SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY **PART** IAS MOTION 56EFM

Justice

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ROSALIE CEDENO, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED WHO WERE EMPLOYED BY ABLE HEALTH CARE SERVICE, INC., D/B/A ABLE HEALTH CARE SERVICES-HEMPSTEAD, INC., ABLE HEALTH CARE SERVICE, INC.-CHHA, AND ABLE HEALTH CARE SERVICE, INC.-LHCSA,

Plaintiff,

- v -

ABLE HEALTH CARE SERVICE, INC., ABLE HEALTH CARE SERVICE, INC.-CHHA, ABLE HEALTH CARE SERVICE, INC.-LHCSA, AND/OR ANY OTHER RELATED ENTITIES

Defendants.

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INDEX NO. 154435/2018

MOTION DATE 07/02/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85 were read on this motion to/for JUDGMENT - SUMMARY.

In this putative class action to recover for several employers' failure to abide by state and federal minimum wage and maximum-hour requirements, the defendants move for summary judgment dismissing the complaint. The plaintiff expressly withdraws her causes of action to recover unpaid spread-of-hours compensation, unpaid reimbursement for employee expenses, and unpaid laundry expenses for home health-aide uniforms, and otherwise opposes the motion. The motion is granted to the extent that those causes of action are dismissed, and the motion otherwise is denied.

The plaintiff is a home health-care aide. The defendants are several private agencies that placed home health-care aides in the households of their clients who needed such services. The plaintiff alleges that, at some point, all the defendants were her employer. The plaintiff

seeks to recover wages and benefits that she alleges she was statutorily and contractually entitled to receive pursuant to Labor Law § 190 *et seq.*, § 663, § 651 *et seq.*, and § 650 *et seq.*, 12 NYCRR 142-2.1, 142-2.2, 142-2.4, 142-2.10, 142-2.14, 142-2.5(c), Public Health Law § 3614-c, and Admin. Code of City of N.Y. (Ad. Code) § 6-109.

In her complaint, the plaintiff specifically asserted that, beginning in April 2012 and continuing through the present, the defendants maintained a policy and practice of requiring her regularly to work in excess of 10 hours per day, without providing the proper hourly compensation for all hours worked, including failing to pay the lawful minimum wage rate for travel time between worksites, and overtime compensation for all hours worked in excess of 40 hours in any given week, as well as unpaid "spread-of-hours" compensation for work days on which she was required to be at her job for more than 10 hours notwithstanding that she actually worked less than 10 hours on those days.

The federal Fair Labor Standards Act (29 USC §§ 201-219; hereinafter the FLSA), Labor Law articles 6, 7, and 19, and title 12, chapter II, subchapter B, part 142 of the New York Code Rules and Regulations codify an employer's obligations to pay its employees at a certain minimum rate of pay. The FLSA fixes a nationwide minimum hourly wage and a maximum number of hours in a work week for employees in most industries. It provides, however, that "[n]o provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter" (29 USC § 218[a]). This

> "Savings Clause operates . . . to allow states, municipalities, or the federal government to pass more protective wage and hour laws in the labor law context. Thus, based upon the face of the statute, the Savings Clause indicates simply that Congress did not intend to preempt the entire labor law field—in the context of labor law statutes, the FLSA merely sets the floor for wages owed and the ceiling for hours that can be worked . . . It is clear that New York and other states are free to legislate in the labor law context in order to set a higher minimum wage or a lower maximum workweek"

(*DeSilva v North Shore-Long Isl. Jewish Health Sys.*, 770 F Supp 2d 497, 517-518 [ED NY 2011]).

New York has availed itself of the opportunity to legislate in this regard. As relevant here, in New York, "[e]very employer shall pay to each of its employees for each hour worked a wage of not less than: . . . $7.15 on and after January 1, 2007, $8.00 on and after December 31, 2013, [and] $8.75 on and after December 31, 2014" (Labor Law § 652[1]; *see* 12 NYCRR 142-2.1[a]). Restrictions on the number of hours per week that an employer may compel an employee to work also are codified in the FLSA, the Labor Law, and NYCRR title 12.
An employer is obligated to pay an employee for overtime at a wage rate of one-and-one-half times the employee's regular rate or, if no regular rate has been fixed, at one-and-one-half times the basic minimum hourly rate, in the manner and pursuant to the methods prescribed by the FLSA (*see* 12 NYCRR 142-2.2). "The applicable overtime rate shall be paid for each workweek [to] non-residential employees for working time over 40 hours" and for "residential employees for working time over 44 hours" (*id*; s*ee Matter of Aldeen v Industrial Appeals Bd.*, 82 AD3d 1220 [2d Dept 2011]; *Lanzetta v Florio's Enters.*, 763 F Supp 2d 615 [SD NY 2011]). Moreover, "[a]n employee shall receive one hour's pay at the basic minimum hourly wage rate, in addition to the minimum wage required in this Part for any day in which . . . the spread of hours exceeds 10 hours" (12 NYCRR 142-2.4; M*atter of Aldeen v Industrial Appeals Bd.*, 82 AD3d 1220 [2d Dept 2011]).

As noted, the plaintiff, in her opposition papers, expressly withdraws her claims for unpaid spread-of-hours compensation, for the defendants' alleged failure to launder and maintain her uniforms, and for the defendants' alleged failure to reimburse her for employee expenses. Nonetheless, there remain triable issues of facts as to the plaintiff's other causes of action.

The defendants contend that the defendant Able Health Care Service, Inc., is not the plaintiff's true employer, and that only Able Health Care Services-Hempstead, Inc., Able Health

Care Services, Inc.-CHHA, and Able Health Care Services, Inc.-LHCSA were her employers. The plaintiff counters that all the defendants were her joint employers. There has been only limited discovery so far (*see* CPLR 3212[f]; *Peg Bandwith, LLC v Optical Communications*, 150 AD3d 625, 626 [1st Dept 2017]), and there is much information that is solely within the knowledge and possession of the defendants (*see Baldasano v Bank of N.Y.*, 199 AD2d 184, 185 [1st Dept 1993]) that would be necessary to resolve this issue.

"A joint employer relationship may be found to exist where there is sufficient evidence that the respondent had immediate control over the other company's employees" (*National Labor Relations Bd. v Solid Waste Servs, Inc.*, 38 F3d 93, 94 [2d Cir 1994]). "The joint employer doctrine applies where there is no single integrated enterprise, but where two employers 'handle certain aspects of their employer-employee relationship jointly'" (*Fowler v Scores Holding Co.*, 677 F Supp 2d 673, 681 [SD NY 2009], quoting *Arculeo v On-Site Sale & Mktg., LLC*, 425 F3d 193, 197-198 [2d Cir 2005]; *see Griffin v Sirva, Inc.*, 835 F3d 283, 292 [2d Cir 2016]).

Labor Law § 190 defines an employer as "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service." "In determining who is an 'employer' for purposes of the N[ew] Y[ork] L[abor] L[aw], courts utilize an 'economic reality' analysis, where 'the overarching concern is whether the alleged employer possessed the power to control the workers in question'" (*Ponce v Lajaunie*, 2015 NY Slip Op 31216[U], * 4 [Sup Ct, N.Y. County, Jul. 15, 2015], quoting *Herman v RSR Sec. Services Ltd.*, 172 F3d 132, 139 [2d Cir 1999]). This analysis includes evaluating such factors as "'whether the alleged employer (1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records'" (*Irizarry v Catsimatidis*, 722 F3d 99, 105 [2d Cir 2013], quoting *Barfield v New York City Health & Hosps. Corp.*, 537 F3d 132, 142 [2d Cir 2008]).

An entity may also be found to be an employer if it has functional control over a worker (*see Barfield v New York City Health & Hosps. Corp.*, 537 F3d at 142). Factors to consider for functional control can include (1) whether the alleged employer's premises and equipment were used for the individual's work; (2) whether there was "business that could or did shift...from one putative joint employer to another;" (3) the extent to which an individual "performed a discrete line-job that was integral to the alleged employer's process of production," and (4) the degree of control and supervision (*Zheng v Liberty Apparel Co.*, 335 F3d 61, 66-67 [2d Cir 2003]). Because the issue of whether an entity is a joint employer "is a mixed question of law and fact," it is '"especially well-suited for jury determination and summary judgment may be granted only when reasonable minds could not differ on the issue'" (*Rodriguez v Metropolitan Cable Communications, Inc.*, 2011 NY Slip Op 33287[U], * [Sup Ct, Queens County, Jul. 26, 2011], quoting *Mendell v Greenberg*, 927 F2d 667, 673 [2d Cir 1991]).

The complaint alleges that Able Health Care Services, Inc., had control over the plaintiff's work schedules and terms of employment. In the absence of discovery, the plaintiff has yet to be able to develop information concerning that defendant's practices and policies concerning her work and the extent to which Able Health Care Services, Inc., exerted control over the other defendants. Discovery is thus required before the court may determine whether a triable issue of fact exists on the issue of whether Able Health Care Service, Inc., jointly employed the plaintiff with its co-defendants (*see Macchio v Michael's Elec. Supply Corp.*, 149 AD3d 718, 720 [2d Dept 2017]).

With respect to the plaintiff's claims for unpaid minimum wages for travel time and for in-service training, the defendants have not sustained their burden on this summary judgment motion by showing that they fully paid her compensation for that time. As to the claims for unpaid overtime wages at a time-and-a-half rate of pay, the documentary evidence submitted by the defendants does not resolve all factual issues as to whether all of those wages were paid, since some of the paystubs that they submitted indicate that the plaintiff was paid only straight

time on several occasions despite obviously working more than 40 hours during the relevant week as a non-residential, i.e. non-live-in, employee.

Contrary to the defendants' contention, a cause of action for failure to pay the full value of wages that were promised and contracted for, and not just the minimum wage, is recognized under the Labor Law even though they correctly argue that the FLSA only permits recovery of the unpaid minimum wage. While "the FLSA is unavailing where wages do not fall below the statutory minimum and hours do not rise above the overtime threshold . . . . [p]laintiffs may, however, have a gap-time claim pursuant to the NYLL" (*Nakahata v New York-Presbyterian Healthcare Systems*, 723 F3d 192, 201-202 [2d Cir 2013]; *see generally Cromwell v. New York City Health & Hosps. Corp.*, 983 F Supp 2d 269, 271 [SD NY 2013]). Stated another way, the Labor Law "provides the right to recover full wages, benefits and wage supplements and liquidated damages accrued during the six years previous to the commencing of an action. Courts have awarded straight time rates higher than the minimum wage, where the parties agreed to the rate" (*Coley v Vannguard Urban Improvement Assn.*, 2018 US Dist LEXIS 50787, *27, Index No. 12-CV-5565[PKC][RER] [ED NY. Mar. 29, 2018] [citation omitted]); *see Denoyer v PMI Sec. Prot. Inc.*, 2018 US Dist LEXIS 11700, *8-9, Index No. 15-CV-4834 [KMK][JCM] [SD NY, Jan. 23, 2018]).

The defendants have not established, prima facie, that the plaintiff did not work a sufficient number of hours for her to assert minimum-wage, maximum-hour claims. In any event, the documentary evidence submitted by the parties reveals a disputed issue of fact as to the number of hours that the plaintiff actually worked for the defendants.

The defendants have not established their entitlement to judgment as a matter of law dismissing the plaintiff's wage parity claims under Public Health Law § 3614-c and Ad. Code § 6-109, which respectively set the minimum amount of total compensation that employers must pay home health care aides in order to receive Medicaid reimbursements for reimbursable care provided in New York City and Westchester, Suffolk, and Nassau Counties, and the minimum

compensation for any employee who works for an entity that contracts with the City of New York to provide services. Such home care aides fall into two main categories: home health aides (HHAs) and personal care aides (PCAs). The state law was enacted to address the pay gap that existed between HHAs and PCAs, and creates what is commonly known as a "wage parity" claim. In this regard, the defendants failed to establish, prima facie, that they either paid the plaintiff the minimum of $14.09 per hour to which she was entitled, as they apparently paid her only $13.00 per hour during her first three months of employment, or that said minimum did not apply to them. Moreover, discovery is necessary to ascertain whether any of the defendants contracted with the City to provide home health care services to a municipal or private facility or in accordance with a City contract.

Contrary to the defendants' contention, a determination as to whether the plaintiff would be a proper class representative is premature at this juncture, except as to the causes of action that she expressly withdrew (*see Moreno v Future Health Servs., Inc.*, 2014 NY Slip Op 50449[U], 43 Misc 3d 1202[A] [Sup Ct, Kings County 2014]). Hence, that branch of the defendants' motion that seeks summary judgment dismissing the other putative class action claims must be denied. CPLR § 902 states, in relevant part:

> "Within sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained. An order under this section may be conditional, and may be altered or amended before the decision on the merits on the court's own motion or on motion of the parties. The action may be maintained as a class action only if the court finds that the prerequisites under section 901 have been satisfied."

As explained by the Appellate Division, First Department,

> "In order to determine if the requirements set forth in CPLR 901 are met, and to assess the considerations listed in CPLR 902, limited discovery must be conducted. Preclass discovery allows the plaintiffs to determine whether the prerequisites of a class action . . .may be satisfied. Indeed, the purpose of preclass certification discovery is to ascertain the dimensions of the group of individuals who share plaintiffs' grievance. However: it has also been held that a motion to dismiss may be made before a motion to determine the propriety of the class and a hearing under CPLR 902 where it appears conclusively from the

> complaint and from the affidavits that there was as a matter of law no basis for class action relief"

(*Downing v First Lenox Terrace Assoc.*, 107 AD3d 86, 89 [1st Dept 2013] [citations and internal quotation marks omitted]; *see Rodriguez v Metro. Cable Communications*, 79 AD3d 841 [2d 2010]; *Katz v NVF Co.*, 100 AD2d 470, 474 [1st Dept 1984]; *Wojciechowski v Republic Steel Corp.*, 67 AD2d 830, 831 [4th Dept. 1979]). Inasmuch as it does not appear conclusively from the complaint and affidavits that there is no basis for class certification, and because only limited document discovery has been conducted, while additional discovery is necessary with respect to numerous issues in this action, further discovery on the issue of the propriety of class certification must be part on the ongoing discovery process.

In light of the foregoing, it is

ORDERED that the defendants' motion for summary judgment is granted to the extent that the plaintiff's causes of action to recover for unpaid spread-of-hours compensation, unpaid reimbursement for employee expenses, and unpaid laundry expenses for home health-aide uniforms are dismissed, and the motion is otherwise denied, without prejudice to renewal upon completion of discovery; and it is further,

ORDERED that the parties shall appear for a status conference on January 28, 2020, at 11:15 a.m.

This constitutes the Decision and Order of the court.

12/11/2019
DATE

JOHN J. KELLEY, J.S.C.

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