Faley v Boyne
2019 NY Slip Op 32987(U)
October 10, 2019
Supreme Court, New York County
Docket Number: 158124/2017
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** **PART** **IAS MOTION 2EFM**

Justice

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THOMAS FALEY,

Plaintiff,

- v -

CHRISTOPHER BOYNE and C. BOYNE PAINTING AND INTERIOR REMODELING CORP.,

Defendants.

---X

INDEX NO. 158124/2017

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 28, 29, 30

were read on this motion to/for SUMMARY JUDGMENT.

In this Labor Law action, plaintiff Thomas Faley moves, pursuant to CPLR 3212, for summary judgment on his causes of action against defendants Christopher Boyne ("Boyne") and C. Boyne Painting and Interior Remodeling Corp. ("Boyne Painting") (collectively "defendants") (Doc. 20-26). Defendants oppose the motion (Doc. 28-29).[1] After oral argument, and after a review of the parties' papers and the relevant statutes and caselaw, it is ordered that the motion is **granted**.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff worked for Boyne Painting from November 3, 2015 through April 22, 2016 (Doc. 1 at 3). Plaintiff commenced the instant action on September 11, 2017, by filing a

[1] This Court allowed defendants to file late papers in opposition to plaintiff's motion for summary judgment (Doc. 27).

summons and complaint (Doc. 1). In the complaint, plaintiff alleged two causes of action: (1) a violation of Labor Law § 650 and its supporting regulations; and (2) a violation of Labor Law § 195. Specifically, plaintiff claimed that he worked six days a week, in excess of 40 hours per week, and that defendants failed to pay him 1½ times his regular pay rate for the overtime hours (Doc. 1 at 5-6). Moreover, he alleged that defendants failed to monitor and/or properly record the actual hours that he worked and that they failed to provide him with accurate wage statements and a written notice of his pay rate (Doc. 1 at 5-6). In their answer, defendants raised various affirmative defenses, including that plaintiff was an independent contractor not entitled to the protections of the Labor Law (Doc. 4).

During discovery, defendants failed to comply with plaintiff's discovery demands. Following a status conference on November 27, 2018, they were admonished by this Court to comply with the prior compliance orders or face preclusion of their evidence at trial (Doc. 13). Despite this warning, defendants failed to fulfil this Court's directives and, by order entered March 27, 2019 (the "3/27/2019 order"), they were precluded from introducing any evidence at trial (Doc. 18).

In the instant motion (motion sequence 001), plaintiff moves, pursuant to CPLR 3212, for summary judgment against defendants on both of his causes of action. In support of his motion, plaintiff submits the pleadings (Doc. 23), defendants' answer (Doc. 24), the 3/27/2019 order (Doc. 25) and his own affidavit (Doc. 26). In his affidavit, plaintiff claims that he worked for defendants as a painter (Doc. 26). Plaintiff also claims that Boyne hired him to work at Boyne Painting and that he supervised plaintiff's work, paid him his wages, and ultimately terminated him in May 2016 (Doc. 26). He averred that "[d]efendants never provided [him] with a written notice of [his] rate of pay, or paystubs" (Doc. 26). Moreover, plaintiff stated that he generally

worked from 7:00 am to 3:30 pm, six (6) days a week, and was paid $250 in cash (Doc. 26). According to plaintiff, he was paid this amount regardless of the hours that he worked per week (Doc. 26).[2]

In opposition, defendants argue that plaintiff is not an employee entitled to the protections of the Labor Láw statute because he received a valid 1099 form and did not object to it (Doc. 28-29). According to defendants, the existence of this "valid" 1099 form creates an issue of fact as to whether the Labor Law applies (Doc. 28). A copy of the form allegedly provided to plaintiff is annexed to defendants' papers in opposition to plaintiff's summary judgment motion (Doc. 29). Defendants also argue that this Court should grant them "reverse" summary judgment and dismiss the complaint as against Boyne, arguing that Boyne is a shareholder of Boyne Painting and is thus shielded from liability (Doc. 28).

LEGAL CONCLUSIONS:

"The 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" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]; *see* CPLR 3212 (b); *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact (*see Mazurek v Metro. Museum of*

[2] Plaintiff claims that the wages owed to him total "$12,764.71, which included unpaid overtime, wage notice violations, and liquidated damages under New York Law" (Doc. 26). Although he states that a copy of a spreadsheet detailing the above calculations was annexed as "Exhibit A" (Doc. 26), the referenced documents was not attached.

Art, 27 AD3d 227, 228 [1st Dept 2006]). If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

Under both the Fair Labor Standards Act ("FLSA") and the New York Labor Law ("NYLL"), "once an employee works 40 hours in a week, he [or she] must be paid 'one and one-half times his [or her] regular rate' for all excess hours" (*Martinez v Dannys Athens Diner Inc.*, 2017 WL 6335908, *2 [SD NY, Dec. 5, 2017, No. 16-cv-7468 (RJS)] [internal quotation marks, brackets and citations omitted]). Akin to the FLSA, "[t]o establish liability under the Labor Law [Statute] on a claim for unpaid overtime, the employee has the burden of proving that he or she performed work for which he or she was not properly compensated, and the employer had actual or constructive knowledge of that work" (*O'Donnell v Jef Golf Corp.*, 173 AD3d 1528, 1528 [3rd Dept 2019]; *see Kuebel v Black & Decker Inc.*, 643 F3d 352, 361 [2d Cir 2011]; *Shang Shing Chang v. Wang,* 2018 WL 1258801, *1–2, 2018 US Dist LEXIS 40121, *2-3 [ED NY, Mar. 12, 2018, No. 15-CV-4385 (FB) (ST)]; *Aponte v Modern Furniture Mfr. Co., LLC.*, 2016 WL 5372799, *11, 2016 US Dist LEXIS 131408, *29 [ED NY, Sept. 26, 2016, No. 14-CV-4813 [ADS] [AKT]). Moreover, "at summary judgment, if an employer's records are inaccurate or inadequate, an employee need only present 'sufficient evidence to show the amount and extent of [the uncompensated work] as a matter of just and reasonable inference'" (*Kuebel v Black & Decker Inc.*, 643 F3d at 362, quoting *Anderson v Mt. Clemens Poetry Co.*, 328 US 680, 687 [1946]; *see Berrios v Nicholas Zito Racing Stable, Inc.*, 849 F Supp 2d 372, 379 [ED NY 2012]; *O'Donnell v Jef Golf Corp.*, 173 AD3d at 1529). Notably, "[t]his burden is not high and may be

satisfied through estimates based on an employee's own recollection and testimony" (*O'Donnell v Jef Golf Corp.*, 173 AD3d at 1529).

Turning first to plaintiff's claims for unpaid wages, this Court finds that, in light of defendants' failure during discovery to provide plaintiff with any record keeping evidence of employment, plaintiff is entitled to a more lenient burden of proof (*see Anderson v Mt. Clemens Pottery Co.*, 328 US 680, 687 [1946], *revd* 328 US 680 [1946]; *Kuebel v Black & Decker Inc.*, 643 F3d at 364). Furthermore, this Court finds that plaintiff has satisfied this burden. In his affidavit, plaintiff provides, *inter alia*, the specific dates of his employment, the approximate hours that he worked for defendants, and the wages paid by defendants per week (*see Maldonado v La Nueva Rampa, Inc.*, 2012 WL 1669341, *3, 2012 US Dist LEXIS 67058, *7 [SD NY, May 14, 2012, No. 10 Civ. 8195 (LLS) (JLC)]; *Rodriguez v Queens Convenience Deli Corp.*, WL 2011 4962397, *2-3, 2011 US Dist LEXIS 120478, *5-6 [ED NY, Oct. 18, 2011, No. 09-cv-1089 (KAM) (SMG)]; *compare Awan v Durrani*, 2015 WL 4000139, *14-15, 2015 US Dist LEXIS 86171, *47 [ED NY, July 1, 2015, No. 14- cv -4562 [SIL)]). Plaintiff also avers that Boyne acted in a supervisory role, establishing that Boyne had at least constructive knowledge of plaintiff's work and hours. Thus, there is sufficient evidence to ascertain a just and reasonable inference for the uncompensated work. This Court also finds that plaintiff has fulfilled his burden on his motion seeking summary judgment as against defendants on his Labor Law § 195 claim. Plaintiff's affidavit affirms that he was never provided a written notice of his rate of pay or paystubs as required by Labor Law § 195 (3).

The burden shifts to defendants to "show by evidence rather than conjecture the extent of overtime worked" (*Kuebel v Black & Decker Inc.*, 643 F3d at 364, quoting *Anderson v Mt. Clemens Poetry Co.*, 328 US at 686), however, this Court finds that they have failed to satisfy

their burden because defendants have not proffered any proof in opposition to plaintiff's motion seeking summary judgment on his claims for overtime compensation. Moreover, in light of defendants' failure to establish that the "act or omission giving rise to such action was in good faith," plaintiff is also entitled to liquidated damages (*Conroy v Millennium Taximeter Corp.*, 2018 WL 5253111, *3-4, 2018 US Dist LEXIS 180885, *8-11 [ED NY, Oct. 22, 2018]; *compare O'Donnell v Jef Golf Corp.*, 173 AD3d at 1532). For similar reasons, defendants also fail to raise a triable issue of fact with respect to plaintiff's Labor Law § 195 claim. Pursuant to Labor Law § 198 (1-d), plaintiff is also entitled to recover wage-statement statutory damages since defendants failed to demonstrate their compliance with Labor Law § 195 (3) (*see Gamero v Koodo Sushi Corp.*, 272 F Supp 3d 481 n 14, 511 [SD NY 2017]; Labor Law § 198 [1-d]).

Although defendants argue, relying on the existence of a 1099 form, that plaintiff is not entitled to summary judgment because there is an issue of fact as to whether he was an employee (*see Johnson v FedEx Home Delivery,* 2011 WL 6153425, *14, US Dist LEXIS 142425, *38 [ED NY, Dec. 12, 2011, No. 04-CV-4935 JG -VVP]; *Dryden Mut. Ins. Co. v Goessi*, 117 AD3d 1512, 1515 [4th Dept 2014]), this Court rejects this argument. The referenced form was not provided to plaintiff during discovery, and it is nevertheless inadmissible at trial given the 3/27/2019 order (*see Mahgoub v 880 Realty, LLC*, 150 AD3d 1216, 1219 [2d Dept 2017]). Thus, it is insufficient to raise a triable issue of material fact precluding summary judgment (*see Meslin v George*, 119 AD3d 915, 916 [2d Dept 2014]; *see also Gibbs v St Barnabas Hosp.*, 16 NY3d 74, 82 [2010]). Defendants' specific argument regarding reverse summary judgment as to Boyne is also without merit because plaintiff sued Boyne in his capacity as employer, not as a shareholder of the entity (*see Ishin v QRT Mgt., LLC*, 133 AD3d 449, 450-451 [1st Dept 2015]; *Bonito v Avalon Partners, Inc.*, 106 AD3d 625, 625-626 [1st Dept 2013]; *Martinez v Alubon,*

Ltd., 111 AD3d 500, 501 [2013], *lv dismissed* 23 NY3d 939 [2014]). Based on the foregoing, the motion is granted.

The remaining arguments are either without merit or need not be addressed given the findings above.

In accordance with the foregoing, it is hereby:

ORDERED that plaintiff's motion seeking summary judgment on his complaint is granted and the matter is referred to a Judicial Hearing Officer to determine the amount of damages he is entitled to; and it is further

ORDERED that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "Local Rules" link), shall assign this matter to an available Special Referee to determine as specified above; it is further

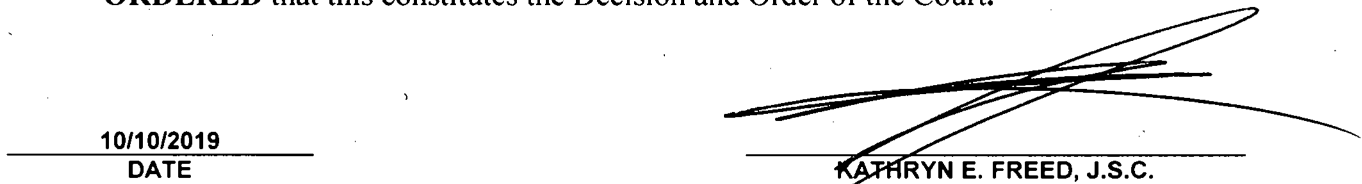
ORDERED that plaintiff's counsel shall serve a copy of this order with notice of entry on defendants within 20 days and that counsel for plaintiff shall, after thirty days from service of

those papers, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at http://www.nycourts.gov/courts/ljd/supctmanh/refpart-infosheet-10-09.pdf) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee's Part in accordance with the Rules of that Part; it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion and it is further

ORDERED that this constitutes the Decision and Order of the Court.



10/10/2019
DATE

KATHRYN E. FREED, J.S.C.

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