

Mancero v 242 E. 38th St. Tenants Corp.

2014 NY Slip Op 30253(U)

January 28, 2014

Sup Ct. NY County

Docket Number: 100721/11

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

BARBARA JAFFE
J.S.C.

PRESENT: _____
Justice

PART 12

Index Number : 100721/2011
MANCERO, ERICH
vs
242 EAST 38TH STREET TENANTS
Sequence Number : 003
REARGUEMRNT/RECONSIDERATION

INDEX NO. 100721/11
MOTION DATE _____
MOTION SEQ. NO. 003

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/28/14

[Signature] J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

-----x
ERICH MANCERO and AVA MANCERO,

Plaintiffs,

- against -

Index No. 100721/11

Mot. seq. no. 003

DECISION AND ORDER

242 EAST 38TH STREET TENANTS CORP., GROGAN &
ASSOCIATES, INC., TIMOTHY C. GROGAN, JOSEPH
HOUTON, LAURA SEYEGH and QUYNN C LUONG,

Defendants.

-----x
BARBARA JAFFE, J.:

For plaintiffs:

Brian K. Robinson, Esq.
Law Offices of Brian K. Robinson, P.C.
61 Broadway, Ste. 1030
New York, NY 10006
212-269-2091

For defendants:

Alan M. Goldberg, Esq.
Rosen, Livingston & Cholst, LLP
275 Madison Ave.
New York, NY 10016
212-687-7770

Plaintiffs move pursuant to CPLR 2221 for an order granting them leave to renew and reargue their opposition to defendants' motion for summary judgment, which I granted by written decision dated July 12, 2013. (40 Misc 3d 1213[A]). Defendants oppose.

I. RELEVANT BACKGROUND

In their complaint, plaintiffs alleged that defendants withheld from plaintiff Erich Mancero overtime wages due to him as superintendent of the cooperative residence located at 242 East 38th Street in Manhattan. In my decision, I held that section 141-1.4 of the Minimum Wage Order for the Building Services Industry ([12 NYCRR 141-1.4]) does not extend overtime rights to janitors of residential buildings, and observed that, in any event, plaintiffs offered no records establishing the claim to overtime. (NYSCEF 53).

II. DISCUSSION

A. Contentions

Plaintiffs argue, as they did in opposing defendants' motion, that the Minimum Wage Order does not prohibit janitors from earning overtime pay, but only prohibits them from being paid overtime at one and one-half times the regular rate, thereby permitting overtime at some other rate. They again rely on *Edwards v Jet Blue*, 21 Misc 3d 1107(A), 2008 NY Slip Op 51992(U) (Sup Ct, Kings County 2008), in which the court observed that the plaintiff, a ground operations agent and baggage handler who was exempt from regulation under the Fair Labor Standards Act (FLSA), was entitled to overtime at a rate greater than that set forth in an administrative regulation promulgated pursuant to the state Labor Law providing that such employees were entitled to overtime pay at one and one-half times the basic minimum hourly rate (12 NYCRR 142-2.2).

Plaintiffs now attach the New York State Department of Labor (DOL) opinion letters on which the *Edwards* court relied, claiming they were previously unobtainable and are therefore newly discovered. In the letters, the DOL advises that employees who are not entitled to overtime pay at one and one-half times the regular rate are entitled to overtime, albeit at a reduced rate. (NYSCEF 59).

Plaintiffs also maintain that I erroneously placed on them the burden of providing records and otherwise seek an order amending their complaint by increasing their liquidated damages. (NYSCEF 58, 60, 64).

B. Analysis

Whether to grant leave to reargue or renew a prior motion rests within the sound

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discretion of the trial justice. (*Hines v New York City Tr. Auth.*, 112 AD3d 528 [1st Dept 2013]; *Garcia v Jesuits of Fordham, Inc.*, 6 AD3d 163, 165 [1st Dept 2004]). In my discretion, I grant plaintiffs leave to reargue and renew my July 2013 decision and order, and adhere to my prior decision for the foregoing reasons.

In *Edwards*, the court addressed a different class of employee and a different regulation which, in contrast to the Minimum Wage Order in issue here, clearly provides for overtime for FLSA-exempt employees. (21 Misc 3d 1107[A] [regulation allows for overtime for FLSA exempt employees at one and one-half times basic minimum hourly rate]). That the court in *Edwards* found that the plaintiff was entitled to overtime compensation at a higher rate than that provided for in the regulation does not constitute authority for the proposition that plaintiff is entitled to overtime here. Such an interpretation rests on the unreasonable assumption that the DOL provided that residential janitors are not entitled to overtime at the specified rate without providing the rate to which they are entitled. (*Cf. People v Finnegan*, 85 NY2d 53, 58 [1995] [“the failure of the Legislature to include a substantive, significant prescription in a statute is a strong indication that its exclusion was intended”]). Moreover, the DOL opinions relied on in *Edwards* are confined to their “unique facts” (*Edwards*, at *5), and have no application here. In any event, *Edwards* does not bind this court. (McKinney’s Cons. Laws of NY, Book 1, Statutes § 72[b] [binding force of judicial construction of a statute depends on court rendering it and rank of tribunal in judicial hierarchy; decisions of Court of Appeals are binding on Appellate Division, those of Appellate Division on Supreme Court, and so on down from superior to inferior judicatories]).

I thus adhere to my earlier opinion in which I relied on *Niemiec v Ann Bendick Realty*, 2007 WL 5157027, at *6 n 6 (ED NY 2008). (*See also Lee v Kim*, 2013 WL 4522581, at *5 [ED

NY 2013] [janitors not entitled to overtime pursuant to section 141-1.4]).

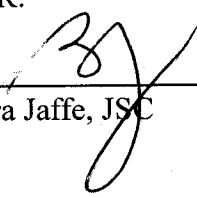
Given this result, I need not address plaintiffs' other arguments.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for leave to reargue and renew is granted, and upon reargument and renewal, I adhere to my prior determination granting defendants summary judgment.

ENTER:



Barbara Jaffe, JSC

DATED: January 28, 2014
 New York, New York