Gamaleldin v Giuffre
2019 NY Slip Op 31180(U)
April 29, 2019
Supreme Court, New York County
Docket Number: 160207/2015
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ **PART** IAS MOTION 47EFM

Justice

----------X

MOHAMMED GAMALELDIN,

Plaintiff,

- v -

IGNAZIO GIUFFRE, CHRIS ERATO, JOHN CELARDO, JOHN GIUFFRE, DANIELA GIUFFRE-CELARDO, PETER BELLINA

Defendant.

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INDEX NO. 160207/2015

MOTION DATE 10/11/2018

MOTION SEQ. NO. 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

Paul A. Goetz, J.S.C.:

In this action seeking payment of unlawful deductions from plaintiff's commissions earned while working as a car salesman for a dealership owned and operated by defendants, plaintiff moves for summary judgment on his complaint, and defendants cross-move for summary judgment dismissing the complaint.

Factual and Procedural Background

Defendants own Giuffre Auto Group, LLC, Giuffre Autoworld, LLC and Giuffre Hyundai Ltd. (collectively "Giuffre"), which is comprised of multiple car dealerships in New York, including Giuffre Hyundai, Giuffre Mazda, Giuffre Mitsubishi, Giuffre Kia, Giuffre Hyundai of White Plains, and Giuffre Suzuki of White Plains. Giuffre is a family-owned and operated company and all of the defendants in this action are related (Moreno affirmation, Exh. A, p. 11). Plaintiff worked as a car salesman for Giuffre, primarily at Giuffre Hyundai in Brooklyn, from August 2009 through August 2012 (Moreno affirmation, exhibit R at 18).

In 2008, six car salespeople commenced an action, in Kings County, against Giuffre seeking the refund of unlawful deductions from their sales commissions (*see Drumgold v Giuffre Auto Group*, Sup Ct, Kings County, index No. 31772/2008). Plaintiff later joined the action. Initially, Giuffre appeared and participated in the litigation, but later defaulted. After an inquest on damages on December 1, 2014, plaintiff was awarded the amount of $74,063.53, which included $47,336 for unpaid wages, $11,834 for liquidated damages, and $14,893.53 in interest (see Moreno affirmation, exhibit B). However, to date, the judgment remains unsatisfied, and Giuffre is no longer operational.

Accordingly, on October 5, 2015, plaintiff commenced this action against the individual defendants Ignazio Giuffre, John Giuffre, Peter Bellina, Chris Erato, John Celardo, and Daniela Giuffre-Celardo, seeking to recover the wages that were awarded to plaintiff in the *Drumgold v. Giuffre* action. In his complaint, plaintiff states that defendants engaged in a regular pattern of making deductions from his earned wages for reasons other than those allowed under New York Labor Law § 193 (Moreno affirmation, exhibit U, ¶ 10). Plaintiff claims that he did not authorize those deductions, and that defendants' practices were unlawful (*Id.* at ¶ 11). Plaintiff alleges that defendants were all his joint employers, and therefore, are all liable for the unlawful wage deductions (*Id.* at ¶ 21).

Plaintiff now moves for summary judgment on his complaint. In support of his motion, plaintiff contends that defendants violated New York Labor Law § 193 by making deductions from his commissions for chargebacks, such as car repair orders, returned warranties, payoff shortages (paying off customer's loan on a previous car), rebate shortages, cost differences, and when a customer failed to complete payment for a car. Further, plaintiff argues that defendants deducted the full amount of the chargeback from his wages, when they were only supposed to deduct a

percentage of the chargeback.

Plaintiff also argues that all defendants must be deemed to be his employer under Labor Law § 190(3). Plaintiff argues that all the defendants had the power to hire and fire him. They also supervised his work and maintained his employment records. Plaintiff argues that as officers of Giuffre, defendants had overall operational control of the car dealerships, possessed an ownership interest, controlled significant functions of the business, and determined employees' salaries and made hiring decisions. Therefore, defendants should be deemed to be employers, under the Labor Law, subject to individual liability for unpaid wages.

Specifically, with respect to John Giuffre, plaintiff argues that there is no dispute that he is the owner and general manager of the Giuffre dealerships. Further, plaintiff argues that at his deposition, John Giuffre testified that he calculated and authorized: adjustments, chargebacks, deductions and other alterations, to his employees' pay (see Moreno affirmation, exhibit J at 75). Moreover, at his deposition, Ignazio Giuffre testified that John Giuffre was substantially involved in the day-to-day operations of the Giuffre dealerships (see Moreno affirmation, exhibit A at 11). Accordingly, plaintiff argues that he has established that John Giuffre was his employer.

With respect to Ignazio Giuffre (Ignazio), plaintiff argues that Ignazio was the used car sales manager during the time he worked as a car salesman at Giuffre (Moreno affirmation, exhibit A at 18). Ignazio interviewed and hired plaintiff to work at Giuffre Hyundai (Moreno affirmation, exhibit D at 36-37). At that interview, Ignazio told plaintiff that he would receive a 20% commission each month based on the number of cars he sold (*id.*). According to plaintiff, as the used car sales manager Ignazio had the power to hire plaintiff, supervise and control plaintiff's employment, and set plaintiff's pay rate (Moreno affirmation, exhibit J, at 23-25, 49; exhibit L, at 64-67).

With respect to Peter Bellina (Bellina), plaintiff argues that at his deposition Bellina testified that he was the general manager of Giuffre Hyundai from 2001-2010 (see Moreno Affirmation, exhibit L). However, in a 2013 affidavit submitted in the *Giuffre Hyundai, Ltd. v Hyundai Motors America* action, Bellina stated that he was the general manager of Giuffre Hyundai at that time (see Moreno affirmation, exhibit M). Thus, according to his own sworn testimony, Bellina was the general manager during the time plaintiff was employed at Giuffre Hyundai from 2009-2012.

Plaintiff argues further that Bellina testified at his deposition that he had the authority to hire and fire sales people and tell them what to do (Moreno affirmation, exhibit L at 48-49, 51). Plaintiff notes that in an unrelated action *Cinturati v Giuffre Hyundai Ltd.*, (Sup Ct, Kings County, Index No. 500030/2009). Bellina testified that, in this family run business, he would do whatever it took to make the business run (see Moreno affirmation, exhibit H at 30, 36). Plaintiff claims that Bellina oversaw the new and used car sales departments, the sales managers, the finance managers, and the inventory (*id.*). Plaintiff also submitted evidence that Bellina approved salesperson chargebacks (see Moreno affirmation, exhibit O).

With respect to Chris Erato (Erato), plaintiff argues that, in the complaint filed in *Giuffre Hyundai, Ltd. v Hyundai Motors America*, Erato is identified as a vice president of Giuffre (Moreno affirmation, exhibit G). Further, plaintiff states that Erato supervised his work while he was in the showroom, or anytime Erato came into the Giuffre Hyundai dealership (Moreno affirmation, exhibit D at 90).

With respect to Daniela Giuffre-Celardo (Giuffre-Celardo), plaintiff argues that, at her deposition, Giuffre-Celardo testified that she was the comptroller of Giuffre, that she was in charge of signing off on payroll checks including plaintiff's payroll, and that she would fix his pay if there

was a discrepancy (Moreno affirmation, exhibit P, at 17; exhibit Q at 17-18, 35-36, 45).

Plaintiff also argues that since defendants failed to produce documents pertaining to his wages, they cannot disprove his claims. Plaintiff notes that, at her deposition, Giuffre-Celardo testified that she did not have any payroll records for plaintiff's earnings. Rather, she testified that all plaintiff's payroll records were lost because of water damage sustained by the Giuffre Hyundai facility caused by Hurricane Sandy (see Moreno affirmation, exhibit P, at 25, 65-66). Plaintiff argues that during the inquest in *Drumgold v Giuffre Auto Group,* he gave detailed testimony about the work he performed for Giuffre and that the judge in that case found his testimony credible, and awarded him $47,336 in back wages (see Moreno affirmation, exhibit R).

Accordingly, plaintiff argues that he established that the chargebacks were unlawful, that as his employer defendants are personally liable for those charge backs, and that the amount of the chargebacks have been established.

In opposition, defendants argue that the deductions from plaintiff's commission were lawful because, as part of his employment at Giuffre Hyundai, plaintiff was required to execute a written "Pay Plan" agreement (Pay Plan) which included the terms of his base salary, commissions and draws (see Martin affirmation, exhibit B). Defendants submit two Pay Plan agreements: one executed by plaintiff in April 2009 (2009 Pay Plan) and the other signed by plaintiff but undated, although labeled with the date "January 2012" (2012 Pay Plan) (*id.*). Defendants argue that the 2012 Pay Plan states that commissions are earned upon the completed delivery of a vehicle and only after all funds related to the transaction have been received by the company. Therefore, according to defendants, any monies paid to the salesperson prior to the completion of that transaction were considered an advance on future commissions, and subject to reversal or adjustment in the event the full amount of the funds were not received by Giuffre (see Martin

affirmation, Exhibit B).

Further, defendants argue that only John Giuffre was plaintiff's employer and that Ignazio, Erato, Bellina, Giuffre-Celardo, and John Celardo (Celardo) were not plaintiff's employer under Labor Law §§ 190 and 193. With respect to Ignazio, defendants argue that he was the used car sales manager and had no authority, control, or supervision over plaintiff (Moreno affirmation, Exhibit A at 18, 33-37). Rather, he only had authority to hire and fire people in the used car department (*id.* at 33). With respect to Erato, defendants argue that he held the position of sales manager of Giuffre Mazda and Mitsubishi from April 2009 through mid-2010 when he transitioned to the role of parts and service director (Moreno affirmation, Exhibit K at 26-28). With respect to Giuffre-Celardo, defendants argue that her responsibilities involved the finances of Giuffre, and those duties do not equate to employer status (Moreno affirmation, Exhibit P at 9, 20, 31). With respect to Bellina, defendants argue that he worked as general manager for a limited period during plaintiff's employment, from 2009 through 2010, after which he transferred to the position of finance director (Moreno affirmation, Exhibit L at 9, 30-31). Thereafter, Bellina spent the majority of his time at Giuffre Kia (*Id.*). With respect to Celardo, defendants note that plaintiff does not make any factual allegations that Celardo was his employer.

Defendants also cross-move for summary judgment dismissing the complaint on the ground that the damages alleged by plaintiff are unsubstantiated. Defendants argue that since the damages award in *Drumgold v Giuffre Auto Group* was pursuant to a default, that award is not binding on them, since they did not have a full and fair opportunity to litigate that issue.

In reply, plaintiff argues that defendants' cross motion is untimely. Pursuant to the parties so ordered stipulation dated November 30, 2017, the parties were to file dispositive motions within 90 days of the date of the filing of the note of issue (NYSCEF Doc. # 67). Here, the note of issue

was filed on February 20, 2018 (NYSCEF Doc. #70). Therefore, defendants had until May 21, 2018 to file their motion. However, defendants filed their cross motion for summary judgment on July 20, 2018, two months after the 90 days had expired, and therefore it is untimely (*Brill v. City of New York*, 2 N.Y.3d 648 [2004]; *Appleyard v. Tigges*, 2019 WL 1601506 [1st Dep't 2019]).

Although the parties stipulated to extend defendants' time to respond to the plaintiff's summary judgment motion, this did not extend the deadline for defendants to file their cross-motion for summary judgment motion as this deadline was set by a court order. While there is a line of cases holding that an untimely cross motion may be considered on its merits when it addresses the same issues as the timely motion (*see Lapin v. Atlantic Realty Apts. Co.*, 48 A.D.3d 337 [1st Dep't 2008]), these cases have been called into doubt by other First Department decisions (*see Kershaw v. Hospital for Special Surgery*, 114 A.D.3d 75, 86-88 [1st Dep't 2013]).

Moreover, the decision to consider such an untimely cross-motion is a matter of discretion (*id.*). Here, it would be improper to consider the defendants' untimely cross-motion without good cause shown. The stipulations extending defendants' time to oppose the plaintiff's summary judgment motion do not state that defendants may also file a cross-motion, and plaintiff likely relied on this fact in consenting to extend defendants' time to oppose his summary judgment motion. Thus, it would be unfair to plaintiff, and would afford defendants an unfair advantage, to consider the defendants' cross-motion without a showing of good cause for the delay (*id.*). Accordingly, the cross-motion for summary judgment will be denied as untimely.

Plaintiff also argues that defendants have conceded that John Giuffre was plaintiff's employer. With respect to the remaining defendants, plaintiff argues that he has established that each one was an employer for purposes of the Labor Law. Plaintiff also argues that defendants do not dispute that deductions were taken from his commissions. Specifically, plaintiff argues that in

their sworn testimony defendants have acknowledged that they made chargebacks to plaintiff's commissions after delivery of the vehicle, and after funds related to that transfer were received by Giuffre. Further, with respect to the 2012 Pay Plan relied upon by defendants, plaintiff disputes the authenticity of that document noting that it was produced on May 16, 2017, well after discovery ended in this action. Plaintiff also notes that, assuming the validity of the 2012 Pay Plan, since it was executed in January 2012, the terms of that Pay Plan would only apply from January 2012 through August 2012, when plaintiff's employment with Giuffre ended. Thus, the terms of the 2012 Pay Plan would not apply to commissions he earned from April 2009 through December 2011. Plaintiff notes further that the terms of the 2009 Pay Plan do not contain any language regarding when he "earned" his commissions. Therefore, any deductions made to his earned commissions from April 2009 through December 2011, were unlawful under the Labor Law § 193. In any event, plaintiff contends that the 2012 Pay Plan must be disregarded as it was put into place during the *Drumgold v Giuffre Auto Group* litigation as an improper attempt to limit his rights.

Plaintiff also argues that there is no dispute that defendants claim that his employment records are unavailable because they were lost during Hurricane Sandy. However, according to plaintiff, lost records do not inure to the benefit of defendants. Rather, in the absence of employment records, an employee need only present sufficient evidence to show the amount and extent of the uncompensated work. Plaintiff argues that in the *Drumgold v Giuffre Auto Group* litigation, the court (Nina Kurtz, Referee) found his testimony regarding the amount and extent of uncompensated work, to be credible. Further, plaintiff argues that defendants have not submitted any evidence to refute his calculation of damages.

Discussion

It is well-established that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016]). The burden then shifts to the motion's opponent "to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Sumitomo Mitsui Banking Corp. v Credit Suisse*, 89 AD3d 561, 563 [1st Dep't 2011], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*O'Brien v. Port Auth. of N.Y. and N.J.*, 29 NY3d 27, 37 [2017], citing *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Plaintiff argues that all of the defendants are his employers, and therefore liable for unlawful deductions from his commissions. Labor Law §190 (3) defines employer as "any person, corporation, limited liability company, or association employing any individual in any corporation, industry, trade, business or service." Courts look to a four-factor "economic reality" test to determine whether this definition has been met—namely whether the alleged employer "(1) had the power to hire and fire the employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; (4) and maintained employment records" (*Matter of Carver v State*, 87 AD3d 25, 30 [2d Dept 2011], *affd* 26 NY3d 272 [2015], quoting *Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 [2d Cir 1999]; *see also Lauria v Heffernan*, 607 F Supp2d 403, 409 [EDNY 2009]).

While no single factor is controlling (*Zheng v Liberty Apparel Co. Inc.*, 355 F3d 61, 72 [2d Cir 2003]), the overarching consideration is whether the entity or individual "possessed the power to control the worker in question" (*Herman v RSR Sec. Servs. Ltd.*, 172 F3d at 139). This does not require "continuous monitoring of employees, looking over their shoulders at all times, or any sort

of absolute control of one's employees" since control may be restricted, "or exercised only occasionally, without removing the employment relationship." (*Herman v RSR Sec. Servs. Ltd.*, 172 F3d at 139).

Defendants have conceded that defendant John Giuffre was plaintiff's employer during the time plaintiff worked for Giuffre Hyundai. Further, plaintiff has not made any factual allegations regarding whether defendant John Celardo was his employer and therefore, plaintiff is not entitled to summary judgment on his claims against John Celardo.

With respect to Peter Bellina, there is no dispute that he was the general manager from 2001 through 2010 (see Moreno affirmation, exhibit L at 9, 51). However, Bellina testified at his deposition that in late 2009/early 2010, he transferred to the position of Finance Director and undertook entirely different responsibilities, which did not include supervising plaintiff's work (Moreno affirmation, exhibit L at 9, 21, 30-31, 60-61, 66-67). The conflicting testimony and evidence regarding Bellina's role as general manager cannot be resolved on summary judgment.

With respect to defendant Ignazio Giuffre, there is a question of fact about whether he was plaintiff's employer. At his deposition, plaintiff testified that he was interviewed and hired by Ignazio (see Moreno affirmation, exhibit D at 36-37). However, at his deposition, Ignazio testified that he could only hire workers for his department, the used car department, and that his duties, which included buying and repairing used cars, varied significantly from that of a sales manager and did not include managing the sales force. (see Moreno affirmation, exhibit A at 22-25, 33). Given that plaintiff was a salesperson and did not work within the used car department, there is a question of fact regarding whether Ignazio was plaintiff's employer.

With respect to Erato, he was a vice president at Giuffre, and assisted in running the day-to-day operations of Giuffre Hyundai. At his deposition in an unrelated case, *Cinturati v Giuffre*

Hyundai Limited, John Giuffre testified that Erato ran all the Giuffre used car departments (see Moreno affirmation, exhibit I). At his deposition, plaintiff testified that Erato supervised his work in the showroom (see Moreno affirmation, exhibit D at 13-23). Erato testified at his deposition that he did not have the authority to hire or fire plaintiff, and that he was the sales manager of Giuffre Mazda and Mitsubishi from 2009-2010, at which point he was made the parts and service director (see Moreno affirmation, exhibit K at 26, 28, 55). In view of the conflicting testimony regarding Erato's authority at Giuffre, there is a question of fact regarding whether he was plaintiff's employer

With respect to Giuffre-Celardo, plaintiff alleges that she was the comptroller of Giuffre, and that she ran the office and prepared monthly financial statements including the payroll (see Moreno affirmation, exhibit Q at 35). Further, Giuffre-Celardo was in charge of plaintiff's payroll and, if there were any issues with his payroll, Giuffre-Celardo would fix it (*Id.* at 17). However, Giuffre-Celardo did not have the authority to and was not responsible for determining the changes to an individual's pay, nor did she determine plaintiff's rate and method of pay (Moreno affirmation, exhibit P at 19-20, 22-23). Thus, there is a question of fact as to whether Giuffre-Celardo can be considered plaintiff's employer for purposes of the Labor Law.

With respect to the issue of wages, plaintiff's commission is considered a "wage" under Labor Law § 190 (1). Labor Law § 193 prohibits an employer from making "any deduction from the wages of an employee" unless permitted by law or authorized by the employee for "insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization, and similar payments for the benefit of the employee" (Labor Law § 193 [1] [a], [b]; *see Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 616-617 [2008]). It is undisputed that the deductions

made to plaintiff's final compensation are not within the categories of permissible deductions delineated in Labor Law § 193. Their legality, therefore, depends on when plaintiff's commission was "earned" and became a "wage" that was subject to the restrictions of section 193 (*see Pachter*, 10 NY3d at 616-617). If the adjustments are made before the commission is earned, section 193 does not prohibit them. But, if the charges were subtracted after the commission was earned, the deductions were unlawful (*id.*; *Maldonado v La Nueva Rampa, Inc.*, 2012 WL 1669341, at *8 [SDNY 2012] [stating that "[t]he purpose of Labor Law § 193 is to prohibit employers from making unauthorized deductions from wages [and therefore] to place the risk of loss for such things as damaged, spoiled merchandise, or lost profits on the employer"]).

Under the common law, "'a broker who produces a person ready and willing to enter into a contract upon his employer's terms . . . has earned his commissions'" (*Srour v Dwelling Quest Corp.*, 5 NY3d 874, 875 [2005], quoting *Feinberg Bros. Agency v Berted Realty Co.*, 70 NY2d 828, 830 [1987]). While this common law rule is usually used in the context of contracts for the sale of real estate, it also applies to the sale of goods and services and, it is well settled that parties to a transaction are free to depart from the common law by entering into a different arrangement (see *e.g. Srour v Dwelling Quest Corp.*, 5 NY3d at 875; *Lane—Real Estate Dept. Store v Lawlet Corp.*, 28 NY2d 36, 42 [1971]). Since the parties "'are free to add whatever conditions they may wish to their agreement'" they may provide that the computation of a commission will include certain downward adjustments from gross sales, billings or receivables. In that event, the commission will not be deemed "earned" or vested until computation of the agreed-upon formula (*Srour*, 5 NY3d at 875).

Here, there is no dispute that deductions were made from plaintiff's earnings. Further, the 2009 Pay Plan, which plaintiff agreed to, indicated that his commissions were subject to

recalculation for "payoff shortages, shortages due to costing errors, all after sale costing errors, tickets related to the sale of a car for demo, business cards, short COD or deposit" (see Martin affirmation, exhibit B). However, unlike the 2012 Pay Plan, the 2009 Pay Plan does not state when a commission is considered earned for purposes of the Labor Law. In the absence of a governing written instrument indicating when a commission is "earned" and becomes a "wage," by the default common-law rule that ties the earning of a commission to the employee's production of a ready, willing and able purchaser of the services is determinative of when a commission is earned (*see Pachter*, 10 NY3d at 618-19). Thus, from April 2009 to January 2012, plaintiff's commissions were earned when he produced a ready, willing and able buyer for a car and any chargebacks from his commissions, other than those listed in the 2009 Pay Plan, were unlawful.

With respect to the period January 2012 through August 2012, the January 2012 Pay Plan explicitly changes when the commission is considered "earned" as provided under the Labor Law, and states that "[a]ny monies paid to the salesperson prior to the completion of the transaction, if any, shall be considered an advance on future commissions and are subject to reversal or adjustment in the event that funds are not received or charged back to the Company" (Martin affirmation, exhibit B). Although plaintiff disputes the authenticity of this document, it is sufficient to raise an issue of fact regarding the lawfulness of the deductions for the period January 2012 through August 2012.

Turning to the issue of damages, an employee who brings suit under the Labor Law for unpaid wages has the burden of proving that he performed work for which he was not properly compensated (*Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 [1946], *superseded by statute on other grounds as stated in Carter v. Panama Canal Co.*, 463 F.2d 1289, 1293 [D.C. Cir. 1972]). However, "where an employer has failed to maintain proper records, wage underpayments

may be calculated by reference to the best evidence available, and the burden shifts to the employer to negate the reasonableness of the calculations" (*Gelco Builders, Inc. v. Holtzman*, 168 A.D.2d 232, 232 [1st Dep't 1990]).

Contrary to defendants' contentions, this relaxed burden shifting analysis is applicable here even though the defendants allegedly did not intentionally destroy or fail to maintain the records, but rather the records were destroyed during Hurricane Sandy (*see Dervisholli v Triangle Gen. Constrs. Inc.*, 2016 WL 6902135, * 3 [EDNY 2016][where defendants' records were destroyed during Hurricane Sandy, the plaintiff bears a relaxed evidentiary burden of showing damages]). Here, plaintiff has submitted testimony from the inquest on damages in the *Drumgold v Giuffre Auto Group* action which details the work he performed for Giuffre, the commissions he received, and the deductions which were made from his paycheck, which totaled approximately $1,300 per month (Moreno affirmation exhibit R at 18-21). Although defendants contend that plaintiff's testimony is unreliable because he could not recall exactly in which months the chargebacks occurred and admitted that chargebacks may not have occurred every month (Moreno affirmation exhibit D at 71, 74, 87), it is well-settled "that it is possible for a plaintiff to meet this burden through estimates based on his own recollection" and even though the results are approximate (*id.*; *see also A. Uliano & Sons Ltd. v. New York State Dept. of Labor*, 97 A.D.3d 664 [2d Dep't 2012]).

The burden thus shifts to defendants to "come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence" (*Anderson*, 328 U.S. at 687-88). Defendants, however, are unable to do so. Thus, plaintiff is entitled to recover unpaid wages from defendant John Giuffre in the amount of $1,300 per month from August 2009 through December 2011 totaling $37,700.

Finally, as the prevailing party, plaintiff is entitled to recover attorneys' fees and liquidated

damages against defendant John Giuffre. New York Labor Law §§ 198(1-a) provides that in an action for unpaid wages in which the employee prevails, the court shall allow such employee to recover the full amount of the underpayment, all reasonable attorneys' fees, prejudgment interest, and unless an employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law, an additional amount as liquidated damages equal to one hundred percent of the total amount of wages found to be due. Here, plaintiff has prevailed on a substantial part of his claim against defendant John Giuffre, who has not provided a good faith basis for the underpayment of plaintiff's wages (*see Mendez v. Radec Corp.*, 907 F.Supp.2d 353, 357 [WDNY 2012] [holding that plaintiff was prevailing party where he was granted partial summary judgment on issue of liability on two of his claims]).

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted as against defendant John Giuffre on the issue of whether he was plaintiff's employer and on liability for the underpayment of plaintiff's wages from August 2009 through December 2011, and is otherwise denied; and it is further

ORDERED that the remaining claims are severed and continued; and it is further

ORDERED that the defendants' cross-motion for summary judgment is denied as untimely; and it is further

ORDERED that plaintiff is entitled to recover from defendant John Giuffre the amount of $37,700 for the period August 2009 through December 2011, plus liquidated damages in the amount of $37,700, totaling $75,400 plus statutory interest from December 31, 2011, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff is also entitled to recover reasonable attorneys' fees incurred in connection with this action against defendant John Giuffre; and it is further

ORDERED that the hearing on attorneys' fees shall be held after the trial of this action.

4/29/19 NYNY
DATE

PAUL A. GOETZ, J.S.C.

Hon. Paul A. Goetz, JSC

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION	
		GRANTED	DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	REFERENCE