SHORT FORM ORDER

INDEX No. 11-12190
CAL No. 12-01230-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

***PRESENT*:**

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 11/5/12
ADJ. DATE 11/13/12
Mot. Seq. # 005 - MG; CASEDISP

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STEPHAN DETURRIS,

Plaintiff,

- against -

SURFSIDE 3 MARINA, INC.,

Defendant.

---X

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Upon the reading and filing of the following papers 1-23, in this matter: (1) Notice of Motion/Order to Show Cause by the Defendant, dated May 20, 2013, and supporting papers (including Memorandum of Law, undated) 1-15; (2) Memorandum of Law in Opposition by the Plaintiff, dated June 7, 2013, 16-21 and supporting papers; (3) Reply Memorandum of Law by the Plaintiff, dated, June 21, 2013, and supporting papers 22-23; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by defendant Surfside 3 Marina, Inc. ("S3M"), for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint, is granted.

Plaintiff brought this action seeking damages for nonpayment of overtime during the time he was employed by the defendant S3M. Plaintiff's claim is for the period between February 15, 2004 to April of 2006, at which time S3M was sold to a company called Marine Max. Plaintiff has also alleged a cause of action for unjust enrichment

Defendant S3M now moves for summary judgment dismissing the complaint. In support of the motion, it submits, *inter alia*, its attorney's affirmation and memorandums of law; the pleadings; thetranscript of the deposition of the plaintiff, Stephan Deturris; the affidavit of Jennifer Hodnick, sworn

to May 8, 2013; the affidavit of Jon Danielecki, sworn to May 14, 2013 and wage statements for plaintiff and four other employees of the defendant. In opposition to this motion, the plaintiff submits his attorney's memorandum of law; and the affidavit of plaintiff, sworn to October 25, 2012.

Plaintiff testified that he first worked for defendant S3M in 1992 or 1993. He returned to work there in 1997 as a fiberglass repair person. The fiberglass division of the marina was located in a separate building. The manager of his division left in 2004. Thereafter, plaintiff began to attend company management meetings. No one else from his division attended these meetings. Plaintiff was shown a copy of an S3M company newsletter, which, among other things, announced that plaintiff was promoted to manager of the fiberglass division and that he would be responsible for supervising the staff and overseeing all warranty and retail fiberglass repairs and service. In response, plaintiff testified that it did not mean anything, he was a worker. Plaintiff was also shown a photograph from another issue of the newsletter which contained a picture of the fiberglass division, picturing plaintiff as the manager, along with three other employees. Plaintiff admitted that he was the only one in his department who had a desk, computer and fax machine. As manager he became responsible for preparing estimates for boat repairs and forwarding them to the company office for authorization of the work, which resulted in the issuance of a work order. He also assigned the repair work to other employees of his division, depending on their skill levels. He would inspect the work, and if, necessary have them do it over or do it himself. He would always tell them how long the job should take. He decided when a job was completed. He made sure jobs were completed on time. He also trained some repair people in his division. There were always at least two technicians working in his department, besides himself. When he came to work S3M, he was paid on an hourly basis. However, at some point he was paid as a salaried employee. He interviewed potential employees for his division and made recommendations as to whom the company should hire and created a classification system for the workers in his department. He also recommended raises for employees in his division. He always wanted the shop to be kept clean. He started an inventory system in his division and kept track of attendance in his division. He had a key to the Fiberglass Division building and opened it up in the morning (except for a brief period after the locks were changed). He was the only one in his division to have a key. He signed and sent supply requisition forms to the parts department. Employees in his division wore uniform shirts, but he did not have to. He only had to dress neat and clean. He signed off on vacation requests for employees in his division, although there was no time off during the busy season. The technicians in his department punched a time card, but he did not review the cards. He recommended the safety equipment that S3M purchased for his division and monitored its use by his employees. He did not have any records with respect to times he was on the S3M premises other than during regular business hours. No one else had such records. He claimed to have verbally complained about not being paid overtime, but never made such a complaint in writing. Plaintiff was shown an organizational chart for S3M which, among other things, listed him as manager of the fiberglass division. He stated that he never told anyone that any information on the chart was incorrect. He prepared performance evaluations for the employees in his division, and initialed the evaluations where the evaluations required the manager's signature.

The defendant also submitted the affidavit of Jennifer Hodnick, a former S3M employee. In 2004, she was promoted to the position of operations manager and held that position until the company was sold in 2006. As part of her duties, she was responsible for the payroll of all managerial and staff members. From January 1, 2004, until May 2005, plaintiff was paid a weekly salary of $1,500. In May

of 2005, plaintiff received a raise and was paid a weekly salary of $1,650 (copies of plaintiff's earning statements were attached). From 2004 to 2006, fiberglass technicians were paid an hourly salary and, as a result, their salaries varied from week to week. If a technician worked more than forty hours a week, they would receive overtime pay at one and a half times their regular hourly rate of pay (which varied from $16 per hour to $27 per hour). From 2004 t0 2006, she attended weekly manager meeting at which plaintiff was present.

Defendant further submitted the affidavit of Jon Danielecki, who served as Director of Services for S3M in 2004 through 2006. He was plaintiff's direct superior in the company. He stated that the plaintiff was the manager of the fiberglass division of the company. It was a separate unit of the company, housed in its own building. It provided a significant stream of revenue to S3M. As a manager, he was relieved of other requirements imposed on his crew. For example, he was not required to wear a uniform, which the crew did. When he was promoted to manager, he received a substantial raise. He was paid as a salaried employee. His crew was paid on an hourly basis. The fiberglass building was opened and closed by plaintiff. Supervising the work and crew was the main part of plaintiff's job. At all times he supervised at least two employees and at times four to five employees. He maintained an office in the fiberglass division building. Plaintiff was solely responsible for assigning work to the fiberglass technicians and ensuring that their work was done timely and correctly. He had the authority to discipline and fire fiberglass technicians. Plaintiff conducted yearly evaluations of his workers and recommended raises. Plaintiff attended weekly management meetings and was the only member of his division to do so. Plaintiff often worked on his own projects in the shop on weekends and evenings. They were not related to his employment by S3M.

Plaintiff submitted his own affidavit in opposition claiming that 80% per cent of his time was spent in fiberglass repair and that he had little to no independent authority.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2 Dept 1987]).

Defendant S3M has established its prima facie entitlement to judgement as a matter of law on the ground that plaintiff was an executive employee and not entitled to overtime pay.

Both New York and federal wage law require employees working more than forty hours per week to be compensated for overtime work at a rate of one-and-a-half times their standard rate, 29 USC §207(a)(1); NY Labor Law §§650 et seq; 12 NYCRR 142-2.2 (expressly adopting the provisions and exemptions of the federal Fair Labor Act of 1938("FLSA"), 29 USC §§201 et seq.) (*see also* ***Kahn v Superior Chicken & Ribs, Inc.***, 331 F Supp2d 115, 117 [EDNY 2004]). However, both provide statutory exemptions for employees properly classified as "bona fide executives" (*see* 29 USC §213 (a)(1), NY Labor Law §651 (5)(c). Since this exemption provides an affirmative defense to overtime claims, the employer has the burden of proving that a plaintiff is an exempt "bona fide executive," and since the FLSA is a remedial statute, its exemptions must be narrowly construed (*see* ***Reiseck v Universal Communications of Miami***, 591 F3d 101 [2d Circ. 2010]).

29 CFR 541.100 entitled General rule for executive employees," states:

> (a) The term "employee employed in a bona fide executive capacity" in section 13(a)(1) of the Act shall mean any employee:
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> 1. (1) Compensated on a salary basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;
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> (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
>
> (3) Who customarily and regularly directs the work of two or more other employees; and
>
> (4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.
>
> (*See also* ***Mullins v City of New York***, 653 F3d 104 2d Circ. 2011]).

It is noted that the executive exemption "does not demand complete freedom from supervision, such that [Plaintiffs are] answerable to no one, as this would disqualify all but the chief executive officer from satisfying [the exemption]." (***Scott v SSP Am., Inc.***, No. 09 Civ. 4399, WL1204406 [EDNY 2011], quoting ***Thomas v Speedway Super America, LLC***, 506 F3d 496, 507 [6th Circ. 2007].

29 CFR 541.102 entitled "Management" states, in relevant part:

> Generally, "management" includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to

> be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.
>
> (a) To qualify for exemption under this part, an employee's "primary duty" must be the performance of exempt work. The term "primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

Consideration of these factors is a highly fact-intensive inquiry to be made on a case-by-case basis in light of the totality of circumstances (***Clougher v Home Depot U.S.A., Inc.***, 696 F Supp2d 285 [EDNY 2010]).

An examination of the facts herein, most of which come from the plaintiff's own testimony, overwhelmingly establishes that the plaintiff was an exempt employee who was not entitled to overtime pay. In 2004, plaintiff was promoted to the position of manager of the fiberglass division. At that time he became a salaried employee, earning $1,500 per week (later raised to $1,650). He was the only salaried employee in his division, all others were paid on an hourly basis. He assigned all fiberglass work to his employees. He would inspect their work to make sure it was done properly. He was responsible for making sure all jobs were completed properly and in a timely manner. He interviewed and recommended which applicants should be hired. He trained all employees in his division. He conducted yearly evaluations of all of his employees. He also recommended raises for employees in his division which were usually followed. He had the authority to discipline and fire fiberglass technicians. He attended weekly management meetings. He opened and closed the fiberglass division building and was the only one in his division who had a key. The above list only highlights his multiple management duties.

In response, plaintiff submits a self-serving affidavit, attempting to raise feigned issues of fact to avoid the consequences of plaintiff's own prior deposition testimony (*see* ***Cagliostro v McCarthy***, 102 AD3d 823, 958 NYS2d 455 [2d Dept 2013]; ***Sunshine Care Corp. v Warrick*** 100 AD3d 981, 957 NYS2d 122 [2d Dept 2012]).

As to the claim for unjust enrichment, to prevail the party asserting such a claim must demonstrate that "(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (***Zamor v L&L Assocs. Holding Corp.***, 85 AD3d 1154, 1156, 926 NYS2d 625 [2d Dept 2011]). The doctrine of unjust enrichment invokes an obligation imposed by equity to prevent injustice in the absence of an actual agreement between the parties concerned (***IDT Corp. v Morgan Stanley Dean Winter & Co.***, 12

NY3d 132, 879 NYS2d 355 [2009]). Here plaintiff was a salaried management employee who was not entitled to overtime pay. Having no equitable claim to such relief, plaintiff's unjust enrichment claim herein must fail.

In light of the foregoing, defendant's motion for summary judgment dismissing the complaint is granted.

Dated: 12/3/13

PETER H. MAYER, J.S.C.