

Xiaoling Ding v Rockland Ind. Living Ctr., Inc.

2024 NY Slip Op 35199(U)

February 20, 2024

Supreme Court, Queens County

Docket Number: Index No. 713794/2023

Judge: Robert I. Caloras

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SUPREME COURT OF THE STATE OF NEW YORK QUEENS COUNTY

PRESENT: HON. ROBERT I. CALORAS PART PART 36 MOTIONS

Justice

-----X **INDEX NO. 713794/2023**
XIAOLING DING,
Plaintiff, **MOTION SEQ. NO. 001**

- v -

ROCKLAND INDEPENDENT LIVING CENTER, INC., DAVID ARON, DAVID GOLDWASSER, HOWARD HELLMAN, GEORGE HOEHMANN, PATRICIA RANIERI

DECISION + ORDER ON MOTION

Defendants.

-----X

The following e-filed documents, listed by NYSCEF under the motion as: 6-11, 13-17, were read on Defendants' motion for an order to dismiss the Complaint pursuant to CPLR 3211 (a) (5) and (a) (7).

Upon the foregoing papers it is ordered that the motion is determined as follows:

On July 5, 2023, plaintiff, a home health aide, commenced the within action against defendants seeking damages for wage and overtime violations of the Fair Labor Standards Act (FLSA, 29 USC § 207) and the New York Labor Law.

As a threshold matter, it is noted that plaintiff submitted a memorandum of law in opposition to defendants' motion and "in support of the cross-motion to amend their complaint." However, plaintiff has not made a formal notice of cross-motion, and plaintiff has not submitted a proposed amended complaint or made any arguments to address that issue in its opposition papers. Therefore, the court will not entertain any request for leave to amend plaintiff's complaint herein.

That branch of defendants' motion to dismiss the complaint pursuant to CPLR 3211 (a) (5) on statute of limitations grounds is denied. On a motion to dismiss a cause of action pursuant to CPLR 3211 (a) (5) as barred by the statute of limitations, a defendant must establish, prima facie, that the time within which to sue has expired. Once that showing has been made, the burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations has been tolled, that an exception to the limitations period is applicable, or that the plaintiff actually commenced the action within the applicable limitations period (*see Quinn v McCabe, Collins, McGeough & Fowler, LLP*, 138 AD3d 1085 [2d Dept 2016]; *Tsafatinos v Law Off. of Sanford F. Young, P.C.*, 121 AD3d 969 [2d Dept 2014]; *Bullfrog, LLC v Nolan*, 102 AD3d 719 [2d Dept 2013]; *Zaborowski v Local 74, Serv. Empl. Intl. Union, AFL-CIO*, 91 AD3d 768 [2d Dept 2012]).

Here, plaintiff's claims under the NYLL are subject to a six-year statute of limitations and plaintiff's FLSA claim is subject to a two-year statute of limitations period. It is also noted that, pursuant to Governor Cuomo's March 20, 2020 executive order related to the COVID-19 pandemic, the statute of limitations for any claims that began to run and did not expire prior to March 20, 2020 was extended for 228 days (*see Brash v Richards*, 195 AD3d 582 [2d Dept 2021]). It is alleged in the complaint that plaintiff was employed from September 2010 to January 2017, and the instant action was commenced on July 5, 2023. Therefore, due to the tolling provision of the executive order, only plaintiff's NYLL claims for the period of December 2016 through January 2017 are timely. Significantly, in her opposition papers, plaintiff admits that any claims that reach beyond the applicable statute of limitations period under FLSA or the NYLL (i.e., September 2010 through November 2016) are time-barred.

Next, the court will address that branch of defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a) (7). On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must accept the facts alleged by the plaintiff as true and liberally construe the complaint, according it the benefit of every possible favorable inference (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 406, 414 [2001]; *see Benitez v Bolla Operating LI Corp.*, 189 AD3d 970 [2d Dept 2020]). The role of the court is to determine only whether the facts as alleged fit within any cognizable legal theory (*see Bianco v Law Offices of Yuri Prakhin*, 189 AD3d 1326 [2d Dept 2020]). In general, when deciding a motion made pursuant to CPLR § 3211 (a) (7), "[t]he court is limited to 'an examination of the pleadings to determine whether they state a cause of action'" (*Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901, 902 [2d Dept 2014], quoting *Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]; *see Fedele v Qualified Pers. Residence Trust of Doris Rosen Margett*, 137 AD3d 965, 967 [2d Dept 2016]).

Initially, defendants contend that plaintiff's causes of action alleging violations of the NYLL must be dismissed because they are not plaintiff's employer. In determining whether a party is an employer for purposes of the NYLL, New York courts have employed an "economic realities" analysis, which considers whether a defendant had an "ownership interest or power to do more than carry out personnel decisions made by others" (*Patrowich v Chem. Bank*, 63 NY2d 541 [1984]). A broad interpretation of the "economic realities" test has been adopted by evaluating "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 of New York*, 87 AD3d 25 [2d Dept 2011], quoting *Herman v RSR Sec. Services Ltd.*, 172 F3d 132, 139 [2d Cir 1999]).

Based upon a careful reading of the allegations of the complaint, and upon consideration of the economic realities of this case, plaintiff, at this stage of the litigation, has sufficiently stated causes of action against defendants as an "employer" within the meaning of the NYLL (*see Lomeli v Falkirk Mgt. Corp.*, 179 AD3d 660 [2d Dept 2020]; *Cohen v Finz & Finz, P.C.*, 131 AD3d 666 [2d Dept 2015]; *Bonito v Avalon Partners, Inc.*, 106 AD3d 625 [1st Dept 2013]). Specifically, plaintiff claims that, during her employment with defendant Rockland Independent Living Center, Inc. (RILC) as a home health aide, the individual defendants exercised control over the daily operations of her work. In particular, the complaint alleges that the individual defendants were "known as a 'boss' to Plaintiff and among Plaintiff's co-workers and participated in the day-to-day operations of

RILC.” It is further alleged in the complaint that the individual defendants were “responsible for business decisions of RILC including but not limited to the amount of salary the employees will receive and hiring and firing of employees.” Moreover, contrary to defendants’ contention, whether RILC acts as a “fiscal intermediary” within the meaning of the Medicaid program known as Consumer Directed Personal Assistance Program (CDPAP) does not necessarily exclude it from being deemed an employer for purposes of plaintiff’s wage claims under FLSA and New York Labor Law in this action (*see Hardgers-Powell v Angels In Your Home LLC*, 330 FRD 89 [US Dist Ct, WD NY 2019] ; *Garcia v Best Professional Home Care Agency, Inc.*, 2023 NY Slip Op 32416[U] [Sup Ct, Kings County 2023]).

Those branches of defendants’ motion to dismiss the first and second causes of action for unpaid overtime wages are granted. Both FLSA and the NYLL require an employer to compensate an employee for work that is in excess of forty hours per week “at a rate not less than one and one-half times the regular rate at which [s]he is employed” (29 USC § 207 (a) (1); 12 NYCRR § 142-2.2). In particular, with respect to the home health care field, the New York State Department of Labor has interpreted its minimum wage order to impose what is known as the 13-Hour Rule. Under this rule, home health aides assigned to 24-hour live-in shifts may be paid for only 13 hours of the 24 hours if the aides are afforded eight hours for sleeping, including five hours of uninterrupted sleep, and if they are afforded three hours for meal breaks (*see Andryeyeva v New York Health Care, Inc.*, 33 NY3d 152, 165-166 [2019]). If any of these three conditions are not met, the employer must pay for all 24 hours of the shift (*id.*). For claims alleging overtime violations under FLSA and the NYLL, to survive a motion to dismiss, “a plaintiff must sufficiently allege [forty] hours of work in a given work week as well as some uncompensated time in excess of the [forty] hours” (*Lundy v Catholic Health Sys. of Long Island, Inc.*, 711 F3d106, 114 [2d Cir 2013]). Additionally, “[p]laintiffs must provide sufficient detail about the length and frequency of their unpaid work to support a reasonable inference that they worked more than forty hours in a given week” (*Nakahata v New York-Presbyterian Healthcare Sys.*, 723 F3d 192, 201 [2d Cir 2013]). “Allegations that the plaintiff ‘typically,’ ‘occasionally,’ or ‘often’ worked certain shifts” are not sufficient to state a plausible claim because such allegations “invite[] speculation” (*Watkins v First Student, Inc.*, US Dist Ct, SD NY, Feb. 28, 2018, Seibel, J., *quoting Lundy*, 711 F3d at 114-15); *see Hudson v St. Joseph’s Hosp. Health Ctr.*, US Dist Ct, ND NY, Jan. 23, 2023, Sharpe, J.)

Here, while plaintiff’s allegations make it conceivable that she did not receive some overtime compensation, absent any specificity as to the frequency, length, or dates of her unpaid overtime work, her allegations invite speculation. The complaint simply alleged that “[t]hroughout Plaintiff’s employment, Plaintiff worked at her assigned client’s home for 24-hour periods with very few intervals of uninterrupted breaks for eating or for sleeping.” In addition, plaintiff alleged “[d]uring Plaintiff’s employment, although Plaintiff worked 24-hour shifts with very few intervals, she was only paid for the first thirteen (13) hours that she worked.” Furthermore, plaintiff’s affirmation submitted in reply to remedy the defects in the complaint is without any probative value since it was not presented in affidavit form (CPLR 2106).

That branch of defendants’ motion to dismiss the fifth cause of action alleging a violation of Labor Law § 191 is denied. Pursuant to Labor Law § 191, provides, in pertinent part, “[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; provided however that a manual worker employed by . . . a non-profitmaking organization shall be paid in accordance with the agreed terms of employment, but not less frequently than semi-monthly.” In support of their motion, defendants argue that RILC was not required to pay plaintiff weekly because it is a not-for-profit organization and that plaintiff was paid biweekly in accordance with the agreed terms of her employment. However, defendants failed to adequately demonstrate the agreed terms of plaintiff’s employment showing that plaintiff was to be paid biweekly instead of weekly.

Accordingly, those branches of defendants’ motion to dismiss the causes of action for unpaid overtime wages are granted. In addition, as discussed above, plaintiff’s NYLL claims for the period of employment from September 2010 through November 2016 are dismissed as time-barred. In all other respects, the motion is denied.

Dated: February 20, 2024



ROBERT I. CALORAS, J.S.C.

