

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

BRUCE D. ZIPES AND JOEL P. GOLDBERG AND
BRUMELJO INC. (T/A BRUCE'S BAKERY),

Petitioners,

To Review Under Section 101 of the Labor Law:
An Order to Comply With Article 19 and an Order
Under Article 19 of the Labor Law, both dated
September 17, 2012,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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DOCKET NO. PR 12-173

RESOLUTION OF DECISION

APPEARANCES

Alan B. Pearl & Associates, P.C. (Alan B. Pearl of counsel), for petitioners.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor (Larissa C. Bates of counsel),
for respondent.

WITNESSES

Bruce D. Zipes for the petitioners.

Supervising Labor Standards Investigator Frank King for the respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on November 8, 2012, and seeks review of two orders issued by the Commissioner of Labor (Commissioner or respondent) on September 17, 2012, against petitioners Bruce D. Zipes, Joel P. Goldberg, and Brumeljo, Inc. (T/A Bruce's Bakery). The Commissioner filed his answer on January 31, 2013.

Upon notice to the parties a hearing was held in this matter on August 8, 2014, in Hicksville, 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, make statements relevant to the issues, and file post-hearing briefs.

The order to comply with Article 19 under review directs compliance with Article 19 and payment to the Commissioner for minimum wages due and owing to 11 employees in the amount of \$61,851.32 for the time period from January 3, 2004 to October 11, 2008, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of \$38,961.25, and assesses a civil penalty in the amount of \$61,851.32, for a total amount due of \$162,663.89.

The order under Article 19 assesses a \$1,000.00 civil penalty against the petitioners for violating Labor Law § 661 and 12 NYCRR 137-2.1 by failing to keep and/or furnish true and accurate payroll records for each employee for the period from January 1, 2004 through October 11, 2008; and \$1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 137-2.2 by failing to give each employee a complete wage statement with every payment of wages for the period from January 1, 2004 through October 11, 2008; for a total due and owing of \$2,000.00.

The petitioners allege that these orders are invalid or unreasonable because the investigation of the petitioners for unpaid wages was settled by stipulation prior to the issuance of the orders on review. The Commissioner argues that he did not waive his right to issue the orders by entering the stipulation.

SUMMARY OF EVIDENCE

On or about April 27, 2010, the parties entered into a “monetary stipulation” that provides in relevant part that the respondent’s investigation of the petitioners for unpaid wages for the period from April 15, 2004 to October 11, 2008 is resolved “in full” for the amount of \$119,657.32 to be paid in scheduled installments, and that “If the employer shall default on any obligation imposed as a result of this stipulation, the New York State Department of Labor is authorized to enter judgment against [petitioners] without further notice, in the amount of \$119,657.32, plus statutory interest, less amounts already paid.” It is undisputed that the petitioners defaulted after having made payments in the amount of \$57,806.00, leaving a balance due of \$61,851.32. It is also undisputed that the respondent issued the orders on review against the petitioners after the petitioners stopped making payments required by the stipulation.

Supervising Labor Standards Investigator Frank King testified that he supervised DOL’s investigation of the petitioners, negotiated with the petitioners and their attorney, and drafted the stipulation, which was meant as “full restitution.” Investigator King stated that he had several discussions with the petitioners’ attorney prior to execution of the stipulation, including that DOL would have the authority to enter a judgment against the individuals and the corporation if the petitioners defaulted on their obligations under the stipulation. Investigator King further testified that after the petitioners defaulted, he was directed by his supervisors to send correspondence to the petitioners notifying them that a default would result in issuance of an order to comply. Investigator King testified that in discussions prior to execution of the stipulation, issuance of an order was not waived.

Petitioner Bruce D. Zipes testified that he was involved in the settlement discussions with Investigator King, and understood the stipulation to be an “all inclusive deal,” and that in the event of a default, “the balance of \$119,657.32 would become due, less payments that were made, and that was all inclusive of the whole agreement.” Zipes further testified that the only issue discussed with DOL with respect to a default was “there would a judgment on any balance not paid off . . . that’s all we discussed, that’s all I remember.”

ANALYSIS

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

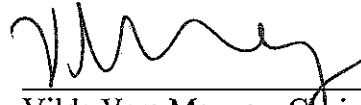
The petitioners allege that the orders issued by the respondent are invalid and unreasonable because the stipulation entered between the parties on April 27, 2010 resolved the respondent’s investigation of the petitioners and limited the respondent’s remedy for a default to the specific terms of the agreement, which are entry of a judgment in the amount owed on the stipulation at the time of default plus interest. The respondent, on the other hand, argues that issuance of an order to comply was not waived during the settlement negotiations or by the stipulation, and that the Commissioner is required by Labor Law § 218 to issue an order to comply when he determines that an employer has violated Article 19 of the Labor Law. For the reasons set forth below, we agree with the petitioners that the orders are invalid and unreasonable, and revoke them.

The petitioners, who held the burden of proof in this proceeding (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR § 65.30), established that they entered a stipulation with the respondent intended to settle the respondent’s investigation of the petitioners, that at the time they defaulted they owed a balance of \$61,851.32 on the settlement amount, and that the respondent’s remedy upon default was to file a judgment in the amount of \$61,851.32 plus statutory interest.

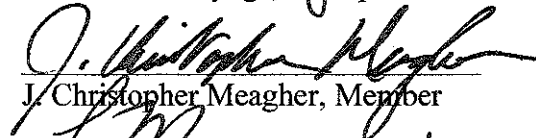
It is well established that “[s]ettlement agreements are contracts and must therefore be construed according to general principles of contract law” (*see, e.g., Red Ball Interior Demolition Corp. v Palmadessa*, 173 F3d 481, 484 [2d Cir. 1999]). We find that the petitioners established that the stipulation was meant to fully settle the claims. The respondent’s evidence suggesting that the possibility of issuing an order to comply was raised and never waived was unclear, and was rebutted by Zipes’ credible testimony that the only remedy discussed if the petitioners defaulted, was entry of a judgment. Zipes’ testimony is consistent with the actual language of the stipulation. To the extent that there may be some ambiguity as to the meaning of the stipulation, we construe it against the respondent as the drafting party (*67 Wall Street Co. v Franklin Nat’l Bank*, 37 NY2d 245, 249 [1975]). If the respondent wished to reserve the right to issue an order under Labor Law § 218 upon the petitioners’ failure to comply with the terms of the stipulation, the respondent could have included language to that effect in the stipulation that its investigator drafted. Having failed to include such language, we find the Commissioner, in the interest of settling the claims without need for further administrative action, waived the authority to issue an order to comply in favor of directly entering a judgment upon the petitioners’ default. Accordingly, we find the orders are invalid and unreasonable, and revoke them.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

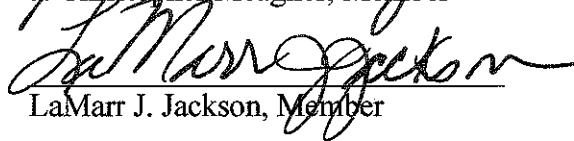
The order to comply with Article 19 and the order under Article 19, both issued against the petitioners on September 17, 2012, are revoked.



Vilda Vera Mayuga, Chairperson



J. Christopher Meagher, Member



LaMarr J. Jackson, Member

Absent

Michael A. Arcuri, Member

Frances P. Abriola, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
March 11, 2015.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:


The order to comply with Article 19 and the order under Article 19, both issued against the petitioners on September 17, 2012, are revoked.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member



Frances P. Abriola, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Utica, New York, on
March 11, 2015.