

Cabrera v Deadwood Constr. Inc.

2022 NY Slip Op 34722(U)

March 7, 2022

Supreme Court, Westchester County

Docket Number: Index No. 50350/21

Judge: James W. Hubert

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
EDGAR CABRERA and MIGUEL MARTINEZ,
individually and on behalf of all other persons similarly
situated who were employed by DEADWOOD
CONSTRUCTION INC., PERLAND INTERIORS
INCORPORATED, SCORPION CONSTRUCTION,
INC., and JEROME HARRIGAN and PATRICK FARRELL
and any other entities affiliated with, controlling, or
controlled by DEADWOOD CONSTRUCTION INC.,
PERLAND INTERIORS INCORPORATED, SCORPION
CONSTRUCTION, INC., and JEROME HARRIGAN and
PATRICK FARRELL individually,

Plaintiffs,

-against-

Index No.: 50350 / 21
Motion Date: 2 / 2 / 21
Motion Seq. No. 1
DECISION AND ORDER

DEADWOOD CONSTRUCTION INC., PERLAND
INTERIORS INCORPORATED, SCORPION
CONSTRUCTION, INC., and JEROME HARRIGAN and
PATRICK FARRELL and any other entities affiliated with,
controlling, or controlled by DEADWOOD
CONSTRUCTION INC., PERLAND INTERIORS
INCORPORATED, SCORPION CONSTRUCTION, INC.,
and JEROME HARRIGAN and PATRICK FARRELL
individually,

Defendants.

-----X
HUBERT, J.

The following documents were read on this motion by Defendants, Deadwood Construction Inc., Jerome Harrigan and Patrick Farrell (collectively hereafter, "the Moving Defendants"), for an order pursuant to rule 3211(a)(7) of the Civil Practice Law and Rules dismissing the amended complaint in the above-captioned action as against them:

- Notice of Motion - Affirmation - Exhibit - Memorandum of Law
- Memorandum of Law in Opposition
- Reply Affirmation - Exhibit - Reply Memorandum of Law

Upon consideration of all of the foregoing, and for the following reasons, the motion to dismiss is denied.

Factual and Procedural Background

Plaintiffs commenced the above-captioned action in Supreme Court, New York County, by filing a Summons and Class Action Complaint via the New York State Courts E-Filing system (hereafter, "NYSCEF") on June 19, 2020.

By stipulation executed by Plaintiffs and all named Defendants and So-Ordered on September 9, 2020, and entered via NYSCEF on September 10, 2020, venue was changed to Supreme Court, Westchester County.

Plaintiffs filed a First Amended Class Action Complaint (hereafter, "the Amended Complaint") via NYSCEF on October 21, 2020, in which pleading Plaintiffs allege that they were formerly employed by all of the Defendants (*see* Amended Complaint [NYSCEF DOC. NO. 31] at ¶1).

Plaintiffs plead four causes of action.

In the first cause of action Plaintiffs allege that Defendants failed to pay minimum wages in violation of section 142-2.1 of title 12 of the Official Compilation of Codes, Rules and Regulations of the State of New York, and section 663 of the Labor Law (Amended Complaint at ¶¶48-58).

In the second cause of action Plaintiffs allege that Defendants failed to pay compensation for overtime in violation of 12 NYCRR 142-2.2 and Labor Law § 663 (*see id.* at ¶¶59-65)..

In the third cause of action Plaintiffs allege that Defendants failed to pay wages for all hours worked in violation of Labor Law §§190 and 650 (*see id.* at ¶¶66-77).

In the fourth cause of action Plaintiffs allege that Defendants failed to provide wage statements in violation of 12 NYCRR 146-2.2 and 2.3, and Labor Law §§ 198-1(d) and 195(3) (*see id.* at ¶¶78-82).

In lieu of an answer, the Moving Defendants made the instant motion pursuant to CPLR 3211(a)(7) by filing via NYSCEF on January 14, 2021.

On January 15, 2021, Defendants, Perland Interiors Incorporated and Scorpion Construction,

Inc., filed an Answer to the Amended Complaint.

On January 25, 2021, Plaintiffs filed via NYSCEF papers in opposition to the instant motion.

On February 1, 2021, the Moving Defendants filed via NYSCEF reply papers in further support of their motion.

The motion was deemed fully submitted on February 2, 2021, the original return date.

Discussion

The motion to dismiss is denied.

On a motion pursuant to CPLR 3211(a)(7) to dismiss a pleading for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the proponent the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. However, where evidentiary material is submitted and considered on [the motion] the question becomes whether the proponent of the pleading has a cause of action, not whether the proponent has stated one. An affidavit submitted by the movant will almost never warrant dismissal under CPLR 3211 unless it establishes conclusively that the proponent of the pleading has no cause of action. Dismissal should not eventuate unless it has been shown that a material fact as claimed by the proponent to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it (internal citations omitted) (*Cajigas v Clean Rite Cleaners, LLC*, 187 AD3d 700, 701 [2d Dept 2020]).

Accepting as true all facts alleged in the Amended Complaint and according Plaintiffs the benefit of every possible favorable inference therefrom, the Court determines that such facts do fit within cognizable legal theories.

The Moving Defendants submit in support of their motion, one exhibit consisting of a copy of the Amended Complaint, a pro forma attorney affirmation identifying the exhibit, and a memorandum of law. None of these submissions constitute evidentiary material, nor are any of them – either individually or in combination – sufficient to show that a material fact claimed by Plaintiffs in the Amended Complaint is not a fact at all.

Therefore, the motion pursuant to CPLR 3211(a)(7) for an order dismissing the Amended

Complaint is denied.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the motion of Defendants, Deadwood Construction Inc., Jerome Harrigan and Patrick Farrell, for an order dismissing as against them the First Amended Class Action Complaint in the above-captioned action, is denied, and it is further

ORDERED that Plaintiffs shall within ten days of entry of this decision and order serve all Defendants with notice of entry, and it is further

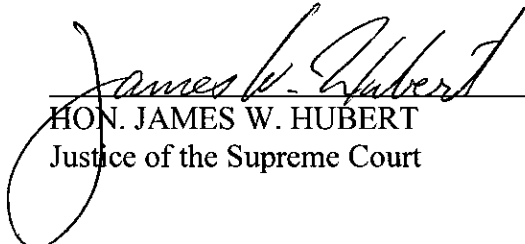
ORDERED that Plaintiffs shall within ten days after service as aforesaid file proof of service by uploading to the New York State Courts E-Filing system, and it is further

ORDERED that Defendants, Deadwood Construction Inc., Jerome Harrigan and Patrick Farrell, may within ten days after service of notice of entry of this decision and order as aforesaid, serve upon Plaintiffs and file via the New York State Courts E-Filing system pleadings responsive to the First Amended Class Action Complaint.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
March 7, 2022

ENTER,


HON. JAMES W. HUBERT
Justice of the Supreme Court