Rutella v National Sec. Corp.
2019 NY Slip Op 33908(U)
December 13, 2019
Supreme Court, Nassau County
Docket Number: 601067-16
Judge: Timothy S. Driscoll
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x

NICO RUTELLA, individually and on behalf of other persons similarly situated who were employed by NATIONAL SECURITIES CORPORATION, NATIONAL HOLDINGS CORPORATION and/or any other entities affiliated with or controlled by NATIONAL SECURITIES CORPORATION and/or NATIONAL HOLDINGS CORPORATION,

Plaintiffs,

-against-

NATIONAL SECURITIES CORPORATION, NATIONAL HOLDINGS CORPORATION and/or any other entities affiliated with or controlled by NATIONAL SECURITIES CORPORATION and/or NATIONAL HOLDINGS CORPORATION,

Defendants.

----------x

TRIAL/IAS PART: 10

NASSAU COUNTY

Index No: 601067-16
Motion Seq. No. 1
Submission Date: 12/6/19

Papers Read on these Motions:

Affirmation in Support with Exhibits.....x
Memorandum of Law in Support.....x
Affirmation in Opposition with Exhibits.....x
Memorandum of Law in Opposition.....x
Reply Affirmation with Exhibit.....x
Reply Memorandum of Law.....x

This matter is before the Court on the motion filed by defendants National Securities Corporation ("NSC") and National Holdings Corporation ("National" and collectively, "Defendants") to dismiss the Complaint against National pursuant to CPLR § 3211(a)(7). For the following reasons, Defendants' motion is denied. The parties are reminded of the conference scheduled for March 4, 2020 at 9:30 a.m.

BACKGROUND

A. Relief Requested

On April 8, 2016, Defendants moved for an Order: 1) pursuant to CPLR § 3211(a)(1) and (a)(7) dismissing the Complaint against NSC and/or compelling arbitration pursuant to CPLR §§ 2201 and 7503(a), and 2) pursuant to CPLR § 3211(a)(7), dismissing the Complaint against National with prejudice. Defendants argued, with respect to NSC, that the action must be dismissed and/or stayed and arbitration compelled based on a valid arbitration agreement. As to National, Defendants contended that Plaintiff failed to state a claim.

In its Decision and Order dated October 3, 2016 (the "Prior Order"), the Court, *inter alia*, granted Defendants' motion to the extent that it stayed the instant action pending arbitration of plaintiff Nico Rutella's ("Plaintiff" or "Rutella") individual claims. In its Decision and Order dated January 3, 2019 (the "Appellate Division Decision"), the Appellate Division, Second Department held that the parties did not agree to arbitrate Plaintiff's claims in this putative class action and Defendants' motion to compel arbitration of Plaintiff's individual claims and to stay proceedings pending the arbitration should have been denied.

As the Appellate Division Decision renders Defendants' motion against NSC academic, the Court will only address Defendants' motion to dismiss the Complaint against National for failure to state a claim.

B. The Parties' History

The parties' history is set forth in detail in the Prior Order, which is incorporated by reference as if set forth fully herein. The Complaint, *see* Buzzetta Affm. at Ex. A, alleges as follows:

Rutella was employed by Defendant[1] from approximately August 2013 through February 2016. Plaintiff alleges, upon information and belief, that NSC and National are a "single integrated enterprise" under New York Labor Law that employed and/or jointly employed Plaintiff and those similarly situated. NSC is allegedly a wholly owned subsidiary of National and Defendants "share a common business purpose[ ], ownership, corporate officers, offices, and

[1] The Complaint does not specify which Defendant employed Rutella.

maintain common control, oversight and direction over the work performed by Plaintiff." *See* Compl. at ¶ 10.

The Class Allegations are that 1) this action is brought on behalf of Plaintiff and a putative class consisting of every other person who worked for Defendants selling or marketing financial products in any capacity within the State of New York at any time between February 2010 and the present, 2) the putative class is so numerous that joinder of all members is impracticable, the size of the putative class is believed to be in excess of fifty individuals, and the names of all potential members of the putative class are not known, 3) the questions of law and fact common to the putative class predominate over any questions affecting only individual members, 4) the claims of Plaintiff are typical of the claims of the putative class, 5) Plaintiff and his counsel will fairly and adequately protect the interests of the putative class, and 6) a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

Beginning in or around February 2010, Defendants employed numerous individuals to perform tasks related to selling and/or marketing financial products. Plaintiff and, upon information and belief, members of the putative class were regularly required to perform work for Defendants without receiving minimum wages or overtime compensation for all hours worked. Rutella worked for Defendants [sic] from approximately August 2013 to February 2016. While working for Defendants, Rutella primarily made telephone calls to individuals in an attempt to sell financial services and products. Rutella typically worked approximately fifty-five hours per week consisting of work 1) from Monday through Friday, 8:00 a.m. to 6:00 p.m., and 2) on Saturday from 9:00 a.m. to 2:00 p.m. During his employment, Rutella was not paid an hourly wage. Instead, Rutella was paid on commission. Rutella received a monthly payment of $1,800.00 from Defendants, but this monthly payment was deducted from any commissions that he earned. As a result, Rutella routinely worked more than forty hours each week, but did not receive overtime wages at time and one-half his regular rate of pay for hours in excess of forty that he worked. In addition, Rutella did not receive minimum wages for all of the hours that he worked.

While employed by Defendants, Rutella 1) did not have any meaningful duties and was

not responsible for decisions regarding the hiring, firing, demotion or promotion of employees, 2) did not exercise independent judgment and discretion on matters of significance, and 3) was subject to control by Defendants with respect to the means used to complete the tasks that he performed for Defendants. Plaintiff believes that Defendants wilfully disregarded and purposefully evaded record keeping requirements or applicable New York law by failing to maintain proper and complete time sheets or payroll records.

The Complaint asserts two causes of action: 1) Defendants violated New York Labor Law Article 19 § 663 and 12 N.Y.C.R.R. § 142-2.1 by wilfully failing to pay Plaintiff and other members of the putative class minimum wages for all hours worked, and 2) Defendants violated New York Labor Law Article 19 § 663 and 12 N.Y.C.R.R. § 142-2.2 by wilfully failing to pay overtime compensation to Plaintiff and other members of the putative class.

C. The Parties' Positions

Defendants contend that Rutella fails to provide any basis for naming National as a defendant. An entity that is merely affiliated with a plaintiff's alleged employer is not liable for the employer's acts in the absence of extraordinary circumstances not pleaded here. Rutella was not employed by NSC – he was an independent contractor – but even if he had been, Rutella merely identifies National as the holding company of NSC and nothing more. Additionally, Rutella should be denied leave to replead against National as no allegations can establish an employment relationship between Rutella and National.

Plaintiff contends that it did not merely allege that National is a wholly owned subsidiary of NSC but rather, alleged that National and NSC are a single integrated enterprise that employed Plaintiffs and those similarly situated. Plaintiff alleges that 1) Defendants share a common business purpose, ownership, corporate officers, offices, and maintain common control, oversight and direction over the work performed by Plaintiff, 2) the work Plaintiff performed and the work performed by those similarly situated simultaneously benefitted Defendants, and 3) Plaintiff was subject to control by Defendants over the means used to complete the tasks he performed on behalf of Defendants. In the event the Court finds Plaintiff's Complaint to be insufficient, he requests leave to replead. Defendants do not offer any factual support for their contention that no allegations could be made to establish an employment relationship between Rutella and National.

RULING OF THE COURT

A. Motion to Dismiss

On a motion to dismiss pursuant to CPLR § 3211(a)(7), the court is required to "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 141 (2017), quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). Dismissal is warranted where the non-movant "fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." *Connaughton*, 29 N.Y.3d at 142.

B. Relevant Legal Principles

The single and joint employer doctrines permit an employee to assert employer liability against an entity that is not formally his or her employer. *Zuccarini v. PVH Corp.*, No. 151755-16, 2016 WL 827393, at *2 (Sup. Ct. N.Y. Cty. Feb. 29, 2016). Particularly, "[t]he single employer doctrine provides that, in appropriate circumstances, an employee, who is technically employed on the books of one entity, which is deemed to be part of a larger single-employer entity, may impose liability for certain violations of employment law not only on the nominal employer but also on another entity comprising part of the single integrated employer." *Id.*, quoting *Fowler v. Scores Holding Co., Inc.*, 677 F. Supp. 2d 673, 680-81 (S.D.N.Y. 2009).

The following factors are examined to determine whether two nominally distinct entities constitute one single employer: "1) interrelation of operations, 2) centralized control of labor relations, 3) common management, and 4) common ownership of financial control." *Zuccarini*, 2016 WL 827393, at *2, quoting *Shiflett v. Scores Holding Co.*, 601 F. App'x 28, 30 (2d Cir. 2015). While no one factor is determinative, the central concern is control of labor relations. *Zuccarini*, 2016 WL 827393, at *2. *Cf. Batilo v. Mary Manning Walsh Nursing Home Co., Inc.*, 140 A.D.3d 637, 638 (1st Dept. 2016).

C. Application of the Principles to the Instant Action

Defendants' motion to dismiss the Complaint against National for failure to state a claim is denied. According the Complaint every favorable inference, as the Court must at the motion to

dismiss phase, Plaintiff alleges that National and NSC constitute a single employer by asserting, upon information and belief, that 1) NSC is a wholly owned subsidiary of National, 2) Defendants share a common business purpose, ownership, corporate officers, offices, and maintained common control, oversight and direction over Plaintiff's work, and 3) the work performed by Plaintiff and others similarly situated simultaneously benefitted Defendants. *See* Compl. ¶ 10.

CONCLUSION

Defendants' motion to dismiss the Complaint against National is denied. The parties are reminded of the conference scheduled for March 4, 2020 at 9:30 a.m.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
December 13, 2019

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
DEC 18 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE