UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

DEFENDANT'S MEMORANDUM OF LAW

IN OPPOSITION TO DEFAULT JUDGMENT

Edward Irizarry
Law Offices of Edward Irizarry, P.C.
260 Madison Avenue
New York, NY 10016
646 216-2127

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO DEFAULT JUDGMENT

Preliminary Statement

Defendants herein submit the following, together with the attached affidavits and exhibits, in opposition to Plaintiff's motion for default, damages and remedies.

STATEMENT OF FACTS

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. A "face sheet" submitted by Isigi showing a date of care for a patient on March 31, 2009 establishes nothing other than that care was provided to an individual. 1:16-cv-02218 Dkt. No. 62-1. Nothing about this submission indicates that Isigi worked on March 31, 2009, or cared for this particular patient at the behest of, or as a result of an assignment from defendants.

Isigi's actual start date with Harry's is April 27, 2009, a date after Judge Sifton ordered that defendants submit a list of all nurses working for Harry's on March 31, 2009 (curiously enough, March 31, 2009 is also the date of the ambiguous Isigi "face sheet"). The pay records establish a start date for Ms. Isigi of April 27, 2009, and first payment on June 24, 2009. Harry's thus could not present Isigi's name to counsel Bernstein in the

Gayle matter because she did not work for Harry's at the time of Judge Sifton's order. There can be no imputation of bad faith or willfulness because of the absence of Ms. Isigi's name from the list produced pursuant to Sifton's order.

During her time at Harry's Nurses Registry and subsequent to June 2009, Ms. Isigi conversed with Debra Harry about the ongoing lawsuit brought by Claudia Gayle and a host of other nurses against Harry's Nurses Registry, Inc. in 2007. Ms. Harry spoke to Isigi about the lawsuit and observed that she did not join it as plaintiff throughout the time that Isigi worked for Harry's up until 2016, a period of over seven years. *See* Exhibit B, Debra Harry Affidavit. Ms. Isigi continued working for Harry's collecting her pay, despite knowing of the pending litigation. All of the specific allegations of retaliation, uncompensated overtime, refusal to tender paychecks, economic damages are denied by defendants. *See* Exhibits B, C, D.

The doctrine of equitable tolling permits a court "under compelling circumstances, [to] make narrow exceptions to the statute of limitations in order prevent inequity." *In re U.S. Lines, Inc*, 318 F.3d 432, 436 (2dCir. 2003). Such compelling circumstances are not present here. Isigi spoke on a daily basis with Ms .Harry, a co-worker caring for the same patient, and discussed the *Gayle* lawsuit. There is no reason to toll the statute of limitations. See Debra Harry Affidavit Exhibit B; see also time sheets where Isigi and Harry alternate in caring for the same patient, Exhibit A.

Ms. Isigi submits ambiguous and speculative assertions, including the ambiguous, "face sheet" in support of her contention that she worked overtime. Defendants submit Exhibit E, which indicates that Ms. Isigi was paid overtime in the years 2015 and 2016. *See* Exhibits B, C, D.

ARGUMENT

Plaintiff's submissions gloss over important issues pertaining to the nature of any damage award, if any, to be awarded Plaintiff Isigi. Under the Fair Labor Standards Act (FLSA) a cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages "may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." 29 U.S.C. § 255.

The FLSA provides that "if an 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…the court may, in its discretion, award no liquidated damages…" 29 U.S.C. § 260.

Under the FLSA, a violation is "willful" if the employer either "`knew or showed reckless disregard for . . . whether its conduct was prohibited by the statute.'" *Singer v. City of Waco, Tex.*, 324 F.3d 813, 821 (5th Cir. 2003) (quoting *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988)). The burden of showing that an FLSA violation was "willful" falls on the plaintiffs. *See id.*; *see also Samson v. Apollo Res., Inc.*, 242 F.3d 629, 636 (5th Cir. 2001) ("A plaintiff suing under the FLSA carries the burden of proving all elements of his or her claim."). On the other hand, an employer who violates the FLSA is liable for liquidated damages equal to the unpaid overtime compensation unless, after

concluding that the employer acted in "good faith" and had "reasonable grounds" to believe that its actions complied with the FLSA, the district court declines to award liquidated damages (or reduces the amount). 29 U.S.C. § 260. Courts have previously refused to read the "good faith" and "willful" provisions together. *See Nero v. Indus. Molding Corp.*, 167 F.3d 921, 929 & n.4 (5th Cir. 1999) (using FLSA to interpret similar provision in Family and Medical Leave Act); *Peters v. City of Shreveport*, 818 F.2d 1148, 1167-68 (5th Cir. 1987), abrogated on other grounds by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). A finding that petitioners failed to show good faith, therefore, does not mean that the plaintiffs showed that petitioners willfully violated the statute and should be exposed to a three year statute of limitations.

The district court's findings of fact must specifically examine petitioners' establishment of good faith, and cannot relieve Plaintiffs of their obligation to show willful violations of the FLSA.

In a pro se filing in the underlying *Gayle* class action, which defendant incorporates herein and again submits to establish his good faith belief in the legality of his payment practices, Defendants show the reasonableness of their actions as well as the absence of bad faith. Exhibit G.

In his pro se filing in 2009, prior to any of the district court's rulings on damages for any respondent and prior to its ruling on summary judgment for respondent class, defendant Harry Dorvilier, a hard-working, highly motivated, and successful immigrant from Haiti, whose primary language was not English, believing that his counsel was not adequately representing his interests or the interests of the business, appeared pro se.

In opposition to respondent Gayle's motion for damages, summary judgment and to

protest any allegation of willfulness on his part, Harry expressed his reliance on state licensing protocol, prior state action dismissing respondent class member's claim of overtime wage violations, and reliance on Supreme Court precedent to establish his defense that respondents were not covered and/or exempt from FLSA overtime requirements, that he did not act willfully, and that respondents' actions were barred by the applicable limitations period. Exhibit G.

Demonstrating bona fide good faith, and the absence of a reckless disregard for the law, defendant Harry Dorvilier detailed his understanding of the state and federal law applicable to the business of third party placements in the field of home and domestic care. Harry explained his understanding of the decisions of U.S. Courts of Appeals and the U.S. Supreme Court including *Fazekas v. Clevland* 204 F.3d 673 (6th Cir. 2000), and *Long Island Care at Home, Ltd.,* v. *Coke,* 551 US 158 (2007). He explained his good faith belief that Harry's Nurses Registry, as a third party broker placing companionship nurses in different homes duly licensed under Article 36 of the New York Public Health Law was not like the placements involved in *Brock v. Superior Care,* 840 F.2d 1054 (2nd Cir. 988), as Superior Care, a staffing agency, was licensed under Article 28 and placed nurses in nursing homes and hospitals. Harry asserted that the facts in his case were like the facts in *Long Island Care at Home, Ltd., v. Coke,* involving the Long Island Care placement agency that was also licensed under Article 36 of the New York Public Health Law.

In *Long Island Care at Home,* the Supreme Court cited the DOL regulation that defined domestic services employment as "services of a household nature performed by an employee in or about a private home ... of the person by whom he or she is employed ... such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, *nurses,* janitors,

laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use [as well as] babysitters employed on other than a casual basis" (emphasis added) 29 CFR § 552.3.

The Supreme Court then upheld the statutory exemption for "companionship services" performed by workers paid by third-party agencies such as Long Island Care. Importantly, the regulation listed “nurses” as those who could perform domestic services of a household nature, and who could, logically, qualify for the exemption if they perform work described as “companionship services.”

Significantly, Justice Stevens at oral argument in *Long Island Care at Home*, queried counsel about the importance the litigation and stated correctly that there was a safe harbor provision in the FLSA regarding the good faith of an employer when they rely on DOL regulations which, as Chief Justice Roberts pronounced, at the same argument, do conflict. Long Island Care at Home, like Harry’s Nurses Registry was being sued for willful violations.

Defendant again cites *Long Island Care at Home* expressing his direct reliance upon the regulations cited therein and upon the regulation’s inclusion of the term *nurses* as exempt employees if they performed *companionship services* in home care settings. Defendant explained how the work of the nurses in individual client cites entailed companionship services. This was supported by Gayle’s testimony that she did not really speak to the client’s about their medical condition unless there was something to be discuss and that “Harry’s Nurses Registry is a home-care agency.” R-376, 410[1].

Gayle’s deposition testimony also established that she chose to remain taking

[1] Numbers preceded with the letter R are to the Record on Appeal of the Gayle case filed with the Second Circuit.

placements from Harry's, agreeing to be paid less money because she preferred working with a client at home rather than 40 patients at a busy facility (R-363, lines 2-10); Gayle's preference for home care referrals was that it was easier work and at the time she "needed to be off her feet" (R 364, lines 9-11); according to Gayle, there was no difference between an employee and an independent contractor (R-368, lines 13-21).

In his affidavit, Harry states expressly how the New York State Department of Labor conducted an audit and stated that respondents were exempt from federal overtime regulations and the FLSA, and presented a decision from that body. He also argues how Harry's Nurses Registry was never found prior to *Gayle* in violation of the FLSA and, on the contrary, that claims for overtime wage violations had been dismissed against him by the state agency reviewing the claims.

Moreover, Harry asserts that the workers, who purchased their own equipment and insurance, and described themselves as independent contractors, were, in fact, independent contractors, and that Respondent Gayle was exempt under the professional employment exemption to the FLSA. Harry also stressed that in *Brock v. Superior Care* the employer was found to be in prior violation of the FLSA whereas Harry's Nurses Registry was never was found in violation. (R. 680--700.) Significantly, *Brock v. Superior Care*, relied upon by both district and circuit courts, was not decided on summary judgment but after a bench trial.

In sum, Defendant established that any transgression in light of the unsettled case law and conflicting precedent was not willful and legitimately rebuts any assertion that he *willfully* violated the FLSA.

In response to Harry's pro se affidavit, Plaintiff's counsel Bernstein moved to strike

it forever from the record, as he has done in this case, when Harry, because of his counsel's disappearance, sought to explain to the court his defense and implored the Court not to grant a default because of his attorney's malpractice.

Plaintiffs cannot establish Harry acted willfully or "knew or showed recklessness" as is required to support a finding that defendants willfully violated the FLSA. At most what we have here is a defendant desperately trying to locate his attorney to avoid a default and filing a Grievance because his attorney does not respond. Nowhere does Plaintiff establish willful violations of the FLSA. Plaintiff has not borne that burden of proof. A finding that defendants failed to show good faith, does not mean that the plaintiffs showed that the defendant willfully violated the statute and should be exposed to a three year statute of limitations.

To fully appreciate this point, the Court need only look to *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111 (1985). In *Thurston*, the Court held that a "knew or showed reckless disregard" standard was an acceptable way to define willfulness under the Age Discrimination in Employment Act ("ADEA"). Id. at 125-26. Despite holding that one of the defendant's defenses was not only incorrect but was also "meritless," Id. at 124, the Supreme Court held that the defendant did not act in reckless disregard of its obligations because it genuinely tried to determine its obligations. Id. at 129-30. Importantly, the Court did not hold that the defendant acted in reckless disregard of the law because it and/or its lawyer relied on a "meritless" interpretation of the ADEA. Instead, the Court's inquiry centered on the *defendant's* actions and mens rea (or lack thereof) - not the quality of the advice the defendant received from counsel.

But as the Supreme Court stated in *Richland Shoe*, "unreasonableness … [does not]

suffice as proof of knowing or reckless disregard." *Mclaughlin v. Richland Shoe Co*., 486 U.S. 128, 135 n. 13 (1988).

Moreover, an entry of default against defendants together with monetary awards to a time-barred plaintiff, under these circumstances, including an absent, irresponsible attorney and no finding of willfulness, violates notions of fairness and justice. Exhibit G. In the context of an FLSA action where the Courts make an independent finding of bad faith to hold a defendant responsible for acts going back to three years instead of the two year statute of limitations, an awarding of liquidated, compensatory and punitive damages unsupported by the requisite findings and imposing a three year statute of limitation under these circumstances would be unfair. Indeed, defendants hired an attorney to represent them in this action, answering the complaint, and presumed that that attorney would properly handle the matter.

Not only was Defendants' failure to respond not willful, deliberate or in bad faith, Defendants have a meritorious defense against Plaintiffs allegations. According to defendant, Plaintiff was not his employee at the time of the original class action and Plaintiff, according to defendant, and a witness, was acutely aware of the original action during its pendency but failed move to join the action. This precludes the implementation of equitable tolling as it relates to this particular plaintiff in a matter dating back almost ten years and ought to preclude any recovery whatsoever. Here the prospective plaintiff, alleging to be one of over twenty or so employees who suffered injury, interacted closely, and conversed with these employees and defendant during and

after the lawsuit against defendant, and cannot now claim she knew nothing of the lawsuit for the past ten years. The high threshold for equitable tolling, considering the circumstances, is simply not met.

Defendants have illustrated diligence warranting relief from default and have shown how Plaintiffs are not entitled to a recovery of damages and certainly not liquidated damages. Defendants were not negligent or careless in their actions in response to Plaintiff's Complaint. On the contrary, Defendants responsibly attempted to understand their rights with respect to Plaintiff's claims and were industrious in their attempts to reach out to defense counsel.

Moreover, defendants have a meritorious defense to Plaintiff's claims. In order to make a sufficient showing of a meritorious defense, Defendants need not establish their defense conclusively. *Pall Corp.*, 249 F.R.D. at 56. Instead, Defendants simply may present evidence of facts that, if proven at trial, would constitute a complete defense. Indeed, likelihood of success is not the measure of a meritorious defense. *ld.* This is because a defense is meritorious if it contains "even a hint of a suggestion" that would constitute a complete defense if proven at trial. *Id* (internal citations omitted). Although more than "conclusory denials" are required to establish a meritorious defense, a defense will be sufficient to warrant the setting aside of an entry of default if it is "potentially viable." *Id.*

Here, Defendants deny Plaintiff's allegations and intended to show at trial, before his lawyers' default that Defendants did not violate the FLSA, did not do so willfully, with respect to Plaintiff, who he asserts was not an employee at the times claimed, not a member of the Gayle class, and, most importantly, that Plaintiff cannot avail herself of the doctrine of equitable tolling, having known of, and conversed about,

the now disposed of class action for many years without seeking to opt-in to the class. This likewise should preclude her from obtaining any damages under New York State Labor law.

With respect to attorney's fees, defendant has filed a motion for sanctions in the Gayle case alleging, among other things, certain billing improprieties. Because of this filing, Defendant also opposes the granting of attorney's fees in the instant matter.

Here, the entry of liquidated, compensatory and punitive damages together with prejudgment interest, as well as attorney's fees on the default would bring about an unfair result. *Weisel*, 197 F.R.D. at 238; *Enron Oil Corp.*, 10 F.3d at 96; *Pall Corp*., 249 F.R.D. at 55. Defendants diligently attempted to determine the appropriate means to litigate against the claims made against them. But was left to filing pro se letters because of his attorney's failure to correspond and properly defend the action. By entering a damages award against defendants, defendants would be open to liability without being awarded the sacred opportunity to defend themselves because of counsel's negligence. This is a substantially unfair result.

Conclusion

For the foregoing reasons, Defendants respectfully request that this Court deny Plainiff's motion for default judgment, liquidated damages, compensatory and punitive damages, as well as pre-judgment interest, and attorney's fees, and that any analysis of damages be made under the applicable two year statute of limitation. In the alternative, Defendants a request a hearing to determine the issues of equitable tolling as well as the issue of the

willfulness of any violations of the FLSA under the correct legal standard which places the burden of proof on Plaintiffs to prove willfulness.

Dated: New York, New York

November 30, 2017

Respectfully submitted,

/s/
Edward Irizarry

To: Jonathan A. Bernstein
Levy Davis & Maher, LLP
(via) ECF