

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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SILVESTRE MAYO, :

Plaintiff, :

- against - :

Case No.: 15 Civ. 6681

: **COMPLAINT**

LIBERTY ASHES, INC., and MICHAEL BELLINO, :
STEPHEN BELLINO and FRANCESCO BELLINO, :
individually, :

Defendants. :

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Plaintiff Silvestre Mayo (“Plaintiff”), by and through his attorneys Shulman Kessler LLP, complaining of Defendant Liberty Ashes, Inc., Michael Bellino, Stephen Bellino and Francesco Bellino (collectively referred to herein as “Defendants”), allege as follows:

INTRODUCTION

1. This lawsuit seeks to recover unpaid overtime compensation for Plaintiff, based upon Defendants’ violation of the Fair Labor Standards Act of 1938 (the “FLSA”), as amended, 29 U.S.C. § 201, *et seq.*, the New York Labor Law (“NYLL” or “N.Y. Lab. Law”), and other appropriate rules, regulations, statutes, and ordinances.

2. This lawsuit also seeks to recover statutory damages for Defendants’ failure to provide proper wage statements, in violation of the NYLL and appropriate rules and regulations.

3. As described below, Plaintiff was a fulltime sanitation driver consistently working over 80 hours per week. Although Plaintiff worked more than 80 hours per week, Defendants never paid him overtime premiums for all hours worked in excess of 40.

JURISDICTION & VENUE

4. Jurisdiction of the Court over this controversy is based upon 29 U.S.C. § 201, *et seq.*, 28 U.S.C. §§ 1331 and 1337 and the doctrine of supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

5. This Court has jurisdiction over all state law claims brought in this action pursuant to 28 U.S.C. § 1367.

6. Defendants do business in Queens County, within the Eastern District of New York, maintaining a place of business at 9533 150th Street, Jamaica, New York 11435.

7. Accordingly, this action properly lies in the Eastern District of New York, pursuant to 28 U.S.C. § 1391.

THE PARTIES

Plaintiff Silvestre Mayo

8. Plaintiff is a resident of Suffolk County, State of New York.

9. At all times relevant to this Complaint, Plaintiff was an “employee” within the meaning of Section 3(e) of the FLSA, 29 U.S.C. § 203(e), and N.Y. Lab. Law § 190(2).

10. At all times relevant, Plaintiff was employed by Defendants as a fulltime sanitation driver to travel, collect, haul away, and dispose of garbage.

11. Plaintiff has expressed his consent to make these claims against Defendants by filing a written consent form, pursuant to 29 U.S.C. § 216(b). (*See* Exhibit A, annexed hereto).

Defendant Liberty Ashes, Inc.

12. Upon information and belief, Liberty Ashes, Inc. was and still is a domestic corporation organized and existing pursuant to the laws of the State of New York.

13. Upon information and belief, Liberty Ashes, Inc.'s principal place of business was and still is at 9533 150th Street, Jamaica, New York 11435.

14. Upon information and belief, and at all times hereinafter mentioned, Liberty Ashes, Inc. was and still is engaged in sanitation business.

15. At all times hereinafter mentioned, Liberty Ashes, Inc. was and still is an "employer" within the meaning of Section 3(d) of the FLSA, 29 U.S.C. § 203(d), and N.Y. Lab. Law § 190(3).

16. At all times hereinafter mentioned, the activities of Liberty Ashes, Inc. constituted an "enterprise" within the meaning of Section 3(r) & (s) of the FLSA, 29 U.S.C. § 203(r) & (s).

17. At all times hereinafter mentioned, Liberty Ashes, Inc. employed employees, including the Plaintiff herein, who regularly engaged in commerce or in the production of goods for commerce or in handling, selling or otherwise working on goods and materials which have moved in or been produced for commerce within the meaning of Section 3(b), (g), (i) and (j) of the FLSA, 29 U.S.C. § 203(b), (g), (i), (j), (r) & (s)(A)(i).

18. At all times hereinafter mentioned, Liberty Ashes, Inc.'s annual gross volume of sales made or business done is not less than \$500,000 within the meaning of 29 U.S.C. § 203(s)(A)(ii).

Defendant Michael Bellino

19. Upon information and belief, and at all times hereinafter mentioned, Michael Bellino owns and/or operates Liberty Ashes, Inc.

20. Upon information and belief, and at all times hereinafter mentioned, Michael Bellino is the President of Liberty Ashes, Inc.

21. Upon information and belief, and at all times hereinafter mentioned, Michael Bellino is the Vice-President of Liberty Ashes, Inc.

22. Upon information and belief, and at all times hereinafter mentioned, Michael Bellino is a shareholder of Liberty Ashes, Inc.

23. Upon information and belief, and at all times hereinafter mentioned, Michael Bellino is a corporate officer of Liberty Ashes, Inc.

24. Upon information and belief, and at all times hereinafter mentioned, Michael Bellino is the Chief Executive Officer of Liberty Ashes, Inc.

25. Upon information and belief, and at all times hereinafter mentioned, Michael Bellino is an agent of Liberty Ashes, Inc.

26. Upon information and belief, and at all times hereinafter mentioned, Michael Bellino has the authority over personnel decisions for Liberty Ashes, Inc.

27. Upon information and belief, and at all times hereinafter mentioned, Michael Bellino has the authority over payroll decisions for Liberty Ashes, Inc.

28. Upon information and belief, and at all times hereinafter mentioned, Michael Bellino supervises employees of Liberty Ashes, Inc.

29. Upon information and belief, and at all times hereinafter mentioned, Michael Bellino has the authority to hire and fire employees for Liberty Ashes, Inc.

30. Michael Bellino has the power to make binding decisions for Liberty Ashes, Inc.

31. Michael Bellino has the power to transfer the assets or liabilities of Liberty Ashes, Inc.

32. Michael Bellino has the power to declare bankruptcy on behalf of Liberty Ashes, Inc.

33. Michael Bellino has the power to enter into contracts on behalf of Liberty Ashes, Inc.

34. At all times hereinafter mentioned, Michael Bellino was and still is an “employer” within the meaning of Section 3(d) of the FLSA, 29 U.S.C. § 203(d), and N.Y. Lab. Law § 190(3).

Defendant Stephen Bellino

35. Upon information and belief, and at all times hereinafter mentioned, Stephen Bellino owns and/or operates Liberty Ashes, Inc.

36. Upon information and belief, and at all times hereinafter mentioned, Stephen Bellino is the President of Liberty Ashes, Inc.

37. Upon information and belief, and at all times hereinafter mentioned, Stephen Bellino is the Vice-President of Liberty Ashes, Inc.

38. Upon information and belief, and at all times hereinafter mentioned, Stephen Bellino is a shareholder of Liberty Ashes, Inc.

39. Upon information and belief, and at all times hereinafter mentioned, Stephen Bellino is a corporate officer of Liberty Ashes, Inc.

40. Upon information and belief, and at all times hereinafter mentioned, Stephen Bellino is the Chief Executive Officer of Liberty Ashes, Inc.

41. Upon information and belief, and at all times hereinafter mentioned, Stephen Bellino is an agent of Liberty Ashes, Inc.

42. Upon information and belief, and at all times hereinafter mentioned, Stephen Bellino has the authority over personnel decisions for Liberty Ashes, Inc.

43. Upon information and belief, and at all times hereinafter mentioned, Stephen Bellino has the authority over payroll decisions for Liberty Ashes, Inc.

44. Upon information and belief, and at all times hereinafter mentioned, Stephen Bellino supervises employees of Liberty Ashes, Inc.

45. Upon information and belief, and at all times hereinafter mentioned, Stephen Bellino has the authority to hire and fire employees for Liberty Ashes, Inc.

46. Stephen Bellino has the power to make binding decisions for Liberty Ashes, Inc.

47. Stephen Bellino has the power to transfer the assets or liabilities of Liberty Ashes, Inc.

48. Stephen Bellino has the power to declare bankruptcy on behalf of Liberty Ashes, Inc.

49. Stephen Bellino has the power to enter into contracts on behalf of Liberty Ashes, Inc.

50. At all times hereinafter mentioned, Stephen Bellino was and still is an “employer” within the meaning of Section 3(d) of the FLSA, 29 U.S.C. § 203(d), and N.Y. Lab. Law § 190(3).

Defendant Francesco Bellino

51. Upon information and belief, and at all times hereinafter mentioned, Francesco Bellino owns and/or operates Liberty Ashes, Inc.

52. Upon information and belief, and at all times hereinafter mentioned, Francesco Bellino is the President of Liberty Ashes, Inc.

53. Upon information and belief, and at all times hereinafter mentioned, Francesco Bellino is the Vice-President of Liberty Ashes, Inc.

54. Upon information and belief, and at all times hereinafter mentioned, Francesco Bellino is a shareholder of Liberty Ashes, Inc.

55. Upon information and belief, and at all times hereinafter mentioned, Francesco Bellino is a corporate officer of Liberty Ashes, Inc.

56. Upon information and belief, and at all times hereinafter mentioned, Francesco Bellino is the Chief Executive Officer of Liberty Ashes, Inc.

57. Upon information and belief, and at all times hereinafter mentioned, Francesco Bellino is an agent of Liberty Ashes, Inc.

58. Upon information and belief, and at all times hereinafter mentioned, Francesco Bellino has the authority over personnel decisions for Liberty Ashes, Inc.

59. Upon information and belief, and at all times hereinafter mentioned, Francesco Bellino has the authority over payroll decisions for Liberty Ashes, Inc.

60. Upon information and belief, and at all times hereinafter mentioned, Francesco Bellino supervises employees of Liberty Ashes, Inc.

61. Upon information and belief, and at all times hereinafter mentioned, Francesco Bellino has the authority to hire and fire employees for Liberty Ashes, Inc.

62. Francesco Bellino has the power to make binding decisions for Liberty Ashes, Inc.

63. Francesco Bellino has the power to transfer the assets or liabilities of Liberty Ashes, Inc.

64. Francesco Bellino has the power to declare bankruptcy on behalf of Liberty Ashes, Inc.

65. Francesco Bellino has the power to enter into contracts on behalf of Liberty Ashes, Inc.

66. At all times hereinafter mentioned, Francesco Bellino was and still is an “employer” within the meaning of Section 3(d) of the FLSA, 29 U.S.C. § 203(d), and N.Y. Lab. Law § 190(3).

FACTS

67. Plaintiff was an employee of Defendants, working under their direct supervision.

68. Plaintiff was employed by Defendants from in or about July 2009 until in or about August 2014.

69. At all times hereinafter mentioned, Plaintiff was required to be paid overtime pay at the statutory rate of one and one-half times his regular rate of pay after he had worked 40 hours in a workweek.

70. In the three years prior to the filing of the Complaint (the “FLSA Period”), Plaintiff worked more than 80 hours for Defendants in most of the workweeks Plaintiff was employed by Defendants.

71. Throughout most workweeks in which Plaintiff was employed by Defendants in the FLSA Period, Defendants failed to compensate Plaintiff for all hours worked in excess of 40 hours per week at a rate of at least one and one-half times his regular hourly rate.

72. In the six years prior to the filing of the Complaint (the “NYLL Period”), Plaintiff worked more than 80 hours per week for Defendants in most of the workweeks Plaintiff was employed by Defendants.

73. Throughout most workweeks in which Plaintiff was employed by Defendants in the NYLL Period, Defendants failed to compensate Plaintiff for all hours worked in excess of 40 hours per week at a rate of at least one and one-half times his hourly regular rate.

74. Upon information and belief, Defendants did not keep accurate records of hours worked by Plaintiff.

75. Defendants willfully disregarded and purposefully evaded record keeping requirements of the FLSA and the NYLL by failing to maintain accurate time sheets and payroll records throughout most workweeks that Plaintiff was employed for Defendant.

76. Defendants failed to furnish Plaintiff with an annual wage notice from February 2012 through February 2014, as was required by the NYLL.

77. Defendants failed to furnish Plaintiff with accurate statements of wages listing hours worked, rates paid, gross wages, allowances and deductions taken, and net wages paid.

AS AND FOR A FIRST CAUSE OF ACTION ON
FOR FAILURE TO PAY OVERTIME
AN FLSA VIOLATION

78. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

79. Plaintiff was a non-exempt employee and is entitled to be paid overtime compensation for all overtime hours worked.

80. Defendants employed Plaintiff for workweeks longer than 40 hours and willfully failed to compensate Plaintiff for the time worked in excess of 40 hours per week, at a rate of at least one and one-half times the regular hourly rate, in violation of the requirements of Section 7 of the FLSA, 29 U.S.C. § 207(a)(1).

81. The complete records concerning the number of hours worked by Plaintiff as well as the compensation Plaintiff received in workweeks in which excess hours were worked are in the exclusive possession and control of Defendants, and as such, Plaintiff is unable to state at this time the exact amount due and owing to him.

82. Defendants failed to keep accurate records of time worked by Plaintiff.

83. Defendants' violations of the FLSA, as described in this Complaint, have been willful and intentional.

84. Defendants did not make a good faith effort to comply with the FLSA with respect to its compensation of Plaintiff.

85. Because Defendants' violations of the FLSA have been willful, a three year statute of limitations applies, pursuant to 29 U.S.C. § 255.

86. Plaintiff has expressed his consent to make these claims against Defendants by filing a written consent form, pursuant to 29 U.S.C. § 216(b).

87. As a consequence of the willful underpayment of wages, alleged above, Plaintiff incurred damages thereby and Defendants are indebted to him in the amount of the unpaid overtime compensation, together with interest, liquidated damages, attorney's fees, and costs in an amount to be determined at trial.

AS AND FOR A SECOND CAUSE OF ACTION
FOR FAILURE TO PAY OVERTIME
A NYLL VIOLATION

88. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

89. Defendants employed Plaintiff for workweeks longer than 40 hours and willfully failed to compensate Plaintiff for the time worked in excess of 40 hours per week, at a rate of at least one and one-half times the regular hourly rate, in violation of the requirements of the NYLL.

90. The complete records concerning the number of hours worked by Plaintiff as well as the compensation Plaintiff received in workweeks in which excess hours were worked are in the exclusive possession and control of Defendants, and as such, Plaintiff is unable to state at this time the exact amount due and owing to him.

91. Defendants failed to keep, make, preserve, maintain, and furnish accurate records of time worked by Plaintiff.

92. By the course of conduct set forth above, Defendants violated N.Y. Lab. Law § 650, *et seq.*; 12 N.Y.C.R.R. § 142-2.2.

93. Defendants' failure to pay overtime compensation to Plaintiff was willful within the meaning of N.Y. Lab. Law § 663.

94. As a consequence of the willful underpayment of wages, alleged above, Plaintiff incurred damages thereby and Defendants are indebted to him in the amount of the unpaid overtime compensation and such other legal and equitable relief due to Defendants' unlawful and willful conduct, as the Court deems just and proper.

95. Plaintiff seeks recovery of liquidated damages, interest, attorneys' fees, and costs to be paid by Defendants as provided by the NYLL.

AS AND FOR THE THIRD CAUSE OF ACTION
FOR VIOLATION OF NOTICE AND RECORD-KEEPING REQUIREMENTS
A NYLL VIOLATION

96. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

97. Defendants failed to supply Plaintiff with an accurate statement of wages as required by N.Y. Lab. Law § 195, containing the dates of work covered by that payment of wages; name of employee; name of employer; address and phone number of employer; rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; gross wages; hourly rate or rates of pay and overtime rate or rates of pay if applicable; the number of hours worked, including overtime hours worked if applicable; deductions; and net wages.

98. Due to Defendants' violations of N.Y. Lab. Law § 195, for each workweek that Defendants failed to provide a proper wage statement from April 9, 2011 through August 10, 2014, Plaintiff is entitled to damages of \$100, or a total of \$2,500 per class member, as provided for by N.Y. Lab. Law § 198, reasonable attorneys' fees, costs, and injunctive and declaratory relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for the following relief, on the first cause of action:

- a. Judgment against Defendants for Plaintiff's unpaid back wages at the applicable overtime rate;
- b. An equal amount to the overtime wage damages as liquidated damages;
- c. Judgment against Defendants that their violations of the FLSA were willful;
- d. To the extent liquidated damages are not awarded, an award of prejudgment interest;
- e. All costs and attorneys' fees incurred prosecuting these claims; and
- f. For such further relief as the Court deems just and equitable.

WHEREFORE, Plaintiff prays for the following relief, on the second cause of action:

- a. Judgment against Defendants for Plaintiff's unpaid back wages at the applicable overtime rate;
- b. Liquidated damages at the applicable rate;
- c. An award of prejudgment interest;
- d. All costs and attorneys' fees incurred in prosecuting these claims;
- e. Issuance of a declaratory judgment that the practices complained of in this action are unlawful under N.Y. Lab. Law § 190 *et seq.*; and
- f. For further relief as this Court deems just and equitable.

WHEREFORE, Plaintiff prays for the following relief, on the third cause of action:

- a. Damages \$100 for each workweek that April 9, 2011 through February 25, 2015 Defendants failed to provide Plaintiff with accurate wage statements, or a total of \$2,500, as provided for by N.Y. Lab. Law § 198;
- b. All costs and attorneys' fees incurred prosecuting these claims;
- c. Issuance of a declaratory judgment that the practices complained of in this action are unlawful under N.Y. Lab. Law § 190 *et seq.*; and
- d. For such further relief as the Court deems just and equitable.

Dated: Melville, New York
November 20, 2015

Yours, etc.,

SHULMAN KESSLER LLP

By: /s/ Troy L. Kessler

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