Sacko v Weiss
2024 NY Slip Op 35140(U)
June 26, 2024
Supreme Court, Bronx County
Docket Number: Index No. 801233/2022E
Judge: Alison Y. Tuitt
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 5

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BOUNA SACKO,

Plaintiff,

-against-

ELI WEISS, ARIEV NUSBAUM a/k/a ARIEY NUSBAUM, ALLEN PHILLIPS a/k/a ALLAN PHILLIPS, a/k/a ALLEN PHILLIPS, DOV MOSHE, HONEY GROUP LLC, MILK N'HONEY, 45th STREET BAGEL INC, PICK A BAGEL LLC, PICK A BAGEL 8TH, LLC, PICK A BAGEL BPC, LLC, PICK A BAGEL NYC 62 LLC, TENTH AVENUE YYY LLC, 444 TENTH F&B LLC, 446 TENTH AVE, 130 WEST 72ND STREET, LLC, WALLACK MGMT CO., INC.,

Defendants.

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Index №. 801233/2022E

Hon. ALISON Y. TUITT
Justice Supreme Court

The following papers were read on this motion (Seq No. 2) to **DISMISS** submitted on November 20, 2023.

Notice of Motion – Affirmation in Support with Exhibit, Memorandum of Law in Support, Afffidavit of Jackie Rabin, Affidavit of Burt Wallach	NYSCEF Doc. # 46 - 51
Affirmation in Opposition with Exhibits, Affidavit in Opposition to Motion, Memorandum of Law in Opposition	NYSCEF Doc. # 53 - 60
Memorandum of Law in Reply	NYSCEF Doc. # 61

Upon the foregoing papers, defendants ELI WEISS, ARIEV NUSBAUM a/k/a ARIEY NUSBAUM, ALAN PHILLIPS a/k/a ALLAN PHILLIPS a/k/a ALLEN PHILLIPS, DOV MOSHE (collectively the Individual Defendants), HONEY GROUP LLC, 45th STREET BAGEL INC, PICK A BAGEL LLC, PICK A BAGEL 8TH, LLC, PICK A BAGEL BPC, LLC, PICK A BAGEL NYC 62 LLC, TENTH AVENUE YYY LLC, 444 TENTH F&B LLC, 446 TENTH AVE (collectively the Entity Defendants), 130 WEST 72ND STREET, LLC, and WALLACK MGMT CO., INC. move to dismiss the amended complaint pursuant to CPLR 3211. Plaintiff opposes defendants' motion.

Plaintiff cooked food in a restaurant known as Milk N' Honey. Plaintiff alleges that defendant MILK N' HONEY, the Individual Defendants, and the Entity Defendants jointly employed him, and/or constitute a single employer, whereas defendants claim that only MILK N' HONEY employed him. Plaintiff alleges that his

employer(s) violated, inter alia, the minimum wage, spread of hours, wage notice, and overtime provisions of the NYS Labor Law.

In his opposition papers, Plaintiff agreed to voluntarily discontinue the complaint as to defendants 130 WEST 72ND STREET, LLC and WALLACK MGMT CO., INC.

Upon defendants' motion to dismiss claims pursuant to CPLR § 3211(a)(7), the court may not rely on facts alleged by defendants to defeat the claims unless the evidence demonstrates the absence of any significant dispute regarding those facts and completely negates the allegations against the moving defendants (*Lawrence v. Graubard Miller*, 11 NY3d 588, 595 [2008]; *Goshen v. Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]; *Leon v. Martinez*, 84 NY2d 83, 87–88 [1994]; *Yoshiharu Igarashi v. Shohaku Higashi*, 289 AD2d 128 [1st Dept 2001]). The court must accept the complaint's allegations as true, liberally construe them, and draw all reasonable inferences in plaintiff's favor (*Nonnon v. City of New York*, 9 NY3d 825, 827 [2007]; *Goshen v. Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]; *Harris v. IG Greenpoint Corp.*, 72 AD3d 608, 609 [1st Dept 2010]; *Vig v. New York Hairspray Co., L.P.*, 67 AD3d 140, 144–45 [1st Dept 2009]). The applicable standard is thus whether reasonable inferences from the complaint sustain a claim, especially upon a pre-answer motion to dismiss as here. (*Harris v. IG Greenpoint Corp.*, 72 AD3d 608, 609 [1st Dept 2010]; *Pepler v. Coyne*, 33 AD3d 434, 435 [1st Dept 2006]; *see Lappin v. Greenberg*, 34 AD3d 277, 279 [1st Dept 2006]). In short, the court may dismiss a claim based on CPLR § 3211(a)(7) only if the allegations completely fail to state a claim (*Leon v. Martinez*, 84 NY2d 83, 88 [1994]; *Harris v. IG Greenpoint Corp.*, 72 AD3d 608, 609 [1st Dept 2010]; *Frank v. DaimlerChrysler Corp.*, 292 AD2d 118, 121 [1st Dept 2002]; *Scott v. Bell Atl. Corp.*, 282 AD2d 180, 183 [1st Dept 2001]).

The pleading requirements for causes of action alleging unpaid wages and overtime compensation under the relevant provisions of the Labor Law are not identical to those under the federal Fair Labor Standards Act (29 USC § 201 et seq.), as the federal pleading requirement of plausibility is not an element of the analysis under CPLR 3211(a)(7) (*see Gutierrez v. Bactolac Pharm., Inc.*, 210 AD3d 746, 747 [2d Dept 2022]).

Here, the amended complaint adequately sets forth causes of action to recover unpaid wages and overtime compensation, as well as for other violations of the NYS Labor Law, as the plaintiff alleges that the defendants failed to pay him minimum wages for all hours worked and failed to pay him overtime compensation for the time periods in which he worked in excess of 40 hours per week (*see Gutierrez*, 210 A.D.3d at 747; *Interstate Home Loan Ctr., Inc. v. United Mtge. Corp.*, 206 AD3d 708, 709–710 [2d Dept 2022]). The amended complaint also states a cognizable cause of action against the defendants alleging a violation of the Wage Theft Prevention Act by alleging that the plaintiff was not provided wage statements under Labor Law § 195(3) (*see Silvers v. Jamaica Hosp.*, 218 AD3d 817, 819 [2d Dept 2023]; *Interstate Home Loan Ctr., Inc. v. United Mtge. Corp.*, 206 AD3d 78, 709–710 [2d Dept 2022]).

Moreover, the amended complaint sets forth sufficient allegations to assert liability against the defendants under the single employer doctrine and the joint employer doctrine (*see Ferris v. Lustgarten Found.*, 189 AD3d 1002, 1006–1007 [2d Dept 2020]; *Matter of Argyle Realty Assoc. v. New York State Div. of Human Rights*, 65 AD3d 273, 282–283 [2d Dept 2009]; *Fowler v. Scores Holding Co., Inc.*, 677 F Supp 2d 673, 680–681 [SD NY 2009]; *Cabrera v. Deadwood Constr., Inc.*, 226 AD3d 743, 743–45 [2d Dept 2024]).

When determining if an ostensible non-employer may be a joint employer, courts have applied the immediate control test (*Brankov v. Hazzard*, 142 AD3d 445 [1st Dept. 2016]). Under the immediate control test, a joint employer relationship may be found to exist where there is sufficient evidence that the defendant had immediate control over the employee and particularly control over or authority to set the terms and conditions of the employee's work (*Id.*, relying on *Haight v. NYU Langone Med. Ctr., Inc.*, 2014 WL 2933190 at *11, 2014 US Dist LEXIS 88117 [SD NY, June 27, 2014, No. 13 Civ. 04993[LGS]). Relevant factors include commonality of hiring, firing, discipline, pay, insurance, records, and supervision (*Id.*). "Of these factors, 'the extent of the employer's right to control the means and manner of the worker's performance is the most important factor.' If such control is established, other factors 'are then of marginal importance'" (*Brankov*, 142 AD3d at 446 [1st Dept. 2016], quoting *Haight*, 2014 WL 2933190 at *11). As a functional matter, courts

evaluate whether a joint employer relationship exists by considering the control exercised in setting the terms and conditions of the employee's work (*Haight*, 2014 WL 2933190 at *11).

Plaintiff's amended complaint gives the Individual Defendants and the Entity Defendants fair notice of his claim that they employed him by alleging that individual defendant Phillips owned Milk N' Honey and the other Entity Defendants, directly supervised plaintiff's supervisors, had authority to terminate plaintiff, and, in fact, ultimately exercised that authority by having the restaurant's manager fire him (NYSCEF Doc. No. 43, ¶¶ 10, 16-27, 182-183, 244-257, 306; *Sanchez v. Brown, Harris, Stevens*, 234 AD2d 170 [1st Dept 1996]; *State Div. of Human Rights v. GTE Corp.*, 109 AD2d 1082, 1083 [4th Dept 1985]; *Santos v. Brookdale Hosp. Med. Ctr.*, 29 Misc3d 1207 [Sup.Ct. Kings County 2010]. *See Villa Maria Institute of Music v. Ross*, 54 NY2d 691, 692 [1981]; *Vincente v. Silverstein Properties, Inc.*, 83 AD3d 586 [1st Dept 2011]; *Arculeo v. On–Site Sales & Marketing, LLC*, 425 F3d 193, 198 [2d Cir 2005]).

Plaintiff also alleges that the Individual Defendants controlled the means and manner of his job performance (NYSCEF Doc. No. 43, ¶¶ 206-212; NYSCEF Doc. No. 54, ¶¶ 21-23, 27), directing him to prepare food products that they would take to other restaurants owned and operated by the Entity Defendants. (NYSCEF Doc. No. 43, ¶¶ 206-212; NYSCEF Doc. No. 54, ¶¶ 24, 25, 32-34, 36-38). One can reasonably infer that these Individual Defendants were using plaintiff as a cook for these other restaurants.

"Ultimately, determination of whether an entity may be considered an employer is 'essentially a factual issue' " (*Haight*, 2014 WL 2933190 at *12, *quoting N.L.R.B. v. Solid Waste Services, Inc.*, 38 F3d 93, 94 [2d Cir. 1994]; *see also Nelson v. Beechwood Org.*, 2004 WL 2978278, at *5, 2004 US Dist LEXIS 25622 [SD NY, Dec. 21, 2004, 03 CIV. 4441 [GEL]). At this stage, plaintiff has plausibly alleged the existence of a joint employer relationship with the Entity Defendants and the Individual Defendants for the purposes of withstanding a motion to dismiss. Therefore, the defendants' motion to dismiss is denied.

Accordingly, it is hereby

ORDERED that Defendants' motion to dismiss is granted only as to defendants 130 WEST 72ND STREET, LLC and WALLACK MGMT CO., INC.; as Plaintiff has agreed to discontinue his claims against those defendants, and the Clerk of the Court is hereby directed to enter judgment accordingly; and it is further

ORDERED that Defendants' motion to dismiss is denied in all other respects; and it is further

ORDERED that the Clerk shall mark Motion Sequence 2 disposed in all court records.

Any relief not specifically granted herein is denied.

This constitutes the Decision and Order of this Court.

Dated: 6/26/2024

Hon. A. Y. Tuitt
ALISON Y. TUITT, J.S.C.

1. CHECK ONE.....	☐ CASE DISPOSED IN ITS ENTIRETY	☒ CASE STILL ACTIVE			
2. MOTION.....	☐ GRANTED	☒ DENIED	☐ GRANTED IN PART	☐ OTHER	
3. CHECK IF APPROPRIATE.....	☐ SETTLE ORDER	☐ SUBMIT ORDER	☐ SCHEDULE APPEARANCE		
	☐ FIDUCIARY APPOINTMENT	☐ REFEREE APPOINTMENT			