SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **IAS MOTION 56EFM**

Justice

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CLAIRE PAJARILLAGA,

Plaintiff,

- v -

GOOD BELLY HOSPITALITY CORP., BLKSQ, LLC, MR WOOH, LLC, WOO SANG KUN a/k/a "JOHNNY WOO," individually, SOO LEE a/k/a "ANNA LEE," individually, CHRISTOPHER REDA, individually, JOHNATHAN BAUDANZA, individually, JOHN FASANO, individually, and ISRAEL BARD, individually,

DECISION + ORDER AFTER INQUEST

Defendants.

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I. INTRODUCTION

This is an action to recover unpaid wages and statutory damages under the Labor Law, as well as damages for retaliation under the Labor Law and the federal Fair Labor Standards Act (29 USC §§ 201-219; hereinafter FLSA). By order dated May 24, 2021, the court granted the plaintiff's motion pursuant to CPLR 3215 for leave to enter a default judgment against the defendants Good Belly Hospitality Corp., BLKSQ, LLC, and Mr. Wooh, LLC (collectively the Good Belly companies) on her statutory cause of action to recover unpaid wages pursuant Labor Law §§ 190 *et seq.*, to recover damages for breach of an oral loan agreement, to recover statutory damages for the employers' failure to provide the written notice required by Labor Law § 195(1)(a), to recover statutory damages for the employers' failure to provide the statement required by Labor Law § 195(3), and to recover for retaliation under FSLA and Labor Law § 215. The court thereupon set the matter down for an inquest to assess damages.

II. FINDINGS OF FACT

At the July 24, 2021 inquest, the plaintiff, Claire Pajarillaga, testified on her own behalf and submitted numerous documents, including a spreadsheet setting forth the wages that she was actually paid and the weeks on which she was not paid, several email and text messages to the principals of the Good Belly companies inquiring as to when she would be paid, personal bank statements, and various invoices and credit card statements referable to vendors and credit card companies to whom she owed money.

The court finds that the plaintiff credibly testified that the Good Belly companies initially hired her in August 2018 to perform the duties of manager at the Marble and Black Square Pizza restaurants, with an annual salary of $80,000, or $1,538.46 per week. The court credits her testimony that, after her first work week, which ended on August 25, 2018, the Good Belly companies tendered her a check in the sum of $2,000.00, but did not provide her with a wage statement or a statement of income, FICA, or Medicare taxes that had been withheld. In all, she was paid the sum of $2,000.00 by check on only one other occasion, with the second payment in that sum tendered one week after the first. The court also credits her testimony that the Good Belly companies thereafter paid her at the rate of $1,600.00 per week, in a combination of cash and check, but only sporadically, sometimes delaying payment for a period of three or four weeks. The court finds that, between October 22, 2018 and January 3, 2018, the Good Belly companies made only one partial payment of wages. In light of the irregularity of wage payments, the plaintiff created an Excel spread sheet to track those payments, and contemporaneously entered the amount on the date she received a particular payment and noted the weeks when she was not paid. The plaintiff credibly testified that she worked for the Good Belly companies from August 22, 2018 until the first week of January 2019.

The spreadsheet, which was authenticated and admitted into evidence, indicated that the Good Belly companies paid the plaintiff only $17,800.00 for her work up until December 2, 2018. The plaintiff credibly established through the spreadsheet and her testimony that she was

underpaid the sum of $600.00 for the workweek ending on October 28, 2018, and that she was not paid at all for the seven full workweeks ending on November 4, 2018, November 11, 2018, November 18, 2018, November 25, 2018, December 9, 2018, December 16, 2018, and December 23, 2018, respectively. She also credibly demonstrated through the spreadsheet and her testimony that she was not paid at all for the partial workweeks ending December 30, 2018, when she worked for three days, and January 6, 2019, when she worked for one day.

The court finds that, notwithstanding the Good Belly companies' initial representation that the plaintiff was to be paid the sum of $80,000 per year, they established a practice of paying her the sum of $1,600 per week, which constitutes an annual gross salary of $83,200. The court thus finds that the Good Belly companies failed to pay the plaintiff the sum of $13,080 in wages to which she was entitled.

In addition, the plaintiff credibly testified that, on November 1, 2018, she loaned the Good Belly companies the sum of $1,089 by charging business expenses on her personal credit card which accrued interest at the rate of 18.49% per annum, or $17.33 per month, that they promised to reimburse her for both the principal and interest, but that they never did so.

III. CONCLUSIONS OF LAW

1. Evidentiary Standards of Proof

A defaulting defendant admits all traversable allegations in the complaint, including the basic issue of liability (*see Amusement Bus. Underwriters v American Intl. Group*, 66 NY2d 878, 880 [1985]; *Cole-Hatchard v Eggers*, 132 AD3d 718, 720 [2d Dept 2015]; *Gonzalez v Wu*, 131 AD3d 1205, 1206 [2d Dept 2015]). The defaulting defendants are, however, "entitled to present testimony and evidence and cross-examine the plaintiff's witnesses at the inquest on damages" (*Minicozzi v Gerbino*, 301 AD2d 580, 581 [2d Dept 2003] [internal quotation marks omitted]; *see Rudra v Friedman*, 123 AD3d 1104, 1105 [2d Dept 2014]; *Toure v Harrison*, 6 AD3d 270, 272

[1st Dept 2004]). The Good Belly companies elected not to present such testimony or cross-examine witnesses at the inquest in this action.

Where a claim is made for unpaid wages under the Labor Law, and, as here, an employer failed to comply with its statutory obligation to preserve complete and accurate payroll records (*see* Labor Law §§ 196-a, 661; *see also* 12 NYCRR 142-2.6), the plaintiff is entitled to the benefits of a reduced burden of proof with regard to the claim (*see Carroll v Tangier*, 2015 NY Slip Op 50239[U], *1, 46 Misc 3d 148[A] [App Term, 1st Dept, Mar. 2, 2015]; *see also Matter of Agnello v National Fin. Corp.*, 1 AD3d 850, 853-854 [1st Dept 2003]). Specifically, the Labor Law imposes the burden of proof on employers who fail to maintain the appropriate records, requiring that they "bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements" (Labor Law § 196-a[a]).

With respect to the plaintiff's FLSA retaliation claim, she "has the burden of proving that [she] performed work for which he [or she] was not properly compensated" (*Anderson v Mt. Clemens Pottery Co.*, 328 US 680, 687 [1946]). Given the statute's remedial purpose and its broader public policy goals, however, a plaintiff can meet this burden "through estimates based on his [or her] own recollection" (*Kuebel v Black & Decker Inc.*, 643 F3d 352, 362 [2d Cir 2011]; *Jemine v Dennis*, 901 F Supp 2d 365, 376 (ED NY 2012); *see Doo Nam Yang v ACBL Corp.*, 427 F Supp 2d 327, 336-337 [SD NY 2005]). As the United States Supreme Court recognized in *Anderson*, "employees seldom keep . . . records [of hours worked] themselves; even if they do, the records may be and frequently are untrustworthy" (*Anderson v Mt. Clemens Pottery Co.*, 328 US at 687). Furthermore, it is the employer who has the statutory duty to "keep proper records of wages, hours . . . and who is in position to know and produce the most probative facts concerning the nature and amount of work performed" (*id.*; *see Kuebel v Black & Decker Inc.*, 642 F3d at 362; *Jemine v Dennis*, 901 F Supp 2d at 376).

Where, as here, the employer has defaulted, and has thus failed to show that it maintained accurate and complete employment records, a plaintiff only needs to submit

"sufficient evidence from which violations of the [FLSA] and the amount of an award may be reasonably inferred" (*Reich v Southern New England Telecomms. Corp.*, 121 F3d 58, 66 [2d Cir 1997], quoting *Martin v Selker Bros.*, 949 F2d 1286, 1296-1297 [3d Cir 1991]; *see Jemine v Dennis*, 901 F Supp 2d at 376). "An employee's burden in this regard is not high" (*Kuebel v Black & Decker Inc.*, 642 F3d at 362). The burden then shifts to the employer to come forward with any evidence to either show "the precise amount of work performed," or to "negative the reasonableness of the inference to be drawn from the employee's evidence" (*Anderson v Mt. Clemens Pottery Co.*, 328 US at 687-688). If the employer fails to produce such evidence, the court may award damages to the employee, even though the result is only "approximate" (*id.* at 688; *see Jemine v Dennis*, 901 F Supp 2d at 376). "In the absence of rebuttal by defendants" (*Chen v Jenna Lane, Inc.*, 30 F Supp 2d 622, 624 [SD NY 1998]), or "where the employer has defaulted, [as here, the employee's] recollection and estimate of hours worked are presumed to be correct" (*Pavia v Around the Clock Grocery, Inc.*, 2005 US Dist LEXIS 43229, 2005 WL 4655383, *5 [ED NY, Nov. 15, 2005]; *see Harold Levinson Assocs., Inc. v Chao*, 37 Fed Appx 19 [2d Cir 2002]; *Jemine v Dennis*, 901 F Supp 2d at 376).

2. First Cause of Action—Failure to Pay Wages and Business Loan

In connection with both the plaintiff's oral employment contract with the Good Belly companies and her agreement to loan them a sum of money by charging business expenses on her personal credit card, subject to reimbursement of both principal and interest, she demonstrated the "formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage" (*Flomenbaum v New York Univ.*, 71 AD3d 80, 91 [1st Dept. 2009]; *see Clearmont Prop., LLC v Eisner*, 58 AD3d 1052, 1055 [3d Dept 2009]). The Good Belly companies ratified the change in weekly salary from $1,538.46 per week to $1,600.00 per week by accepting the benefits (*WebMD LLC v Aid in Recovery, LLC*, 166 AD3d 447, 448 [1st Dept 2018]) of the plaintiff's continued work for them at that rate of pay.

Labor Law § 190(1)(d) provides that an employee such as the plaintiff here "shall be paid the 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 § 190(2) provides that "[n]o employee shall be required as a condition of employment to accept wages at periods other than as provided in this section." The Labor Law "expressly provides that employees are entitled to recover all unpaid wages" (*Jemine v Dennis*, 901 F Supp 2d at 375; *see* Labor Law § 198[3]; *Chun Jie Yin*, 2008 US Dist LEXIS 118533, 2008 WL 906736, *6 [ED NY, Mar. 7, 2008]; *Jowers v DME Interactive Holdings, Inc.*, 2006 US Dist LEXIS 32536, 2006 WL 1408671, *9 (SD NY, May 22, 2006]). Labor Law § 198 creates a cause of action to recover unpaid or underpaid wages.

The terms of employment that were agreed upon were that the Good Belly companies would pay the plaintiff the sum of $1,600 per week in wages. The court concludes that they violated Labor Law §§ 190(1)(d) and 190(2) by paying her less frequently than semi-monthly, and did not pay her at all for several workweeks, for a total obligation of $13,080 in unpaid wages. The court also concludes that the Good Belly companies breached their oral loan agreement with the plaintiff, and are liable to her in the principal sum of $1,089, plus $641.21, representing $17.33 per month in contractual interest for a period of 37 months, for a total of $1,730.21.

Since the failure to pay wages is a species of breach of contract, the plaintiff is also entitled to an award of statutory prejudgment interest on that claim pursuant to CPLR 5001(a) and (b). The court concludes that November 15, 2018, is a "reasonable intermediate date" (CPLR 5001[b]) from which to compute interest on that award, inasmuch as the damages arising from the Good Belly companies' failure to pay wages were incurred "at various times" (*id.*) between October 22, 2018 and January 6, 2019 (*see Lager Assoc. v City of New York*, 304 AD2d 718, 723 [2d Dept 2003]; *Delulio v 320-57 Corp.*, 99 AD2d 253, 255 [1st Dept 1984]). Accordingly, prejudgment interest shall be awarded to the plaintiff on her $13,080 recovery of

unpaid wages at 9% per annum (*see* CPLR 5004) from November 15, 2018 to the date that judgment is entered hereon. Inasmuch as the plaintiff is recovering prejudgment contractual interest on her $1,089 principal recovery for breach of the loan agreement, and that rate is higher than the statutory rate, the contractual interest rate is the proper rate to apply (*see Retirement Accounts, Inc. v Pacst Realty, LLC*, 49 AD3d 846, 846-847 [2d Dept 2008]).

3. Second Cause of Action---Failure to Provide Labor Law § 195(1)(a) Notice

Pursuant to Labor Law § 195(1)(a), an employer must provide written notice to each employee that contains certain information, including the employee's rate of pay and pay day, as well as the employer's "doing business as" name, physical address, and mailing address if different from the physical address. Labor Law § 198(1-b) provides, in relevant part, that

> "If any employee is not provided within ten business days of his or her first day of employment a notice as required by subdivision one of section one hundred ninety-five of this article, he or she may recover in a civil action damages of fifty dollars for each work day that the violations occurred or continue to occur, but not to exceed a total of five thousand dollars, together with costs and reasonable attorney's fees."

Inasmuch as the plaintiff worked for 132 days without receiving that notice, which, at the rate of $50 per day, would come to $6,600, and the statute caps such statutory damages at $5,000, the plaintiff is entitled to recover the sum of $5,000 on her second cause of action. That award shall bear prejudgment interest at the rate of 9% per annum from May 24, 2021, the date that the court determined that liability was established against the Good Belly companies (*see* CPLR 5002; *see Rohring v City of Niagara Falls*, 84 NY2d 60, 68 [1994]; *Love v State of New York*, 78 NY2d 540, 542 [1991]; *Gyabaah v Rivlab Transp. Corp.*, 170 AD3d 616, 617 [1st Dept 2019]; *Gibbs v State Farm Fire & Cas. Co.*, 169 AD3d 1483, 1484-1485 [1st Dept 2019]).

4. Third Cause of Action—Failure to Provide Labor Law § 195(3) Statement

Under Labor Law § 195(3), an employer must provide a statement with each paycheck stating:

> "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; [and] allowances."

Labor Law § 198(1-d) provides, in relevant part, that

> "[i[f any employee is not provided a statement or statements as required by subdivision three of section one hundred ninety-five of this article, he or she shall recover in a civil action damages of two hundred fifty dollars for each work day that the violations occurred or continue to occur, but not to exceed a total of five thousand dollars, together with costs and reasonable attorney's fees."

Inasmuch as the plaintiff worked for 132 days without receiving that notice, which, at the rate of $250 per day, would come to $33,000, and the statute caps such statutory damages at $5,000, the plaintiff is entitled to recover the sum of $5,000 on her third cause of action. That award shall bear prejudgment interest at the rate of 9% per annum from May 24, 2021, the date that the court determined that liability was established against the Good Belly companies.

5. Fourth Cause of Action—Retaliation Under FSLA and Labor Law

As set forth in this court's May 24, 2021 order, the plaintiff established her claim of retaliation under the FSLA, and the New York State analogue articulated in Labor Law § 215, by showing: "(1) participation in protected activity known to the defendant, like the filing of a FLSA lawsuit; (2) an employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse employment action" (*Kassman v KPMG*, 925 F Supp 2d 453, 472 [SD NY 2013]; *see Mullins v City of N. Y.*, 626 F3d 47, 53 [2d Cir 2010]). Specifically, she complained about not being paid on time and that, in retaliation, the Good Belly companies only paid the wages of hourly employees, and claimed to have no money left over to pay the plaintiff. Labor Law § 215(2)(a) provides, in relevant part, that

> "[a]n employee may bring a civil action in a court of competent jurisdiction against any employer or persons alleged to have violated the provisions of this section. The court shall have jurisdiction . . . to order all appropriate relief, including . . . ordering payment of liquidated damages, costs and reasonable attorneys' fees to the employee by the person or entity in violation . . . Liquidated damages shall be calculated as an amount not more than twenty thousand dollars. *The court shall award liquidated damages to every employee aggrieved under this section*, in addition to any other remedies permitted by this section"

(emphasis added).

Based on the Good Belly companies' absolute refusal to pay any wages whatsoever to the plaintiff for 9 of the final 10 weeks of her employment, thus evincing willful retaliation, the court concludes that the plaintiff is entitled to recover the maximum $20,000 in liquidated damages under Labor Law § 215, with prejudgment interest from May 24, 2021, the date when liability was established.

6. Consequential Damages

The court rejects the plaintiff's contention that she is entitled to recover, as consequential damages, the debts to utilities, credit card companies, and other vendors that she accrued during the period of time when the Good Belly companies did not pay her. Consequential damages are damages that do not directly flow from a breach of contract (*see Lola Roberts Beauty Salon, Inc. v Leading Ins. Group Ins. Co., Ltd.*, 160 AD3d, 824, 826 [2d Dept 2018]). Crucially, "[c]onsequential damages, designed to compensate a party for reasonably foreseeable damages, must be proximately caused by the breach" (*Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 193 [2008]). The plaintiff's obligation to pay her debts to utilities, credit card companies, and other vendors remained the same whether she had been paid or not and, thus, the accrual of those debts was not proximately caused by the breach of her employment contract.

7. Attorneys' Fees

The several Labor Law provisions violated here, as well as FSLA, entitle the plaintiff to an award of attorneys' fees. The court notes that the plaintiff has yet to make a specific application for such an award. The plaintiff thus has until December 31, 2021 to make such an application by uploading an attorney's affirmation describing the services rendered and identifying a reasonable hourly fee rate, along with an itemized invoice for the services that were rendered.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the Clerk of the court shall enter judgment in favor of the plaintiff, Claire Pajarillaga, 140-35 Burden Crescent, Briarwood, New York 11435, and against the defendants Good Belly Hospitality Corp., 355 West 14th Street, New York, New York 10014, BLKSQ, LLC, 44 Ninth Avenue, New York, New York 10011, and Mr. Wooh, LLC, 355 West 14th Street, New York, New York 10014, jointly and severally,

(a) in the sum of $13,080, plus statutory prejudgment interest at the rate of 9% per annum from November 15, 2018, on so much of the first cause of action as sought recovery of unpaid wages,

(b) in the sum of $1,730.21 on so much of the first cause of action as sought recovery for breach of a business loan agreement,

(c) in the sum of $5,000, plus statutory prejudgment interest at the rate of 9% per annum from May 24, 2021, on the second cause of action,

(d) in the sum of $5,000, plus statutory prejudgment interest at the rate of 9% per annum from May 24, 2021, on the third cause of action,

(e) in the sum of $20,000, plus statutory prejudgment interest at the rate of 9% per annum from May 24, 2021, on the fourth cause of action;

and it is further,

ORDERED that, should the plaintiff be so advised, she shall submit an application for an award of attorneys' fees on or before December 31, 2021 in accordance herewith.

This constitutes the Decision and Order After Inquest of the court.

11/17/2021
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION