

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :
 :
 LEO TSIMMER, :
 :
 Petitioner. :
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 To Review Under Section 101 of the New York State :
 Labor Law: An Order to Comply with Article 19 of the :
 Labor Law, dated April 15, 2011, :
 :
 -against- :
 :
 THE COMMISSIONER OF LABOR, :
 :
 Respondent. :
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DOCKET NO. PR 11-180

RESOLUTION OF DECISION

APPEARANCES

Kestenbaum, Dannenberg & Klein, LLP (Jeffrey C. Dannenberg of counsel), for Petitioner.

Pico Ben-Amotz, Counsel, NYS Department of Labor (Melanie Scotto of counsel) for Respondent.

WITNESSES

Leo Tsimmer for Petitioner. Dawn Hughes, Labor Standards Investigator, for Respondent.

WHEREAS:

On June 14, 2011, Leo Tsimmer (Petitioner) filed a petition to review an order that the Commissioner of Labor (Commissioner) issued against him and King Street Residents Corp. (King Street) on April 15, 2011. The Respondent filed its Answer on July 27, 2011.

The order under review is an Order to Comply with Article 19 of the New York State Labor Law and the Minimum Wage Order of 12 NYCRR Part 141 for Petitioner’s failure to pay wages at the rate prescribed in such Minimum Wage Order in the amount of \$13,688.40 to one employee, with interest at the statutory rate of 16%,¹ in the amount of \$13,110.86 and a civil

¹ Labor Law Section 219 (1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include “interest at the rate in effect as prescribed by the superintendent of financial services 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 per centum per annum.”

penalty in the amount of \$3,422.10; all for a total due and owing of \$30,221.36.

The petition alleges that a) there should be no liability for wages either by Petitioner or King Street, b) Petitioner was neither the actual nor the constructive employer of the claimant, and c) Petitioner was not involved with or a party to Respondent's investigation of the underlying claim and should not have been named individually in the Order to Comply.

A hearing was held on October 16, 2013, in New York, N.Y. before Administrative Law Judge Jeffrey M. Bernbach, the designated Hearing Officer in this proceeding. 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 make closing arguments.

I. SUMMARY OF EVIDENCE

Testimony of Labor Standard's Investigator Dawn Hughes

Labor Standards Investigator Dawn Hughes testified that on or about July 25, 2005, Thomas Pifko (Claimant) filed a claim for unpaid minimum wages with the New York Department of Labor (DOL), alleging that during the period March 1, 2001 through April 2005, he worked from 8 a.m. to 10 p.m. seven days per week as a building superintendent at 3-5 King Street, New York, N.Y., for which he received no pay but was provided with an apartment in one of the buildings rent free. The claim was filed against Petitioner Leo Tsimmer and King Street Residents Corp.

Claimant did not appear at the hearing and Hughes testified that the Respondent relied on the claim form in support of its assertion that Petitioner was Claimant's employer. Hughes testified that she made no inquiries of Petitioner or King Street concerning the ownership, management or operation of King Street, or the extent to which Petitioner had any role in the supervision or payment of wages to Claimant and to her knowledge, no one else at the DOL made such inquiries for the Respondent. Hughes acknowledged that the Respondent during the investigation was not even focused on Petitioner individually as the Claimant's employer and instead directed its inquiries to King Street. Hughes also testified that there was nothing in the Final Report of Respondent's Senior Labor Standards Investigator regarding the extent to which the Petitioner should be considered as an employer in addition to King Street and that Petitioner was only added to the Order right before it was issued in April 2011. Hughes further testified that to her knowledge, the Petitioner was never asked if he was the president of King Street.

Testimony of Petitioner Leo Tsimmer

Petitioner testified that he had no involvement whatsoever with King Street until July 2002, at which time a corporation known as Sleepy Soho LLC, of which Petitioner was a 50% owner, purchased the shares of King Street. The other owner of Sleepy Soho, David Kislin, thereafter became President of King Street and Petitioner became Corporate Secretary. Petitioner denied any responsibility for hiring employees or having the authority to fire employees or for payroll matters; testifying instead that his responsibilities were solely to ensure that the buildings were operating properly. He further testified that Claimant's supervisor was Building Manager Joe Montalto, an employee of a separate real estate management company

retained by King Street, who was brought in several months after Petitioner and his partner bought the buildings and who directed Claimant in the performance of his duties. Petitioner also testified that he knew that Claimant lived in one of the buildings rent free and that he expected the Claimant to properly discharge his duties. He made Montalto aware of his expectations and occasionally told Claimant directly when he thought something was dirty or needed to be fixed.

In 2005, one of the two buildings was sold and Claimant's employment was terminated by Mr. Montalto, both as a result of the sale and due to the nature of his performance. Petitioner testified that, after discussions with Montalto, he recommended that Claimant be discharged but that the decision to do so was made by Kislin, after consultation with his father. Montalto thereafter assumed the duties of Building Superintendent.

II. GOVERNING LAW

Standard of Review and Burden of Proof

The Labor Law provides that "any person . . . may petition the board for a review of the validity or reasonableness of any . . . order made by the [C]ommissioner under the provisions of this chapter" (Labor Law § 101 [1]). It also provides that a Commissioner's order shall be presumed "valid" (Labor Law § 103 [1]).

A petition filed with the Board that challenges the validity or reasonableness of an order issued by the Commissioner must state "in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101[2]). It is a petitioner's burden at the hearing to prove the allegations that are the basis for the claim that the order under review is invalid or unreasonable (Board Rules of Procedure and Practice § 65.30 at 12 NYCRR § 65.30 ["The burden of proof of every allegation in a proceeding shall be upon the person asserting it."]; State Administrative Procedure Act § 306; *Angelo v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

III. FINDINGS AND CONCLUSIONS OF LAW

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

"Employer" as used in Articles 6 and 19 of the Labor Law means "any person, corporation or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]; *see also* Labor Law § 651 [6]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7]).

The federal Fair Labor Standards Act, like the New York Labor Law defines "employ" to include "suffer or permit to work" (29 USC § 230 [g]), and "the test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same test . . . for analyzing employer status under the Fair Labor Standards Act" (*Chu Chung v The New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n6 [SDNY 2003]).

In *Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 (2d Cir 1999), the Second Circuit Court of Appeals stated that the test used for determining employer status by explaining that:

“Because the statute defines employer in such broad terms, it offers little guidance on whether a given individual is or is not an employer. In answering that question, the overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the ‘economic reality’ presented by the facts of each case. Under the ‘economic reality’ test, the relevant factors include whether the alleged employer (1) had the power to hire and fire 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” (internal quotations and citations omitted).

When applying this test, “no one of the four factors standing alone is dispositive. Instead the ‘economic reality’ test encompasses the totality of the circumstances, no one of which is exclusive.” (*Id.* [internal citations omitted]).

Of the *Herman* factors, Petitioner credibly testified that he did not hire the Claimant and while he had input into the decision to terminate the Claimant, the final decision was made by Kislin, in consultation with his father. Petitioner further credibly testified that while he may have occasionally told the Claimant that something was dirty and to clean it up, his expectations for things to be done in the buildings were expressed to Montalto, who supervised the Claimant’s work and effectively managed the buildings. The Claimant’s compensation arrangements had been established prior to Petitioner becoming an owner of the buildings and his testimony was that he “never felt a need” to inquire as to how that was handled and the financial aspects of the buildings in terms of “employees or contractors, tax matters, etc.” were handled by his partner.

We do not find that the Petitioner’s contacts with the Claimant rises to the level of control necessary to support the DOL’s determination that Petitioner was an “employer” under Article 19 of the Labor Law, and the DOL has presented no evidence sufficient to rebut Petitioner’s testimony (*see Petition of Franbilt, Inc. et al*, Docket No. PR 07-019 [July 30, 2008], *Petition of Roberto A. Bautista*, Docket No. PR 09-105 [September 22, 2010], *Petition of Ronald Suhanosky, Jr.*, Docket No. PR 11-113 [October 2, 2013]). The Claimant did not testify and the reference to the Petitioner on the claim form with nothing more cannot form the basis for a finding that Petitioner is individually liable for claimed unpaid wages under the Labor Law. We find that on the entire record the Petitioner met his burden of proof by credibly testifying that he was not an employer, and that the Commissioner failed to rebut Petitioner’s testimony. Accordingly, we find that the Order against Petitioner as the employer was neither valid nor reasonable and Petitioner is not liable for the unpaid wages, civil penalties and interest set forth in the Orders.

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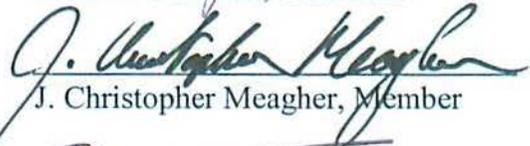
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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

The Petition is granted and the Order issued against Petitioner Leo Tsimmer is dismissed.



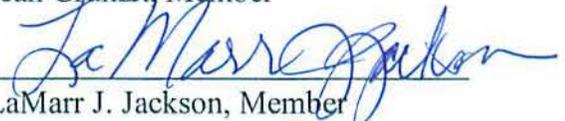
Anne P. Stevason, Chairman



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
February 27, 2014.