

Hichez v United Jewish Council of the E. Side
2021 NY Slip Op 32646(U)
December 13, 2021
Supreme Court, New York County
Docket Number: Index No. 653250/2017
Judge: Phillip Hom
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PHILLIP HOM **PART 2**

Justice

-----X

PIFANIA HICHEZ, CARMEN CARRASCO, SEFERINA
ACOSTA

Plaintiffs,

- v -

UNITED JEWISH COUNCIL OF THE EAST SIDE, HOME
ATTENDANT SERVICE CORP.,

Defendant.

-----X

INDEX NO. 653250/2017

MOTION DATE 07/23/2021

MOTION SEQ. NO. 008

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 008) 185, 186, 187, 188, 189, 190, 191, 192, 193

were read on this motion to/for

DISMISS

Upon the foregoing documents, it is ORDERED that Defendant United Jewish Council of the East Side, Home Attendant Service Corp.'s ("UJC") branch of the motion seeking to dismiss the Amended Complaint under CPLR §3211(a)(7) is denied, and the branch of the motion seeking to dismiss the under CPLR §3211(a)(1) is granted as to Counts I, II and III of the Amended Complaint.

Background

Plaintiffs Pifania Hichez ("Hichez"), Carmen Carrasco ("Carrasco"), and Seferina Acosta ("Acosta") (collectively "Plaintiffs") commenced this putative class action to recover unpaid wages from UJC. Plaintiffs worked for UJC as home care aides and were paid on an hourly basis. Plaintiffs allege, among other things, that UJC failed to pay them minimum wage and

overtime pay, and assert claims for violations of the NY Home Care Worker Wage Parity Act, NY Public Health Law §3614-c and the Fair Wages for New Yorkers Act.

Plaintiffs typically worked 24-hour shifts, caring for elderly individuals day and night, and often working as much as 120 hours a week. Hichez worked for UJC from May 2002 to April 2014. Carrasco worked for UJC from approximately November 2000 to November 2015. Acosta worked for UJC from approximately 2007 to April 20, 2014. UJC filed the present motion to dismiss under CPLR §§ 3211(a)(1) and (7). Plaintiffs oppose the motion.

CPLR § 3211(a)(7) Failure to state cause of action

Under CPLR §3211(a)(7), the court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Ullmann v Norma Kamali, Inc.*, 207 AD2d 691 [1st Dept 1994]). The pleading is to be afforded a liberal construction (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court accepts the facts as alleged in the complaint as true, giving plaintiffs the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory (*Id.* at 87-88).

In the present case, dismissal of the Amended Complaint is not warranted under CPLR §3211 (a)(7) for failure to state a cause of action. The affidavits and the other documents submitted by UJC fail to establish as a matter of law that the Plaintiffs have no cause of action (*Leader v Steinway, Inc.* 180 AD3d 886, 888 [2d Dept 2020]). Plaintiffs have substantially complied with CPLR §3013 and the statements in the pleading are sufficiently particular to give the Court and parties notice of the nature of their action (*Foley v D'Agostino*, 20 AD2d 770 [1st Dept 1964]). Plaintiffs' pleading is sufficient to overcome a motion to dismiss because CPLR §3211(a)(7) dismissals merely address the adequacy of the pleading, and do not reach the

substantive merits of a party's cause of action (*Lieberman v Green*, 139 AD3d 815 [2d Dept 2016]).

The Court finds that Plaintiffs' allegations in the amended complaint state viable causes of action against UJC. Accordingly, the branch of the motion seeking to dismiss the Amended Complaint under CPLR §3211(a)(7) is denied.

CPLR § 3211(a)(1) Documentary evidence

Under CPLR §3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). While "documentary" is not defined by statute, the Courts have listed categories, such as documents reflecting out-of-court transactions, including contracts, deeds, wills, mortgages, and even correspondence, that constitute documentary evidence (*Amsterdam Hospitality Group LLC v. Marshall-Alan Assoc.*, 120 A.D.3d 431 [1st Dept 2014] *citing* David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10 at 22)).

Under the Fair Labor Standards Act of 1938 as amended, employers must pay employees one and one-half times their regular rate for any hours worked over 40 hours per week (12 NYCRR §142-3.2), and an additional hour of pay where the "spread-of-hours" worked exceeds 10 hours (12 NYCRR §142-3.4). Not-for-profit entities may exempt themselves from the statutory minimum wage and related regulations if they certify that their employees are paid a wage, exclusive of allowances, of not less than the minimum wage (Labor Law §652[3][b]). The exemption ends under two circumstances: (1) 60 days after the entity notifies the commissioner that it wishes these provisions to apply to it, or (2) immediately upon the commissioner finding that the entity has failed to pay a wage, exclusive of allowances, of not less than minimum wage

(*id.*, §652[3][c]; *Jimenez v Concepts of Independence*, 2018 NY Slip Op 30257[U], *7 [Sup Ct, NY County 2018]).

The Amended Complaint contains seven causes of action (NYSCEF Doc. No. 188). UJC moves to dismiss the following three causes of action: Count I for failure to pay Plaintiffs the statutorily required minimum wage in violation of NYLL § 652 and 12 NYCRR § 142-3.1 (*Id.* at ¶70); Count II for failure to pay Plaintiffs the statutorily mandated overtime rate for all hours worked in excess of 40 per week in violation of NYLL, Article 19, § 650, and 12 NYCRR § 142-3.2 (*Id.* at ¶74); and Count III for failure to pay Plaintiffs an additional hour of pay at the basic minimum hourly wage rate for every day that Plaintiffs worked a spread-of-hours that exceeded 10 hours in violation of NYLL §§ 190, and 650, and 12 NYCRR § 142-3.4 (*Id.* at ¶78).

In support of its motion, UJC submits, among other things, its November 27, 1981 Statement of Non-Profitmaking Institutions (the “Certification”) as documentary evidence showing it is exempt from the applicable minimum wage regulations and related wage orders (NYSCEF Doc. No. 189). UJC claims that the Certification exempts it from the New York State Minimum Wage Order for Miscellaneous Industries and Occupations (the “Wage Order”, NYSCEF Doc. No. 190), including the obligation to pay minimum wage, overtime and spread-of-hours. UJC claims that the Certification dated November 27, 1981 is still in effect because (a) it has never requested that the Wage Order apply to it, and (b) the Commissioner has never found that UJC failed to pay the required minimum wage (NYSCEF Doc. No. 187 ¶10).

In opposition, Plaintiffs argue that UJC paid them \$10 per hour for 12 hours of daytime weekday work and \$11.10 per hour for 12 hours of daytime work on weekends. Defendant also paid them a single *per diem* payment of \$16.95 each day they worked a 24-hour shift, for a maximum of \$150.15 per day, despite working 24 hour shifts. During the time that Plaintiffs

worked for UJC in 2015, the last year of their employment, employers were required to pay their employees a minimum wage of \$8.75 per hour, and therefore, UJC should have paid the Plaintiffs \$210 per day (Labor Law § 652 [1]). Plaintiffs further argue that UJC did not pay them the overtime hours or spread-of-hours even when Plaintiffs worked hours exceeded 10 hours a day. Plaintiffs further argue that UJC failed to pay the minimum wage that it was statutorily obligated to pay under Labor Law § 652(1) regardless of the non-profitmaking exemption.

In *Jimenez, supra*, another New York County Supreme Court case with analogous facts, defendant moved to dismiss plaintiff's complaint under CPLR §3211(a)(7). Plaintiff also alleged she was not paid for 24 hour shifts, overtime and the additional hour of pay where the "spread-of-hours" exceeds 10 hours. As in the present case, defendant made the Labor Law §652(3)(b) election to be exempt from the minimum wage requirements, overtime and the "spread-of hours" pay. The *Jimenez* court found that defendant was not bound by the minimum wage regulations and related wage orders because it did not request that the wage orders apply to it and the commissioner had not found that defendant failed to pay minimum wage. The court dismissed plaintiff's causes of action for overtime pay and spread of hours pay. (*Jimenez* at *10).

The two cases which Plaintiffs rely upon are distinguishable. The defendants in *Melamed v Americare Certified Special Serv., Inc.*, 2014 NY Slip Op 33296[U] [Sup Ct, Kings County 2014] are two for-profit corporations, headquartered in New York, that are jointly managed by parent corporate entity Care Management, Inc. (*Id.* at *3-4), which is distinguishable to the case at bar because Labor Law §652(3)(b)'s "[n]on-profitmaking institutions" exception does not apply.

In *Smellie v Mount Sinai Hosp.*, 2004 US Dist LEXIS 24006 [SDNY Nov. 24, 2004] the court granted leave to plaintiffs to file a second amended complaint because it had to determine

the preliminary issue of whether the plaintiffs were employees or independent contractors before determining whether Labor Law § 652 applies. The *Smellie* court appears to have wanted to address the worker classification issue before determining the Labor Law issue.

The Court rejects Plaintiffs' argument that the Court should not dismiss their overtime wages and spread-of-hour claims because UJC has not shown it paid statutory minimum wages and that Plaintiffs should be given the opportunity to discover whether the non-profitmaking exemption continued to apply. A party must exhaust available administrative remedies before being permitted to litigate in court (*Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52 [1978]; *YMCA v Rochester Pure Waters Dist.*, 37 NY2d 371 [1975]; see also *Doe v St. Clare's Hosp. & Health Ctr.*, 194 AD2d 365, 366 [1st Dept 1993]). The doctrine of exhaustion of administrative remedies is premised on the principle that a reviewing court usurps an agency's function when it deprives the administrative tribunal of an opportunity to consider the matter, make its ruling, and state the reasons for its action (see *YMCA v Rochester Pure Waters Dist.*, *supra* at 375).

In the present case, Labor Law § 653 gives exclusive authority to the Commissioner of Labor (the "Commissioner") to investigate whether an entity has failed to pay the minimum wage. There is no evidence that the Commissioner ever did an investigation or issued an order in this case that would allow Plaintiffs to seek judicial review of any adverse finding.

While Plaintiffs argue that UJC had to pay the minimum wage under State law, the Court finds that UJC has been exempt from Labor Law § 652 and applicable wage orders since it filed its Certification dated November 27, 1981, making it exempt from current and future applicable wage orders (NYSCEF Doc. No. 189, and 187 at ¶6). UJC has also submitted evidence of a Freedom of Information Law Request ("FOIL") to confirm the existence of the Certification on

December 2015 (NYSCEF Doc. No. 189 and 187 at ¶7). Plaintiffs have failed to prove that UJC requested that the wage orders apply to it, or that the Commissioner found that UJC has failed to pay the required wages (Labor Law §652[3][c], *Jimenez*, at *3). Accordingly, the Court dismisses Plaintiffs’ Counts I, II, and III causes of action, for failure to pay minimum wage, overtime and spread-of-hours pay, respectively.

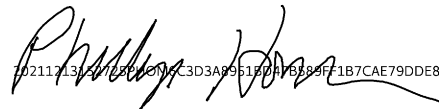
Conclusion

Accordingly, it is,

ORDERED, that the branch of the motion seeking to dismiss the Amended Complaint under CPLR §3211(a)(7) is denied, and it is further ORDERED that the branch of the motion seeking to dismiss under CPLR §3211(a)(1) is granted solely as to Counts I, II and III of the Amended Complaint; and it is further,

ORDERED, UJC shall serve a copy of this Order with Notice of Entry upon all parties, within 30 days of the date of entry.

This constitutes the Decision and Order of the Court.


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December 13, 2021

DATE

PHILLIP HOM, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE