SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART LPM

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ADRIAN ALMANZAR, FRANCISCO CRUZ, CARMELO DELGADO, JOSE GOMEZ, CESAR RODRIGUEZ, and SANTIAGO MORALES,

Plaintiffs,

- against -

TOWNHOUSE MANAGEMENT CO., INC., FASHION WEAR REALTY CO., INC., BRONX VIII LLC, 735 BRYANT LLC, 1221 SHERIDAN LLC, 1225 SHERIDAN LLC, 2350 CRESTON LLC, 3212 KRUGER LLC, WINDWARD REALTY CORP., WILDER REALTY LLC, and STEVE HACKEL,

Defendants.

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DECISION AND ORDER

Index No. 305788/2014

PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated July 14, 2015 of defendants Windward Realty Corp., Wilder Realty LLC and Steve Hackel and the affirmation, exhibits, and memorandum of law submitted in support thereof; plaintiffs' affirmation in opposition dated August 13, 2015 and the exhibits submitted therewith; the reply memorandum of law dated August 26, 2015 of defendants Windward Realty Corp., Wilder Realty LLC and Steve Hackel; and due deliberation; the court finds:

The court *sua sponte* recalls and vacates its decision and order dated October 2, 2015 and substitutes the following decision therefor to correct an error in the first and third decretal paragraphs regarding the fourth cause of action of plaintiff Carmelo Delgado.

After they were terminated from their positions as resident janitors or porters at several apartment buildings owned or managed by the various defendants, plaintiffs Adrian Almanzar ("Almanzar"), Francisco Cruz ("Cruz"), Carmen Delgado ("Delgado"), Jose Gomez ("Gomez"), Cesar Rodriguez ("Rodriguez") and Santiago Morales ("Morales") commenced this action asserting claims

for Labor Law violations and breach of contract among other causes of action.[1] Defendants Windward Realty Corp., Wilder Realty LLC, and Steve Hackel (collectively "Windward") now move pursuant to CPLR 3211(a)(5) and (a)(7) for an order dismissing (1) Gomez's complaint as barred by a release; (2) the first through third causes of action for Labor Law Article 19 wage violations asserted by Almanzar, Cruz, Delgado, Gomez and Rodriguez; (3) the fourth cause of action for Labor Law Article 7 violations or as asserted by Almanzar, Cruz, Rodriguez and Morales; (4) the fifth cause of action for New York City Human Rights Law violations asserted by Almanzar, Cruz, Rodriguez, and Morales; (5) the ninth cause of action for breach of the covenant of good faith and fair dealing; and (6) the eleventh cause of action for fraud.

On a motion to dismiss brought under CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88, 638 N.E.2d 511, 513, 614 N.Y.S.2d 972, 974 (1994). Defects in a complaint may be remedied by affidavits from the nonmoving party. *See Dollard v. WB/Stellar IP Owner, LLC*, 96 A.D.3d 533, 948 N.Y.S.2d 243 (1st Dep't 2012) (citation omitted). A CPLR 3211(a)(5) defense is waived unless it is raised in a responsive pleading. *See* CPLR 3211(e).

Release

Windward did not attach a copy of its answer with the motion, but the answer filed with the clerk on May 13, 2015, of which the court takes judicial notice, *see Matter of Travelers Prop. Cas. Co. of Am. v. Archibald*, 24 A.D.3d 480, 2 N.Y.S.3d 92 (1st Dep't 2015), includes the defense of release. "Generally, a valid release constitutes a complete bar to an action on a claim which is the subject of the

[1] Rodriguez alleges he was the resident janitor and porter at 735 Bryant Avenue and Morales alleges he was the resident janitor and porter at 1221 and 1225 Sheridan Avenue. *See* Def. Ex. A, Amended Verified Complaint, ¶¶ 13, 15, and 239.

release." *Centro Empresarial Cempresa S.A. v. América Móvil, S.A.B. de C.V.*, 17 N.Y.3d 269, 276, 952 N.E.2d 995, 1000, 929 N.Y.S.2d 3, 8 (2011). Windward submits the release Gomez signed on March 28, 2013.

Gomez admits executing the release but states that he signed a different release than the one Windward submitted. Paragraph 8 in Gomez's version states the release may not be modified whereas Paragraph 8 in the Windward version states that Gomez assigned his claims against a non-party Receiver to defendant 2350 Creston LLC. The paragraph, though, does not constitute a material change in the effect of the document. Moreover, Gomez did not refute that he had assigned those claims.

Gomez's argument that he entered into the release under duress is deficient. He made no allegations of duress or undue influence in the complaint. He did not tender an affidavit in opposition, *see Gonzalez v. 40 W. Burnside Ave. LLC*, 107 A.D.3d 542, 968 N.Y.S.2d 50 (1st Dep't 2013), and his attorney has no personal knowledge of the underlying facts. *See Plain v. Vassar Bros. Hosp.*, 115 A.D.3d 922, 982 N.Y.S.2d 558 (2d Dep't 2014). His lack of familiarity with the English language is unavailing. *See Chemical Bank v. Geronimo Auto Parts Corp.*, 225 A.D.2d 461, 639 N.Y.S.2d 340 (1st Dep't 1996); *Pimpinello v. Swift & Co.*, 253 N.Y. 159, 170 N.E. 530 (1930). Moreover, Gomez waited more than two years before filing the action. *See Achache v. Och*, 128 A.D.3d 563, 8 N.Y.S.3d 565 (1st Dep't 2015); *Allen v. Riese Org., Inc.*, 106 A.D.3d 514, 965 N.Y.S.2d 437 (1st Dep't 2013). Accordingly, Gomez's complaint against Windward is dismissed. Given the foregoing, the court will not address Windward's arguments regarding Gomez's individual causes of action.

First through Third Causes of Action for Violations of Article 19 of the Labor Law

Windward moves to dismiss the claims for unpaid wages, overtime and spread of hours pay, *see* Labor Law §§ 650 *et seq.*, brought by Almanzar, Cruz, Delgado and Rodriguez on the ground that resident janitors are exempt from collecting hourly wages as set forth in the Minimum Wage Order

applicable to the Building Services Industry. *See* 12 NYCRR §§ 141 *et seq*. A janitor is a "person employed to render any physical service in connection with the maintenance, care or operation of a residential building." *See* 12 NYCRR § 141-3.4. A resident janitor also "resides in the building where he or she renders services, or in another building within a distance of 200 feet therefrom." *See* 12 NYCRR § 141-3.5. Resident janitors are paid weekly based on the total number of building units subject to a cap. *See* 12 NYCRR §§ 141-1.2 and 141-2.8. They are excluded from collecting hourly wages and overtime. *See* 12 NYCRR §§ 141-1.3 and 141-1.4. Almanzar, Cruz, Delgado and Rodriguez all admit they were resident janitors. Therefore, they may not recover wages, overtime or spread of hours pay for time spent on resident janitor duties. *See Mancero v. 242 E. 38th St. Tenants Corp.*, 2014 N.Y. Misc. LEXIS 394 (Sup. Ct. N.Y. County 2014); *Koljenovic v. Marx*, 999 F. Supp. 2d 396 (E.D.N.Y. 2014).

The complaint, though, also alleges that plaintiffs performed work outside of the duties normally assigned to janitors. *See* New York City Administrative Code § 27-2052. Plaintiffs painted and plastered numerous apartments, replaced plumbing and cabinetry, and performed mold removal. Payments for painting an apartment or for major repairs are not considered part of the minimum wage, *see* 12 NYCRR § 141-2.5(b), and plaintiffs expected compensation for the extra work. *See* Def. Ex. A, ¶¶ 48, 56. Whether plaintiffs were entitled to recover hourly wages for the extra work or whether they were to be paid in some other fashion was not addressed. In viewing the factual allegations in the light most favorable to plaintiffs, *see African Diaspora Mar. Corp. v. Golden Gate Yacht Club*, 109 A.D.3d 204, 968 N.Y.S.2d 459 (1st Dep't 2013), the complaint sets forth sufficient facts to state a minimum wage claim as it pertains to the extra work.

As to the second and third causes of action, plaintiffs seek overtime and spread of hours pay. Building service employees are entitled to one and one-half times the regular rate for hours worked in

excess of forty hours per week. *See* 12 NYCRR § 141-1.4. Although omitted from the wage order for the Building Services Industry, spread of hours pay is the "interval between the beginning and end of an employee's workday" and includes working time, time off for meals, and intervals of duty. *See* 12 NYCRR § 142-2.18. An employee is entitled to one hour's pay at the basic minimum hourly wage rate for any day in which the spread of hours exceeds ten hours. *See* 12 NYCRR § 142-2.4.

Pleading requirements under the Labor Law are the same as those under the Fair Labor Standards Act, *see* 29 U.S.C. § 201 *et seq*. *See DeJesus v. HF Mgmt. Servs.*, 726 F.3d 85 (2d Cir. 2013), *cert denied*, 134 S. Ct. 918, 187 L. Ed. 2d 781 (2014); *Lundy v. Catholic Health Sys. of Long Island, Inc.*, 711 F.3d 106 (2d Dep't 2013). Here, only Almanzar and Cruz specified the hours spent on extra work each week. Delgado alleged the extra work took one to three days to complete and Rodriguez sought compensation on a per project basis. Apart from Cruz, Almanzar, Delgado and Rodriguez failed to set forth facts sufficient to infer that they were entitled to overtime compensation. General statements that they "regularly" or "typically" worked overtime is insufficient. *See Serrano v. I. Hardware Distribs., Inc.*, 2015 U.S. Dist. LEXIS 97876 (S.D.N.Y. July 27, 2015); *Bustillos v. Acad. Bus, LLC*, 2014 U.S. Dist. LEXIS 3980 (S.D.N.Y. Jan. 13, 2014). Similarly, plaintiffs did not identify the specific day(s) for which they were entitled to spread of hours pay.

Plaintiffs, who have not submitted any affidavits in opposition, rely on a table detailing their "average" weekly hours split between resident janitor duties and major repair work. The table, though, fails to correct the deficiencies in the complaint. If anything, the table disproves their claims for overtime pay and does not address their spread of hours claim at all. Accordingly, the second cause of action brought by Almanzar, Delgado and Rodriguez is dismissed, and the third cause of action brought by Almanzar, Cruz, Delgado and Rodriguez is dismissed.

Fourth Cause of Action for Retaliation under Labor Law § 215

Labor Law § 215(1)(a) prohibits an employer from discharging, threatening, penalizing, discriminating or retaliating against an employee who has made a complaint about Labor Law violations. Any civil action must be brought within two years of the violation. *See* Labor Law § 215(2)(a). Windward argues the complaint fails to state a cause of action for retaliation and that the claims of at least four plaintiffs are time-barred. Almanzar, Cruz, Rodriguez and Morales consent to dismissal of this cause of action but Delgado opposes.

To state a claim under Labor Law § 215, plaintiff must plead that while employed by the defendant he or she made a complaint about the employer's violation of the Labor Law and was terminated or otherwise penalized, discriminated against, or subjected to an adverse employment action as a result. *Higueros v. New York State Catholic Health Plan*, 526 F. Supp. 2d 342, 347 (E.D.N.Y. 2007). Although it has been held that an employee must have complained about a specific violation, *see Epifani v. Johnson*, 65 A.D.3d 224, 882 N.Y.S.2d 234 (2d Dep't 2009), Labor Law § 215(1)(a) does not mandate an explicit reference to a section or chapter. "All that is required is that the complaint to the employer be of a colorable violation of the statute." *Weiss v. Kaufman*, 2010 N.Y. Misc. LEXIS 5699, at *5 (Sup. Ct. N.Y. County Nov. 22, 2010). Delgado's complaint alleges that defendants "retaliated against [him] by terminating [his] employment" after he complained about not being paid. *See* Def. Ex. A, ¶ 1. He further identified the Labor Law violations in his complaint. Although inartfully drafted, Delgado has adequately pleaded a cause of action for unlawful retaliation in violation of Labor Law § 215. *See Payano v. CompassRock Real Estate LLC*, 2014 U.S. Dist. LEXIS 65118 (E.D.N.Y. May 14, 2014).

Fifth Cause of Action for New York City Human Rights Law Violations

Plaintiffs, who are Hispanic, allege they were victims of national origin discrimination when they were replaced by younger men in violation of New York City Human Rights Law, *see* New York

City Administrative Code §§ 8-101 *et seq.* Windward argues the fifth cause of action by Almanzar, Cruz, Rodriguez and Morales is time-barred by the three year limitations period applicable to such claims. *See Herrington v. Metro-North Commuter R.R. Co.*, 118 A.D.3d 544, 988 N.Y.S.2d 581 (1st Dep't 2014), citing Administrative Code of the City of New York § 8-502(d). Windward did move to dismiss Delgado's discrimination claim.

Plaintiffs commenced the action on November 4, 2014. They concede that any claims accruing before November 4, 2011 are time-barred. "Francisco Cruz Santiago Morales" consent to dismissal but Almanzar and Rodriguez argue their claims are timely based upon the relation back doctrine. According to the complaint, Almanzar was terminated on November 15, 2011 and Rodriguez was terminated on December 6, 2011.[2] *See* Def. Ex. A, ¶¶ 5, 13.

The relation back doctrine permits a plaintiff to correct a pleading error by adding a new claim or new party after the Statute of Limitations has expired upon a showing that "(1) both claims arose out of [the] same conduct, transaction or occurrence, (2) the new party is 'united in interest' with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (3) the new party knew or should have known that, but for an excusable mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him as well." *Buran v. Coupal*, 87 N.Y.2d 173, 178, 661 N.E.2d 978, 981, 638 N.Y.S.2d 405, 408 (1995). It is plaintiff's burden to establish the doctrine's applicability. *See Anderson v. Montefiore Med. Ctr.*, 41 A.D.3d 105, 837 N.Y.S.2d 98 (1st Dep't 2007). Plaintiffs have failed to meet the last two prongs.

Parties are united in interest when there is some relationship between them giving rise to vicarious liability of one for the conduct of the other. *See Valmon v. 4 M & M Corp.*, 291 A.D.2d 343,

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[2] Rodriguez also alleges that he was fired on December 5, 2014. *See* Def. Ex. A, ¶ 238.

344, 738 N.Y.S.2d 340, 341 (1st Dep't 2002). Their interests "must be 'such that they stand or fall together and that judgment against one will similarly affect the other.'" *Lord Day & Lord, Barrett, Smith v. Broadwall Mgmt. Corp.*, 301 A.D.2d 362, 363, 753 N.Y.S.2d 68, 70 (1st Dep't 2003) (internal citation omitted). Sharing common officers or shareholders and resources such as offices and employees is insufficient, *see Raymond v. Melohn Props., Inc.*, 47 A.D.3d 504, 851 N.Y.S.2d 17 (1st Dep't 2008); *Xavier v. RY Mgt. Co., Inc.*, 45 A.D.3d 677, 846 N.Y.S.2d 227 (2d Dep't 2007), because the fault of one corporation may not be imputed to a co-defendant corporation. *See Desiderio v. Rubin*, 234 A.D.2d 581, 652 N.Y.S.2d 68 (2d Dep't 1996). Other than their conclusory statements, plaintiffs' papers are bereft of any evidence demonstrating a relationship between the defendants such that Windward would be vicariously liable for co-defendants' conduct. Although plaintiffs state "they could not expect the complexity and the number of unknown and unnamed Defendants," there is no indication that Windward actively concealed its identity. *See Regina v. Broadway-Bronx Motel Co.*, 23 A.D.3d 255, 804 N.Y.S.2d 305 (1st Dep't 2005). Notice to the defendant also is a linchpin of the relation back doctrine. *See Cintron v. Lynn*, 306 A.D.2d 118, 762 N.Y.S.2d 355 (1st Dep't 2003). Plaintiffs have not established that Windward was aware or should have been aware of the claim but for their mistake. *See Soto v. Bronx-Lebanon Hosp. Ctr.*, 93 A.D.3d 481, 939 N.Y.S.2d 849 (1st Dep't 2012).

Ninth Cause of Action for Breach of the Covenant of Good Faith and Fair Dealing

Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing is dismissed as duplicative of their breach of contract claim. *See Rossetti v. Ambulatory Surgery Ctr. of Brooklyn, LLC*, 125 A.D.3d 548, 5 N.Y.S.3d 373 (1st Dep't 2015); *Salomon v. Citigroup Inc.*, 123 A.D.3d 517, 999 N.Y.S.2d 21 (1st Dep't 2014). All plaintiffs consent to dismissal of this cause of action.

Eleventh Cause of Action for Fraud

A cause of action for fraud may not be maintained when the only fraud charged relates to a

breach of contract. *See Jeffers v. American Univ. of Antigua*, 125 A.D.3d 440, 3 N.Y.S.3d 335 (1st Dep't 2015). Since plaintiffs failed to set forth any representations distinct from defendants' obligations to pay wages or defendants' intent to perform, the eleventh cause of action is dismissed. *See Demetre v. HMS Holdings Corp.*, 127 A.D.3d 493, 7 N.Y.S.3d 110 (1st Dep't 2015); *MMCT, LLC v. JTR Coll. Point, LLC*, 122 A.D.3d 497, 997 N.Y.S.2d 374 (1st Dep't 2014). All plaintiffs except Gomez consent to dismissal. As to Gomez, whose complaint has already been dismissed, he failed to allege that the release was procured by fraud in his complaint or tender an affidavit in opposition.

Accordingly, it is

ORDERED, that the motion of defendants Windward Realty Corp., Wilder Realty LLC and Steve Hackel seeking dismissal of plaintiffs' complaint is granted to the extent dismissing the complaint of Jose Gomez; dismissing the second cause action of plaintiffs Adrian Almanzar, Carmelo Delgado, and Cesar Rodriguez; dismissing the third cause action of plaintiffs Adrian Almanzar, Francisco Cruz, Carmelo Delgado, and Cesar Rodriguez; dismissing the fourth cause of action of plaintiffs Adrian Almanzar, Francisco Cruz, Cesar Rodriguez, and Santiago Morales; dismissing the fifth cause of action of plaintiffs Adrian Almanzar, Francisco Cruz, Cesar Rodriguez, and Santiago Morales; and dismissing the ninth and eleventh causes of action of all plaintiffs against them; and it is further

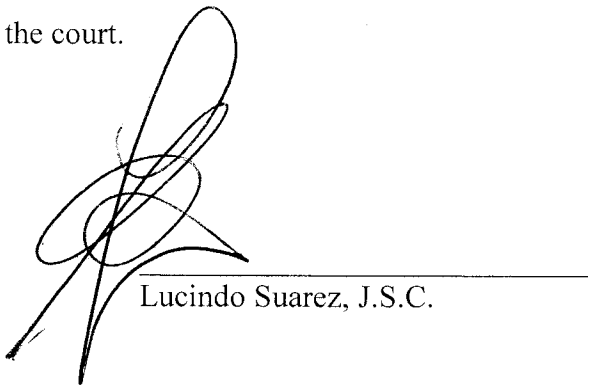
ORDERED, that the clerk of the court shall enter judgment in favor of defendants Windward Realty Corp., Wilder Realty LLC and Steve Hackel dismissing the complaint of plaintiff Jose Gomez against them; and it is further

ORDERED, that the clerk of the court shall enter judgment in favor of defendants Windward Realty Corp., Wilder Realty LLC and Steve Hackel dismissing the second cause action of plaintiffs Adrian Almanzar, Carmelo Delgado, and Cesar Rodriguez; dismissing the third cause action of plaintiffs Adrian Almanzar, Francisco Cruz, Carmelo Delgado, and Cesar Rodriguez; dismissing the

fourth cause of action of plaintiffs Adrian Almanzar, Francisco Cruz, Cesar Rodriguez, and Santiago Morales; dismissing the fifth cause of action of plaintiffs Adrian Almanzar, Francisco Cruz, Cesar Rodriguez, and Santiago Morales; and dismissing the ninth and eleventh causes of action of all plaintiffs against them.

This constitutes the decision and order of the court.

Dated: November 13, 2015



Lucindo Suarez, J.S.C.