UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ROBERT G. GREENE, et al.,

Plaintiffs,

vs.

JACOB TRANSPORTATION SERVICES, LLC, et al.,

Defendants.

Case No.: 2:09-cv-00466-GMN-CWH

ORDER

Pending before the Court is the Motion to Dismiss, (ECF No. 222), filed by Defendants Carol Jimmerson and James Jimmerson (collectively "the Jimmersons"), to which Plaintiffs Robert G. Greene ("Greene"), Thomas Schemkes, and Gregory Green (collectively "Plaintiffs") filed a Response, (ECF No. 225).

Also pending before the Court is the Motion to Dismiss filed by the Jimmersons and Defendant Jacob Transportation Services, LLC ("Jacob Transportation") (collectively "Defendants"), to which Plaintiffs filed a Response, (ECF No. 239). Defendants did not file a reply to either Response, and the deadline to do so has passed. For the reasons discussed below, the Motions to Dismiss are both GRANTED in part and DENIED in part.

I. BACKGROUND

On March 10, 2009, Greene initiated this case alleging state law minimum wage claims and federal claims under the Fair Labor Standards Act ("FLSA") against Executive Coach & Carriage ("Executive"). (See Compl., ECF No. 1). Discovery later revealed that Executive was actually the dba of Bentley Transportation Services, LLC ("Bentley Transportation"). (See Order 1:23–24, ECF No. 16).

Following a series of motions, the Court dismissed Greene's state law claims. First, Judge Jones, to whom this case was originally assigned, held that Greene's "state law minimum wage claim must be dismissed because limousine drivers are specifically excluded from Nevada's minimum wage laws under Nevada Revised Statute 608.250(2)(e)." (Id. 3:20–22, ECF No. 16). Further, Judge Jones held that NRS § 608.250(2)(e) was not impliedly repealed by the Nevada Minimum Wage Amendment passed in 2006. (Id. 3:22–4:2). In that same Order, Judge Jones dismissed Greene's state law overtime claim, improper wage deduction claim, and claim for waiting penalties, holding that the statute upon which Greene based those claims, NRS § 608.100, did not confer a private right of action. (Id. 10:2–12:15). Judge Jones later granted judgment on Greene's only remaining state law claim, failure to pay for all hours worked pursuant to NRS § 608.016. (Order 7:7–8, ECF No. 31) ("[Greene's] claims based on § 608.016 are inapplicable to commission-based pay structures like the one entered into by [Greene] and [Bentley Transportation].").

On July 9, 2010, after the state claims had been dismissed, Bentley Transportation filed a Motion to Dismiss/Motion for Summary Judgment on Greene's remaining FLSA claims, alleging that Greene had named the wrong party as his employer. (See Mot. to Dismiss, ECF No. 39). Bentley Transportation's Reply further clarified that Greene's true employer was Jacob Transportation and argued that no amendment could cure the Complaint because Greene had in the meantime opted into another suit against Jacob Transportation, Schemkes v. Presidential Limousine, No. 09-cv-01100-GMN-PAL (D. Nev.), that raised only FLSA claims. (Reply 3:8–21, ECF No. 44). The Court denied Bentley Transportation's Motion and, "[i]n order to simplify the confusion that the parties have created in the present case," consolidated Greene's case with the portion of the Schemkes litigation involving Jacob Transportation. (Order 4:20–22, ECF No. 54).

Discovery in Greene was scheduled to close on June 15, 2011, but Greene moved on May 25, 2011, to modify the Court's Scheduling Order. (See Mot. to Extend Time, ECF No. 73). Specifically, Greene proposed August 31, 2011, as the new discovery cut-off date and June 15, 2011, as the deadline for any motion to amend or supplement the pleadings. (Id.). Magistrate Judge Johnston granted Greene's Motion on June 21, 2011. (Order, ECF No. 73). That same day, Greene filed a Motion for Leave to Amend to substitute Jacob Transportation for Bentley Transportation and to add the Jimmersons "as joint employer party defendants." (See Mot. for Leave to File 8:10, ECF No. 82). The Motion further alleged that:

> Jim Jimmerson is the sole owner, founder, and managing member of Jacob, whereas his wife Carol Jimmerson is Jacob's CEO. Between them, Jim Jimmerson and Carol Jimmerson are solely responsible for the terms and conditions of Plaintiff's employment, including the payment of and deductions from Plaintiff's wages.

(Id. 9:12–16).

On August 31, 2011, Magistrate Judge Johnston denied Greene's Motion after applying Rule 16(b) rather than Rule 15 and concluding that Greene had failed to show "good cause" for the untimely amendment. (Order, 2:22–3:24, ECF No. 113). Magistrate Judge Johnston also awarded sanctions under 28 U.S.C. § 1927. (Id. 6:6–14). The Court ultimately dismissed the case because Greene had named the wrong party and because he was already suing the proper party in Schemkes. (Order 3:2–5:4, ECF No. 159). As a result, the Court unconsolidated the Schemkes case and ordered that the Clerk of Court refile it under Case No. 11-cv-00355. (Id. 9:25–10:4).

Greene appealed the Court's dismissal of his state law wage claims and denial of his Motion to Amend the FLSA claims so as to name the correct entity. (See Notice of Appeal, ECF No. 163). On January 27, 2015, the Ninth Circuit issued a Memorandum reversing and remanding the case back to this Court. (See Mem. Op., ECF No. 170). Specifically, the Ninth

Circuit reversed the Court's dismissal of Greene's claim under the Nevada Minimum Wage Amendment in light of an intervening case issued by the Nevada Supreme Court, Thomas v. Nevada Yellow Cab Corp., 327 P.3d 518 (Nev. 2014). (Id. ¶ 1). Next, the Ninth Circuit held that the Court "erred in finding that § 608.016 does not apply to commission-based pay arrangements." (Id. ¶ 2). Finally, the Ninth Circuit reversed the Court's decision denying Greene's Motion for Leave to Amend for holding Greene to a "deadline with which Greene of course could not have complied" and ordered that "on remand Greene will be allowed to file an amended complaint." (Id. ¶ 3).

On March 27, 2015, Greene filed his Amended Complaint, (ECF No. 175), against Jacob Transportation and the Jimmersons. Subsequently, the Court again ordered the consolidation of Greene's case and the Schemkes case and required Plaintiffs to file a new consolidated complaint. (Order, ECF No. 200). Pursuant to the Court's Order, Plaintiffs filed their First Amended Consolidated Complaint ("FACC"), (ECF No. 204), alleging the following causes of action: (1) failure to pay minimum wages under the FLSA, 29 U.S.C. § 206; (2) failure to pay minimum wages under the Nevada Constitution, art. XV, § 16; (3) failure to pay overtime wages under the FLSA, 29 U.S.C. § 207(a)(1); (4) failure to pay overtime wages under Nevada law, NRS § 608.100(1)(b); (5) failure to pay for each hour worked under Nevada law, NRS § 608.016; (6) improper wage deductions under Nevada law, NRS § 608.100(2); (7) waiting penalties under Nevada law, NRS § 608.020; and (8) liquidated damages under the FLSA, 29 U.S.C. § 216(b). (See FACC ¶¶ 32–99).

In the instant Motions to Dismiss, Defendants seek, inter alia, dismissal of Plaintiffs' state law claims.

II. LEGAL STANDARD

Dismissal is appropriate under Rule 12(b)(6) where a pleader fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6); Bell Atl. Corp. v. Twombly, 550 U.S. 544,

555 (2007). A pleading must give fair notice of a legally cognizable claim and the grounds on which it rests, and although a court must take all factual allegations as true, legal conclusions couched as a factual allegations are insufficient. Twombly, 550 U.S. at 555. Accordingly, Rule 12(b)(6) requires "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. This standard "asks for more than a sheer possibility that a defendant has acted unlawfully." Id.

If the court grants a motion to dismiss for failure to state a claim, leave to amend should be granted unless it is clear that the deficiencies of the complaint cannot be cured by amendment. DeSoto v. Yellow Freight Sys., Inc., 957 F.2d655, 658 (9th Cir. 1992). Pursuant to Rule 15(a), the court should "freely" give leave to amend "when justice so requires," and in the absence of a reason such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc." Foman v. Davis, 371 U.S. 178, 182 (1962).

III. DISCUSSION

The Court first considers the Motion to Dismiss filed by the Jimmersons, (ECF No. 222), then turns to the Motion to Dismiss filed by Defendants collectively, (ECF No. 236).

A. The Jimmersons' Motion to Dismiss (ECF No. 222)

The Jimmersons' Motion asserts three grounds for dismissal. First, the Jimmersons argue that the FACC improperly names them as parties to this action in contravention of the Ninth Circuit's decision. Specifically, the Jimmersons argue that "[t]he Ninth Circuit did not

find error in disallowing leave to add the Jimmersons as party-defendants in the Greene case, as no such argument was presented to it at all." (Jimmersons' MTD 3:12–14, ECF No. 222). However, the issue presented to the Ninth Circuit was not so narrow.[1] As to this issue, Greene merely asked the Ninth Circuit to determine whether the Court erred by not allowing Greene leave to amend. Brief for Appellant at 8, Greene v. Exec. Coach & Carriage, No. 12-17306 (9th Cir. Feb. 22, 2013). This broad complaint necessarily encompasses Greene's more specific complaint that he was denied leave to add the Jimmersons as defendants. Greene thus need not have specifically mentioned the Jimmersons to the Ninth Circuit at all.[2]

Accordingly, because the Ninth Circuit found fault with the Court's denial of Greene's Motion to Amend, the Ninth Circuit necessarily "[found] error in disallowing leave to add the Jimmersons as party-defendants." (Jimmersons' MTD 3:12–13). Indeed, the Court's Order re-consolidating this case and the Schemkes case specifically recognized that any amended complaint would include claims against the Jimmersons. (See Order 2:11–23, ECF No. 200). There, the Court ordered Plaintiffs to "file an Amended Complaint" including only "the FLSA claims asserted in [the Greene case] and [the Schemkes case] as well as the Nevada Minimum Wage and NRS § 608 claims asserted in [the Greene case] **against JTS and Jim and Carol Jimmerson**." (Id.) (emphasis added). The claims asserted in the FACC are limited only to

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[1] Throughout the Motion to Dismiss, Defendants' counsel, Mario Lovato ("Lovato"), mischaracterizes the Ninth Circuit Memorandum, which merely reversed dismissal of Greene's state law claims and instructed the Court to allow Greene to file an amended complaint. (See Jimmersons' MTD 9:23–24, 10:20) ("[T]he Circuit Court found that Greene should have been allowed to change the entity defendant from 'Executive Coach and Carriage' to Jacob Transportation Services, LLC."; "Greene was given leave to sue one party, Jacob Transportation services, LLC."). The Court reminds Defendants' counsel of the Ninth Circuit's admonition regarding similar mischaracterizations: "This court is not in a position to examine the ethical dimension of Lovato's conduct in the district court, but it advises Lovato to do so." Greene v. Exec. Coach & Carriage, No. 12-17306, Dkt. No. 51 (9th Cir. July 22, 2015).

[2] Moreover, Greene did argue on appeal that "justice required joining additional real parties in interest." (Jimmersons' MTD 8:28). "[R]eal parties in interest" clearly include the Jimmersons.

these claims. Accordingly, the Court finds that Greene's FLSA and Nevada state claims are properly asserted against the Jimmersons.

Next, the Jimmersons argue that the claims against them are barred by the statute of limitations. (Jimmersons' MTD 12:22–13:20). Specifically, the Jimmersons contend that "[f]or a case filed alleging violations prior to 2009, new claims cannot be asserted against new parties in 2015." (Id. 13:14–15). However, this argument ignores that Plaintiffs originally attempted to add the Jimmersons in 2011. (See Mot. to Amend, ECF No. 82). In addition, the Jimmersons fail to identify what statute of limitations applies in this instance. The Court therefore declines to dismiss Plaintiffs' claims as time barred at this juncture.

Finally, the Jimmersons argue that the FACC improperly alleges that the Jimmersons qualify as employers under Nevada state law. Under Nevada statute, "'[e]mployer' includes every person having control or custody of any employment, place of employment or any employee." NRS § 608.011. In Boucher v. Shaw, 196 P.3d 959 (Nev. 2008) (en banc), the Nevada Supreme Court considered whether certain "high-level managers" including a CEO and a CFO who also "maintained a 100-percent ownership interest" in the employer-entity as members of its parent company could be held personally liable as employers under NRS Chapter 608. Boucher, 196 P.3d at 961. The Court held that because "NRS 608.011 does not contain specific language that extends personal liability to individual managers[,] . . . individual management-level corporate employees, such as [the 'high-level managers'], cannot be held liable as employers for the unpaid wages of employees under Nevada's wage and hour laws." Id. at 963.

Here, Plaintiffs allege that the Jimmersons are "the sole officers and owners of Jacob. Mr. Jimmerson is the owner and managing member of Jacob while Mrs. Jimmerson is the CEO of Jacob." (FACC ¶ 8). Based on Boucher, therefore, the Jimmersons cannot be held

personally liable as "employers" under Nevada state law. Consequently, the Court DISMISSES Plaintiffs' Nevada state law claims against the Jimmersons with prejudice.

B. Defendants' Motion to Dismiss (ECF No. 236)

In the next Motion to Dismiss, Defendants[3] collectively seek to dismiss both the statutory and constitutional state claims asserted in the FACC. First, Defendants argue that Plaintiffs' state law claims under NRS §§ 608.016, 608.100, and 608.020–608.050 must be dismissed because no private right of action exists for their enforcement. (See Defs.' MTD 5:22–24). Plaintiffs argue that a private right of action does exist. However, case law from this district has consistently held that no private right of action exists to enforce labor statutes arising from any of the statutes at issue here.[4] See, e.g., Sargent v. HG Staffing, LLC, No. 3:13-cv-00453-LRH-WGC, 2016 WL 128141, at *2 (D. Nev. Jan. 12, 2016) (compiling cases). The Ninth Circuit's Memorandum does not contradict this conclusion as the court merely "assume[d], without deciding, that there is a private right of action to bring [a claim under NRS §608.016], because Executive does not argue otherwise." (Mem. Op. ¶ 2, ECF No. 170). The Court therefore DISMISSES Plaintiffs' Fourth, Fifth, Sixth, and Seventh Causes of Action with prejudice, as amendment cannot cure this deficiency.

Second, Defendants argue that "no minimum wage claims can exist for time periods prior to the 2014 Thomas decision because the Nevada statutes specifically exempted limousine

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[3] Because this Motion only pertains to Plaintiffs' state law claims, and, as discussed above, Plaintiffs' state law claims are dismissed against the Jimmersons, practically this Motion only implicates Jacob Transportation. However, the Court refers to "Defendants" in discussing this Motion for consistency.

[4] In contrast, Plaintiffs' claim for unpaid minimum wages under the Minimum Wage Amendment does include a private right of action. See Nev. Const. art. XV, § 16 ("An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief."); Tyus v. Wendy's of Las Vegas, Inc., No. 2:14-cv-00729-GMN, 2015 WL 463130, at *3 (D. Nev. Feb. 4, 2015).

drivers from Nevada's Minimum Wage from its inception in 1965 to the date of repeal by Thomas in 2014." (Defs.' MTD 11:5–8). Indeed, prior to the Minimum Wage Amendment, NRS § 608.250(2)(e) exempted limousine drivers from Nevada's statutory minimum wage requirements. See Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court in & for County of Clark, 383 P.3d 246, 247 (Nev. 2016). However, in Thomas v. Nevada Yellow Cab Corp., 327 P.3d 518 (Nev. 2014), the Nevada Supreme Court ruled that the Nevada Minimum Wage Amendment impliedly repealed NRS § 608.250(2)(e). Id. at 248. Defendants now contend that the repeal was not effective until the Nevada Supreme Court issued its opinion in Thomas.

Defendants' arguments have been soundly rejected by the Ninth Circuit and the Nevada Supreme Court. See, e.g., Nev. Yellow Cab Corp., 383 P.3d at 252 ("We conclude that MRS 608.250(2)(e) was repealed when the Amendment was enacted in 2006, not when Thomas was decided in 2014."). Indeed, the Ninth Circuit specifically held in this case:

> The district court erred in dismissing Greene's claim under the Nevada Minimum Wage Amendment, embodied in Article 15, § 16 of the Nevada Constitution. See Thomas v. Nevada Yellow Cab Corp., 327 P.3d 518, 522 (Nev. 2014) (holding that the Nevada Minimum Wage Amendment, which contains no taxicab and limousine exception, "supersedes and supplants the taxicab driver exception set out in [Nevada Revised Statutes §] 608.250(2)"). **Because the repeal of § 608.250(2) occurred in 2006 when the amendment was ratified, we reject Executive Coach and Carriage's ("Executive") retroactivity argument**. Greene does not allege that he is owed wages for hours worked prior to 2006. We therefore reverse the district court's dismissal of the minimum wage claim.

(Mem. Op. ¶ 3) (emphasis added). The Court therefore DENIES Defendants' Motion to Dismiss Plaintiffs' minimum wage claims under the Minimum Wage Amendment.

IV. CONCLUSION

IT IS HEREBY ORDERED that the Jimmersons' Motion to Dismiss, (ECF No. 222), is **GRANTED in part and DENIED in part**.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss, (ECF No. 236), is **GRANTED in part and DENIED in part**.

IT IS FURTHER ORDERED that Plaintiffs' First, Third, and Eighth Causes of Action asserted against the Jimmersons survive, and Plaintiffs' First, Second, Third, and Eighth Causes of Action against Jacob Transportation survive.

IT IS FURTHER ORDERED that Plaintiffs' Second Cause of Action is **DISMISSED with prejudice** as asserted against the Jimmersons, and Plaintiffs' Fourth, Fifth, Sixth, and Seventh Causes of Action are **DISMISSED with prejudice** with respect to each Defendant.

DATED this 3 day of February, 2017.

Gloria M. Navarro, Chief Judge
United States District Judge