

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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U.S. DISTRICT COURT E.D.N.Y.
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JOSE A. GONZALEZ and JUAN F. MAGARIN LEON, on:
behalf of themselves and all others similarly situated,

LONG ISLAND OFFICE

Plaintiffs,

Case No.:

- against -

COMPLAINT

LIDENMAR RESTAURANT, INC.
d/b/a CHATEAU LA MER, and
GEORGE VOUTSINAS, an individual,

CV - 11 5302

Defendants.

BIANCO, J.

WALL, M.J.

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Plaintiffs, JOSE A. GONZALEZ and JUAN F. MAGARIN LEON, on behalf of themselves,
and on behalf of all others similarly situated, by and through their attorneys, SHULMAN KESSLER
LLP, complaining of the defendants, allege as follows, as and for their complaint:

INTRODUCTION

1. Plaintiffs bring this action seeking monetary damages and affirmative relief based upon defendants' violation of the Fair Labor Standards Act of 1938 (hereinafter referred to as "FLSA"), as amended, 29 U.S.C. § 201, *et seq.*, the New York Labor Law (hereinafter referred to as "NYLL"), and other appropriate rules, regulations, statutes and ordinances.

STATEMENT PURSUANT TO LOCAL RULE 9

2. For purposes of complying with Local Rule 9, plaintiffs state that they have no corporate parent, subsidiary or affiliate and that there are no other interested parties.

JURISDICTION & VENUE

3. 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.

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

5. Defendants do business in the State of New York, within the Eastern District of New York, maintaining places of business at 845 South Wellwood Avenue, Lindenhurst, New York 11757.

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

THE PARTIES

7. The plaintiff, JOSE A. GONZALEZ, is a resident of the County of Suffolk, State of New York.

8. At all times relevant to the complaint, plaintiff, JOSE A. GONZALEZ, 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).

9. The plaintiff, JUAN F. MAGARIN LEON, is a resident of the County of Suffolk, State of New York.

10. At all times relevant to the complaint, plaintiff, JUAN F. MAGARIN LEON, 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).

11. That the plaintiff, JOSE A. GONZALEZ, was employed by the defendants from in or about 2003 through in or about 2009.

12. That during the course of his employment with the defendants, the plaintiff, JOSE A. GONZALEZ, was a cook.

13. That the plaintiff, JUAN F. MAGARIN LEON, was employed by the defendants from in or about January 2010 until in or about May 2010.

14. That during the course of his employment with the defendants, the plaintiff, JUAN F. MAGARIN LEON, worked as a kitchen laborer.

15. Upon information and belief, defendant, LIDENMAR RESTAURANT, INC. d/b/a CHATEAU LA MER, was and still is a domestic corporation organized and existing pursuant to the laws of the State of New York.

16. Upon information and belief, defendant, LIDENMAR RESTAURANT, INC. d/b/a CHATEAU LA MER's principal place of business was and still is at 845 South Wellwood Avenue, Lindenhurst, New York 11757.

17. Upon information and belief, and at all times hereinafter mentioned, the defendant, LIDENMAR RESTAURANT, INC. d/b/a CHATEAU LA MER was and still is engaged in the restaurant and catering business.

18. Upon information and belief, the defendant, LIDENMAR RESTAURANT, INC. was and still is doing business as Chateau La Mer.

19. At all times hereinafter mentioned, defendant, LIDENMAR RESTAURANT, 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).

20. Upon information and belief, and at all times hereinafter mentioned, the defendant, GEORGE VOUTSINAS, owns and/or operates the defendant, LIDENMAR RESTAURANT, INC.

21. Upon information and belief, and at all times hereinafter mentioned, the defendant, GEORGE VOUTSINAS, is the President of the defendant, LIDENMAR RESTAURANT, INC.

22. Upon information and belief, and at all times hereinafter mentioned, the defendant, GEORGE VOUTSINAS, is the Vice-President of the defendant, LIDENMAR RESTAURANT, INC.

23. Upon information and belief, and at all times hereinafter mentioned, the defendant, GEORGE VOUTSINAS, is a shareholder of the defendant, LIDENMAR RESTAURANT, INC.

24. Upon information and belief, and at all times hereinafter mentioned, the defendant, GEORGE VOUTSINAS, is a corporate officer of the defendant, LIDENMAR RESTAURANT, INC.

25. Upon information and belief, and at all times hereinafter mentioned, the defendant, GEORGE VOUTSINAS, is the Chief Executive Officer of the defendant, LIDENMAR RESTAURANT, INC.

26. Upon information and belief, and at all times hereinafter mentioned, the defendant, GEORGE VOUTSINAS, is an agent of the defendant, LIDENMAR RESTAURANT, INC.

27. Upon information and belief, and at all times hereinafter mentioned, the defendant GEORGE VOUTSINAS, has the authority over personnel decisions for the defendant, LIDENMAR RESTAURANT, INC.

28. Upon information and belief, and at all times hereinafter mentioned, the defendant, GEORGE VOUTSINAS, has the authority over payroll decisions for the defendant, LIDENMAR RESTAURANT, INC.

29. Upon information and belief, and at all times hereinafter mentioned, the defendant, GEORGE VOUTSINAS, has the authority to hire and fire employees for the defendant, LIDENMAR RESTAURANT, INC.

30. At all times hereinafter mentioned, the defendant, GEORGE VOUTSINAS, 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).

31. Defendant, GEORGE VOUTSINAS, has the power to make binding decisions for defendant, LIDENMAR RESTAURANT, INC.

32. At all times hereinafter mentioned, the activities of the defendants constituted an “enterprise” within the meaning of Section 3(r) & (s) of the FLSA, 29 U.S.C. § 203(r) & (s).

33. At all times hereinafter mentioned, defendants employed employees, including the plaintiffs 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).

34. At all times hereinafter mentioned, defendants’ 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)

FACTS

35. Plaintiff, JOSE A. GONZALEZ, was an employee of the defendants, working under their direct supervision.

36. At all times hereinafter mentioned, plaintiff, JOSE A. GONZALEZ, was required to be paid overtime pay at the statutory rate of time one and one-half (1 and 1/2) his regular rate of pay after he had worked forty (40) hours in a workweek.

37. Plaintiff, JOSE A. GONZALEZ, worked more than sixty (60) hours in most workweeks in which he was employed by the defendants.

38. Defendants failed to compensate the plaintiff, JOSE A. GONZALEZ, for time worked in excess of forty (40) hours per week at a rate of a least one and one-half (1 and 1/2) times his regular hourly rate, throughout the entire term of his employment with the defendants.

39. Plaintiff, JUAN F. MAGARIN LEON, was an employee of the defendants, working under their direct supervision.

40. At all times hereinafter mentioned, plaintiff, JUAN F. MAGARIN LEON, was required to be paid overtime pay at the statutory rate of time and one-half (1 and 1/2) his regular rate of pay after he had worked forty (40) hours in a workweek.

41. Plaintiff, JUAN F. MAGARIN LEON, worked more than sixty (60) hours in most workweeks in which he was employed by the defendants.

42. Defendants failed to compensate the plaintiff, JUAN F. MAGARIN LEON, for time worked in excess of forty (40) hours per week at a rate of a least one and one-half (1 and 1/2) times his regular hourly rate, throughout the entire term of his employment with the defendants.

43. Plaintiff, JOSE A. GONZALEZ, worked more than ten (10) hours on most workdays in which he was employed by the defendants.

44. Defendants failed to compensate the plaintiff, JOSE A. GONZALEZ, for time worked in excess of ten (10) ten hours per day, throughout his employment.

45. Plaintiff, JUAN F. MAGARIN LEON, worked more than ten (10) hours on most workdays in which he was employed by the defendants.

46. Defendants failed to compensate the plaintiff, JUAN F. MAGARIN LEON, for time worked in excess of ten (10) ten hours per day, throughout his employment.

COLLECTIVE ACTION CLAIMS

47. Upon information and belief, there are approximately more than ten (10) current and former employees that are similarly situated to the plaintiffs, who have been denied overtime compensation. The named plaintiffs are representative of those other workers and are acting on behalf of the defendants' current and former employees' interests as well as their own interest in bringing this action.

48. Plaintiffs seek to proceed as collective action with regard to the First Cause of Action, pursuant to 29 U.S.C. § 216(b) on behalf of themselves and the following class of persons:

All persons who give their consent, in writing, to become a party plaintiff and who are and have been employed, by the defendants, at any time during the three (3) years prior to the filing of their respective consent forms.

49. Similarly situated former and current employees are readily identifiable and locatable through use of the defendants' records. These similarly situated employees should be notified of and allowed to opt-in to this action, pursuant to 29 U.S.C. § 216(b). Unless the Court promptly issues such a notice, persons similarly situated to the plaintiffs, who have been unlawfully deprived of overtime pay, in violation of the FLSA, will be unable to secure compensation to which they are entitled, and which has been unlawfully withheld from them by the defendants.

AS AND FOR A FIRST CAUSE OF ACTION ON
BEHALF OF PLAINTIFFS AND THE FLSA COLLECTIVE CLASS
FOR FAILURE TO PAY OVERTIME
A FLSA VIOLATION

50. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "49" of the Complaint, with the same force and effect, as if fully alleged herein.

51. Defendants employed plaintiffs for workweeks longer than forty (40) hours and willfully failed to compensate the plaintiffs for the time worked in excess of forty (40) hours per week, at a rate of at least one and one-half (1 and 1/2) times the regular hourly rate, in violation of the requirements of Section 7 of the FLSA, 29 U.S.C. § 207(a)(1).

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

53. The plaintiffs have expressed their consent to make these claims against the defendants by filing a written consent form, pursuant to 29 U.S.C. § 216(b). (*See Exhibit "A," annexed hereto*).

54. As a consequence of the willful underpayment of wages, alleged above, the plaintiffs have incurred damages thereby and the defendants are indebted to them in the amount of the unpaid overtime compensation, together with interest and liquidated damages, in an amount to be determined at trial.

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

55. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "54" of the Complaint, with the same force and effect, as if fully alleged herein.

56. Defendants employed plaintiffs for workweeks longer than forty (40) hours and willfully failed to compensate the plaintiffs for the time worked in excess of forty (40) hours per week, at a rate of at least one and one-half (1 and 1/2) times the regular hourly rate, in violation of the requirements of NYLL.

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

58. By the course of conduct set forth above, defendants have violated N.Y. Lab. Law § 650, *et seq.*; 12 N.Y.C.R.R. § 146-1.4.

59. Defendants have a policy and practice of refusing to pay overtime compensation to the plaintiffs.

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

61. Plaintiffs seek recovery of liquidated damages, attorneys' fees, and costs to be paid by the defendants as provided by the NYLL.

**AS AND FOR A THIRD CAUSE OF ACTION ON
BEHALF OF PLAINTIFFS
FOR VIOLATION OF THE SPREAD OF HOURS WAGE ORDER
OF THE NEW YORK COMMISSIONER OF LABOR
A NYLL VIOLATION**

62. Plaintiffs repeat and re-allege each and every allegation contained in paragraphs “1” through “61” of the Complaint, with the same force and effect, as if fully alleged herein.

63. Defendants failed to pay plaintiffs one (1) additional hour pay at the basic minimum wage rate before allowances for each day plaintiffs spread of hours exceeded ten (10), in violation of N.Y. Lab. Law §§ 190, *et seq.* & 650, *et seq.*, as codified by 12 N.Y.C.R.R. § 146-1.6.

64. Defendants failed to pay plaintiffs in a timely fashion, as required by Article 6 of the NYLL.

65. Defendants’ failure to pay plaintiffs an additional hour pay for each day plaintiff’s spread of hours exceeded ten (10) was willful within the meaning of N.Y. Lab. Law § 663.

66. As a result of the foregoing, plaintiffs have been injured, and defendants have profited thereby, in an amount to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs, JOSE A. GONZALEZ and JUAN F. MAGARIN LEON, on behalf of themselves, and the FLSA Collective Class, respectfully request that they be awarded the following relief, on the first cause of action:

- a. Judgment against defendants for plaintiffs' 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, plaintiffs pray for the following relief as follows, on the second cause of action:

- a. Judgment against defendants for an amount equal to plaintiffs' unpaid back wages at the applicable overtime rate;
- b. An equal amount to the overtime wage damages as liquidated damages;
- c. All costs and attorneys' fees incurred in prosecuting these claims; and
- d. For further relief as this Court deems just and equitable.

WHEREFORE, plaintiffs pray for the following relief as follows, on the third cause of action:

- a. Judgment against defendants for an amount equal to plaintiffs' unpaid back wages;
- b. All costs and attorneys' fees incurred in prosecuting these claims; and
- c. For further relief as this Court deems just and equitable.

Dated: Melville, New York
October 26, 2011

Yours, etc.,

SHULMAN KESSLER LLP

By: 

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Putative Collective Class*

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