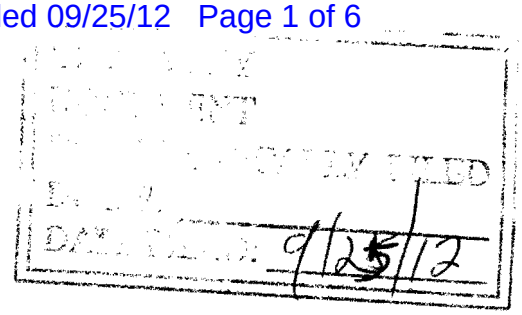

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOEL CHAVEZ,

Plaintiff,

-v-

PANDA JIVE, INC. d/b/a PENELOPE and LUKUS HASENSTAB,

Defendants.

11 Civ. 6323 (JSR)

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

Pending before the Court are the cross-motions for summary judgment filed by both plaintiff and defendants in the above-captioned case. The parties submitted written briefs to the Court, and the Court heard oral argument on May 15, 2012. Having now fully considered the parties' written and oral arguments, and having reviewed the underlying record, the Court hereby grants plaintiff's motion for summary judgment in part, and otherwise denies the parties' cross-motions for summary judgment.

Plaintiff Joel Chavez brings this labor action against defendants Panda Jive and Lukus Hasenstab to recover unpaid overtime wages. Chavez was an employee of Panda Jive, d/b/a Penelope, a restaurant in the Gramercy neighborhood of New York City. He worked as a restaurant kitchen worker and alleges that, between 2005 and 2011, he consistently worked over 40 hours a week but did not receive the time and a half pay to which he was entitled. Plaintiff brings claims for unpaid overtime under both

the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207 and the analogous provisions of New York Labor Law ("NYLL"), N.Y. Labor L. §§ 198, 199, 663; see also N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.1.

The parties cross-moved for summary judgment on the same four issues: (1) whether Chavez was a "bona fide executive employee" after December 2009, and thus exempt from FLSA overtime requirements; (2) whether defendants are liable for Chavez's unpaid overtime before December 2009 or whether what he is owed is "de minimis" and unrecoverable; (3) whether defendants "willfully" violated the FLSA such that the statute of limitations for Chavez's federal claims is extended from two to three years; and (4) whether defendant Hasenstab, a manager at Penelope, had general authority over Chavez, including the ability to fire him, making Hasenstab Chavez's "employer" and thus subjecting Hasenstab to individual liability under the FLSA.

As it turns out, the only issue ripe for summary judgment is the second issue raised by the parties, which the Court now decides in favor of plaintiff. At oral argument, defense counsel conceded that, prior to December 2009, Chavez was paid as an hourly employee, thus rendering the executive employee exception to overtime pay inapplicable. See Transcript of Oral Argument dated May 15, 2012 ("Tr.") at 4; 29 C.F.R. § 541.100(a) (interpreting 29 U.S.C. § 213(a)(1)) (requiring that employee be

"compensated on a salary basis" to be exempt from overtime); Morrul v. GTL Const., LLC, No. 06 Civ. 168(SCR), 2007 WL 2142343, at *2 (S.D.N.Y. July 24, 2007) (employer must prove both salary and duty requirements to show managerial exception applies). Defendants nevertheless argue that the unpaid overtime, averaged over the year, was "de minimis" such that defendants should not be now found liable for unpaid overtime.

The de minimis exception applies, however, only in cases where there is a "practical administrative difficulty of recording additional time," such as an employee's commuting time. Singh v. City of New York, 524 F.3d 361, 371 (2d Cir. 2008) (Sotomayor, J.); Reich v. N.Y. Transit Auth., 45 F.3d 646, 652 (2d Cir. 1995). This is not such a case: defendants concede that they paid Chavez only straight time for hours for which their own records explicitly show he was owed time and a half. See, e.g., Reply Memorandum of Law in Support of Defendants' Motion for Summary Judgment dated May 4, 2012 at 4-5; Tr. at 5-6. Accordingly, the Court grants summary judgment to plaintiff on the issue of liability against defendant Panda Jive for overtime hours Chavez worked prior to moving back to Penelope's kitchen in December 2009.[1]

[1] Chavez claims overtime for hours worked between 2005 and 2009. See Am. Compl. ¶¶ 10-15. Although the FSLA statute of limitations would limit Chavez's recovery to, at most, his claims for hours worked as far back as September 9, 2008, i.e., three years prior

On all other issues (including the amount of damages owed on the pre-December 2009 claims, as well as whether defendant Hasenstab is jointly and severally liable for those claims) there exist genuine issues of material fact that can only be resolved at trial. For example, on the issue of whether Chavez was a salaried employee or an hourly employee for his work from December 2009 through his termination in August 2011, each side points to relevant evidence in support of their respective positions that precludes this Court from imposing summary judgment. In particular, while the parties agree that Chavez received his wages in a combination of check and cash, defendants argue that his weekly check of approximately $704 represented his "salary" and that the $100 in cash he received above that was just a "bonus" that did not affect his $704/week guaranteed salary, see Tr. at 15-16, whereas plaintiff argues that defendants' wage records show that there were weeks where Chavez worked less than 40 hours per week and received less than $704 for that week, see id. at 22, showing he was not a salaried worker but rather was being paid by the hour.

For example, in the week ending February 13, 2011, defendants' wage records show that Chavez worked 38 hours, at a

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to when Chavez filed this action, see 29 U.S.C. § 255(a), the NYLL has a six year statute of limitations, which allows plaintiff to recover for unpaid overtime as far back as September 9, 2005, N.Y. Labor L. § 663(3).

"wage" of $14.00 (presumably per hour), and that his total for the week was adjusted by "-$2.65." Declaration of Daniel R. Bright dated Apr. 2, 2012 ("Bright Decl."); Tr. at 28 (Court noting that "[t]he very fact that the internal records are computed in terms of hours is strong evidence for" plaintiff). In response, however, defendants argue that their payroll listing for that same week shows that Chavez received his normal check for $704.24, see Affirmation of S. Tito Sinha dated Mar. 30, 2012 ("Sinha Decl.") Ex. 5 at 370, and that the $2.65 is simply an error in the wage records, rather than demonstrating that Chavez's pay was adjusted based on hours worked less than 40 hours per week, Tr. at 29. Plaintiff responds that even accepting Chavez received his $704.24 check, the $2.65 could have been "fined or docked" against Chavez, although plaintiff's counsel conceded that "[w]e don't have any testimony on what happened there." Tr. at 23-24. Without multiplying examples further, this is plainly a jury question, and is just one of many disputed issues in this case that preclude entering summary judgment on either party's cross-motion except in the one limited respect indicated above.

Moreover, on one important factual matter that would have been helpful to the Court on these cross-motions -- specifically what the circumstances of Chavez's last two months of employment were -- the record was not adequately developed to

support the imposition of summary judgment in favor of either party. The parties agree that during the last two months of Chavez's employment, he was paid solely in cash and not by check. Defendants argue this was done at Chavez's request; he requested that his hours be reduced and that he be paid in cash. See Tr. at 12. But there was no testimony taken as to whether the amount Chavez was paid in cash for those two months still reflected a baseline salary amount, which would possibly bear on whether defendants had treated Chavez as an hourly or salaried employee throughout his employment. Id. at 25-27, 33-35.

Accordingly, with the exception of the aforementioned issue of defendant Panda Jive's liability for unpaid overtime for hours worked before December 2009, the parties' cross-motions for summary judgment are hereby denied and the case will proceed to trial. Counsel for both parties are directed to convene a joint telephone conference with the Court by no later than October 1, 2012 in order to schedule a trial date. The Clerk of the Court is directed to close document numbers 19 and 20 on the docket of this case.

SO ORDERED.

JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
September 24, 2012