

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

JOSEPH MALATESTA and LTC ELECTRICAL
CONTRACTING, LLC and G.M. DEVELOPMENT,
INC. and ALLSTYNE DEVELOPMENT LLC (T/A
LTC ELECTRIC, INC.),

Petitioners,

DOCKET NO. PR 09-353

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 October 8, 2009,

RESOLUTION OF DECISION

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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APPEARANCES

Rabinowitz & Galina, Michael M. Rabonowitz of Counsel, for petitioners.

Maria L. Colavito, Counsel, NYS Department of Labor, Larissa C. Wasyl of Counsel, for Respondent.

WITNESSES

Joseph Malatesta for the petitioner; Senior Labor Standards Investigator Jeremy Kuttruff and Demetrio Mota for the Respondent.

WHEREAS:

The petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on December 1, 2009. Upon notice to the parties a hearing was held on October 28, 2010 in New York, New York, before Devin A. Rice, Associate Counsel to the Board and the designated Hearing Officer in this proceeding. Each party was

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

The order to comply with Article 6 of the Labor Law (wage order) directs compliance with Article 6 and payment to the Commissioner for wages due and owing to claimant Demetrio Mota in the amount of \$13,570.00 for the time period from February 25, 2005 through July 15, 2006, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of \$7,025.17, and assesses a 100% civil penalty in the amount of \$13,570.00, for a total amount due of \$34,165.17. The order under Article 19 (penalty order) assesses a \$500.00 civil penalty against the petitioner for failure to keep and/or furnish true and accurate payroll records.

SUMMARY OF EVIDENCE

Testimony of Joseph Malatesta

Petitioner Joseph Malatesta testified that he is employed by petitioner LTC Electrical Contracting, LLC. and is a 50% owner of G.M. Development, Inc. and the sole member of Allstyne Development. LTC Electrical Contracting, LLC is a New York City licensed electrical contractor. G.M. Development, Inc. and Allstyne Development are real estate development companies that build homes to rent to tenants.

Malatesta rented an apartment to the claimant in 2005 and hired him later that year to sporadically perform odd jobs such as painting at construction projects where Allstyne and G.M. were building homes. Malatesta testified that the claimant worked "maybe three, four weeks, if I recall, or five weeks total. But it wasn't even consecutively." The "labor logs" Malatesta maintained for Allstyne indicated that the claimant worked on a job site in 2006. Malatesta further testified that he remembered the claimant had worked on another project for "three, four days to remove shingles from the side of [a] house and we paid him for that." Malatesta denied that the claimant worked approximately 66 weeks from on or about February 2005 through the middle of 2006 as set forth in the wage order.

Malatesta testified that he provided the claimant with all the tools and supplies to perform the work he was hired to do and he "basically" just had to show up and that was it.

According to Malatesta's labor logs, the claimant stopped working for the petitioners on or about June 30, 2006. Malatesta testified that the claimant worked odd jobs for him two or three times and that he was paid three different ways: by cash, by check, and by an agreement with the claimant to credit unpaid rent by offsetting "some of the labor time." This handwritten agreement signed by Malatesta and the claimant dated July 15, 2006, states:

"I, Demetrio Mota, accept as payment for work performed for Joseph Malatesta from 5/1/06 – 6/30/06 in the amount of \$8,618.00 in exchange for back rent due Joseph Malatesta for my residing at

[redacted] Corona, New York 11268 for the time period of January 1, 2006 – April 20, 2006. Total rent due \$2,200.00 per each month totaling \$8,800.00 I also accept this as payment for my maintenance charge of \$150.00 per month for March, April, May, June, July 2006.¹”

Malatesta admitted that he did not have records of the cash wages paid to the claimant because “cash is cash.”

Malatesta also testified concerning several landlord tenant actions the claimant filed against him in which the claimant alleged, among other things, that he was owed wages. None of these cases resulted in a disposition on the issue of unpaid wages.

Testimony of Demetrio Mota

Demetrio Mota testified that he was originally a tenant in a building owned by Malatesta and eventually started to work for him as “handyman” in 2005. Mota testified that he performed various jobs for Malatesta including building a fence, painting, plastering, tiling, ceramics, carpentry, and carrying electrical wires.

Malatesta told Mota where to arrive to work, what hours to work, and provided all of the materials used to perform the work. Furthermore, Malatesta set Mota’s rate of pay and gave Mota his wages. Mota testified Malatesta agreed to pay him “\$160.00 for minor carpentry work for eight hours . . . we agreed upon \$160.00, \$20.00 per hour.” Mota stopped working for Malatesta because he was owed wages. Mota testified that Malatesta evicted him from the apartment he was renting because Malatesta did not want to pay Mota his wages.

Mota testified that he first worked for Malatesta from February 2005 to April 2005. Malatesta paid him \$500.00 for the first week he worked which was “\$600.00, but he retained \$100.00 for the taxes because it was \$20.00 per hour before taxes.” Mota testified that he was paid no other wages by Malatesta for that time period:

“[Malatesta] told me that I was living in his house, that he wasn’t going to cheat me, that he was waiting the completion of some buildings after which he was going to receive some credits. And I believed him because he is a multi-millionaire man, I was living in his house, and I thought that my money was secure.”

Mota started to work for Malatesta again from May 2, 2006 to July 9, 2006 despite being owed wages from the first time period he had worked for Malatesta. Mota explained that he still believed he would be paid upon completion of a building that Malatesta was constructing. Mota testified that Malatesta did not pay him any wages for the entire period

¹ The claimant testified that he had never seen this agreement and that it was not his signature at the bottom of the page.

from May 2, 2006 to July 9, 2006, because of a landlord-tenant dispute over allegedly unpaid rent that was the subject of a court action.

Finally, Mota testified that he did not work continuously for the petitioners from April 2005 to May 2006 as found by the wage order.

Testimony of Senior Labor Standards Investigator Jeremey Kuttruff

Senior Labor Standards Investigator Jeremy Kuttruff testified that he was assigned to investigate Mota's claim against the petitioners for unpaid wages. The claim, which was originally written in Spanish, but translated for the Board at the hearing officer's request, alleges that the claimant worked for Joseph Malatesta and LTC Electrical Contracting from February 25, 2005 to July 15, 2006 at an agreed pay rate of \$20.00 per hour and was not paid for the weeks ending February 25, 2005 through May 2, 2006 for a total amount owed of \$6,520.00.

Upon receipt of the claim, Kuttruff notified LTC Electrical Contracting, LLC of a wage claim filed against it in the amount of \$13,575.00 for wages owed to Mota for the time period from February 25, 2005 to July 15, 2006. Malatesta responded to the claim on behalf of LTC Electrical Contracting, LLC denying that the claimant was ever an employee of LTC Electrical Contracting, LLC and advising that such company did not exist prior to March 2006 and did not start corporate payroll until January 2007.

Kuttruff, however, determined that there was sufficient evidence to indicate that the claimant had been employed by the petitioners, such as checks from Allstyn Development and G.M. Development made out to the claimant and signed by Malatesta, and payroll logs provided by the claimant to DOL that include the claimant's name. Kuttruff further explained that LTC Electrical Contracting, LLC did not produce any evidence that the claimant was not their employee or that he was a subcontractor in business for himself.

Kuttruff ultimately concluded that Malatesta, LTC Electrical Contracting, LLC, G.M. Development, Inc., and Allstyn Development, LLC had employed the claimant based on the checks from G.M. and Allstyn and the claim form naming LTC Electrical Contracting, LLC as an employer. Kuttruff testified that:

"They, first of all, were two companies also owned by the same person who owns LTC Electric and [the checks] bear his signature . . . in the course of investigation when we find that we have one agent, in this case Mr. Malatesta . . . and at times we end up with multiple corporations, we hold them all accountable . . . we take the position that Joseph Malatesta did employ Demetrio Mota through these two companies, and then Mr. Mota's statement that he worked for [LTC Electrical LTC] we included that company. . . ."

Kuttruff further testified that Malatesta was named as the claimant's employer on the wage order because he signed the checks, told the claimant what work to do, where to do it,

and provided the tools and materials to perform the work. LTC Electrical Contracting, LLC was named as an employer because it was one of the active corporations on file for Malatesta and because the claimant included a business card for LTC Electrical Contracting, LLC with his claim. G.M. Development, Inc. and Allstyn Development, LLC were included on the wage order because paychecks from those entities were submitted to DOL by the claimant and because Kuttruff determined that they were corporations owned by Malatesta.

On cross-examination, Kuttruff conceded that part of the claim period was prior to LTC Electrical Contracting, LLC's incorporation in 2006.

Rebuttal testimony of Joseph Malatesta

Malatesta testified that the claimant performed "mostly painting, nothing else," and did not do any carpentry, plumbing, electrical or tiling work, and did not have the capability to perform such work. Malatesta further testified that "in general" he paid the claimant for his labor, and that the "rent setoff and the few checks and the cash constitute all the monies that were due him."

Malatesta testified that he gave DOL quarterly employment tax reports which did not indicate the claimant as an employee of LTC Electrical Contracting, LLC. Malatesta also produced some labor logs to DOL which he kept "pretty accurately."

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 petitioners have the burden to show that the orders are invalid or unreasonable (Labor Law § 101, 103; 12 NYCRR 65.30). Here, the petitioners allege that they did not employ the claimant despite admitting in their petition and at hearing that he worked as a handyman on an "as needed basis" in buildings owned by Malatesta, G.M. Development, and Allstyn Development in exchange for a setoff against owed rent. The petitioners also allege that the wages found due and owing to the claimant in the wage order are incorrect because the claimant did not work for the petitioners for the entire time period covered by the wage order.

"Employer" as used in Article 6 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]). "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]).

We find that Malatesta and the corporate entities he operated hired the claimant, supervised and controlled his work schedule and controlled his conditions of employment, determined the pay rate and method of payment, and maintained some employment records of the claimant. Malatesta, himself, admitted that he hired the claimant to perform odd jobs for the petitioners, that he provided all of the necessary tools and materials for the claimant, and that he had an agreement with the claimant to offset unpaid wages against unpaid rent. Additionally, the claimant testified that Malatesta told him when and where to work and what work to do, agreed to a wage rate of \$20.00 an hour, paid the claimant his wages as evidenced by paychecks signed by Malatesta, and included the claimant in the partial payroll logs produced by the claimant to DOL. Therefore, we find that the petitioners were the employers of the claimant, and reject the petitioners' argument that an individual hired on an "as needed" basis or as a casual laborer is not an employee.

Article 19 of the Labor Law requires employers to maintain payroll records and to keep those records available for inspection by the Commissioner at any reasonable time (Labor Law § 661). DOL regulations at 12 NYCRR 142-2.6 provide that weekly payroll records must be maintained and preserved for six years and shall show, *inter alia*, the name and address; social security number; wage rate; number of hours worked daily and weekly; amount of gross wages; deductions from gross wages; allowances if any claimed as part of minimum wages; and net wages paid for each employee.

The petitioners failed to produce any payroll records for the relevant time period and argue that the quarterly payroll tax filings for 2006 should be accepted as payroll records that prove the claimant was not employed by the petitioners since he was not listed in the quarterly filings. However, quarterly payroll tax filings are not payroll records because they do not include all of the information required by 12 NYCRR 142-2.6.

In the absence of adequate payroll records, the Commissioner, as she must, determined the amount of underpayments based on the claimant's statement (Labor Law § 196-a). We have repeatedly held that where an employer fails to maintain required records, DOL may use the best available evidence to calculate back wages due to an employer's employees, which in this case was the estimate made by DOL based on the claimant's statement (*see e.g. Matter of Han*, PR 09-095 [December 15, 2010]; *Matter of Abdul Wahid et al.*, PR 08-005 [November 17, 2009]; *Matter of Ricardo J. Ahrens*, PR 07-062 [August 27, 2009]; *Matter of 238 Food Corp.*, PR 05-068 [April 25, 2008]; *see also* Labor Law § 196-a).

The petitioners, having failed to produce payroll records, had the burden to prove that DOL's calculation of wages owed to the claimant, which was based on the claimant's claim form, was unreasonable (Labor Law § 196-a). The petitioners have not met this burden.

The wage order finds that the petitioners owe the claimant \$13,570.00 for the time period from February 25, 2005 through July 15, 2006, which is based on the claimant's claim form which lists in detail the weeks he was not paid, the hours he worked those weeks, and the promised pay rate. Specifically, the claim form states that the petitioners failed to pay the claimant \$6,520.00 from February 25, 2005 to May 2, 2005, and failed to pay \$7,050.00 from May 2, 2006 to July 9, 2006. The petitioners did not produce any credible evidence that the claimant did not work the hours claimed.

In fact, the information contained in the claim form is partially corroborated by the agreement of July 15, 2006 between Malatesta and the claimant to offset \$8,618.00 in wages for work performed by the claimant for the petitioners from May 1, 2006 to June 30, 2006 against alleged rent arrears owed by the claimant to Malatesta. This agreement is consistent with the time period for the unpaid wages listed by the claimant on his claim form for the time period he worked for the petitioners in 2006, and is for approximately the same amount of unpaid wages. For that reason, we affirm the wage order except that it is modified to the extent that LTC Electrical Contracting, LLC is not liable for wages owed to the claimant in 2005, because the petitioners did demonstrate that LTC was not in business until 2006.

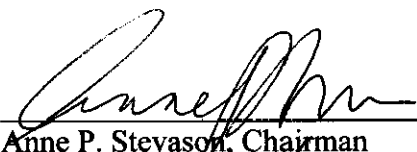
It is clear from the record that in the background of this wage and hour case is a landlord tenant dispute that is completely irrelevant to whether the petitioners employed the claimant and owed him wages. Indeed, we recently held that Labor Law § 193 prohibits an employer from deducting rent arrears from an employee's wages even where the employee has authorized such deductions (*Matter of Mendlowitz*, PR 10-240 [December 15, 2010] [interim decision]). The petitioners have violated the Labor Law by using self help to collect alleged rent arrears through wage deductions instead of recovering the unpaid rent in

housing court. We therefore find that any rents recovered by the petitioners from the claimant's wages through deductions under the July 15 agreement were illegally withheld from the claimant.

For the reasons set forth above, the wage order is affirmed in all respects except that the liability of LTC Electrical Contracting, Inc. for unpaid wages is reduced by \$6,520.00 and the civil penalty and interest are proportionally reduced.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed in all respects against Joseph Malatesta, G.M. Development, Inc., and Allstyne Development, Inc.; and
2. The wage order is modified to reduce the wages due and owing by LTC Electrical Contracting, LLC. to \$7,050.00 for the time period from May 2, 2006 to July 9, 2006, and to proportionally reduce the civil penalty and interest; and
3. The penalty order is affirmed in all respects; and
4. The petition of Joseph Malatesta and LTC Electrical Contracting, LLC and G.M. Development, Inc. and Allstyne Development, Inc. be, and the same hereby is, denied.


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
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