Ramires v AGDG Car Wash Corp.
2021 NY Slip Op 34335(U)
July 22, 2021
Supreme Court, Nassau County
Docket Number: Index No. 616170/2019
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 30
NASSAU COUNTY

Index No.: 616170/19
Motion Seq. No.: 03
Motion Date: 02/26/2021

FREDIS RAMIRES, CARLOS ALVAREZ, EVENOR VELASQUEZ, MANUEL GARCIA, JUAN GARCIA LORGIO INTERIANO, ROBERTO RAMOS a/k/a SANTIAGO LOPEZ, LUCIO GAITAN a/k/a ALEXANDER GAINTAN, MELVIN JOEL GARCIA a/k/a EMERSON GARCIA, OSCAR PAZ CRUZ, DAVID MOLINA, LEONIDAS GONZALEZ, MARIO GRIMALDI, HENRY NUNEZ, FREDIS MANCIA a/k/a JOSE MANCIA, JOSE MARQUEZ, KEVIN BARRIENTOS, WILFREDO CRUZ and JOSE CRUZ, on behalf of themselves and others similarly situated,

Plaintiffs,

- against -

AGDG CAR WASH CORP., PM & JP CAR WASH, LLC, RICHARD GABAY, PETER MAZZA and JOSEPH PANZA,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits and Memorandum of Law	**1**
Affirmation in Opposition and Exhibits and Memorandum of Law	**2**
Reply Affirmation and Memorandum of Law	**3**

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiffs move for an order approving and granting their attorneys' fees in this action, and directing the Clerk of the Court to grant a judgment in that amount. Defendants oppose the motion.

In support of the motion, counsel for plaintiffs asserts, in pertinent part, that, "[a]fter years of hotly contested litigation in this wage/hour class action case, on January 18, 2021, Defendants unexpectedly served an Offer to Comprise under CPLR Rule 3221.... A CPLR Rule 3221 Offer to Compromise is an unusual device and not typically served in a normal settlement negotiation. Rather, it is a strategic litigation tool which is potentially devasting and costly for Plaintiffs. It states that if plaintiffs reject the offer, and plaintiffs fail to recover a more favorable judgment (likely at trial), then plaintiffs are not only prevented from recovering their costs, but worse, becomes **liable for Defendants' cost from the date of the offer**. Here, Defendants served the Offer on January 18, 2021, the same day they noticed 17 plaintiffs' depositions and 4 witness depositions to be held over the coming weeks. Thus, the Offer represented thousands in costs that Plaintiffs would be prevented from recovering against Defendants, but could also be liable to pay Defendants' own costs. Therefore, serving of the Offer, and particularly its timing, was a strategic and calculated litigation tactic made by Defendants. On January 28, 2021, Plaintiffs accepted the Offer and filed that acceptance with the Court (the 'Acceptance').... A Judgment, pursuant to the Acceptance, was signed by the Clerk of the Court on February 8, 2021, and entered against all Defendants, in favor of all named Plaintiffs.... While the Offer specified the Judgment amount of $150,00.00 including costs made (*sic*) be taken against Defendants, it was silent as to fees (like attorneys' fees).... As fully briefed by the Memorandum of Law in Support ('MOL') as attached hereto, the Supreme Court has pointedly held that the issue of whether an Offer to Compromise that includes costs, but is silent as to fees (like here), turns on whether the underlying statute defines 'fees' as part of 'cost.' The underlying statute here is the NYLL, which define fees separately from costs.

Therefore, as conclusively held, the Offer does not include attorneys' fees and Plaintiff (*sic*) is entitled to recover them upon this motion." *See* Plaintiffs' Affirmation in Support Exhibits 1-3.

Counsel for plaintiffs contends, in pertinent part, that, "[i]ndeed, since this litigation began, Defendants made their litigation tactics crystal clear – they employed a scorched Earth strategy, vexatiously litigating each and every issue at all costs instead of every providing a good faith settlement or proceeding with orderly discovery. Defendants chose to rack up attorneys' fees rather than pragmatically resolving fixable issues. Defendants (*sic*) litigation strategy was dubious, as Plaintiffs were suing under New York's Labor Law, entitling Plaintiffs to their entire attorneys' fees should they 'prevail' on **any** issue in this litigation. Indeed, Plaintiffs cautioned Defendants on their strategy, **over and over again**, stating that they will ultimately be responsible for plaintiffs' fees if they continue to refuse to agree to pragmatic resolutions for the most basic of issues. Undeterred, Defendants never altered and continue with meritless litigate (*sic*) at all cost. Also of note is that Defendants served the Offer after being informed that Plaintiffs intended to file a motion for summary judgment the following Friday, being January 22, 2021. Had Plaintiffs' (*sic*) filed that motion, they would have been entitled to their attorneys' fees for Defendants (*sic*) failure: to pay minimum wage, improper use of the tip credit, overtime pay, provide proper wage statements, and wage notices -- as required by the NYLL. [citations omitted]."

Counsel for plaintiffs submits, in pertinent part, that, "[p]laintiffs' attorneys' fees should be approved. I am the Firm's principal employment lawyer and have been a litigator since 2002 when I worked as an associate at a national law-firm in downtown Manhattan. I devote nearly the entirety of my practice to litigation.... This Court has found that my hourly rate of $450.00 in wage and hour cases is reasonable based on my experience. Judge Goodstein of this Court recently granted me counsel fees of $25,141.00 in in a wage and hour case following an inquest, wherein defendants failed to appear. [citation omitted]. That award was based on my $450.00 per hour rate.... The Eastern District has also approved of many wage/overtime settlements based on my billing rate of $450.00.... Nathalia Castiollo, the Firm's licensed paralegal, has a billable rate of $150, which is also fair and reasonable. Ms. Castillo is the Firms' principal paralegal and office manager.... My Firm has expended 485 partner hours and 22 paralegal hours on this matter. Multiplying the expended hours by a $450.00 hourly billable rate for partners, and $150.00 billable rate for paralegals, equals $220,740.00. (*sic*) Which is the presumptively reasonable fee in this matter and should be awarded.... Additionally, Plaintiffs (*sic*) invoices for work attributed against these Defendants only (PM&JP, AGDG, Mazza, Panza and Gabay) in the Federal Action was substantial. A significant part of that time was spent on issues that had relevance in this action and likely lead to Defendants providing the Offer. For example, Plaintiffs (*sic*) motion seeking class certification relied on the interrogatory responses provided in the Federal Action of the following Plaintiffs to establish a common policy and practice of failing to: pay minimum wage, overtime, spread of hours pay, wage notices and wage statements: Carlos Alvarez, Evenor Velasques, Fredis Ramires, Juan Garcia, Julio Maldonado, Lorgio Interiano, Lucio Gaitan a/k/a Alexander Gaintan, Manuel Garcia, Melvin Garcia a/k/a Emerson Garcia, Oscar Paz Cruz and Roberto Ramos a/k/a Santiago Lopez. Plaintiffs would (*sic*) had to provide those responses in this case, had it not already been done in the Federal Action. Thus, for the purposes of this motion, Plaintiffs are willing to waive those fees (although reserve their rights as to their entitlement to same), which further underscores the reasonableness of the relief requested herein." *See* Plaintiffs' Affirmation in Support Exhibit 13.

Counsel for plaintiffs argues, in pertinent part, that, "[a]n award of reasonable attorneys' fees is statutorily **required** for a prevailing plaintiff in a wage-and-hour action - like here. NYLL 663(1) ('If any employee is paid by his or her employer less than the wage to which he or she is entitled under the provisions of this article, he or she **shall** recover in a civil action the amount of any such underpayments, together with costs **all** reasonable attorney's fees…') (emphasis added) and NYLL § 198 (1-a) ('In any action instituted in the courts upon a wage claim by an employee or the commissioner in which the employee prevails, the court **shall** allow such employee to recover the full amount of any underpayment, all reasonable attorney's fees…' (emphasis added). Attorneys' fees are also statutorily required in additional sections of the NYLL: a. improper wage notices under NYLL 198 (1-b)…; and b. improper wage statements under NYLL 198 (1-d)…. [citations omitted]. The Supreme Court has held that a (*sic*) 'plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on **any** significant issue in litigation which achieves **some** of the benefit the parties sought in bringing suit.' [citation omitted] (emphasis added). Courts have unanimously held that accepting an offer of judgment -- like here (and therefore obtaining a judgment against Defendants in favor of Plaintiffs) **automatically** renders Plaintiffs the prevailing party under the NYLL, entitling Plaintiffs to an award of attorneys' fee under the NYLL. [citations omitted]. Any contention that the Offer includes attorneys' fees is flat-out wrong and squarely rejected by the Supreme Court. For starters, the face of the Offer makes no reference to fees - only costs…. The rule is, when an offer to compromise is silent as to fees, the question as to whether the word 'cost' includes 'attorneys' fees' (as Defendants contend) turns on whether the underlying statute defines 'fees' as part of 'cost.' [citation omitted]. Here, the relevant underlying statues in this wage-hour case is the NYLL. Looking at those statutes, it is well established that fees and costs are defined separately in **all** relevant sections." *See* Plaintiffs' Affirmation in Support Exhibit 1.

In opposition to the motion, counsel for defendants asserts, in pertinent part, that, "[t]he Defendants' January 18, 2021 Offer of Compromise (the 'Offer') pursuant to CPLR Rule 3221 (the 'Rule'), accepted by Plaintiffs on January 28, 2021, explicitly allowed Plaintiffs $150,000 'including costs accrued'. As construed by the courts cited in Defendants' Memorandum of Law, pursuant to the Rule attorney's fees are a subset of costs. Plaintiff (*sic*) accepted $150,000 in full satisfaction of all potential liability to conclude this action. Plaintiffs conflate Defendants' Offer pursuant to the Rule with federal statutes, New York Labor Law, or other statutes to obfuscate Defendants' Offer, which was made solely pursuant to CPLR Rule 3221. Plaintiffs' memorandum of law does not address the relevant precedent pursuant to the Rule. Plaintiffs accepted Defendants' Offer to conclude this action. Class Counsels' post-judgment demand for additional attorney's fees was apparently designed as a duplicitous scheme to ambush Defendants and this Court by 'accepting" Defendants' Offer but then initiating post-judgment litigation. Plaintiffs' tactics bear the distinct odor of mendacity."

Counsel for defendants further submits, in pertinent part, that, "[t]he legislative intent of the statute, CPLR Rule 3221 (the 'Rule'), is to facilitate settlement. Parties can expeditiously bring finality to their litigation by a plaintiff's acceptance of a defendant's offer pursuant to the Rule. In this action Plaintiffs accepted Defendants' Offer to conclude all litigation. Class Counsel's post-judgment motion is completely unwarranted and should be denied in its entirety. Class Counsel had three (3) conversations with the Court after Defendants served their Offer, before Counsel accepted it. Not once during those calls did Class Counsel ask whether Defendants intended to exclude 'attorney's fees' from their Offer 'including costs'. On

January 19, 2021, the Court conducted a 'check-in' conference with counsel for the Parties to, among other things, ascertain the status of settlement negotiations. I advised the Court and Class Counsel that Defendants had made a 'top dollar' written 'take it or leave it' Offer of $150,000 to fully settle the matter. Class Counsel scoffed at the Offer and expressed no interest in it at that conference on January 19, 2021, or at any time, until Plaintiffs accepted it on January 28, 2021. On January 25, 2021, counsel for the Parties spoke with the Court a second time regarding litigation and potential mediation. Again, Class Counsel remained silent about his tactic to accept Defendants' Offer then file a post-judgment motion for additional attorney's fees. On January 26, 2021, counsel spoke with the Court a third time asking only if Defendants' $150,000 offer was still on the table. Class Counsel again did not raise attorney's fees and had no reason to believe there was an unstated exclusion of 'fees' from 'costs' in the Offer. Defendants calculated they owed the entire class of Plaintiffs less than $30,000 in total. Additional attorney's fees are unwarranted as Plaintiffs' damages and Class Counsel's costs and fees were included in Defendants' offer. Attorney's fees are construed by CPLR Rule 3221 as a subset of 'costs accrued', as set forth in Defendants' Memorandum of Law. The Defendants' offered to 'allow judgment to be taken against them in the above-entitled action' to quiet all Plaintiffs' claims and terminate this litigation. Defendants did not offer a partial compromise with an invitation to Class Counsel to continue the action over the amount of his claimed fees. When formulating this Offer, Defendants offered far more than Plaintiffs could ever prove at trial, plus costs solely to conclude this action at this time with no further proceedings. Nowhere in the Defendants' Offer is there an exclusion of attorney's fees. Class Counsel pretends Defendants did not intend to include attorney's fees, but there is nothing in the Offer that could lead to a reasonable belief that Defendants intended to exclude any potential liability from 'the action'. Paragraph 1 of

Plaintiffs' Complaint defines 'the action' as seeking attorney's fees. The 'action' should have the same definition at the beginning of the lawsuit as it does at the end. If Class Counsel had a good faith question as to the meaning of Defendants' Offer, they had ten (10) days after receipt to make appropriate inquiries. Class Counsel planned an ambush rather than make good faith inquiries. Defendants need only to receive from Plaintiffs an allocation of monetary amounts to be paid to each of the workers for damages and to Class Counsel for costs and fees equaling an aggregate total of $150,000. Defendants shall then produce the designated checks to Class Counsel to conclude this action."

Counsel for defendants also contends, in pertinent part, that, "[a]fter years of cost and aggravation caused by this action, Defendants wanted to put an immediate end to any further litigation. Class Counsel had made excessive demands for years, far above a judgment he could ever obtain. These are the precise circumstances CPLR Rule 3221 is designed to remediate. Unscrupulous plaintiffs could abuse the legal process by filing lawsuits, making implausible allegations, and use the litigation process and cost of defense to leverage unjustified settlements. To remedy such abuse, the legislature enacted the Rule. It is brilliant in serving judicial economy. If accepted, the action is immediately terminated on those terms with no further litigation. If rejected and plaintiffs fail to obtain a more favorable judgment, plaintiffs must pay for Defendants' costs of defending the action from the date of the offer. Courts construe 'attorney's fees' to be a sub-set of 'costs'. 'If the offer is not accepted and the claimant fails to obtain a more favorable judgment, he shall not recover costs from the time of the offer, but shall pay costs from that time. (CPLR Rule 3221). That critical phrase is unique to the Rule. Class Counsel relies on Federal Rule 68, which has no parallel language regarding costs.... Class Counsel drove up Defendants' costs with duplicative filings and intrusive discovery demands based on fictitious damages calculations. Class Counsel used the federal and state courts for the same purpose — to threaten, harass and annoy Defendants into making an unjustified settlement offer. These are precisely the circumstances which the legislature designed the Rule to remedy. Class Counsel engaged in lengthy motion practice in federal court, but when faced with a trial date, withdrew all claims. Plaintiffs' disingenuous effort to separate 'attorney's fees' from 'costs' in this matter is completely without merit. Federal Rule of Civil Procedure Rule 68 differs from CPLR Rule 3221 squarely on the issue of whether attorney's fees are included in costs, or not. Plaintiffs' reliance on a federal statute, Rule 68, to construe a state statute, CPLR 3221, is contrary to state law and is entirely misplaced, as set forth in Defendants' Memorandum of Law in Opposition.... Class Counsel did not discuss any aspect of the Defendants' Offer until after they accepted it. It is flatly false that attorney's fees were discussed 'over and over again'. Class Counsel's strategy is to ambush rather than to resolve differences in good faith.... [A]dditional attorney's fees should not be awarded. It can be presumed that Class Counsel has a contingent fee agreement with Plaintiffs. Ordinarily such agreements provide that plaintiffs pay one-third of their total recovery in fees to their attorney. Class Counsel is attempting to boost his recovery by pretending that fees were not part of the settlement. Defendants never intended to exclude fees or any potential liability from their Offer. Class Counsel could have asked a good faith question about inclusions or exclusions from Defendants' written Offer but failed to do so. As Defendants' lump sum offer included costs, Plaintiffs' counsel receives his fees on a contingency basis, which is a reasonable percentage of the lump sum. Courts have deemed a one-third contingency fee to be presumptively fair. Plaintiffs' reliance on an unopposed application is scant evidence of a reasonable hourly rate, particularly when it was granted based on 'Plaintiff's counsel's contentions ... and the Defendant's default'.... [T]he presumptive reasonable fee to be awarded is a reasonable percent of the total $150,000 accepted by Plaintiffs to settle this action. Further, the number of hours claimed is excessive. Plaintiffs admit the pleadings and written discovery of this case were substantially like the federal case. In this action, the pleadings, discovery, class certification motion and motions to argue a failed 'relation back' theory to extend the statute of limitations were all used from the prior federal case. Neither Class Counsel's hourly rate nor the number of hours he claims is reasonable.... Class Counsel's motion for additional attorney's fees is without merit in fact or law and respectfully should be denied in its entirety."

Counsel for defendants further argues, in pertinent part, that, "[a]fter Class Counsel accepted Defendants' Offer, rather than arrange for remittance of the $150,000 and filing a stipulation of discontinuance, as most attorneys would do, Class Counsel filed a judgment with the County Clerk. If Class Counsel had brought anything further before the Court, his plan to seek a bigger settlement post-judgment would have been revealed and rejected. An offer pursuant to CPLR 3221 serves judicial economy. To implement the process, an offer in compromise is made. The offeree has two options - reject and continue the litigation or accept and conclude the case. Class Counsel elected to unconditionally accept Defendants' Offer. Accordingly, the instant motion for additional fees is substantively deficient and procedurally untimely. Well-settled precedent fully supports the principle that post-judgment is too late to seek additional terms. 'When there is no express reservation of rights with respect to the derivative issue of attorneys' fees, it must be deemed to have been waived and subsumed in the negotiated settlement' [citations omitted].... Pursuant to the Rule, when a plaintiff accepts the sum offered, the matter is concluded on that basis. In this action, Plaintiffs accepted Defendants' Offer and judgment has been entered. A judgment is the determination of the rights of the parties in an action, CPLR 5011, and a final judgment will dispose of the entire litigation before the court, both as to subject matter and parties. [citations omitted]. The judgment filed in this case is a final disposition. The matter is concluded upon Defendants' payment of $150,000. No post-judgment litigation for additional fees is appropriate after entry of judgment on Defendants' Offer."

Counsel for defendants also asserts, in pertinent part, that, "[t]he Defendants' Offer explicitly 'included costs'. The Rule has been construed to include attorney's fees in the Rule's meaning of costs. The Rule provides that when a plaintiff rejects a defendant's offer and fails to 'obtain a more favorable judgment, he shall not recover costs from the time of the offer but shall pay costs from that time.'… In the cases where defendants have been awarded 'costs' pursuant to this Rule, as in the cases cited above, courts have included attorney's fees in the award as a sub-set of costs. Thus, in this action Plaintiffs have already accepted all their attorney's fees already. The meaning of 'costs' pursuant to CPLR 3221 is well-settled…. The legislative intent to include attorney's fees within the meaning of costs is further discussed in CPLR 3220, a Rule similar in purpose and operation to CPLR 3221 pertaining to contracts…. The terms 'costs and fees' are redundant pursuant to the Rule. Class Counsel attempts to draw a distinction where there is no difference."

CPLR § 3221 reads, "[e]xcept in a matrimonial action, at any time not later than ten days before trial, any party against whom a claim is asserted, and against whom a separate judgment may be taken, may serve upon the claimant a written offer to allow judgment to be taken against him for a sum or property or to the effect therein specified, ***with costs then accrued***. If within ten days thereafter the claimant serves a written notice that he accepts the offer, either party may file the summons, complaint and offer, with proof of acceptance, and thereupon the clerk shall enter judgment accordingly. If the offer is not accepted and the claimant fails to obtain a more favorable judgment, he shall not recover costs from the time of the offer, but shall pay costs from that time. An offer of judgment shall not be made known to the jury (emphasis added)." The Court notes the difference between CPLR § 3221 and CPLR § 3220, in that CPLR § 3220, "Offer to liquidate damages conditionally", includes the provision for ***"expenses necessarily incurred by the party"***.

Based upon the case law and arguments provided by both counsel, the Court finds that CPLR § 3221, as well as the similar federal statute, Federal Rule of Civil Procedure 68, do not include attorney's fees in the specified language of ***"costs"***. Costs are distinct from attorney's fees because attorney's fees are considered to be merely the incidents of litigation. *See Baker v. Health Management Systems, Inc.*, 98 N.Y.2d 80, 745 N.Y.S.2d 741 (2002). Consequently, the general rule is that each litigant is required to absorb the cost of her or her own attorney's fees, ***unless an award is authorized*** by agreement between the parties, ***statute*** or court rules (emphasis added). *See id.*; *Norstar Bank of Long Island v. Stradford*, 125 A.D.2d 298, 508 N.Y.S.2d 583 (2d Dept. 1986).

New York Labor Law § 633(1) reads, "[i]f any employee is paid by his or her employer less than the wage to which he or she is entitled under the provisions of this article, he or she shall recover in a civil action the amount of any such underpayments, ***together with costs all reasonable attorney's fees***, prejudgment interest as required under the civil practice law and rules, and unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law, an additional amount as liquidated damages equal to one hundred percent of the total of such underpayments found to be due. Any agreement between the employee, and the employer to work for less than such wage shall be no defense to such action (emphasis added)."

The instant matter before the Court is a wage-and-hour action pursuant to the New York Labor Law and therefore, according to the statute above, New York Labor Law § 633(1), an award of attorney's fees are authorized.

"In determining reasonable compensation for an attorney, the court must consider such factors as the time, effort, and skill required; the difficulty of the questions presented; counsel's experience, ability, and reputation; the fee customarily charged in the locality; and the contingency or certainty of compensation." *Green v. Silver*, 79 A.D.3d 1097, 913 N.Y.S.2d 574 (2d Dept. 2010). *See also Matter of Gaffney v. Village of Mamaroneck*, 21 A.D.3d 1032, 801 N.Y.S.2d 400 (2d Dept. 2005); *Matter of Freeman*, 34 N.Y.2d 1, 355 N.Y.S.2d 336 (1974). The determination as to whether legal fees are reasonable under the circumstances is a matter within the sound discretion of the hearing court. *See N. Santemma v. Chasco Co.*, 261 A.D.2d 408, 689 N.Y.S.2d 220 (2d Dept. 1999).

Counsel for plaintiffs is requesting attorneys' fees in the amount of $220,740.00, which is $70,000.00 more than the actual settlement offer. The Court finds that, in order to ascertain whether the legal fees requested by counsel for plaintiffs are in fact reasonable, a hearing must be held.

Accordingly, plaintiffs' motion, for an order approving and granting their attorneys' fees in this action, and directing the Clerk of the Court to grant a judgment in that amount, is hereby **GRANTED to the extent that a hearing shall be held** with respect to same. And it is further

ORDERED that the matter is hereby set down for a hearing to determine the amount of plaintiffs' reasonable attorneys' fees. Said hearing is to be held before this Court, IAS Part 30, at 9:30 a.m. on the 26th day of August, 2021.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

ENTERED
Jul 23 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: Mineola, New York
July 22, 2021