

Judge McMahon

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD KIM,

12^x CV 3214

Plaintiff,

-against-

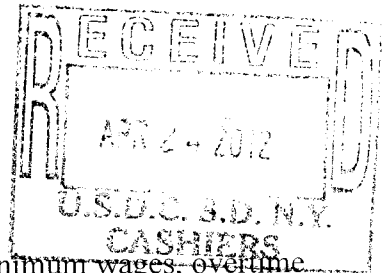
NYLA CAFE, LLC d/b/a SPITZER'S CORNER,
ROBERT SHAMLIAN, DAVID MOON, and
SUNG PARK,

Defendants.
----- X

COMPLAINT

12 CV _____

ECF CASE



PRELIMINARY STATEMENT

1. Plaintiff Edward Kim brings this action to recover unpaid minimum wages, overtime wages, and money damages under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (“FLSA”), and New York State Labor Law Art. 6, §§ 190 *et seq.* and the supporting New York State Department of Labor Regulations, N.Y.C.R.R., tit. 12, Part 142 *et seq.* (collectively, “NYLL”).
2. Plaintiff Kim is a former prep cook for the bar and restaurant NYLA Café, LLC, which does business as the gastropub Spitzer’s Corner (“Spitzer’s Corner” or “Restaurant”). Plaintiff was a young adult employed at the Spitzer’s Corner between late March 2010 and January 6, 2011. Upon information and belief, the Restaurant is owned by Defendant Robert Shamlian and additional investors. During Plaintiff Kim’s employment, Spitzer’s Corner was operated by Defendant David Moon, general manager, and Defendant Sung Park, chef de cuisine.
3. Plaintiff Kim worked for Defendants six days a week, and worked shifts lasting anywhere from 10 to 19 hours a day performing not only prep cook duties, but also an ever-growing

list of butcher, receiver, brunch prep at the Restaurant, in addition to off-site errand duties.

4. During the first three weeks of his employment, Plaintiff Kim did not receive any wages from Defendants.
5. Throughout his employment with Defendants, Plaintiff Kim never received proper overtime or spread-of-hour wages.
6. In addition, Defendants Moon and Park willfully misrepresented to Plaintiff Kim that he was employed as an “apprentice” in the culinary arts, and alternately and erratically paid him straight “salary” wages and hourly wages. At no time, however, did Plaintiff Kim receive proper payment for the hours worked.
7. According to the U.S. Department of Labor and New York State Department of Labor, no apprenticeship program was registered with the under NYLA Cafe, LLC or Sung Park’s name during the relevant time period. Even if an apprenticeship or training program in fact existed, the New York State Department of Labor regulation, 12 N.Y.C.R.R. § 146-2.11, requires that apprentices must be paid at least the minimum rates prescribed in the relevant industry wage order.
8. Plaintiff seeks to recover his lawful minimum wages, overtime wages, spread-of-hours wages, plus liquidated damages, prejudgment interest, compensatory damages, and attorney’s fees and costs.

JURISDICTION & VENUE

9. Jurisdiction is conferred on the Court by 28 U.S.C. §§ 1331 and 1337 and by 29 U.S.C. § 216(b). The Court has supplemental jurisdiction over Plaintiff’s state law claims pursuant to 28 U.S.C. § 1367(a).

10. Venue is proper in the Southern District of New York pursuant to 28 U.S.C. § 1391(b) and (c) in that Defendant NYLA Cafe, LLC is located in this District, and the unlawful actions or omissions complained of occurred in, and the records relevant to such practices are maintained in, this District.

PLAINTIFF

11. Plaintiff Edward Kim is an adult individual currently residing in Queens, New York.

12. Plaintiff Kim was employed by Defendants as a prep cook, butcher, and receiver at Spitzer's Corner from approximately late March 2010 until January 6, 2011. Typically, his shifts at the Restaurant lasted anywhere from 10 to 19 hours a day, six days a week.

13. Plaintiff Kim was engaged in commerce. All employees at Spitzer's Corner are engaged in an industry affecting commerce.

14. At all times relevant to this action, Plaintiff Kim was Defendants' employee within the meaning of the Fair Labor Standards Act and New York Labor Law.

DEFENDANTS

15. Defendant NYLA Cafe, LLC was incorporated in the State of New York and operates at 101 Rivington Street, New York, New York. Upon information and belief, NYLA Cafe, LLC is owned by Defendant Robert Shamlian, and an unknown number of additional investors.

16. Corporate Defendant NYLA Cafe, LLC is a business engaged in interstate commerce or an enterprise engaged in interstate commerce that had gross sales exceeding \$500,000 per year. Upon information and belief, the Restaurant purchases and handles goods moved in interstate commerce.

17. Upon information and belief, Defendant Shamlian, as owner and officer of Spitzer's

Corner, has the power to hire and fire employees, set wages, set terms and conditions of employment, and maintain employment records at Spitzer's Corner.

18. Upon information and belief, Defendant David Moon was a general manager during the relevant time period. Defendant Moon had the power to hire and fire employees, set wages, set terms and conditions of employment, and maintain employment records.
19. Defendant Sung Park was the chef de cuisine of Spitzer's Corner. Defendant Park had the power to hire and fire employees, set wages, set terms and conditions of employment, and maintain employment records.
20. Defendants Shamlian, Moon, and Park were Plaintiff's employers as that term is defined by the Fair Labor Standards Act and New York Labor Law.

STATEMENT OF FACTS

MINIMUM WAGE

21. Both the federal Fair Labor Standards Act and New York State Labor Law require that employees be paid a minimum wage. 29 U.S.C. § 206; N.Y. Lab. Law § 652.
22. Defendants never paid Plaintiff Kim for his first three weeks of work, which began on or about March 25, 2010. During this period, Plaintiff Kim worked six days a week, approximately 40 hours a week.

OVERTIME PAY

23. Federal and New York State labor law require that Defendants pay an overtime rate of one-and-a-half times the regular rate of pay for each hour of work over 40 hours a week. 29 U.S.C. § 207; N.Y. Lab. Law §§ 650 *et seq.*; 12 N.Y.C.R.R. § 146-1.4.
24. On or about mid-April 2010, Plaintiff Kim began working six days a week, for at least 10 hours a day, and as many as 19 hours per day. Defendants required Plaintiff Kim to work

this arduous work schedule until the end of his employment.

25. Although Plaintiff Kim was initially assigned duties as a prep cook, Defendant Park required Plaintiff to perform an ever-expanding list of duties beyond that of a normal prep cook, including butchering, receiving heavy shipments of groceries and beer, and performing personal errands for the chef. Plaintiff's duties included preparing more than hundreds of pounds of meat, seafood, and vegetables per week; peeling, blanching, and frying 100 pounds of potatoes per day, four to six days per week. In addition, whenever the Restaurant's full-time brunch prep cooks departed, Defendants immediately reassigned all of brunch cook's preparatory responsibilities to Plaintiff — without reducing any of his existing responsibilities.
26. During this time period, Plaintiff Kim worked a minimum of 80 to 88 hours a week. During the busier summer months, however, Plaintiff's workweek hours exceeded 90 hours a week.
27. From approximately mid-April 2010 until June 15, 2010, Defendants paid Plaintiff Kim \$350 a week in cash.
28. Then, in approximately mid-June 2010, Defendant Park told Plaintiff Kim that now that he was "on the books," he was "on salary."
29. From June 16, 2010 until January 6, 2011, Defendants paid Plaintiff Kim erratic amounts each pay period, which began on the first and sixteenth of each calendar month. Plaintiff Kim's pre-tax compensation varied from \$900 "salary" wages per pay period to \$720 per pay period (approximately every 15 days).
30. By contrast, upon information and belief, the prep cook whom Plaintiff Kim replaced earned approximately \$1,200 to \$1,400 every two weeks.

31. Defendants never informed Plaintiff Kim of his regular rate of pay, nor his overtime rate of pay. Nonetheless, his paystubs reflected a \$9-per-hour rate for several half-month pay periods — but reflected drastically undercounts of the hours Plaintiff worked per week. The pay periods during which Plaintiff received the \$9 hourly rate included those ending on June 15, 2010 and August 31, 2010.
32. Defendants never paid Plaintiff Kim his lawful overtime pay for his hours of work beyond 40 hours of work per week.

SPREAD OF HOURS

33. New York State Department of Labor Regulation § 146-1.6 provides that, if an employee works for more than 10 hours per day, then the employer is required to pay the employee an extra hour of pay at the minimum wage. 12 N.Y.C.R.R. § 146-1.6. This “spread-of-hours” regulation is applicable even if there is a split shift.
34. Defendants consistently required Plaintiff Kim to work more than 10 hours a day, but never paid Plaintiff the required extra hour’s pay at the minimum wage.

KNOWING AND INTENTIONAL ACTS

35. Defendants knowingly, intentionally and willfully committed the acts alleged herein.
36. The Defendants knew that the nonpayment of minimum wage, overtime pay and spread-of-hours pay would financially injure Plaintiff Kim.
37. On or around March 18, 2010, before Plaintiff Kim began working at the Restaurant, Defendant Park represented to Plaintiff that he would be hired as an “apprentice” and would learn how to prepare dishes in the kitchen.
38. On or around the first week of June 2010, Defendant Moon, in the presence of Defendant Park, obligated Plaintiff Kim to sign a sheet of paper at the Restaurant entitled

“apprenticeship.” Defendant Moon represented that Plaintiff would be working at the restaurant as an apprentice, but did not provide Plaintiff with a copy of the paper.

39. According to the U.S. Department of Labor Office of Apprenticeship and the New York State Department of Labor, no apprenticeship program was registered under Defendant NYLA Cafe, LLC or Defendant Park during the relevant time period.
40. Defendants knowingly and intentionally failed to pay Plaintiff Kim his entitled minimum wage, overtime, and spread-of-hours wages.
41. Upon information and belief, Defendants intentionally failed to keep full and accurate records of Plaintiff Kim’s hours and wages in order to avoid liability for their wage violations.
42. Upon information and belief, in or around late August or early September 2010, all Spitzer’s Corner kitchen staff was required to start clocking in and out at the Restaurant’s time clock using punch cards. Nonetheless, Defendant Park directed Plaintiff to punch in and out at the wrong hours — punching “in” at approximately 6 a.m., many hours after Plaintiff had actually started work, and punching “out” at approximately 2 or 3 p.m., many hours before he actually ceased working — for approximately one week during this time.
43. After approximately one week, Defendant Park instructed Plaintiff Kim to stop clocking in, stating that it was because Plaintiff was purportedly “on salary” and did not need to use time cards to log his working hours. Other kitchen staffers at Spitzer’s Corner, however, were required to clock in and out daily at the time clock, which, upon information and belief, they did until approximately mid-November 2010.
44. Starting in approximately late August or early September 2010, Defendant Park ordered

Plaintiff Kim to discard the time clock punch cards for all kitchen staff in a trash bin on a weekly basis, until approximately mid-November 2010.

45. At one point during Plaintiff's employment at the Restaurant, Defendant Park told Plaintiff that the assignment to Plaintiff of additional responsibilities allowed the Restaurant to reduce the salary that would otherwise have to be paid to the higher-paid kitchen staff.

FIRST CAUSE OF ACTION

Federal Minimum Wage and Overtime Violations

46. Plaintiff repeats and realleges all the paragraphs above.
47. The Defendants' intentional failure to pay Plaintiff the proper minimum wage and to pay overtime for his hours over 40 hours a week violates 29 U.S.C. §§ 206(a), 207.
48. Plaintiff is entitled to recover from Defendants, jointly and severally, his unpaid minimum wages, overtime wages, an additional equal amount as liquidated damages, reasonable attorney's fees, and the costs of the action, pursuant to 29 U.S.C. § 216(b), in an amount to be determined at trial.

SECOND CAUSE OF ACTION

New York State Wage Violations

49. Plaintiff alleges and realleges all the paragraphs above.
50. Plaintiff routinely worked more than ten hours per day.
51. Defendants willfully failed to pay Plaintiff proper minimum wages, overtime wages, and an extra hour of pay at the basic minimum wage for each day Plaintiff had a spread of hours in excess of ten hours per day.
52. The Defendants' intentional failure to pay Plaintiff the minimum wage, overtime pay, and

spread of hours pay, violates New York State Labor Law §§ 650 *et seq.* and 12 N.Y.C.R.R. §§ 146-1.4, 146-1.6. In addition, New York State Department of Labor regulations, N.Y.C.R.R. tit. 12, Part 146, require employers to pay learners, trainees, or apprentices in accordance with minimum wages established in the industry wage order for all hours of labor.

53. As a result of Defendant's New York Labor Law violations, Plaintiff is entitled to recover from Defendants amounts to be proven at trial for unpaid minimum wages, overtime wages, spread-of-hours wages, liquidated damages equal to one hundred percent of the total wages found to be due, reasonable attorney's fees, and the costs of the action, pursuant to New York Labor Law § 663(1).

PRAYER FOR RELIEF

WHEREFORE Plaintiff respectfully request that a judgment be granted as follows:

- (a) awarding plaintiff compensatory and liquidated damages;
- (b) awarding plaintiff pre-judgment interest and post-judgment interest;
- (c) awarding plaintiff reasonable attorneys' fees and costs; and
- (d) such other relief as this Court deems is just and proper.

Dated: New York, New York
April 24, 2012

Respectfully submitted,

By: 

Shirley Lin, Esq.

Kenneth Kimerling, Esq.

ASIAN AMERICAN LEGAL DEFENSE
AND EDUCATION FUND
99 Hudson Street, 12th Floor
New York, NY 10013
212-966-5932 x. 220 (t); 212-966-4303 (f)

Attorneys for Plaintiff