

**Volpe v American Language
Communication Ctr., Inc.**

2021 NY Slip Op 34300(U)

June 14, 2021

Supreme Court, New York County

Docket Number: Index No. 153993/2018

Judge: Verna L. Saunders

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS PART IAS MOTION 36

Justice

-----X INDEX NO. 153993/2018
JOHN VOLPE, Plaintiff, MOTION SEQ. NO. 001

- v -

AMERICAN LANGUAGE COMMUNICATION CENTER, INC., (d/b/a AMERICAN LANGUAGE CENTER), JEAN PACHTER and PETER PACHTER, Defendant.

DECISION + ORDER ON MOTION

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 25, 30, 32

were read on this motion to/for DISMISS

Plaintiff commenced this action seeking unpaid wages pursuant to New York Labor Law (NYLL) §§ 190, et seq. claiming that defendants failed to pay him required minimum and overtime wages. Defendants move, pre-answer, seeking dismissal of the complaint pursuant to CPLR 3211 arguing that as a professional, plaintiff is exempt from the relevant provisions of the NYLL; he never received less than minimum wage; and the holdings in his prior federal action, where he sought the same relief, bar recovery in this action. (NYSCEF Doc No. 5, Memorandum of Law in Support).

Plaintiff opposes the motion.

When considering a defendant's motion to dismiss plaintiff's complaint for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (See Leon v Martinez, 84 NY2d 83, 87-88 [1994].) Although a court should not be concerned with the ultimate merits of the case (see Anguita v Koch, 179 AD2d 454, 457 [1st Dept 1992]), these considerations do not apply to allegations consisting of bare legal conclusions, as well as, factual claims which are flatly contradicted by documentary evidence. (See Simkin v Blank, 19 NY3d 46, 52 [2012].)

Plaintiff was an English as a Second Language (ESL) teacher for the American Language Communication Center, Inc. (ALCC) from 2004 through 2014. Plaintiff asserts that during his employment he worked twenty-nine to thirty-two hours per week and was paid fifteen dollars per hour. Plaintiff further asserts he spent an additional fifteen hours per week preparing for his class, attending meetings, and correcting exams. Plaintiff alleges he was not paid for his out-of-

class work and as such, this unpaid time brought his rate of pay below minimum wage. (NYSCEF Doc. No. 2, *Complaint*).

Defendants argue, *inter alia*, that plaintiff commenced a lawsuit in the United States District Court for the Southern District of New York, to wit: *John Volpe v American Language Communication Center, Inc., et al.*, Index Number 15-CV-6854 (GBD) asserting identical claims. In that action, the court dismissed plaintiff's NYLL claims, without prejudice, declining supplemental jurisdiction over the state law claims and dismissed plaintiff's federal claims, with prejudice, holding that federal overtime and minimum wage provisions do not apply to plaintiff as he fell under the Fair Labor Standards Act (FLSA) exemption for employees in a bona fide professional capacity. (*Volpe v Am. Language Commun. Ctr., Inc.*, 200 F Supp 3d 428 [SDNY 2016].) The decision was upheld by the Second Circuit Court of Appeals. (*Volpe v Am. Language Commun. Ctr., Inc.*, 692 F App'x 51 [2d Cir 2017].) With respect to NYLL overtime requirements, defendants contend that the findings in the federal action hold true in this instant action insofar as a plaintiff who is exempt under the FLSA will also be exempt from NYLL overtime provisions. Thus, defendants avow that plaintiff is estopped from re-litigating the issue of his exemption as he was already found exempt in the federal action. Similarly, defendants argue that the minimum wage provision of the NYLL do not apply to plaintiff as teachers are considered professionals and thus, exempt.

Finally, defendants argue that if the exemptions did not apply to plaintiff, his minimum wage claim would still not lie as plaintiff was not paid less than minimum wage and in fact was paid more than required by NYLL. Specifically, plaintiff concedes he was paid fifteen dollars (\$15.00) per hour from 2004 through 2014 and during that time the highest rate of minimum wage was eight dollars and seventy-five cents (\$8.75). Therefore, based on plaintiff's rate of pay he received more wages than he was entitled to under the NYLL.

In opposition, plaintiff argues, in sum and substance, that the federal action was dismissed on the merits only as to plaintiff's FLSA claims and unlike FLSA the NYLL does not have a specific exemption for teachers. As the federal action decided claims under FLSA and expressly declined to decide plaintiff's state causes of action under NYLL, plaintiff avers collateral estoppel does not apply here. Plaintiff further argues that he is not exempt under the NYLL professional exemption and that there is no evidence in the record that he was required to have "advance knowledge in any field of science or learning, or that such knowledge is customarily acquired by a prolonged course of specialized instruction, as distinguished from a general academic education." (NYSCEF Doc. No. 12; *Memorandum of Law in Opposition* at 6). Plaintiff further argues that an employee may maintain a cause of action for failure to pay minimum wage based upon unpaid hours even if the weekly wage divided by the total hours worked is above minimum wage. Thus, plaintiff asserts he has a claim for the unpaid gap-time hours regardless of his rate of pay for the other hours he worked.

In reply, defendants maintain that if an employee is exempt under FLSA they are exempt under NYLL and that plaintiff has misinterpreted the law on this issue. Defendants argue that as plaintiff was found to be an exempt professional under FLSA, he is exempt here and thus, his overtime, minimum wage, and gap-time claims do not lie. Defendants counter plaintiff's argument that he is not a professional under NYLL, contending that he meets the two prong test,

to wit: his primary duty was teaching and his employer required teachers hold a baccalaureate or equivalent degree and receive ESL training (first prong); and, his position required some discretion and independent judgment (second prong).

As an initial matter, the First Department has held that exemptions under FLSA require exemptions under NYLL. (See generally, *Anderson v Ikon Off. Solutions, Inc.*, 38 AD3d 317 [1st Dept 2007].) While the federal court's ruling does not explicitly bar plaintiff from seeking recovery in this action, as it declined supplemental jurisdiction over plaintiff's state law claims, this court may consider the judicial admissions and findings in that action, as well as, the relevant case law and statutes. Accordingly, plaintiff's claims fail as 12 NYCRR § 142-2.2 and 12 NYCRR § 142-2.14(c)(4)(iii) are subject FLSA exemptions.

12 NYCRR § 142-2.2 states that “[a]n employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's regular rate in the manner and methods provided in and subject to the exemptions of sections 7 and 13 of 29 USC 201 et seq., the Fair Labor Standards Act of 1938, as amended, provided, however that the exemptions set forth in sections 13(a)(2) and (4) shall not apply.” Section 7 of 29 USC 201 et seq., the Fair Labor Standards Act of 1938 (FLSA) pertain to maximum hours, overtime compensation, et cetera and section 13 addresses exemptions. Currently, FLSA sections 13 (a)(2) and (4) have been repealed, however section 13(a)(1), which addresses minimum wage requirements, states that provisions of sections 6 and 7 shall not apply to “any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman...” Thus, any person employed in a bona fide professional capacity may not maintain a minimum wage (section 6) or an overtime wage (section 7) violation.

Pursuant to 12 NYCRR § 142-2.14(c)(4)(iii), work in a bona fide professional capacity means work by an individual “a) whose primary duty consists of the performance of work: requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual or physical processes; or original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination or talent of the employee; and (b) whose work requires the consistent exercise of discretion and judgment in its performance; or (c) whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work) and is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.”

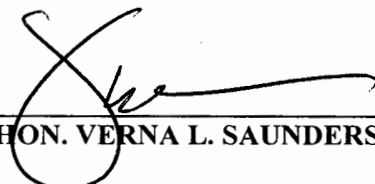
It is clear from the plain language of the regulation, that as a teacher, plaintiff is exempt from the recovery sought. Furthermore, plaintiff's assertions that the record is devoid of evidence showing that he was required to have advance knowledge in any field of science or learning is without merit as it is undisputed that plaintiff worked as a teacher for ALCC whose license requires its teachers hold a baccalaureate or equivalent degree from an institution

licensed or recognized by the department.¹ Additionally, plaintiff alleges, in his federal amended complaint, that his teaching position required discretion and independent judgment. This judicial admission contained in plaintiff's federal pleadings is annexed to the moving papers and is properly a part of the record before this court. (See *Mich. Nat'l Bank-Oakland*, 89 NY2d 94,103 [1996].) Likewise, in plaintiff's complaint here, he asserts that he spent several hours per week preparing for classes, preparing quizzes and correcting exams, all within the purview of the consistent exercise of judgment and discretion. Thus, after careful consideration of the arguments advanced in connection to this pre-answer motion to dismiss, this court finds that plaintiff is exempt from recovering under NYLL as he worked in a bona fide professional capacity as an ESL teacher. All remaining arguments have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

ORDERED that defendants' motion is granted in its entirety and the complaint is dismissed; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for defendants shall serve a copy of this decision and order, with notice of entry, upon plaintiff.

June 14, 2021


HON. VERNA L. SAUNDERS, JSC

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

¹ This court is persuaded by the findings in the federal action *Volpe v Am. Language Commun. Ctr., Inc.*, 200 F Supp 3d 428 [SDNY 2016] which indicated that the ALCC's license with the New York State Education Department requires its teachers hold a baccalaureate or equivalent degree and that its website indicates that its ESL teachers all have at least a Bachelor's degree, with many holding a Master's degree.