

Spitzer v HMSM Food Corp

2022 NY Slip Op 35010(U)

March 1, 2022

Supreme Court, Queens County

Docket Number: Index No. 709128/19

Judge: Robert I. Caloras

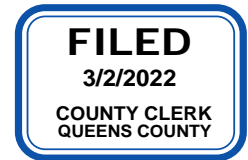
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**Short Form Order
NEW YORK SUPREME COURT - QUEENS COUNTY
PRESENT: HON. ROBERT I. CALORAS PART 36
Justice**

-----X
STEVEN SPITZER,
Plaintiff,
-against-
HMSM FOOD CORP d/b/a C-TOWN,
Defendant.

**Index No. 709128/19
Seq. No. 1**



-----X

The following papers numbered E23-E29, E31-E43, E46-E48 read on this motion by the Defendant for an order pursuant to CPLR 2304, and 3103, quashing or modifying a subpoena duces tecum, or fixing conditions upon the same, served by the Plaintiff by his attorneys of record, upon Interactive Business Services, dated March 4, 2021, and annexed hereto, upon the grounds that the subpoena (a) the subpoena duces tecum was improperly issued in an effort to skirt the usual discovery process; (b) seeks information and documents that are neither necessary nor material to the prosecution or defense of any issues in this action; (c) fails to specify the documents sought with reasonable particularity; (d) is vague, ambiguous, overbroad, and unduly burdensome; and (e) requires the improper disclosure of personal and private financial and tax information of the corporate defendant and non-party employees of the Defendant; and the cross motion by Plaintiff for an order to strike Defendant’s the fifth affirmative defense or in the alternative compel production of list of Union Members who are employed in Defendant’s supermarket between 2012 and 2018.

**PAPERS
NUMBERED**

Notice of Motion-Affirmations-Exhibits.....	E23-E29
Affirmation in Opposition-Exhibits.....	E31-E36
Notice of Cross Motion-Affirmation-Exhibits-Memo of Law.....	E37-E43
Affirmation in Opposition to the Cross Motion and Reply to the Motion..	E46-E47
Reply Affirmation.....	E48

Upon the foregoing papers, it is ordered that Defendant’s motion is granted and Plaintiff’s cross motion is denied for the following reasons:

In the Amended Complaint, Plaintiff asserted the following five causes of action: New York State overtime violations pursuant to Labor Law 198.1-a, 662 and 663, and 12 NYCRR 142-2.2; violation of the Wage Theft Prevention Act; violation of NYLL 215, retaliation; spread of hours violation; and violation of Labor Law 195. Plaintiff alleged that he was employed as a store manager at Defendant’s supermarket, C-Town, from 2004 until October 6, 2018 when he was terminated. He further alleged that he worked on average six days a week, 75 hours a week, was paid \$975.00 per week, and never collected overtime. In its Answer, Defendant denied Plaintiff’s allegations alleged in the Amended Complaint, and asserted eight affirmative defenses, including the fifth affirmative defense which alleged that “Plaintiff was an exempt administrative and executive employee for purposes of the claims brought under the New York Labor Law”.

It is undisputed that Plaintiff served a subpoena duces tecum upon Interactive Business Services, Defendant’s Accountant, requesting that they produce the following records at Plaintiff’s counsel’s office on April 30, 2021: Form 941, NYS 45, corporate income tax returns, copies of payroll including W-2, paystubs, schedules prepared for HMSM Food Corp d/b/a C-Town between 2012-2018. Defendant now moves for an order pursuant to CPLR 2304 and 3103 to quash or modify the subpoena duces tecum. Defendant argues that Plaintiff is using the subpoena as a discovery device, and the information demanded therein is not material or necessary to the prosecution of this

action and is overbroad. In the alternative, Defendant requests that the Court issue a protective order to ensure that the personal and confidential information of other employees, and Defendant's corporate income tax returns, are used solely for this case.

In opposition, Plaintiff submitted the following: deposition transcripts for Shay Coriat, Barbara Jerome, Anika Thurmond and Obidkhan Pulatov; and UFCW Local 1500 Agreement. He argues, in pertinent part, that even though he was the store manager he performed tasks that an employee paid at a lower rate was obligated to do, because Defendants purposely understaffed the store. As such, Plaintiff argues rather than being a bona fide executive, he was merely a "stock person supervisor" pursuant to 29 CFR 541.115, and entitled to overtime wages. Thereby, he claims that the documents in his subpoena duces tecum are relevant with respect to Defendants' fifth affirmative defense which allege that he was an exempt administrative and executive employee for purposes of the claims brought under the New York Labor Law.

"Pursuant to CPLR 3101(a)(4), a party may obtain discovery from a nonparty of 'matter material and necessary in the prosecution or defense of an action' in possession of the nonparty, as long as the nonparty is apprised of the reasons such disclosure is sought" (Islip Theatres, LLC v Landmark Plaza Props. Corp., 183 AD3d 875, 876 [2d Dept. 2020]). "A party or nonparty moving to quash a subpoena has the initial burden of establishing either that the requested disclosure is utterly irrelevant to the action or that the futility of the process to uncover anything legitimate is inevitable or obvious" (Lima v Ancona, 192 AD3d 1093 [2d Dept. 2021], quoting Matter of Kapon v Koch, 23 NY3d 32, 34 [2014] [internal quotation marks omitted]). "Should the [movant] meet this burden, the subpoenaing party must then establish that the discovery sought is material and necessary to the prosecution or defense of [the] action" (Lima v Ancona, supra; quoting Matter of Kapon v Koch, supra at 34 [internal quotation marks omitted]).

12 NYCRR 142-2.2 provides, in pertinent part 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 . . . ". 12 NYCRR 142-14(c)(4) provides, in pertinent part, that an employee does not include any individual permitted to work in, or as an:

Executive, administrative or professional capacity.

(i) Executive. Work in a bona fide executive... capacity means work by an individual:

(a) whose primary duty consists of the management of the enterprise in which such individual is employed or of a customarily recognized department or subdivision thereof;

(b) who customarily and regularly directs the work of two or more other employees therein;

(c) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight;

(d) who customarily and regularly exercise discretionary powers; and

Moreover, 29 C.F.R. 541.106, entitled "Concurrent Duties," provides in relevant part as follows:

a. Concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption if the requirements [of the exemption] are otherwise met. Whether an employee meets the requirements of [the exemption] when the employee performs concurrent duties is determined

on a case-by-case basis and based on the factors set forth in [the exemption]. Generally, exempt executives make the decision regarding when to perform nonexempt duties and remain responsible for the success or failure of business operations under their management while performing the nonexempt work. In contrast, the nonexempt employee generally is directed by a supervisor to perform the exempt work or performs the exempt work for defined time periods

b. For example, an assistant manager in a retail establishment may perform work such as serving customers, cooking food, stocking shelves and cleaning the establishment, but performance of such nonexempt work does not preclude the exemption if the assistant manager's primary duty is management. An assistant manager can supervise employees and serve customers at the same time without losing the exemption. An exempt employee can also simultaneously direct the work of other employees and stock shelves.

Furthermore,, 29 CFR 541.700 defines "primary duty" as:

(a) To qualify for exemption under this part, an employee's "primary duty" must be the performance of exempt work. The term "primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

(b) The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion.

(c) Thus, for example, assistant managers in a retail establishment who perform exempt executive work such as supervising and directing the work of other employees, ordering merchandise, managing the budget and authorizing payment of bills may have management as their primary duty even if the assistant managers spend more than 50 percent of the time performing nonexempt work such as running the cash register. However, if such assistant managers are closely supervised and earn little more than the nonexempt employees, the assistant managers generally would not satisfy the primary duty requirement.

Here, the Court finds that Defendant met its initial burden of establishing that the evidence sought in the subpoena is utterly irrelevant and immaterial with respect to whether or not Plaintiff is an exempt employee whose primary duties consisted of performing non-exempt work. The Court also finds that Plaintiff failed to establish that the discovery sought in the subpoena is material and necessary to the prosecution or defense of this action. Notably, Plaintiff relies upon 29 C.F.R. 541.115, which he claims provides that he was a non-exempt employee because he was working as a stock person supervisor and not as a bona fide executive. However, this regulation was repealed in 2004. Even if Defendant limited its payroll by not having enough employees to perform the required work, Plaintiff's subpoena does not seek information limited to a particular moment when he may have performed non-exempt work. Accordingly, Defendants' motion to quash the subpoena duces tecum and for a protective order is granted.

Plaintiff also cross moves for an order striking Defendant's fifth affirmative defense, or in the alternative compelling Defendant to respond to a letter, dated August 16, 2021, Plaintiff's counsel sent to Defendant's counsel requesting Defendant provide a list of its employees who are members of the Union from 2010 to present based upon Shay Coriat's testimony which indicated that said list was available. In a letter, dated August 23, 2021, Defense counsel notified Plaintiff's counsel that he was objecting to this demand "as overbroad because it calls for information that is not material or necessary to the prosecution or defense of the action. It seeks information that is not relevant to the issues in dispute nor reasonably calculated to lead to the discovery of admissible evidence". Plaintiff claims he is entitled to the Union list because it would purportedly show how many other family member and/or employees were receiving compensation but not working in the supermarket. Plaintiff further claims that the following provision in the removal order issued by Judge Eric N. Vitaliano, Eastern District of New York, supports his claim that he is entitled to overtime wages:

The overtime provision referenced by HMSM states that "[C-Town] agrees to pay all employees, both full time and part time, for any and all hours worked in excess of their regular eight (8) hour work day" . . . The plain language of this provision is straightforward and does not require judicial interpretation.

In opposition, Defendant argues the cross motion should be denied for similar reasons asserted in support of its motion to quash Plaintiff's subpoena duces tecum. The nature and degree of the penalty to be imposed pursuant to CPLR 3126 is a matter within the discretion of the trial court (see Kihl v Pfeffer, 94 NY2d 118, 122–123 [1999]; Umar v Ohrnberger, 72 AD3d 1066, 1066–1067 [2d Dept. 2010]; Joseph v Iannace, 6 AD3d 502, 503 [2d Dept. 2004]). The drastic remedy of striking a pleading is warranted where the party's failure to comply with court-ordered discovery is willful and contumacious, or due to bad faith, whereupon the burden shifts to the nonmoving party to demonstrate a reasonable excuse (see Morgenstern v. Jeffsam Corp., 78 AD3d 913, 914 [2d Dept. 2010]; Bomzer v Parke–Davis, Div. of Warner Lambert Co., 41 AD3d 522 [2d Dept. 2007]; Hasan v MABSTOA, 286 AD2d 303 [2d Dept. 2001]; Palmenta v Columbia University, 266 AD2d 90 [1st Dept. 1999]; Kaplan v Emmett, 265 AD2d 307 [2d Dept. 1999]). The willful and contumacious character of a party's conduct can be inferred from the party's repeated failure to comply with discovery demands or orders without a reasonable excuse (see MacDonald v Leif, 89 AD 995 [2d Dept. 2011]; Workman v Town of Southampton, 69 AD3d 619, 620 [2d Dept. 2010]; Horne v Swimquip, Inc., 36 AD3d 859 [2d Dept. 2007]; Sowerby v Camarda, 20 AD3d 411, 411 [2d Dept. 2005]).

Here, the Court finds Plaintiff failed to establish the existence of a Court Order which directed Defendant to provide a list of its employees who were members of the Union from 2010 to present. Contrary to Plaintiff's claims, the removal order issued by Judge Vitaliano, did not provide

that these records are discoverable. Moreover, the Compliance Conference Order issued by Justice Mojgan Lancman on August 31, 2021, did not address this demand and merely provided that Defendant would file a motion to quash the subpoena duces tecum and Plaintiff “intends to cross-move to compel compliance with the subpoena. Consequently, Defendant has not been directed pursuant to a Court Order to provide the Union list and, as such, Plaintiff is not entitled to an order striking Defendant’s fifth affirmative defense pursuant to CPLR 3126. The Court also finds that Plaintiff has failed to establish his entitlement to an order directing Defendant to disclose the Union list pursuant to CPLR 3124. As noted above, the number of employees working on any given day is not material and necessary to the Plaintiff’s defense of Defendant’s fifth affirmative defense. Accordingly, the cross motion is denied.

Dated: March 1, 2022



ROBERT I. CALORAS, J.S.C.

