State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: June 20, 2019 527385

FRANCIS O'DONNELL,
Appellant,
v
MEMORANDUM AND ORDER
JEF GOLF CORP. et al.,
Respondents.

Calendar Date: May 2, 2019

Before: Garry, P.J., Mulvey, Aarons, Rumsey and Pritzker, JJ.

Charny & Wheeler, Rhinebeck (Nathaniel K. Charny of counsel), for appellant.

Daniel Gartenstein, Kingston, for respondents.

Pritzker, J.

Appeal from a judgment of the Supreme Court (Ryba, J.), entered February 2, 2018 in Ulster County, upon a decision of the court partially in favor of defendants.

Defendants own and operate a golf course that employed plaintiff as a groundskeeper during golf season (early April to late November) from 2004 to 2011. Defendant John North is the president of defendants JEF Golf Corp. and JEF Restaurant Corp., and he was also the life partner of plaintiff's late mother. In March 2014, plaintiff commenced this action against defendants alleging that they violated the Labor Law when, among other things, they failed to pay him overtime compensation and failed to provide him with wage notices and wage statements. Plaintiff

requested, among other things, damages for unpaid overtime wages, liquidated damages and counsel fees. Defendants answered and asserted that plaintiff was fully compensated for his services at an agreed-upon rate. After a one-day nonjury trial, Supreme Court concluded that defendants failed to provide a wage statement notice as required by Labor Law § 195 (3) and, thus, plaintiff was entitled to statutory damages of $2,500. The court found, however, that plaintiff failed to produce sufficient evidence to support a just and reasonable inference of the amount and extent of the alleged overtime, and, as such, it declined to award plaintiff unpaid overtime damages, liquidated damages or prejudgment interest damages, nor did it award counsel fees. Plaintiff appeals.

Plaintiff's primary contention on appeal is that Supreme Court erred by dismissing his unpaid overtime claim. To establish liability under the Labor Law on a claim for unpaid overtime, the employee has the burden of proving that he or she performed work for which he or she was not properly compensated, and the employer had actual or constructive knowledge of that work (see Kuebel v Black & Decker Inc., 643 F3d 352, 361 [2d Cir 2011]; Shang Shing Chang v Wang, 2018 WL 1258801, *1-2, 2018 US Dist LEXIS 40121, *2-3 [ED NY, Mar. 12, 2018]).[1] Although the employee has the burden of proving a failure to compensate, "it is the employer's responsibility to maintain accurate records of an employee's hours" (Padilla v Manlapaz, 643 F Supp 2d 302, 307 [ED NY 2009]; see Williams v Epic Sec. Corp., 358 F Supp 3d 284 301 [SD NY 2019]). "In situations where an employer's payroll records are inaccurate or inadequate [to show the employee was uncompensated for additional work], an employee has carried out his [or her] burden if he [or she] produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference" (Berrios v Nicholas Zito Racing Stable, Inc., 849 F Supp 2d 372, 379 [ED NY 2012] [internal quotation marks and citations omitted]; see Kuebel v Black &

[1] The standard to determine federal overtime claims under the Fair Labor Standards Act is almost identical to the standard applied when determining unpaid overtime claims under the Labor Law (see Berrios v Nicholas Zito Racing Stable, Inc., 849 F Supp 2d 372, 380 [ED NY 2012]).

Decker Inc., 643 F3d at 362). This burden is not high and may be satisfied through estimates based on an employee's own recollection and testimony (see Kuebel v Black & Decker Inc., 643 F3d at 362; Shang Shing Chang v Wang, 2018 WL 1258801 at *1, 2018 US Dist LEXIS 40121 at *3). After the employee meets his or her burden, "[t]he burden then shifts to the employer to prove by a preponderance of the evidence that the [employee] was properly paid for the hours worked" (Padilla v Manlapaz, 643 F Supp 2d at 307; see Labor Law § 196–a [a]; Berrios v Nicholas Zito Racing Stable, Inc., 849 F Supp 2d at 380). Notably, when reviewing a verdict following a nonjury trial, the "trial court's findings are not to be lightly set aside unless its conclusions could not have been reached based upon any fair interpretation of the evidence" (Silverman v Mergentime Corp./J.F. White, Inc., 252 AD2d 925, 926 [1998] [internal quotations marks, brackets and citation omitted]; see Chase Manhattan Bank v Douglas, 61 AD3d 1135, 1136 [2009]).

Plaintiff presented the testimony of a coworker, Herman Schwall, who had worked with plaintiff for approximately four or five years. Schwall testified that he and plaintiff would typically start a work day around 5:30 a.m. or 6:00 a.m., but that he did not work with plaintiff all day. According to Schwall, he observed plaintiff working seven days a week from 5:30 a.m. or 6:00 a.m. until 8:30 p.m. or 9:00 p.m. However, this evidence was called into question when Schwall admitted that there were certain times of the day when he was unable to see plaintiff and was unaware if he was working. Colleen Bicknese, plaintiff's friend, testified that she lived across the street from the golf course and would observe plaintiff approximately 3 to 10 times a day and that he started work at 6:30 a.m. seven days a week and, "at times," ended work after dark five to seven days a week. However, Bicknese also testified that, for approximately two of the subject years, she was attending college classes that were approximately 1½ to 3 hours long, during which time she was not aware if plaintiff was working. Bicknese also testified that, when she was home, she did not constantly observe plaintiff. James Scarles, plaintiff's downstairs neighbor, testified that he observed plaintiff leave his home seven days a week at 6:00 a.m. and

return home between 9:30 p.m. and 10:00 p.m., but that he never observed what plaintiff did during the day.

Plaintiff testified that, after receiving his first pay check, he became aware that he was being paid for a 40-hour work week. Plaintiff explained to North that he was working more than 40 hours per week, but North changed the subject, and plaintiff failed to address the topic with him again. Plaintiff entered a document into evidence that he had created summarizing his daily hours worked for an average week during the 2008 golf season (exhibit No. 1). Plaintiff also testified about an average work week during 2008, including various breaks that were taken during the day. Plaintiff explained that, on some days, breaks were longer in duration than on other days, and that on Tuesdays, he would take a three-hour break in the evening to play in a golf league. Plaintiff testified that his work load increased as did the number of hours that he worked after his mother became ill in 2010. Plaintiff also testified generally to the various tasks that he performed while working. After testifying that he was sure that he began working on the golf course April 1 of every year, plaintiff was confronted with documents showing that he was receiving unemployment for the first two weeks of April 2008.

To counter plaintiff's allegations, Frederick O'Donnell, plaintiff's brother, testified that exhibit No. 1 was inaccurate. Specifically, O'Donnell stated that plaintiff was not working from 5:30 p.m. to 8:00 p.m. because that was the time that plaintiff was at the golf course restaurant and bar. O'Donnell also testified that plaintiff had been told that he was only supposed to work 40 hours a week, but that plaintiff did not listen. Both North and O'Donnell explained that, during work hours, plaintiff would take care of his cars, which were left in the golf course parking lot. North testified that he hired plaintiff to perform groundskeeping duties at the golf course and that, initially, plaintiff was paid $9 an hour. Plaintiff expressed that he might want to work overtime, but North said that, because he ran a small operation, he could not pay plaintiff time and a half for overtime. North testified that, a couple of weeks later, plaintiff again brought up

overtime, at which point North offered to hire another individual to help plaintiff. However, plaintiff said that he could do the work, which North took to mean that plaintiff could handle the work within a 40-hour work week without overtime. North also testified that, in 2005, he felt that there were times when the work was not getting done in a reasonable amount of time because plaintiff got sidetracked with other things. Because of this, North drafted a document that detailed the essential work that was to be done in the course of a week to give plaintiff guidance in completing his tasks. North testified that the essential work that needed to be done could be accomplished in 33 hours, still leaving seven hours for other miscellaneous tasks.

Although an employee's testimony may be sufficient evidence to establish that the employee worked certain hours for which he or she was not compensated (see Berrios v Nicholas Zito Racing Stable, Inc., 849 F Supp 2d at 379), we find that plaintiff's testimony alone was not sufficient in this regard. Significantly, plaintiff's witnesses could not corroborate his work schedule beyond his general start and end times. Although plaintiff presented an exhibit purporting to establish the hours that he worked during the 2008 golf season, neither this exhibit nor the testimony accounted for weather events, holidays or days off. In addition, plaintiff's testimony failed to include how long his required tasks took him to complete, and there were also inconsistencies in plaintiff's testimony regarding his tasks. For example, plaintiff testified that every morning during his three-hour morning block of work, he cut the greens, which he described as a two-hour task. However, plaintiff later testified that he only cut the greens a couple of days a week because Schwall cut them four to five days a week. "Viewing the record as a whole and according deference to the court's assessment of the quality of the evidence" (Chase Manhattan Bank v Douglas, 61 AD3d at 1137 [internal quotation marks and citations omitted]), we find no basis to disturb its finding that plaintiff failed to meet his burden of producing "sufficient evidence to show the amount and extent of [his] work as a matter of just and reasonable inference" (Berrios v Nicholas Zito Racing Stable, Inc., 849 F Supp 2d at 379; compare

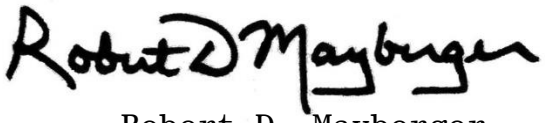
Williams v Epic Sec. Corp., 358 F Supp 3d at 301-302). Even if we were to find that plaintiff met his burden in this regard, upon our review of the record, defendants established, by a preponderance of the evidence, that plaintiff was "properly paid for the hours worked" (Padilla v Manlapaz, 643 F Supp 2d at 307; see Berrios v Nicholas Zito Racing Stable, Inc., 849 F Supp 2d at 380). Inasmuch as plaintiff was not entitled to overtime compensation, he was also not entitled to liquidated damages or prejudgment interest damages (compare Conroy v Millennium Taximeter Corp., 2018 WL 5253111, *3-4, 2018 US Dist LEXIS 180885, *8-11 [ED NY, Oct. 22, 2018]; Fermin v Las Delicias Peruanas Restaurant, Inc., 93 F Supp 3d 19, 48-50 [ED NY 2015]).

Plaintiff also asserts that he is entitled to counsel fees based upon Supreme Court's finding that defendants failed to provide a wage statement notice as required by Labor Law § 195 (3). "'[O]nly a prevailing party is entitled to recover an attorney's fee' and[,] '[t]o be considered a prevailing party, a party must be successful with respect to the central relief sought'" (Village of Hempstead v Taliercio, 8 AD3d 476, 476 [2004], quoting Fatsis v 360 Clinton Ave. Tenants Corp., 272 AD2d 571, 571 [2000]). "Such a determination requires an initial consideration of the true scope of the dispute litigated, followed by a comparison of what was achieved within that scope" (DKR Mtge. Asset Trust 1 v Rivera, 130 AD3d 774, 776 [2015] [internal quotation marks, brackets and citation omitted]). Plaintiff alleged four distinct claims against defendants – they failed to pay him overtime compensation, they failed to pay him spread of hours wages, they failed to provide him with wage notice and wage statements, and they failed to reimburse expenses. Although plaintiff requested damages totalling approximately $171,000, he was only awarded a total of $2,500 on his claim that defendants failed to provide him a wage statement. As such, plaintiff was not successful to the central relief sought and, thus, was not entitled to counsel fees (see Blue Sage Capital, L.P. v Alfa Laval U.S. Holding, Inc., 168 AD3d 645, 646-647 [2019], lv denied ___ NY3d ___ [May 9, 2019]; Village of Hempstead v Taliercio, 8 AD3d at 476). Plaintiff's remaining contentions have been reviewed and lack merit.

Garry, P.J., Mulvey, Aarons and Rumsey, JJ., concur.

ORDERED that the judgment is affirmed, without costs.

ENTER:



Robert D. Mayberger
Clerk of the Court