UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLOS TORRES, on behalf of himself and all others similarly situated,

Plaintiffs,

-against-

GRISTEDE'S OPERATING CORP., et al.,

Defendants.

04 Civ. 3316 (PAC)

ORDER

HONORABLE PAUL A. CROTTY, United States District Judge:

For the reasons stated on the record at the conclusion of oral argument, the Court grants Plaintiffs' motion for partial summary judgment; and holds that defendant John Catsimatidis is an employer within the meaning of the Fair Labor Standards Act ("FLSA") and New York Labor Law ("NYLL"). As such, defendant John Catsimatidis is jointly and severally liable for Plaintiffs' damages. The Court makes the following additional holdings in support of this decision.

Both parties agree that the word "employer" is defined broadly to include "any person acting directly or indirectly in the interest of an employer in relation to any employee." 29 U.S.C. § 203(d). "Person" includes individual, so that individuals may be held liable or responsible for violations of the law by a corporate employer. Id. at § 203(a).

Both parties agree that the traditional requirements for piercing the corporate veil are not required to establish individual liability under the FLSA and NYLL,.

At the hearing held on September 8, 2011, the Court recited passages from an affidavit signed by Mr. Catsimatidis, on January 13, 2009, in a case that was pending here in the Southern District of New York, Trader Joe's Company v. Gristede's Foods, Inc., et al., 09 Civ. 163 (LAP).

There is no need to repeat what was said in open Court, except to briefly summarize Mr. Catsimatidis' affidavit: (1) he is the sole owner, President and CEO of Gristede's and its parent company; (2) he has owned the enterprise for 20 years; (3) he has the right and authority to open, close and reopen stores; (4) he can set prices for goods offered for sale; (5) select the décor for the stores; (6) control any store's signage and advertising. Indeed, he can run the entire operation where he "made [his] fortune trading in the kind of goods sold in the Red Apple and Gristedes supermarket chains that [he] own[s]."

This affidavit, together with Mr. Catsimatidis' statements in open Court in this proceeding that he could shut down the business, declare bankruptcy, as well as provide the personal signature necessary for a bank letter of credit to be issued in favor of Gristede's, demonstrate that he has absolute control of Gristede's, and all of its operations.

Nonetheless, Mr. Catsimatidis' urges that he should not be held to be an employer. The "economic reality" test he applies requires the individual to have:

(1) the power to hire and fire employees;
(2) supervise and control employee work schedules;
(3) determine the rate and methods of pay; and
(4) maintain employment records.

Carter v. Dutchess Community College, 735 F.2d 8 (2d Cir. 1984). In other words, before an individual can be held to be an employer, he must have acted in an immediate and direct way over the workers in question.

But, as the Second Circuit later held in Herman v. RSR Sec. Services Ltd., 172 F.3d 132 (2d Cir. 1999), the Carter test of "economic reality" should be based on "all the circumstances. . . so as to avoid having the test confined to a narrow legalistic definition." Id. at 139 (emphasis in original). That, of course, is precisely what Mr. Catsimatidis is attempting to do, as he argues that there must be some connection between what the individual has done (in the exercise of his

responsibility) and the wrong alleged in the complaint. He argues that corporate officers should not be liable solely due to that officer status; nor should they be held accountable because they have cheap products.

However, "[a]n employer need not look over his workers' shoulders every day in order to exercise control." Id. at 190 (quoting Brock v. Superior Care, Inc., 840 F.2d 1054, 1060 (2d Cir. 1988) (finding the plaintiffs to be employees, as opposed to independent contractors, even though the employer's "visits to the job sites occurred only once or twice a month")). In the Herman case, the individual at issue was held to be an employer because he hired management staff, as opposed to the workers who had FLSA complaints. There is no evidence that Mr. Catsimatidis hired any class member, but there does not have to be. It stands uncontradicted that he hired managerial employees.

Mr. Catsimatidis signed all paychecks to the class members. See Dong v. Ng, No. 08 Civ. 917 (JGK)(MHD), 2011 WL 2150544, at *9 (S.D.N.Y. Mar 08, 2011) (finding the signing of payroll certifications to be a significant factor in the economic reality test) (adopted by 2011 WL 2150545 (S.D.N.Y. May 31, 2011)). He argues that it was only an electronic signature. But, even if that is a difference, it does not have any significance.

Based on these facts, defendant Catsimatidis argues, as Portnoy did in Herman, that only evidence indicating direct control over the employees at issue should be considered. The Court specifically rejected the argument: "Such a contract ignores the relevance of the totality of the circumstances in determining Portnoy's operational conduct of RSR's employment of the Guards." Id. at 140.

Mr. Catsimatidis argues that he cannot fire anyone, but we should be careful about accepting the characterization of limitations on his power. See Ansoumana v. Gristede's

Operating Corp., 255 F. Supp. 2d 184, 190 (S.D.N.Y. 2003) (employer's characterization cannot control, "otherwise there could be no enforcement of any minimum wages or overtime law"). This is especially true when key managerial employees at Gristede's concede that Mr. Catsimatidis hired them, and acknowledged his power to close or sell Gristede's stores. (Plaintiffs' 56.1 Statement of Facts, ¶¶ 18, 19, 20, 21). Defendant's responses do not deny these statements, so much as engage in an extended quibble about their legal significance. See United States v. Mottley, 130 Fed. Appx. 508, 510 (2d Cir. 2005) (quoting Lipton v. Nature Co., 71 F.3d 464, 469 (2d Cir. 1995) ("[M]ere conclusory allegations or denials . . . are not evidence and cannot by themselves create a genuine issue of material fact where none would otherwise exist.")).

Mr. Catsimatidis routinely reviews financial reports, works at his office in Gristede's corporate office and generally presides over the day to day operations of the company. His employees recognize that he is in charge. (Id. at ¶¶ 53, 55, 56, 57, 59, 62, 63, 64). For the purposes of applying the total circumstances test, it does not matter that Mr. Catsimatidis has delegated powers to others. (Id. at ¶ 71). What is critical is that Mr. Catsimatidis has those powers to delegate.

Further, Mr. Catsimatidis admits that he controls Gristede's banking and real estate matters. Notwithstanding the argument that his control in these two critical areas is not relevant to his status as employer, (Id. at ¶¶ 75-79), they are part of "the total circumstances" in analyzing whether Mr. Catsimatidis is in fact an employer.

Where officers and owners have "overall operational control of the corporation, possess an ownership interest in it, control significant functions of the business or determine the employees' salaries and makes hiring decisions," they may be held to be employers under the

FLSA. Ansoumana, 255 F. Supp. 2d at 192 (quoting Lopez v. Silverman, 14 F. Supp. 2d 405, 412 (S.D.N.Y. 1998)) (emphasis added).

In short, there is no aspect of Gristede's operations from top to bottom and side to side which is beyond Mr. Catsimatidis' reach. There is no area of Gristede's which is not subject to his control, whether he chooses to exercise it. He had operational control and, as such, he may be held to be an employer. Herman, 172 F.3d at 140-41; Ansoumana, 255 F. Supp. 2d at 193.

The conclusion should come as no surprise to Mr. Catsimatidis. Given his own public pronouncements, as well as his conduct here in this proceeding, it is pellucidly clear that he is the one person who is in charge of the corporate defendant. There is no genuine issue of material fact concerning Mr. Catsimatidis' statements. Mr. Catsimatidis is an employer within the meaning of the law and he will be held jointly and severally liable for the damages which have accrued in this action.

Dated: New York, New York
September 9, 2011

SO ORDERED

PAUL A. CROTTY
United States District Judge