

Shawn P. Day, et al.,

Plaintiffs

v.

DECISION AND ORDER
(Motion to Dismiss)

Capozza Tile Co., Inc., et al.,

Defendants

This matter is before the Court on Defendants' (Capozza Tile Co., Inc. and Joseph F. Capozza) Motion to Dismiss. Through their motion, which was filed pursuant to M.R. Civ. P. 12(b)(6), Defendants seek the dismissal of Counts IV and VI of Plaintiffs' Second Amended Complaint.

Factual Background

In September 2009, Plaintiffs filed a two-count Complaint claiming that they are entitled to overtime pay under federal and state statutes. Plaintiffs subsequently filed an Amended Complaint, adding a third count for "Unfair Agreement" pursuant to 26 M.R.S. § 629. As part of their response to the Amended Complaint, Defendants asserted counterclaims against each of the Plaintiffs. As Defendants explain, "the gravamen of the counterclaims is that Plaintiffs misreported their hours of work, failed to actually work the hours for which they were compensated, and therefore obtained greater compensation than that to which they were legally and/or equitably entitled."¹

In January 2010, Plaintiffs filed a Second Amended Complaint in which they included three additional counts. In Count IV, Plaintiffs allege that the Defendants' Counterclaims were filed "in retaliation" for Plaintiffs' claim for overtime pay and, therefore, the counterclaims constitute a

¹ Defs.' Mot. at 1.

violation of 29 U.S.C. § 215(a)(3). In Count VI, Plaintiffs allege that Defendants failed to keep accurate records as required by 29 U.S.C. § 211(c) and 26 M.R.S. § 622.

Discussion

I. Standard of Review

A motion to dismiss pursuant to M.R. Civ. P. 12(b)(6) “tests the legal sufficiency of the complaint and, on such a challenge, ‘the material allegations of the complaint must be taken as admitted.’” *Shaw v. Southern Aroostook Comm. Sch. Dist.*, 683 A.2d 502, 503 (Me. 1996) (quoting *McAfee v. Cole*, 637 A.2d 463, 465 (Me.1994)). When reviewing a motion to dismiss, the Court examines “the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory.” *Id.* A dismissal under M.R. Civ. P. 12(b)(6) will be granted only “when it appears beyond a doubt that the plaintiff is entitled to no relief under any set of facts that he might prove in support of his claim.” *Id.* (quoting *Hall v. Bd. of Env'tl. Prot.*, 498 A.2d 260, 266 (Me. 1985)). “The legal sufficiency of a complaint challenged pursuant to M.R. Civ. P. 12(b)(6) is a question of law.” *Bean v. Cummings*, 2008 ME 18, ¶ 7, 2008 ME 18, 939 A.2d 676, 679 (citations and internal quotation marks omitted).

II. Count IV: Unlawful Retaliation in Violation of 29 U.S.C. § 215(a)(3).

In Count IV of their Second Amended Complaint, Plaintiffs allege that Defendants filed their counterclaims in retaliation for Plaintiffs’ claim for overtime pay. According to Plaintiffs, Defendants’ counterclaims constitute unlawful retaliation under Section 215(a)(3) of the Fair Labor Standards Act. Under Section 215(a)(3), an employer “may not discharge or in any other manner discriminate against any employee because such employee has filed any complaint or caused to be instituted any proceeding under or related to this Act . . .” *Id.*

Defendants argue that Count IV is barred because the filing of a compulsory counterclaim in a civil action does not, as a matter of law, constitute unlawful retaliation. In support of this argument, Defendants cite a number of federal cases.² Defendants acknowledge, however, that some federal courts have concluded that a counterclaim may constitute unlawful retaliation if it is “totally baseless.”³

Upon review of the various cases, including the decision in *Orr v. James Julia, Inc.*, 2008 U.S. Dist. LEXIS 49687 (*Kravchuck, Mag.*)(accepted by *Orr v. James D. Julia, Inc.*, 2008 U.S. Dist. LEXIS 65518), the only known Maine case in which the issue was addressed, the Court is persuaded that under certain circumstances, the assertion of a compulsory counterclaim can be the basis of a retaliation claim. In particular, a counterclaim can serve as grounds for a retaliation claim provided that the counterclaim is “totally baseless”, which is recognized as a difficult standard. *Id.* See also *Munroe v. Partsbase, Inc.*, No. 08-80431-CIV, 2009 U.S. Dist. LEXIS 15801, 2009 WL 413721, *8 (S.D. Fla. Feb. 18, 2009)⁴; and *Ergo v. Int'l Merch. Servs.*, 519 F.Supp.2d 765, 781 (N.D.Ill.2007)). The “totally baseless” standard permits a court to weigh appropriately “an employer’s First Amendment rights to access to the courts against employees’ needs to assert statutory rights.” *Monroe*, 2008 U.S. Dist. LEXIS 15801, 2009 WL413721, *8.

Even with this heightened standard, when the pleading is viewed in the light most favorable to the Plaintiffs and the allegations in the complaint are taken as true, as the Court must on a motion to dismiss, the Court cannot conclude that it is “beyond a doubt that the plaintiff is entitled to no relief under any set of facts that he might prove in support of his claim.” *Hall v. Bd. of Envtl. Prot.*,

² See Defs.’ Mot. at 2-4 (citing, *inter alia*, *Hernandez v. Crawford Building Material Co.*, 321 F.3d 528, 532-33 (5th Cir. 2003); *Gross v. Akin, Gump, Strauss, Hauer & Feld LLP*, 599 F. Supp.2d 23, 33-34 (D.D.C. 2009); *Kenfish v. Madahcom, Inc.*, 566 F. Supp.2d 1343, 1349 (M.D. Fla. 2008); *Ergo v. Int’l Merchant Servs., Inc.*, 519 F. Supp.2d 765, 780-81 (N.D. Ill. 2007)).

³ Def.’s Mot. at 4-5 (citing, *inter alia*, *Martin v. Gingerbread House, Inc.*, 977 F.2d 1405, 1408 (10th Cir. 1992). See also *Orr v. James D. Julia, Inc.*, 2008 U.S. Dist. LEXIS 49687, 2008 WL 2605569, at *17 (D. Me. June 27, 2008).

⁴ The Court recognizes that it has cited to a number of “unpublished” decisions, which are not binding precedent. However, the Court believes that the cases include helpful analyses and citations to applicable “reported” decisions. Accordingly, the Court includes citation to these cases to aid in its discussion of the issues presented by Defendants’ motion.

498 A.2d 260, 266 (Me. 1985).⁵ Dismissal at this stage of the proceedings, therefore, is not appropriate.

III. Count VI: Violation of 29 U.S.C. § 211(c) & 26 M.R.S. § 622.

In Count VI of their Amended Complaint, Plaintiffs allege that Defendants violated federal and state statutes requiring employers to keep accurate record of hours worked. *See* 29 U.S.C. § 211(c)⁶ and 26 M.R.S. § 622.⁷ Defendants contend that Count VI fails to state a claim because neither Section 211 of the Federal Act, nor Section 622 of Maine's statute provides an employee with a private right of action. Plaintiffs do not seriously dispute Defendants' contention.⁸ Instead, Plaintiffs argue that the alleged violation of the record-keeping laws by Defendants is relevant to the parties' contractual relationship and Defendants' counterclaim for breach of contract.

The plain language of the statutes and pertinent case law establish that neither the state statute, nor the federal statute authorizes a private cause of action. *See* 26 M.R.S. § 626-A (providing a private right of action for unpaid wages but not for violation of Section 622); *In re Wal-Mart Wage & Hour Empl. Practices Litig.*, 490 F. Supp. 2d 1091, 1131 (D. Nev. 2007)(applying Maine law); *In re Wage Payment Litigation*, 2000 ME 162, ¶ 10, 759 A.2d 217, 222 (no express or implied right of action under Maine statute). *See also Rosse v. Associated Limousine Servs.*, 438 F. Supp.2d 1354, 1366 (S.D. Fla 2006) (citing *Elwell v. Univ. Hosps. Home Care Servs.*, 276 F.3d 832, 843 (6th Cir. 2002); and 29 U.S.C. § 217 which authorizes the Secretary to initiate injunction proceedings or restrain any violation of 29 U.S.C. § 215 including 29 U.S.C. § 215(a)(5), which

⁵ Defendants urge the Court to conclude that the counterclaim is not baseless as a matter of law in part given the Defendants' filings in connection with and the Court's decision on Plaintiffs' motion for attachment. The Court's ability to consider documents other than the pleadings when evaluating a motion to dismiss is limited. When considering a motion to dismiss, the Court can "consider official public documents, documents that are central to the plaintiff's claim, and documents referred to in the complaint, without converting a motion to dismiss into a motion for a summary judgment when the authenticity of such documents is not challenged." *Moody v. State Liquor & Lottery Comm'n*, 2004 ME 20, ¶ 8, 843 A.2d 43, 47. Under *Moody*, therefore, the Court cannot, consider the affidavits at this stage of the proceedings.

⁶ 29 U.S.C. § 211(c) provides, in relevant part: Every employer subject to any provision of [the Fair Labor Standards] Act . . . shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him . . ." *Id.*

⁷ 26 M.R.S. § 622 provides, in relevant part, "Every employer shall keep a true record showing the date and amount paid to each employee pursuant to section 621-A. Every employer shall keep a daily record of the time worked by each employee unless the employee is paid a salary that is fixed without regard for the number of hours worked. . . ." *Id.*

⁸ *See* Pls.' Opp. at 4.

makes it unlawful for an employer to fail to comply with the record-keeping requirements of 29 U.S.C. 211 (c)). Consequently, regardless of the relevancy of the alleged violations to the issues generated by Plaintiffs' Second Amended Complaint or Defendants' Counterclaim, Plaintiffs do not have an independent cause of action based on the purported violations.

Conclusion

Based on the foregoing analysis, the Court orders:

1. The Court denies Defendants' Motion to Dismiss Count IV of Plaintiffs' Second Amended Complaint.
2. The Court grants Defendants' Motion to Dismiss Count VI of Plaintiffs' Second Amended Complaint. Accordingly, the Court dismisses Count VI of Plaintiffs' Second Amended Complaint.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Date: 6/17/10


Justice, Maine Business & Consumer Docket