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

PRESENT: MANUEL J. MENDEZ **PART** 13
Justice

JOSEPH BREWSTER,
Plaintiff,
-against-

CAREER AND EDUCATIONAL CONSULTANTS, INC., WARREN L. RICHMAN, and SUSAN R. MELOCCARO, *individually and in their official capacities*,
Defendants.

INDEX NO.	162567/2015
MOTION DATE	11/29/2017
MOTION SEQ. NO.	003
MOTION CAL. NO.	

The following papers, numbered 1 to 8 were read on this motion for Partial Summary Judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits	4 - 6
Replying Affidavits	7 - 8

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Plaintiff's motion for partial summary judgment pursuant to CPLR §3212, is granted to the extent that Plaintiff is granted judgment on liability on his Second and Third Causes of Action against Defendant Career and Educational Consultants, Inc.

From October 20, 2003 until his resignation on July 6, 2016 Plaintiff was employed by Defendant Career Educational Consultants, Inc. ("CEC"). He worked thirty-five (35) hour weeks under the supervision of Defendants Warren L. Richman and Susan R. Meloccaro (the officers and sole shareholders of CEC). On August 1, 2011 Plaintiff received a salary increase to $80,000.00 per year. From August 9, 2013 to July 6, 2016 (the "Relevant Time Period") Plaintiff's duties included recruiting workers for CEC subcontract locations, obtaining their job placement records and proof of their retention paperwork for CEC (Moving Papers Ex. 5). Plaintiff alleges that during the Relevant Time Period, he was either not paid his full wages (including occasionally not being paid any wages), not paid on regular pay days, was not paid minimum wages and was not furnished any earning statements for 146 pay periods. On December 9, 2015 Plaintiff commenced this action to recover damages for violations of NY Labor Law §191, §193, §195, unjust enrichment, conversion and to pierce the corporate veil.

Plaintiff now moves for partial summary judgment on his First, Second and Third Causes of Action in his Complaint. Defendants oppose the motion.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v City of New York, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie

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

showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Amatulli v Delhi Constr. Corp., 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]; Martin v Briggs, 235 AD2d 192, 663 NYS2d 184 [1st Dept. 1997]).Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (Kornfeld v NRX Tech., Inc., 93 AD2d 772, 461 NYS2d 342 [1983], aff'd 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]).

"Article 6 of the Labor Law governs employers' payment of wages and benefits to employees" (Bynog v Cipriani Grp., Inc., 1 NY3d 193, 770 NYS2d 692, 802 NE2d 1090 [2003]). An employer is subject to civil liability for failure to pay "wages" as required by Labor Law 191 (Truelove v Ne. Capital & Advisory, Inc., 95 NY2d 220, 715 NYS2d 366, 738 NE2d 770 [2000]). Labor Law §190[1] defines the term "wages," as "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis." (Guiry v Goldman, Sachs & Co., 31 AD3d 70, 814 NYS2d 617 [1st Dept. 2006]). "A clerical and other worker shall be paid the wages earned in accordance with the agreed terms of employment, but not less frequently than semi-monthly, on regular pay days designated in advance by the employer" (NY Lab. Law §191[d]). "Clerical and other worker includes all employees not included in subdivisions 4, 5, and 6 of this section, except any person employed in a bona fide executive, administrative or professional capacity whose earnings are in excess of nine hundred dollars a week" (*Id* §190).

Plaintiff fails to makes a prima face showing of entitlement to judgment as a matter of law on his First Cause of Action alleging a violation of Labor Law §191. Plaintiff's fixed salary during the Relevant Time Period was $80,000.00 per year equating to $3,076.92 bi-weekly (Moving Papers Ex. 16). A professional earning more than $900 a week is "expressly excluded" from the protections of Labor Law § 191 (Eden v St. Luke's-Roosevelt Hosp. Ctr., 96 AD3d 614, 947 NYS2d 457 [1st Dept. 2012]). Plaintiff is expressly excluded from the protections of Labor Law 191 even if he alleges, and Defendants have admitted, that he was not paid less than the $900 threshold 72% of the pay periods during the Relevant Time Period.

Plaintiff makes a prima face showing of entitlement to judgment as a matter of law on his Second Cause of Action against Defendant CEC. Labor Law §193 provides that "no employer shall make any deduction from the wages of an employee unless those deductions are made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency or are expressly authorized in writing by the employee and are for the benefit of the employee'" (Gennes v Yellow Book of NY, Inc., 23 AD3d 520, 806 NYS2d 646 [2nd Dept. 2005]). Labor Law §190[2] defines an employee as "any person employed for hire by an employer in any employment" (Corcoran v GATX Corp., 49 AD3d 1174, 852 NYS2d 913 [4th Dept. 2008], *lv dismissed* 10 NY3d 909, 891 NE2d 303, 861 NYS2d 269 [2008]). It applies equally to all employees defined in §190[2] (*Id*). Defendants testified that most of Plaintiff's paychecks "basically [fell] in the $500 to $600 range" and that Plaintiff was not paid his full wages because

"[Defendants] have no money" even though Defendant Richman conceded that Plaintiff was entitled to his full wages (Moving Papers Exs. 3, 18). As Plaintiff has demonstrated (*Id* at Exs. 3, 11, 12), and Defendants have admitted (*Id* at Exs 1, 2, 17), CEC made deductions to his salary based on its revenues. CEC's actions to reduce Plaintiff's wages without any writing issued by CEC was a violation of Labor Law §193 (Gennes, *supra*).

Defendants contention that a 2013 Memo they drafted creates an issue of fact for the deductions and non-payment of Plaintiff's wages is unavailing. The Memo was drafted on April 17, 2013 and only concerned placement goals and salary adjustments from April to June 2013 (Moving Papers Ex. 15). Aside from the record that demonstrates that Plaintiff never actually received the memo, nor was his salary ever reduced during these three months (*Id* at Exs. 15, 16), the memo is outside the Relevant Time Period. Defendants further admitted that no subsequent memo followed the 2013 Memo to dictate salary adjustments following June 2013 (*Id* at Ex. 1).

Plaintiff makes a prima face showing of entitlement to judgment as a matter of law on his Third Cause of Action against Defendant CEC. NY Labor Law §195[3] requires employers to provide a "statement with every payment of wages" (NY Lab. Law §195[3]). "Where an employer fails to keep contemporaneous records of employees, ... hours worked, rate of pay, and wages earned or to provide employees with wage statements showing such information with each payment of wages, the employer bears the burden of proving paid wages" (Matter of Baudo v N.Y. State Indus. Bd. of Appeals, 61 NYS3d 887 [1st Dept. 2017]). Plaintiff has shown that Defendants repeatedly failed to provide him with statements of earnings paid or due and unpaid (Kasoff v KVL Audio Visual Servs., Inc., 87 AD3d 944, 930 NYS2d 5 [1st Dept. 2011]). During the Relevant Time Period Defendants furnished Plaintiff a wage statement only twice (Moving Papers Ex. 12). For a violation of §195[3] Plaintiff is entitled to "recover damages of two hundred fifty dollars for each work day that the violations occurred or continued to occur, but not to exceed a total of five thousand dollars, together with costs and reasonable attorneys' fees" (NY Labor Law §198[1-d]).

Plaintiff has not moved for summary judgment on his Sixth Cause of Action to pierce the corporate veil against Defendants Richman and Meloccaro, and therefore judgment on liability as to Plaintiff's Second and Third Causes of Action cannot be given against them individually, or in their official capacities.

Accordingly, it is ORDERED, that Plaintiff's motion for partial summary judgment pursuant to CPLR §3212, is granted to the extent that Plaintiff is granted judgment on liability on his Second and Third Causes of Action against Defendant Career and Educational Consultants, Inc., and it is further,

ORDERED, that Plaintiff is granted Judgment on Liability on his Second and Third Causes of Action for Defendant Career and Educational Consultants, Inc.'s violation of New York Labor Law Sections §193 and §195, and it is further,

ORDERED, that the remainder of Plaintiff's motion pursuant to CPLR §3212 is denied, and it is further,

ORDERED, that the Clerk enter judgment accordingly.

Enter:

MANUEL J. MENDEZ
J.S.C.

Dated: December 8, 2017

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE