of wages (Labor Law § 191). 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.

Labor Law § 193 prohibits “any deduction from the wages of an employee” except under certain circumstances enumerated in the statute, including deductions made in accordance with certain laws, rules, and regulations, or those that are “are expressly authorized in writing by the employee and are for the benefit of the employee” (Labor Law § 193). To state a claim under section 193, a plaintiff must allege a specific deduction, 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 443, 449 [1st Dept 2017]). A cause of action under § 193 exists where an employer failed to pay a specific, non-discretionary, portion of the employee’s wages, such as a bonus or specifically bargained-for additional compensation (*see Ryan v Kellogg Partners Institutional Servs.*, 19 NY3d 1 [2012] [employer’s failure to pay a non-discretionary bonus was found to be a violation of Labor Law § 193]; *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]).

The complaint alleges that Plaintiff “typically worked five to six days per week and approximately nine hours each day,” and “would work approximately 52 to 56 hours a week for Defendants” (Complaint ¶ 27). He “was paid \$13 to \$14 hourly regardless of the amount of hours worked,” and his “biweekly paychecks would typically reflect approximately \$700 to \$800 for the 80 hours regardless of the total amount of hours he worked” (*id.* ¶¶ 28-29). He was then “compensated in cash for some of the remaining hours at the same flat hourly rate – without time and one half premium payment” (*id.* ¶ 30). He also alleges that he did not receive proper paystubs (complaint ¶ 53). The third cause of action alleges violations of Labor Law § 191 and 193 due to Defendants’ alleged failure to pay overtime (*id.* ¶ 60 [“By willingly failing to pay Plaintiff Vargas for earned overtime wages, Defendant willingly violated Labor Law § 191.”], ¶ 62 [“By withholding earned overtime compensation from Plaintiff Vargas pursuant to Labor Law § 193 and the cases interpreting same, Defendants made unlawful deductions.”])). These allegations do not state a cause of action under § 191 because Vargas does not allege that he was not paid in a timely manner under the statute, only that he was not paid his agreed-upon wage (*accord, Brown v South Nassau Communities Hosp.*, 2019 WL 3413557, Slip Op 32239 [U] [Sup Ct, NY County, July 29, 2019]; *Wysocki v. Kel-Tech Construction, Inc.*, 2005 WL 6239342, 2005 Slip Op 30399 [U] [Sup Ct, NY County, April 8, 2005], *affd.*, 33 AD3d 375 [1st Dept 2006]). These allegations are also not sufficient to state a cause of action under Labor Law § 193 because Plaintiff does not allege that Defendants made a specific deduction from his wages

or that they withheld a specific portion of his wages (*Perella*, 153 AD3d at 449 [“wholesale withholding of payment is not a ‘deduction’ within the meaning of Labor Law § 193”]).

Therefore, the third cause of action under Labor Law §§ 191, 193, is dismissed.

But Plaintiffs also argue that they have adequately pled a cause of action for what is known as “gap time,” referencing several federal cases (*see* NYSCEF Doc. No. 13 at 8). “A gap-time claim is one in which an employee has not worked 40 hours in a given week but seeks recovery of unpaid time worked, or in which an employee has worked over 40 hours in a given week but seeks recovery for unpaid work under 40 hours” (*Lundy v Catholic Health Sys. of L.I. Inc.*, 711 F3d 106, 115 [2d Cir 2013]). New York courts have acknowledged the viability of gap time claims (*see, e.g., Brown, supra*, at *6 [“Section 663 allows an employee to recover where she is paid ‘less than the wage to which he or she is entitled’”]; *Cedeno v Able Health Care Serv., Inc.*, 2019 WL 6778880, 2019 NY Slip Op 33624 [U] [Sup Ct, NY County, Dec. 12, 2019]). Plaintiff’s allegation that his agreed-upon hourly rate of pay was \$13 to \$14 and that he worked 52 to 56 hours per week, but was paid \$700 to \$800 for 80 hours of work, plus some additional cash payment, regardless of the number of hours worked, is sufficient to state a gap time claim because it is, in essence, an allegation that Defendants either paid Vargas less than his agreed-upon hourly rate of pay; failed to pay him for all hours worked; and/or failed to pay him overtime wages.

Nevertheless, the cases that support gap time claims consistently find that they fall under Labor Law § 663, not § 191 or 193 (*see Nakahata v New York-Presbyterian Healthcare Sys., Inc.*, 723 F3d 192, 202 [2d Cir 2013] [“gap-time claim would be consistent with the language of NYLL § 663 (1), which states that ‘[i]f any employee is paid by his or her employer less than the wage to which he or she is entitled . . . he or she shall recover in a civil action the amount of any

such underpayments”]). Plaintiff asserts his first cause of action for unpaid overtime under § 663, but not his third cause of action. On a motion to dismiss, the motion “must be denied if from the pleadings’ four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 West 32nd Owners Corp*, 98 NY2d at 152).

Therefore, Defendants’ motion to dismiss the third cause of action is granted to the extent that Plaintiff seeks relief under Labor Law §§ 191 and 193, but Plaintiff is granted leave to replead a gap time claim pursuant to Labor Law § 663.

Accordingly, it is

ORDERED that the motion to dismiss is granted in part; and it is further

ORDERED that the second cause of action and those portions of Plaintiff’s class claims that seek an award of statutory and liquidated damages are dismissed, with leave to file an amended complaint which makes it clear that Plaintiff seeks statutory and liquidated damages only to the extent that he asserts an individual claim, which will be waived upon such event as certification of the class might ensue at a later stage of this case; and it is further

ORDERED that any such amended complaint shall be filed within 20 days of the filing hereof; and it is further

ORDERED that the third cause of action is dismissed to the extent that Plaintiff seeks relief under Labor Law §§ 191 and 193, and Plaintiff is granted leave to replead a gap time claim pursuant to Labor Law § 663 in an amended complaint which shall be filed within 20 days of the filing hereof; and it is further

ORDERED that the motion to dismiss is denied as to the remainder of the motion; and it is further

ORDERED that Defendants shall file an answer to the complaint, to the extent it has survived the within dismissals, and to the extent that no amended complaint has been filed, within 30 days from the filing hereof; and it is further

ORDERED that within 30 days of the filing of Defendants' answer, the parties shall submit a joint proposed preliminary conference order, in a form that substantially conforms with the court's form order located at <https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/PC-CD.pdf>, to the court by email to its Part Clerk (Part 38) attn.: rwoody@nycourts.gov.

This shall constitute the decision and order of the court.

ENTER:



4/12/2021
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE