Tokhtaman v Human Care, LLC
2016 NY Slip Op 31606(U)
August 22, 2016
Supreme Court, New York County
Docket Number: 151268/2016
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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NINA TOKHTAMAN, individually and on behalf of others similarly situated,

Plaintiffs,

-against-

HUMAN CARE, LLC, COUNTY AGENCY INC., HERSHAL WEBER, or any other related entities,

Defendants.

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Index No. 151268/2016
Motion Seq. 001

DECISION/ORDER

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action to recover wages and benefits under New York's Labor Laws, defendants Human Care, LLC, County Agency Inc., and Hershal Weber ("Weber") (alleged chief executive director of the corporate defendants) (collectively, "defendants") move to dismiss complaint of the plaintiff Nina Tokhtaman ("plaintiff") for failure to state a cause of action (CPLR 3211(a)(7)) and on the ground that plaintiff lacks capacity to sue (CPLR 3211(a)(3)).

Factual Background

Plaintiff is a former home health care attendant of defendants, which provide nursing and home health aide services at the residences of their clients ("Clients").

Plaintiff brought this action on behalf of herself and "all other persons similarly situated" to recover wages and benefits pursuant to NY Labor Law §§190, 663, 651 and 650, 12 NYCRR §§ 142-2.1, 142-2.2, 142-2.4, 142-2.14 and 142-2.6, and NY Public Health Law § 3614-c (first through fourth causes of action), and for breach of contract (fifth cause of action). Plaintiff alleges that since February 2010, defendants failed to provide the proper hourly and overtime compensation for hours worked and hours worked in excess of 40 hours in any given week, and

spread of hours wages compensation.

In support of dismissal of the complaint, defendants argue that plaintiff's claim, that she was not paid for the eight hours she was asleep and three hours she had for meals, lacks merit under statutory and caselaw. Under New York law and a New York Department of Labor ("DOL") advisory opinion, defendants are only required to pay a person in plaintiff's position 13 hours of pay for each 24-hour period. Also, plaintiff's allegations demonstrate that she was paid wages greater than the threshold for the spread of hour wages. Similarly, the claim that defendants withheld her wages is defeated given that the wages plaintiff concedes she received satisfied and exceeded the minimum wage, overtime, and spread of hours requirements. Further, plaintiff lacks standing to raise a breach of contract claim on behalf of unknown governmental agencies and unknown contracts to which she is not a party. And, there are no factual allegations to support any alter-ego claim. Finally, a class action suit is an inappropriate vehicle to pursue a wage claim, which are fact intensive and not conducive to class action litigation.

In opposition, plaintiff contends that the statute requires that workers get paid at least the minimum wage for each hour worked except for a residential employee. Given that plaintiff alleges that she and other members of the class are not residential employees and maintained their own residences, they do not qualify as residential employees subject to the residential exception and caselaw upon which defendants rely to dismiss the complaint is inapplicable. Further, plaintiff sufficiently alleges a spread of hours wage claim. Defendants fail to acknowledge that plaintiff alleges that all 24 hours of her shift are compensable work time. Thus, if plaintiff was paid $149.50 per day as defendants concede, plaintiff only received $6.22 per hour, which is less than the applicable minimum wage for each hour. And, plaintiff, a third-

party beneficiary of the defendants' government contract, states a breach of contract claim against the named defendants who are the parties to such government contract. Plaintiff need not seek to pierce the corporate veil to hold Weber jointly liable with his employer, as he was the chief executive officer of defendants with authority to hire and fire plaintiff and supervise the conditions of employment. Further, dismissal of the class action based on whether plaintiff will ultimately be unable to certify the class is premature at pleading this stage.

In reply, defendants argue that plaintiff, a "non-residential live-in" employee, is only entitled to be paid 13 hours for each 24-hour period. Plaintiff cannot, in good faith, allege that she is not a live-in. Further, plaintiff's opposition fails to support the claims in the complaint, and although there is no motion for class certification, the issues with class certification show the impropriety of the claim.

Discussion

At the outset, defendants' contention that plaintiff is precluded from seeking class certification and that class certification is an improper vehicle for her claim, is premature in the absence of any discovery on this issue (*Moreno v Future Care Health Servs., Inc.*, 43 Misc.3d 1202(A), 992 N.Y.S.2d 159 [Supreme Court, Kings County 2014]; *Andryeyeva v. New York Health Care, Inc.*, 45 Misc.3d 820, 994 N.Y.S.2d 278 [Supreme Court, Kings County 2014] ("individual assessment of how much each putative class member was underpaid based on how many 24-hour shifts he or she worked during the class period is a matter of individual damages and is not an impediment to class certification" (*citing Lamarca v. Great Atlantic and Pacific Tea Company*, Inc., 16 Misc. 3d 1115(A), 2007 WL 2127354 [Supreme Court, New York County 2007], aff'd 55 A.D.3d 487, 868 N.Y.S.2d 8 [1st Dept 2008]). The amount of time of

interrupted sleep and time for meals each person had pertain to damages and does not preclude class action relief, as the paramount issue in this regard is defendants' claimed conduct (*see Lamarca, supra* 16 Misc.3d 1115(A)).

Further, defendants' contentions regarding piercing the corporate veil are misplaced, as plaintiff does not seek to pierce the corporate veil against any defendant (Memorandum in Opposition, pp. 11-13). And, at this pre-answer stage, plaintiff's allegations as against Weber (¶¶16-17) are sufficiently stated (*see Bonito v. Avalon Partners, Inc.*, 106 A.D.3d 625, 967 N.Y.S.2d 19 [1st Dept 2013] (finding that plaintiffs stated a cause of action against individual "Au," "as an employer, not as a corporate officer" within the meaning of Labor Law Article 6, and, under the New York Minimum Wage Act by alleging that he exercised control of the corporation's "day-to-day operations," "hired and fired employees, supervised and controlled employees' work schedules, determined the method and rate of pay, kept employment records, and approved any vacations")).

As to defendants' remaining arguments, when considering a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the pleadings must be liberally construed (see, CPLR § 3026; *Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 104 A.D.3d 401, 960 N.Y.S.2d 404 [1st Dept 2013]) and 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 into any cognizable legal theory" (*Siegmund Strauss, Inc. v. East 149th Realty Corp., supra*; *Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756, 874 N.E.2d 720 [2007]; *Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]).

However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence" or evidentiary material, including affidavits are not presumed to be true or accorded every favorable inference (*David v. Hack*, 97 A.D.3d 437, 948 N.Y.S.2d 583 [1st Dept 2012]; *Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81, 692 N.Y.S.2d 304 [1st Dept1999], affd. 94 N.Y.2d 659, 709 N.Y.S.2d 861, 731 N.E.2d 577 [2000]; *Kliebert v. McKoan*, 228 A.D.2d 232, 643 N.Y.S.2d 114 [1st Dept.], lv. denied 89 N.Y.2d 802, 653 N.Y.S.2d 279, 675 N.E.2d 1232 [1996]), and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17 [1977]; *see also Leon v. Martinez*, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]; *Ark Bryant Park Corp. v. Bryant Park Restoration Corp.*, 285 A.D.2d 143, 150, 730 N.Y.S.2d 48 [1st Dept.2001]; *WFB Telecom., Inc. v. NYNEX Corp.*, 188 A.D.2d 257, 259, 590 N.Y.S.2d 460 [1st Dept.1992], *lv. denied* 81 N.Y.2d 709, 599 N.Y.S.2d 804, 616 N.E.2d 159 [1993]).

Defendants' claim, that plaintiff lacks standing to raise a breach of contract claim (fifth cause of action) due to her allegations, "upon information and belief" on behalf of an unidentified government agency and unidentified contract, is insufficient to merit dismissal of this claim. Plaintiff alleges that defendants entered into contract(s) with government agencies that required them to pay plaintiffs wages as required by NY Public Health Law § 3614-c. Plaintiff further alleges:

> 88. Upon information and belief, the schedule of prevailing rates of wages and benefits to be paid all workers furnishing labor pursuant to the contracts *was included in and formed a part of the contract(s).*
> 89. Beginning in or about 2010, Plaintiffs furnished labor to Defendants in furtherance of Defendants' performance of the contract(s).
> 90. Defendants willfully paid Plaintiffs less than the prevailing rates of wages and

> benefits to which Plaintiffs were entitled and breached their obligation to pay Plaintiffs all wages they were due as required by NY Public Health Law § 3614-c.
> 91. Upon information and belief, at all times relevant to this complaint, Defendants was required to certify and did certify that they paid Plaintiffs wages as required by NY Public Health Law § 3614-c.
> 92. Plaintiffs, as third party beneficiaries of Defendants' contract(s) with government agencies to pay wages as required by the NY Health Care Worker Wage Parity Act, are entitled to relief for the breach of this contractual obligation, plus interest.

Allegations made upon information and belief "are to be considered true for the purposes of a motion to dismiss pursuant to CPLR 3211(a)(7)" (*Waxman Real Estate LLC v. Sacks*, 32 Misc.3d 1241(A), 938 N.Y.S.2d 230 [Supreme Court, New York County 2011]; *Novus Partners, Inc. v. Vainchenker*, 32 Misc.3d 1241(A), 938 N.Y.S.2d 228 (Table) [Supreme Court, New York County 2011]). Therefore, the above allegations are sufficient to assert a breach of contract claim (*see Moreno v. Future Care Health Servs., Inc.*, 43 Misc.3d 1202(A), 992 N.Y.S.2d 159, 2014 WL 1236815 (Table) [Supreme Court, King County 2014] (Plaintiffs are the third-party beneficiaries of such agreement whereby Medicaid, Medicare, or any other government agency remunerates the defendant for home health care services rendered by the plaintiffs; "The plaintiffs need not, at this juncture, allege the particulars of the contracts that may have been breached since the plaintiffs' wages must meet the minimum requirements of the statute enacted to protect them" (*id.*)).

As to defendants' remaining claims concerning the minimum wage, overtime, and failure to pay wages claims (first through fourth causes of action), defendants' ground for dismissal rests on DOL's opinion of March 11, 2010, which responded to the following question as follows:

> 4. Under New York State law, if a home health care aide "lives in," what hours count towards calculating a ten-hour day?

* * * * *

> Regulation 12 NYCRR § 142–2.1[1] provides that the minimum wage shall be paid to employees for the time an employee is . . . required to be available to work at a place prescribed by the employer. However, that regulation provides that *"residential employees," those who live on the premises of their employer,* are not deemed to be working during normal sleeping hours merely because the employee is "on call" for those hours or any time the employee is free to leave the place of employment. Since your letter does not state the nature of the premises in which the aides in question are living, a definitive determination as to whether the individuals fall within that definition cannot be made. While this distinction is important for the purposes of determining the number of hours at which overtime is owed . . . *the Department applies the same test for determining the number of hours worked by all live-in employees.* (Emphasis added).
>
> In interpreting these provisions, it is the opinion of this Department that live-in employees must be paid not less than for thirteen hours per twenty-four hour period provided that they are afforded at least eight hours for sleep and actually receive five hours of uninterrupted sleep, and that they are afforded three hours for meals. If an aide does not receive five hours of uninterrupted sleep, the eight-hour sleep period exclusion is not applicable and the employee must be paid for all eight hours. Similarly, if the aide is not actually afforded three work-free hours for meals, the three-hour meal period exclusion is not applicable."
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> Therefore, a live-in employee is required to be paid "spread of hours" pay for all days in which he or she works as a live-in employee since such employee is deemed to work, at minimum under the rubric described above, thirteen hours per day.

According to this Opinion, "residential employees," are "those who live on the premises of their employer." And, the "test" applied by the Department in this Opinion, upon which defendant relies, applies, on its face, to "those who live on the premises of their employer." Thus, contrary to defendants' contentions, it cannot be said that plaintiff's residential" or "non-residential" status is inconsequential. Inasmuch as plaintiff alleges that she "maintained her own

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[1] As relevant herein, 12 NYCRR 142–2.1(b) provides:

> The minimum wage shall be paid for the time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee. However, a residential employee—one who lives on the premises of the employer—shall not be deemed to be permitted to work or required to be available for work:
> (1) during his or her normal sleeping hours solely because he is required to be on call during such hours; or
> (2) at any other time when he or she is free to leave the place of employment.

residence, and did not 'live in' the homes of defendants' Clients, reliance upon the Opinion as a ground for dismissal is misplaced.

Nor can it be said that plaintiff's allegations belie her claim that she was not a live-in employee, or that she was indeed, a "non-residential 'live-in'" employee subject only to be paid for 13 hours during her 24-hour shift. While plaintiff claims that she "generally" worked "168 hours per week" (¶¶31) (*i.e.*, 24 hours a day for 7 days a week), plaintiff also alleges that she "maintained her own residence" and "*often*" worked 24-hour shifts during her employment; she also indicates that, "When" she worked 24-hour shifts, was required to stay overnight at the Clients' residences and needed to be ready to provide assistance as, and generally not permitted to leave during her shift (¶¶29, 32-33). Allegedly, "when" she worked a 24-hour shift, plaintiff was not given an opportunity to sleep for eight hours without interruption, did not receive a one-hour break for each of three meals per day, and yet, was only paid for approximately 13 hours of her 24-hours shifts, and not paid for the other 11 hours worked.

In *Andryeyeva v. New York Health Care, Inc.* (45 Misc.3d 820, 994 N.Y.S.2d 278 Supreme Court, Kings County 2014]), the plaintiffs alleged that they worked "a number of" 24–hour shifts during their employment in a week, during which they were required to stay overnight at the clients' residences in order to provide assistance throughout the night, but did "not 'live in the home of their employer's client, the person to whom their services are rendered" In addressing whether class certification was appropriate, the Court addressed the issue of whether defendants were required to pay putative class members for each of the 24 hours of a 24–hour shift, regardless of how many hours an individual home attendant was actually able to take for meals and sleep, or whether eight hours for sleep and three hours for meals may be

excluded. The Court explained, that 12 NYCRR § 142–2.1 (also at issue herein) carves out an exception for employees who live on the employer's premises, and as it was undisputed that *the putative class members maintained their own homes, they were "not, therefore, included in this exception.*"

Thus, it cannot be said, at this juncture, and before discovery has been completed, that plaintiff did not "live-in" or was not a "residential" employee, as defendants argue.

And, given that plaintiff alleges that she was entitled to be paid the entire 24 hours of her 24-hour shift as compensable work time, defendants' calculations based on their payment of 13 hours as a ground for dismissal of the spread of hours claims is unwarranted, at this juncture.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendants' motion to dismiss plaintiff's complaint for failure to state a cause of action (CPLR 3211(a)(7) and on the ground that plaintiff lacks capacity to sue (CPLR 3211(a)(3), is denied; and it is further

ORDERED that defendants shall serve their answer upon plaintiff within 30 days of the date of this order; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry; and it is further

ORDERED that the parties shall appear for a Preliminary Conference on October 18, 2016, 2:15 p.m.

This constitutes the decision and order of the Court.

Dated: August 22, 2106

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.

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