

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

GEORGE MULLER AND IVAN MULLER AND :
615 OCEAN AVE REALTY CORP., :

Petitioners, :

DOCKET NO. PR 09-218

To Review Under Section 101 of the Labor Law: :
An Order to Comply with Article 6 of the Labor Law :
and an Order Under Article 19 of the Labor Law, both :
dated July 10, 2009, :

RESOLUTION OF DECISION

- against -

THE COMMISSIONER OF LABOR, :

Respondent. :
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APPEARANCES

Cobert, Haber & Haber (Eugene F. Haber of counsel), for the petitioners.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Benjamin T. Garry of counsel), for the respondent.

WITNESSES

George Muller and Ivan Muller for the petitioners; Vital Sosa and Senior Labor Standards Investigator Jeremy Kuttruff for the respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on August 7, 2009, and seeks review of two orders issued by the Commissioner of Labor (Commissioner or respondent) against petitioners George Muller, Ivan Muller, and 615 Ocean Ave Realty Corp. on July 10, 2010. Upon notice to the parties, a hearing was held on August 5, 2011 and January 10, 2012, in New York, New York, before Devin A. Rice, Associate Counsel to the Board and the designated Hearing Officer in this proceeding, with the respondent appearing the second day by videoconference from Albany, New York. Each

party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and to file post-hearing briefs.

The first order is to comply with Article 6 of the Labor Law (wage order). It finds that the petitioners failed to pay wages in the amount of \$10,800.00 to claimant Vital Sosa from July 1, 2005 to October 31, 2007. The wage order further finds interest due at the rate of 16% calculated to the date of the order in the amount of \$2,925.76, and assesses a civil penalty in the amount of \$10,800.00, for a total amount due of \$24,525.76.

The second order is under Article 19 of the Labor Law (penalty order). It finds that from on or about July 1, 2005 through October 31, 2007, the petitioners failed to keep and/or furnish true and accurate payroll records for each employee, and assesses a \$500.00 civil penalty.

SUMMARY OF EVIDENCE

On May 20, 2008, Vital Sosa filed a claim with the Department of Labor (DOL) alleging that he had not been paid by the petitioners, residential building owners, for work performed between July 1, 2005 and October 31, 2008. Specifically the claim alleges that his monthly salary was \$1,200.00 and that he had not been paid from July 2005 to December 2007.

Petitioner George Muller, an officer of 615 Ocean Ave Realty Corp., testified that he met Sosa in 2000, and at that time reached an agreement with him that he could live in the basement apartment at 615 Ocean Ave, Brooklyn, New York, in exchange for him taking out the garbage, cleaning the building, and doing "handyman-type" work if needed. In addition, Muller agreed to pay Sosa \$300.00 a week. Muller testified that in 2007, he learned that the Fire Department and the Buildings Department had demanded access to the basement, but were refused by Sosa. Muller further testified that he terminated Sosa in 2008 and commenced an eviction proceeding against him because he had built a "rooming house" in the basement. The petitioners stopped paying wages as of that date.

George Muller testified that the petitioners paid Sosa by checks written by his sister-in-law Beatrice Muller. Sosa picked up the checks, which were post-dated, in advance. The checks were always for one month, in the amount of \$1,200.00. Muller was typically present at the building at least once a week.

Petitioner Ivan Muller testified that he is a shareholder of 615 Ocean Ave Realty Corp., but was not involved in managing the building. He later testified that he is the president of the corporation. He testified that his brother, George Muller, was responsible for running 615 Ocean Avenue. Ivan Muller estimated that he went to the building once or twice a year. Sosa picked up his paychecks from Beatrice Muller, Ivan Muller's wife, at their home. The checks were post-dated so that Sosa would not need to come often.

Ivan Muller produced bank statements showing the following checks made out to Sosa and debited from the petitioners' account:

- Check 1190 in the amount of \$1,200.00, dated November 30, 2006, and cleared on February 22, 2007;
- Check 1191 in the amount of \$1,200.00, dated December 30, 2006, and cleared on February 22, 2007;
- Check 1221 in the amount of \$1,200.00, dated January 30, 2007, and cleared on April 9, 2007;
- Check 1222 in the amount of \$1,200.00, dated February 28, 2007, and cleared on April 9, 2007;
- Check 1223 in the amount of \$1,200.00, dated March 30, 2007, and cleared on April 9, 2007;
- Check 1271 in the amount of \$1,200.00, dated April 30, 2007, with "April 2007" written on the memo line, and cleared on July 12, 2007;
- Check 1272 in the amount of \$1,200.00, dated May 30, 2007, with "May 2007" written on the memo line, and cleared on July 12, 2007;
- Check 1273 in the amount of \$1,200.00, dated June 30, 2007, with "June 2007" written on the memo line, and cleared on July 12, 2007;
- Check 1300 in the amount of \$1,200.00, dated July 30, 2007, with "July 2007" written on the memo line, and cleared on September 10, 2007;
- Check 1301 in the amount of \$1,200.00, dated August 30, 2007, with "August 2007" written on the memo line, and cleared on September 10, 2007;
- Check 1333 in the amount of \$1,200.00, dated October 8, 2007, with "September 2007" written on the memo line, and cleared on October 30, 2007; and
- Check 1357 in the amount of \$1,200.00, dated October 31, 2007, with "October 2007" written on the memo line and not negotiated.

Vital Sosa testified that Ivan Muller hired him in 1987 because his cousin lived in another building owned by the Mullers. Sosa stated that Ivan Muller sent him to work at 615 Ocean Avenue and agreed to pay him \$300.00 a week plus a rent-free apartment. Sosa testified that he was paid by checks, which he picked up every two months from Ivan Muller's home. He further testified that "sometimes I would go there and they would give me eight to ten checks . . . sometimes I would deposit them all together." George Muller fired Sosa "like around October 2007." George Muller did not tell Sosa why he was fired. Sosa testified that at the time he was fired, the petitioners owed him nine months salary. Sosa explained that the petitioners did give him a check a few days before he was fired, but it could not be cashed because "something was missing" from it. Sosa gave the check to Ivan Muller who promised to replace it, but never did.

Sosa testified that somebody helped him fill out the claim form he filed with DOL. He admitted that the dates on the claim form for the time period he is owed wages are incorrect. He told the person who filled out the form for him that he was owed for nine months wages, but did not tell the person the dates. Sosa testified that all of the dates for 2005 on the claim form are incorrect, and that none of the amounts indicated on page 2 of the claim form are right. Sosa testified that the petitioners started to owe him wages from "like around January or so, around there" and that although he is not certain, the last check received was cashed and deposited "like around February." Sosa does not recall ever depositing any checks in 2007, and did not recognize any of the checks produced by the petitioners.

Sosa denied not allowing the Fire Department and Buildings Department access to the basement. He testified that if they needed access, George Muller would have told him. He also denied running a rooming house in the basement or collecting rent from people who lived with him, but admitted that he built a bathroom in the basement. Sosa also admitted that the petitioners evicted him from his apartment after they terminated him, and that he did not file his claim with DOL until after he no longer lived in the building.

Senior Labor Standards Investigator Jeremy Kuttruff testified that he was the only investigator from DOL who worked on the investigation other than at the intake level when the claim was completed and signed. Kuttruff testified that he sent letters to the petitioners notifying them of the claim, and none were returned as undeliverable. He further testified that he prepared the order to comply based on the claim form, because the petitioners failed to provide evidence to prove the wages claimed had been paid. Kuttruff never spoke to Sosa, George Muller, or Ivan Muller.

FINDINGS

The Board makes the following findings of fact and law pursuant to the provision of Board Rules of Procedure and Practice (Rules) 65.39 (12 NYCRR 65.39).

The petitioners' burden of proof in this matter is to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30).

The wage order

Article 6 of the Labor Law requires an employer¹ to pay a manual worker weekly and not later than seven calendar days after the end of the week in which the wages were earned (Labor Law § 191 [1] [a]). The order finds that the petitioners owe the claimant wages in the amount of \$10,800.00 for the time period from July 1, 2005 to October 31, 2007, and calculates the wages due based on the information in the claim form. The

¹ We find no merit in the petitioners' argument that the claimant was an independent contractor. The record shows that the petitioners employed the claimant as a superintendent in a residential building they owned. The claimant was not in business for himself (see e.g. *Brock v Superior Care Inc.*, 840 F 2d 1054, 1059 [2d Cir 1988]).

claimant admitted that the claim period was incorrect and that he was only owed wages from on or about January 2007 until he was terminated in October 2007. The petitioners explained that they paid the claimant with post-dated checks, several given to him at one time, and the claimant agreed that he was paid this way. In support of this testimony, Ivan Muller produced bank records showing 12 checks made out to the claimant between November 30, 2006 and October 31, 2007², all of which were negotiated except for the final check. Although the claimant testified that he did not recognize these checks, we find that they are sufficient proof of payment for January to September, 2007, and that the petitioners do not owe the claimant wages for that time period. However, no evidence of payment was produced for October 2007. There is no evidence that the check made out to the claimant, dated October 31, 2007, was ever cashed. Furthermore, the claimant testified credibly that something was wrong with his October 2007 paycheck, that the bank would not accept it, and that it was never replaced by the petitioners. Therefore, we find that the petitioners owe the claimant \$1,200.00 in wages earned in October 2007; and the wage order must be modified accordingly.

Civil Penalty

The wage order imposes a 100% civil penalty. The petition does not object to the civil penalty, and it is therefore affirmed (*see* Labor Law § 101 [2] [objections not raised are deemed waived]).

Interest

Labor Law § 219(1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include “interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment. Banking Law section 14-A sets the “maximum rate of interest” at “sixteen percent per centum per annum.”

The penalty order

The penalty order assesses a civil penalty of \$500.00 against the petitioners for failure to maintain true and accurate payroll records for each employee. The petitioners did not contest the penalty order and, in any event, produced no evidence that they maintained payroll records in the form required by Article 19 (Labor Law § 101 [2]). Accordingly, the penalty order is affirmed.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is modified to reduce the wages due and owing to \$1,200.00 and the civil penalty to \$1,200.00, with interest at 16% per annum recalculated based on the new principle amount;

² After the record was closed on January 10, 2012, the petitioners' attorney attempted to submit the backs of the checks into evidence. Counsel for the respondent correctly objected in writing, and the Board did not review or consider the petitioners' submission.

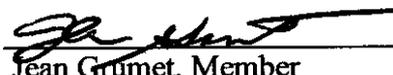
2. The penalty order is affirmed; and
3. The petition for review be, and the same hereby is, denied.



Anne P. Stevason, Chairperson



J. Christopher Meagher, Member



Jean Grumet, Member

LaMarr J. Jackson, Member



Jeffrey R. Cassidy, Member

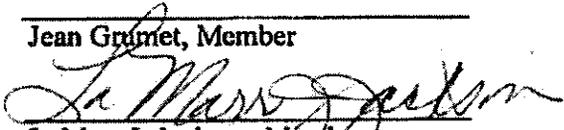
Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
May 30, 2012.

2. The penalty order is affirmed; and
3. The petition for review be, and the same hereby is, denied.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grinet, Member



LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
June 4, 2012...