2001 WL 8595
United States District Court, S.D. New York.

Zeng LIU, Miao Chen, Feng Jiang, Hong Huang and Xiao Li, Individually, and on behalf of all others Similarly Situated and as Class Representatives, Plaintiffs,
v.
DONNA KARAN INTERNATIONAL, INC., d.b.a. the Donna Karan Company a.k.a. Dkny, Jen Chu Fashion Corp., Wong Chai Sportswear, Inc., Y & C Mfg. Inc., Calvin Chen, Winnie Young Chen, Jen Jen of New York Inc ., and H.L.S. Fashion Corp., Defendants.

No. 00 Civ. 4221(WK). | Jan. 2, 2001.

Attorneys and Law Firms

Kenneth Kimmerling, Stanley Marc, New York, New York, Adam T. Klein, Scott Moss, New York, New York, for Plaintiffs.

Bettina B. Plevin, Nina Massen, Proskauer Rose LLP, New York, New York, for Defendants Donna Karan International, Inc.

Chi-Yuan Hwang, Flushing, New York, for All Other Defendants.

Opinion

MEMORANDUM & ORDER

KNAPP, Senior J.

***1** This class action has been brought on behalf of Chinese immigrant workers who were employed in a garment factory ("plaintiffs").[1] Plaintiffs allege violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 216(b) and New York Minimum Wage Act, N.Y. Lab. Law §§ 650 *et seq.*

[1] Plaintiffs did not originally bring this case as a class action. They subsequently filed an amended complaint with the proper pleadings for a such an action.

Defendant Donna Karan International, Inc. ("Donna Karan") moved to dismiss the Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. We heard oral argument on this motion on December 5, 2000. For the reasons that follow, we deny it.

FACTUAL BACKGROUND

Plaintiffs worked in garment factories owned by defendants Jen Chu Apparel Inc. ("Jen Chu Factory") and Jen Jen of New York, Inc. ("Jen Jen Factory"), corporations which are owned by defendants Calvin and Winnie Chen (the "Chens"), making clothing for, among other manufacturers, Donna Karan.[2] Plaintiffs were either paid by the hour or per piece they produced. Plaintiffs allege they worked 80 hour weeks, were never paid overtime and that their income was less than minimum wage. They bring this action against the defendants asking for unpaid minimum wages, unpaid overtime, and liquidated damages pursuant to Federal and New York labor laws.

[2] Plaintiffs worked at the Jen Chu Factory and the Jen Jen Factory interchangeably. These factories, now owned by the Chens, had several prior corporate owners: defendants Jen Chu Fashion Corp.; W & C Fashion Corp.; Wong Chai Sportswear, Inc.; Y & C Mfg. Inc. Plaintiffs allege that these corporations were created and then dissolved to avoid paying taxes. As we view this case, there are two groups of defendants: the Chens and their factories; and Donna Karan.

Plaintiffs state their claim against the two groups of defendants (the Chens and Donna Karan) asserting that they acted as joint employers. While the plaintiffs were technically employed by the Chens, they claim that Donna Karan is jointly responsible for their maltreatment. Plaintiffs claim that most-and at times all-of the garments on which they worked were made for Donna Karan, and that Donna Karan dictated the prices of the garments and the production requirements, which in turn dictated the hours plaintiffs worked.

Donna Karan, in this motion to dismiss under Rule 12(b)(6), claims that the Amended Complaint fails properly to assert that Donna Karan was a joint employer under the FLSA. We have received opposition papers from plaintiffs and have heard oral argument by plaintiffs and Donna Karan. We have not received any papers on behalf of or heard oral argument from the Chens.

PROCEDURAL POSTURE

We point out that this is a Rule 12(b)(6) motion to dismiss.

Many of the cases cited by the plaintiff that address similar issues to the one before us dealt with motions for summary judgment or those made post trial. In such cases there was no need to speculate what helpful or harmful facts would have been developed in the course of discovery or trial. Here, however, we are bound by the doctrine that all uncertainties must be found in favor of the nonmoving party.

DISCUSSION

The FLSA, which regulates the minimum and overtime wages paid by employers engaged in interstate commerce, applies to all those who qualify as "employers" within the meaning of the Act, which defines, with exceptions not here relevant, an "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee," 29 U.S.C. § 203(d), and an "employee" as "any individual employed by an employer," id. § 203(e)(1). The Supreme Court has stated that the expression "to employ" is to be interpreted expansively in order to cover those who might not qualify under strict application of traditional agency law. *Nationwide Mut. Ins. Co. v. Darden* (1992) 503 U.S. 318, 326. In addition, Department of Labor regulations promulgated under the Act, recognizing that an employee may have more than one employer under its broad definitions, see 29 C.F.R. § 791.2(a), refer to this circumstance as "joint employment." They provide that joint employment arises where "the facts establish that the employee is employed jointly by two or more employers, i.e. that employment by one employer is not completely disassociated from employment by the other employer(s)." 29 C.F.R. § 791.2(a).

***2** Both parties agree that in deciding whether Donna Karan qualifies as a joint employer within these definitions we should look to the "economic reality" presented by the facts before us. In analyzing the arguments of the parties, their final contentions boil down to whether we should deem ourselves controlled by the Second Circuit decision in *Carter v. Dutchess Community College* (2d Cir.1984) 735 F.2d 8, as Donna Karan contends, or by Judge Denise Cote's decision in *Lopez v. Silverman* (S.D.N.Y.1998) 14 F.Supp.2d 405, which we originally suggested might be controlling.

I. *The* Carter *Test*

The *Carter* test looks to 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. *Id.* at 12 (citations omitted).

In *Carter* the plaintiff was incarcerated under the control of the New York State Department of Correctional Services, but was selected to participate in a program sponsored by Dutchess Community College ("DCC") whereby inmates who were college graduates served as teaching assistants to DCC's regular staff. *Id.* at 10. DCC was paying Carter less than minimum wage. He sued, *inter alia,* for back wages pursuant to the FLSA. Using the four factor test, the *Carter* court held that these facts might be enough to find the DCC liable. *Id.* at 15.

Citing *Carter* factors, Donna Karan argues that the Amended Complaint fails to state a claim that would hold it liable in that it fails to allege any facts which would suggest (1) that Donna Karan had the power to hire and fire the factory employees; or (4) that it maintained employment records for those employees. Donna Karan further contends that the facts the Amended Complaint does allege in regard to factors (2) and (3) are insufficient to support the claim that Donna Karan acted as a "joint employer."

II. *The* Lopez *Factors*

The *Lopez* case, which we originally indicated should be controlling, dealt with this issue as one of first impression. The question there was whether Renaissance Sportswear, Inc. ("Renaissance"), the defendant garment manufacturer, was a joint employer of plaintiff employees who worked for the Paks, who ran a sewing and pressing operation known first as Woo and then as Han, and was thus liable for plaintiffs' overtime compensation. *Lopez,* 14 F.Supp.2d at 414. During the time at issue, 85 to 95 percent of the work at the Paks' factory was performed for Renaissance. Renaissance conducted frequent quality control inspections at the Paks' factory and dictated the amount of time in which the garments had to be complete, thereby supervising the employees and controlling the standards that the Paks' employees were required to meet in performing their work. However, Renaissance never exercised direct control over the wages or hours of the Paks' workers, hired or fired the Paks' employees, set their rates of pay, or engaged in any general funding or management of Woo or Han.

***3** In deciding what test to apply to these facts, Judge Cote specifically rejected the *Carter* test, pointing out that it would rarely permit a finding of joint employer status outside of situations involving direct corporate subsidiaries or managing administrators, and thus would virtually never hold a manufacturer liable under the FLSA for the conditions of a factory, over which they could exercise substantial control. *Id.* at 415.

Instead, Judge Cote combined factors from *Rutherford*

Food Corp. v. McComb (1947) 331 U.S. 722, the leading Supreme Court case dealing with joint employment; and *Brock v. Superior Care, Inc.* (2d Cir.1988) 840 F.2d 1054, a Second Circuit case distinguishing employees from independent contractors; as well as added additional factors which she deemed relevant, "in keeping with the parties' agreement that the economic reality test requires consideration of the totality of the circumstances, based on an examination of all pertinent facts of the case." *Lopez,* 14 F.Supp.2d at 420. Using these factor, Judge Cote found that Renaissance was a joint employer of plaintiffs and granted plaintiffs' motion for summary judgment in regards to this issue.

III. *The Case Before Us*

Some of the factors used by Judge Cote to determine that a joint employment relationship existed seem to us to be applicable to the case before us. Here, the Amended Complaint alleges that during the time in question the percentage of the clothing made in the Chens' factories for Donna Karan ranged from 60 to 100 percent. It also states that Donna Karan dictated the prices of the garments and the production requirements. Allegedly Donna Karan had representatives in the Chen factories on a daily basis. The Amended Complaint further purports that Donna Karan controlled wages and hours of the workers through setting low prices and making large output demands.

Donna Karan argues that *Lopez* departs from Second Circuit precedent and therefore should be ignored, claiming that the Second Circuit elected not to follow its analysis in *Herman v. RSR Sec. Servs. Ltd.,* (2d Cir.1999) 172 F.3d 132, a FLSA case that is more recent than *Lopez*. However, the facts in *Herman* were significantly different than those in *Lopez* and to those in the case before us. *Herman* dealt with the question of whether a corporation's chairman of the board, who held 50% ownership share in the company, qualified as an employer under the FLSA. Furthermore, *Herman* states that none of the factors examined standing alone are dispositive and that the " 'economic reality' test is determined based upon all the circumstances, any relevant evidence may be examined so as to avoid having the test confined to a narrow legalistic definition." 172 F.3d at 139 (citing *Superior Care,* 840 F.2d at 1059; and *Rutherford Food Corp.,* 331 U.S. 722, 730).

At oral argument Donna Karan contended that the case against it should be dismissed even if we were to adopt the *Lopez* factors. It based that argument predominantly on the additional factors, pointing out that neither of the facts examined by the additional factors are here present. While we agree that on the face of the Amended Complaint there is no statement of fact similar to the additional factors in *Lopez,* we find that the absence of such fact is not dispositive. Both of the economic reality tests cited by the parties suggest that we should look to the totality of the circumstances. Furthermore, Judge Cote looked at the additional factors because they were specific to the record in *Lopez.* Discovery or a trial might establish unique factors for consideration in this case. Moreover, the additional factors we may decide to consider could weigh in favor of finding that Donna Karan did not in fact act as a joint employer.

***4** However, such factors are not our concern here. *Lopez* addressed motions for summary judgment whereas we are faced with a Rule 12(b)(6) motion to dismiss. Whether the facts and circumstances ultimately developed by discovery or actual trial should established that Donna Karan in fact acted as a joint employer under the FLSA remains to be seen. For now we only hold that the Amended Complaint states enough to survive a motion to dismiss.

CONCLUSION

Based on the Amended Complaint we find that plaintiffs have stated a cause of action against Donna Karan upon which relief may be granted. For this reason, Donna Karan's motion to dismiss the Amended Complaint is denied.

Parallel Citations

6 Wage & Hour Cas.2d (BNA) 1142