SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice PART 35

Index Number : 650578/2011
DAVID BIRNBAUM LLC/RARE 1
vs.
PARK, SOYOUNG 'JULIE'
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the portion of plaintiff David Birnbaum LLC/Rare 1's motion for summary judgment dismissing its causes of action against defendant Soyoung (Julie) Park for breach of contract, breach of duty of loyalty, monetary damages and accounting, is granted and said causes of action are severed and dismissed as moot; and it is further

ORDERED that the joint motion of plaintiff David Birnbaum LLC/Rare 1 and the counterclaim defendant David Birnbaum to dismiss Soyoung (Julie) Park's counterclaims is denied; and it is further

ORDERED that the portions of defendant/counterclaim plaintiff Soyoung (Julie) Park's cross-motion for summary judgment on her counterclaims against David Birnbaum LLC/Rare 1 and David Birnbaum [individually], are granted and the matter is referred to Hon. Ira Gammerman to hear and determine the amount of the overtime and severance due and owing to defendant/counterclaim plaintiff Soyoung (Julie) Park on her first through sixth counterclaims, and the amount of reasonable attorneys' fees due and owing to defendant/counterclaim plaintiff Soyoung (Julie) Park solely with respect to her *first, second, fifth and sixth counterclaims* against

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: _____ _____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

the LLC and Birnbaum *for overtime* pursuant to the Federal Fair Labor Standards Act 29 USC § 216 (b) and New York State Labor Law §§ 663(1) and 198 [1–a]); and it is further

ORDERED that the portion of defendant/counterclaim plaintiff Soyoung (Julie) Park's cross-motion for sanctions is denied; and it is further

ORDERED that counsel for defendant/counterclaim plaintiff Soyoung (Julie) Park shall serve a copy of this order with notice of entry on all parties and the Special Referee Clerk, Room 119M, within 30 days of entry to arrange a date for the reference to a Special Referee.

This constitutes the decision and order of the court.

Dated 1-24-2013 **ENTER:** _____, **J.S.C.**

HON. CAROL EDMEAD

Check one: ☑ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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DAVID BIRNBAUM LLC/RARE 1,

Plaintiff/Counterclaim Defendant,

-against-

Index No. 650578/2011

SOYOUNG (JULIE) PARK,

Defendant/Counterclaim Plaintiff,

DECISION/ORDER

- and -

RACHMINOV DIAMONDS INTERNATIONAL CORPORATION, and RACHMINOV DIAMONDS (USA) LLC,

Defendants.

-and-

DAVID BIRNBAUM,

Counterclaim Defendant

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiff/counterclaim defendant David Birnbaum LLC/Rare 1 (the "LLC") moves for an order dismissing its complaint as against defendant Soyoung (Julie) Park ("Park") as moot. The LLC and its owner, counterclaim defendant David Birnbaum ("Birnbaum"), move to dismiss Park's counterclaims asserted against them. Park opposes the motion and cross-moves for summary judgment and for attorneys' fees.

Background Facts

The LLC is involved in the jewelry business. Birnbaum is its owner and president. Park

was employed by the LLC, "primarily as an administrative assistant/sales person,"[1] in September 2008, pursuant to a written employment and confidentiality agreement (the "Agreement"), which contained a restrictive covenant prohibiting her from accepting employment with any jewelry company for six months after termination. The Agreement also stated that she was employed in a "non-exempt position"[2] at a salary of $34 per hour" (which was later increased to $44 per hour), and contained, as relevant here, a four-week termination notice provision.

In September 2010, Park received an email from Birnbaum stating that she was terminated from her position. Upon termination, she was paid for two weeks. In October 2010, approximately two weeks after her termination and within the six-month effective period of the non-compete covenant, she began working for defendants Rachminov Diamonds International Corporation and Rachminov Diamonds (USA) LLC (collectively, "Rachminov defendants"). In March 2011, the LLC commenced this action against Park, *inter alia*, for breach of contract, *i.e.*, the non-compete covenant, and for injunctive relief; and against Rachminov, for tortious interference and an accounting. In November 2011, Park stopped working for the Rachminov defendants. On December 22, 2011, during the deposition of Rachminov's Chief Executive Officer Moyan ("Moyan"), the LLC learned that Park was no longer employed by Rachminov.[3]

In her answer to the complaint, Park asserted counterclaims against the LLC and

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[1] The parties' views as to Park's position at the LLC are very divergent.

[2] The court notes that this term is generally used to describe an employee who is not exempt from overtime and minimum wage laws (*see e.g., Mullins v City of New York*, 653 F.3d 104, 114 [2d Cir. 2011]; *Yourman v Giuliani*, 229 F.3d 124 [2d Cir 2000]["The purpose of the salary basis test is to distinguish "true" executive, administrative, or professional employees from *non-exempt* employees, *i.e.*, employees who may be disciplined "by piecemeal deductions from ... pay"])(emphasis added).

[3] The LLC's claims against Rachminov defendants were dismissed as moot by this court's prior decision dated April 9, 2012.

Birnbaum, individually, for unpaid overtime in violation of the Federal Fair Labor Standards Act ("FLSA") and the New York State Labor Law ("NYLL"), and for breach of contract against the LLC for failure to pay overtime and for severance. Park seeks to recover no less than $1,810.40 in overtime on each claim under the FLSA and under the NYLL; breach of contract against the LLC; $1,810.40 in liquidated damages under the FLSA and the NYLL; plus, reasonable attorneys' fees in the amount of approximately $134,000.00.

In its motion, the LLC first seeks the dismissal of its own claims against Park for breach of contract, breach of the duty of loyalty, monetary damages and accounting, as moot, on the ground that Park was terminated by the Rachminov defendants in November 2011 and the LLC did not suffer any damages as result of her employment with the Rachminov. And, the LLC and Birnbaum move jointly to dismiss Park's counterclaims against them.

The movants argue that Park is not entitled to *overtime* because, first, she is exempt from overtime pay under the "administrative" exemption of the FLSA and NYLL. She was employed in an administrative capacity and assumed a managerial role, which required the use of independent judgment and discretion. She reviewed and approved employee time sheets, supervised the graphic design team and was responsible for enforcing the LLC's "English-only policy." And second, her total weekly compensation of $44 per hour exceeded the requisite standards under the FLSA of $455 per week and $543 under the NYLL. And in any event, the claimed overtime included going to parties on behalf of plaintiff or taking exotic business trips overseas or to vacation spots to make deliveries or meet clients.

Further, even if Park prevails on her statutory overtime claims, she is not entitled to *legal fees* permitted by the FLSA and NYLL. The LLC issued a check to Park in the amount of $1,500

for overtime and subsequently made on offer to compromise damages in the amount of $4,501, but Park did not accept it, and instead counterclaimed for overtime and severance pay. Thus, Park's counsel should not use his client's asserted overtime claims to build up the legal fees.

Further, the counterclaim for breach of contact for failure to pay her four weeks of severance pay should also be dismissed. Park is not entitled to a four-week severance upon termination because her Agreement with the LLC contains no provision for severance in case of termination, and she failed to perform her job duties during the "notice" period by refusing to meet in a restaurant with Birnbaum, upon his request, to discuss the transition of her projects to other staff.

Finally, the court should not award sanctions against the LLC because it did not bring this action in bad faith and the court has ruled in its April 9, 2012 decision that plaintiff's action was not frivolous when it was commenced.

In opposition, Park argues that the court should deny the LLC's and Birnbaum's motion. In her cross-motion, she seeks summary judgment dismissing the LLC's complaint against her and summary judgment on her counterclaims against the LLC and Birnbaum.

Birnbaum was Park's employer as defined by FLSA, 29 USC §203 (e), and NYLL §§190 (3) and 651 (6), and therefore, he is jointly and severally liable with the LLC for Park's overtime pay under the FLSA and NYLL. Birnbaum failed to deny the relevant factual allegations in the counterclaims, and thus, is deemed to admit them.

Further, Park is entitled to *overtime* payments for certain weeks when she worked in excess of 40 hours per week (Park transcript, pp. 46; 71). The Agreement provides that Park is "non-exempt" [from overtime and minimum wage law] and therefore, under the FLSA and

NYLL, she was required to be paid no less than one and half times her regular rate for hours worked over the weekly 40 hour limit. The "discretionary" or "travel" bonus paid to Park by the LLC was nothing more than hourly pay for work in excess of 40 hours a week, disguised as a "bonus." And, under both the FLSA and NYLL, a bonus cannot be credited towards the overtime compensation due to an employee.

Park argues that she was *not exempt* from overtime and minimum wage laws under the administrative exemption provision, because, firstly, she was paid by the hour, and not "on a salary basis" at the rates of no less than $455 (as required by the FLSA), or $543 (NYLL) per week. And, secondly, she primarily performed "clerical or secretarial work," which did not require the exercise of discretion and independent judgment as required by the FLSA and NYLL.[4] Her work involved answering telephones, maintaining clients' files, mass mailings to wealthy individuals; "Googling" prospective customers; preparing cover letters; meeting with customers; taking orders; and selling finished jewelry pieces (Park Affidavit, ¶ 10; Birnbaum transcript, pp. 223-224).

Park also lacked authority to commit the LLC "in matters that have significant financial impact," and lacked "authority to negotiate and bind [the LLC] on significant matters" so as to be exempt under the FLSA. Birnbaum testified at his deposition that Park's work required "minimal" independent judgment as she did not have the authority to set the price or to deviate from established policy without Birnbaum's prior approval (Birnbaum transcript, pp. 228-229). And, the court should disregard Birnbaum's assertion in his affidavit that Park reviewed employees' time sheets, as it contradicts his prior deposition testimony that he was the only one

[4] 29 CFR §541.202(a), §541.200(a)(3); 12 NYCRR §142-2.2.

who was authorized to review and draw check marks on the time sheets (see Birnbaum's transcript, pp. 61-64; 98; 105-106).

Park also argues that she is entitled to recover liquidated damages under both the FLSA and the NYLL.

Further, the LLC *breached its contract* with Park by failing to pay her the required *severance*. Under the Agreement, the LLC was obligated to pay her for four weeks of severance pay, if Park was employed for more than one year and terminated for cause or without cause. Park was terminated in September 2010, after two years of employment with plaintiff, the LLC only compensated Park for two weeks and therefore, Park is entitled to the remaining two weeks' pay.

Further, Park rejected plaintiff's June 2011 $4,501 "Offer to Liquidate Damages" pursuant to CPLR 3220 as improper, since it was not related to Park's counterclaims, and Birnbaum [individually] cannot make such offer to Park since she did not assert a breach of a contract claim against him. The court should deny the LLC's request for costs because the LLC and Birnbaum do not seek attorneys' fees in their notice of motion and, under CPLR 3220, the LLC would be eligible for an award of limited expenses only if Park's liability is established at trial and the amount awarded is less than that previously offered by the LLC.

And, the court should award her, as a prevailing party, reasonable attorney's fees and costs of litigating against the LLC and Birnbaum, jointly and severally, pursuant to the FLSA, 29 USC §216 (b), and NYLL §§198 and 663. It is irrelevant that the reasonable attorneys' fees exceed her claimed damages, because the FLSA and the NYLL do not impose a "proportionality" requirement.

Park refused to accept a check for $1500 from plaintiff, offered to her in May 2011, in exchange for her discontinuing the counterclaims, because at that time, she had been defending this action and prosecuting her counterclaims against plaintiff for over two months, and incurred more than $13,000 in attorneys' fees and costs (*see* Rich Affirmation, ¶34); her discontinuance of the counterclaims would not discontinue the present action on behalf of plaintiff; and plaintiff did not offer to unconditionally settle this suit.

Further, the court should award sanctions to Park pursuant to 22 NYCRR 130-1.1 on the ground that the LLC's conduct is frivolous. The LLC knew, at least in October 2011, that its claims against Park had no merit, when Park testified at her deposition that she was employed as an administrative assistant at Rachminov and did not sell any jewels (Park transcript, pp. 106-107). Further, in December 2011, Rachminov's CEO Moyan testified at his deposition that, to his knowledge, Park never operated as a "private jeweler," and never sold jewelry on Rachminov's behalf (Moyal transcript, pp. 67; 23-25). Furthermore, this court stated in its April 9, 2012 decision and order that plaintiff admittedly "suffered no damages by virtue of [any] loss of customers or confidential information (Birnbaum transcript, exhibit E p. 435)," and further discovery did not reveal any relevant evidence on this issue" (April 9, 2012 Order).

In reply, the LLC argues that in its and Birnbaum's [joint] reply, they denied each and every allegation asserted in Park's counterclaim.[5]

Park is not entitled to an overtime pay as she was employed in an administrative capacity as a "highly paid payroll master and senior administrator," which required the use of independent

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[5] The LLC also asserts that Park's [70]-page memorandum of law, or part of it, should be stricken as it exceeds the allowable number of pages pursuant to 12 NYCRR 130-1.1.

judgment and discretion, within the meaning of the FLSA and NYLL; Birnbaum's August 15, 2012 affidavit does not conflict with his deposition testimony wherein he clearly states that Park was a payroll master, supervised the graphics design team and was responsible for enforcing the English-only policy. Park was paid on a salary basis; she admitted during her deposition that it was "my understanding, it was going to be regular office hours like about 40 hours, give or take every week" (Park transcript, p. 13). Park cannot argue both ways: on the one hand, that she is entitled to overtime payment as the non-exempt clerical employee, and on the other hand, that she is entitled to severance as a salaried employee.

And even if she were entitled to overtime pay, plaintiff paid her more than she was entitled to, by paying for her trips at a regular rate of an 8-hour a day compensation, well in excess of the actual hours worked, plus $175 to $250 in discretionary trip bonuses. Furthermore, Park's trips and cocktail receptions, for which she claims overtime payments, were voluntary (*see* time sheets, stating that all trips are voluntary, signed by Park, exhibit to Birnbaum Affidavit, *infra*). And, travel time outside regular work hours and downtime during the business trip, do not qualify as "work time" within the meaning of the FLSA or NYLL.

Further, the LLC submits an affidavit of Birnbaum, stating that he did not frivolously commence this suit. He understood, based on Eden Rachminov's February 2011 email to him, that Rachminov USA was using Park as a "private jeweler."

Park is not entitled to severance because the LLC had no contractual obligation to give Park four weeks' notice. The discretionary notice provision in the Agreement is unenforceable as it states that the parties "can part ways at any time" (Agreement, exhibit A to Park's opposition and cross-motion). And even assuming the Agreement unambiguously required four weeks'

notice, plaintiff or Birnbaum would not be obligated to pay Park for the four weeks' notice period since the LLC is excused from performance because Park refused to meet with Birnbaum to discuss the transition period.

Finally, the court should not award Park statutory legal fees because Park refused to accept $1,500 and later, $4,501, in the early stages of this litigation, while well aware that, for the overnight trips, she had been compensated for more time than she actually worked. Furthermore, Park makes no attempt to differentiate between the fees expended prosecuting Park's overtime counterclaims and those relating to her defense and other counterclaims.

Park is also not entitled to legal fees under NYCRR § 130-1.1 (sanctions). The costs claimed to have been incurred by Park after December, 2011 relating to her discovery motion, the depositions of the LLC's Comptroller and Birnbaum in his personal and corporate capacities, and the instant cross-motion, all relate to Park's counterclaims and therefore, no legal fees are warranted. Furthermore, in December, 2011, at the time when it became clear that Park no longer worked for Rachminov, the LLC could not have unilaterally discontinued its claims against Park, because she was actively prosecuting her counterclaims.

Discussion

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st

Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Initially, the court holds the portion of LLC's motion to dismiss its first through fourth causes of action against Park as moot is granted and said causes of action are severed and dismissed.

Birnbaum LLC and David Birnbaum's Motion To Dismiss Park's Counterclaims

The joint motion of the LLC and Birnbaum to dismiss Park's counterclaims against them is denied.

A. Overtime

(1) FLSA and NYLL (first, second, fifth and sixth counterclaims)

As movants, the LLC and Birnbaum failed to establish their entitlement to summary dismissal of Park's claims for overtime premised upon a violation of the FLSA and NYLL. The FLSA requires an employer to compensate its employees "at a rate not less than one and one-half times the regular rate" for each hour worked in excess of forty during a workweek (29 USC § 207[a][1]).[6] Furthermore, any employer that violates the 29 USC §207 overtime provision is liable to the employee affected for overtime compensation, liquidated damages, prejudgment interest, attorneys' fees and costs (29 USC § 216[b]).

However, employers are exempt from this overtime pay requirement if the employee acts "in a *bona fide* executive, administrative, or professional capacity" (29 USC §213[a][1]

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[6] The FLSA states in relevant part:

"[N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed" (29 USC 207 [a][1]).

[exempting, *inter alia*, executives, managers and professionals from overtime pay requirements]). It is the employer's burden to demonstrate that an employee falls within an exempted category of the Act (*see Busgith v Hudson News Co.*, 2008 WL 1771788, *citing Martin v Malcolm Pirnie, Inc.*, 949 F2d 611, 614 [2d Cir 1991]).

In order to be considered "an employee employed in a *bona fide* administrative capacity" under the FLSA, an employee must be "(1) [c]ompensated on a salary or fee basis[7] at a rate of not less than $455 per week [. . .], exclusive of board, lodging or other facilities; (2) whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and (3) [w]hose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance" (29 CFR §541.200).

Thus, to prove that a plaintiff is an exempt employee under 29 USC § 213 (a)(1), a defendant must show that (1) the plaintiff was paid on a salary basis and (2) performed administrative duties (*see* 29 CFR 541.200).

As to the New York Labor Law, Article 19 is New York State's Minimum Wage Act. As part of the Act, Labor Law § 653 allows the Commissioner of Labor to appoint a Wage Board to investigate the adequacy of wages and recommend appropriate wage rates (NYLL § 653[1]; see also *Ballard v Community Home Care Referral Serv, Inc.*, 264 AD2d 747, 747 [1999]). The Wage Board may also recommend that the Commissioner of Labor promulgate overtime rate

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[7] Section 541.602 "Salary basis," provides that "[an] employee will be considered to be paid on a "salary basis" within the meaning of these regulations if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 CFR §541.602.

regulations (Labor Law § 655 [5] [b]). In accordance with this scheme, the Commissioner of Labor enacted 12 NYCRR 142-2.2, which provides: "An employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's regular rate in the manner and methods provided in and subject to the exemptions of sections 7 and 13 of 29 USC 201 *et seq.*, the Fair Labor Standards Act of 1938 as amended" (12 NYCRR 142 2-2). Employees paid less than the wage required by the law "may recover in a civil action the amount of any such underpayments, together with costs and such reasonable attorney's fees as may be allowed by the court, and if such underpayment was willful, an additional amount as liquidated damages" (NYLL §663[1]).

12 NYCRR § 142-2.14 defines an employee as

> "any individual employed, suffered or permitted to work by an employer, *except* as provided below [. . .]
>
> ***
>
> (ii) Administrative. Work in a bona fide . . . administrative . . . capacity means work by an individual:
> (a) whose *primary* duty consists of the performance of office or nonmanual field work directly related to management policies or general operations of such individual's employer;
> (b) who *customarily and regularly* exercises discretion and independent judgment;
> (c) who regularly and directly assists an employer, or an employee employed in a bona fide executive or administrative capacity (e.g., employment as an administrative assistant); or who performs, under only general supervision, work along specialized or technical lines requiring special training, experience or knowledge; and
> (d) who is paid for his services a *salary* of not less than: [. . .] $536.10 per week on and after January 1, 2007 [or] $543.75 per week on and after July 24, 2009, inclusive of board, lodging, other allowances and facilities."
> (Emphases added).

The LLC and Birnbaum failed to meet their burden of establishing that Park is exempt from the FLSA's and NYLL's[8] overtime pay provisions.

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[8] The above federal and state regulations are nearly identical.

Even assuming that Park's duties included "performance of office work directly related to management policies or general operations" by reviewing and approving employee time sheets, or that she "exercised discretion and independent judgment" with respect to the company's operations by supervising the graphic design team in enforcing the "English-only" policy, the movants failed to demonstrate the second prong of the above statutory standard, *i.e.*, that Park was compensated on a *salary* basis within the meaning of the FLSA and NYLL.

"An employee paid strictly on an hourly basis would not fall within the definition of a salaried employee" *(Zubair v EnTech Engineering P.C.,* 808 FSupp2d 592 [SDNY 2011], *citing Wright v Aargo Sec. Servs., Inc.*, No. 99 Civ 9115, 2001 WL 91705, at *5 [SDNY 2001]). Here, even assuming that at times, Park's total weekly payments exceeded the requisite standards under the FLSA [$455 per week] and under NYLL [$543.75 per week], the LLC and Birnbaum acknowledge that Park was paid $44 *per hour*. And in any event, Park established, through submitted time sheets, earnings records and deposition testimony, that in certain weeks, when she worked fewer than 40 hours per week, she was paid, in accordance with the number of hours she worked that week, *less than* $455 a week (*see* exhibits W and Y to Rich Affirmation). Thus, since her compensation was "subject to reduction because of variations in [. . .] quantity of the work performed" (29 CFR §541.602, *supra*), she cannot be considered a salaried employee so as to be exempt from the FLSA's and NYLL's overtime pay provisions.

The movants' reliance on *Lichtman v Martin's News Shops* (81 AD3d 696, 917 NYS2d 222 [2d Dept 2011]), is misplaced. In *Lichtman*, plaintiff held the title of "office manager" and her duties included auditing store reports and paying vendors for merchandise, balancing bank statements, auditing the weekly reports of the store managers. She also had the authority to hire

and train staff, purchase office equipment and supplies and implement different bookkeeping systems and accounting controls, for which she earned $900 per week, and received, *inter alia*, a car allowance and reimbursement for her home phone bill.

Unlike the plaintiff in *Lichtman*, in this case, Park did not have authority to hire and train employees, or exercise her independent judgment with respect to merchandise or clients. Indeed, Birnbaum testified that Park answered telephones; maintained clients' files; helped coordinate mass mailings to wealthy individuals; "Googled" prospective customers; prepared cover letters; and sometimes met with customers. However, her sales responsibilities, which require independent judgment, were minimal: she did not take orders from customers for colored gems of particular characteristic; and did not have decision-making authority, *e.g.*, in setting the price (Birnbaum transcript, pp. 223-229).

Therefore, since the LLC and Birnbaum failed to establish that Park is exempt from the FLSA and NYLL's overtime provisions, this portion of the motion is denied.

(2) Breach of Contract for Failure to Pay Overtime (the Third Counterclaim against the LLC)

"It is a court's task to enforce a clear and complete written agreement according to the plain meaning of its terms, without looking to extrinsic evidence to create ambiguities not present on the face of the document" (*150 Broadway N.Y. Assoc., L.P. v Bodner,* 14 AD3d 1, 6 [2004]).

By the express terms of the parties' contract, "[the LLC] agree[d] to employ [Park] for an indefinite period of time in a non-exempt position[9] at a [. . .] salary of $34 per hour + medical

[9] It should be noted that while at his deposition, Birnbaum stated that he copied the form agreement from the web and did not understood it to mean "non-exempt from overtime and minimum wage laws" (Birnbaum

benefits . . ." Therefore, the LLC was required to pay Park no less than one and a half times her regular rate for hours worked over the weekly 40 hour limit. Having failed to establish that it complied with this requirement, the LLC's motion for summary dismissal of the third counterclaim for breach of contract by failure to pay overtime is unwarranted.

B. Breach of Contract for Failure to Pay Severance (the Fourth Counterclaim against the LLC)

The LLC failed to establish *prima facie* entitlement to judgment dismissing Park's claim for breach of contract for failure to pay severance.

"[W]here a contract of ordinary employment stipulates for [. . .] a certain period of notice, the employment may be cancelled on shorter notice or with none at all upon payment of wages or salary for the period of notice" (*Holt v Seversky Electronatom Corp.*, 452 F2d 31 [2d Cir 1971], *citing* 9 Williston, A Treatise on the Law of Contracts §1017, at 136 [3d ed. 1967]). Thus, "when an employee's protection has been diminished by a late notice of termination or no notice at all, New York courts have required the employer to pay the employee's salary for the full notice period (*Holt v Seversky Electronatom Corp.*, 452 F2d at 34; *see Latimi v Metropolitan Transportation Auth.*, 17 Misc 3d 1115(A), 851 NYS2d 64 (Table), 2007 WL 3025727 [NY City Civ Ct 2007][where the parties' agreement provided for ten-day notice, the party was entitled to an award equal to the notice provision in the contract, *to wit*, ten days wages]).

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footnote 9, contd.

transcript, p. 244), this term is generally used by courts to describe an employee who is not exempt from overtime and minimum wage laws (*see e.g., Mullins v City of New York*, 653 F.3d 104, 114 [2d Cir. 2011]; *Yourman v Giuliani*, 229 F.3d 124 [2d Cir 2000]["The purpose of the salary basis test is to distinguish "true" executive, administrative, or professional employees from *non-exempt* employees, *i.e.*, employees who may be disciplined "by piecemeal deductions from ... pay"])(emphasis added).

Here, the parties' Agreement states in pertinent part:

> "In consideration of employment, [Julie Park] agrees that [. . .] her employment, compensation, and benefits can be terminated, with or without cause, and with 2-4 weeks notice, at any time, at the option of either [the LLC] or [Park]. Both [Park] or [the LLC] may, of course part ways at any time. *Four weeks is the informally understood 'Notice' to be given by either party if [Park] has been with [the LLC] for over a year*. If under a year, then 2 weeks notice."
> (Exhibit A to Park's opposition and cross-motion).

Park was terminated in September 2010, after two years of employment with plaintiff, and therefore, under the agreement, the LLC was obligated to give her four weeks' notice. It is undisputed that she did not receive four weeks' notice, but was terminated immediately. She did, however, receive payment for two weeks after her termination. However, due to the LLC's failure to comply with its notice obligation and failure to pay Park for the entire four-week notice period, this portion of the LLC's and Birnbaum's motion is denied.

Park's Cross-Motion For Summary Judgment

A. Counterclaims Against The LLC (the First through Fourth Counterclaims)

In accordance with the preceding discussion, and based on the testimonial and documentary evidence in the record, the court finds that Park established her *prima facie* entitlement to judgment as a matter of law on her counterclaims for overtime under the FLSA and NYLL against the LLC (the first and second counterclaims), and on her breach of contract counterclaims for failure to pay her overtime and severance (the third and fourth counterclaims). Therefore, Park's motion for summary judgment on such counterclaims against the LLC is granted.

B. Claims Against Birnbaum as Individual

Park also established her *prima facie* entitlement to judgment as a mater of law on her

counterclaims for overtime under the FLSA and NYLL against Birnbaum personally (the fifth and sixth counterclaims).

Section 3 (d) of the FLSA, 29 USC §203 (d), defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee." Similarly, under NYLL §190 (3), "employer" includes "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service." In interpreting the definition of "employer," the Second Circuit has applied an "economic reality test" to determine whether a given individual should be held liable as an employer for violations of the FLSA (*Chung v New Silver Palace Restaurant, Inc.*, 246 FSupp 2d 220 [SDNY 2002], *citing Herman v RSR Sec. Servs., Ltd.*, 172 F3d 132, 139 [2d Cir 1999]). This test considers four factors to determine whether the individual exercised adequate control over the employees to charge him with responsibility for violations of their rights, including "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records" (*Herman, quoting Carter v Dutchess Community College*, 735 F2d 8, 12 [2d Cir1984]). No single factor is dispositive, for "economic reality is based on all the circumstances" (*id.*). The state courts have also adopted the "economic reality" test, following the Court of Appeals's decision in *Patrowich v Chemical Bank* (63 NY2d 541, 483 NYS2d 659 [1984]; *see Kaiser v Raoul's Restaurant Corp.*, 72 AD3d 539, 899 NYS2d 210 [1st Dept 2010][the test requires evidence that shows the corporate employer sued (*i.e.*, the putative employer) has "an [ ] ownership interest [in the company] or power to do more than carry out personnel decisions made by others"]; *see also Wachter v Kim*, 82 AD3d 658, 920

NYS2d 66 [1st Dept 2011]).

Here, it is undisputed that Birnbaum is the owner of the LLC and has "power to do more than carry out personnel decisions made by others" (*Kaiser v Raoul's Restaurant Corp., supra*). Furthermore, the testimonial and documentary evidence demonstrates that Birnbaum personally hired Park, and in September 2010, terminated her by sending her an email, stating that she "did not need to come into the office since he believed she was a threat to his company"; he paid her two weeks salary over the next two weeks; upon termination, after Park refused "to meet him and another staff member at a restaurant outside the office for purposes of easing the transition of her projects to other staff," he "chose not to pay her the additional two weeks salary" (the LLC's and Birnbaum's memorandum of law, pp. 3; 7). Furthermore, Birnbaum's testimony shows that he supervised and controlled Park's work schedules and conditions of employment, and determined the rate and method of payment (*see* Birnbaum transcript, *passim*). Such evidence establishes *prima facie* of Birnbaum's personal liability to Park for unpaid overtime under FLSA and NYLL.

Birnbaum's opposition failed to raise an issue of fact, or even address the issue of Birnbaum's personal liability, warranting summary judgment in Park's favor. Therefore, this portion of Park's cross-motion is granted.

Legal Fees

A. Statutory Legal Fees

Under the FLSA and NYLL, a prevailing plaintiff is entitled to recover reasonable attorneys' fees and costs from the defendant (29 USC § 216 (b); NYLL § 663(1); §198 (1–a); *Kahlil v Original Old Homestead Restaurant, Inc.*, 657 FSupp2d 470 [SDNY 2009]). Thus, Park, as a prevailing party with respect to her *statutory claims for overtime* against the LLC and

Birnbaum, is entitled to reasonable legal fees, to be determined at hearing.

B. Sanctions Pursuant to 22 NYCRR 130-1.1

However, Park is not entitled to sanctions against the LLC. Courts may impose reasonable costs or sanctions for frivolous conduct, *i.e.*, conduct which "is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" (22 NYCRR 130-1.1 [c] [1]; *see Citibank [S.D.] v Alotta*, 277 AD2d 547, 548-549 [3d Dept 2000]). In considering whether specific conduct is frivolous, courts are required to examine "whether or not the conduct was continued when its lack of legal or factual basis was apparent [or] should have been apparent" (22 NYCRR 130-1.1 [c]).

Park failed to show that the LLC acted in bad faith or that its conduct was completely without merit. First, although the LLC and Birnbaum did not prevail on their motion, it was supported by reasonable arguments, albeit ones which did not persuade the court *(150 Nassau Associates LLC v RC Dolner LLC*, 30 Misc 3d 1224(A), 926 NYS2d 345 [Sup Ct, New York County 2011][Trial Order]).

Furthermore, while the LLC's continued prosecution of its own claims would be frivolous, its defense of Park's counterclaim was not (*see Navin v Mosquera*, 30 AD3d 883, 817 NYS2d 705 [3d Dept 2006][defendants should not be entitled to collect litigation expenses associated with their own claims]). Indeed, the LLC's and Birnbaum's "continued" litigation, including discovery, was related solely to defending against the counterclaims asserted by Park.

Therefore, sanctions against the LLC and Birnbaum are unwarranted and this portion of Park's cross-motion is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the portion of plaintiff David Birnbaum LLC/Rare 1's motion for summary judgment dismissing its causes of action against defendant Soyoung (Julie) Park for breach of contract, breach of duty of loyalty, monetary damages and accounting, is granted and said causes of action are severed and dismissed as moot; and it is further

ORDERED that the joint motion of plaintiff David Birnbaum LLC/Rare 1 and the counterclaim defendant David Birnbaum to dismiss Soyoung (Julie) Park's counterclaims is denied; and it is further

ORDERED that the portions of defendant/counterclaim plaintiff Soyoung (Julie) Park's cross-motion for summary judgment on her counterclaims against David Birnbaum LLC/Rare 1 and David Birnbaum [individually], are granted and the matter is referred to Hon. Ira Gammerman to hear and determine the amount of the overtime and severance due and owing to defendant/counterclaim plaintiff Soyoung (Julie) Park on her first through sixth counterclaims, and the amount of reasonable attorneys' fees due and owing to defendant/counterclaim plaintiff Soyoung (Julie) Park solely with respect to her *first, second, fifth and sixth counterclaims* against

the LLC and Birnbaum *for overtime* pursuant to the Federal Fair Labor Standards Act 29 USC § 216 (b) and New York State Labor Law §§ 663(1) and 198 [1–a]); and it is further

ORDERED that the portion of defendant/counterclaim plaintiff Soyoung (Julie) Park's cross-motion for sanctions is denied; and it is further

ORDERED that counsel for defendant/counterclaim plaintiff Soyoung (Julie) Park shall serve a copy of this order with notice of entry on all parties and the Special Referee Clerk, Room 119M, within 30 days of entry to arrange a date for the reference to a Special Referee.

This constitutes the decision and order of the court.

Dated: January 24, 2013

Hon. Carol R. Edmead

HON. CAROL EDMEAD