UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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KUJTIM DEMIROVIC *et al.*,

Plaintiffs,

-against-

MEMORANDUM AND ORDER
15 CV 327 (CLP)

FRANKLIN ORTEGA *et al.*,

Defendants.
----------X

POLLAK, United States Magistrate Judge:

This action was commenced on January 21, 2015, by plaintiffs Kujtim Demirovic, Richard Reinoso, Murto Avdalovic, and Senad Perovic (collectively, "plaintiffs") against Franklin Ortega, Rocio Uchofen, and P.O. Italianissimo Ristorante Inc. (the "Restaurant") (collectively, "defendants"), pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., and New York Labor Law ("NYLL") § 650 et seq. Plaintiffs sought to recover unpaid overtime, minimum wages, and spread-of-hours pay, along with applicable liquidated damages, under both the FLSA and NYLL, as well as damages for defendants' failure to provide wage notices and retaliation.[1] On September 21, 2015, the parties consented to have the case reassigned to the undersigned for all purposes.

The Court bifurcated the trial of this matter so that the wage and hour claims under the FLSA and NYLL were presented in the first phase of the trial, while the retaliation claims under those same statutes were presented in a second phase. The first phase of the trial began on

[1]In their Answer filed on March 12, 2015, defendants asserted various counterclaims for conversion, fraud, abuse of process, unjust enrichment, defamation, and civil RICO violations, which were dismissed by this Court on September 15, 2016. On January 31, 2017, this Court also granted the third-party defendants' motion to dismiss the Third Party Complaint.

October 23, 2017 and continued until October 25, 2017. On October 26, 2017, the jury returned a verdict in favor of the plaintiffs and against the Restaurant and defendant Ortega. The jury, however, found that defendant Uchofen was not an "employer" under the FLSA or NYLL and therefore was not liable for the unpaid wages. In the second phase of the trial, held on October 26, 2017, the same jury returned a verdict in favor of the plaintiffs against all defendants, including Uchofen, on plaintiffs' claims of retaliation.

The jury returned its verdicts in the form of special verdicts under Rule 49(a) of the Federal Rules of Civil Procedure. The Court has calculated damages based on the jury's verdicts as set forth below. The Court also grants plaintiffs' motion for liquidated damages on the retaliation claims under Section 215 of the New York Labor Law and plaintiffs' motion for attorney's fees and costs.

DISCUSSION

A. Damages Based on the Jury Verdict in Phase One—the Wage Claims Trial

The Court submitted special verdict forms that asked the jury to make written findings with respect to specific issues of fact. See Fed. R. Civ. P. 49(a), (b); see also Cash v. County of Erie, 654 F.3d 324, 343 (2d Cir. 2011) (setting forth the framework for interpreting general and special verdicts). In entering judgment based on the jury's responses to the questions, the Court is mindful of its duty "to attempt to harmonize the answers, if it is possible under a fair reading of them" and "to reconcile the jury's findings, by exegesis if necessary[.]" Gallic v. Baltimore & Ohio R.R. Co., 372 U.S. 108, 119 (1963).

1. Defendants' Liability

The jury found that, in addition to the Restaurant, Franklin Ortega was plaintiffs' employer within the meaning of the FLSA and the NYLL for the period from January 21, 2009 through December 6, 2014. See Murphy v. Healthshare Human Servs. of N.Y., 254 F. Supp. 3d 392, 404 (E.D.N.Y. 2017) (explaining that "[c]ourts apply the same horizontal joint employment test under federal and New York labor law"). (See Verdict Sheet I[2] at 80). The jury also determined that Rocio Uchofen was not plaintiffs' employer at any time relevant to this litigation. (See id. at 81). Thus, defendants P.O. Italianissimo Ristorante, Inc. and Franklin Ortega are jointly and severally liable as employers for the damages on plaintiffs' wage claims, but defendant Rocio Uchofen is not liable as an employer for such. See N.Y. Lab. Law § 651(6); Drozd v. Vlaval Constr., Inc., No. 09 CV 5122, 2011 WL 9192036, at *5-7 (E.D.N.Y. Oct. 18, 2011), adopted, 2012 WL 4815639 (Oct. 10, 2012).

2. The Wage Claims: Legal Standards

a. Minimum Wage Claims

As indicated on the verdict form, the jury found that the Restaurant and defendant Ortega had failed to pay each of the plaintiffs proper minimum wages in violation of the FLSA and NYLL. An employer who fails to meet minimum wage obligations under the FLSA and the NYLL "shall be liable to the employee or employees affected in the amount of their unpaid minimum wages . . . and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b); see N.Y. Lab. Law § 663(1). Here, the plaintiffs claimed and the jury found that, other

[2] Citations to "Verdict Sheet I" refer to the first Verdict Sheet completed by the jury with respect to plaintiffs' wage claims in the first phase of the trial, dated October 26, 2017, ECF No. 92.

than tips and gratuities, plaintiffs were not paid any wages for their services.[3] (See Verdict Sheet I at 2, 23, 43, 64). Thus, based on the jury's findings, plaintiffs were owed minimum wages for every hour worked during the relevant employment period.

In determining the wages owed based on the hours the jury found that each plaintiff had worked, the Court considered the applicable minimum wage rates in effect under the FLSA and NYLL during each plaintiff's period of employment. Both statutes specify that, where the other prescribes a higher minimum wage rate, the statute containing the higher wage rate shall control. See 29 U.S.C. § 218(a); N.Y. Lab. Law § 652(1) (McKinney 2016). In this case, the wage rates provided by the NYLL were higher throughout plaintiffs' employment; therefore, the Court uses the rates prescribed under the NYLL as the applicable minimum wage rate for each relevant period.

Thus, in calculating the wages owed to each plaintiff, the Court has used the following minimum wage rates prescribed by the NYLL for each of the relevant time periods as follows: (1) $7.15 per hour from January 21, 2009 to July 23, 2009; (2) $7.25 per hour for the period from July 24, 2009 to December 30, 2013; and (3) $8.00 an hour for the period from December 31,

[3] Since defendants failed to comply with the tip credit requirements under the NYLL and FLSA, defendants were not authorized to deduct the amounts received by the plaintiffs in tips and gratuities when calculating the amounts of wages owed. See, e.g., 29 U.S.C. § 203(m); 29 C.F.R. § 531.59(b)(explaining that "an employer is not eligible to take the tip credit unless it has informed its tipped employees in advance of the employer's use of the tip credit of the provisions of [29 U.S.C. § 3(m)]" and that "[i]n order for the employer to claim the maximum tip credit, the employer must demonstrate that the employee received at least that amount in actual tips"); N.Y. C.C.R.R. § 146-1.3 (providing that an employer may take a tip credit if the employee "receives enough tips and if the employee has been notified of the tip credit as required"); Camara v. Kenner, No. 16 CV 7078, 2018 WL 1596195, at *11 (S.D.N.Y. Mar. 29, 2018) (summarizing the requirements under the NYLL and FLSA). (See n.4 infra).

2013 to the end of plaintiffs' employment. See N.Y. Lab. L. § 652(1); 12 N.Y. C.C.R.R. § 137-1.2(e) (2009).[4]

b. Overtime Claims

Under both the FLSA and NYLL, an employee is entitled to overtime pay, calculated at one and one-half times the employee's regular hourly rate, for hours worked in excess of 40 in one work week. See 29 U.S.C. § 207(a)(2)(C); N.Y. Lab. Law § 663(3); 12 N.Y. C.C.R.R. § 146-1.4. The jury found that three of the plaintiffs, Demerovic, Reinoso, and Perovic, worked more than 40 hours per week and thus were entitled to receive unpaid overtime wages for the hours worked over 40 in a week.[5] The method for calculating overtime under both the FLSA and NYLL is the same. Even if the plaintiffs are owed overtime wages in violation of both the FLSA and the NYLL, they are not entitled to recover double damages. See Janus v. Regalis Constr., Inc., No. 11 CV 5788, 2012 WL 3878113, at *7 (E.D.N.Y. July 23, 2012), adopted, 2012 WL 3877963 (E.D.N.Y. Sept. 4, 2012).

The FLSA provides that overtime pay should be calculated based on the employee's

[4] Defendants argue that although the jury was charged on the regular minimum wage rate, each plaintiff testified that he worked as a server and thus "equity dictates that the servers' minimum wage should apply." (11/2/2017 Behrins Decl. at 1, ECF No. 103). The defendants waived any such argument by failing to object to the jury instructions that contained the standard minimum wage and by failing to request an instruction as to the tip credit. See, e.g., Fed. R. Civ. P. 51(c); Cash v. County of Erie, 654 F.3d at 340 (explaining that failure to object on the record as required under Rule 51(c) results in waiver). Even if the argument had not been waived, the defendants cite no authority in support of their position, nor could they: the tip credit is an affirmative defense that the defendants did not raise, on which the jury was not instructed, and as to which the defendants adduced no evidence. See, e.g., Martinez v. Alimentos Saludables Corp., No. 16 CV 1997, 2017 WL 5033650, at *22 n.12 (E.D.N.Y. Sept. 22, 2017) (explaining that the tip credit is an affirmative defense upon which the defendants bear the burden of proof).

[5] Plaintiff Avdalovic did not allege a claim for unpaid overtime (see Am. Compl. ¶¶ 62-63, 141, Mar. 23, 2015, ECF No. 10), and the portions of the verdict sheet pertaining to him did not ask the jury to make findings with respect to overtime. (See Verdict Sheet I at 23-41).

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