

The first order to comply with Article 6 (wage order) under review was issued by the respondent Commissioner of Labor (Commissioner) on June 30, 2009 against petitioner Richard Rubin and Maria Sonner, Daniel Weinstein, Dan DeMonte, Ace Franchising, Inc., and America's Cutting Edge Holdings, Inc. (T/A America's Cutting Edge Real Estate Services). Maria Sonner, Daniel Weinstein, Dan DeMonte, Ace Franchising, Inc., and America's Cutting Edge Holdings, Inc. did not appeal or otherwise appear in this proceeding. The wage order directs compliance with Article 6 and payment to the Commissioner for wages due and owing to Michael Ratner and Bernadette DeLuca in the amount of \$17,346.20 for the time period from July 29, 2002 through July 1, 2008, with interest continuing thereon at the rate of 16% calculated to the date of the wage order, in the amount of \$2,677.25, and assesses a 100% civil penalty in the amount of \$17,346.20, for a total amount due of \$37,369.65.

The second order to comply with Article 6 (supplements order) under review was issued by the Commissioner on the same date against the same parties, with only the petitioner appealing, and directs compliance with Article 6 and payment to the Commissioner for supplemental wages (vacation) due and owing to Bernadette DeLuca in the amount of \$784.62 for the time period from July 29, 2002 to June 6, 2008, with interest continuing thereon at the rate of 16% calculated to the date of the supplements order, in the amount of \$133.11, and assesses a 100% civil penalty in the amount of \$784.62, for a total amount due of \$1,702.35.

The order under Article 19 of the Labor Law (penalty order) was also issued on the same date against the same parties, with only the petitioner appealing. The penalty order imposes a \$500.00 civil penalty against the petitioner and the other named parties 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 July 1, 2007 through July 1, 2008

SUMMARY OF EVIDENCE

Testimony of Robert Rubin

Robert Rubin, a self-employed investment banker, testified that on or about 2002 or 2003, he was introduced by an intermediary to a group of individuals from Utah who approached him to restructure the debt and equity of a company variously known as Ace Franchising and Ace Real Estate and referred to interchangeably as Ace throughout this proceeding. In 2003 or 2004, Rubin met with Christopher Young, the self-identified chairman of Ace. Rubin testified that at the time, Maria Sonner was the president and CEO of Ace, and Tom Sullivan was the CFO. Young informed Rubin that his company, Ace Investors, a real estate holding company, had put significant money into Ace and asked Rubin whether he could put a group together to make an investment in return for substantial equity in Ace Investors. Rubin testified that in 2003 or 2004, he succeeded in putting together financing for the company. The Rubin Family Irrevocable Trust¹ along with

¹ Rubin is grantor of the trust.

Sonner, Sullivan, Ace Investors, and others purchased Ace² at that time. Rubin testified that he was not personally an owner of Ace and that the Trust did not play any role in the day to day management of the company. Rubin explained his role in Ace as an investment adviser representing the Trust by “overlooking” the investment by bringing in more equity to grow the business. In this role, he was compensated by a fee for any transactions that were consummated.

Rubin testified that he was not an officer, director, or employee of Ace. He did not hire or fire employees or contractors, did not set employee work schedules, and did not supervise or direct any of the employees’ work. Rubin further testified that he did not have an office at Ace, did not attend Board meetings, was not a signatory on any of the company’s bank accounts, and was not involved in payroll. He was present at Ace once every four to five weeks at first, and later, as the company started to have financial and other problems, he may have come more often.

Rubin explained that during the relevant time period, Ace’s ownership and management structure changed for various reasons. Originally, Sonner and Sullivan ran the daily operations of the company. Sullivan and Sonner both left the company at approximately the same time, and Rubin believes that Daniel DeMonte then took over that role. Rubin testified that eventually an investor named Daniel Weinstein put money into the company and “took over” day to day operations. According to Rubin, at the time Sonner and Sullivan left Ace, the financial records were in such disarray, that he refused to provide further financial assistance without a certified statement, although he did pay an IRS tax claim for unpaid payroll taxes in order to keep the government from shutting Ace down. Ace is no longer in business because Weinstein was never able to refinance the company.

Testimony of Michael Ratner

Claimant Michael Ratner testified that he applied for a job as a real estate appraiser at Ace in 2004. Sonner interviewed Ratner in November 2004 and she hired him in July 2005. Ratner testified that he became aware of Rubin within a month of working at Ace, although they never met. Sonner told Ratner that Rubin was an “investor.” Ratner often observed Rubin meeting with Sonner.

Ratner testified that after Sonner left in 2006, DeMonte became manager, and convened a staff meeting where he announced that Rubin was “taking over.” From that time, Rubin was at the office more frequently, once every week or two. Ratner testified that he was paid by Paychex payroll checks. The checks were originally signed by Sonner, and later signed by Rubin. Ratner did not have a copy of a paycheck with him at the hearing and believed that the signature was an electronic copy or a stamp.

² It is unclear from the record precisely which of the various companies involved was actually purchased. Testimony indicates variously calls the company Ace Cutting and America’s Cutting Edge, Inc. The actual name of the entity is not relevant to our decision which deals solely with the legal question of whether Rubin was an employer of the claimants under Articles 6 and 19 of the Labor Law, and does not decide any other issues.

Ratner testified that eventually there were problems with payment of wages at Ace. Ratner discussed these problems with DeMonte, and DeMonte replied that he would speak to Rubin and everybody would get paid.

Ratner testified that he never discussed his job with Rubin, was not interviewed by Rubin, was not hired by Rubin, was not fired by Rubin, was not aware of anybody who had been hired or fired by Rubin, and was not aware of any memos or directives sent by Rubin.

Testimony of Bernadette DeLuca

Bernadette DeLuca started working for Ace as a review appraiser in 2002. She was interviewed by Maria Sonner and Godwin Tui, and eventually hired. DeLuca first saw Rubin in late 2004. She testified that Rubin would come in and out of the office to meet with Sonner. In late 2004, Sonner introduced Rubin to DeLuca without mentioning his title. In the beginning, Rubin was at the office once a month, but he eventually came more often to meet with Sonner and DeMonte.

In 2006, Ace experienced problems paying its employees. Around the same time, Sonner told the staff that Rubin was going to be the new owner. DeLuca testified that in late 2007 or early 2008, the company downsized, and at that time DeMonte started to manage the office. After Sonner left Ace, Rubin started coming to the office once a week to meet with DeMonte and others.

DeLuca believed Rubin was the owner of Ace, because his signature was on Ace's preprocessed paychecks (Sonner's signature was on the checks until she left Ace) and gave directions as to what was going on in the company. Furthermore, DeMonte introduced Rubin as the owner and she heard from DeMonte and others that they were waiting for Rubin to close a deal in order to pay the employees. Additionally, DeLuca testified that she was under the impression that Weinstein, who was running the company at the time it closed, took direction from Rubin.

DeLuca testified that she had never seen any documentation of Rubin's role in the company or stating that he was an officer, never discussed her work with Rubin, never took directions from Rubin, or even spoke with him.

Testimony of Senior Labor Standards Investigator Frank King

Senior Labor Standards Investigator Frank King testified that he did not investigate this matter, nor did he supervise the investigation. Furthermore, he did not speak to the claimants. King testified that Labor Standards Investigator Anne Maria Culberson investigated the case, that she is still employed by the Department of Labor, and that he does not know why she did not testify³. King testified that he believed based on his review of the file that Rubin was named an employer in the orders because many of the claimants listed

³ Counsel for DOL explained that Culberson now works in a different division of DOL.

Rubin on their claim forms as an owner, although he conceded that there was no indication in the file that Culberson had made any efforts to confirm ownership.⁴

Various documents related to DOL's investigation were entered into evidence pursuant to the State Administrative Procedures Act, including a letter from Culberson to counsel for DOL stating that a former employee of Ace advised DOL that "[Ace] is owned by the Rubin Family Trust."

Rebuttal testimony of Robert Rubin

Rubin testified in rebuttal that his involvement with Ace was limited to watching over the Trust's investment. He invested none of his own money into the company, was never a CEO or chairman as indicated in printout from the Secretary of State's records, and, in fact, had no involvement with Ace prior to 2004. He explained that the trust purchased the interest of Ace partners and was a minority shareholder. With respect to his signature on pre-processed payroll checks, Rubin was adamant that he never authorized Ace to use his signature for that purpose. Finally, Rubin testified that he never held himself out as a chairman or president of Ace.

FINDINGS AND CONCLUSIONS OF LAW

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

The Petitioner has the burden to show that the Orders are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law § 101, 103; 12 NYCRR 65.30).

"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]).

⁴ A printout from the Secretary of State's website dated 2001, listed Rubin as CEO. Counsel for DOL stipulated that Rubin was not in an official capacity as of 2001 and that the date on the secretary of state records had to be incorrect. This stipulation is consistent with Rubin's testimony as well as DeLuca's testimony that she was not aware of Rubin until 2004.

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]).

Rubin credibly testified that his role with Ace was as a financial advisor and that a trust that he was the grantor of was a minority shareholder. Therefore, he had no individual ownership interest in Ace. In this role, Rubin testified without contradiction that he did not hire or fire employees, did not supervise employees or control their work schedules, and was not involved in payroll. There is no evidence that he managed the business or maintained or was responsible for maintaining employment records. Additionally, the only evidence that he was an owner or officer of Ace came from hearsay statements allegedly made by others to Ratner and LeDuca, who each conceded that they had no direct knowledge of Rubin’s role in the company. Indeed, Ratner’s testimony that Sonner identified Rubin as an investor, and the representation made by a former employee to Culberson that the Rubin Family Trust was an owner, supports Rubin’s position that he was not an employer under the Labor Law. The only issue to determine is whether in his role as a financial advisor, Rubin’s efforts to secure financing for Ace to keep it in business rose to the level of controlling the conditions of the claimants’ employment. We find that it did not: Indeed, to the extent that Rubin was merely an investor in the company through an irrevocable trust fund that itself was a minority shareholder, with no proven managerial role in the company, we find that he is not individually liable as an employer under Articles 6 and 19 of the Labor Law (*see e.g. Chan et al. v Tung et al.*, 12 Wage & Hour Cas. 2d (BNA) 507 (SDNY 2007) (minority shareholder not individually liable for wage and hour violations where evidence failed to show operational control or managerial responsibilities)⁵. Accordingly, the orders are revoked with respect to Rubin.

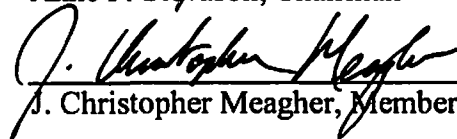
⁵ The instant matter is distinguishable from *Matter of Franbilt et al.*, PR 07-019 (July 30, 2008), where we found an individual liable as an employer who was an owner and sole shareholder, and who had ultimate authority of a company. There was no credible evidence in this matter that Rubin, individually, was an owner, sole shareholder, or had operational control over Ace.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage orders, supplements order, and penalty order, all dated June 30, 2009, is revoked with respect to Robert Rubin; and
2. The Petition of Robert Rubin be, and the same hereby is, granted.



Anne P. Stevason, Chairman

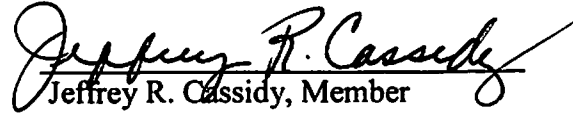


J. Christopher Meagher, Member



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 6, 2013.


NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage orders, supplements order, and penalty order, all dated June 30, 2009, is revoked with respect to Robert Rubin; and
2. The Petition of Robert Rubin be, and the same hereby is, granted.

Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Jean Grumet, 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
February 14, 2013