

Garzon v 68-60 Austin St. Realty Corp.
2021 NY Slip Op 33194(U)
January 7, 2021
Supreme Court, Queens County
Docket Number: Index Number 342/2017
Judge: Joseph Risi
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HON. JOSEPH RISI, A.J.S.C.

IAS PART 3

FILED

**1/8/2021
10:39 AM**

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JOSE GARZON,

Index Number 342/2017

**COUNTY CLERK
QUEENS COUNTY**

Plaintiff,

-against-

DECISION AFTER INQUEST

68-60 AUSTIN STREET REALTY CORP., and ILYA
MIKHAILOV, and EDMUND LAU, as Individuals,

Defendant.

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The plaintiff commenced this action to recover monetary damages for underpayment of minimum wage in violation of New York Labor Law §652, overtime provisions in violation of New York Labor Law §650 and 12 N.Y.C.R.R. §142-2.2, violation of notice and recordkeeping requirements under New York Labor Law §195(1), and attorney's fees, costs, and interests under New York Labor Law §653, arising from the time of plaintiff's employment as a parking garage attendant.

Plaintiff was employed by 68-60 Austin Street Realty Corp. ("Austin Street Realty"), located at 68-60 Austin Street, Forest Hills, New York 11375. Defendants, Austin Street Realty, Ilya Mikhailov, and Edmund Lau, (hereinafter referred to as "defendants"), filed an answer on March 9, 2017, but failed to appear at the Trial Scheduling Part on July 9, 2019. Accordingly, pursuant to Order of the same date, the Hon. Jeremy S. Weinstein struck the defendants' answer and the matter was referred to the undersigned for an inquest on the issue of damages. An inquest was held on July 30, 2019, and based upon the credible testimony and admissible evidence adduced therein, the court finds as follows:

I. INTRODUCTION

Plaintiff, Jose Garzon ("Garzon"), alleges defendants' failed to pay him the statutory minimum for approximately six years of employment (*see* New York Labor Law §652). Plaintiff seeks to recover damages in the amount of \$21,228.99 for the minimum wage violations, \$4,901.27 for overtime violations, and \$25,552.50 in attorney fees. The defendants failed to adequately compensate Mr. Garzon pursuant to the statutory minimum wage pursuant to New York Labor Law ("NYLL") §652, as well as reasonable attorney's fees and costs under NYLL §650.

At the inquest, the plaintiff was the sole witness. He testified and submitted into evidence, *inter alia*, proof of prior payments by defendants and copies of timesheets regarding

the hours allegedly worked.

II. FINDINGS OF FACT

The plaintiff, who is 78 years old, testified that he was employed as a parking garage attendant located at 68-60 Austin Street, Forest Hills, New York 11375. Plaintiff alleges the Defendants own and operate the parking garage. Mr. Garzon began his employment in 2004 and continued until his termination in February 2016. According to the plaintiff, he was an hourly employee, his schedule was set by his employers, and would be paid monthly by check.

Mr. Garzon contends from 2010 to 2014, defendants scheduled him to work nine-hour shifts, five days a week, for a total of forty-five hours per week. He further testified that from 2014 to 2016, his schedule was altered by the Defendants, reducing his schedule to nine-hour shifts, three days a week, for a total of twenty-seven hours per week. Garzon testified throughout his employment at Austin Street Realty, he was paid \$5 per hour and that rate never increased at any point.

III. DISCUSSION

A. Standard of Proof

A defaulting defendant admits all allegations in the complaint, including the basic issue of liability. (*see Amusement Bus. Underwriters v American Intl. Group*, 66 NY2d 878 [1985]; *Cole-Hatchard v Eggers*, 132 AD3d 718 [2nd Dept. 2015]; *Gonzalez v Wu*, 131 AD3d 1205 [2nd Dept. 2015]). Defendants are "entitled to present testimony and evidence and cross-examine the plaintiff's witnesses at the inquest on damages" (*Minicozzi v Gerbino*, 301 AD2d 580, 581 [2nd Dept. 2003]; *see Rudra v Friedman*, 123 AD3d 1104 [2nd Dept. 2014]; *Toure v Harrison*, 6 AD3d 270 [1st Dept. 2004]). However, the defendants chose to not present any such testimony or cross-examine witnesses at the inquest.

Where a claim is made for unpaid wages under the New York Labor Law, and an employer has failed to comply with its statutory obligation to preserve complete and accurate payroll records. (*see New York Labor Law §§196-a and 661; see also 12 NYCRR §142-2.6*), the plaintiff is entitled to the benefits of a reduced burden of proof with regard to the claim. (*see Carroll v Tangier*, 2015 NY Slip Op 50239[U] [App Term, 1st Dept. 2015]; *see also Matter of Agnello v National Fin. Corp.*, 1 AD3d 850 [1st Dept. 2003]). Furthermore, it is the employer who has the statutory duty to "keep proper records of wages, hours . . . and who is in position to know and produce the most probative facts concerning the nature and amount of work performed." (*Kuebel v Black & Decker Inc.*, 643 F3d 352, 362 [2nd Cir. 2011]; *Jemine v Dennis*, 901 F. Supp. 2d 365, 376 [ED NY 2012]). Likewise, the Labor Law imposes a higher burden on employers who fail to maintain the appropriate records, requiring that they "bear the burden of proving that the complaining employee was paid wages, benefits and supplements." (New York Labor Law §196-a).

B. Statute of Limitations

The limitations period applicable to a minimum wage or overtime claim under the New York Labor Law is six years (*see* NYLL § 663(3)). This action was commenced on January 5, 2017. Thus, plaintiff has viable claims relating back to his date of employment from 2010 through 2016.

Accordingly, based on the credible testimony and admissible evidence submitted, this Courts finds that the defendants failed to adequately compensate Mr. Garzon pursuant to the statutory minimum wage as defined under NYLL §652, as well as reasonable attorney fees and costs under NYLL §650. Furthermore, under NYLL, each Defendant is jointly and severally liable for any damages award. (*See Pineda v. Masonry Constr., Inc.*, 831 F. Supp. 2d 666, 685-86 [S.D.N.Y. 2011]).

IV. DAMAGES

A. Minimum Wage Hour

An employer's obligation to pay its employees at a certain minimum rate of pay codified in Article 19 of the New York Labor Law, and title 12, chapter II, subchapter B, part 142 of the New York Code Rules and Regulations. 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, \$9.00 on and after December 31, 2015 and until December 31, 2016, or, if greater, such other wage as may be established by federal law..." Labor Law § 652(1); *see* 12 NYCRR 142-2.1(a).

Specifically, Plaintiff alleges he was paid an hourly rate of \$5.00. This rate falls below the state and federal minimum wage. (*see* 29 U.S.C. § 206 [federal minimum wage is \$7.25 per hour]; NYLL §652 [lowest minimum wage in New York City was \$7.25 per hour from 10/10/2010 – 12/31/2013; \$8.00 per hour from 1/1/2014 – 12/31/2014; \$8.75 per hour from 1/1/2015 – 12/31/2015; and \$9.00 per hour from 1/1/2016 – 2/29/2016].

Pursuant to Plaintiff's Exhibit 7, below represents the calculations of Mr. Garzon's compensation for his time as a parking attendant.

Dates	Hourly Rate	Time	Wages
10/10/2010 – 12/31/2013	\$5.00	166.71 weeks x 45 hours = 7,501.95	7,501.95 hours x \$5.00 = \$37,509.75
1/1/2014 – 12/31/2014	\$5.00	52 weeks x 27 hours = 1,404	1,404 hours x \$5.00 = \$7,020
1/1/2015 – 12/31/2015	\$5.00	52 weeks x 27 hours = 1,404	1,404 hours x \$5.00 = \$7,020
1/1/2016 – 2/29/2016	\$5.00	8.48 weeks x 27 hours = 228.96	228.96 hours x \$5.00 = \$1,144.80
			Total: \$52, 694.55

However, the regular rate of pay, pursuant to NYLL §652, is calculated below.

Dates	Hourly Rate	Time	Wages
10/10/2010 – 12/31/2013	\$7.25	166.71 weeks x 45 hours = 7,501.95	7,501.95 hours x \$7.25 = \$54,389.14
1/1/2014 – 12/31/2014	\$8.00	52 weeks x 27 hours = 1,404	1,404 hours x \$8.00 = \$11,232
1/1/2015 – 12/31/2015	\$8.75	52 weeks x 27 hours = 1,404	1,404 hours x \$8.75 = \$12,285
1/1/2016 – 2/29/2016	\$9.00	8.48 weeks x 27 hours = 228.96	228.96 hours x \$9.00 = \$2,060.65
			Total: \$79, 966.78

Plaintiff, upon calculated reductions for taxes and other expenses, alleges Defendants were required to pay Mr. Garzon, \$73,923.54. Defendants have paid Mr. Garzon \$52,694.55. Accordingly, Mr. Garzon is entitled to payment of \$21,228.99 in unpaid minimum wage earnings.

B. Attorney's Fees and Costs

NYLL entitles a prevailing plaintiff to his reasonable attorney's fees and costs. (*Najnin v. Dollar Mountain, Inc.*, 2015 U.S. Dist. LEXIS 141811 [S.D.N.Y. Sept. 25, 2015] (citing 29 U.S.C. § 216(b); NYLL §198; and NYLL §663). The party seeking fees bears the burden to demonstrate that his attorneys' fees are reasonable and must provide the court information to assess the fee application (*Reyes*, 2019 U.S. Dist. LEXIS 146885).

Plaintiff's attorney is seeking \$24,239.50 in legal fees. Plaintiff has attached a copy of his attorney's time records as Exhibit 8. Upon further review, Plaintiff's Exhibit 16 established attorney's fees in the amount of \$17,637.50, constituting reasonable fees and costs.


IV. CONCLUSION

Accordingly, after inquest, this court awards damages in the total amount of \$38,866.49 for failure to pay the statutory minimum wage under New York Labor Law § 652, as well as reasonable attorney's fees and costs under New York Labor Law § 650 consisting of \$21,228.99 in back owed wages and \$17,637.50 in attorney's fees..

The County Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: January 7, 2021


 Hon. Joseph Risi, A.J.S.C.

FILED

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