

UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF FLORIDA  
Miami Division

**Case Number: 12-21005-CIV-MORENO**

MIGUEL A. NAVARRO,

Plaintiff,

vs.

BJ RETREADER TIRES INC. and LORENZO  
BUITRON, individually,

Defendants.

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**ORDER DENYING DEFENDANTS' MOTION TO RECONSIDER ORDER DENYING  
DEFENDANTS' MOTION TO DISMISS COUNT IV**

THIS CAUSE came before the Court upon the Defendants' Consolidated Motion to Reconsider Order Denying Motion to Dismiss Count IV and Motion to Strike Plaintiff's Response to Motion to Dismiss for Fraud Upon the Court (**D.E. No. 16**), filed on June 5, 2012.

The Defendants have argued that Count IV should be dismissed because it never received the notice letter that Plaintiff was required to send them before filing a claim under Fla. Stat. § 448.110(6)(a) (2011). However, the Plaintiff alleges that it provided Defendant with notice and has filed a copy of this alleged notice with the court. "When considering a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court must accept all of the plaintiff's allegations as true and construe them in the light most favorable to the plaintiff." *Gomez v. Kern*, 2012 WL 1069186 \*1 (S.D. Fla. Mar. 29, 2012)(citing *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008)). "In the instant case, the Court must accept the allegations of the Complaint as true and the Plaintiffs allege that they have performed all conditions precedent to filing an action under

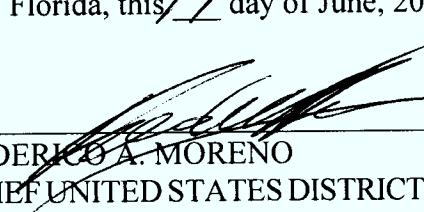
the Florida Minimum Wage Act." *Mesa v. Ag-Mart Produce, Inc.*, 2008 WL 2790224 \*11 (M.D. Fla. July 18, 2008).

Because the Plaintiff disputes the allegation that it failed to comply with the statute's notice provision, the minimum wage claim cannot be dismissed until the Plaintiff has had an opportunity to provide evidence of its compliance. "[I]t is still early in the discovery period, and the Defendants have not decisively demonstrated that the Plaintiff cannot prove compliance with the pre-suit notice (for example, the Plaintiff may be able to engage in discovery of the Defendants' records to obtain a copy of the pre-suit notice allegedly sent to the Defendants)." *Curry v. High Springs Family Practice Clinic and Diagnosis Ctr. Inc.*, 2008 WL 5157683 \*10 (N.D. Fla. Dec. 9, 2008). If the Plaintiff is unable to provide such evidence of the Defendant's receipt of the notice, the Defendant may be able to obtain summary judgment against the Plaintiff on this claim. "Yet without more evidence or affidavits, the Plaintiff's denial of the Defendants' requested admissions that pre-suit notice had not been provided is not enough to prevent the grant of summary judgment against the Plaintiff." *Id.*

THE COURT has considered the motion and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

**ADJUDGED** that the motion is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 19<sup>th</sup> day of June, 2012.

  
FEDERICO A. MORENO  
CHIEF UNITED STATES DISTRICT JUDGE

Copies provided to:  
Counsel of Record