

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

TRAVIS GIL AND FITNESS ARTIST, LLC T/A
THE FITNESS ARTIST,

Petitioners,

To Review Under Section 101 of the Labor Law:
An Order to Comply with Article 6 and 19 of the Labor
Law, dated December 26, 2019,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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DOCKET NO. PR 20-039

RESOLUTION OF DECISION

APPEARANCES

Hodgson Russ LLP, Albany (Michael D. Zahler of counsel), for petitioners.

Jill Archambault, Acting General Counsel, NYS Department of Labor, Albany (Justine Clarke Caplan of counsel), for respondent.

WHEREAS:

This proceeding was commenced when petitioners, Travis Gil (hereinafter “Gil”) and Fitness Artist, LLC T/A The Fitness Artist (hereinafter “Fitness Artist”), filed a petition with the Industrial Board of Appeals (hereinafter “Board”) on February 24, 2020. Respondent filed an answer to the petition on June 2, 2020. On July 1, 2020, petitioners filed a motion to strike the seventh affirmative defense in respondent’s answer and the motion also requests that the Board revoke the order under review.

The petition alleges that the claimant executed a valid waiver of his wage claim which precludes respondent Commissioner of Labor from issuing the order to comply under review. Respondent’s seventh affirmative defense in her answer asserts that the Commissioner of Labor is not limited in enforcement actions even in situations where a claimant has waived his right to a private action against his employer. Respondent further asserts that the agreement at issue here does not specifically refer to wages, nor is it dated and the terms of the agreement provide that it is only in effect once dated.

Petitioners move to strike the seventh affirmative defense, arguing that it is frivolous because the claimant waived his claim to any purportedly owed wages by executing a valid release

prior to filing his claim with respondent, and he executed such release knowingly and voluntarily. Petitioners further assert that the New York Labor Law does not specifically prohibit an employee from waiving a wage claim. Respondent opposes petitioners' motion asserting that she is not a party to the purported release of the wage claim and such a release does not preclude the respondent from enforcing the Labor Law. Respondent further asserts that the purported release and waiver does not specifically include the wages that are the subject of the order on review here. Both parties cited legal authority for their positions.

Board Rule § 65.13 states:

“(a) If any matter contained in a petition, answer or reply be frivolous, irrelevant, redundant, repetitious, unnecessary, impudent, or scandalous, or may tend to embarrass or delay the hearing or consideration of a proceeding, the Board, on its own motion or on the motion of any party made on ten (10) days' notice of motion, may order such material stricken. In such case, the pleading will be deemed amended accordingly, or the Board may order that an amended pleading be served, omitting the objectionable material.

(b) If any material contained in a petition, answer or reply be so indefinite, uncertain or obscure that the precise meaning or application thereof is not readily apparent, the Board, on its own motion or on the motion of any party made on ten (10) days' notice of motion, may order the party responsible to file and serve an amended pleading.”

The burden of proof is on the party making such assertion (Board Rules of Procedure and Practice (hereinafter “Board Rules”) [12 NYCRR] § 65.30), as such, the petitioners have the burden of proving that the seventh affirmative defense in the respondent's answer should be stricken and that the order under review should be revoked. Courts have consistently held a defense should not be stricken if there is any doubt as to its availability (*Warwick v Cruz*, 270 AD2d 255, 255 [2d Dept 2000]).

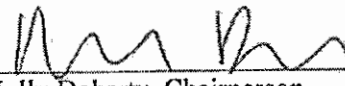
Here, the parties do not dispute that an agreement that is a release and/or waiver was entered into between petitioners and claimant; however, there are facts about whether or not the agreement included some or all of the wages that respondent includes in its order, when the agreement was executed, and if, as petitioners assert, the claimant entered into the agreement voluntarily, that the Board cannot make a determination on summarily.

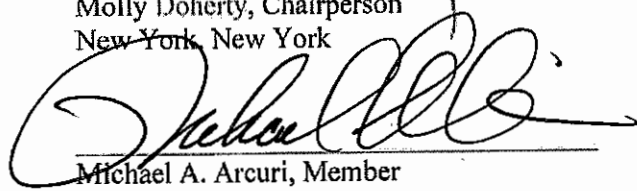
We deny the petitioners motion to strike the seventh affirmative defense and to revoke the order. The Board makes no determination herein regarding the validity of petitioners' arguments regarding the force of the agreement and whether it constitutes a waiver, precluding respondent from seeking the unpaid wages included in the order. The petitioners may renew this argument after a *de novo* hearing during which both parties have the opportunity to present all relevant facts to support their positions on this issue and the other issues raised by the parties.


NOW, THEREFORE, IT IS HEREBY RESOLVED AND ORDERED THAT:

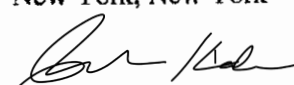
1. The motion to strike the seventh affirmative defense and to revoke the order is denied.

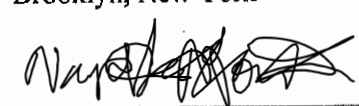
Dated and signed by the Members
of the Industrial Board of Appeals
on November 18, 2020.



Molly Doherty, Chairperson
New York, New York

Michael A. Arcuri, Member
Utica, New York

Gloribelle J. Perez, Member
New York, New York

Patricia Kakalec, Member
Brooklyn, New York

Najah Farley, Member
Brooklyn, New York