

Espinoza v A S K Std. Tr. Corp.

2024 NY Slip Op 31471(U)

April 19, 2024

Supreme Court, New York County

Docket Number: Index No. 655685/2021

Judge: Nancy M. Bannon

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

PRESENT: HON. NANCY M. BANNON PART 61

Justice

-----X

ALFONSO VARGAS ESPINOZA,

Plaintiff,

INDEX NO. 655685/2021

MOTION DATE 2/21/2024

MOTION SEQ. NO. 003

- v -

A S K STANDARD TRANSIT CORP., GO NEW YORK
TOURS INC., ATTRACTION PASS INC, ASEN
KOSTADINOV, YULIYA TULAKSHYNA and DIMITRIA
KOSTADINOV

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

I. INTRODUCTION

In this action, plaintiff seeks, *inter alia*, to recover unpaid wages as well as statutory damages under the New York Labor Law (“NYLL”) from the defendants. Defendants move pursuant to CPLR 3212 for summary judgment dismissing the complaint arguing, *inter alia*, that the plaintiff was an independent contractor rather than an employee, and thus not entitled to the protections of the NYLL, and that plaintiff’s use of a forged Social Security card bars any recovery. The plaintiff opposes the motion. The motion is granted in part.

II. BACKGROUND

Individual defendants Asen Kostadinov (“Kostadinov”), Yuliya Tulakshyna

(“Tulakshyna”), and Dimitrina Filipov (“Filipov”) (incorrectly sued herein as “Dimitria Kostadinov”) own and operate the three entity defendants in this matter: A S K Standard Transit Corp. d/b/a Bike Rental Central Park (“BRCP”), Go New York Tours Inc. (“Go New York”) and Attraction Pass, Inc. (“Attraction Pass”) (collectively, with the individual defendants, the “Defendants”). BRCP offers bicycle rentals to tourists.

In June 2016, the plaintiff, Alfonzo Vargas Espinoza, began working for BRCP. In connection with the start of his employment, he signed an I-9 form and provided a copy of what he claimed was his Social Security card. Unbeknownst to Defendants at the time, the Social Security card was forged. Plaintiff also signed a vendor agreement, agreeing to work as an independent contractor for BRCP. Defendant Dimitrina Kostadinov signed on behalf of BRCP.

On September 27, 2021, plaintiff commenced the instant action, alleging five causes of action for: (1) failure to pay minimum wage for each hour worked as provided in 12 NYCRR § 142-3.1; (2) failure to pay overtime wages for hours worked in excess of 40 hours per week as provided in 12 NYCRR § 142-2.2; (3) failure to pay Spread of Hours compensation for days plaintiff worked more than 10 hours a day as provided in NYCRR § 142; (4) failure to provide a proper wage notice at the time of hiring as provided in NYLL § 195(1); and (5) failure to provide accurate wage statements as provided in NYLL § 195(3). Specifically, plaintiff alleged that from July 1, 2017, to April 18, 2021, he worked approximately 40-45 hours per week on weekdays, but was required to punch out early or not record all his working hours in order to prevent him from recording more than 40 hours in a week. Plaintiff alleged that he was only compensated for up to 40 hours of weekday work per week, for which he was paid the hourly minimum wage. Plaintiff further alleged that he worked approximately 7-9 hours per day on weekends, and that his compensation for this work was either based on the number of hours worked multiplied by

the minimum wage, or was 40% of total bike rentals he generated, whichever amount was less. Plaintiff further alleged he was also not permitted to record his working hours on weekends. According to the plaintiff, from April 19, 2021, to May 2, 2021, he worked on average 4 hours a day, 7 days a week, and was paid 40% of the total rentals he successfully generated, but otherwise received no additional compensation regardless of how many hours he worked.

The defendants filed an answer asserting 27 affirmative defenses.

Discovery was conducted and this motion ensued.

III. LEGAL STANDARD

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). However, if the initial burden is not met by the movant, summary judgment must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York Univ. Med. Ctr., *supra*; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013); O’Halloran v City of New York, 78 AD3d 536 (1st Dept. 2010). This is because “summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.” Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting Nesbitt v Nimmich*, 34 AD2d 958, 959 (2nd Dept. 1970).

IV. DISCUSSION

In support of their motion, Defendants submit, *inter alia*: the subject Social Security card; a transcript of plaintiff's EBT; an affidavit of Kostadinov and a transcript of Kostadinov's EBT; a transcript of Filipov's EBT; the vendor agreement between BRCP and plaintiff designating plaintiff an independent contractor; the I-9 forms signed by plaintiff; BRCP's hourly wage and overtime payment records for plaintiff; timecards from June 2016 to July 2020; paystubs from 2017 to 2020; a list of commission payments to plaintiff; and wage notices signed by plaintiff from 2016 to 2020.

Defendants argue that plaintiff's claims are barred because he used a forged Social Security card to procure employment, in violation of federal laws and regulations. Defendants likewise rely on the forged Social Security card to argue that plaintiff's claims are barred by the doctrine of unclean hands. Defendants maintain that plaintiff was both an hourly employee and an independent contractor, that he was properly compensated by commission for his work as an independent contractor, and that the claims regarding his wages while working as an hourly employee are contradicted by the evidence. Defendants further contend that the claims against Tulakshyna, Go New York, and Attraction Pass must be dismissed because these defendants are improper parties to this litigation.

In opposition, plaintiff submits, *inter alia*, his own affidavit which includes allegations that he was employed by BRCP from 2016 to 2020 and that during that time he was not allowed to accurately record the hours he worked; his W-2 forms for 2016 through 2020; IRS guidance on the classification of hourly employees and independent contractors; and a Jackson affidavit from Kostadinov stating that BRCP is unable to locate plaintiff's 1099 forms. Plaintiff also submits BRCP's certificate of incorporation listing Tulakshyna as Chief

Executive Officer; a biennial statement from the NYS Department of Corporations, State Records & Uniform Commercial Code showing the same as of March 25, 2020; another biennial statement listing Kostadinov as Chief Executive Officer as of August 24, 2022; a wage statement signed by plaintiff in 2016 indicating his primary language as “Hispano”; a New York State Department of Labor Spanish language wage notice template from 2011; and a BRCP advertising flyer.

A. Plaintiff’s Use of a Forged Social Security Card

The parties do not dispute that plaintiff’s Social Security card was forged. Indeed, the plaintiff testified at his deposition that the card he provided was “fake.” However, the defendants, relying on Hoffman v Plastic Compounds, Inc., 535 US 137, 148 (2002), incorrectly argue that plaintiff’s tendering of a forged Social Security card is a complete bar to recovery pursuant to federal law, specifically the Immigration Reform and Control Act of 1986 (“IRCA”). Hoffman, though, does not bar an employee’s claims under the NYLL, as “Congress [in enacting the IRCA] expressly preempted only state and local laws that impose ‘civil or criminal sanctions’ on employers of undocumented aliens.” Balbuena v IDR Realty L.L.C., 6 NY3d 338, 357 (2006). A worker who submits a false Social Security card may still have a claim against an employer if “it is clear that [the employer] failed to comply with its employment verification obligations in good faith.” Macedo v J.D. Posillico, Inc., 68 AD3d 508, 511 (1st Dept. 2009). Even though they learned of the falsified Social Security card in January 2023, nine months prior to filing this motion, the Defendants fail to demonstrate in their papers any good faith efforts to verify plaintiff’s employment status at the time of his hiring, as required by the IRCA. In particular, defendant Asen Kostadinov’s deposition testimony and affidavit are silent on that issue. Rather, this witness testified, in combative and

argumentative manner, that he had no knowledge of when the plaintiff started working for A S K Standard, that he was not the person who hired the plaintiff and he had no idea who that person was. In her deposition, Dimitrina Filipov, Asen's sister, who signed the independent contractor agreement with the plaintiff, was his supervisor, and last worked as a manager for A S K Standard a year prior, did not testify as to any verification efforts. She also seemed to have difficulty recalling any information about the business, including any other details of hiring the plaintiff. Thus, in regard to any defense premised in the IRCA, there remains an issue of fact as to whether Defendants made the requisite good faith effort to meet their burden under the IRCA to verify plaintiff's employment status.

Defendants' unclean hands argument, which is likewise based on the submission of a forged Social Security card, is also unavailing because Defendants fail to show that they relied on the forged Social Security card or suffered injury, both necessary elements of an unclean hands claim. "[U]nclean hands is applicable only when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct." Citibank, N.A. v Am. Banana Co., 50 AD3d 593, 594 (1st Dept. 2008) (internal quotation marks omitted).

B. Plaintiff's Status as an Employee v Independent Contractor

The Defendants appear to argue that plaintiff worked for BRCP as an independent contractor rather than an employee and thus lacks standing to bring these NYLL claims, this argument is unavailing. However, in his affidavit, defendant Asen Kostadinov states that the "plaintiff served in two capacities while working for the bike rental business" and that it was the plaintiff's "denial" of doing any work as an independent contractor that should bar any recovery or at least limit it. In so arguing, the Defendants submit a vendor agreement which

designates plaintiff as an independent contractor. However, it is well settled that such agreements are not dispositive in determining whether plaintiff has wage claims as an hourly employee. See In re Morton, 284 NY 167, 175 (1940); Shanklin v Wilhelmina Models, Inc., 161 AD3d 610 (1st Dept. 2018) (plaintiffs may assert claims as employees notwithstanding that they signed agreements stating they were independent contractors); Areneo v Town Bd. for Town of Clarkstown, 55 AD3d 516 (2nd Dept. 2008) (existence of a contract designating a person as an independent contractor is to be considered but is not dispositive).

Indeed, Defendants' own proof submitted in support, namely the I-9 forms signed by plaintiff, BRCP's hourly wage and overtime payment records for plaintiff, and plaintiff's timecards, pay stubs, and wage notices, establish that plaintiff worked for BRCP as an hourly employee, even if he may have also done some additional work as an independent contractor. And the Defendants' other evidence concerning the commission payments made to plaintiff for his work as an independent contractor does not establish, *prima facie*, that he was *not* an employee entitled to bring this action. Thus, contrary to the Defendants' contention, the complaint is not subject to dismissal on this ground.

C. Plaintiff's Wage Claims: First, Second, Third, and Fifth Causes of Action

Defendants argue that their submission of plaintiff's timecards and payment records establish, as a matter of law, their entitlement to judgment dismissing plaintiff's causes of action, numbered here as in the complaint, for failure to pay (1) minimum wage, (2) overtime, and (3) Spread of Hours compensation, and for (5) providing inaccurate wage statements. Defendants argue that their submissions show several weeks where plaintiff recorded more than 40 hours of work, demonstrating that plaintiff was not categorically prevented from recording more than 40 hours of work throughout the entirety of the period at issue, and thus

casting the plaintiff's credibility into doubt. However, Defendants' evidence is at best determinative only as to the subset of work weeks for which more than 40 hours of work were recorded. It does not, however, refute the plaintiff's claims that at other times during his work for BRCP plaintiff was prevented from recording more than 40 hours per week, as well as his weekend work hours, thereby affecting his minimum wage payments, overtime wages, Spread of Hours payment on days he worked over 10 hours, and the accuracy of his wage statements.

Therefore, the branch of Defendants' motion seeking summary judgment dismissing the plaintiff's first, second, third, and fifth causes of action as to all defendants is denied.

D. Plaintiff's Wage Notice Claim: Fourth Cause of Action

In their submissions, Defendants allege but fail to establish, *prima facie*, that they were in compliance with and did not violate NYLL § 195(1). This statute requires employers to provide their employees, at the time of hiring, a notice listing "the rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, [or] commission[.]" Section 195(1)(c) states that the employer must provide this notice both in English and the employee's primary language if other than English, so long as the Department of Labor has an available wage notice template in the employee's primary language.

Defendants submit various wage notices provided to plaintiff at the time of his initial hiring and subsequently when his wage increased, all of which were written solely in English. In the first wage notice, from 2016, plaintiff listed "Hispano" as his primary language. Defendants submit no evidence that they supplied plaintiff a wage notice in Spanish, nor that there was no Spanish-language template available from the Department of Labor at the time of plaintiff's hiring. Defendants thus fail to show, *prima facie*, that they provided plaintiff proper wage notices in Spanish, plaintiff's primary language.

Therefore, the branch of Defendants' motion seeking summary judgment dismissing plaintiff's fourth cause of action as to all defendant is denied.

E. Claims against defendants Yuliya Tulakshyna, Go New York, and Attraction Pass

Ordinarily, a corporation exists independently of its owners, as a separate legal entity, and its owners are not liable for the actions of the corporation. See Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135 (1993). The doctrine of piercing the corporate veil is a limitation to this rule, "typically employed by a third party seeking to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation." Id. "Piercing the corporate veil requires a showing that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." Ciavarella v Zagaglia, 132 AD3d 608, 608-09 (1st Dept. 2015) (quotation and citation omitted); see also Fantazia Int'l Corp. v CPL Furs New York, Inc., 67 AD3d 511 (1st Dept. 2009). Since a fact-specific analysis is necessary when determining whether to pierce the corporate veil, summary judgment is generally not appropriate. See Emposimato v CICF Acquisition Corp., 89 AD3d 418 (1st Dept. 2011); see First Bank of Ams. v Motor Car Funding, Inc., 257 AD2d 287 (1st Dept. 2008).

Kostadinov, in his capacity as President and principal owner of BRCP, attests in his affidavit that while Tulakshyna holds a 2% ownership interest in BRCP, she had no day-to-day involvement or oversight with the company. Defendants' submissions also include plaintiff's deposition transcript, where plaintiff states that he did not know or ever meet Tulakshyna while working for BRCP. These submissions suffice to demonstrate, *prima facie*, that Tulakshyna is simply a minority owner of BRCP without any involvement in the day-to-day

management of the corporation, and thus that she is presumptively not individually liable for BRCP's alleged wrongdoing. In opposition, plaintiff's submissions establish that Tulakshyna incorporated BRCP in 2006 and was registered as its' Chief Executive Officer as late as November 2019, during the time plaintiff worked for BRCP. However, plaintiff's submissions fail to raise an issue of fact as to the elements necessary for veil piercing, as they do not demonstrate or even suggest that Tulakshyna had any individual involvement, as either an owner or corporate officer of BRCP, in any transactions or decisions relating to plaintiff's compensation, let alone that she dominated the corporation and used that dominance to commit a fraud or wrong against him.

Dismissal is also warranted as against Go New York and Attraction Pass. Kostadinov attests in his affidavit that he is the owner and president of all three corporate defendants, but that Go New York and Attraction pass are separate legal entities from BRCP. Furthermore, Kostadinov attests that plaintiff never worked for Go New York or Attraction Pass in any capacity. Indeed, the payment records submitted by defendants show that plaintiff never received compensation from Go New York or Attraction Pass. In opposition, plaintiff submits fliers showing cross promotion between the corporate defendants, and points to the common ownership through Kostadinov. Once again, though, plaintiff's submissions fail to raise a triable issue as the mere fact of common ownership and cross-promotion, without more, is insufficient to demonstrate that Kostadinov and/or BRCP dominated Go New York and Attraction Pass and misused that control to commit a fraud or wrong against plaintiff. See Ciavarella v Zagaglia, supra. Indeed, plaintiff's submissions are bereft of evidence connecting, in any way, either Go New York or Attraction Pass to BRCP's handling of his hiring, scheduling or compensation.

For these reasons, the branch of Defendants’ motion seeking to dismiss all causes of action as against Tulakshyna, Go New York, and Attraction Pass is granted.

V. CONCLUSION

For the reasons set forth above, the Defendant’s motion is granted to the extent of dismissing all causes of action as against defendants Yuliya Tulakshyna, Go New York Tours Inc., and Attraction Pass Inc. As such, left for trial are all five causes of action of the complaint as against defendants A S K Standard Transit Corp., Asen Kostadinov and Dimitiria Kostadinov.

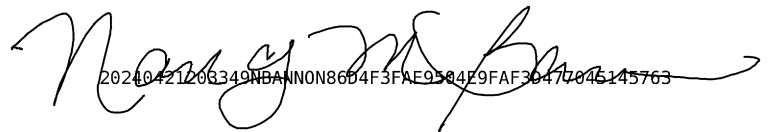
The parties are encouraged to explore settlement.

Accordingly, upon the foregoing papers, it is

ORDERED that the Defendants’ motion pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted to the extent of dismissing all causes of action as against defendants Yuliya Tulakshyna, Go New York Tours Inc., and Attraction Pass Inc., and the motion is otherwise denied; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the Court.


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4/19/2024
DATE

NANCY M. BANNON, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART

OTHER