UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROSELYN ISIGI,	:	
	:	16 Civ. 2218 (FB) (SMG)
Plaintiff,	:	
	:	
- against -	:	
	:	
HARRY'S NURSES REGISTRY, INC., and HARRY DORVILIER,	:	
	:	
	:	
Defendants.	:	

PLAINTIFF'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFAULT JUDGMENT

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PLAINTIFF'S REPLY MEMORANDUM
IN FURTHER SUPPORT OF DEFAULT JUDGMENT

Preliminary Statement

Plaintiff has been awarded default judgment with respect to liability. The well-pleaded allegations of her complaint are deemed true. Defendants' answer has been stricken. Defendants are no longer entitled to dispute the allegations of the complaint or to seek relief on their affirmative defenses.

What remains is a determination of damages. However, Defendants have raised no opposition to Plaintiff's calculation of wage damages or legal argument concerning the availability of damages for retaliation. Defendants' factual contentions are insufficient or are barred by operation of the grant of default judgment. Defendants' perfunctory opposition to the application for attorney's fees and costs is frivolous.

In this Reply Memorandum, Plaintiff will address each of the six categories of claims in this litigation: (1) timely FLSA wage claims; (2) timely NYLL wage claims; (3) FLSA claims that may be subject to a statute of limitations defense; (4) FLSA retaliation claims; (5) NYLL retaliation claims; (6) attorney's fee claims.[1]

Argument: Defendants' Submissions are Directed at Liability, not Damages, and Should Be Disregarded

Plaintiff worked for Defendants between March (or, as Defendants would have it, April)

[1] Inasmuch as the Court has already informed the parties that it will not entertain attempts to revisit the propriety of default judgment, Plaintiff will simply point out that, contrary to Defendants' contentions, their default was not the result of the purported malpractice of their former attorney. Their default was the result of Harry Dorvilier's willful and contumacious refusal to appear for deposition after admonition by the Court and his subsequent lie about the reason for non-appearance, both of which post-dated any alleged malpractice by counsel. Dkt. No. 56 *passim*. Those acts sever the purported causal link between counsel's alleged malpractice and the award of default judgment.

2009 and May 2016. She filed this lawsuit on May 3, 2016. The FLSA statute of limitations is two or three years; the New York Labor Law statute of limitations is six years. Thus, claims accruing in May 2010 and thereafter are unquestionably timely. Defendants' submissions simply ignore the Labor Law claims.

I. The FLSA Wage Claims

A. The Applicable Statute of Limitations is Three Years

An employer's willful violation extends the FLSA statute of limitations from two years to three. 29 U.S.C. § 255(a). Plaintiff pleaded a willful violation. Supp. Cplt. ¶ 29. The allegation is deemed true. *Greyhound Exhibitgroup, Inc., v. E.L. U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir. 1992). Defendants waived the opportunity to challenge willfulness. *See also* Point III-A.

B. Defendants Concede that Ms. Isigi is Entitled to Back Pay for Two Years

Defendants request, in their Memorandum, that "any analysis of damages be made under the applicable two year statute of limitation." Dkt. No. 73 at 12.

C. Plaintiff's Calculation of the Back Wages Due Her is Largely Unrebutted

1. Back Wages During the Misclassification Period

Defendants do not attempt to controvert Ms. Isigi's estimate of the hours that she worked during the pre-2015 period, during which she was compensated as an independent contractor.

2. Defendants' Exhibit E; Back Wages During 2015

Plaintiff alleges that Defendants reclassified her as an employee on an unknown date in 2015. Supp. Cplt. ¶ 20. She sought discovery of her time and pay records. Ex. 19 ¶ 4.[2]

[2] Numbered exhibits are annexed to the Affirmations of Jonathan A. Bernstein dated October 19, 2017 and December 10, 2017.

Defendants defaulted; Plaintiff moved to compel; the motion was granted; Defendants ultimately produced documents. Dkt. No. 18 (R&R); Dkt. No. 20 (Order adopting R&R); Ex. 11. Exhibit E to Defendants' Opposition, which appears to be an unauthenticated collection of pay stubs generated and issued during 2015, was not included with that production or produced at any time prior to November 30. Bernstein Aff. Dec. 10, 2017 ¶ 2. Plaintiff's counsel accordingly surmised, in his moving Affirmation, that Defendants reclassified field nurses, including Ms. Isigi, as employees on or about May 4, 2015. Bernstein Aff. Oct. 19, 2017 ¶ 23.

Neither Defendants' Memorandum of Law nor Mr. Dorvilier's Affidavit mentions the date of reclassification. Exhibit E appears to indicate that Defendants began paying overtime premium pay at the beginning of 2015 and not in the middle of the year. Those pay stubs reflect biweekly pay periods during which, *e.g.*, 80 hours were compensated at $18.23 per hour and 88 hours were compensated at $27.35 per hour. Ex. E at 3.[3] Defendants did not, however, produce the time records associated with the pay stubs. For that reason, the pay stubs are not direct evidence that Ms. Isigi was paid overtime premium pay for all hours worked in excess of 40 per workweek during the relevant pay period. That is, Ms. Isigi might have worked 20 hours during the first week of the pay period and 148 hours the second week, which would entitle her to 108 hours, not 88 hours, overtime pay. Alternatively, the Court can, if it wishes, give Defendants the benefit of the doubt and infer that Ms. Isigi worked 84 hours in each of the weeks covered by the pay stub.

That is, if the Court exercises discretion under Fed. R. Civ. Pro. 37(d)(1)(A)(ii) to excuse

[3] Exhibit E provides additional corroboration for Ms. Isigi's recollection that she worked 84 hours per week.

Defendants' failure to produce the documents in discovery, and if the Court overlooks Defendants' failure to authenticate the records, and if the Court draws inferences favorable to Defendants notwithstanding their failure to produce the time records associated with the pay records, then Ms. Isigi would not be entitled to overtime premium pay for hours worked during the first 17 weeks of 2015 and her award should be adjusted accordingly.[4]

D. Defendants's Default is a Waiver of Their Defense to Liquidated Damages

An employer who violates the compensation provisions of the FLSA is liable for unpaid wages "and an additional equal amount as liquidated damages." 29 U.S.C. § 216(c). Liquidated damages under the FLSA are presumed in every case where violation of the statute is found. 29 U.S.C. § 260. The presumption may be overcome if defendant proves, as an affirmative defense, both that the violation was in subjective good faith and that the employer had objectively reasonable grounds for believing that its conduct did not violate the statute. *Brock v. Wilamowsky*, 833 F.2d 11, 19 (2d Cir. 1987). That burden "is a difficult one to meet" and "double damages are the norm, single damages the exception." *Id.* The FLSA "does not authorize the court to decline to award liquidated damages, in whole or in part, unless the employer has established its good-faith, reasonable-basis defense." *Id.* at 20.

That is, full liquidated damages are awarded in every case unless the employer establishes an affirmative defense. In this case, Defendants' answer was stricken. Defendants thus have not pleaded the affirmative defense; they perforce cannot attempt at this procedural juncture to prove

[4] As is discussed in Paragraph 27 of the Bernstein Affirmation dated October 19, 2017, the damages sought for each week are $539.00 ($12.25 per hour x 44 hours) with 100% liquidated damages thereon. Thus, the total damages sought for the 17 weeks are $18,326.00. Defendants have not proposed any calculation.

the unpleaded defense.

FLSA liquidated damages are not "damages" for purposes of the liability/damages distinction relevant to an inquest following default. *E.g., Reich v. SNET*, 121 F.3d 58, 71 n.4 (2d Cir. 1997) ("As used in the FLSA 'liquidated damages' is something of a misnomer... It is an award of special or exemplary damages added to the normal damages") (citations and quotations omitted).

II. The NYLL Wage Claims

Defendants' opposition papers do not address the NYLL wage claim. Dkt. No. 73 *passim.* Nor do they address the claim for liquidated damages on the NYLL wage claim. *Id.* Nor do they address the claim for interest on back wages due under the NYLL. *Id.*

III. Statute of Limitations on the FLSA Claim; Equitable Tolling

A. Defendants Have, By Operation of Law, Asserted No Statute of Limitations Defense

Defendants' answer was stricken. Accordingly, they have not pleaded any affirmative defenses. The FLSA statute of limitations is "not a substantive condition precedent to the maintenance of a cause of action, but a procedural limitation on relief that must be pleaded as an affirmative defense." *Gunawan v. Sake Sushi Rest.*, 897 F. Supp. 2d 76, 87 (E.D.N.Y. 2012) *quoting Brock v. Wackenhut Corp.*, 662 F.Supp. 1482, 1487 (S.D.N.Y.1987). A party asserting a statute of limitations defense must do so in its answer; failure to do so constitutes a waiver of the defense. Fed. R. Civ. Pro. 8(c)(1); *Day v. McDonough*, 547 U.S. 198, 202 (2006); *Mooney v.*

City of New York, 219 F.3d 1123, 127 (2d Cir. 2000); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008) ("the law typically treats a limitations defense as an affirmative defense ... subject to rules of forfeiture and waiver").

B. Appropriateness of Equitable Tolling

Alternatively, if this Court permits Defendants to assert a statute of limitations defense notwithstanding the striking of their answer, Ms. Isigi may recover back wages for hours worked prior to May 2010 only if the Court grants equitable tolling. Equitable tolling turns in part on a favorable exercise of discretion and in part on establishment of the factual predicate: that Ms. Isigi was "employed as [a] field or per diem nurse" between November 7, 2004 and March 31, 2009 and that Defendants improperly failed to disclose that fact when ordered to do so in the *Gayle* action. Defendants urge that discretion be exercised in their favor in part because they dispute Plaintiff's claim that she was unaware of her right to opt into the *Gayle* action. Defendants urge that the factual predicate fails because of documents purportedly showing that Ms. Isigi was not an employee on the relevant date and allegations disputing her unawareness.

1. The Affidavit of Debra Harry

Ms. Harry claims that she discussed the *Gayle* lawsuit with Ms. Isigi. However, she does not claim that she made Ms. Isigi aware of her right to opt into the lawsuit. Even if Ms. Harry's allegation is believed, it is insufficient to rebut Ms. Isigi's contention that she was unaware of her right to opt into the lawsuit at the relevant time.

2. Defendants' Exhibit A

Defendants' Exhibit A purports to show that Ms. Isigi's first assignment for Harry's was on May 4, 2009. That document should be disregarded. The document was never produced in

discovery. Plaintiff requested, in her First Request for Production of Documents,

> The plaintiff's entire personnel file and/or any other document generated or maintained by Defendants reflecting the duration of Plaintiff's employment ...

Ex. 19 ¶ 1. Exhibit A was not produced pursuant to that Request or at any other time. Its use on this motion should be precluded. Fed. R. Civ. Pro. 37(d)(1)(A)(ii). Moreover, Exhibit A is not authenticated as a business record. It is hearsay. Finally, Exhibit A does not support Defendants' contentions, as is discussed at Point III-F(3) immediately below.

3. Defense Counsel's Unsupported Contention Regarding Ms. Isigi's First Assignment; the Face Sheet Appended to Plaintiff's Affidavit

Defense counsel states in his Memorandum that

> Roselyn Isigi was first contracted by and received her first nursing assignment from Harry's Nurses Registry (hereinafter Harry's) on April 27, 2009. Isigi received her first paycheck from Harry's in June of 2009. The evidence from her personnel file corroborates these dates. *See* Exhibit A.

Dkt. No. 72 at 1. Exhibit A appears to be an unauthenticated computer-generated record of services rendered to patients including GH, Ms. Isigi's patient (but does not show the date of first "contact"). The document suggests that GH was first cared for by Harry's on May 2, 2009.[5]

The Face Sheet (Ex. A to the Affidavit of Roselyn Isigi) indicates a "Start of Care Date" of March 31, 2009. The common-sense interpretation of a document generated by Harry's Nurses Registry stating that a patient's "Start of Care Date" is 3/31/09 is that a nurse at Harry's began caring for the patient on that date. Defendants do not argue that the common-sense

[5] There is no evidence that Exhibit A was contained in Ms. Isigi's "personnel file;" Defendants' discovery production represents that it was not. It would be unusual for a nurse's personnel file to contain the records of other nurses' assignments.

interpretation is wrong. Defendants do not challenge the authenticity of the Face Sheet. In the face of an inference arising from the Face Sheet, a document generated by Harry's, that someone at Harry's began caring for GH on May 31, 2009, and Ms. Isigi's sworn allegation that she was that caregiver, Defendants ask this Court to believe that Harry's has no record of care provided to GH before May 2, 2009. The more likely explanation is that a document like Exhibit A for the March 31-May 2, 2009 period exists and that Defendants have not produced it.

IV. FLSA Retaliation Claims

A. Defendants' Attempt to Contest Liability

Ms. Isigi pleaded that Defendants retaliated against her. She quoted the retaliatory statements that were made to her, which statements bespeak anti-Semitism. Supp. Cplt. ¶ 22-23. Defendants protest that Mr. Dorvilier and his agent could not have made the remarks attributed to them because, they contend, they are not anti-Semites. However, Defendants' answer has been stricken. The allegations of the complaint are true as a matter of law. Defendants' insistence that the allegations are untrue as a matter of fact is irrelevant on this motion.

B. Damages

Plaintiff seeks compensatory and punitive damages for retaliation under the FLSA. Moving Mem. at 16-17. Defendants' submissions do not attempt to challenge Plaintiff's statements of the law.

V. New York Labor Law Retaliation Claims

Plaintiff seeks liquidated damages for retaliation under the NYLL. Moving Mem. at 17.

Defendants' submissions do not attempt to challenge Plaintiff's statements of the law.

VI. Attorney's Fees

Plaintiff seeks attorney's fees and costs as authorized by the FLSA and the NYLL. Counsel has supported that application with time and billing records and legal argument. Defendants have not challenged counsel's proposed hourly rate or any of the time or expense entries. Defendants have not argued that the law applicable to attorney fee applications requires that the application be denied in whole or in part.

Instead, Defendants contend that fees should be denied in their entirety because Mr. Dorvilier seeks sanctions against Plaintiff's counsel in the *Gayle* matter. Unsurprisingly, Defendants offer no authority in support of that contention.

Mr. Dorvilier has alleged to the *Gayle* court that Plaintiff's counsel "double dipped" in that case, that he failed to remit the judgment amounts to his clients and committed various other malefactions. Magistrate Judge Go requested that counsel provide a complete accounting of monies obtained and disbursed in that case; counsel has done so. M.J. Go has yet to issue a report and recommendation. 07 Civ 4672 Dkt. No. 228-38. Now Defendants seek to use the pendency of the baseless application for sanctions as justification for denying Ms. Isigi and her attorney a recovery of attorney's fees and costs.

Counsel denies Mr. Dorvilier's charges. It is patent that even if counsel were guilty as charged with respect to the *Gayle* matter, that would have no bearing on Ms. Isigi's or counsel's entitlement to recover attorney's fees and costs in this matter.

The application for attorney's fees has been revised to reflect work done in this action

since the filing of the moving papers. Bernstein Aff. Dec. 10, 2017 ¶¶ 4-5.

Conclusion

For the foregoing reasons, plaintiff Roselyn Isigi respectfully requests that this Court grant her motion for default judgment in its entirety, awarding her $384,830.50, together with attorney's fees and costs in the amount of $45,024.03 and grant such other and further relief as to this Court may seem just, fair and equitable.

Dated: New York, New York
December 10, 2017

Respectfully submitted,

_____/s/_____

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