

SUPREME COURT- STATE OF NEW YORK
DUTCHESS COUNTY

Present: Hon. THOMAS R. DAVIS, J.S.C.

SUPREME COURT: DUTCHESS COUNTY

-----X
JAIME MARSELLA,

Plaintiff(s),

-against-

MILLBROOK GOLF AND TENNIS CLUB INC.,

Defendant(s).

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DECISION AND ORDER

(Motion Seq. No. 1)

Index No.: 2025-50542

In this action for, among other things, violations of the Federal Fair Labor Standards Act, the defendant moved, pre-answer, to dismiss six of the plaintiff's nine causes of action (motion sequence #1). Because the defendant only demonstrated that the seventh cause of action fails to state a claim, the motion will be granted to extent of dismissing that cause of action.¹ The following papers were read and considered in determining the motion:

NYSCEF document numbers 7-12 and 17-20.

Relevant background

The plaintiff alleged in his complaint that for approximately nineteen years, he was employed by the defendant as its Chief Tennis Instructor. He listed many duties that his job entailed and asserted that in the six years prior to January 30, 2025, he was paid a package of compensation which included: A salary of \$40,000 for the period of May 1 to September 30 each year, and, at the end of each of those months, the following: \$100.00 per hour for each hour spent teaching a private lesson; 15% of each of the other teaching staffs' private lessons' income; 50% of the gross revenue taken in by the defendant's for ladies' programs and kids' camp; 100% of the charges paid by the defendant's members for stringing rackets; and 100% of the sale price of rackets and shoes sold in the defendant's tennis pro shop.

Plaintiff asserted that also during the six years prior to January 30, 2025, he was not paid weekly by the defendant, but "[w]henver [defendant] decided to get around to paying [him],

¹ As discussed, *infra.*, the plaintiff's fourth and eighth causes of action are also being dismissed based on plaintiff's express statement in his opposition papers that he is withdrawing those claims.

which could be and was often weeks after the income was earned by [him]...” (NYSCEF Doc. No. 9, ¶8).

Plaintiff alleged that the lack of timely payment caused great financial upheaval in his life. He asserted that he worked sixty hours per week for the defendant, that he often worked two shifts in one day or ten hours, and that he was not paid extra for working extra shifts or for more than ten hours per day. He further alleged, *inter alia*, that he was not employed in a professional or administrative capacity, he was not an outside salesperson (nor a number of other types of worker), that he was not in business for himself, that he did not have discretion or independent judgment while working for the defendant, and that the defendant had complete control over how, where and when he performed his work.

Plaintiff further asserted, *inter alia*, that he provided manual labor to the defendant, that he was not paid overtime by the defendant, that he was not provided sick leave, that he accrued sick leave at a rate of one hour for every thirty hours worked, and that he was not paid for his sick leave.

Plaintiff’s complaint asserted nine causes of action (labeled “counts”): Count 1: violation of the Federal Fair Labor Standards Act (“FSLA”) 29 USC §201, a failure to pay required overtime; Count 2: violation of New York State Labor Law §191, failure to pay timely wages; Count 3: violation of New York State Labor Law Article 19, failure to pay overtime; Count 4: violation of New York State Labor Law §196-b, failure to pay sick leave; Count 5: violation of New York State Labor Law, failure to provide proper time of hire notice; Count 6: violation of New York State Labor Law, failure to provide accurate wage statements; Count 7: unjust enrichment; Count 8: prima fact tort; Count 9: equitable accounting.

Defendant moved pursuant to CPLR §§3211(a)(1) and (a)(7) to dismiss Counts 2, 4, 5, 7, 8 and 9. In opposition, plaintiff expressly withdrew his Counts 4 and 8. Therefore, the only causes of action at issue on the instant motion are Counts 2, 5, 7 and 9.

Discussion/analysis

The standards for dismissal of a complaint pursuant to CPLR §3211(a)(1) and §3211(a)(7) are well-established:

“A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only if the documentary evidence submitted utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law (*see Granada Condominium III Assn. v. Palomino*, 78 A.D.3d 996, 996, 913 N.Y.S.2d 668; *Fontanetta v. John Doe I*, 73 A.D.3d 78, 83, 898 N.Y.S.2d 569; *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190). ‘In order for evidence to qualify as ‘documentary,’ it must be unambiguous, authentic, and undeniable’ (*Granada Condominium III Assn. v. Palomino*, 78 A.D.3d at 996, 913 N.Y.S.2d 668, quoting *Fontanetta v. John Doe I*, 73 A.D.3d at 84–86, 898 N.Y.S.2d 569). ‘Neither affidavits,

deposition testimony, nor letters are considered ‘documentary evidence’ within the intendment of CPLR 3211(a)(1)’ (*Granada Condominium III Assn. v. Palomino*, 78 A.D.3d at 997, 913 N.Y.S.2d 668)” (*Integrated Const. Services, Inc. v. Scottsdale Ins. Co.*, 82 A.D.3d 1160 [2d Dept 2011]).

“In considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Nonnon v. City of New York*, 9 N.Y.3d 825, 827, 842 N.Y.S.2d 756, 874 N.E.2d 720; *Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Paolicelli v. Fieldbridge Assoc., LLC*, 120 A.D.3d 643, 644, 992 N.Y.S.2d 60)” (*Wallkill Medical Development, LLC v. Catskill Orange Orthopaedics, P.C.*, 131 A.D.3d 601 [2d Dep’t 2015]).

With the aforesaid in mind, the motion as to each of the following Counts is determined as follows:

Count 2:

Defendant contended that Count 2 must be dismissed because the Second Judicial Department has ruled that no private right of action exists for an alleged violation of New York Labor Law §191, and that even if a private right of action did exist, plaintiff failed to plead this Count with requisite specificity.

In opposition, plaintiff asserted that Labor Law §198 was recently amended and now provides a private right of action. In reply, defendant argued that the amendment to §198 had nothing to do with permitting a private right of action, but merely amended the remedies afforded in wage-claim cases.

New York State Labor Law §191, entitled “Frequency of payments,” provides, *inter alia*, that “[a] manual worker shall be paid weekly and not later than seven calendar days after the end of the week in which the wages are earned” (*id.* § 191[1][a][i]).

Labor Law §191 does not expressly authorize a private right of action by an employee for its alleged violation by the employer. The issue is whether a private right of action to enforce §191 is provided for in Labor Law §198.

This particular issue has been the subject of several federal and New York State cases (*see, e.g., Grant v. Global Aircraft Dispatch, Inc.*, 223 AD3d 712 [2d Dept 2024]; *Vega v. C.M. and Associates Construction Management, LLC*, 175 AD3d 1144 [1st Dept 2019]; *Galante v. Watermark Services IV, LLC*, 722 F.Supp3d 170 [WDNY 2024]).

As of 2024, there has existed a conflict in opinion between the First and Second Judicial Departments, with the Second Department holding that §198 does not afford an employee a private right of action to enforce §191 (*Grant v. Global Aircraft Dispatch, Inc., supra.*). That holding was based on the determination, at that time, that §198 neither expressly nor impliedly provided a private right of action.

The Second Department held that §198 did not *expressly* provide a private right of action because subsection one thereof only expressly allowed for an action by an employee “instituted upon a wage claim.” The Court determined that based on legislative history, a “wage claim” only included claims by an employee for underpayment or nonpayment, not late payment, which is the subject of §191. Notably, the Court’s reasoning was also based on its observation that there was, “nothing to suggest that the statute was meant to address circumstances in which an employer pays full wages pursuant to an agreed-upon, biweekly pay schedule that nevertheless does not conform to the frequency of payments provision of law” (*id.*, at 719).

The Second Department held that an *implied* private right of action did not exist because creation of such a right would not be “consistent with the legislative scheme,” which is one of the three factors considered in determining whether an implied private right of action can be found (*id.*, at 719, citing *Konkur v. v. Utica Academy of Science Charter School*, 38 NY3d 38, 41 [2022]).

As noted above, defendant cited the Second Department’s holding in *Grant* as requiring dismissal of plaintiff’s second cause of action pursuant to Labor Law §191, while plaintiff asserted that recent amendments to §198 in May 2025 now allow a private right of action. Defendant has argued that the amendments only pertain to the remedy afforded under §198, but do not allow a private right of action. It asserted that the Second Department’s holding in *Grant, supra.*, is still controlling.

In this Court’s view, it is unclear whether the holding in *Grant, supra.*, still applies in light of the amendments to §198.

Section 198, prior to its amendments in May of this year (which amendments were specifically made retroactive to actions currently pending, including the case *sub judice*) read, in pertinent part, as follows:

“1. In any action instituted upon a wage claim by an employee or the commissioner in which the employee prevails, the court may allow such employee in addition to ordinary costs, a reasonable sum, not exceeding fifty dollars for expenses which may be taxed as costs. No assignee of a wage claim, except the commissioner, shall be benefited by this provision. 1-a. On behalf of any employee paid less than the wage to which he or she is entitled under the provisions of this article, the commissioner may bring any legal action necessary, including administrative action, to collect such claim and as part of such legal action, in addition to any other remedies and penalties otherwise available under this article, the commissioner shall assess against the employer the full amount of any such underpayment, and an additional amount as liquidated damages, unless the employer proves a

good faith basis for believing that its underpayment of wages was in compliance with the law. Liquidated damages shall be calculated by the commissioner as no more than one hundred percent of the total amount of wages found to be due, except such liquidated damages may be up to three hundred percent of the total amount of the wages found to be due for a willful violation of section one hundred ninety-four of this article. In any action instituted in the courts upon a wage claim by an employee or the commissioner in which the employee prevails, the court shall allow such employee to recover the full amount of any underpayment, all reasonable attorney's fees, prejudgment interest as required under the civil practice law and rules, and, unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law, an additional amount as liquidated damages equal to one hundred percent of the total amount of the wages found to be due, except such liquidated damages may be up to three hundred percent of the total amount of the wages found to be due for a willful violation of section one hundred ninety-four of this article."

As amended, §198 contains the same language as above, but now also includes the following language immediately after the above-cited language:

"Notwithstanding the provisions of this subdivision, liquidated damages shall not be applicable to violations of paragraph a of subdivision one of section one hundred ninety-one of this article where the employer paid the employee wages on a regular payday, no less frequently than semi-monthly. Such violations shall be subject to damages as follows:

- (i) no more than one hundred percent of the lost interest found to be due for the delayed payment of wages calculated using a daily interest rate for each day payment is late based on the annual rate of interest then in effect, as prescribed by the superintendent of financial services pursuant to section fourteen-a of the banking law for the employer's first violation; or
- (ii) for conduct occurring after the effective date of this paragraph, liquidated damages equal to one hundred percent of the total amount of wages found to be due in violation of paragraph a of subdivision one of section one hundred ninety-one of this article for any employer who, after the effective date of this paragraph, has been subject to one or more previous findings and orders for violations of paragraph a of subdivision one of section one hundred ninety-one of this article for which no proceeding for administrative or judicial review as provided in this chapter is pending and the time for initiation of such proceeding shall have expired and relating to employees performing the same work.

For purposes of this subdivision, an order shall mean a single final order or determination made by the commissioner or a court of competent jurisdiction, regardless of the number of employees or the time period that was subject to such order."

The addition of the above language raises the question of whether the statute does now, at least impliedly, allow a private right of action for a violation of §191(1)(a) because it clearly sets forth an allowance of damages for claimed violations of that section under certain circumstances. The statute is not now, as it previously was, silent as to damages for violations of §191. Further, the added language raises the question of whether a “wage claim” might now include a claim for late payments, not just underpayments or lack of payments.

As to defendant’s assertion that the plaintiff’s second cause of action also fails for lack of pleading specificity under CPLR §3013, the Court finds that there are sufficient allegations in the complaint and the plaintiff’s affirmation in opposition to put the defendant on notice of the transactions intended to be proved and the material elements of this claim, as required by the statute. Plaintiff has asserted that his pay was never regularly provided, and that throughout his time working for the defendant he was paid “randomly *circa* every 5-6 weeks” (NYSCEF Doc. No. 18, ¶8). Those allegations provide defendant with sufficient facts to understand the basis for plaintiff’s claim of late payments under Labor Law §191.

While this Court is not making any definitive determination as to the impact of the recent amendments to Labor Law §198 on the second cause of action at this stage of the litigation, given that the instant motion is a pre-answer motion to dismiss and the complaint must be read in the light most favorable to the plaintiff, the Court is not prepared to dismiss the second cause of action at this time.

Count 5:

Defendant argued that Count 5 must be dismissed because plaintiff alleged that he had been employed by the defendant for nineteen years, while the statute at issue in this cause of action (Labor Law §195(1)(a)) was not enacted until 2011 and was not retroactive.

The statute requires, *inter alia*, that the employer provide to the employee, “at the time of hiring”, a notice advising the employee of their rate of pay, pay frequency and other details of their wages and other compensation. Defendant argued that because plaintiff was hired prior to the statute’s effective date, it has no application to him.

In opposition, the plaintiff submitted an affirmation in which he asserted that he was re-hired for his position every year, that each year he worked pursuant to a “purported contract,” and that he was never provided with the time-of-hire notice required by the statute in any of the years he was re-hired.

In reply, defendant argued that inasmuch as plaintiff’s allegation of being re-hired each year was not contained in his complaint, the complaint should be dismissed. It further reiterated that because plaintiff began working for defendant prior to 2011, the statute does not apply.

It is well-settled that the Court may consider affidavits or affirmations submitted by a plaintiff in opposition to a pre-answer motion to dismiss to remedy any defects in the complaint, because the question is whether the plaintiff has a cause of action, not whether he has artfully

stated one (*see Leon v. Martinez*, 84 NY2d 83, 88 [1984]; *Chanko v. American Broadcasting Companies, Inc.*, 27 NY3d 46, 52 [2016]).

Therefore, the Court may consider the plaintiff's statement in his affirmation in opposition to the instant motion that he was re-hired by the defendant each year. Further, the documents submitted by the defendant in support of its own motion support the plaintiff's allegation that he was re-hired annually (NYSCEF Doc. No. 10).

Notably, one of the cases cited by defendant (*Martinez v. Alimentos Saludables Corp.*, 2017 WL 5033650 [EDNY 2017]) supports the contention that the Court can consider later re-hire date(s) of an employee in applying the statute.

Therefore, plaintiff's fifth cause of action cannot be dismissed at this time.

Count 7:

Defendant argued that plaintiff's claim for unjust enrichment must be dismissed because he did not allege that the work he performed for the defendant was outside the scope of his duties, nor that his salary did not constitute reasonable value for the services he provided, which allegations are required under relevant caselaw.

In opposition, plaintiff argued that he provided significant benefits to the defendant which outweighed the compensation paid to him. He noted that he often worked nights and weekends and was not paid overtime. He further argued that the federal cases cited by defendant are not controlling.

Several federal courts applying New York law have held that a plaintiff may not allege that his former employer was unjustly enriched at his expense when the employer compensated the plaintiff by paying him a salary. Rather, a plaintiff must allege that he performed work that "exceeded the scope of his duties" in his position and, therefore, his salary did not constitute reasonable value for the services he provided (*see James v. Countrywide Financial Corp.*, 849 F.Supp.2d 896, 323 [EDNY 2012]; *Levion v. Societe Generale*, 822 F.Supp.2d 390, [SDNY 2011]; *Griffin v. Aldi, Inc.*, 2016 WL 7235787 [NDNY 2016]).

New York cases discussing the issue have generally held similarly (*see, e.g., Furman v. Watchman*, 229 AD2d 358 [1st Dept 1996] (refusing to dismiss unjust enrichment claim because plaintiff did allege, and the documentary evidence submitted by defendant tended to support, that the employment agreement did not require plaintiff to perform certain extra work which the plaintiff performed, and the parties agreed that if such work had been performed, extra compensation would be provided); *Silipo v. Wiley*, 138 AD3d 1178 [3d Dept 2016]).

Here, reading the plaintiff's complaint and his affirmation in the light most favorable to him, they do not allege that he performed work that was outside the scope of his duties, nor that his agreed salary and other compensation did not constitute reasonable value for the services he provided. His ninth cause of action, which seeks an equitable accounting, appears to suggest that he does not believe he was paid the full amount of additional compensation that the defendant

agreed to pay him (e.g., for sales of merchandise, percentages of camp programs, etc.). However, the complaint does not actually allege that he performed work that was outside the scope of his duties, nor that if he had been paid the full amount to which he believes he is entitled as outlined in his compensation package, it would not constitute reasonable value for the services he provided.

Therefore, the seventh cause of action will be dismissed.

Count 9:

Defendant argued that plaintiff's claim for an equitable accounting must be dismissed because there was no fiduciary relationship between the parties, which is a prerequisite for a claim to share in the defendant's profits.

In opposition, plaintiff asserted in an affirmation that the parties had a contractual relationship of employment and argued that such contract created a fiduciary relationship.

In reply, defendant argued that the plaintiff did not assert a contractual employment relationship in the complaint and, in any event, in order for a fiduciary relationship to have existed to enable the plaintiff to share in the defendant's profits, their agreement would have to have had a provision for the sharing of losses, and plaintiff made no allegation to that effect.

The right to an equitable accounting is premised upon the existence of a confidential or fiduciary relationship (*see, e.g., Lawrence v. Kennedy*, 95 AD3d 955 [2d Dept 2012]).

Generally, too, an employee seeking an accounting from his employer based on a claimed entitlement to a share of the employer's profits must demonstrate that the agreement between them included an agreement to share in the losses (*id.*).

Contrary to defendant's contention, however, the plaintiff's allegations are not simply that the employment agreement included a right to share in the defendant's profits. They include, *inter alia*, that the plaintiff was to be paid a set fee at the end of each month (\$100 per hour) for each private lesson he taught, as well as 100% of the charges paid by club members for stringing rackets (a duty required of the plaintiff), and other portions of revenues collected by the club.

The documents submitted by the defendant in support of its motion included some of the very contracts entered into between the parties (NYSCEF Doc. No. 10). The independent contractor agreements included with NYSCEF Doc. No. 10 indicate that the fees paid by members of the club for private lessons were to be billed to the members by the defendant and collected by the defendant. The plaintiff was not permitted to bill the club members directly. Those contracts set forth, in effect, an end-of-the month reconciliation process whereby plaintiff would submit proof of the lessons he provided, and defendant was required to remit payment to the plaintiff for such lessons from the money it collected on his behalf. Indeed, defendant is identified in the independent contractor agreements as the "collection agent" for such fees.

In short, defendant's own evidence demonstrated that it acted, at least in part, as an "agent" of the plaintiff for collecting certain fees belonging to the plaintiff for his work at the defendant's club, and that defendant was required to pay plaintiff at the end of each month for the fees so

collected. This creates a question of fact as to whether the parties were engaged in a fiduciary relationship, at least for some period of time (see *Lawrence v. Kennedy, supra*. (fiduciary relationship might be found to exist in the context of a longstanding employment agreement where plaintiff [employee] allegedly relied upon the defendant [employer] to collect and determine the amount of revenues to which the plaintiff was entitled)).

Therefore, the plaintiff's allegations, together with the documentary evidence submitted by the defendant, support the plaintiff's claim for an equitable accounting rather than "utterly refute" it.

Plaintiff's ninth cause of action cannot be dismissed at this time.

Based on the foregoing, it is hereby

ORDERED that the defendant's motion to dismiss (motion sequence #1) is GRANTED TO THE EXTENT that the plaintiff's fourth, seventh and eighth causes of action are DISMISSED, and the motion is OTHERWISE DENIED; and it is further

ORDERED that the defendant shall file and serve an answer to the plaintiff's remaining claims in accordance with the time prescribed under CPLR §3211(f); and it is further

ORDERED that within 10 days of receipt of defendant's answer, the plaintiff shall upload a letter to NYSCEF requesting the Court to schedule a preliminary conference.

Dated: October 14, 2025
Poughkeepsie, NY

ENTER:



Hon. Thomas R. Davis, J.S.C.

To: All parties via NYSCEF

Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.