Zavala v 411 Holbrook Inc.
2017 NY Slip Op 30434(U)
March 1, 2017
Supreme Court, Suffolk County
Docket Number: 13-30422
Judge: Joseph A. Santorelli
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SHORT FORM ORDER

INDEX No. 13-30422
CAL. No. 16-00408-OT

PUBLISH

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 8-5-16
ADJ. DATE 9-1-16
Mot. Seq. # 001 - MD

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FRANCISCO LEOPOLDO ZAVALA,

Plaintiff,

- against -

411 HOLBROOK INC., d/b/a BELLO POULTRY MARKET, INC., and ABDULSALEM MUSED,

Defendants.

---X

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Upon the following papers numbered 1 to 24 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-14 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 15-19 ; Replying Affidavits and supporting papers 20-24 ; Other ______; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint against defendant Abdulsalem Mused, is denied.

In this action, the plaintiff seeks to recover damages arising, *inter alia*, from the defendants' failure to pay him overtime wages and from their unlawful termination of his employment at Bello Poultry Market. It is undisputed that Abdulsalem Mused is the principal owner of 411 Holbrook, Inc., which owns the building located at 411 Union Avenue, Holbrook, New York, and that Mused is also the principal owner of Bello Poultry Market, which operates a slaughterhouse at that location.

As may be gleaned upon review of the complaint and the plaintiff's deposition testimony, the plaintiff alleges that from January 2012 to January 2013, he was employed as a butcher by the defendants at a rate of $11 per hour; that he regularly worked in excess of 40 hours per week; but that throughout the course of his employment, he was paid at his regular hourly rate for all hours worked. The plaintiff also alleges that on December 24, 2012, he injured his finger at work while cutting pieces

of meat; that as a result of his injury, he missed 13 days of work; that the defendants promised to pay his medical bills; that when he returned to work in January 2013, he submitted copies of his medical bills, which totaled approximately $1,900.00; and that the following day, the defendants terminated his employment and refused to pay his medical bills. The plaintiff claims that the defendants' failure to pay him overtime wages was knowing and willful. Regarding the termination of his employment, he claims that he is an individual with a "disability" within the meaning of Executive Law § 292 (21), and that the defendants' decision to discharge him was based on his disability and lacked a legitimate, non-discriminatory justification.

The plaintiff pleads three causes of action in the complaint: the first, based on the defendants' failure to pay overtime wages in violation of Labor Law § 650, *et seq.* and 12 NYCRR 142-2.2, the second, for failure to provide him with notice of his rate of pay and the basis of his rate of pay as required under Labor Law § 195, and the third, alleging discriminatory termination based on a known disability in violation of Executive Law § 296.

The defendants, in their answer, allege among a myriad of affirmative defenses that the plaintiff "was not an employee of Defendants 411 Holbrook, Inc. or Abdulsalem Mused"; they also plead counterclaims for abuse of process and prima facie tort, to which the plaintiff has duly replied.

Now, discovery having been completed and a note of issue having been filed on March 8, 2016, the defendants timely move for summary judgment dismissing the complaint against Mused, based solely on the defense that he was not the plaintiff's employer. As proof of the defense, the defendants rely exclusively on Mused's own affidavit, the text of which is reproduced below in its entirety:

> ABDULSALEM MUSED, being duly sworn, deposes and asserts the truth of the following under penalty of perjury:
>
> 1) I am the Plaintiff [sic] in the above entitled action, and as such, I am fully familiar with the facts and circumstances contained herein.
>
> 2) I make this Affidavit in support of my motion seeking summary judgment against Plaintiff as I am not the employer of Plaintiff Francisco Leopoldo Zavala pursuant to New York Labor Law.
>
> 3) I do not have an office located at 411 Union Avenue, Holbrook, New York 11741.
>
> 4) I do not supervise the operations of Bello Poultry Market, Inc. located at 411 Union Avenue, Holbrook, New York 11741 (hereinafter referred to as "Bello Poultry").
>
> 5) I do not supervise the day-to-day operations of Bello Poultry.
>
> 6) I do not have control over the operations of Bello Poultry.
>
> 7) I do not have control over the day-to-day operations of Bello Poultry.

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8) I do not hire or fire any employees of Bello Poultry. I have never hired or fired any employees of Bello Poultry.

9) I do not supervise or control the employee work schedules or conditions of employment at Bello Poultry.

10) I do not determine the rate of pay or method of payment for wages, overtime, or any of the like at Bello Poultry.

11) I do not set any standards of work or employment of employees at Bello Poultry.

12) There are numerous managers at Bello Poultry. I am not a manager at Bello Poultry.

13) There are no employees at Bello Poultry that are under my exclusive direction or control.

14) I personally do not maintain any employment records of Bello Poultry.

WHEREFORE, I respectfully request that my motion for summary judgment be granted in its entirety, and for such other further relief as this Court deems just and proper.

The plaintiff, in opposition, submits a copy of a transcript of Mused's testimony at the plaintiff's May 6, 2015 hearing before the Workers' Compensation Board, at which Mused testified, *inter alia*, that from the time he purchased the building and the poultry business in 2011, he personally maintained weekly "attendance" records for each of the employees, indicating hours worked and amounts paid and bearing the signature of the employee and his or her manager.

Under New York law, employees are provided with wage and overtime protections similar to those afforded under the Fair Labor Standards Act (29 USC § 201, *et seq.*; "FLSA"). Employers are required to pay employees overtime at a rate of one and one-half times their regular rate for time worked in excess of 40 hours during any work week, unless they are exempt (12 NYCRR 142-2.2), and may be held liable under New York's overtime or minimum wage laws (Labor Law art 6, § 190 *et seq.*; Labor Law art 19, § 650 *et seq.*) for failure to do so. Under Labor Law § 190 (3), the term "employer" is defined expansively to include "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service." Labor Law § 651 (6) similarly defines "employer" to include "any individual, partnership, association, corporation, limited liability company, business trust, legal representative, or any organized group of persons acting as employer." In analyzing whether a person or entity may qualify as an "employer" under those broad standards, this court is bound to apply the same tests and consider the same factors as it would if it were determining employer status under the FLSA (*e.g.* ***Jin Dong Wang v LW Rest.***, 81 F Supp 3d 241 [ED

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NY 2015] [and cases cited therein]),[1] which defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee" (29 USC § 203 [d]).

In determining, then, whether a person may be liable as an "employer" under the FLSA, the primary consideration is whether the alleged employer possessed the power to control the worker in question, with an eye to the "economic reality" of the situation (***Herman v RSR Sec. Servs.***, 172 F3d 132 [2d Cir 1999]). "Under the economic reality test, the relevant factors include 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" (*id.* at 139 [internal quotation marks omitted]). No one of the four factors, standing alone, is dispositive (*id.*). A finding of "employer" status, moreover, "does not require continuous monitoring of employees, looking over their shoulders at all times, or any sort of absolute control of one's employees. Control may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA" (*id.*). When assessing, as here, whether an individual within the allegedly employing company may be personally liable as an "employer," a court will also consider the extent to which that individual possesses control over the company's actual operations in a manner that relates to a plaintiff's employment (***Irizarry v Catsimatidas***, 722 F3d 99 [2d Cir 2013], *cert denied* ___ US ___, 134 S Ct 1516 [2014]). Evidence indicating an individual's direct control over a plaintiff employee, however, is not the only evidence to be considered; evidence showing an individual's authority over management, supervision, and oversight of the company's affairs in general is also relevant (*id.*). "A person exercises operational control over employees if his or her role within the company, and the decisions it entails, directly affect the nature or conditions of the employees' employment" (*id.* at 110). Since "the existence and degree of each relevant factor lends itself to factual determinations * * * individual employer liability is rarely suitable for summary judgment" (***Sethi v Narod***, 974 F Supp 2d 162, 187 [ED NY 2013] [internal quotation marks and punctuation omitted]).

To obtain summary judgment on the merits of a case, it is necessary that a party establish its cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment" in its favor (CPLR 3212 [b]), and that it do so "by tender of evidentiary proof in admissible form" (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790, 792 [1979]; *accord* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Upon review of the record presented, the court finds that is unable to determine as a matter of law whether Mused was an "employer" under the relevant provisions of the Labor Law. To the extent that the defendants rely on Mused's affidavit, the court finds it plainly insufficient. Summary judgment is denied, therefore, with respect to the first and second causes of action.

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[1] This statement of law derives from the federal district courts of the Second Circuit, which generally treat the definition of "employer" under the Labor Law and under the FLSA as coextensive. As the parties evidently agree that the statement is correct, and absent New York case law to the contrary, this court will proceed with its analysis accordingly.

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As to the third (and final) cause of action, and notwithstanding the breadth of relief requested in their notice of motion, it is apparent that the defendants failed in their moving papers to offer any argument addressing the plaintiff's claim of unlawful discriminatory conduct; the court notes, in any event, that an individual may be subject to liability as an "employer" for violating Executive Law § 296 (1) where, as here, he or she has an ownership interest in the employing company (***Gorman v Covidien, LLC***, 146 F Supp 3d 509 [SD NY 2015]; ***Equal Empl. Opportunity Commn. v Suffolk Laundry Servs.***, 48 F Supp 3d 497 [ED NY 2014]; ***Warshun v New York Community Bancorp***, 957 F Supp 2d 259 [ED NY 2013]).

Accordingly, the motion is denied.

Dated: MAR 0 1 2017

HON. JOSEPH A. SANTORELLI
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION