Slip Copy, 2011 WL 918634 (S.D.Fla.)
(Cite as: 2011 WL 918634 (S.D.Fla.))

Only the Westlaw citation is currently available.

United States District Court, S.D. Florida,
Miami Division.
Roldan Cardona RODRIGUEZ, Raul Egardo Hernandez Rodgriguez, Plaintiff,
v.
MARBLE CARE INT'L, INC., Robert Segurola, Defendants.

No. 10-23223-CIV.
March 15, 2011.

Daniel T. Feld, K. David Kelly, J.H. Zidell, PA, Jamie H. Zidell, Miami Beach, FL, for Plaintiffs.

Chris Kleppin, Kristopher Walter Zinchiak, Glasser, Boreth, & Kleppin, Plantation, FL, for Defendants.

Robert Segurola, Hallandale, FL, pro se.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

DONALD L. GRAHAM, District Judge.

***1** THIS CAUSE comes before the Court on Defendants' Motion for Summary Judgment [D.E. 35].

THE COURT has considered the motions, the relevant portions of the record, and is otherwise fully advised in the premises.

I. BACKGROUND

Defendant Marble Care Int'l, Inc. ("Marble Care") is a small, local floor finisher with one location in Broward County, Florida. Defendant Robert Segurola ("Segurola") is the owner of Marble Care. The Plaintiffs worked for the Defendants as basic laborers for approximately two to six months during 2010.

Plaintiffs filed an Amended Compliant alleging violations of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, for alleged overtime violations [D.E. 5]. Plaintiffs seek back wages, liquidated damages, interest, attorney's fees, and costs. On November 11, 2010, the Defendants filed a Motion to Dismiss for Lack of Jurisdiction, and Alternatively, Motion to convert Motion to Dismiss into Motion for Summary Judgment without prejudice [D.E. 11]. On November 30, 2010, the Court denied the Defendants' motion without prejudice, and directed the parties to conduct limited discovery solely to the issue of subject matter jurisdiction [D.E. 19]. Subsequently, Defendants filed the instant Motion for Summary Judgment [D.E. 35]. Plaintiff filed a Motion for Enlargement of Discovery Period and Summary Judgment Deadlines [D.E. 34]. Defendant responded in opposition to the motion for enlargement of time. Pending the Court's ruling on the Motion for Enlargement of time, Plaintiff filed an untimely Response to Defendants' motion for, summary judgment. Defendants thereafter filed a Motion to Strike Plaintiff's Untimely Filed Response to Defendants' Motion for Summary Judgment [D.E. 52].

II. LAW & DISCUSSION

A. Summary Judgment Standard

Federal Rule of Civil Procedure S6 provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed R.Civ.P. 56(c). On a motion for summary judgment, the court is to construe the evidence and factual inferences arising therefrom in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). The moving party has the burden of production. *See Adickes*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). When the moving party has met this burden by offering suffi-

cient evidence to support the motion, the party opposing must then respond by attempting to establish the existence of a genuine issue of material fact. *Adickes*, 398 U.S. at 160.

At the summary judgment stage, the judge's function is not to "weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In making this determination, the Court must decide which issues are material. A material fact is one that might affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1966). Where the non-moving party fails to prove an essential element of its case for which it has the burden of proof at trial, summary judgment is warranted. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Mutton v. Strickland*, 919 F.2d 1531, 1536 (11th Cir.1990). Finally, a party cannot defeat a motion for summary judgment by resting on the conclusory allegations in the pleadings. *See* Fed.R.Civ.P. 56(e) ; *Anderson*, 47 U.S. at 248.

B. Discussion

***2** An "employer" covered by the FLSA must provide its employees with minimum wage and overtime compensation. See 29 U.S.C. § 206(a) (1). To establish jurisdiction for an overtime violation under the FLSA, the plaintiff employee must show either, (1) enterprise coverage-that the employer was engaged in commerce or in the production of goods for commerce; or (2) individual coverage-that the employee was engaged in commerce or in the production of goods for commerce. See 29 U.S.C. § 207(a)(1).

1. Enterprise Coverage

Enterprise coverage exists when the employer:

> (i) has employees engaged in commerce or in the production of goods for commerce, or has employees handling, selling, or otherwise working on goods or material that have been moved in or produced for commerce by any person; and
>
> (ii) has an annual gross volume of sales made or business done that is not less than $500,000.

29 U.S.C. 203(s)(1). Both prongs must be satisfied in order to invoke jurisdiction for an overtime violation. *See Exime v. E.W. Ventures, Inc.*, 591 F.Supp.2d 1364, 1369 (S.D.Fla.2008).

The parties dispute both prongs. Specifically, whether Plaintiff has adduced evidence that two or more employees handled goods and material that have been moved in commerce. Additionally, the parties dispute whether Plaintiff has demonstrated that Defendants had annual gross volume of sales made or business done equal to or greater than $500,000 during the year Defendants employed Plaintiffs.

Both Plaintiffs worked only in the year 2010. It is undisputed that, to date, Defendants have not filed their 2009 or 2010 tax returns. Rather, Defendants rely upon the Sworn Declaration of Segurola and the bank statements for Marble to establish that the $500,000 threshold requirement is not met. Plaintiffs argue that Defendants should not be allowed to benefit from not filing their tax return with their FLSA coverage defense. Plaintiffs however have provided no evidence disputing that defendants gross annual sales volume in 2010 was less than $500,000. Because the minimum sales requirement for enterprise coverage has not been met, summary judgment is appropriate. *See Scott v. K.W. Max Investments, Inc.*, 2007 WL 423080, at *3 (M.D.Fla.2007).

2. Individual Coverage

To establish individual coverage under the FLSA, an employee must prove that he was (1) engaged in commerce or (2) engaged in the production of goods for commerce. *Thorne v. All Restoration Services, Inc.*, 44B F.3d 1264 (11th Cor.2006). Here, Plaintiffs rely upon the "engaged in commerce" prong. For an employee to be "engaged in commerce", the employee "must be directly parti-

cipating in the actual movement of persons or things in interstate commerce by (i) working for an instrumentality of interstate commerce, e.g., transportation or communication industry employees, or (ii) by regularly using the instrumentalities of interstate commerce in his work, e.g., regular and recurrent use of interstate telephone, telegraph, mails, or travel." *Id.* Plaintiffs assert that their work for Defendants involved the use of goods that traveled in interstate commerce. Defendants rely upon the sworn declaration of Defendant Segurola that Defendants did not purchase supplies out-of-state, nor did they engage in any credit card transactions that were out of state [D.E. 35-1]. Plaintiffs respond with the Affidavit of Roldan Cardona Rodriguez in which he lists products manufactured out-of-state that he claims he used on a regular and recurrent daily basis [D.E. 50-1]. However, Defendant Roldan Cardona Rodriguez previously testified during his deposition that he never ordered or purchased any supplies for Defendants and that he had no idea where any of the supplies or products used by Defendants came from [D.E. 35-2]. The Court finds that Plaintiffs have failed to provide any credible evidence that he handled goods "in commerce." Accordingly, Plaintiffs are not individually covered by the FLSA.

***3** Plaintiffs have failed to offer any competent evidence to indicate that they are capable of sustaining their burden of proving at trial that FLSA jurisdiction exists based on either Enterprise or Individual Coverage. Accordingly, Defendants' motion for summary judgment is granted.

3. Individual Defendant's Liability

Under the FLSA, an individual corporate officer can be considered an employer. Title 29 U.S.C. § 203(d) defines an "employer" as "any person acting directly or indirectly in the interest of the employer in relation to an employee." 29 U.S.C. § 203(d).

Here, Defendants assert that Defendant Segurola's liability is only derivative to that of the Corporate-Defendant's liability, *Patel v. Wargo,* 803 F.2d 632, 637 (11th Cir.1966), and therefore he is entitled to summary judgment on that ground. The Court agrees. As this court has found that the Corporate-Defendant is not subject to suit, and since Defendant Segurola's liability is only derivative to that of the Corporate-Defendant, *Patel v. Wargo*, 603 F.2d 632, 637 (11th Cir.1966), Segurola is entitled to summary judgment on that ground.

Based on the foregoing, it is hereby

ORDERED AND ADJUDGED that Defendants' Motion for Summary Judgment [D.E. 35] is **GRANTED.** It is further

ORDERED AND ADJUDGED that this case is CLOSED for administrative purposes and all pending motions are DENIED as moot.

DONE AND ORDERED in Chambers at Miami, Florida, this *14th* day of March, 2011.

S.D.Fla.,2011.
Rodriguez v. Marble Care Int'l, Inc.
Slip Copy, 2011 WL 918634 (S.D.Fla.)

END OF DOCUMENT