SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. WILLIAM PERRY** **PART** **23**

Justice

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KEVIN LEE, JORDAN SHERMAN, ROBERT PACHECO, ALEXANDRE RAKHMANOV, IGNAZIO BONGIORNO, BESNIK DIBRA, VASYL SKYDANIUK, MICHAEL MADERA, JERMAL LINCOLN, STEVEN BOSA, CESAR PINTO, LASCELLES INGLETON, JASON LIRIANO

Plaintiff,

- v -

INDEPENDENT MECHANICAL, INC., DENKO MECHANICAL, INC., S. DENKO MECHANICAL, INC., SERGEI DENKO, LAURA DENKO,

Defendant.

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INDEX NO. 160681/2017

MOTION DATE 10/01/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70

were read on this motion to/for DISMISS.

Plaintiffs Kevin Lee, Jordan Sherman, Robert Pacheco, Alexandre Rakhmanov, Ignazio Bongiorno, Besnik Dibra, Vasyl Skdaniuk, Michael Madera, Jermal Lincoln, Steven Bosa, Cesar Pinto, Lascelles Ingleton and Jason Liriano bring this class action employment action against Defendants Independent Mechanical Inc. ("Independent"), Denko Mechanical Inc., S. Denko Mechanical Inc., Sergei Denko, the CEO of the three corporations, and Laura Denko, their President. Plaintiffs allege various violations of statutory rights, including: overtime provisions of the New York Labor Law ("NYLL") § 160; anti-discrimination provisions in the New York City Human Rights Law ("NYCHRL"); prevailing wage, benefits, and overtime provisions of NYLL § 120; the requirement that employers furnish their employees with wage statements on each payday containing specific categories of accurate information under the NYLL § 195[3]; and

the requirement of furnishing accurate wage notices at the time of hiring and on an annual basis under NYLL § 195[1].

Plaintiffs allege, inter alia, that they are former employees of Defendants, that Defendants failed to pay them prevailing wages as required by public works contracts, and that for non-public works contracts, Defendants fraudulently represented to contractors/project managers that Plaintiffs had union status in order to secure higher union wages, but that Defendants never passed those higher wages on to Plaintiffs. (NYSCEF Doc No. 44, Am. Cmplt., at ¶¶ 2-6; 44-50.) In perpetrating this fraud, Plaintiffs allege that Sergei Denko frequently directed them to wear union uniforms and falsely represent to Department of Buildings personnel and security guards that they were employed by Denko Mechanical, rather than Independent. (*Id*. at ¶¶ 51-56.)

In the amended complaint, Plaintiffs set forth the following causes of action on behalf of themselves and the class:

1. Breach of contract (*id*., at ¶¶ 246-251);
2. Unjust enrichment (*id*. at ¶¶ 252-258);
3. Quantum meruit (*id*. at ¶¶ 259-265);
4. Failure to furnish wage notices in violation of NYLL § 195[1] and the New York Wage Theft Prevention Act ("NYWTPA") (*id*. at ¶¶ 266-270); and
5. Failure to furnish proper wage statements in violation of NYLL § 195[3] and the NYWTPA (*id*. at ¶¶ 271-276),

in addition to the following causes of action:

6. Fraudulent inducement, on behalf of Plaintiffs Santos, Bosa, and Rakhmanov (*id*. at ¶¶ 277-282);
7. Unpaid overtime under the NYLL and the New York Codes, Rules, and Regulations ("NYCRR"), on behalf of Plaintiffs Rakhmanov, Dibra, and Skydaniuk (*id*. at ¶¶ 283-286);
8. Hostile work environment based on race and racial discrimination, on behalf of Plaintiffs Lee, Santos, Lincoln, Ingleton, and Pinto (*id*. at ¶¶ 287-292);
9. Hostile work environment based on religion, in violation of the NYCHRL, on behalf of Plaintiff Sherman (*id*. at ¶¶ 293-298); and
10. Retaliation in violation of NYLL § 215, on behalf of Plaintiff Lee. (*Id*. at ¶¶ 299-305.)

In motion sequence 003, Defendants move to dismiss causes of action 1-7 and 10 in their entirety, and to dismiss the eighth cause of action as to all Plaintiffs other than Lee. (NYSCEF Doc No. 51, Ms002 Memo at 2.)

Discussion

On a pre-answer motion to dismiss a complaint for failure to state a cause of action, pursuant to CPLR 3211 [a] [7], "the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory." (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121 [1st Dept 2002].) However, "factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003].)

Pursuant to CPLR 3211[a][1], in order to prevail on a motion to dismiss based on documentary evidence, "the documents relied upon must definitively dispose of plaintiff s claim." (*Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248, 248 [1st Dept 1995].) Dismissal pursuant to CPLR 3211[a][1] is warranted only if the documentary evidence submitted "utterly refutes plaintiff's factual allegations" (*Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]) and "conclusively establishes a defense to the asserted claims as a matter of law." (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004] [internal quotation marks omitted].)

Causes of action 1-3 for breach of contract, unjust enrichment, and quantum meruit

In moving to dismiss pursuant to CPLR 3211[a][2], "[s]ubject matter jurisdiction refers to objections that are 'fundamental to the power of adjudication of a court.' 'Lack of jurisdiction'

should not be used to mean merely 'that elements of a cause of action are absent,' but that the matter before the court was not the kind of matter on which the court had power to rule." (*Garcia v Govt. Empls. Ins. Co.*, 130 AD3d 870, 871 [2d Dept 2015], *quoting Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d 200, 202 [2013].)

Defendants argue that this court lacks subject matter jurisdiction over the first three causes of action, as there is no private right of action to enforce prevailing wage regulations. (Ms002 Memo at 10, *citing Cayuga-Onondaga Counties Bd. of Co-op. Educ. Servs. v Sweeney*, 89 NY2d 395, 401-03 [1996].)

This argument is incorrect. (*Cox v NAP Const. Co.*, 10 NY3d 592, 602 [2008] [holding that, in NYLL case, "where a valid statute requires the insertion of provisions intended for the protection of laborers or other groups in contracts relating to matters which are subject to regulation by the State, a contractual obligation is created which may be enforced by action brought by one of the group for whose benefit the provisions have been inserted"].) *Cayuga-Onondaga Counties* is distinguishable, as that case dealt with the Commissioner of Labor's overarching powers to enforce prevailing wage payment requirements for public works, which "may be exercised independently of the position or even existence of a private complainant." (*Cayuga-Onondaga Counties*, 89 NY2d at 403.)

Next, Defendants argue that Plaintiffs fail to state a claim for breach of contract because they are not parties to the public works contracts, six of which are allegedly submitted in support as documentary evidence. (Ms002 Memo at 11; NYSCEF Doc Nos. 29-31, 33-35 [Contracts].)

However, Defendants' submissions do not "definitively dispose of plaintiff's claim[s]." (*Bronxville Knolls*, 221 AD2d at 248.) These are subcontracts to which Defendant Denko Mechanical Inc. is a subcontractor, with Clifford Group Inc. (NYSCEF Doc Nos. 30-31, 35), MBI

Group (NYSCEF Doc No. 33), or Comfort Zone Mechanical Corp. (NYSCEF Doc No. 34) serving as contractor, and there is no indication on their face that the subcontracts pertain to public works or that Defendants have produced "all the relevant contracts for the projects at issue[.]" (*Ansah v A.W.I. Sec. & Investigation, Inc.*, 2014 WL 1398225, at *7-8 [Sup Ct, NY County 2014].)

Plaintiffs' allegations that: they performed work at "The Empire State Building, Grand Central Station, Borough of Manhattan Community College, LaGuardia Community College, Queens College, and the Fashion Institute of Technology" pursuant to public works contracts (Am. Cmplt. at ¶ 2), that Defendants are parties to those public works contracts (*id*. at ¶ 44), that Plaintiffs are third-party beneficiaries thereto (*id*. at ¶ 47), and that Defendants breached the contracts by failing to pay Plaintiffs the prevailing wage (*id*. at ¶ 49), are legally sufficient. (*Perez v Long Island Concrete Inc.*, 203 AD3d 552 [1st Dept, Mar. 17, 2022]; *Jara v Strong Steel Doors*, Inc., 16 Misc 3d 1139[A], at *8-9 [Sup Ct, Kings County 2007].)

Defendants' motion to dismiss the causes of action for unjust enrichment and quantum meruit based on the same "documentary evidence" is denied for the same reason. (Ms002 at 12-13.) Defendants' motion to dismiss these causes of action on the grounds that they are duplicative of the breach of contract claim is denied (*id*.), as Plaintiffs are "not precluded from proceeding on both breach of contract and quasi-contract theories where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue." (*Maldonado v Olympia Mechanical Piping & Heating Corp*., 2003 WL 25519842, at *5 [Sup Ct, NY County 2003], *quoting Curtis Properties Corp. v Greif Companies*, 236 AD2d 237, 238 [1st Dept 1997].) Although Plaintiffs do refer to the breach of the public works contracts (which have not yet been produced) in pleading these causes of action, they also allege that Defendants "fraudulently misrepresented that Plaintiffs were union workers and billed the City and private owners for labor

performed by Plaintiffs at higher union rates. However, Defendants then paid *less than* the union rates." (Am. Cmplt. at ¶¶ 256, 262 [emphasis in original].) As such, these causes of action are not entirely duplicative of the breach of contract claim.

Causes of action 4 and 5 for wage notices and statements under NYLL § 195[1] and [3]

"New York Labor Law § 195[1] requires employers to provide employees a written statement containing the rate and measure of pay, allowances, designated regular payday, and the name, address, and phone number of the employer at the time of hire." (*Ribbler v Chicksation Inc.*, 2018 WL 3632228, at *5 [Sup Ct, NY County 2018].)

Defendants argue that "any claim by plaintiff under prior provision of §195[1] for failure to furnish annual wage notice is enforceable only by the Commissioner of Labor under NYLL §198[1-b] and not by an employee's private right of action." (Ms001 Memo at 13, *quoting Hunter v Planned Bldg. Servs., Inc.*, 2018 WL 3392476, at *4 [Sup Ct, Queens County 2018].) Plaintiffs counter that the Labor Law was amended in 2011 to give individual employees a private right of action. (NYSCEF Doc No. 69, Opposition, at 12, *citing Ribbler*, 2018 WL 3632228.)

Plaintiffs' reading of NYLL § 195[1] is correct, as evidenced by Defendants' own citation to *Hunter*: "the private right of action for violation to recover damages [for failing to provide wage notices] through NYLL § 198 was not available until after the WTPA took effect on April 9, 2011." (2018 WL 3392476 at *3.)

"Labor Law § 195[3] requires employers to provide statements with each payment of wages. This statement must list the dates covered by the payment, the rate and measure of pay, address and phone number of employer, gross wages, deductions, allowances, and net wages. (*Ribbler*, 2018 WL 3632228, at *5.)

Defendants argue that Plaintiffs fail to state a claim for a violation of NYLL § 195[3], as "Plaintiffs only claim that they were entitled to a different wage than the one they were paid, not that the wage they were paid was not included in the statement. Thus, Plaintiffs are not even alleging that this law was broken, only reiterating their other non-viable claims under an inapplicable statute." (Ms001 Memo at 14.)

The court disagrees. Plaintiffs allege that "Defendants did not issue accurate pay stubs to the Plaintiffs and other similarly situated class members, in violation of New York Labor Law § 195[3]." (Am. Cmplt. at ¶ 273.) "Defendants extend no evidence to the contrary. Therefore, plaintiffs have adequately pled a violation of Labor Law § 195[3]." (*Ribbler*, 2018 WL 3632228, at *5.)

Cause of action 6 for fraudulent inducement

"The elements of a claim for fraudulent inducement are: 1) a false representation of material fact, 2) known by the utterer to be untrue, 3) made with the intention of inducing reliance and forbearance from further inquiry, 4) that is justifiably relied upon, and 5) results in damages." (*MBIA Ins. Corp. v Credit Suisse Sec. (USA) LLC*, 32 Misc 3d 758, 773 [Sup Ct, NY County 2011].)

Defendants argue that Plaintiffs' cause of action for fraudulent inducement should be dismissed for lack of specificity, pursuant to CPLR 3016, as Plaintiffs do not name which unions Defendants falsely represented they were members of, or state the union wage rate. (Ms001 Memo at 14-15.) Further, Defendants argue that Plaintiffs are at-will employees and are unable to assert this cause of action.

The allegations underlying the cause of action for fraudulent inducement are sufficiently pled under CPLR 3016, which requires that "the circumstances constituting the wrong shall be

stated in detail." Plaintiffs allege that Defendants falsely represented to Plaintiffs that they would receive union wages, which Defendants knew was untrue, as evidenced by their acts of directing Plaintiffs to wear union uniforms and identify themselves as such, with the intention of inducing Plaintiffs' reliance in order to perform work, that Plaintiffs did in fact rely on those representations and suffered damages by not being paid wages under the union rate because Defendants pocketed them. (Am. Cmplt. at ¶¶ 51-56, 277-282.) Contrary to Defendants assertion, Plaintiffs also specifically identify the union by name, Local Steamfitters Union 638. (*Id*. at ¶ 43.)

"The [amended] complaint here sufficiently sets forth [the required elements for common-law fraudulent inducement] …Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (*Braddock v Braddock*, 60 AD3d 84, 86, 88 [1st Dept 2009].)

Further, Plaintiffs' cause of action is not barred by the at-will employment doctrine. "New York law is clear that absent 'a constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual contract of employment, an employer's right at any time to terminate an employment at will remains unimpaired.'" (*Smalley v Dreyfus Corp.*, 10 NY3d 55, 58 [2008].) As such, "[a]n at-will employee, who has been terminated, can not state a fraudulent inducement claim on the basis of having relied upon the employer's promise not to terminate the contract." (*Laduzinski v Alvarez & Marsal Taxand LLC*, 132 AD3d 164, 168 [1st Dept 2015].) "However, where an at-will employee alleges an injury 'separate and distinct from termination of [his] employment,' he may have a cause of action for fraudulent inducement." (*Id*.)

Here, Plaintiffs' alleged injury is the discrepancy in pay from the union rate versus what they actually received (Am. Cmplt. at ¶ 282), which is "separate and distinct from termination[.]" (*Laduzinski*, 132 AD3d at 168.) Defendants' argument that *Laduzinski* is distinguishable because

it "involves an employee **who accepted a two-year employment contract** and is therefore not an employee at-will" (NYSCEF Doc No. 70, Reply, at 5 [emphasis in original]), is incorrect, as that plaintiff was an at-will employee, despite the fact that he had signed a contract.

Cause of action 7 for overtime wages

Accepting all facts in the amended complaint as true, Plaintiffs adequately plead a cause of action for unpaid overtime wages. (Am. Cmplt. at ¶¶ 283-286; *Ackerman v New York Hosp. Med. Ctr. of Queens*, 127 AD3d 794, 795 [2d Dept 2015] [denying motion to dismiss cause of action for overtime wages where plaintiff alleged that he was an employee of the defendant, that wages were determined on the basis of time, and that overtime compensation was withheld by defendant].) The "documentary evidence" submitted by Defendants to evidence that they actually did pay overtime to Plaintiffs (NYSCEF Doc Nos. 61-64 [singular pay stubs showing overtime pay for 9, 11, and 12 hours]) is insufficient to "utterly refute" their allegations. (*Goshen*, 98 NY2d at 326.) Moreover, "[w]hen the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of action, not whether [he or] she has stated one" (Asgahar v Tringali Realty, Inc., 18 AD3d 408, 409 [2d Dept 2000]).

Cause of action 8 for hostile work environment based on race

"Even one racial epithet is inexcusable … A racially hostile work environment exists when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 310 [2004].)

Defendants argue that Plaintiffs Santos, Lincoln, Ingelton, and Pinto fail to state a cause of action for hostile work environment because they do not allege when Sergei Denko made the racist statements, the statements are "far-fetched," and they do not rise above "a petty slight or trivial

inconvenience." (Ms001 Memo at 16-17.) Defendants also argue that "Lincoln alleges that Mr. Denko repeatedly call him the n-word. [However,] Mr. Lincoln's race is never identified." (*Id*.)

Plaintiffs, however, do identify the race of Lincoln, in addition to the races of each Plaintiff asserting this cause of action. (Am. Cmplt. at ¶ 290 ["Mr. Lee, Mr. Santos, Mr. Lincoln, Mr. Ingleton – … are African Americans – and Mr. Pinto – [is] Puerto Rican"].)

Moreover, Plaintiffs' detailed allegations, accepted as true for the purposes of determining a motion to dismiss *(Frank*, 292 AD2d at 121), sufficiently state a cause of action for hostile work environment based on race. (Am. Cmplt. at ¶¶ 66-88, 98-107, 127-133, 143-149, 159-165, 287-292.) Further, Plaintiffs do not bear the burden of demonstrating that Defendants' alleged discrimination rose above the level of "petty slights and trivial inconveniences" at this stage of the litigation, as that constitutes an affirmative defense to be pled in Defendants' answer. (*Golston-Green v City of New York*, 184 AD3d 24, 42 [2d Dept 2020].)

To the extent that Defendants argue that the claim is time-barred by a three-year statute of limitations, Defendants fail to meet their burden for dismissal under CPLR 3211[a][5]. These Plaintiffs allege that Defendants racially discriminated against them throughout the course of their employment, i.e., for Lincoln and Ingleton, 2015 through 2017 (Am. Cmplt. at ¶¶ 134, 150), for Santos, 2016 through the present (*id*. at ¶ 119), and for Pinto, 2017 through 2019. (*Id*. at ¶ 166.) Plaintiffs commenced this action on December 1, 2017 (NYSCEF Doc No. 2) and moved to amend their complaint on October 7, 2019 (NYSCEF Doc No. 23); however, due to delays from the COVID-19 pandemic, the court granted the motion on February 10, 2021. (NYSCEF Doc No. 47.) Accepting these facts as true, Plaintiffs allegations would not be not time-barred pursuant to the continuing violation doctrine exception. (*See Sculerati v New York Univ.*, 2003 WL 21262371, at *5 [Sup Ct, NY County 2003].)

Cause of action 10 for retaliation

Plaintiffs adequately allege a cause of action for retaliation, as they allege that Lee filed a complaint against Defendants, and that he was fired as a result. (Am. Cmplt. at ¶¶ 299-305; *Harrington v City of New York*, 157 AD3d 582, 585 [1st Dept 2018] ["a plaintiff must show that (1) he/she has engaged in a protected activity, (2) his/her employer was aware of such activity, (3) he/she suffered an adverse employment action based upon the activity, and (4) a causal connection exists between the protected activity and the adverse action"].) Defendants' argument for dismissal is conclusory and unsupported by caselaw. (NYSCEF Doc No. 70, Reply, at 8.) Thus, it is hereby

ORDERED that Defendants' motion sequence 001 for dismissal is denied in its entirety, and it is further

ORDERED that Defendants are directed to serve an answer to the amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to thereafter meet and confer and electronically file a proposed Preliminary Conference Order for the court's review and signature, within thirty (30) days.

9/09/2022					**WILLIAM PERRY, J.S.C.**		
DATE							
CHECK ONE:		**CASE DISPOSED**			**X**	**NON-FINAL DISPOSITION**	
		GRANTED	**X**	**DENIED**		**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**