Cao v Greenwich Nail & Spa Serv.
2014 NY Slip Op 31574(U)
June 18, 2014
Sup Ct, New York County
Docket Number: 101486/12
Judge: Donna M. Mills

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : **DONNA M. MILLS** **PART** 58

Justice

JING CAO,

Plaintiff,

-v-

GREENWICH NAIL & SPA SERVICE, et al.,

Defendants.

INDEX NO. 101486/12

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL NO.

The following papers, numbered 1 to _____ were read on this motion for _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits– Exhibits.... _____

Answering Affidavits– Exhibits _____ _____

Replying Affidavits _____ _____

CROSS-MOTION: _____ YES ✓ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

FILED

JUN 23 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: June 18, 2014

J.S.C.

DONNA M. MILLS, J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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JING CAO,

Plaintiff,

-against-

GREENWICH NAIL & SPA SERVICE, INC. et al.,

Defendants.

----------x

Index No.

101486/12

DONNA MILLS, J. :

In this action, plaintiff Jing Cao, moves for summary judgment, or in the alternative, partial summary judgment, on the issue of defendants, her former employers, failure to pay wages due and owing and for failure to pay overtime wages. Defendants oppose the motion on the grounds that there are triable issues of fact.

Plaintiff is claiming that from December 12, 2010 to November 6, 2011 she was a nail salon technician in the employ of defendants. Plaintiff maintains that during her employment with the defendants she worked twelve hours a day, each day of the week. She further maintains that she was only paid $275 per week by the defendants.

In support of her motion for summary judgment, plaintiff primarily relies on a Notice to Admit which was sent to defendants on May 20, 2013. Defendants never responded to the Notice to Admit. The Notice to Admit sought admission to answers establishing a prima facie case of wage and overtime violation pursuant to the New York Labor Law §§ 198.1-1, 663, 652 and NY Comp. Codes R. & Regs. Tit. 12 § 142-2.2 et seq. Defendants argue that the Notice to Admit is facially improper in that it concerns the ultimate and fundamental facts which plaintiff had knowledge were in dispute as a result of defendants' answer.

CPLR § 3212(b) requires that for a court to grant summary judgment, the court must determine if the movant's papers justify holding, as a matter of law, "that the cause of action or defense has no merit." It is well settled that the remedy of summary judgment, although a drastic one, is appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact (Vamattam v Thomas, 205 AD2d 615 [2nd Dept 1994]). It is incumbent upon the moving party to make a prima facie showing based on sufficient evidence to warrant the court to find movant's entitlement to judgment as a matter of law (CPLR § 3212 [b]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Summary judgment should be denied when, based upon the evidence presented, there is any significant doubt as to the existence of a triable issue of fact (Rotuba Extruders v Ceppos, 46 NY2d 223 [1978]). When there is no genuine issue to be resolved at trial, the case should be summarily decided (Andre v Pomeroy, 35 NY2d 361, 364 [1974]).

Through the use of a Notice to Admit, a party can request another party to admit stated facts or the genuineness of a document, where the party requesting the admission "reasonably believes there can be no substantial dispute at the trial and ... [where the matters] are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry" (CPLR 3123[a]; *see also Taylor v. Blair,* 116 A.D.2d 204 [1985]).

If a party fails to respond to a Notice to Admit within 20 days after service, the

matters therein are deemed admitted for the purpose of the litigation (CPLR 3123[a]; *Marine Midland Bank, N.A. v. Custer,* 97 A.D.2d 974 [1983], *affd* 62 N.Y.2d 732 [1984]). A matter deemed admitted pursuant to a Notice to Admit, however, is still "subject to all pertinent objections to admissibility which may be interposed at the trial" (CPLR 3123[b]), and it is not necessarily of such probative value as to relieve a party of the necessity of establishing its right to ultimate relief upon the trial (*see* 44A N.Y. Jur 2d, Disclosure § 295, at 189).

However, a Notice to Admit may not be used to elicit an admission of fundamental and material issues or ultimate facts. *Meadowbrook–Richman, Inc. v. Cicchiello,* 273 A.D.2d 6 [1st Dep't 2000]; *PDG Psychological, P.C. v. State Farm Ins. Co.,* 12 Misc.3d 1183(a)(2006).

As defined above, a Notice to Admit may be used to settle any fact that is not at issue. A Notice to Admit should not contain any questions that would require that the opposing party concede any material facts. It is for this reason that failure to respond to a Notice to Admit is deemed as an admission.

One cannot deem any failure to respond to a Notice to Admit as an admission to a material fact. To allow such would spawn an abuse of this disclosure device and contradict the purpose of the Notice to Admit. Further, it would prevent attorneys from regarding their ethical duty to actively participate in the litigation of each case as well as timely responding to documents submitted by opposing counsel (see *Metropolitan Property and Cas. Ins. Co. v. Thomas*, 18 Misc3d 1103(A) [NY Sup. 2007]).

In the instant case, issues of hours of work and rate of pay go to the heart of plaintiff's claim of unpaid wages, and a Notice to Admit should not serve as a basis to

elicit facts concerning the ultimate and fundamental issues, fact which plaintiff is well aware are in dispute. As such, plaintiff's Notice to Admit improperly demanded that defendants concede matters that were in dispute. Thus, defendants had no obligation to furnish admissions in response to plaintiff's notice (*see, Orellana v. City of New York,* 203 A.D.2d 542, 543, 612 N.Y.S.2d 943).

Additionally, plaintiff's reliance on defendants' work log or journal is also insufficient to establish plaintiff's entitlement to judgment as a matter of law, because it is written primarily in a foreign language, and was not properly translated to English.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied.

DATED: 6/18/14

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.