SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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ANTONINO ROMANO

Plaintiff,

-against-

RAMON ZARATE,

Defendant.

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DECISION/ORDER
Index No. 155313/2016

HON. DAVID COHEN, J.:

The papers submitted by plaintiff show that (a) in connection with the sale of Mamma Ristorante Corp., defendant Zarate agreed to indemnify plaintiff Romano under certain circumstances; (b) a Federal class action FLSA claim was brought against 8 restaurants and their owners including 802 Restaurant Corp and Mamma Ristorante Corp (co-owned by plaintiff and defendant, also named individually); (c) the claims against Zarate and Mamma Ristorante were dismissed in the Federal action; (d) the NY Department of Labor conducted an audit of 802 Restaurant for potential wage law violations; (e) following a two-year investigation, the NYDOL assessed a $231,035.53 payment in connection with the audit to Mr. Christopher Lamotta as the employer, 802 Restaurant; (f) the assessment was later reduced to $165,221 per settlement and paid by plaintiff; and (g) in or about May 2016, the Federal class action was settled by plaintiff individually and on behalf of 802 Restaurant, in the amount of $270,000, with $55,000 apportioned to 802 Restaurant and Mamma. The settlement states "[t]he parties hereto warrant and represent that they are the persons or entities which have collectively all the interest in the any of the matters set forth herein and that they have the right, power and specific authority to enter into, execute and consummate this Agreement." Plaintiff Romano signed the settlement on behalf of 802 Restaurant, an entity that plaintiff alleges it sold four years prior, in 2012.

The complaint asserts five causes of action that (1) Zarate is liable to Romano for the $165,221 settlement amount with the NYDOL pursuant to the contractual indemnity; (2) Zarate is liable to Romano for the $165,221 settlement amount with the NYDOL pursuant to a contribution/indemnity theory as the co-owner and day to day caretaker of 802 Restaurant; (3) Zarate is liable to Romano for the $55,000 settlement

amount in the Federal class action pursuant to terms of the settlement that apportioned that amount to Mamma Ristorante because Zarate was the person who operated Mamma Ristorante and failed to follow the wage law; (4) Zarate is the true responsible party for the Mamma Ristorante settlement as co-owner and as the party that made the payroll decisions and (5) pursuant to the indemnity agreement, defendant agreed to pay plaintiff for legal fees incurred by plaintiff in connection with wage matters involving 802 Restaurant and Mamma Ristorante.

Based upon the documents submitted, the NYDOL did not assess plaintiff Romano with any wage law claims. In a June 4, 2015 letter, the NYDOL assessed a claim against Mr. Christopher Lamotta as the employer. Nowhere in the letter from the NYDOL is plaintiff mentioned as the target of the investigation, the responsible party or the employer. The letter is cc'd to a Tony Romano but is addressed and sent to Mr. Lamotta only. The letter also references a conversation with Mr. Lamotta but does not mention any contact with plaintiff. As the indemnity agreement only provides for indemnification for wage law claims against Mr. Romano in connection with 802 Restaurant and Mamma Ristorante and not for claims made against another party, the first and fifth causes of actions are dismissed. Although, plaintiff alleges that he paid the ultimate assessment and legal fees, he does not provide any support or explanation for why the indemnity agreement should cover the payments he made on behalf of a different party. As plaintiff has not properly stated a claim against defendant based upon the evidence submitted, the first and fifth causes of action are dismissed.

The second, third and fourth causes of action are also dismissed. As discussed in *Herman v RSR Sec. Services Ltd.* (172 F3d 132 [2d Cir 1999], *holding mod by Zheng v Liberty Apparel Co. Inc.*, 355 F3d 61 [2d Cir 2003]), there is no right to contribution or indemnification for employers held liable under Fair Labor Standards Act (FLSA) (*see also See Martin v. Gingerbread House, Inc.*, 977 F2d 1405 [10th Cir 1992][a third party complaint by an employer seeking indemnity from an employee is preempted by the FLSA]; *Lyle v. Food Lion, Inc.*, 954 F2d 984 [4th Cir 1992][court should not engraft an indemnity action upon this otherwise comprehensive federal statute," *i.e.*, the FLSA]; *LeCompte v. Chrysler Credit Corp.*, 780 F.2d 1260 [5th Cir 1986]). The *Herman* Court offered several reasons for this rule: (1) the text

of the FLSA makes no provision for contribution or indemnification; (2) the statute was designed to regulate the conduct of employers for the benefit of employees, and it cannot therefore be said that employers are members of the class for whose benefit the FLSA was enacted; (3) the FLSA has a comprehensive remedial scheme as shown by the "express provision for private enforcement in certain carefully defined circumstances (*see Northwest v Transport,* 451 US 77 [1981]) and that such a comprehensive statute strongly counsels against judicially engrafting additional remedies; and (4) the Act's legislative history is silent on a right to contribution or indemnification (*Herman,* 172 F3d at 144 [2d Cir 1999]). The same reasoning bars such claims under the New York Labor Law (*Flores v Mamma Lombardis of Holbrook, Inc.,* 942 FSupp2d 274 [EDNY 2013]; *Gustafson v. Bell Atlantic Corp.,* 171 FSupp2d 311 [SDNY 2001]).

To the extent that plaintiff argues that the indemnification comes not from the agreement but from a common law indemnification/contribution theory, said recovery would also not be permitted (*see LeCompte v. Chrysler Credit Corporation,* 780 F2d 1260 [5th Cir 1986] [that an employer could not sue for indemnification from its supervisory, middle-management employees who were allegedly responsible for the FLSA violations. The Court held that reliance on state law, "applied as a de facto amendment to the Fair Labor Standards Act, would conflict with its mandate" insofar as the FLSA has no cause of action for indemnity by an employer against employees who violate the Act]; *Herman,* 172 F3d at 144, ["Yet, even if the FLSA does not authorize contribution or indemnification, appellant declares these claims may nonetheless be prosecuted under New York law. This view of the law is flawed because the FLSA's remedial scheme is sufficiently comprehensive as to preempt state law in this respect."]; *see also Lyle v Food Lion, Inc.*, 954 F2d 984 [4th Cir 1992]; *Martin v Gingerbread House, Inc.*, 977 F2d 1405 [10th Cir 1992]). The Second, Fourth, Fifth and Tenth Circuits have consistently held that common law indemnity claims against employees under the FLSA are preempted by the Supremacy Clause of the United States Constitution (*Quintana v Explorer Enterprises, Inc.*, 2010 WL 2220310, at *2 [SD Fla June 3, 2010]).

Additionally, the third and fourth causes of action are also dismissed as they are based on a theory that defendant is liable to plaintiff due to his management/ownership/involvement in Mamma Ristorante

and the apportionment in the settlement agreement. However, defendant and Mamma Ristorante were specifically dismissed from the action (*see Bojaj v Moro Food Corp.*, 2014 WL 6055771 [SDNY Nov. 13, 2014]). When Romano signed the ultimate settlement agreement in that matter apportioning to Mamma Ristorante, despite the clause stating that he had the "right, power and specific authority to enter into, execute and consummate" the Agreement and thus, effect defendant and Mamma Ristorante, he did not have such authority.[1] Plaintiff may not seek to enforce an apportionment contained in a settlement, that he put into the agreement, without the consent of defendant and Mamma Ristorante, specifically after the Court had already dismissed them out of the action. Therefore, the third and fourth causes of action that relate to the settlement of the Federal class action lawsuit are also dismissed. It is therefore

ORDERED, that the first and fifth causes of action are dismissed without prejudice; and it is further

ORDERED, that the second, third and fourth causes of action are dismissed with prejudice.

This constitutes the decision and order of the Court.

DATE : 2/24/2017

COHEN, DAVID B., JSC

[1] The Court also questions how plaintiff allegedly had the authority to negotiate and ultimately sign on behalf of 802 Restaurant, an entity he has allegedly sold four years prior.