UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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LUIS COLLADO,

Plaintiff,

-against-

APEX SUPPLY CO., INC., et. al.,

Defendants.

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17 Civ. 727 (HBP)

OPINION
AND ORDER

PITMAN, United States Magistrate Judge:

This matter is before me on the parties' joint application to approve their settlement (Docket Item ("D.I.") 30, 31). All parties have consented to my exercising plenary jurisdiction pursuant to 28 U.S.C. § 636(c).

Plaintiff alleges that he was formerly employed by defendants Apex Supply Corporation ("Apex"), a hardware equipment and supply retail business, and its shareholders -- Ian Lynch ("Lynch") and Matthew Taragano ("Taragano"). Plaintiff seeks to recover allegedly unpaid overtime wages pursuant to the Fair Labor Standards Act (the "FLSA"), 29 U.S.C. §§ 201 et seq., and the New York Labor Law (the "NYLL"). Plaintiff also asserts a claim based on defendants' failure to provide certain notice and wage statements as required by the NYLL. Plaintiff commenced this action as a collective action with respect to the FLSA

claims, but the parties reached a settlement before conditional certification.

Plaintiff alleges that he was employed by Apex, Lynch and Taragano from approximately March 2013 until his termination on January 24, 2017, and that, during that time, he worked 2,758.5 hours of overtime without compensation. He claims that his overtime rate of pay was approximately $17.44. Exclusive of liquidated or statutory damages, plaintiff claims that he is owed approximately $44,969.00 in unpaid overtime pay. Plaintiff claims that he is entitled to a total of approximately $99,938.00 for unpaid overtime wages, liquidated damages and statutory damages for alleged violations of the NYLL.

Defendants deny plaintiff's allegations. Apex contends that plaintiff worked fewer hours at a lower hourly rate than he alleges. Further, Apex argues that it has already paid plaintiff the overtime wages to which he is entitled and that any overtime worked by plaintiff for which he was not compensated is de minimis. Apex kept detailed hourly worksheets, daily logs, and calendars that document the number of hours worked by and wages owed to plaintiff. Lynch and Taragano argue they were not plaintiff's employers.

I held a lengthy settlement conference on June 23, 2017 that was attended by the parties and their counsel. After a

protracted discussion of the strengths and weaknesses of the parties' respective positions, the parties agreed to resolve the dispute for a total settlement of $30,000 (Letter of Abdul Hassan, Esq., to the undersigned, dated June 6, 2017 (D.I. 30)("Hassan Letter"), Ex. 1). The agreement also provides that plaintiff's counsel will receive $550.00 for his out-of-pocket expenses, $9,815.00 (or approximately 33%) of the remaining $29,450.00 will be paid to plaintiff's counsel as fees and the remaining $19,635.00 will be paid to plaintiff.

Court approval of an FLSA settlement is appropriate

> "when [the settlement] [is] reached as a result of contested litigation to resolve bona fide disputes." Johnson v. Brennan, No. 10 Civ. 4712, 2011 WL 4357376, at *12 (S.D.N.Y. Sept. 16, 2011). "If the proposed settlement reflects a reasonable compromise over contested issues, the court should approve the settlement." Id. (citing Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1353 n.8 (11th Cir. 1982)).

Agudelo v. E & D LLC, 12 Civ. 960 (HB), 2013 WL 1401887 at *1 (S.D.N.Y. Apr. 4, 2013) (Baer, D.J.) (alterations in original). "Generally, there is a strong presumption in favor of finding a settlement fair, [because] the Court is generally not in as good a position as the parties to determine the reasonableness of an FLSA settlement." Lliguichuzhca v. Cinema 60, LLC, 948 F. Supp. 2d 362, 365 (S.D.N.Y. 2013) (Gorenstein, M.J.) (internal quotation marks omitted). In Wolinsky v. Scholastic Inc., 900 F.

Supp. 2d 332, 335 (S.D.N.Y. 2012), the Honorable Jesse M. Furman, United States District Judge, identified five factors that are relevant to an assessment of fairness of an FLSA settlement:

> In determining whether [a] proposed [FLSA] settlement is fair and reasonable, a court should consider the totality of circumstances, including but not limited to the following factors: (1) the plaintiff's range of possible recovery; (2) the extent to which the settlement will enable the parties to avoid anticipated burdens and expenses in establishing their claims and defenses; (3) the seriousness of the litigation risks faced by the parties; (4) whether the settlement agreement is the product of arm's length bargaining between experienced counsel; and (5) the possibility of fraud or collusion.

(internal quotation marks omitted). The settlement here satisfies these criteria.

First, plaintiff's net settlement represents approximately 43.6% of his allegedly unpaid overtime pay. Apex disputes the number of hours plaintiff worked and contends that plaintiff's hourly rate of pay was lower than plaintiff alleges. Moreover, Apex kept time and wage records detailing how many hours plaintiff worked and how much compensation he was entitled to. As discussed in more detail below, given the risks these issues present, plaintiff's settlement is reasonable.

Second, the settlement will entirely avoid the expense and aggravation of litigation. There is a dispute among the parties with respect to plaintiff's hourly rate of pay and the

number of hours plaintiff actually worked. Trial preparation would probably require additional depositions to explore these issues. The settlement avoids the necessity of conducting these depositions.

Third, the settlement will enable the plaintiff to avoid the risk of litigation. Apex disputes plaintiff's entitlement to any unpaid overtime, the rate at which any overtime should be calculated and the number of hours plaintiff actually worked. Apex maintained employee records that allegedly captured the days plaintiff was absent from work, the number of hours plaintiff worked and the weekly salary plaintiff was entitled to. Given the documentary evidence, it is uncertain whether, or how much, plaintiff would recover at trial. See Bodon v. Domino's Pizza, LLC, No. 09-CV-2941 (SLT) 2015 WL 588656 at *6 (E.D.N.Y. Jan. 16, 2015) (Report & Recommendation) ("[T]he question [in assessing the fairness of a class action settlement] is not whether the settlement represents the highest recovery possible . . . but whether it represents a reasonable one in light of the uncertainties the class faces . . . ." (internal quotation marks omitted)), adopted sub nom. by, Bodon v. Domino's Pizza, Inc., 2015 WL 588680 (E.D.N.Y. Feb. 11, 2015); Massiah v. MetroPlus Health Plan, Inc., No. 11-cv-05669 (BMC), 2012 WL 5874655 at *5 (E.D.N.Y. Nov. 20, 2012) ("[W]hen a settlement

assures immediate payment of substantial amounts to class members, even if it means sacrificing speculative payment of a hypothetically larger amount years down the road, settlement is reasonable . . . ." (internal quotation marks omitted)).

Fourth, because I presided over the settlement conference that immediately preceded plaintiff's acceptance of the settlement, I know that the settlement is the product of arm's-length bargaining between experienced counsel. Both counsel represented their clients zealously at the settlement conference.

Fifth, there are no factors here that suggest the existence of fraud. The settlement was reached at the end of the settlement conference. This fact further negates the possibility of fraud or collusion.

The settlement agreement also contains a release (Hassan Letter, Ex. 1 ¶ 4). It provides that plaintiff releases defendants "from any actions, causes of action, suits, . . . in law or equity, which he may have against Defendants as of the date of execution of this Agreement, whether known or unknown, asserted or unasserted, arising out of their wage and/or wage/hour claims . . ." (Hassan Letter, Ex. 1 ¶ 4). Although the release is unlimited in duration and contains both known and unknown claims, it is permissible because it is limited to claims

relating to wage and hour issues. See e.g., Yunda v. SAFI-G, Inc., 15 Civ. 8861 (HBP), 2017 WL 1608898 at *3 (S.D.N.Y. April 28, 2017) (Pitman, M.J.); Santos v. Yellowstone Props., Inc., 15 Civ. 3986 (PAE), 2016 WL 2757427 at *1, *3 (S.D.N.Y. May 10, 2016) (Engelmayer, D.J.) (approving release that included both known and unknown claims and was limited to wage and hour claims); Hyun v. Ippudo USA Holdings, 14 Civ. 8706 (AJN), 2016 WL 1222347 at *3-*4 (S.D.N.Y. Mar. 24, 2016) (Nathan, D.J.) (approving release that included both known and unknown claims through the date of the settlement that was limited to wage and hour issues; rejecting other release that included both known and unknown claims and claims through the date of the settlement that were not similarly limited); cf. Alvarez v. Michael Anthony George Constr. Corp., No. 11 CV 1012 (DRH)(AKT), 2015 WL 10353124 at *1 (E.D.N.Y. Aug. 27 2015) (rejecting release of all claims "whether known or unknown, arising up to and as of the date of the execution of this Agreement" because it included "the release of claims unrelated to wage and hour issues" (internal quotation marks omitted)).

Finally, the settlement agreement provides that one-third of the settlement fund, after the deduction of plaintiff's counsel's out-of-pocket expenses, will be paid to plaintiff's counsel. Contingency fees of one-third in FLSA cases are

routinely approved in this Circuit. Santos v. EL Tepeyac Butcher Shop Inc., 15 Civ. 814 (RA), 2015 WL 9077172 at *3 (S.D.N.Y. Dec. 15, 2015) (Abrams, D.J.) ("[C]ourts in this District have declined to award more than one third of the net settlement amount as attorney's fees except in extraordinary circumstances."), citing Zhang v. Lin Kumo Japanese Rest. Inc., 13 Civ. 6667 (PAE), 2015 WL 5122530 at *4 (S.D.N.Y. Aug. 31, 2015) (Engelmayer, D.J.) and Thornhill v. CVS Pharm., Inc., 13 Civ. 507 (JMF), 2014 WL 1100135 at *3 (S.D.N.Y. Mar. 20, 2014) (Furman, D.J.); Rangel v. 639 Grand St. Meat & Produce Corp., No. 13-CV-3234 (LB), 2013 WL 5308277 at *1 (E.D.N.Y. Sep. 19, 2013) (approving attorneys' fees of one-third of FLSA settlement amount, plus costs, pursuant to plaintiff's retainer agreement, and noting that such a fee arrangement "is routinely approved by courts in this Circuit"); Febus v. Guardian First Funding Grp., LLC, 870 F. Supp. 2d 337, 340 (S.D.N.Y. 2012) (Stein, D.J.) ("[A] fee that is one-third of the fund is typical" in FLSA cases); accord Calle v. Elite Specialty Coatings Plus, Inc., No. 13-CV-6126 (NGG)(VMS), 2014 WL 6621081 at *3 (E.D.N.Y. Nov. 21, 2014); Palacio v. E*TRADE Fin. Corp., 10 Civ. 4030 (LAP)(DCF), 2012 WL 2384419 at *6-*7 (S.D.N.Y. June 22, 2012) (Freeman, M.J.).

Accordingly, for all the foregoing reasons, I approve the settlement in this matter. In light of the settlement, the

action is dismissed with prejudice and without costs. The Clerk is respectfully requested to mark this matter closed.

Dated: New York, New York
October 19, 2017

SO ORDERED

HENRY PITMAN
United States Magistrate Judge

Copies transmitted to:

All Counsel