

Dong Hua Zhang, v Amy's Rest. NY Inc.

2023 NY Slip Op 34419(U)

December 14, 2023

Supreme Court, New York County

Docket Number: Index No. 652266/2020

Judge: Verna L. Saunders

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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

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36

Justice

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INDEX NO. 652266/2020

DONG HUA ZHANG, Plaintiff,

MOTION SEQ. NO. 001; 002

- v -

AMY'S RESTAURANT NY INC. d/b/a Amy's Restaurant, DONG-H RESTAURANT, INC., SIEW FOONG HUI a/k/a Amy Hui, and "JOHN" DONG, Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 48, 49, 50, 51, 52, 53

were read on this motion to/for AMEND CAPTION/PLEADINGS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64

were read on this motion to/for SANCTIONS

In this proposed class action, plaintiff Dong Hua Zhang moves to amend the caption to correct defendant John Dong's name to reflect his true name of Xumin Dong a/k/a Xu Min Dong pursuant to CPLR § 305(c) (Mot. Seq. 001). In response, defendants cross-move for partial summary judgment pursuant to CPLR 3212, dismissing the complaint as against "John" Dong, and for legal fees and costs associated with bringing the motion. Plaintiff additionally moves for sanctions as against defendants for spoliation of evidence (Mot. Seq. 002).

As relevant background, plaintiff was employed by defendants as a deliveryman in Amy's Restaurant from March 19, 2014, through March 19, 2020 (NYSCEF Doc. No. 1, ¶7 complaint). Corporate defendants, Amy's Restaurant NY Inc. ("Amy's Restaurant") and Dong-H Restaurant, Inc., both have the principal address of 586 West 207th Street, New York, NY 10034 (id. ¶¶8-9). Defendant Siew Foong Hui a/k/a Amy Hui ("Hui") is an owner/operator of Amy's Restaurant who allegedly supervised and paid plaintiff (id. ¶¶ 11-13). It is also alleged that defendant "John" Dong ("Dong") hired plaintiff and had the power to hire and fire employees, supervised employee work schedules and conditions, determined the rate and method of payment, and maintained employee records at Amy's Restaurant (id. ¶ 15-18). Corporate defendant Dong-H Restaurant, Inc.'s role in the current action is unclear from the papers.

Plaintiff worked part-time from about 2013 to March 2019 for thirty (30) hours per week, and from April 2019 to March 2020 he worked sixteen (16) hours per week (NYSCEF Doc. No. 1 ¶¶ 29-30). Plaintiff alleges that until December 31, 2017, he was paid a rate of \$5.00 per hour (id. ¶ 31). From January 2018 to about June 2018 plaintiff was paid \$6.25 per hour, and from about July 2018 to December 2018 he was paid \$7.25 per hour (id. ¶¶ 32-33). From around

January 2019 till the commencement of this action, he was paid \$9.00 per hour (*id.* ¶ 34).¹ Plaintiff states that he was paid in cash (*id.* ¶¶ 37, 39). Plaintiff claims he delivers an average of twenty orders a day and he is not reimbursed for the cost of purchasing a car, paying for gasoline, or maintaining the vehicle (*id.* ¶¶ 39-42). Plaintiff claims he was not furnished with any documentation of defendants' use of tip credit nor Time of Hire Notice (*id.* ¶¶ 22-23). Furthermore, defendants allegedly did not post the required New York State Department of Labor posters regarding minimum wage, overtime, tip credit, and pay day information (*id.* ¶ 25).

Plaintiff initially brought this action individually and as a class representative on behalf of all other current and former employees of Amy's Restaurant (*id.* ¶ 44). On behalf of himself and the class, he alleges (1) failure to pay the minimum wage in violation of the Fair Labor Standards Act (FLSA); (2) failure to provide meal periods in violation of New York Labor Law (NYLL); (3) failure to keep records in violation of NYLL; (4) failure to provide Time of Hire Wage Notices in violation of NYLL; (5) failure to provide wage statements in violation of NYLL; and (6) failure to pay delivery experts work "on the road" compensation covering the cost associated with operating vehicles for delivery (NYSCEF Doc. No. 1 at 9-13). Last, on behalf of himself, plaintiff alleges: (7) failure to pay minimum wage/unpaid wages in violation of NYLL (*id.* at 9-10). Although the complaint indicates an intention of a class action, there is no indication in the record that there has been pre-certification discovery or a motion to certify the class; hence, the court evaluates Mot. Seqs. 001 and 002 only as to plaintiff Zhang.

In Mot. Seq. 001, plaintiff moves to amend the caption with respect to the name of defendant "John" Dong; however, the court finds it prudent to first evaluate defendants' cross-motion for partial summary judgment, which seeks dismissal of the complaint as against Dong. Summary judgment is appropriate where there are no disputed material issues of facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the moving party tenders sufficient evidentiary proof, the opposing party must proffer its own evidence to show disputed material facts requiring a trial (*id.*).

Defendants move for partial summary judgment, pursuant to CPLR 3212(b), dismissing the claims against Dong, alleging that he is not plaintiff's employer under the FLSA or NYLL. In determining whether someone is an employer, the courts have employed the economic reality test, which weighs "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records" (*Matter of Carver v State*, 26 NY3d 272, 279 [2015], quoting *Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 [1999]). None of the factors alone are dispositive of the status of an employer (see *Herman v RSR Sec. Servs. Ltd.*, 172 F3d at 139). Defendants argue that it is clear from plaintiff's deposition testimony that Dong does not qualify as an employer under the economic realities test.

As to the first factor, defendants point to the fact that there is no evidence that Dong was involved in the hiring process (NYSCEF Doc. No. 34 at 8). Hui testifies that she hires

¹ At the commencement of this action, plaintiff states he was presently employed by defendants (NYSCEF Doc. No. 1 ¶ 27).

employees at Amy's Restaurant, and that she hired plaintiff (NYSCEF Doc. No. 60 at 31, lines 4-5; at 32, lines 11-12). In opposition, plaintiff argues that decisions to hire and fire were made jointly between husband and wife, Hui and Dong (NYSCEF Doc. No. 48, *Opposition* ¶ 37). Plaintiff relies on Hui's testimony, in which she states, "Basically this is a family-oriented operation. Therefore no, we did not have any recordkeeping, but if we hire anybody, basically we know what is [the] lowest wage available plus some tips" (NYSCEF Doc. No. 61 at 18, lines 5-8, *deposition transcript*). Plaintiff contends that Hui's use of "we" shows that Dong was an employer. Furthermore, plaintiff relies on his own assertions. For example, in response to a question at deposition as to who fired and hired employees, when he testified that "I think it is up to the owner and the owner's husband and how they talk about hiring and firing, and they would not let us know" (NYSCEF Doc. No. 50 at 46, lines 7-13, *plaintiff deposition*).

Plaintiff's arguments and evidence are insufficient to satisfy this prong of the economic reality test. Plaintiff's assertion that he "thinks" both defendants hired and fired people is merely speculative. Plaintiff provides no testimony, such as personal knowledge of Dong hiring and firing employees, that would lend merit to his speculation. The court has held that "speculative arguments are insufficient to raise triable issues of fact" to defeat a motion for summary judgment (*Schloss v Steinberg*, 100 AD3d 476, 476 [1st Dept 2012]). Since there is no other evidence outside of plaintiff's unsubstantiated theory that Dong was involved in the hiring and firing process, the court finds that the first factor of the economic reality test is not met.

Next, the court evaluates the second and third factors: whether Dong supervised and controlled employee work schedules or conditions of employment and whether he determined the rate and method of payment. Dong testified that in 2014, the same year plaintiff was hired, he had a stroke, which left him partially paralyzed (NYSCEF Doc. No. 40 at 13, 15, 19, *Dong deposition*). He testifies that prior to the stroke, he mopped, cleaned, and cooked (*id.* at 13 ¶ 19-22). Hui characterizes her husband's role at the restaurant as "some cooking and sometimes delivery" and denies that Dong ever told plaintiff which orders to deliver (NYSCEF Doc. No. 61 at 35, lines 3-16). Dong states Hui made the employee schedules, and he denies coordinating any of the delivery orders (*id.* at 15, lines 10-20). Following the stroke, he says he only sat at the front of the restaurant, went outside for a "puff," and never touched any delivery orders, because he "had no business there" (*id.* 19, lines 7-15).

In response, plaintiff again relies on his own deposition testimony, in which he states that supervision of the employees and work schedule was up to the "owner couple" (NYSCEF Doc. No. 50 at 47, lines 8-13). He also stated that the "workers wouldn't know" who is responsible for setting the work schedule (NYSCEF Doc. No. 50 at 47, lines 4-13). He further states he has "no idea" who controlled the conditions of employment (*id.* at 47, lines 14-21). Plaintiff also states that the "female owner," Hui, was responsible for paying all of the employees (*id.* at 46, lines 14-18). When asked who sets the pay rate, plaintiff continually states he has "no idea who" and that he "wouldn't know" (*id.* at 46-47). Here, too, plaintiff relies solely on his own speculation and admits that he did not know whether Dong was responsible for supervision or payment of employees.

The court finds that defendant has met his burden of establishing that the second and third factors under the economic reality test were not met, because plaintiff only refutes

defendant's assertions with speculation. As previously stated, speculative arguments are insufficient to defeat a motion for summary judgement (see *Schloss v Steinberg*).

Finally, the court evaluates whether Dong maintained employment records. Defendants maintain that there is no evidence Dong maintained employment records as evidenced by plaintiff's testimony (NYSCEF Doc. No. 34 at 8). Hui maintains that she is owner and "the boss" of the restaurant (NYSCEF Doc. No. 61 at 13, lines 23-24). Defendant also points to plaintiff's testimony where he states he has "no idea" who maintained records or controlled the conditions of employment (NYSCEF Doc. No. 50 at 47, lines 14-21). In response, plaintiff alleges that there has been "destruction of evidence through Defendants' intentional spoliation of evidence," and therefore, the evidence should be construed in plaintiff's favor (NYSCEF Doc. No. 48 ¶ 40). Aside from general assertions that there was destruction of evidence, plaintiff makes no statement as to the nature of the destroyed evidence or whether the allegedly destroyed evidence had any bearing on whether Dong maintained employment records. Plaintiff fails to provide any non-speculative evidence contradicting defendant that would create a triable issue of fact. Similar to the reasoning in the previous three factors, the last factor of the economic realities test has not been met because it is only plaintiff's speculation that defendant Dong maintained any records and otherwise lacks substantiating evidence or personal knowledge.

The court finds that there is no dispute of material fact regarding whether Dong was an employer of plaintiff, because none of the economic reality test factors have been met. Therefore, the court grants Dong's motion for summary judgment on the basis that he is not an employer of plaintiff.

Since Dong's motion is granted and he is discontinued from the action, plaintiff's motion to amend the caption to reflect Dong's true name is denied as moot.

Additionally, plaintiff moves for sanctions in connection with the alleged spoliation of evidence and willful failure to produce documents (NYSCEF Doc. No. 47, *memorandum of law at 1*). "On a motion for spoliation sanctions, the moving party must establish that (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed with a 'culpable state of mind,' which may include ordinary negligence; and (3) the destroyed evidence was relevant to the moving party's claim or defense" (*Duluc v AC & L Food Corp.*, 119 AD3d 450, 451 [1st Dept 2014], quoting, *VOOM HD Holdings LLC v EchoStar Satellite, LLC.*, 93 AD3d 33, 45 [1st Dept 2012]).

According to defendants, the evidence was destroyed by an act of God during Hurricane Ida which caused flooding in September 2021 (*id.* at 2, *see*, NYSCEF Doc. No. 61 at 23). Hui testifies that records with employee's signatures, tips, and wages were ruined because of a flood in the basement where the records were kept (NYSCEF Doc. No. 61 at 23, lines 10-14). She also testifies that the records included credit card receipts (*id.* at 30). Hui states she did not previously provide the records because her attorney had not asked for them (*id.* at 41, lines 8-9). Plaintiff asserts that this is evidence of destruction, and that Hui was negligent in preventing the destruction of the evidence.

Hui's attorney argues that there were significant problems with the deposition testimony translation, which caused confusion in Hui's answers (NYSCEF Doc. No. 55 at 3-4, *opposition*). The court notes there are multiple objections contained within the transcript due to issues with the interpretation. For example, the interpreter stated "The interpreter was not sure whether she meant some paper. I don't know. The interpreter was lost, I'm sorry" at the time where the flooding was discussed (NYSCEF Doc. No. 61 at 28, lines 17-19). At another point, the defendant's attorney asked for a break for the translator, because "two thirds" of Hui's answer was not translated (*id.* at 25, lines 6-7). Defendants clarify stating that the records destroyed in the flood were comprised of credit card payment receipts that contained information relating to the credit card tips, which were not specifically demanded by plaintiff in his discovery demands (NYSCEF Doc. No. 55 at 4).

Defendants aver that despite the records that were destroyed by flooding, extensive pay records were previously produced including: "1) what days Plaintiff worked; 2) the daily pay Plaintiff earned each day; 3) the credit card tips Plaintiff earned each day; 4) additional payments Plaintiff earned each day based upon how far he had to travel to make deliveries; and 5) the combined total of the daily wage, credit card tips, and travel payments Plaintiff received each day" (NYSCEF Doc. No. 55 at 6-7; NYSCEF Doc. No. 57, *records*). Defendants argue that this production wholly complied with the discovery demands because the records they produced show the credit card tips received by plaintiff each day. Plaintiff argues that defendants did not comply with the demands, because "the documents requested is specifically tailored to 'Plaintiff and/or 'Plaintiff's employment' or 'Plaintiffs during their employment', 'tips or other payments' received by Plaintiffs' in Defendants' possession" (NYSCEF Doc. No. 64, *reply at 2*). Plaintiff states that because Hui testifies that some of the records lost contained employee signatures, these documents were included in the discovery demands.

Defendants further state that plaintiff did not ask for all credit card receipts, which would contain "information relating to the credit card tips that employees received from customers" during a six-year period (NYSCEF Doc. No. 55 at 4). Defendants argue that production of these documents would be unduly burdensome because the credit card receipts were for all orders during the relevant time period, not just specifically orders that plaintiff delivered. Defendants further affirm that as the pay records were produced in good faith they satisfied the discovery obligations (NYSCEF Doc. No. 55 at 7). Furthermore, defendants state that the pay records produced are comprehensive and include the credit card tips plaintiff earned each day (NYSCEF Doc. No. 55 at 2; NYSCEF Doc. No. 57).

The court is vested with "broad discretion regarding discovery" (*M.P. by Fabiana P. v Jewish Bd. of Fam. & Children's Servs.*, 211 AD3d 584, 585 [1st Dept 2022]). The court finds that given that the other pay records produced include the credit card tips, producing all of the credit card receipts would be overbroad and unduly burdensome. Since plaintiff did not demand all the credit card receipts specifically, there was no obligation for plaintiff to preserve them. Furthermore, the court does not find that the records were destroyed with a culpable state of mind given the unprecedented flooding during Hurricane Ida (*see*, New York Times Article, NYSCEF Doc. No. 63). Although the destroyed documents have some relevance, since they presumably contained plaintiff's signature, defendants have demonstrated that the tip credits were also documented in the evidence produced. As such, the court therefore denies plaintiff's

motion for sanctions for spoliation of evidence (see *Duluc v AC & L Food Corp.*, 119 AD3d at 451).

Defendants seek attorney’s fees in connection with their cross-motion for summary judgment and fees associated with defending plaintiff’s motion for sanctions. The court denies this request, because “[i]t is well settled in New York that a prevailing party may not recover attorneys’ fees from the losing party except where authorized by statute, agreement or court rule” (*Fiduciary Ins. Co. of Am. v. Med. Diagnostic Servs., P.C.*, 150 AD3d 498, 498 [1st Dept 2017]). Since there is no statute, agreement, or court rule providing for attorney’s fees, the court denies defendants’ request. Therefore, it is hereby

ORDERED that defendants’ cross-motion for partial summary judgment dismissing the complaint as against defendant “John” Dong is granted; and it is further

ORDERED that plaintiff’s motion to amend the caption is denied as moot; and it is further

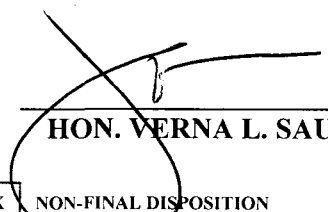
ORDERED that the action is discontinued as to defendant Dong, and it is severed and continued as to the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court’s records to reflect the change in the caption herein.

ORDERED that plaintiff’s motion for sanctions (Mot. Seq. 002) is denied.

December 14, 2023



HON. VERNA L. SAUNDERS, JSC

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