

Percy v Movage, Inc.

2023 NY Slip Op 34081(U)

November 16, 2023

Supreme Court, New York County

Docket Number: Index No. 650209/2023

Judge: Richard Latin

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This opinion is uncorrected and not selected for official publication.

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

<p>PRESENT: <u>HON. RICHARD LATIN</u></p> <p style="text-align: right;"><i>Justice</i></p> <p>-----X</p> <p>ANTHONY PERCY, ANTHONY PERCY</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>MOVAGE, INC.,BAJO VUJOVIC,</p> <p style="text-align: center;">Defendant.</p> <p>-----X</p>	<p>PART 46M</p> <p>INDEX NO. <u>650209/2023</u></p> <p>MOTION DATE <u>04/12/2023</u></p> <p>MOTION SEQ. NO. <u>001</u></p> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is defendants' motion pursuant to CPLR 3211(a)(7) to dismiss for failure to state a cause of action is determined as follows:

“A party may move for judgment dismissing one or more causes of action asserted against him on the ground that... the pleading fails to state a cause of action” (CPLR 3211[a][7]). “In considering a motion to dismiss pursuant to CPLR 3211(a) (7), the facts pleaded are presumed to be true, and the court must afford those allegations every favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory” (*Sitar v Sitar*, 50 AD3d 667, 669 [2d Dept 2008]; *Leon v Martinez*, 84 NY2d 83, 87–88 [1994]). “[T]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail” (*Morad v Morad*, 27 AD3d 626, 626–627 [2d Dept 2006] [internal quotation marks and citations omitted]; see also *Leon*, 84 NY2d at 87).

In this action, plaintiff states that he worked for defendant Movage, Inc. – owned by defendant Bajo Vujovic – as a mover from February 2018 to July 2022. Plaintiff is a New York

resident and defendant Movage, Inc. is a New York corporation with headquarters in New Jersey. Plaintiff states that he reported to a New York location each day to begin work, that he received his daily assignments at that location along with the vehicle and other materials needed to perform his work, and that “about half” of the customer he serviced were in New York. At the end of each day plaintiff states that he would return his moving truck to a New York location and that payment for his work was performed in New York by check – although the check was issued in New Jersey and subject to New Jersey taxation. Defendant disputes numerous aspects of plaintiff’s description of his work but in a motion to dismiss “the facts pleaded are presumed to be true” (*Sitar*, 50 AD3d at 669).¹ Plaintiff’s complaint seeks to recover uniform maintenance pay, spread of hours pay, and other damages for plaintiff and similarly situated employees who worked as movers for defendants, plus liquidated damages pursuant to New York Labor Laws (NYLL) §§ 191 and 198.

Defendant argues that New Jersey is a more appropriate forum for plaintiff’s claims and that New Jersey law should govern the alleged conduct.

In the context of tort law, New York utilizes interest analysis to determine which of two competing jurisdictions has the greater interest in having its law applied in the litigation. The greater interest is determined by an evaluation of the facts or contacts which...relate to the purpose of the particular law in conflict. Two separate inquiries are thereby required to determine the greater interest: (1) what are the significant contacts and in which jurisdiction are they located; and, (2) whether the purpose of the law is to regulate conduct or allocate loss.

“If conflicting conduct-regulating laws are at issue, the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders.”

¹ Plaintiff argues that the parties’ conflicting facts create an issue of fact that necessitates denial of the motion to dismiss. In a motion to dismiss, the court assumes the facts in the light most favorable to the non-movant – in this case, Plaintiff. For purposes of this motion, the court assumes the facts asserted in Plaintiff’s affidavit and any contradictions in Defendant’s affidavit do not necessitate denial of a motion to dismiss but are instead resolved by viewing the facts in the light most favorable to the non-movant.

(*Padula v Lilarn Properties Corp.*, 84 NY2d 519, 521 [1994] (quoting *Cooney v Osgood Machinery, Inc.*, 81 NY2d 66 [1993])). *Padula* also involved New York Labor Law regulations, a plaintiff who was a New York resident, and a New York corporation that operated out-of-state (*see id.*). The court held that “the fundamental question in this case, where the parties share a common domicile, is whether Labor Law §§ 240 and 241 are primarily conduct-regulating or loss-allocating” (*id.* at 522). The court then determined that the New York labor laws at issue “embody both conduct-regulating and loss-allocating functions...[but] are primarily conduct-regulating rules, requiring that adequate safety measures be instituted at the worksite and should not be applied to the resolution of this tort dispute arising in Massachusetts (*id.* at 522-523).

Plaintiff’s complaint cites alleged violations of 12 NYCRR 142-2.5(c)² and Labor Law §§ 191³ and 195⁴ along with the remedies in Labor Law § 198. All of which are “primarily conduct-regulating rules” requiring businesses to take certain actions (*id.*). As such, “the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders.” (*id.* at 521 [internal quotation marks and

² Which states in relevant part that “No allowance for the supply, maintenance or laundering of required uniforms shall be permitted as part of the minimum wage. Where an employee purchases a required uniform, he shall be reimbursed by the employer for the cost thereof not later than the time of the next payment of wages.”

³ Which states in relevant part that “A manual worker shall be paid weekly and not later than seven calendar days after the end of the week in which the wages are earned.”

⁴ Which states in relevant part that “Every employer shall...provide his or her employees, in writing in English and in the language identified by each employee as the primary language of such employee, at the time of hiring, a notice containing the following information: the rate or rates of pay and 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...; prevailing wage supplements, if any, claimed as part of any prevailing wage or similar requirement pursuant to article eight of this chapter; 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.”

citations omitted]; *see also Aviles v Port Auth. of N.Y. and N.J.*, 202 AD2d 45, 46 [1st Dept 1994] citing *Neumeier v Kuehner*, 31 NY2d 121 [1972]).

However, here, unlike in *Padula*, the parties dispute which state is properly considered the jurisdiction where the tort occurred. The conduct at issue in this matter relates to payment methods, notices issued and the maintenance of uniforms. Plaintiff argues that this conduct occurred in New York as he reported to a New York location each day to begin work and end work, that he received his daily assignments at that location along with his uniform, vehicle, and other materials needed to perform his work, and that he received payment for his work in New York by check. As noted above, defendant disputes numerous aspects of plaintiff's description of his work but in a motion to dismiss "the facts pleaded are presumed to be true" (*Sitar*, 50 AD3d at 669).

However, it is uncontested that defendant Movage, Inc.'s base of operations was in New Jersey. Checks were issued in New Jersey and subject to New Jersey taxation. Furthermore, while plaintiff states that he received his assignments in New York, the operational base of the company was in New Jersey and the assignments accordingly stemmed directly or indirectly from New Jersey. The applicability of New York law to a business directing employees in New York to perform work at least partially within New York, as here, was addressed by the court in *Matter of Boettcher (American Broadcasting Co. – Ross)* (79 AD2d 740, 741 [3d Dept 1980]). The court upheld an administrative court determination that "since claimants' base of operations was in the State of New Jersey, their services did not constitute New York employment" (*id.*). Here, it is uncontested that defendant's base of operations was in the State of New Jersey and, despite work performed by plaintiff in New York based upon assignments locally issued in New York, defendant Movage, Inc.'s services are not properly considered New York employment. As such, the claims based upon the conditions of plaintiff's employment – which constitute the entirety of


plaintiff’s action – are properly considered to have occurred in New Jersey – and New Jersey accordingly possesses a “greater interest in having its law applied in the litigation” (*Padula*, 84 NY2d at 521).

Accordingly, defendants’ motion is granted. Furthermore, as plaintiff’s action is dismissed as it applies to him, the class action sought by plaintiff is also dismissed and the court need not consider whether a dismissal of the class action would be appropriate had the action not been dismissed as against plaintiff as individually situated. The court notes that granting defendants’ motion and determining that New Jersey is the more appropriate jurisdiction in no manner restricts plaintiff from bringing his claims in a New Jersey court should violations exist under New Jersey law.

Any requests for relief not addressed herein are denied.

The Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

<u>11/16/2023</u> DATE	 RICHARD LATIN, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/> REFERENCE
			<input type="checkbox"/>	<input type="checkbox"/> FIDUCIARY APPOINTMENT