

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

CLAUDIA GAYLE, Individually and
On Behalf of All Others Similarly Situated
and as Class Representative, et. al.

Plaintiffs

v.

HARRY'S NURSES REGISTRY, INC. and
HARRY DORVILIER

Defendants

ROSELYN ISIGI,

Plaintiff-Appellee

v.

HARRY DORVILIER, HARRY'S NURSES REGISTRY
Defendants-Appellants

CLAUDIA GAYLE Individually and
On Behalf of All Others Similarly Situated
and as Class Representative, et. al.

v.

HARRY'S NURSES REGISTRY, INC.,
Defendant

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

IN RE: DORVILIER AND HARRY'S NURSERY a/k/a
HARRY'S NURSES REGISTRY, INC.,

Petitioner

McFARLANE

v.

Harry's Nurses Registry

**ATTORNEY AFFIRMATION IN
SUPPORT OF MOTION TO
VACATE JUDGMENTS/
ORDERS**

**18-3472 2d Cir Court of Appeals
Summary Order**

(filed 02/18/2020)

**18-1343 2d Cir Court of Appeals
Summary Order**

(12/19/2019)

**12-4764-cv 2d Cir Court of appeals
Summary Order**

(filed 12/8/2014)

**16Civ.01765 (AMD) (LB) EDNY
Memorandum Decision and Order**

(*Habeus Corpus* Petition decision/
order filed 05/31/2017)

17-CV-06350 (PKC) (PK) EDNY

Decided April 2, 2020

GEORGE A. RUSK, Esq., affirms as true and states:

1. I am an attorney admitted to practice before this Court.

2. I have been retained by Defendants to prosecute this motion to vacate in connection with the above-captioned matters. I have diligently reviewed the records regarding the above captioned cases and am familiar with the facts and circumstances relating to said cases.

BACKGROUND REGARDING HARRY'S NURSES LITIGATION

3. All the matters raised in (a) the cases identifying *Claudia Gayle* as Plaintiff (hereinafter referred to as the "*Gayle Case*") and (b) the *In Re: Dorvilier* criminal case that was reviewed by the Eastern District Court of New York in response to a habeus corpus petition (hereinafter referred to as the "*Dorvilier Criminal Case*") -- relate to a common set of facts and events that occurred during the period from November 7, 2004 to November 7, 2007 for alleged violations of the federal Fair Labor Standards Act (hereinafter referred to as the "FLSA") and analogue provisions under the New York State Labor Law. All the alleged violations at issue in those cases include but are not limited to Defendants' alleged failure to pay overtime wages (*Gayle Case*); and its alleged unlawful deduction of \$1 per hour from paychecks of nurses working for Defendant for the purpose of offsetting employer paid Workmans' Compensation insurance contributions (*Dorvilier Criminal Case*). The November 7, 2004 and November 7, 2005 dates are the operative dates for the commencement of FLSA violations in the *Gayle Case* because FLSA, section 255(a) establishes a three year statute of limitations for willful violations and a two year statute of limitations for non-willful violations, that prevents consideration of violations that occur more than two or three years prior to the date that an FLSA complaint is

filed. For purposes of this motion, the FLSA Complaint at issue in the *Gayle Case*, was filed was November 7, 2007 and therefore only willful violations occurring after November 7, 2004 or non-willful violations occurring after November 7, 2005 fall within the applicable statute of limitations and may be considered.

4. The cases involving *Roselyn Isigi* (hereinafter referred to as the “*Isigi case*”) and *Marjorie McFarlane* (hereinafter referred to as the “*McFarlane case*”), though filed more recently and relating to facts and events from a different time frame, involve the same lead counsel for Plaintiff, the same defendants and identical legal issues to those raised in the *Gayle Cass* and the *Dorvilier Criminal Case*. For judicial economy purposes, legal and constitutional issues that challenge jurisdiction and the validity of the decisions reached in the *Gayle Cases*, the *Dorvilier Criminal Case* and which are relevant to the *Issigi* and *McFarlane Cases*, are raised herein.

5. After the more thorough discussion provided in connection with this motion, hopefully it will become apparent that (1) the above specified legal proceedings conducted to date, at some point turned into a rush to judgment which gained momentum and somehow “veered off the tracks;” and (2) resulted in inappropriate Court decisions that were highly prejudicial to Defendants.

DEFENDANT DORVILIER AND PRIOR *PRO SE* STATUS

6. One of the principal defendants, Mr. Harry Dorvilier, (hereinafter referred to as “Defendant Dorvilier”), was born in Haiti and is of African American heritage. He is a hard-working, highly motivated U.S. citizen with an accounting background who founded a successful

business in 1991. The business has been operating since that time under the names Harry's Nurses Registry, Inc. and/or Harry's Home Care (hereinafter collectively referred to as "HNR").

7. HNR is a corporation organized under the laws of the State of New York with its principal place of business located in New York City at 88-25 163rd Street, Jamaica and is licensed to do business with the New York State Department of Health Office of Health Systems Management/Home Care Service Agency. By the terms of its License, HNR is strictly limited to conducting its business in New York State.

8. At the outset of the litigation that is the subject of the instant motion, Defendant Dorvilier retained legal counsel to represent his interests and the interests of HNR. However, over time he became increasingly frustrated with what he determined to be an inability of his attorneys to properly convey to the Court what he saw as complex, more subtle aspects the FLSA that demanded attention. As a result, Defendant Dorvilier decided to represent himself *pro-se*, with mixed results. Though he felt that he was able to raise significant legal issues, the legal outcome was not what he expected and demanded a new approach.

9. Defendant's decision to pursue his appeals *pro se* in retrospect was perhaps ill-advised, but his drive to seek justice and a fair outcome was right on target and hopefully the issues raised in this motion will translate a layman's sense of injustice and unfair treatment, into an articulate, fact based presentation that will persuade this Court that indeed, the judicial system treated Defendants poorly over the past 13 years of litigation. It is Defendant's position that principles of fundamental fairness and justice require that the decisions challenged by the instant motion, be fully and fairly reviewed and vacated in their entirety based on the significant, substantive legal defects discussed in this motion.

10. Though the courts have demonstrated their willingness to patiently and courteously consider the many arguments that Defendant Dorvilier has raised at trial and on appeal, unfortunately key, fundamental issues relating to jurisdiction, application of applicable law and statutory interpretation -- never saw the light of day and/or did not receive serious consideration. Indeed, when the record is reviewed it is apparent that a number of key, substantive issues that Defendant Dorvilier thought he had communicated were given a curt and perfunctory review in large part because of the manner in which they were presented *pro se*. The purpose of this motion is to now flesh out and present those key legal issues to the Court and to vacate a number of the Decisions of this Court pursuant to FRCP Rule 60(b) and 60(d)(3). A listing of the separate and distinct substantive legal issues raised by Defendant in the instant motion are set forth below:

- a. Defective Consent Fails to Meet Statutory Requirements
- b. Fraud and Fraud on the Court
- c. Absence Of Engagement In Commerce and Violation of Protections Provided by the 14th Amendment of the United States Constitution
- d. Individual Liability Of Defendant Dorvilier Constitutes a Violation of New York State Law and the 14th Amendment of the United States Constitution
- e. Criminal Liability Of Defendant Dorvilier Constitutes a Violation of Federal and State Law and the 14th Amendment of The United States Constitution
- f. Improper Application of US DOL Regulatory Exemption That Insulates Defendants from FLSA Liability
- g. Improper Application of Statute of Limitations That Reduces Actual and Liquidated Damages
- h. Denial of Defendant Right to Jury Determination of the Amount of FLSA

Liquidated Damages as provided by the 6th Amendment of the U.S. Constitution and *Per Se* Unlawful Denial of Defendants Good Faith Affirmative Defense

i. Flawed Discovery

The accompanying Memorandum of Law filed herewith focuses on each of these legal issues in more detail.

11. Though the legal process that Defendants have endured to date on the cases captioned above has been exhausting, frustrating and expensive, and yielded only limited results for Defendants -- Defendant Dorvilier continues to believe in the rule of law and that justice will prevail once the facts and legal arguments are properly presented and articulated.

DEFENDANTS' MOTION FOCUSES ON FLSA GREY AREAS THAT DEMAND ATTENTION

12. The FLSA statute was enacted by Congress in 1937 and is dated in many respects. Many of the issues raised by Defendants address grey areas of that statute that were likely not anticipated when enacted and allow considerable discretion in interpretation. Defendants are hopeful that to some extent the instant motion will resolve some of the inequities that have resulted from this statute and bring into focus, specific issues that should be addressed in a comprehensive manner by strict judicial scrutiny and perhaps a Congressional re-authorization overhaul.

13. For example, it is hard to understand how the Domestic Worker exemption, which has been codified in a US DOL regulation since 1975 and was found to be valid by the U.S. Supreme Court in its 2008 decision was entirely overlooked by the Courts in their decisions in

this case. Also overlooked by Courts was the fact that the U.S. Supreme Court noted in said decision that US DOL had tried unsuccessfully to remove this exemption and make domestic workers subject to FLSA overtime payment requirements, in three separate proposed rulemaking efforts during the period 1993 to 2007; a fourth proposed rulemaking was initiated by US DOL to remove that exemption and the regulatory change was upheld and took effect on October 15, 2015 (see Home Care Association of America v. Weil, (No. 15-5018)). It is Defendants' position that throughout the entire period during which the instant litigation took place, domestic workers such as those employed by Defendant HNR were exempt from overtime rules by the express terms of this provision.

14. Similarly, for example, it also is hard to understand how Defendant Dorvilier can be held **individually liable for corporate conduct** (i.e. for non-payment of overtime wages) when the laws of the New York State insulate him from such a harsh result; **individually and criminally liable for similar corporate conduct** (i.e. for non-payment of employer worker's compensation contributions); or that Defendants can be determined to have acted in a **willful** manner that triggers \$307,000 in liquidated damages when in fact the underlying action/conduct in question (i.e. non-payment of overtime wages) in fact was authorized under the FLSA (and the U.S. Supreme Court) under the domestic worker exemption and was specifically determined to be lawful by two separate administrative law judges and a justice of the New York State Supreme Court (Emphasis added).

15. There are other examples of perplexing, troubling issues raised by Plaintiff that include the introduction of stolen/tainted evidence by Plaintiff; collusion between Plaintiff's counsel and government officials to initiate criminal proceedings against Defendant Dorvilier;

and the improper and arbitrary application of “short-cut” processes and procedures by the New York State Department of Labor (hereinafter referred to as “NYS DOL”) that resulted in the swift criminal conviction of Defendant Dorvilier in lieu of long, drawn out, labor intensive agency actions that would require NYS DOL to formally declare a change in policy and engage in cumbersome litigation to reverse two inconvenient Administrative Law Judge decisions by the NYS DOL Workers’ Compensation Board that had prevented NYS DOL from holding Defendants liable for the amount of Workers’ Compensation insurance contributions that NYS DOL had sought from them for the 2008 - 2010 period. In point of fact, NYS DOL did not accomplish this policy change and confirm it by court affirmation until April 2019 (see Matter of Harry’s Nurses Registry, Inc. (Commissioner of Labor), 2019 NY Slip Op 03114, decided on April 25, 2019, Appellate Division, Third Department). Plaintiff only asks that the Court keep an open mind regarding these issues in its consideration of the instant motion and that they not be dismissed out of hand as musings that are the product of an overactive imagination.

16. Defendant Dorvilier remains hopeful that at some point the inequities he has suffered under the FLSA will at some point be remedied by judicial (through the instant motion) and Congressional action that brings the FLSA in step with the 21st century.

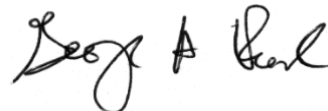
17. I have been retained to work closely with Defendant Dorvilier on the instant motion and am confident after conferring with him and reviewing relevant documents and case law, that I am able to present to the court a full range of substantive issues that demand attention to achieve substantial justice.

RELIEF REQUESTED BY DEFENDANTS

Plaintiff respectfully requests an Order of this Court:

- (a) vacating the judgment in the *Gayle Case*, the *Issigi Case*, the *MacFarlane Case* and the *Dorvilier Criminal Case*;
- (b) reversing all Decisions inconsistent with the rulings of the Court herein, including the *NYS Criminal Case* conviction of Defendant Dorvilier;
- (c) returning to Defendants all damages awarded in the *Gayle Case*, the *Issigi Case*, the *MacFarlane Case* and the *Dorvilier Criminal Case* to the extent that the Decisions in those cases:
 - (i) were premised on legal error or lack of jurisdiction
 - (ii) awarded damages that were not consistent with applicable statute of limitation requirements
 - (iii) awarded liquidated damages premised on a finding of “willful” action or awarded without a jury trial; or
 - (iv) are determined to be inconsistent with the rulings of the Court herein;
- (d) awarding attorneys’ fees for the preparation, filing and hearing of this motion and the reimbursement of attorneys’ fees incurred by Plaintiff in this case; and
- (e) such other and further relief as this Court deems just and proper.

Dated: November 27, 2020
Buffalo, New York



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