

Gonzalez v Victor's Coffee Shop, Deli & Rest., Inc.

2023 NY Slip Op 30701(U)

March 8, 2023

Supreme Court, New York County

Docket Number: Index No. 655351-2021

Judge: Lynn R. Kotler

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

Luis Gonzalez

INDEX NO. 655351-2021

- v -

MOT. DATE

Victor's Coffee Shop, Deli & Restaurant, Inc., et. al.

MOT. SEQ. NO. 001

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| The following papers were read on this motion to/for <u>default judgment</u> | |
| Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits | NYSCEF DOC No(s). _____ |
| Notice of Cross-Motion/Answering Affidavits — Exhibits | NYSCEF DOC No(s). _____ |
| Replying Affidavits | NYSCEF DOC No(s). _____ |

In this action, plaintiff seeks to recover alleged unpaid wages that accrued between August of 2019 and March 16, 2020. Specifically, plaintiff, Luis Gonzalez ("Gonzalez") seeks overtime and minimum wage payments for all unpaid hours worked, statutory and punitive damages, and reasonable attorney's fees, interest, costs, and disbursements. Gonzalez now moves for an order pursuant to CPLR § 3215 granting him a default judgement against his former employer, defendant Victor's Coffee Shop, Deli & Restaurant, Inc. ("Victors") and against the owner of Victors, Victor Doe ("Doe"). Gonzalez seeks a default judgment against Victors and Doe and an inquest to assess damages. The motion has been submitted without opposition despite proof of service of notice of the motion on the defendants via regular mail. Therefore, the motion is considered on default. The court's decision follows.

Plaintiff has provided proof of service of the summons and complaint upon Doe via personal service upon a "Ms. Rodriguez", a person of suitable age and discretion at Doe's actual place of business, 125-10 Rockaway Blvd., South Ozone Park, NY 11420, and by mailing a copy of the summons and complaint to the same address pursuant to CPLR § 308(2). Plaintiff has provided proof of service of the summons and complaint upon Victors via personal service to Ms. Nancy Dougherty, an authorized agent of the Office of the Secretary of State of the State of New York, in accordance with BCL § 306. Despite such service, the defendants have not answered the complaint and their time to do so has not been extended by the court. Therefore, plaintiff has established that the defendants have defaulted in appearing in this action.

While a default in answering the complaint constitutes an admission of the factual allegations therein, and the reasonable inferences which may be made therefrom (*Rokina Optical Co., Inc. v. Camera King, Inc.*, 63 NY2d 728 [1984]), plaintiff is entitled to default judgment in his favor, provided he otherwise demonstrates a *prima facie* cause of action (*Gagen v. Kipany Productions Ltd.*, 289 AD2d 844

Dated: 3/8/23



HON. LYNN R. KOTLER, J.S.C.

1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
2. Check as appropriate: Motion is GRANTED DENIED GRANTED IN PART OTHER
3. Check if appropriate: SETTLE ORDER SUBMIT ORDER DO NOT POST
- FIDUCIARY APPOINTMENT REFERENCE

[3d Dept 2001]). An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim (*Zelnick v. Biderman Industries U.S.A., Inc.*, 242 AD2d 227 [1st Dept 1997]; and CPLR § 3215[f]) or a complaint verified by a person with actual knowledge of the facts surrounding the claim (*Hazim v. Winter*, 234 AD2d 422 [2d Dept 1996]; and CPLR § 105 [u]).

In the complaint, plaintiff asserts seven causes of action. The first, third and fourth causes of action allege that defendants violated the Fair Labor Standards Act (29 USC § 201 *et seq.*, herein referred to as the "FLSA") and 12 NYCRR § 142-2.2 by failing to pay Gonzalez overtime pay. The second cause of action asserts that defendants violated the Labor Law when they failed to pay plaintiff a minimum wage. The fifth cause of action claims that defendants violated Labor Law § 215 when they terminated him in retaliation for complaints Gonzalez made about his insufficient pay. The sixth cause of action alleges that defendants violated Labor Law § 195 (1)(a) when they failed to furnish plaintiff with hiring notices during his employment. The seventh cause of action states that defendants violated Labor Law § 195 (3) when they failed to furnish wage statements to plaintiff during his employment.

With regard to the failure to pay overtime, "an employer shall pay an employee for overtime at a 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" (12 NYCRR § 142-2.2). 29 USC § 207(a) states that "no employer shall employ any of his employees... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." A cause of action exists when an employer fails to compensate their employee pursuant to 29 USC 207 (see *Nakahata v. New York-Presbyterian Healthcare Sys., Inc.*, 723 F3d 192 [2d Cir 2013]).

Minimum wage is defined by NYLL § 652. Minimum wage for food service workers is less than for other employees. There is no indication as to whether Gonzalez was a tipped food service worker. Generally, minimum wage requires every employer to pay each of its employees for each hour worked a minimum wage (NYLL § 652[1]). A cause of action exists where the employer does not pay an employee minimum wage for their labor (see *id.*)

Regarding the assertion of retaliatory termination, Labor Law § 215 states that it is against the law to fire an employee because they complain about an alleged violation of another provision of the Labor Law and provides a private civil cause of action.

Labor Law § 195 (1)(a) requires employers to provide employees with wage notices at the time of hiring. The notices must contain:

"the rate or rates of pay and the basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; allowances, if any, claimed as part of the minimum wage, including tip, meal, or lodging allowances; the regular pay day designated by the employer in accordance with section one hundred ninety-one of this article; the name of the employer; any "doing business as" names used by the employer; the physical address of the employer's main office or principal place of business, and a mailing address if different; the telephone number of the employer; plus such other information as the commissioner deems material and necessary. . . . For all employees who are not exempt from overtime compensation as established in the commissioner's minimum wage orders or otherwise provided by New York state law or regulation, the notice must state the regular hourly rate and overtime rate of pay"

Finally, Labor Law § 195 (3) states that every employer shall furnish each employee with a statement with every payment of wages which lists:

“the dates of work covered by that payment of wages; name of employee; name of employer; address and phone number of employer; rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; gross wages; deductions; allowances, if any, claimed as part of the minimum wage; the benefit portion of the minimum rate of home care aide total compensation as defined in section thirty-six hundred fourteen-c of the public health law (“home care aide benefits”), if applicable; prevailing wage supplements, if any, claimed as part of any prevailing wage or similar requirement pursuant to article eight of this chapter; and net wages. Where such prevailing wage supplements are claimed, or such home care aide benefits are provided, the statement shall either: (i) identify the type of each supplement claimed, or the type of each home care aide benefits provided, and the hourly rate for each; or (ii) be accompanied by a copy of the applicable notice required under subdivisions one and two of this section.”

New York Labor Law provides a private cause of action for violations of Labor Law § 195 (1) & (3) (Labor Law § 198 [1-b] & [1-d]).

Plaintiff’s motion is supported by his sworn affidavit of merit. In his affidavit, Gonzalez asserts that he was employed by the defendants from August of 2019 through March 16, 2020, as a general deli worker. He states that he was never properly paid minimum wage for his labor during this time and that he was not paid overtime wages despite working at least sixteen overtime hours per week during his employment. Gonzalez asserts that, beginning in August of 2019 and continuing through the remainder of his employment, he consistently complained to Doe about being paid insufficient, improper and unlawful wages, both orally and in writing through text messages. He also states that he never received proper wage statements or hiring notices from the defendants. Gonzalez claims that on March 16, 2020, he was suddenly terminated. He claims that he was never paid proper overtime wages pursuant to both federal and state law, that he was never paid the proper minimum wage pursuant to the state law and that he was retaliated against in violation of state law and was never provided the requisite wage and hiring documents required by the state law.

Firstly, plaintiff has failed to demonstrate a *prima facie* cause of action as against Doe. Plaintiff does not allege that Doe was his employer. Rather, plaintiff alleges that Victors was his employer and Doe owned Victors. “A corporation exists independently of its owners, as a separate legal entity [and] owners are normally not liable for the debts of the corporation” (*Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 NY2d 135 [1993]). In order to pierce the corporate veil that prevents an owner of a corporation from being held responsible for the corporation’s debts, the movant must “establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene” (*Id.*) Since plaintiff has not alleged that Doe disregarded the corporate form, he cannot be held liable under a veil-piercing theory. Plaintiff has otherwise failed to demonstrate Doe’s liability for any of the causes of action he has asserted in the complaint. Accordingly, plaintiff’s motion is denied in its entirety as to Doe without prejudice to renewal within 90 days. Plaintiff’s failure to so renew shall be deemed an unreasonable failure to prosecute and the complaint against Doe shall be severed and dismissed.

As against Victors, plaintiff has demonstrated that he did not receive minimum wage nor overtime wages for his hours worked while employed with Victors, and that he was suddenly fired on March 16, 2020. He has further established that he never received wage statements or hiring notices. Finally, plaintiff has shown that his termination was retaliatory because he complained that he was paid insufficient, improper and unlawful wages, both orally and in writing through text messages. Therefore, plaintiff has demonstrated *prima facie* causes of action for: 1) Victor’s failure to pay Gonzalez overtime pay in violation of the FLSA and 12 NYCRR 142-2.2; 2) Victor’s failure to pay plaintiff minimum wage during

his employment in violation of Labor Law § 652(1); 3) Victor's retaliatory termination of Gonzalez because he complained that he was receiving insufficient pay in violation of Labor Law § 215; 4) Victor's failure to furnish plaintiff with hiring notices during his employment in violation of Labor Law § 195 (1)(a); and 5) Victor's failure to furnish wage statements to plaintiff during his employment in violation of Labor Law § 195 (3). Therefore, Gonzalez is entitled to judgment on liability for all causes of action as against his employer, Victors. An inquest shall be held to determine plaintiff's damages.

In accordance herewith, it is hereby

ORDERED that the motion is denied as to defendant Victor Doe without prejudice to renewal within 90 days. Plaintiff's failure to so renew shall be deemed an unreasonable failure to prosecute and the complaint against Doe shall be severed and dismissed; and it is further

ORDERED that the motion is granted to the extent that plaintiff is granted a default judgment on liability against defendant Victor's Coffee Shop, Deli & Restaurant, Inc. on all causes of action; and it is further

ORDERED that plaintiff's damages as against Victor's Coffee Shop, Deli & Restaurant, Inc. will be determined at inquest; and it is further

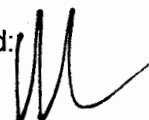
ORDERED is that plaintiff is directed to file note of issue on or before April 28, 2023 so that an inquest may be scheduled.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated:

3/8/23
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.