Achiaw v Orva Shoes, Inc.
2023 NY Slip Op 33950(U)
October 26, 2023
Supreme Court, New York County
Docket Number: Index No. 653215/2022
Judge: Richard Latin

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD LATIN** **PART** **46M**

Justice

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EMMANUEL ACHIAW,

Plaintiff,

- v -

ORVA SHOES, INC.,ELLIOT AIZER, ORVA 34 LLC,ORVA 714 LLC,ORVA 88 LLC,ORVA PERFORM, LLC,ORVADIRECT.COM LLC

Defendant.

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INDEX NO. 653215/2022

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 16, 17, 18, 19, 21, 22, 23, 24, 25

were read on this motion to/for DISMISSAL.

Upon the foregoing documents and after oral argument on the record on July 20, 2023, defendants' motion to dismiss the amended complaint is determined as follows:

Plaintiff commenced the instant action alleging various violations stemming from his employment with Orva, a shoe store, including that he was paid "bi-weekly" instead of weekly, did not receive an annual pay notice or periodic pay statements, and that he should have been entitled to overtime. As a preliminary matter, defendants never sought to dismiss the first cause of action for overtime, acknowledging that it required discovery, and at the oral argument defendants withdrew their claim, without prejudice, that was based on NYLL 191. Likewise, the plaintiff concedes the retroactive effect of the amendment to NYLL 195(1) and, as a result, agrees to the dismissal of the wage notice claim. The causes of action still in controversy relate to plaintiff's unpaid "spread-of-hours" compensation pursuant to a wage order that was promulgated by the Commissioner of the Department of Labor, whether Elliot Aizer has any individual liability, and whether defendants violated NYLL 195(3) in failing to provide pay stubs.

As to the spread-of-hours claim, defendants argue that this claim must be dismissed as the plaintiff earned more than the minimum wage. They cite to *Nam v The Permanent Mission of the Republic of Korea*, among other federal cases, to argue that under the wage orders the spread-of-hours benefit is only available only to those who are paid the minimum wage, and that the only exception to that pertains to the hospitality industry, which Orva does not belong (2023 WL 2138601 [SD NY, February 21, 2023, No. 21-cv-06165, Rochon, J.]).

Plaintiff maintains that employees who are paid above the minimum wage are still entitled to the additional spread-of-hours benefit hour unless they are paid above the minimum wage sufficiently to cover the additional hour. He argues that the federal cases that defendants cite to do not address the actual conflict but deal generally with situations where courts are asked to dismiss blunderbuss complaints where every wage and hour regulation is alleged to be violated.

Here, plaintiff argues that the only relevant spread-of-hours law is a miscellaneous industry wage order, 12 NYCRR 14202.4, that has been interpreted in Department of Labor opinions and state court appellate authority. Specifically, he points to *Seenaraine v Securitas Security Services USA Inc.*, for the proposition that the opinions of the New York State Department of Labor concerning 12 NYCRR 142-2.4 are "neither unreasonable nor irrational, nor . . . in conflict with the plain meaning of the promulgated language" (37 AD3d 700 [2d Dept 2007]). The Department of Labor has previously stated in its opinion letters that, "12 NYCRR §142-2.4 . . . requires that on any day that an employee works a "spread of hours" . . . he must be paid at a minimum: the minimum wage for such hours together with an additional hour of pay at the minimum wage. If, however, the employee's regular wages for those hours worked is equal to or greater than this "spread of hours pay," no additional wages need be paid" (New York Department of Labor Opinion Letter, RO-07-0009, March 16, 2007).

Moreover, plaintiff argues that the Department of Labor's opinion is further supported by the more recent case of *Benitez v Bolla Operating LI Corp.* (189 AD3d 970 [2d Dept 2020]). Both plaintiff and defendants maintain that the language on page 972 of this opinion is dispositive in their favor. The relevant section states as follows:

> "'The spread of hours is the length of the interval between the beginning and end of an employee's workday' (12 NYCRR 146-1.6). On each day on which the spread of hours exceeds 10, an employee is entitled to receive 'spread-of-hours' pay, which is 'one additional hour of pay at the basic minimum hourly rate' (12 NYCRR 146-1.6[a]). Although an employee who earns more than the minimum wage rate ***generally*** is not entitled to receive spread-of-hours pay (*see* 12 NYCRR 142-2.4[a]; *Seenaraine v Securitas Sec. Servs. USA, Inc.*, 37 A.D.3d 700, 701, 830 N.Y.S. 2d 28; *Fermin v Las Delicias Peruanas Rest., Inc.*, 93 F. Supp. 3d 19, 45-46 [E.D. N.Y.]), under the Hospitality Industry Wage Order, "all employees in restaurants and all-year hotels" are entitled to spread-of-hours pay regardless of their regular pay rate (12 NYCRR 146-1.6[d])."
> (*Benitez*, 189 AD3d at 972 [emphasis added]).

Plaintiff mains that the key word here is "generally," meaning that it does not always apply in this manner. Furthermore, he adds that the *Benitez* case pertains to deli market workers and largely concerns 12 NYCRR 146-1.6 and that is why the "under the Hospitality Industry Wage Order" clause follows the general proposition in the last sentence of the above quotation. Defendants argue that the "under the Hospitality Industry Wage Order" clause follows the general proposition because the court is clearly stating the only the exception to the "general" rule. While defendants' inference may ultimately be right, *Benitez* hardly unequivocally states that the hospitality wage order is the only exception for allowing a spread-of-hours benefit to an employee making greater than minimum wage. The clause merely qualifies the general rule under this fact pattern and one can easily envision a different qualifying clause under a different fact pattern. Therefore, in light of the New York State appellate authority and opinion from the Department of Labor, and despite

the abundance of federal cases standing for the opposite, this Court is constrained to deny the branch of the motion seeking to dismiss plaintiff's spread-of-hours claim.

With respect to Aizer, after construing the plaintiff's pleadings liberally, accepting these facts alleged as true, and affording the plaintiff the benefit of every possible inference read in the light most favorable to the plaintiff, the complaint pleads sufficient facts to maintain individual liability against Aizer (*see Goshen v Mutual Life Ins. Co. of New York,* 98 NY2d 314 [2002]). Whether plaintiff will ever be able to prove that Aizer was anything more than a supervisor or needs Aizer's inclusion in order to recover on any of his causes of action are irrelevant considerations at this juncture.

As to the branch of the motion concerning plaintiff's NYLL 195(3) claim, it must survive as New York provides for a provide right of action pursuant to NYLL 198(1-d) and the failure to provide wage statements is a continuing violation that survives the Wage Theft Prevention Act's lack of retroactive application unlike the initial wage notice.

Accordingly, defendants' motion to dismiss is granted solely to the extent that the portion of cause of action count III based on NYLL 195(1) is dismissed and is denied in all other respects; and it is further

ORDERED that defendants shall submit an answer within 20 days of the date of entry of this order.

This constitutes the decision and order of the Court.

10/26/2023
DATE

RICHARD LATIN, 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