UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

----------X Docket No. : 12-4764-CV

CLAUDIA GAYLE, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

-against-

HARRY'S NURSES REGISTRY, INC. and HARRY DORVILIEN,

Defendants-Appellants.

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PRELIMINARY STATEMENT

Defendant-Appellant HARRY DORVILIEN ("Dorvilien") and his corporation, Defendant-Appellant HARRY'S NURSES REGISTRY, INC. ("Harry's") (collectively, "Defendants" or "Appellants") respectfully submit this Reply Brief in further support of their appeal from :

(1) that part of the interlocutory Decision-Order dated March 9, 2009 of the Honorable District Court Judge Charles P. Sifton (R 648-677)[1], for the United States District Court for the Eastern District of New York which denied Appellants' motion for summary judgment and which granted Plaintiff CLAUDIA GAYLE's ("Plaintiff Gayle") motion for partial summary judgment on the issue of liability;

(2) each and every part of the interlocutory

Decision-Order of the Honorable Nicholas G. Garaufis, United States District Judge for the Eastern District of New York dated December 23, 2010 (R 900-911) which denied Appellants' motion for reconsideration of Judge Sifton's prior interlocutory Decision-Order dated March 9, 2009 (R 648-677) and which granted summary judgment on damages to Plaintiff Gayle, awarding her unpaid wages and liquidated damages totaling $14,780;

(3) that part of the interlocutory Decision-Order of the Honorable Nicholas G. Garaufis, United States District Judge for the Eastern District of New York dated March 1, 2012 (R 1111-1127) which granted partial summary judgment on the issue of liability to the class action Plaintiffs other than Plaintiff Gayle ("class action Plaintiffs");

(4) that part of the final Decision-Order of the Honorable Nicholas G. Garaufis, United States District Judge for the Eastern District of New York dated September 14, 2012 (R 1163-1173) which granted summary judgment on damages to the class action Plaintiffs awarding them unpaid wages and liquidated damages totaling collectively $619,071.76 in damages; and

(5) that part of the post-Judgment Decision-Order dated September 27, 2013 (R 1452-1459) and Amended Judgment of the Honorable Nicholas

G. Garaufis, United States District Judge for the Eastern District of New York dated October 16, 2013 (R 1468-1469) which awarded additional damages of $126,464 to specified Plaintiffs; $127,754.17 in additional attorney fees to Plaintiffs' attorneys and additional costs in the amount of $2,460.29;

(6) His Honor's computation and application of the appropriate Statute of Limitations; and

such other further relief as to this Honorable Court shall be deemed just, proper and equitable.

ARGUMENT

Defendants-Appellants adopt the facts as stated and the points as argued in Defendants-Appellants' initial brief in support of the within appeal, as if fully set forth at length again herein.

POINT I

THE HOME HEALTH CARE EXEMPTION UNDER LONG ISLAND CARE AT HOME V. COKE IS STILL BINDING LAW

On September 17, 2013, the United States Department of Labor

issued its long-delayed final rule revising its regulations to eliminate the Fair Labor Standards Act's ("FLSA") companionship exemption for agency-employed direct care workers. The effective date of the revisions has been

postponed until January 1, 2015, therefore the aforesaid companionship exemption is still in effect.

Under the new regulation, all agency employed direct care workers who are currently exempt due to the nature and type of the work actually done in the placements home will, as of the first of next year be protected by the FLSA in minimum wage, overtime, and record-keeping requirements.

As the basis for the revision, the Department of Labor acknowledges that currently two direct care workers, working 12 hours shifts are currently used to provide 24 hour home care, seven days a week and the revision will mandate adding a third direct care worker, leveling the number of hours worked by any home care worker to 8 hour shifts, to support the continuity of care. Should a placement desire two workers rather than three, the healthcare industry will be allowed to offer the placement's family the option to pay a higher rate, such as time and a half for overtime in return for fewer workers in the placement's home, allowing both the individual healthcare workers, and the agencies themselves, enhanced income, which until then was unavailable due to Medicaid's refusal to pay overtime.

Substance must trump form or labels.

By her testimony that Plaintiff Gayle chose

to remain taking placements from Harry's, agreeing to be paid less money than the other, busier, nursing home referrals because she preferred working with a single patient at home rather than 40 patients at a busy facility(R 363, lines 2-10) as well as her stated preference for home care referrals explaining that it was easier work and at the time she "needed to be off her feet" (R 364, lines 9-11), Plaintiff Gayle freely admits, the work she performed at the placements' homes during the night shift was similar to that of a home care companion, rather than a nurse. Therefore, she should have been classified as such falling within the home care companionship exemption to the FLSA. Caring for a usually sleeping patient allows an inordinate amount of time not to be doing nursing duties when compared to a busy ward with 40 or more patients always in need of attention.

The similarities between Harry's Nurses Registry Inc. and Long Island Care at Home, Ltd. are striking. New York Department of Health web site reveals that the two are both licensed home care services agencies located in New York. Harry's was granted its license number 9245L001, one year prior to Long Island Care receiving its license number 9376L001. The services provided and set forth on their respective licenses are

virtually the same. They are both licensed to provide home health care, housekeeping, nursing and personal care. There is no reason the two should be treated differently.

Plaintiff Evelyn Coke was employed as a home worker who provided home services to elderly and infirm men and women who were otherwise unable to care for themselves. Ms. Coke was paid by Long Island Care at Home, Ltd. ("Long Island Care"), a third party referral agency that facilitated her placement. Ms. Coke sued her former employer, alleging that Long Island Care failed to pay the minimum and overtime wages to which she was entitled to under the Fair Labor Standards Act ("FLSA") as amended by the 1974 "FLSA Amendments".

Coke was employed by a third party and not the individuals receiving services. Coke pointed out the conflict in the two regulations, 29 C.F.R. § 552.3 and § 552.109, and then argued that because she was not working in a private home of her employer (referring to the language in 552.3), the FLSA companionship exception did not apply. The Court rejected that argument and upheld the regulation permitting a third party to pay the care provider. The Court held that the companionship exception to the over-time and minimum-wage provisions of the FLSA applied to the work she performed. This exemption will disappear effective January 1, 2015 when the

U.S. Department of Labor's revision of the law takes effect.

The distinction diminishes in light of the quality and quantity of tasks and responsibilities that are attendant to the one on one relationship of a home care giver as compared to the exponentially heightened tasks and responsibilities of a hospital duty nurse helping a staff to handle 40 or more patients at a time.

The U.S. Department of Labor specifically includes nurses when defining the statutory term "domestic service employment" See 29 CFR § 552.3

As the United States Supreme Court clearly reasoned in Long Island Care at Home v. Coke 551 U.S. 158, 163, 127 S.Ct. 2339, 168 L. Ed. 2d 54 (2007), the determining factor in the statute is a general description of the kind or type of work that must be performed in the placement's home by the worker put under his or her charge.

The District Court originally dismissed the lawsuit. This Honorable Court set aside the dismissal and the United States Supreme Court reversed the Second Circuit's decision remanding the case back to the District Court for further proceedings consistent with their opinion.

The United States Department of Labor interpreted the statutory exemption to include workers who are employed by an agency other than the family or household utilizing their

services. Unlike the distinction in the within case where Plaintiff Gayle was employed directly by the placements with whom she visited, Ms. Coke's employment was completely controlled by Long Island Care, and the Supreme Court still found her exempt from overtime based on the work she performed at the placement's home as satisfying the companionship exemption.

In light of the testimony, and with an eye on the favorable inferences that must be afforded the non-movant when confronting summary judgment, The Court's finding that Gayle was non-exempt should be reversed and the case should be remanded so that the factual determination can be made regarding the quality and quantity of the tasks and responsibilities Gayle actually performed.

The Supreme Court's decision in Long Island Care v. Coke settled the third party agency issue by holding that the exemption applied in situations where the work emanated from a third party referral service such as Long Island Care. By her own testimony as detailed above, Plaintiff-Appellee Gayle's tasks undertaken at the placements she selected more closely resembled that of a home care companionship, such as provided by Long Island Care placements by Plaintiff Coke in Coke. As Plaintiff-Appellee Gayle described at deposition, she took the placements from Defendants-Appellants to get

off her feet, to try the easier job of caring for a single person rather than 40 patients in a hospital setting and providing service in the home of a placement (R 363-364) rather than a full ward of a busy hospital. Such a 97.5% reduction in task responsibility, in light of the deference afforded the non-movant facing motion for summary judgment, in light of the substance of Plaintiff Gayle's testimony, there are clear questions of fact as to whether Plaintiff Gayle could be properly classified as such a home care worker under the FLSA.

The proper focus must remain on the amount of time the worker spent doing the type of work. It is a case sensitive inquiry as to how much of the 12 hour night shift was actually spent caring for the placement, and it can be assumed, that the placement was in bed, asleep, for most of this time.

In order to satisfy their burden of proof, plaintiff must establish that they performed uncompensated overtime "work" See Reich v. New York City Transit Authority, 45 F.3d 646, 651 (2d Cir 2005) (employees are entitled to compensation only for "work").

When a Plaintiff such as Plaintiff-Appellee Gayle testifies
that she took placement jobs to afford herself a 97.5% reduction in task responsibility (from 40 patients down to one placement), to get off her

agency does not exercise any right to curtail their services, leaving the decision to the family of the placement alone, to decide whether or not to continue with that nurse. The agency has no control or right to remove a nurse from a household, outside of that particular choice being made by the family or the placements themselves. Under those circumstances, similar to those in the record herein, the Court was unable to conclude that substantial evidence existed as to whether the claimants' work could be categorized as an employee-employer relationship. The case was remanded.

In 1990, in the case of Trauma Nurses v. New Jersey Department of Labor, 242 N.J. Super 135, 576 A.2d 285 (N.J. App. Div. 1990) another factually similar case involving nurses, that turned on the categorization of them as independent contractors. In determining independent contractor status, the court reasoned that the independent nature of their profession would survive without the existence of the agency. The nurses in Trauma, were required to fulfill educational and licensure requirements in order to practice their profession, were able to choose the number of shifts they decide to work, and the individual nurses need not work exclusively through the agency, instead working simultaneously for others.

In the case of State Insurance Fund v. Harry's Nurses Registry, 2011 N.Y. Slip Op 32191(U), Honorable Justice Milton Tingling categorized the field nurses as independent contractors under New York State Law and the Harry's worker's compensation obligation was limited to the 11 persons working daily in office on staff as salaried employees.

On June 23, 2008, the New York Association and Homes and Services for the Aging published a Memorandum (R 701-702) whereby the agency explained a then new law that was to take effect the following year which prohibited registered nurses and licensed practical nurses from mandatory overtime. As explained therein, the new mandate applies to healthcare employers operating pursuant to Public Health Law Article 28, and exempts home care agencies such as Harry's and Long Island Care at Home, where Coke took placements, operating pursuant to Public Health Law Article 36, from mandatory overtime compensation.

On a chart annexed to the Memorandum (R 702-703), it plainly shows that registered nurses and licensed practical nurses operating under Article 36 agencies are exempt from the overtime law.

POINT III

SUMMARY JUDGMENT AS TO LIQUIDATED DAMAGES SHOULD

NOT HAVE BEEN GRANTED BECAUSE KNOWINGLY WILLFUL VIOLATION OF THE FAIR LABOR STANDARDS ACT PRESENTS FACT QUESTIONS AND NOT STRICT LIABILITY

In page 16 of Defendants-Appellees' Brief, the nurses admit that they did not assert willfulness within their complaint and seek to presume the application of willfulness automatically as strict liability. Whether an action is governed by a two or three-year statute of limitations, and whether liquidated damages is appropriate are issues of fact that should not be awarded absent pleading and proof.

"Willfulness cannot be found on the basis of mere negligence or on a completely good faith but incorrect assumption that pay plan complied with the FLSA in all respects" Boekemeier v. Fourth Universalist Society in City of New York, 86 F.Supp 2d 280, 288 (S.D.N.Y 2000) *quoting* McLaughlin v. Richland Shoe, 486 U.S. 128, 133 L.Ed.2d 115, 108 S.Ct. 1677 (1988).

Under the advice of counsel, and with the governing case law precedents cited above and in Appellants' initial brief, any strict liability application of the willfulness issue is unduly harsh and draconian and contrary to the rule as stated in Davis v. Lenox Hill Hospital, 2004 U.S. Dist. LEXIS 17283, 9 Wage & Hour Cas. 2d 1683 (SDNY 2004, Docket : 03 Civ. 3746) which held that a Defendant's actual knowledge and its reasonableness remains genuine issues of material fact inappropriate for summary

disposition.

Whether liquidated damages are appropriate is a mixed question of law and fact for the court. The court retains the discretion to reduce or deny an award of liquidated damages "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act." Dybach v. Florida Department of Corrections, 942 F.2d 1562,1566 (11th Cir. 1991).

Here, competent admissible evidence established that Harry Dorvilien had subjective and objective good faith belief that its compensation practices did not violate the law. If an employer acts reasonably in determining its legal obligation, its actions cannot be deemed willful See McLaughlin at 486 U.S. 128,135.

Harry's compensation practices were regularly reviewed by the Department of Labor, the State Insurance Fund, and in litigation. His attorneys and inside and outside auditors never alerted him that any of his practices violated any applicable law, including the FLSA. To disregard such advice and precedent would be willful. To follow the advice of competent counsel in light of the aforesaid case

law would not.

"Whether the defendants knew or recklessly disregarded the fact that a failure to pay the plaintiffs over time violated the FLSA is a disputed issue of fact and must be decided by a jury" Vaicaitiene v. Partners in Care, 2005 U.S. Dist. LEXIS 13490, 2005 WL 1593053 (S.D.N.Y. 2005)(summary judgment denied). Whether Defendants violated the FLSA, and whether they acted willfully, are factual issues involving the merits of the action, which cannot be applied on a strict liability basis and must be proven. Automatic application of same is inappropriate.

POINT IV

A SECOND JUDGMENT IN FAVOR OF PLAINTIFF-APPELLANT WILLIE EVANS IS PRECLUDED BY HIS PRIOR FAILED ADJUDICATION OF THE MATTER

Plaintiff-Appellee Willie Evans' initiated a complaint with the New York State Department of Labor for overtime compensation in 2007, claiming that he had worked more than a 40 hour week for Defendants-Appellants, and as such should have received over time compensation. New York State Department of Labor disagreed and dismissed(R 723). Until now, there was no further litigation seeking review of the determination and there has been no appeal, therefore that prior adjudication should be

deemed final.

Now, the same Plaintiff-Appellee Willie Evans is being allowed a second claim for the same overtime wages he was previously denied. Plaintiff-Appellee Willie Evans' second chance at the same relief violates the principles of claim preclusion and *res judicata* and provides a further distinction between the class members and it is respectfully submitted, an additional error enforced improperly by the Honorable Court.

The doctrine of collateral estoppel prevents the re-
litigation of an issue or determination of fact after the party sought to be estopped has had a full and fair opportunity to present his or her case. One of the conditions which must be satisfied before the doctrine will be applied is that the issues in the two actions are identical.

> A federal court must apply the collateral estoppel rules of the state that rendered a prior judgment on the same issues currently before the court LaFluer v. Whitman, 300 F.3d 256,271 (2d Cir. 2002). Collateral estoppel in New York precludes a party from re-litigating in a subsequent action or proceeding, an issue clearly raised in a prior action or proceeding had decided against that party, whether or not the tribunals or causes of action are the same Ryan v.

New York Telephone, 62 N.Y.2d 494, 467 N.E.2d 487, 478 N.Y.S.2d 823 (1984).

Leon v. Department of Education, 2014 U.S. Dist. LEXIS 60788 (E.D.N.Y. 2014).

Federal courts must give state court judgments the same preclusive effect so long as the issue in question was actually and necessarily decided in a prior proceeding and is decisive in the current proceeding Id.

Any award of summary judgment to Willie Evans violates the principles of *res judicata* and claim preclusion, requiring reversal.

CONCLUSION

For all of the reasons contained in Defendants-Appellants' initial brief and the reasons set forth herein, it is respectfully submitted that this Honorable Court reverse the Decisions-Orders appealed from and remand the within action back to the District Court for trial.

Respectfully submitted,

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"R" references are to the corresponding pages in the Appendix Record on Appeal.