STATE OF VERMONT

SUPERIOR COURT
Lamoille Unit

CIVIL DIVISION
Docket No. 202-12-17 Lecv

BOB DION et al.,
Plaintiffs
v.

STEPHEN LEVIN et al.,
Defendants

DECISION

Motions for Summary Judgment:
Plaintiffs' Motion for Partial Summary Judgment (Motion #6, filed December 17, 2019)
Defendants' Motion for Summary Judgment (Motion #7, filed December 17, 2019)

Defendants Stephen and Petra Levin hired Plaintiff Bob Dion in June of 2014 to be the property manager for an estate in Stowe that the Levins periodically use, otherwise, the Levins's primary residence is in Florida. Mr. Dion and his wife Maureen and their ward/granddaughter left their prior home and his work in Massachusetts to relocate to Stowe for the job. They occupied a house on the estate as part of the arrangement and Mr. Dion received a salary. There was no written job description and he performed a wide variety of personal as well as property-related services. Ms. Dion did specific housekeeping work during the first year and was paid on an hourly basis. In addition, she performed miscellaneous services throughout the period of Mr. Dion's employment. Mr. Dion was terminated in May of 2017 after almost 3 years.

The Dions have several causes of action that fall into two general categories: claims for wages and wrongful termination. Defendants include the Levins and separate entities that paid Mr. Dion's salary and provided health insurance. Defendants counterclaimed for damages to the property and conversion of personal property.

Following a Decision of January 4, 2019 on a motion to dismiss, the remaining claims of Plaintiffs are:

I. Unlawful termination – breach of implied contract
II. Unlawful termination – violation of public policy
III. Unpaid wages and overtime – FLSA (Bob, overtime; Maureen, payment for services)
IV. Unpaid wages and overtime – VT (same)
V. Age discrimination (Bob)
VI. Gender discrimination (Maureen)
VII. (Dismissed)
VIII. Promissory estoppel

The court has reviewed the statements of undisputed facts and responses, supporting affidavits and exhibits, and memoranda of law. For the reasons set forth below, both Motions for Summary Judgment are denied except as noted below regarding Count II.

Plaintiffs' Motion for Partial Summary Judgment

Plaintiffs seek summary judgment on their wage and overtime claims (Counts III and IV). Both parties have framed their arguments with respect to the Fair Labor Standards Act (FLSA) and acknowledge that because the Vermont statute is similar with respect to applicability (though different with respect to damages), the same arguments apply to both as to liability.

Bob Dion

Mr. Dion's claim is that he worked substantially in excess of 40 hours per week and is entitled to overtime pay for all hours over 40 per week. He claims that he was a blue collar worker who qualifies for overtime pay under the FLSA because he worked in the channels of interstate commerce and was not exempt as either an executive or administrative employee. He also argues that he is not subject to the exception from overtime pay applicable to domestic workers who reside in the household where domestic services are performed because he claims that his work was mixed and that the non-domestic responsibilities predominate over the domestic services. Defendants claim that he was either an executive or administrative employee, and if not, he was a live-in domestic service worker whose non-domestic responsibilities were *de minimus,* and that under any of those statuses he is not entitled to overtime pay under the FLSA.

The court has carefully reviewed the statements of undisputed facts and responses to them and read the exhibits and the portions of the record cited to. From this, the court concludes that there are significant disputes of material fact that preclude the court from determining the legal status of Mr. Dion with respect to the FLSA. Many statements presented as facts are conclusory interpretations involving inferences, and such inferences may or may not be reasonable when full facts are available about context. Other "facts" are given without sufficient specificity or contextual information to interpret those facts. There are contradictory statements made by different witnesses that call for credibility determinations.

For example, from the record presented, the court cannot make reliable findings regarding Mr. Dion's employment status, such as whether he qualified for the executive exemption from the FLSA.[1] 29 USCA §213 (a)(1). This requires determining whether Mr. Dion's job involved directing the work of two or more other employees. Certainly, Mr. Dion was to coordinate with vendors and contractors, but the level of his responsibilities with respect to others who worked on the estate— such as the "Vermont boys" who did outdoor work on the estate but were employees of a landscape contractor— is unclear. For example, to what extent he had responsibility to "direct" their work, and whether they qualify as "other employees" is unclear.

The factfinder will need to determine who the employer was. Erin Stuart, Inc. paid Mr. Dion to be the property manager for property owned by a separate LLC. The court cannot determine the full scope of Mr. Dion's job responsibilities in relation to the interests of Erin

[1] The facts do not support the exemption for administrative employees under any scenario, as his work was not to be in charge of general business operations with discretion to make significant decisions. *Id.*

Stuart, Inc., the LLC owner of the real estate, and the Levins from the selected facts both parties provided. More facts with greater detail are needed to determine who the employer was and whether the executive exemption is applicable at all to the employment relationship.

Furthermore, even if the court were to determine that Mr. Dion was not an executive and that he was providing domestic services to the Levins with non-domestic duties being only *de minimus,*[2] the fact that Erin Stuart, Inc. paid him may mean that the exemption from the requirement to pay overtime to live-in domestic service workers may not be available. 29 CFR §552.109 (c).[3] The court cannot make that determination now because the factual issues need to be determined first.[4] Each party presented only a partial picture with selected facts to support its position.

The terms of Mr. Dion's employment were not specified clearly, and the facts and representations presented in the motions show a job with mixed responsibilities combining some aspects of management and some aspects of household services. He apparently neither had full supervisory responsibility for the estate property, nor was he simply a live-in groundskeeper. The overall profile of what services were provided, for whom they were provided, how much time they took, and how significant a level of "management" responsibility he had irrespective of time spent is not clear. The jury as factfinder will need to make determinations of credibility and reasonable inferences from evidence that is disputed in order to find the facts that are necessary for a legal status determination for purposes of the FLSA claim. The issue cannot be decided on summary judgment.

Maureen Dion

Maureen's claim is that, excluding the first year during which she was paid an hourly wage for specific services, she spent 8 hours a week performing services for which she was not paid. While the parties do not dispute that she did certain things that she describes (involvement in hiring housekeeper, airport pickups, recordkeeping of contractors), there is a significant dispute about the terms on which she did them. She argues that the Levins wanted a husband and wife team and knew that she was performing the services she describes but did not pay her.

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[2] A more complete set of facts may also be needed to determine whether non-domestic services were substantial or *de minimus.*

[3] "(c) Third party employers of employees engaged in live-in domestic service employment within the meaning of § 552.102 may not avail themselves of the overtime exemption provided by section 13(b)(21) of the Act, even if the employee is jointly employed by the individual or member of the family or household using the services. However, the individual or member of the family or household, even if considered a joint employer, is still entitled to assert the exemption." 29 CFR §552.109 (c). Because the facts of the relationship between Erin Stuart, Inc. and the Levins with respect to Mr. Dion's employment are not clear, and the extent of the domestic service duties of his job are also unclear, the court cannot, at this time, possibly determine whether this regulation applies, and if so, how.

[4] There are also disputes about how much time Mr. Dion actually spent working.

Defendants argue that only Mr. Dion was hired, that they never asked her to do anything, and that whatever she did was done on a voluntary basis in order to help out her husband in his job.

There does appear to be one undisputed occasion on which "Stephanie" (one of the Defendants' agents) asked Ms. Dion to help catalogue artwork under time pressure and she spent several hours doing so. The agreement to perform this work was between Stephanie and Ms. Dion, without the involvement of her husband who has not been shown to have any responsibility for this task. Thus, a jury could find that she was entitled to be paid for this work. As to the other services she performed, the terms on which she performed them is a material fact that is highly disputed.

Summary

Because of the significant disputes over facts that are material to the wage and hour claims of both Plaintiffs as described above and the necessity of factual determinations to be made by the jury as factfinder, Plaintiff's Partial Motion for Summary Judgment must be denied. An evidentiary trial is needed.

Defendants' Motion for Summary Judgment

Defendants seek summary judgment on all outstanding claims of Plaintiffs as well as dismissal of RMET Holdings, Inc. for lack of personal jurisdiction. The court addresses their arguments below using the organizational framework of their motion rather than claim-by-claim.

I. Motion for Dismissal of RMET Holdings, Inc. for lack of personal jurisdiction

Erin Stuart, Inc. paid Mr. Dion's compensation and RMET Holdings, Inc. provided his health insurance coverage. The property Mr. Dion was hired to manage is owned by a third party LLC of which Stephen Levin is the sole member. Mr. Dion's primary contacts were with the Levins or their assistants. The actual relationship and agreements among all these parties is unknown, but all have a role in Mr. Dion's employment. Services were provided for the benefit of the property to some extent, and to some extent to the Levins personally, and perhaps to Erin Stuart, Inc. as well.

There is some kind of relationship between all these parties that is unknown. Moreover, RMET Holdings, Inc. was a participant in Mr. Dion's employment in Vermont in some way, even though the specifics of various agency relationships are lacking. Martin Sweren's statements in paragraphs 10 and 11 of his affidavit that the entities were separate are simply conclusory statements without supporting specific facts and thus insufficient, given facts of other related entity involvement with Mr. Dion's employment in Vermont, to support a determination that RMET did not have the minimum contacts necessary for personal jurisdiction in Vermont. The request for dismissal of RMET Holdings, Inc. must be denied.

II. Unlawful Termination Claims - Breach of Implied Contract & Promissory Estoppel (Counts I and VIII)

Defendants argue that the facts support summary judgment on both Claim I, which alleges breach of an implied contract, and Claim VIII, which alleges wrongful termination based on promissory estoppel. They argue that Mr. Dion was an "at will" employee who could be terminated at any time, and that none of the statements Mr. Levin made and Plaintiffs relied on had the legal effect of modifying the "at will" relationship to one of implied contract, nor did they constitute promises sufficient to support a claim of promissory estoppel. Plaintiffs claim that based on representations made to Mr. Dion, he has claims for wrongful termination based on at least one of these causes of action, and that the terms of Mr. Dion's employment were such that he could only be terminated for cause, which was not justified.

Specific statements Plaintiffs rely on are disputed. Plaintiffs claim that Mr. Levin said that they "don't fire anybody," and "No matter what happens here, I will take care of you." Plaintiff's Statement of Undisputed Facts in Opposition to Motion for Summary Judgment, ¶¶ 12 and 13. Defendants dispute both these statements in their response, and claim that the "don't fire anybody" statement was taken out of context.

A jury as factfinder is necessary to determine both what was actually said by whom and when, and what any such statements meant in context. The statements are subject to interpretation and require contextual facts in order for their meaning to be determined. The jury may conclude that they were simply generalized and vague statements upon which reliance was unreasonable, or that they were of a sufficiently specific and definite nature that the Dions' reliance on them as terms of employment or an enforceable promise was reasonable. Therefore the court cannot conclude that under no circumstances could these statements support Plaintiffs' claims as a matter of law.

Moreover, if the jury found that Mr. Dion could not be fired without just cause, it would need to evaluate whether there was just cause. The jury would need to determine facts about his job performance as well as any communications on that issue that occurred between the Levins and Mr. Dion during the period of employment.

Because there are disputes of material fact, Defendant's motion for summary judgment is denied as to Claims I and VIII.

III. Age and Gender Discrimination (Counts V and VI)

Bob Dion (Age Discrimination)

Bob Dion was 68 when hired and 70 when terminated. His claim is that the stated reason for his firing was bogus and that when he was fired, he was replaced by younger employees (both short and long term successors) who maintained the estate in an inferior condition than he had done. Defendants point out that there is no evidence that the Levins ever made any age-related comments to him.

Defendants acknowledge that Mr. Dion meets three of the four criteria necessary for a prima facie case of age discrimination: he is within a protected age group; he was qualified for the position; and he was subject to an adverse employment action (firing). *Robertson v. Mylan Laboratories, Inc.*, 2004 VT 15 ¶ 25. They contend that because of the absence of age-related

comments on the part of the Levins, he cannot show the fourth: that the firing occurred under circumstances giving rise to an inference of discrimination. *Id.*

Plaintiffs argue that discrimination can be inferred from the fact that Mr. Dion did excellent work as a manager, kept the property in immaculate shape, never was disciplined or given a review or told of dissatisfaction, was replaced by younger workers brought up from Florida who did not maintain the property in good condition, and the stated reason for termination had no basis. Some of these facts are undisputed (e.g. no bad employment reviews), and some are disputed (e.g. whether he did an excellent job, whether there is no valid basis for termination). There is conflicting evidence as to the condition of the property during Mr. Dion's management and the condition of the property afterwards when managed by younger persons.

Defendants seek to rely on the "same actor inference" on the grounds that when Mr. Dion was hired, he was already in the protected class, so one can infer that the reason for the firing was not discrimination. However, this is just a named type of inference and the jury would have to determine whether the inference applied or not and find facts accordingly.

The jury as factfinder must evaluate inferences from evidence of the entire relationship between the parties. If the jury were to find that the evidence supports the facts the Plaintiffs alleged, there is a sufficient basis for a reasonable inference of age discrimination that would satisfy the fourth criterion for a prima facie case. *Id.*

The burden would then shift to Defendants to show a legitimate, nondiscriminatory reason for the firing. There is considerable dispute as to whether such a reason exists. Plaintiff vehemently denies that his management skills were poor, and points to lack of discipline or warning. The jury as factfinder would have to determine the facts. Even if the jury found there was a legitimate reason, the jury would have to determine whether, in context, the reason was used as a mere pretext for age discrimination.

Accordingly, the state of the evidence does not permit a ruling on Mr. Dion's age discrimination claim as a matter of law.

Maureen Dion (Gender Discrimination)

Defendants argue that Ms. Dion is unable to demonstrate that she was subject to an adverse employment action because, they claim, she was never an employee. As described above, there are disputes of fact as to whether the services that Ms. Dion performed were simply voluntary to help her husband, or should be recognized as employment for which she was not paid. As noted above, there was at least one instance when Stephanie asked her to perform work on behalf of a Defendant and she did so and was not paid. Accordingly, the evidence does not support judgment for Defendants on this claim as a matter of law.

IV. Federal and State Wage and Hour Laws (Counts III and IV)

See ruling above on Plaintiff's Motion for Partial Summary Judgment. For the same reasons, Defendants' request for summary judgment these claims must be denied.

V. Unlawful Termination – Violation of Public Policy (Count II)

Defendants argue that Plaintiffs cannot show the required elements for such a claim:

> (1) the employer directed the employee to perform an illegal or unethical act as part of the employee's duties; (2) the action directed by the employer would violate a statute or clearly expressed public policy; (3) he or she was terminated as a result of refusing to perform the requested act in violation of public policy; and (4) the employer was aware or should have been aware that the employee's refusal was based upon the employee's reasonable belief that the act was illegal.

LoPresti v. Rutland Regional Health Services, 2004 VT 105, ¶ 26, quoting *Rocky Mtn. Hosp. & Med. Serv. V. Mariani,* 916 P. 2d 519, 525 (Colo. 1996)

Plaintiffs have not come forward with any facts, whether undisputed or not, showing these elements. They merely argue that the claim should survive summary judgment. On this record, Defendants are entitled to summary judgment on Count II.

ORDER

Based on the foregoing,

1. Defendants' motion to dismiss REMT Holdings, Inc. is *denied,*
2. Plaintiffs' motion for partial summary judgment (MPR 6) is *denied,*
3. Summary judgment is granted to Defendants on Count II (Unlawful Termination – Violation of Public Policy); otherwise Defendants' motion for summary judgment (MPR 7) is *denied.*
4. The case will be scheduled for a pretrial status conference and the next available civil jury draw.

Dated this 26th day of March 2020.

Mary Miles Teachout

Mary Miles Teachout
Superior Judge