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Chan v. Triple 8 PalaceS.D.N.Y.,2004.Only the Westlaw citation is currently available.
United States District Court,S.D. New York.
Heng CHAN, et al., Plaintiffs,
v.
TRIPLE 8 PALACE, et al., Defendants.
No. 03 Civ. 6048(GEL).

May 24, 2004.

Mark S. Cheffo, Erica J. Goodstein, Skadden Arps Slate Meagher & Flom, New York, N.Y. for plaintiffs Heng Chan, Shing Tao Au, Yan Bin Cao, Ai Yin Chen, Wan Zhen Jiang, Fong Li, Jian Yun Lin, Wei Chao Tan, Feng Qin Zheng Tang, Sum Kay Wong, and Yong Cai Zhang.
Raymond Nardo, Andrew Y. Lin, Mineola, N.Y. for defendants Lung Kong Chan, Chiu Ng, Wei Wong, and Zen Quan Zhao.

OPINION AND ORDER

LYNCH, J.

***1** In this action charging violations of the Fair Labor Standards Act ("FLSA") and related claims under New York State law, plaintiff restaurant employees charge two corporations and twelve individuals with wage and hour violations, misappropriation of tips, and failure to reimburse uniform expenses. Four of the individual defendants, Lung Kong Chan, Chiu Ng, Wei Wong and Zen Quan Zhao, move to dismiss the complaint, arguing that plaintiffs have not adequately pled that the individual defendants are "employers" under the FLSA, and to dismiss the state claims, arguing that supplemental jurisdiction should be declined because the state claims predominate over the federal claims. The motion will be denied.

DISCUSSION

I. *Failure to State a Claim Under the FLSA*

The complaint adequately alleges that the moving defendants are "employers" within the meaning of the statute. In the context of a motion to dismiss, the Court accepts "as true the facts alleged in the complaint," *Jackson Nat'l Life Ins. Co. v. Merrill Lynch & Co .,* 32 F.3d 697, 699-700 (2d Cir.1994), and may grant the motion only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Thomas v. City of New York,* 143 F.3d 31, 36 (2d Cir.1998) (internal citations omitted). To be deemed adequate at the pleading stage, a complaint need not use particular words nor demonstrate that plaintiff will prevail on the merits, but need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief." *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 512-13 (2002) (quoting Fed.R.Civ.P. 8(a)).

The parties agree that under the FLSA, an employer "includes any person acting directly or indirectly in the interest of an employer in relation to an employee." 20 U.S.C. § 203(d). This definition is not technical, but must be construed in accord with "economic reality," *Goldberg v. Whitaker,* 366 U.S. 28, 33 (1961), taking into account whether the alleged "employer" (1) had the power to hire and fire the employees; (2) supervised and controlled employee work schedules or conditions of

employment; (3) determined the rate and method of payment; and (4) maintained employment records. *Herman v. RSR Security Service, Ltd.,* 172 F.3d 132, 139 (2d Cir.1999). None of these factors alone is controlling; the determination of "economic reality" depends on "the totality of the circumstances." *Id.*

Applying these standards, plaintiffs have unquestionably adequately alleged that Chan, Ng, and Zhao were "employers" within the meaning of the statute. As to each, the complaint alleges (1) that he was an "employer within the meaning of the [FLSA]" (Compl.¶ ¶ 33, 38, 46); (2) that he was either "Manager" or "General Manager" of the restaurant (*id.,* ¶ ¶ 32, 37, 45); and (3) that he "had the power to hire and fire plaintiffs, control their conditions of employment, and determine the rate and methods of payment" (*id.,* ¶ ¶ 34, 39, 47). Arguably, the first of these allegations, standing alone, is too conclusory; arguably, the second, standing alone, is insufficiently specific, as functions rather than titles determine "employer" status under the FLSA. But the Court need not decide whether these two allegations, alone or together, are sufficient to state a claim, since the third allegation specifically asserts that each of these three defendants exercised three of the four functions that would warrant a finding that an individual is an "employer" under *Herman.* Since no single factor is controlling, and all four factors need not be present to justify a finding of "employer" status, the plaintiffs have alleged facts that, if proved, would justify a reasonable fact-finder in concluding that these defendants were statutory "employers."

***2** Defendants' arguments that dispute the accuracy of these allegations or decry the absence of evidentiary detail to support them miss the point. At the pleading stage, the question is not whether the allegations are true, but merely whether the allegations, if proved, support plaintiffs' claim for relief. Plaintiffs need not win their case on the merits in the complaint. Here, plaintiffs have alleged not merely that these three defendants held certain titles or should be found to have a particular legal status, but that they in fact exercised concrete powers in the restaurants-allegations which, if true, would support a finding of liability. Nothing more is required.

The case is closer as to defendant Wong. As to him, plaintiffs omit the critical allegation that he actually exercised the power to hire and fire, to determine conditions of employment, or to determine payment for work, including only the conclusory allegation of "employer" status and the fact that Wong held the title of "manager." (Compl.¶ ¶ 40, 41.) The only other allegation specifically referring to Wong is that, along with various other defendants, he "took a portion of the tip pool, at the direction or with the knowledge and acquiescence of the other Defendants." (*Id .* ¶ 62.) It is questionable whether merely taking tips to which one is not entitled constitutes "determining the rate and method of payment," one of the *Herman* factors, particularly in the context of this complaint, which specifically names two other defendants, Zhao and Cheuk Hong Lau as persons who "controlled the distribution of tips earned by tipped employees." (*Id.* ¶ 60.)

Nevertheless, for purposes of surviving a motion to dismiss, the allegations of the complaint suffice, if barely. First, the complaint does allege that Wong was a manager of the restaurants. (Compl.¶ 40.)

While holding the title of a manager, in and of itself, is perhaps inconclusive or vague, managers usually possess the power to supervise and control work schedules, one of the *Herman* factors. Second, although Wong is not specifically named as one of those who "controlled the distribution of tips," that function is assigned not merely to Zhao and Lau, but to "[d]efendants" generally, *"including"* Zhao and Lau. (*Id.* ¶ 60.) The complaint also alleges that "[d]efendants" generally "mandated a tip pooling arrangement" that plaintiffs claim was illegal. (*Id.* ¶ 59.) Since these allegations appear to apply to all defendants, they can reasonably be read to allege that Wong exercised the power to determine the rate and manner of payment, at least as it relates to tips. These specific factual allegations, taken together with the general conclusory allegation that Wong was an "employer," are adequate to assert that Wong is liable under the FLSA, and to give him notice of the claims asserted against him. What the facts actually show will of course be tested on summary judgment and at trial.

***3** Accordingly, the motion to dismiss the complaint for failure to state a claim under the FLSA is denied.

II. *Supplemental Jurisdiction*

The moving defendants also argue that the Court should decline to exercise supplemental jurisdiction over the state claims in the complaint pursuant to 28 U.S.C. § 1367(c)(2), because the state claims allegedly "substantially predominate[ ]" over the federal claims. This argument is without merit.

As plaintiffs point out, this Court has jurisdiction over state claims "that are so related to claims in the action within [its] original jurisdiction." 28 U.S.C. § 1367(a). There is no question that that standard is met here. The federal and state claims in this case "derive from a common nucleus of operative fact" and would normally be expected to be tried in a single judicial proceeding. *United Mine Workers v. Gibbs,* 383 U.S. 715, 725 (1966). Indeed, the very same acts of the defendants that are alleged to violate federal law form the basis of the state claims. Requiring separate federal and state cases to litigate these claims would be wasteful and foolish.

The sole basis for defendants' contention that the state claims "substantially predominate" is that the state claims have a longer statute of limitations, thus potentially permitting greater recoveries on the state claims. (D.Mem.7.) But this does not mean that the state claims predominate. Courts generally find this exception to apply only "where 'a state claim constitutes the real body of a case, to which the federal claim is only an appendage'-only where permitting litigation of all claims in the district court can accurately be described as allowing a federal tail to wag what is in substance a state dog." *West Mifflin v. Lancaster,* 45 F.3d 780, 789 (3d Cir.1995) (quoting *Gibbs,* 383 U.S. at 727). But in this case, even if *recovery* were limited to the period within the shorter federal statute of limitations, discovery and trial on the federal claims alone would surely permit inquiry into practices extending further into the past beyond the limitations period, in order to establish the background to plaintiffs' claims. Thus, the same facts would be developed and the same evidence presented to the factfinder on both federal and state claims. The size of the potential recovery is plainly not determinative of whether state or

federal claims "predominate," particularly where the size of recovery reflects only the application of different statutes of limitations to state and federal claims that are virtually identical as to both fact and law.

Finally, even if § 1367(c)(2) applied in this situation, the provision does not divest the Court of supplemental jurisdiction; rather, it gives the Court discretion to decline to exercise the jurisdiction provided by § 1367(a). ("The district courts *may decline to exercise* supplemental jurisdiction" under the circumstances set forth in § 1367(c).) At this early stage of the case, the considerations of efficiency and fairness supporting the exercise of jurisdiction appear to outweigh any possibility that the importance of state law issues might counsel declining jurisdiction. Perhaps, when the facts are more fully developed and the legal issues that may arise under state and federal law are more clearly understood, there will be a basis for concluding that the state law issues "substantially predominate" and would be better resolved in state court. At this point, however, nothing in defendants' motion suggests that this is the case.

***4** Accordingly, the motion to dismiss the state law claims for lack of jurisdiction is denied.

CONCLUSION

For all of the foregoing reasons, the individual defendants' motion to dismiss the complaint is denied.

SO ORDERED.

S.D.N.Y.,2004.
Chan v. Triple 8 Palace

Not Reported in F.Supp.2d, 2004 WL 1161299 (S.D.N.Y.)

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