

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

-----X
In the Matter of the Petition of: :

HOUCINE RACHED AND SPECTRUM JEWELRY, :
INC., :

Petitioners, :

DOCKET NO. PR 13-007

To Review Under Section 101 of the Labor Law: :
An Order to Comply with Article 19 of the Labor Law :
and an Order Under Article 19 of the Labor Law, both :
dated November 23, 2009, :

RESOLUTION OF DECISION

- against - :

THE COMMISSIONER OF LABOR, :

Respondent. :
-----X

APPEARANCES

Law Offices of Joseph A. Altman P.C., Bronx (Joseph A. Altman of counsel), for petitioners.

Pico Ben-Amotz, General Counsel, New York State Department of Labor, Albany (Fredy Kaplan and Benjamin Garry of counsel), for respondent.

WITNESSES

Petitioner Houcine Rached for petitioners.

Supervising Labor Standards Investigators Emy Bautista and Nancy Gao for respondent.

WHEREAS:

The petition in the above-captioned case was filed with the Industrial Board of Appeals (Board) on February 13, 2013, and subsequently amended on November 3, 2014,¹ and seeks review of two orders issued by respondent Commissioner of Labor on November 23, 2009 against petitioners Houcine Rached and Spectrum Jewelry, Inc. Respondent filed her answer on April 13, 2015. Upon notice to the parties a hearing was held on August 11, 2015, October 7, 2016, and March 8, 2017 in New York, New York, before Devin A. Rice, Counsel to the Board and the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity

¹ By resolution of decision dated July 1, 2014, this matter was dismissed because petitioners failed to file an amended petition as directed by the Board. Petitioners filed for reconsideration, which was granted by an interim resolution of decision dated March 11, 2015 accepting the amended petition and reinstating the matter.

to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues.

The order to comply with Article 19 of the Labor Law (wage order) directs petitioners to comply with Article 19 and pay respondent for wages due and owing to four named employees for work performed during the period from January 1, 2005 through January 31, 2009 in the amount of \$21,473.96, with interest continuing thereon at the rate of 16% calculated to the date of the wage order in the amount of \$2,786,31, and assesses a 100% civil penalty in the amount of \$21,473.96, for a total amount due of \$45,734.23.

The order under Article 19 of the Labor Law (penalty order) imposes a \$1,000.00 civil penalty against petitioners for violating Labor Law § 661 and 12 NYCRR 142-2.6 for failing to keep and/or furnish true and accurate payroll records for each employee from on or about January 2, 2005 through January 31, 2009, and a \$1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.7 by failing to give each employee a complete wage statement with every payment of wages during the period from on or about January 2, 2005 through January 31, 2009, for a total amount due of \$2,000.00.

The petition alleges the orders are unreasonable or invalid because petitioners were not an employer of the employees named by the wage order. We find, for the reasons set forth below, petitioners were not claimants' employer, and revoke the orders.

SUMMARY OF EVIDENCE

Petitioner Houcine Rached was president of Spectrum Jewelry, Inc., which is a corporation that was dissolved in 2013. Rached testified he opened Spectrum Jewelry in 2001 at 219 East Fordham Road and relocated to 263 East Fordham Road in 2004 or 2005. Rached testified he sold jewelry from a showcase and occupied approximately 25 % of the store's floor space. The remaining store space was occupied by his subtenant, Ahmed Awadaalah, who operated The Electronic Spot, Inc., which sold electronics and cell phones. Rached's sublease with Awadaalah began on July 1, 2008.

Rached explained that when he moved into 263 East Fordham Road he was a subtenant of Leo Sport, a clothing store. At that time, the store had two signs – one for Leo Sport and one for Spectrum Jewelry. Rached took over the lease for the entire store in May 2008 when Leo Sport went out of business. He subletted space to Awadaalah on July 1, 2008. Awadaalah operated The Electronic Spot at another location prior to July 1, 2008. Rached testified that the individuals interviewed by respondent worked for The Electronic Spot. When Awadaalah vacated 263 East Fordham Road in 2010, the individuals interviewed by respondent "were gone." During the time Awadaalah subleased space from Rached, a sign for The Electronic Spot was in the storefront along with a separate sign for Spectrum Jewelry.

Rached testified he sold jewelry from his showcases and never sold electronics or cell phones. Rached's business card, which was in respondent's investigative file, reads:

"Spectrum Jewelry Inc.
"14k, 18k, 22k

“Special orders or platinum
“Specializing in custom orders
“Watch, jewelry repair.”

The lease for 263 East Fordham Road specifically allows for “the retail sale of jewelry and electronics” and states any sublease must be approved by the landlord in writing. Rached explained that because the lease allowed for the occupant to sell jewelry and electronics he was permitted to sublet to Awadaalah. Rached testified that the landlord consented to the sublease although it was never done in writing. Rached testified he had nothing to do with the electronics and cell phone business and that only his own family members – Younes Rached, Saqine Saleh, and Nouredine Rached – worked for him at Spectrum Jewelry. Rached further testified that about six people worked for the Electronic Spot, including Albert Solano, who was one of the workers interviewed by respondent.

Rached did not recall being interviewed by respondent’s investigators or being requested to provide documents. Supervising Labor Standards Investigator Nancy Gao testified that the notice to provide records was issued to Younes Rached, who was the individual who identified himself to respondent’s investigator as the manager.

Respondent issued the orders under review against petitioners after a “sweep” by labor standards and unemployment insurance investigators on September 12, 2008, of businesses located on Fordham Road in Bronx, New York. Respondent’s investigators interviewed three individuals working at a store located at 263 East Fordham Road as part of the sweep, and subsequently received one anonymous and incomplete claim form against Spectrum Jewelry, Inc. on October 31, 2008. Interview sheets from the date of the sweep taken by respondent’s investigators at 263 East Fordham Road indicate the individuals interviewed identified their employer variously as “Spectrum Wireless” or “Spectrum Jewelry.” Only one of the investigators who conducted the initial interviews, Emy Bautista, testified. Bautista testified she interviewed “Jesus,” who did not want to be interviewed and refused to sign the interview sheet she completed. On a later visit to the location on December 18, 2008, Bautista interviewed three additional individuals working at the location. Bautista’s interview sheets from her second visit indicate the individuals interviewed worked for Spectrum Jewelry and were paid by “Yunis,” the “owner.” One of the individuals alleged he was hired by Yunis, one was hired by the previous owner, Ackmin, and one did not know who had hired him. Bautista further testified that the store had two sections, “one section that had jewelry and there was another that had electronics.”

Bautista and Gao each testified that respondent requested payroll records from petitioners, that none were provided, and because no payroll records were provided, the orders were issued based on the information provided by the individuals respondent had interviewed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Petitioners have the burden to show by a preponderance of evidence that the orders are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law § 101, 103;

Board Rule [12 NYCRR] § 65.30; *Matter of RAM Hotels, Inc.*, PR 08-078 at p 24 [Oct. 11, 2011]). Petitioners allege the orders are unreasonable because they were not claimants' employer. We find based on the record before us that petitioners met their burden of proof.

"Employer" as used in Article 19 of the Labor Law means "any individual, partnership, association, corporation, limited liability company, business trust, legal representative, or any organized group of persons acting as an employer" (Labor Law § 651 [6]). An "employee" is "any individual employed or permitted to work by an employer" (Labor Law § 651 [5]). "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 § 203 [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]). There is no evidence petitioners satisfied any of these factors.

Petitioner Houcine Rached credibly testified that two separate businesses operated at the same location – an electronics and cell phone store owned and operated by Ahmed Awadaalah doing business as the Electronics Spot and Rached's business, Spectrum Jewelry – and that he had no involvement with Awadaalah's business. Rached also testified credibly that his only employees were his relatives and that the individuals interviewed by respondent worked for Awadaalah. Rached's testimony was not rebutted by respondent and his description of two separate and unrelated entities operating at the same location is supported by the record including the testimony of respondent's investigator. Bautista testified that the store had two sections – one selling jewelry and the other selling electronics. The sublease and the business card for Spectrum Jewelry, which does not indicate the sale of electronics or cell phones, also support petitioner's testimony.

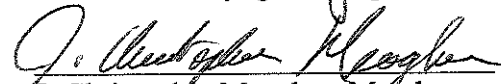
Because petitioners met their burden of proof to show they were not employers of the claimants named in the orders, and respondent did not provide sufficient and reliable evidence to rebut petitioners' proof, we find the orders unreasonable and revoke them.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The orders are revoked; and
2. The petition be, and the same hereby is, granted.



Vilda Vera Mayuga, Chairperson


J. Christopher Meagher, Member

Michael A. Arcuri, Member


Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York
on May 3, 2017.

Because petitioners met their burden of proof to show they were not employers of the claimants named in the orders, and respondent did not provide sufficient and reliable evidence to rebut petitioners' proof, we find the orders unreasonable and revoke them.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The orders are revoked; and
2. The petition be, and the same hereby is, granted.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member


Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by a Member
of the Industrial Board of Appeals
in Utica, New York
on May 3, 2017.