

Maria v Manhattan Homes Co., LLC

2023 NY Slip Op 34121(U)

November 16, 2023

Supreme Court, New York County

Docket Number: Index No. 150317/2023

Judge: Dakota D. Ramseur

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

PRESENT: HON. DAKOTA D. RAMSEUR **PART** **34M**

Justice

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FERNANDO MARIA,

Plaintiff,

- v -

MANHATTAN HOMES COMPANY, LLC, SALIM MOALEMI

Defendant.

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INDEX NO. 150317/2023

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 10, 11 were read on this motion to/for DISMISSAL.

Plaintiff Fernando Maria commenced the instant action in January 2023 against defendants Manhattan Homes Company, LLC (hereinafter, “Manhattan Homes”) and Salim Moalemi, as owner of Manhattan Homes, seeking damages for wage and overtime violations of the Fair Labor Standards Act (“FLSA,” 29 USC § 207) and the New York Labor Law (N.Y. Labor Law §§ 160, 652, 191, and 195). In this motion sequence (001), defendants move pursuant to CPLR 3211 (a) (7) to dismiss (1) all causes of action against Moalemi on grounds that he cannot be considered plaintiff’s “employer,” and (2) plaintiff’s New York Labor Law § 191 claims, as against both defendants, to the extent that this claim is premised on unpaid wages and missed wage payments. Plaintiff opposes the motion in its entirety. For the following reasons, defendants’ motion is granted.

Plaintiff alleges that he worked as a porter from April 2005 to the present at a residential building defendants owned located at 64 Vermilyea Avenue in Manhattan. According to plaintiff, throughout employment, defendants violated: § 207 (a) of the FLSA and § 160 of the N.Y. Labor Law by failing to pay him overtime compensation for hours worked in excess of forty hours per week (Counts I and II); FLSA § 206 (a), N.Y. Labor Law § 652 (1) and Title 12, § 141-1.4 of the New York Code Rules and Regulations (NYCRR) by failing to pay a minimum wage as defined by those statutes (Counts III and IV); N.Y. Labor Law § 191 (1) (a) for failing pay him weekly as required for manual workers (Count V); and NYLL § 195 (3) for not furnishing him a wage statement on each payday (Count VI).

While there is no dispute that Manhattan Homes is an “employer” within the meaning of the FLSA and New York Labor Law, defendants contend that plaintiff has not pled sufficient facts to demonstrate Moalemi may be considered his employer. The relevant allegations in plaintiff’s complaint are as follows:

“At all relevant times herein, Defendant Moalemi was and is the owner and day to day overseer of Manhattan Homes, who in that

role personally manages and oversees the day-to day operations and is ultimately responsible for making all personnel-related decisions for the company, including but not limited to the hiring and firing of all employees and the setting of employees' hours, rates, and methods of pay, including those decisions with respect to Plaintiff.” (NYSCEF doc. no. 4 at ¶ 6, complaint)

“Defendant Moalemi owns, manages, and oversees the business on a day-to-day basis, and as detailed above, he is responsible for making all personnel-related decisions” (*Id.* at ¶ 9.)

These two paragraphs form the entire basis for liability against Moalemi as an “employer” under federal and state labor laws.

On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), courts afford the pleadings a liberal construction, accept the facts as alleged in the complaint as true, and give the plaintiff the benefit of every possible favorable inference. (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015].) However, the Court need not accept as true bare legal and factual conclusions. (*L.Y.E Diamonds, Ltd. v Gemological Inst. Of Am., Inc.* (169 AD3d 589, 590-591 [1st Dept 2009].)

Between *Zheng v Liberty Apparel Co. Inc.* (355 F3d 61, 78-79 [2d Cir. 2003]), *Tapia v BLCH 3rd Ave, LLC* (906 F3d 58, 61 [2d Cir. 2008]), and *Irizarry v Catsimatidis* (722 F3d 99, 110 [2d Cir. 2013]), plaintiff acknowledges that courts traditionally look to four indicators as to whether an individual or business entity may be classified as employers: (1) the power to hire and fire employees, 2) supervise and control their employee's work schedules or conditions of employment, (3) determined the rate and method of wage payment, and (4) are responsible for maintaining employment records. (*See Tapia*, 906 F3d at 61.) As can easily be seen, plaintiff describes Moalemi's position as an employer in nearly identical terms. The allegations plaintiff makes in paragraphs 6 and 9 consist of merely boilerplate recitations of the applicable legal standard. There are no facts from which one can conclude, for example, that Moalemi held the authority to hire or fire employees or that he controlled the terms of their employment. Since the entirety of plaintiff's allegations against Moalemi as his employer are entirely conclusory and “claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss” (*see Godfrey v Spano*, 13 NY3d 358, 373 [2009]), defendants' motion to dismiss each cause of action against Moalemi is granted.

The second branch of defendants' motion to dismiss focuses on what type of claims may be litigated under N.Y. Labor Law § 191. In paragraphs 50 and 51 of his complaint, plaintiff alleges that he is considered a “manual worker” within the meaning of the N.Y. Labor Law § 190 and that § 191 (1) (a) requires manual workers to be paid all wages owed on a weekly basis. (*Id.* at ¶ 50, 51.) He further states, in paragraph 53, that he “is entitled to any *unpaid wages*, liquidated damages associated with any missed or late payments, interest, attorneys' fees for Defendants' violation of the NYLL's requirement to pay all wages to manual worker employees on at least as frequently as a weekly basis (emphasis added).” (*Id.* at ¶ 53.) Defendants contend

that § 191 does not permit recovery for the unpaid wages and missed or late payments that plaintiff alleges in paragraph 53.

§ 198 (1-a) provides that, in actions instituted by an employee on a wage claim, “the Court shall allow such employee to recover the full amount of any underpayment, all reasonable attorney’s fees... and...an additional amount as liquidated damages.” (N.Y. Labor Law § 198.) In *Vega v CM & Assoc. Constr. Mgt., LLC* (175 AD3d 1144, 1145 [1st Dept 2019]), the First Department held that the remedies identified in § 198 apply to all violations of Article 6 of the New York Labor Law, including § 191’s frequency requirement. For § 191 specifically, the Court noted the term “underpayment” encompasses instances where an employer violates § 191’s frequency requirement but pays all wages due before the commencement of an action. (*Id.*) As it explained, the term “underpay” is defined as “to pay less that what is normal or required” and, as such, concluded that “the moment that an employer fails to pay wages in compliance with [the frequency requirement of] section 191 (1), the employer pays less than what is required.” (*Id.*) Applied here, *Vega* and §191 (1) clearly permit plaintiff to seek liquidated damages associated with “missed or late payments” so long as defendants made the payments before the commencement of this action. Accordingly, since plaintiff may recover liquidated damages under § 191 associated with missed and late wages, his fifth cause of action is not dismissed in its entirety. Nonetheless, plaintiff appears to concede defendants’ point that § 191 may not be used to recover *unpaid* wages. (*See* NYSCEF doc. no. 10 at 9, plaintiff’s memo of law [“the First Department recently and firmly held [in *Vega*] that a manual worker paid less frequently than weekly may bring a claim to recover liquidated damages for the missed or delayed payment of weekly wages even though the employee received all wages due, albeit late, prior to bringing suit”].) As such, defendants’ motion to dismiss plaintiff’s fifth cause of action is granted to the extent that he seeks unpaid wages and liquidated damages thereon under § 191.

Accordingly, for the foregoing reasons, it is hereby


ORDERED that Manhattan Homes Company, LLC and Salim Moalemi’s motion to dismiss pursuant to CPLR 3211 (a) (7) plaintiff’s complaint as asserted against Moalemi is granted; and it is further

ORDERED that their motion to dismiss pursuant to CPLR 3211 (a) (7) plaintiff’s fifth cause of action under New York Labor Law Section 191 is granted to the extent that plaintiff seeks unpaid wages as part of the claim; and it is further

ORDERED that the parties shall appear at 60 Centre Street, Courtroom 341 at 9:30 a.m. on January 9, 2023, for a status conference with the Court; and it is further

ORDERED that counsel for defendants shall serve a copy of this order, along with a notice of entry, within twenty (20) days of entry.

This constitutes the Decision and Order of the Court.


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DAKOTA D. RAMSEUR, J.S.C.

11/16/2023

DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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