

Baizan v Wicked Wolf N.
2024 NY Slip Op 35459(U)
August 19, 2024
Supreme Court, Westchester County
Docket Number: Index No. 57751/2024
Judge: Alexandra D. Murphy
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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. ALEXANDRA D. MURPHY, J.S.C.**

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JESUS PONCE BAIZAN,

Plaintiff,

Index No. 57751/2024

– against –

Motion Seq. 1

WICKED WOLF NORTH AND JAMES CAREY,
Defendants.

DECISION & ORDER

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El-Hag & Associates P.C., White Plains, NY (Dylan Wiley of counsel) for the plaintiff.

The Law Offices of Joseph S. Garafola, Elmsford, NY for the defendant.

In an action to recover damages for violations of Article 6 of the Labor Law, the plaintiff moves to dismiss the defendants' counterclaim asserted in their answer:

Papers Considered

NYSCEF Doc. No. 8-18

1. Notice of Motion/Affirmation of Dylan James Wiley, Esq./Exhibits 1-3;
2. Affirmation of Joseph S. Garafola, Esq. in Opposition;
3. Memorandum of Law in Reply.

Factual and Procedural Background

The plaintiff Jesus Ponce Baizan was employed as a chef by the defendant Wicked Wolf North between August 20, 2022, and September 9, 2023. The defendant James Carey is the owner of the Wicked Wolf North. The plaintiff alleges that he worked approximately 62 hours a week, generally Tuesday to Sunday, and was paid as a salaried employee on a weekly basis.

The plaintiff commenced this action against the defendants asserting causes of action for failure to pay minimum wage, failure to pay overtime wages, failure to pay wages within the statutory timeframes pursuant to Labor Law 191, failure to provide wage notices pursuant to Labor Law 198, and failure to pay spread of hours¹ pay pursuant to

¹ An employee shall receive one hour's pay at the basic minimum hourly wage rate, in addition to the minimum wage required in this Part for any day in which:

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12 NYCRR 142-2.4. The complaint alleges that the plaintiff was paid \$12.90 per hour and that he should have received an overtime premium equal to 1.5 times the regular rate of pay.

The defendants joined issue with the service of their answer with counterclaims. The answer asserts that the Wicked Wolf North opened on August 1, 2022. Carey hired the plaintiff as a grill chef to work 40 hours per week for a five-day period. The plaintiff was paid \$400 per week and was provided with a W2 tax form. At the plaintiff's request, the plaintiff was paid an additional \$400 per week in cash for which he was provided with a 1099-NEC (Nonemployee Compensation) tax form as an independent contractor. The answer asserts that the plaintiff chose his own workdays and usually did not work Mondays and Thursdays. On September 9, 2023, the plaintiff failed to report to work. The defendants assert that the plaintiff walked off the job and never returned. The answer asserts a counterclaim that the plaintiff was an independent contractor and voluntarily left the job.

The plaintiff moves to dismiss the counterclaim pursuant to CPLR 3211(a)(7). The plaintiff argues that his purported status as an independent contractor is an affirmative defense and not a cognizable cause of action.

In opposition, the defendants argue that the plaintiff is an independent contractor and submit a copy of the 1099 tax form.

Discussion

On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, "the court must liberally construe the complaint, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Minovici v Belkin BV*, 109 AD3d 520 [2d Dept 2013]; see *Leon v Martinez*, 84 NY2d 83, 87–88 [1994]; *Treeline 990 Stewart Partners, LLC v RAIT Atria, LLC*, 107 AD3d 788, 791 [2d Dept 2013]). However, factual allegations which are flatly contradicted by the record are not presumed to be true and, "[i]f the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action" (*Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530, 530 [2d Dept 2007]; see *Daub v Future Tech Enter., Inc.*, 65 AD3d 1004 [2d Dept 2009]).

The plaintiff argues that his purported status as an independent contractor is an affirmative defense and not a cause of action. Therefore, the plaintiff argues that the counterclaim must be dismissed for failure to state a cause of action.

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- (a) the spread of hours exceeds 10 hours; or
 - (b) there is a split shift; or
 - (c) both situations occur.

(12 NYCRR 142-2.4).

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A counterclaim is a cause of action asserted by a defendant against a plaintiff (CPLR 3019[a]). By its very nature, a counterclaim seeks affirmative relief (*P.J.P. Mech. Corp. v Commerce & Indus. Ins. Co.*, 65 AD3d 195, 199-200 [1st Dept 2009]). Under CPLR 3011, a plaintiff is required to reply to an averment in the defendant's pleading that as a matter of law constitutes a counterclaim and is denominated as a counterclaim in the answer (5 New York Civil Practice: CPLR P 3011.02).

Pursuant to CPLR 3018(b), a party shall plead, as affirmative defenses, all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading. Affirmative defenses do not seek affirmative relief.

"The effect of a successful affirmative defense is the dismissal of a plaintiff's complaint or cause of action. It does not give the defendant any affirmative relief against a plaintiff, such as monetary damages" (*P.J.P. Mech. Corp. v Commerce & Indus. Ins. Co.*, 65 AD3d at 199-200 ["[A] claim that does not defeat the plaintiff's cause of action, but constitutes an independent cause of action for the defendant, should be pleaded as a counterclaim, and not as an affirmative defense" (quoting 84 NY Jur 2d, Pleading 166)]).

The Court finds that the facts as alleged in the counterclaim fit within a cognizable legal theory for a declaratory judgment that the plaintiff was an independent contractor. An action for a declaratory judgment must be supported by the existence of a justiciable controversy (*Matter of Hargraves v City of Rye Zoning Bd. of Appeals*, 162 AD3d 1022, 1024 [2d Dept 2018]). "There must be a genuine, concrete dispute between adverse parties, not merely the possibility of hypothetical, contingent, or remote prejudice to the plaintiff" (*Matter of Hargraves v City of Rye Zoning Bd. of Appeals*, 162 AD3d at 1025). Here, the counterclaim alleges a justiciable controversy as to whether the plaintiff was an employee and therefore entitled to the rights and protections of Article 6 of the Labor Law or an independent contractor.

Thus, the defendants' counterclaim is "sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action" (CPLR 3013; *Ackerman v NY Hosp. Med. Ctr. of Queens*, 127 AD3d 794, 795-796 [2d Dept 2015]). Based upon the foregoing, the counterclaim states a cause of action against the plaintiff.

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Accordingly, it is

ORDERED that the plaintiff's motion to dismiss the defendants' counterclaim asserted in their answer is **DENIED**; and it is further

ORDERED that the plaintiff shall serve this order with notice of entry within 10 days of the date herein; and it is further

ORDERED that that the plaintiff's time to serve an answer to the counterclaim is extended, pursuant to CPLR 3211(f), until 10 days after service of this order with notice of entry.

Counsel for all parties shall appear for a **Preliminary Conference** at a date and time to be provided by the part clerk.

Dated: White Plains, New York
August 19, 2024


HON. ALEXANDRA D. MURPHY, J.S.C.