

# SUMMONS ISSUED

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U.S. DISTRICT COURT E.D.N.Y.

★ FEB 07 2012 ★

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

BROOKLYN OFFICE

-----X  
LIGORIO CORTEZANO HERNANDEZ,

Plaintiff,

**COMPLAINT**

-against-

**ECF Case**

ELI'S BREAD (ELI ZABAR) INC., ELI  
ZABAR AND MARK STEWART,

CV 12-586

Defendants.  
-----X

1 Plaintiff, Ligorio Cortezano Hernandez ("Ligorio Hernandez"), by and through  
2 attorneys, Hernandez & Paulonis, P.C., upon their knowledge and belief, as and against  
3 defendants, Eli's Bread (Eli Zabar) Inc. ("Eli's Bread"), Eli Zabar and Mark Stewart, alleges as  
4 follows: **GLASSER, J.**  
**MANN, M.J.**

5 **NATURE OF THE ACTION**

6 1. "Eli's Bread" is a 15,000 square foot specialty bakery located at 403 East 91<sup>st</sup>  
7 Street, New York, NY. Defendants are the owners and managers of the establishment.

8 2. For more than six years prior to the filing of this action until June 2011, defendants  
9 employed plaintiff to work in Eli's Bread bakery, rolling and cutting dough, oiling bread molds  
10 and trays, placing dough in molds and trays, painting bread with egg batter and then baking the  
11 bread. In addition to his regular duties, plaintiff was required to train new employees how to  
12 perform the same duties.

1           3. For more than six years prior to the filing of this action until June 2011, plaintiff  
2 was paid a fixed sum on a weekly basis, despite working in excess of 55 to 58 hours each week.  
3 His shifts were Monday through Friday, from 8:00 am to 7:00 pm or 7:30 pm any given day.

4           4. From June 2011 until November 2011, defendants employed plaintiff as a bread  
5 packer and delivery driver.

6           5. From June 2011 until November 2011, plaintiff was paid a fixed sum on a weekly  
7 basis despite working in excess of 50 hours a week, Monday through Saturday, 10:00 pm to 8:00  
8 am.

9           6. At all times mentioned herein, defendants maintained a policy and practice of  
10 requiring plaintiff to work in excess of forty (40) hours per week without providing lawful wages  
11 required by federal and state law.

12           7. As a result of these unlawful practices, among others, defendants failed to pay  
13 plaintiff overtime wages for the hours worked over forty (40) hours, either at the straight rate of  
14 pay, or for any additional overtime premium and one (1) additional hour of pay for each day he  
15 worked a spread of hours over 10 hours per day.

16           8. Plaintiff commences this action pursuant to the Fair Labor Standards Act of 1938,  
17 29 U.S.C. §201 *et seq.* ("FLSA"), the Code of Federal Regulations Relating to Labor, Wage and  
18 Hour Division, Department of Labor, 29 C.F.R. § 500 *et seq.* (CFR), New York State Labor Law  
19 §§ 190 *et seq.* and 650 *et seq.* ("NYLL") and Wage Orders of the New York State Commission  
20 of Labor codified at N.Y.C.R.R. Tit. 12, §§ 142 *et seq.* and 146 *et seq.* (NYCRR), seeking  
21 compensation for unpaid wages, double damages, liquidated damages, pre-judgment interest,  
22 attorney's fees, costs, disbursements and all other available legal remedies for the defendants'  
23 violations of federal and state labor laws.

24



1           17. Eli Zabar is sued individually in his capacity as an owner of Eli's Bread (Eli  
2 Zabar), Inc..

3           18. Eli Zabar is sued individually in his capacity as an officer of Eli's Bread (Eli  
4 Zabar), Inc..

5           19. Eli Zabar is sued individually in his capacity as an agent of Eli's Bread (Eli  
6 Zabar), Inc..

7           20. Eli Zabar is sued individually in his capacity as a sole proprietor conducting  
8 business under the assumed name Eli's Bread.

9           21. Eli Zabar is sued individually in his capacity as a partner of a partnership  
10 conducting business under the assumed name Eli's Bread.

11           22. Eli Zabar possesses or possessed operational control over Eli's Bread (Eli Zabar),  
12 Inc., possesses or possessed and ownership interest in Eli's Bread (Eli Zabar), Inc., and controls  
13 or controlled significant functions of Eli's Bread (Eli Zabar), Inc..

14           23. Eli Zabar possesses or possessed operational control over Eli's Bread (Eli Zabar),  
15 Inc., possesses or possessed and ownership interest in Eli's Bread (Eli Zabar), Inc. and controls  
16 or controlled significant functions of Eli's Bread (Eli Zabar), Inc..

17           24. Eli Zabar determined the wages and compensation of persons employed to work  
18 at Eli's Bread, including the plaintiff, established the schedules of the employees, maintained  
19 employee records, and had the authority to hire and fire employees.

20           25. Mark Stewart is an individual engaging in business in this judicial district during  
21 all times mentioned herein.

22           26. Mark Stewart is sued individually in his capacity as an owner of Eli's Bread (Eli  
23 Zabar), Inc..



1           36. Individual Defendants, Eli Zabar and Mark Stewart, possess operational control  
2 over Eli's Bread (Eli Zabar), Inc., possess an ownership interest in Eli's Bread, and control  
3 significant functions of Eli's Bread (Eli Zabar), Inc..

4           37. Upon information and belief, Eli Zabar serves as or served as Chairman and/or  
5 Chief Executive Officer of Eli's Bread.

6           38. Upon information and belief, Mark Stewart serves as or served as Chairman  
7 and/or Chief Executive Officer of Eli's Bread.

8           39. Upon information and belief, Eli Zabar serves as or served as Chairman and/or  
9 Chief Executive Officer of Eli's Bread (Eli Zabar), Inc..

10          40. Upon information and belief, Mark Stewart serves as or served as Chairman  
11 and/or Chief Executive Officer of Eli's Bread (Eli Zabar), Inc..

12          41. All defendants are associated and joint employers, act in the interest of each other  
13 with respect to employees, pay employees by the same method, and share control over the  
14 employees.

15          42. Each defendant possessed substantial control over the plaintiff's working  
16 conditions, and over the policies and practices with respect to the employment and compensation  
17 of the plaintiff.

18          43. Defendants jointly employed the plaintiff and are plaintiff's employers within the  
19 meaning of 29 U.S.C. 201 et seq. and the NYLL.

20          44. In the alternative, all defendants constitute a single employer of the plaintiff.

21                           **Corporation as Alter Ego of Individual Defendants**

22          45. Upon information and belief, Eli Zabar and Mark Stewart operate Eli's Bread (Eli  
23 Zabar), Inc. as either an alter ego of themselves and/or fail to operate Eli's Bread (Eli Zabar),  
24 Inc. as an entity legally separate and apart from their own selves, by, among other things

- 1 a. failing to adhere to the corporate formalities necessary to operate Eli's Bread (Eli
- 2 Zabar), Inc. as a corporation;
- 3 b. defectively forming or maintaining the entity of Eli's Bread (Eli Zabar), Inc., by
- 4 among other things failing to hold annual meetings or maintaining appropriate
- 5 company records;
- 6 c. transferring assets and debts freely as between all Defendants;
- 7 d. operating Eli's Bread (Eli Zabar), Inc. for their own benefit as the sole or majority
- 8 shareholder;
- 9 e. operating Eli's Bread (Eli Zabar), Inc. for their own benefit and maintaining
- 10 control over it as a closed corporation or closely held controlled entity;
- 11 f. intermingling assets and debts of their own with Eli's Bread (Eli Zabar), Inc.;
- 12 g. diminishing and/or transferring assets to protect their own interests; and
- 13 h. other actions evincing a failure to adhere to the corporate form.

14 **Enterprise Coverage**

15 46. At all relevant times, defendants were the plaintiff's employers within the  
16 meaning of the FLSA and New York Labor Law.

17 47. Defendants had the power to hire and fire plaintiff, control the terms and  
18 conditions of employment, and determine the rate and method of any compensation in exchange  
19 for plaintiff's services.

20 48. At all times mentioned, defendants, separately and jointly, had a gross annual  
21 volume of sales of not less than \$500,000.00 (exclusive of excise taxes at the retail level that are  
22 separately stated).

23 49. Defendants and/or their enterprise were directly engaged in interstate commerce.  
24 As examples, numerous items and products that were used in the bakery on a daily basis include

1 items such as flour, dairy products, fruits, nuts, eggs, oils and spices, among other ingredients  
2 produced outside of the State of New York. Defendants also market and sell bakery goods over  
3 the internet across state lines.

4 **Plaintiff**

5 50. At all relevant times, plaintiff was employed primarily as a baker and bread  
6 packer and delivery man.

7 51. Plaintiff regularly handled goods bought and sold in interstate commerce, such as  
8 bakery ingredients and products produced and shipped outside of the State of New York.

9 52. Plaintiff's work duties required neither discretion nor independent judgment.

10 53. Plaintiff regularly worked in excess of 40 hours per week.

11 54. For more than six years prior to the filing of this action until June 2011,  
12 defendants employed plaintiff to work in Eli's Bread bakery, rolling and cutting dough, oiling  
13 bread molds and trays, placing dough in molds and trays, painting bread with egg batter and then  
14 baking the bread. In addition to his regular duties, plaintiff was required to train new employees  
15 how to perform the same duties.

16 55. For more than six years prior to the filing of this action until June 2011, plaintiff  
17 was paid a fixed sum on a weekly basis, despite working in excess of 55 to 58 hours each week.  
18 His shifts were Monday through Friday, from 8:00 am to 7:00 pm or 7:30 pm any given day.

19 56. From May 31, 2011 until October 29, 2011, defendants employed plaintiff as a  
20 bread packer and delivery driver.

21 57. From May 31, 2011 until October 29, 2011, plaintiff was paid a fixed sum on a  
22 weekly basis despite working in excess of 50 hours a week, Monday through Saturday, 10 pm to  
23 8 am.



1           58. From January 2006 through April 23, 2006, plaintiff received fixed weekly  
2 compensation in the amount of \$745.00.

3           59. From April 24, 2006 through April 22, 2007, plaintiff received fixed weekly  
4 compensation in the amount of \$845.00.

5           60. From April 23, 2007 through April 13, 2008, plaintiff received fixed weekly  
6 compensation in the amount of \$870.00.

7           61. From April 14, 2008 through October 29, 2011, plaintiff received fixed weekly  
8 compensation in the amount of \$870.00.

9           62. At all times mentioned herein, defendants maintained a policy and practice of  
10 requiring plaintiff to work in excess of forty (40) hours per week without providing lawful wages  
11 required by federal and state law.

12           63. Plaintiff was not permitted to take breaks from work and did not receive his 30  
13 minute lunch break or afternoon break, as required under NYLL. Rather, he received an  
14 occasional few minutes break during momentary lulls in work.

15           64. Plaintiff's pay did not vary even when he was required to stay later or work a  
16 longer day than his usual schedule.

17           65. Defendants did not provide plaintiff with any document or other statement  
18 accurately accounting for all of his actual hours worked, or setting forth the rate of pay for all of  
19 his hours worked.

20           66. No notification, either in the form of posted notices, or other means, was ever  
21 given to plaintiff regarding overtime and wages as required under the FLSA and NYLL.

22           67. During his employment with the defendants, plaintiff was paid by weekly  
23 paycheck.

24

**Defendants' General Employment Practices**

1  
2           68. Defendants regularly required plaintiff to work in excess of forty (40) hours per  
3 week without paying the proper regular rate of pay, overtime wages, or spread of hours  
4 compensation.

5           69. Defendants maintained a policy and practice of requiring the Plaintiff to work in  
6 excess of forty (40) hours per week without paying him appropriate minimum wage and/or  
7 overtime compensation, or spread of hours compensation, as required by federal and state law.

8           70. Plaintiff was paid week to week at the same flat rate of pay regardless of the  
9 actual hours worked.

10           71. Defendants' pay practices resulted in plaintiff not receiving payment for all of his  
11 hours worked, resulting in plaintiff's effective rate of pay falling below the required minimum  
12 wage rate.

13           72. Defendants failed to post at the workplace, or otherwise provide to plaintiff, the  
14 required wage and hour posters in the bakery, and did not provide plaintiff with statutorily  
15 required wage and hour records or statements of his pay received, in part so as to hide  
16 defendants' violations of the wage and hour laws, and to take advantage of plaintiff's lack of  
17 sophistication in wage and hour laws.

18           73. Defendants willfully disregarded and purposefully evaded recordkeeping  
19 requirements of FLSA and NYLL by failing to maintain accurate and complete timesheets and  
20 payroll records.

21           74. Defendants did not pay plaintiff for his full time worked, nor did they pay  
22 additional overtime pay.





**PRAYER FOR RELIEF**

WHEREFORE, plaintiff respectfully request that this court enter judgment against defendants:

- a. Declaring that the defendants have violated the overtime wage provisions of, and associated rules and regulations under, the FLSA as to plaintiff;
- b. Declaring that defendants' violation of the provisions of the FLSA was willful as to plaintiff;
- c. Awarding plaintiff damages for the amount of unpaid overtime wages, and damages for any improper deductions or credits taken against wages under the FLSA;
- d. Awarding plaintiff liquidated damages in an amount equal to 100% of his damages for the amount of unpaid minimum and overtime wages, and damages for any improper deductions or credits taken against wages under the FLSA;
- e. Declaring that defendants have violated the overtime wage provisions of, and rules and orders promulgated under, the NYLL as to plaintiff;
- f. Declaring that defendants have violated the Spread of Hours Wage Order of the New York Commission of Labor as to plaintiff;
- g. Declaring that defendants have violated the recordkeeping requirements of NYLL with respect to plaintiff's compensations, hours, wages and any deductions or credits taken against wages;
- h. Declaring that the defendants' violations of the New York Labor Law and Spread of Hours Wage Order were willful as to plaintiff;
- i. Awarding plaintiff damages for the amount of unpaid overtime wages, damages for any improper deductions or credits taken against wages, as well as awarding spread of hours pay under the NYLL as applicable;

- 1 j. Awarding plaintiff liquidated damages in an amount equal to twenty-five percent  
2 (25%) of the total amount of minimum wage, spread of hours pay, and overtime  
3 compensation shown to be owed pursuant to NYLL as applicable;
- 4 k. Awarding plaintiff pre-judgment and post-judgment interest as applicable;
- 5 l. Awarding plaintiff the expenses incurred in this action, including costs and attorney's  
6 fees; and
- 7 m. All such other and further relief as the Court deems just and proper.

8

9 **DEMAND FOR TRIAL BY JURY**

10 Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, plaintiff demands a  
11 trial by jury on all questions of fact raised by the complaint.

12  
13 Dated: New York, New York  
14 February 6, 2012

15 HERNANDEZ & PAULONIS, P.C.  
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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

Docket

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**LIGORIO CORTEZANO HERNANDEZ,**

**Plaintiff,**

**-against-**

**ELI'S BREAD (ELI ZABAR) INC., ELI ZABAR AND MARK STEWART,**

**Defendants.**

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**COMPLAINT**

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