

Lawrence v Morning Star Home Health Agency, Inc.
2023 NY Slip Op 30416(U)
February 9, 2023
Supreme Court, New York County
Docket Number: Index No. 155093/2018
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART IV

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EVELYN A. LAWRENCE, individually and on behalf
of all other persons similarly situated who were employed
by MORNING STAR HOME HEALTH AGENCY, INC.,
along with other entities affiliated or controlled by
MORNING STAR HOME HEALTH AGENCY, INC. and
MORNING STAR HEALTH INCORPORATED

**DECISION FOLLOWING
INQUEST**

Index No. 155093/2018

Plaintiffs,

-against-

MORNING STAR HOME HEALTH AGENCY, INC. and
MORNING STAR HEALTH INCORPORATED, and/or
related entities

Defendants.

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HON. FRANK P. NERVO, J.S.C.

A brief procedural recitation of this matter is essential to the inquest of this matter. After filing an answer in this matter, defendants failed to further appear. The Court, via Order of the Hon. Louis L. Nock, J.S.C., granted defendants' counsel's request to be relieved as counsel and further granted defendants a 60-day stay to retain substitute counsel (NYSCEF Doc. No. 36). Defendants failed to appear, either by counsel or without counsel,¹ at the subsequent preliminary conference (NYSCEF Doc. No. 37). The Court, in its

¹ The Court notes that as corporate entities, defendants are required to appear via counsel and are prohibited from appearing pro-se pursuant to CPLR § 321(a); in any event, defendants failed to appear by any method.

discretion, adjourned the conference due to defendants' non-appearance (*id.*). Thereafter, defendants again failed to appear at the adjourned preliminary conference, defendants' answer was stricken due to their failure to appear, and plaintiff was directed to submit a proposed default judgment (NYSCEF Doc. No. 39). The Court granted such default judgment and directed that the issue of damages be heard via inquest (NYSCEF Doc. No. 42). By Administrative Order, the inquest in this matter was assigned to Part IV, before the Hon. Frank P. Nervo, J.S.C. Thereafter, this Court held a conference where all counsel agreed to proceed with the inquest on paper submissions (NYSCEF Doc. Nos. 46 & 47). The Court has received papers in support of plaintiff's damages (NYSCEF Doc. Nos. 48 – 51 & 54). The Court has also received defendants' papers in opposition to damages (NYSCEF Doc. Nos. 42 & 53).

UNPAID COMPENSATION

Turning to the merits of the inquest and considering the procedural posture of this matter, namely defendants' default, it is beyond cavil that defendants have admitted all traversable allegations in the complaint, including liability (*Amusement Bus. Underwriters v. American Intl. Group*, 66 NY2d 878 [1985]; *Curiale v. Ardra Ins. Co., Ltd.*, 88 NY2d 268 [1996]). Whether a default is premised upon failure to answer or upon striking of an answer is of no moment

(*Abbas v. Cole*, 44 AD3d 31, 33 [2d Dept 2007]). Accordingly, the only issue before the Court is “plaintiff’s conclusion as to damages” (*Amusement Bus Underwriters v. American Intl. Group, supra; Curiale v. Ardra Ins. Co., Ltd, supra*).

Plaintiff bears the burden of setting forth a prima facie case as to damages at this inquest (*Oparaji v. 245-02 Merrick Blvd., LLC* 149 AD3d 1091 [2d Dept 2017]). The Court finds plaintiff has established the following by sufficient evidence to provide the requisite evidentiary and factual basis for the Court to determine damages (*see generally* NYSCEF Doc. Nos. 48 – 51 & 54; *O’Donnell v. JEF Golf Corp.*, 173 AD3d 1528 [3d Dept 2019]).

Plaintiff was employed by defendants from April 2003 to March 2018 as a home health aide providing personal care services such as bathing, cooking, feeding, changing diapers, escorting clients to doctor appointments, and keeping clients’ home neat and orderly. Plaintiff worked 12 and 24-hour shifts; during these shifts plaintiff was paid \$8.75/hr (2014 – 2017) and \$10.00/hr (2017 – 2018), working approximately 96 hours per week. When plaintiff worked a 24-hour shift, plaintiff was paid for 12-hours of work despite never receiving at least five hours of uninterrupted sleep nor three one-hour meal breaks and being unable to leave the client’s home during the shift. Plaintiff ate while supervising or

feeding clients due to the constant care clients required. Plaintiff did not receive a spread of hours premium, as required, nor did plaintiff receive overtime. Likewise, plaintiff was not paid for mandatory training sessions. Plaintiff recorded the hours worked on a timesheet provided to defendants, although such timesheets did not provide a space to indicate whether the home health aid received meal breaks or uninterrupted sufficient sleep.

To the extent that defendants contend further discovery or evidence regarding the number of hours worked by plaintiff is necessary, including plaintiff's cellphone location data, to prove plaintiff's claim, defendants misapprehend the consequence of their default, the procedural posture of this matter, and evidence required to make out a prima facie case of wage theft (*see* NYSCEF Doc. No. 52 seeking an order "voiding plaintiff's overtime claim," and "that plaintiff be required to produce location tracking for the court to prove hours"; *see also* NYSCEF Doc. No. 53 at p. 6, point III "Plaintiff should have to produce some corroborating evidence to assert her claim"). Defendants' default precludes such discovery, and, in any event, it is defendants' burden to offer proof in mitigation of the damages claimed by plaintiff (*Amusement Bus. Underwriters v. American Intl. Group*, 66 NY2d 878 [1985] "defendant ... may, at inquest, offer proof in mitigation of damages"; *Eden Park Health Services, Inc., v.*

Estes, 2 AD3d 1186 [3d Dept 2003] “defendant’s intentional conduct in defaulting ... should not be excused or rewarded”).

It is beyond cavil that defendants’ claim that plaintiff’s claims are unbelievable or damages are inflated, without any evidentiary support proffered by defendants for same, is insufficient to carry defendants’ burden mitigating damages and, effectively, amounts to an improper challenge of defendants’ liability at inquest, as liability has already been established by defendants’ default. Furthermore, defendants’ claim is submitted by defendants’ counsel, a person without personal knowledge of the facts and is insufficient, as a matter of law, to constitute evidence mitigating damages (*see e.g. Gardner v. Schuster*, 91 AD2d 625 [2d Dept 1982]; *see generally JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]). Stated differently, a defaulting defendant’s submissions at inquest are limited to the introduction of evidence concerning damages – not submitting unsupported claims by persons without personal knowledge of the facts seeking to limit or oppose liability (*id.*).

It is well established that a defendant bears the burden of proffering evidence in its control to mitigate damages at inquest – such as time sheets records proving the hours/days/shifts plaintiff worked (*Eden Park Health*

Services, Inc. v. Estes, 2 AD3d at 1188; *O'Donnell v. JEF Golf Corp.*, 173 AD3d at 1529).

[O]n a claim for unpaid overtime, the employee has the burden of proving that he or she performed work for which he or she was not properly compensated, and the employer had actual or constructive knowledge of that work. Although the employee has the burden of proving a failure to compensate, it is the employer's responsibility to maintain accurate records of an employee's hours. In situations where an employer's payroll records are inaccurate or inadequate to show the employee was uncompensated for additional work, an employee has carried out his or her burden if he or she produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. **This burden is not high and may be satisfied through estimates based on an employee's own recollection and testimony.** After the employee meets his or her burden, the burden then shifts to the employer to prove by a preponderance of the evidence that the employee was properly paid for the hours worked.

(*O'Donnell v. JEF Golf Corp.*, 173 AD3d at 1529 [internal quotations, citations, and brackets omitted]).

Here, notably absent from defendants' submissions are any records of plaintiff's timesheets or compensation. Accordingly, plaintiff's recollection and affidavit testimony regarding the number of hours worked and compensation for same is sufficient to meet plaintiff's burden given defendants' failure to produce any records regarding plaintiff's timesheets or compensation (*id.*).

Defendants’ submissions amount to mere unsubstantiated allegations, assertions, and expressions of hope to limit damages and undo the finding of liability attendant to their default (*Zuckerman v. City of New York*, 427 NY2d 557 [1980]). Furthermore, as discussed *supra*, defendants’ default precludes further discovery or a challenge as to liability.

Accordingly, plaintiff has established entitlement to damages for unpaid compensation in the following amounts:²

spread of hours	\$10,605.00
unpaid benefits	\$40,614.77
unpaid hours, additional wages, and supplemental benefits	\$195,729.92

Thus, plaintiff is entitled to a total judgment for unpaid compensation in the amount of \$246,949.69.

ATTORNEYS’ FEES

Turning to the attorneys’ fees sought by plaintiff, where attorney fees are authorized, either by statute or agreement, the fee sought must be reasonable; where the fee is unreasonable, inflated, or needlessly incurred, the Court may

² The Court, for clarity, incorporates the figures contained in NYSCEF Doc. No. 50 and calculations as set forth in NYSCEF Doc. No. 51 at ¶ 7 – 56.

dismiss the claim for attorneys' fees (*American Motorists Ins. Co. v. Napco Sec. Systems Inc.*, 244 AD2d 197 [1st Dept 1997]). In determining the reasonableness of attorneys' fees, the Court considers the attorneys' affidavit and submissions to elicit the "difficulty of the issues and the skill required to resolve them; the lawyers' experience, ability and reputation; the time and labor required; the amount involved and benefit resulting to the client from the services; the customary fee charged for similar services; the contingency or certainty of compensation; the results obtained and the responsibility involved" (*Bankers Federal Sav. Bank FSB v. Off West Broadway Developers*, 224 AD2d 376 [1st Dept 1996]).

Here, plaintiff's counsel seeks judgment in the amount of \$24,706.42 for attorneys' fees and costs incurred in prosecuting this matter. Plaintiff's counsel is entitled to seek recovery of these fees from defendants pursuant to statute (see e.g. Labor Law §§ 190, 663, 650, and 651; 12 NYCRR §§ 142-2.1 et seq.; Public Health Law § 3614-c). Thus, the question before this Court is whether the fees sought are reasonable. The Court finds such fee reasonable. Plaintiff's counsel has devoted significant time to prosecution of this matter (NYSCEF Doc. No. 49 at ¶ 62 & 51 [105.6 hours]; NYSCEF Doc. No. 51), the matter required a significant number of hours for successful prosecution, and the attorneys

performing such work charged reasonable hourly rates given their expertise and experience (NYSCEF Doc. No. 49 at ¶ 67 – 70).

I N T E R E S T

Finally, turning to the interest sought on the above awards, plaintiff prays for pre-judgment interest on the award without specifying the date for same (NYSCEF Doc. No. 47 at p. 11). The Court finds that interest should be calculated by the earliest date the cause of action existed, the date defendants first failed to pay plaintiff the legal wage – June 1, 2012 (CPLR § 5001[b]; *Gertler v. Davidoff Hutcher & Citron LLP*, 186 AD3d 801 [2d Dept 2020]; NYSCEF Doc. No. 50).

Interest on the award of legal fees is properly calculated from the date plaintiff was determined to be the prevailing party (*see Solow Mgmt. Corp. v. Tanger*, 19 AD3d 225 [2d Dept 2005]). Here, the Court's Order striking defendants' answer and granting a default judgment to plaintiff is the date plaintiff was determined to be the prevailing party on the issue of liability. Accordingly, interest from the date that Decision and Order was deemed filed, September 12, 2019, is appropriate.

Accordingly, it is

ORDERED and ADJUDGED that plaintiff, EVELYN A.

LAWRENCE, 114-27 110th Avenue Jamaica, NY 11435 shall have judgment, jointly and severally, for wage theft and unpaid compensation in the amount of \$246,949.69, jointly and severally, as against defendants, MORNING STAR HOME HEALTH AGENCY, INC., 626 Rxr Plaza, Suite 624 Uniondale, NY 11556 / 606 Johnson Avenue, Suite 4 Bohemia, NY 11716 / 65 Airport Drive, Suite 10 & 11, Ronkonkoma, NY 11779 / 1 S. Ocean Avenue Patchogue, NY 11772, and MORNING STAR HEALTH INCORPORATED, 65 A Airpark Drive, Suite 10 Ronkonkoma, NY 11779 / 606 Johnson Avenue, Suite 4 Bohemia, NY 11716 / 65 Airport Drive, Suite 10 & 11, Ronkonkoma, NY 11779 / 1 S. Ocean Avenue Patchogue, NY 11772, with interest at the statutory rate from June 1, 2012, as calculated by the Clerk of the Court and together with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED and ADJUDGED that plaintiff's counsel, VIRGINIA & AMBINDER, LLP, 40 broad Street, Seventh Floor New York, NY 10004, shall have judgment, jointly and severally, for attorney's fees in the amount of \$24,706.42 as against defendants, MORNING STAR HOME HEALTH AGENCY, INC., 626 Rxr Plaza, Suite 624 Uniondale, NY 11556 / 606 Johnson

Avenue, Suite 4 Bohemia, NY 11716 / 65 Airport Drive, Suite 10 & 11,
Ronkonkoma, NY 11779 / 1 S. Ocean Avenue Patchogue, NY 11772, and
MORNING STAR HEALTH INCORPORATED, 65 A Airpark Drive, Suite
10 Ronkonkoma, NY 11779 / 606 Johnson Avenue, Suite 4 Bohemia, NY 11716 /
65 Airport Drive, Suite 10 & 11, Ronkonkoma, NY 11779 / 1 S. Ocean Avenue
Patchogue, NY 11772, with interest at the statutory rate from September 12, 2019,
as calculated by the Clerk of the Court and together with costs and
disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that judgment shall be submitted to the Clerk of the Court,
unless directed otherwise by that office, and not to chambers.

THIS CONSTITUTES THE DECISION, ORDER, AND JUDGMENT OF THE COURT FOLLOWING INQUEST.

Dated: February 9, 2023

E N T E R:



HON. FRANK P. NERVO
J.S.C.