

Allen v Pasha Fashion Ltd.

2021 NY Slip Op 32671(U)

December 14, 2021

Supreme Court, New York County

Docket Number: Index No. 154203/2017

Judge: Erika M. Edwards

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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: <u>HON. ERIKA EDWARDS</u> <p style="text-align: center;"><i>Justice</i></p> <p style="text-align: center;">-----X</p> <p>OMAR ALLEN,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>PASHA FASHION LTD. d/b/a PASHA FASHION, MOHAMED ELSAYAD, individually, 2828 CHURCH AVE APPAREL CORP. d/b/a BARGAIN LAND and IBRAHIM "MOHAMMED" SAFI, individually,</p> <p style="text-align: center;">Defendants.</p> <p style="text-align: center;">-----X</p>	PART 11 INDEX NO. <u>154203/2017</u> MOTION DATE <u>07/12/2021</u> MOTION SEQ. NO. <u>004</u>
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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104 were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents and oral argument held before this court on December 2, 2021, the court grants Plaintiff Omar Allen’s (“Plaintiff”) partial summary judgment motion as to liability on his first, second, third and fifth causes of action in Plaintiff’s amended complaint and damages on his Labor Law § 195 claim as against Defendants Pasha Fashion Ltd. d/b/a Pasha Fashion (“Pasha”) and Mohamed Elsayad, individually (“Elsayad”) (collectively, “Defendants”).

Plaintiff brought this action against Defendants Pasha, Elsayad, 2828 Church Ave Apparel Corp. d/b/a Bargain Land (“2828 Church”) and Ibrahim “Mohammed” Safi, individually (“Safi”). Plaintiff asserts claims for unpaid minimum wages, overtime, spread of hours compensation, wage notice violation and damages pursuant to LL §§ 195 and 198 for failure to comply with state wage record-keeping requirements against Defendants Pasha and Elsayad and retaliation against all Defendants. Only the claims against Defendants Pasha and Elsayad remain.

Plaintiff now moves for partial summary judgment in his favor as to liability as against Defendants Pasha and Elsayad on Plaintiff's first, second, third and fifth causes of action involving his claims for unpaid minimum wages, overtime, spread of hours and wage statement violation, respectively, and as to damages on his Labor Law § 195 claim for failure to provide wage statements.

Plaintiff argues in substance that he is entitled to partial summary judgment on these claims as a matter of law. Plaintiff argues that he was hired by Defendant Elsayad, who is the sole owner of Defendant Pasha, in approximately 2010 and that Plaintiff worked for Defendants as a retail sales associate until May 2017. Plaintiff argues in substance that Defendants failed to maintain and provide accurate payroll records, so Plaintiff has to rely upon his memory to determine the average amount of hours he worked and the amount of money he received.

Plaintiff alleges in substance that over the years he worked at least six days/week from at least 10:00 a.m. to 8:00 p.m. or later. For the first three years, Elsayad paid him commission only at a rate of 10% of the sales that Plaintiff made, for an average of \$50.00 to \$200.00/week, except he made approximately \$480.00 during the week of Christmas in 2010. In 2013, Plaintiff began receiving a flat daily rate, which began at \$50.00/day and increased over the years to \$75.00/day, plus commission which varied from \$30.00/week to no more than \$100/week. Plaintiff further alleged that Elsayad paid Plaintiff in cash which was placed inside of an envelope in which Elsayad wrote the dates Plaintiff worked, the rate of pay or whether he was paid by the hour, shift, day, week, salary, commission, the regular and overtime rates of pay, or the number of regular and overtime hours worked. Elsayad did not provide Plaintiff with a wage statement and he failed to provide Plaintiff with copies of the envelopes as part of discovery. Defendants only provided copies of a notebook that Elsayad began to maintain on advice of

counsel at some point after litigation began, so any entries in this notebook related to previous dates were not made contemporaneously.

Defendants oppose Plaintiff's motion and argue in substance that Elsayad did not hire Plaintiff; that Plaintiff was not an employee, but an independent contractor or freelancer; that Plaintiff's motion was premature; that his average pay over the years was above the minimum wage; that Defendants complied with their record keeping requirements; and that during his last year of employment, Plaintiff chose to work commission only so he could have flexibility in the number of hours and days he worked per week.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his

failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Summary judgment is “often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue” (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]). An award of summary judgment is appropriate when no issues of fact exist (see CPLR 3212(b); *Sun Yan Ko v Lincoln Sav. Bank*, 99 AD2d 943, 943 [1st Dept 1984]).

Here, the court finds that Plaintiff demonstrated his entitlement to partial summary judgment as to liability as against Defendants Pasha and Elsayad on Plaintiff’s claims for Defendants’ failure to pay Plaintiff minimum wages, overtime compensation, spread of hours and wage statement violation and damages for their failure to comply with the state’s record keeping requirements. Defendants failed to raise any material issues of fact in dispute to refute these claims.

Plaintiff demonstrated that he was an employee of Defendants. Plaintiff also demonstrated that based upon the applicable minimum wage requirements for each year, Defendants paid him less than minimum wage and that he did not receive one hour’s pay for spread of hours when he worked in excess of ten hours/day based on the average hours that he worked and average pay that he received each week. Defendants conceded that they never paid Plaintiff overtime for working in excess of 40 hours/week.

Plaintiff also demonstrated that Elsayad is personally liable as the sole owner of the store, because he hired Plaintiff, determined Plaintiff’s schedule, including the hours and days of week that Plaintiff worked, determined the rate of pay and the amount of money that he paid to

Plaintiff, including the amount of base pay, commission and bonuses, taxes and deductions, he handed the cash to Plaintiff and he was responsible for maintaining the wage records.

Additionally, Plaintiff demonstrated that Defendants failed to keep accurate, contemporaneous payroll records, including the identities of the employee and employer, dates and times that Plaintiff and other employees worked in the store and information regarding their rate of pay or amount of pay received, among other requirements. Also, Defendants failed to maintain and produce any such records. As such, Plaintiff demonstrated that he is entitled to \$5000.00 in damages on his Labor Law § 195(3) wage statement violation claim, which is the maximum amount permitted by law.

As such, the court grants Plaintiff's partial summary judgment motion as to liability as against Defendants Pasha and Elsayad as to Plaintiffs claims for minimum wages, overtime compensation, spread of hours and wage statement violation and on his claim for damages for Defendants' failure to comply with the state's record keeping requirements.

The court severs these claims and schedules an immediate non-jury trial before this court for the assessment of damages on February 23, 2022, at 9:30 a.m. to be held virtually.

The court has considered any additional arguments raised by the parties which are not discussed herein and the court denies all requests for relief not expressly granted herein.

As such, it is hereby

ORDERED that the court grants Plaintiff Omar Allen's partial summary judgment motion as to liability on his first, second, third and fifth causes of action in Plaintiff's amended complaint and damages on his Labor Law § 195 claim as against Defendants Pasha Fashion Ltd. d/b/a Pasha Fashion and Mohamed Elsayad, individually, only; and it is further

ORDERED that the court severs Plaintiff's first, second, third and fifth causes of action in Plaintiff's amended complaint and damages on his Labor Law § 195 claim as against Defendants Pasha Fashion Ltd. d/b/a Pasha Fashion and Mohamed Elsayad, individually, and orders that an immediate non-jury trial of the issues regarding damages as to these claims shall be had before the court on February 23, 2022, at 9:30 a.m. via Microsoft Teams (separate link will be provided to counsel via email); and it is further

ORDERED that all documents to be relied upon at the trial must be pre-marked and provided to opposing counsel and the court via email to the Part 11 Clerk, Ms. Bing Zhao, at SFC-Part11-Clerk@nycourts.gov no less than seven (7) days prior to the commencement of the damages trial; and it is further

ORDERED that plaintiff's counsel shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for Defendants Pasha Fashion Ltd. d/b/a Pasha Fashion and Mohamed Elsayad and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such non-jury trial before the undersigned; and it is further

ORDERED that such service upon the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that if the parties wish to schedule a settlement conference with the court prior to the damages trial, then they can request with Ms. Zhao.

This constitutes the decision and order of the court.

12/14/2021

DATE



ERIKA EDWARDS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE