

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

GENDRI CASTILLO, individually and on behalf
of all others similarly situated,

Plaintiff,

- against -

FIRST CARE OF NEW YORK, INC.,

Defendant.

Index No. _____

SUMMONS

Place of Trial: Westchester County

The basis of venue is Defendant
First Care of New York, Inc.'s
place of business.

To the above named Defendant:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance on the plaintiff's attorneys within twenty (20) days after the service of this summons exclusive of the date of service (or within thirty (30) days after the service if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded below.

Dated: January 25, 2013

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CLASS ACTION COMPLAINT

Jury Trial Demanded

Plaintiff, Gendri Castillo, by his undersigned attorneys, for his class action complaint against defendant, alleges upon information and belief, except as to the allegations that pertain to plaintiff which are alleged upon personal knowledge, as follows:

1. Plaintiff brings this class action, individually and on behalf of a class of similarly situated employees, to seek redress for systematic and class wide underpayment of minimum wage and overtime pay against defendant First Care of New York Inc. ("First Care"), a provider of home health care for the elderly and infirm in and around New York City.

2. Defendant's unlawful practices, in violation of the provisions of the New York Labor Law and applicable regulations, include, but are not limited to, its failure to pay plaintiff and the class he seeks to represent for all wages due for work performed and overtime at not less than one and one-half times the minimum hourly rate for all hours worked in excess of 40 hours in a workweek as well as failure to pay the "spread of hours" premium required by the New York Labor Law and applicable regulations.

3. On behalf of the class, plaintiff seeks unpaid wages, actual, incidental, consequential and compensatory damages, pre-and post-judgment interest, and attorney's fees and costs.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action because defendant operates its business in the State of New York, County of Westchester.

5. Venue in this Court is proper under CPLR § 503. Defendant regularly conducts business in the State of New York and within Westchester County. Defendant has offices in Westchester County, the Bronx, Brooklyn, Queens, and, on information and belief, Manhattan, New York, and represents that it provides services in Westchester County and in the City of New York. Accordingly, plaintiff's causes of action arise in this venue.

6. Plaintiff brings causes of action based solely on and arising under New York law. The claims of plaintiff and the class are claims for violations of New York law. These claims arise from defendant's systematic wage abuse against its home health care workers in New York.

PARTIES

7. Plaintiff Gendri Castillo ("Castillo"), an individual residing at 1099 Forest Avenue, Apartment 2, Bronx, New York 10456 in Bronx County, is a home health care worker formerly employed by defendant to work in and around the City of New York to provide personal care and assistance to disabled and elderly clients of the defendant.

8. At all times relevant to this action, defendant First Care, was and is a closely held, for profit domestic corporation formed in accordance with the laws of the State of New York conducting business in the State of New York, including Westchester County. First Care describes itself as a "New York State Home Care Service agency licensed by the New York State

Department of Health” and “as servicing [the] Bronx, Brooklyn, Manhattan, Queens, and Westchester counties.”

9. At all times relevant to this action, plaintiff and the class were “employees” covered by the New York Labor Law, and defendant was an “employer” of plaintiff and the class of home health care workers he seeks to represent, as those terms are defined by New York Labor Law §§ 651 (5) and (6) and applicable regulations, 12 NYCRR § 142-2.14.

CLASS ACTION ALLEGATIONS

10. Plaintiff brings this case pursuant to CPLR Article 9 on behalf of a class (the “Class”) of all current and former hourly paid home health care workers employed by the defendant in the State of New York for work performed during the period from January 26, 2007 through the entry of judgment (the “Class Period”).

11. The class is so numerous that joinder of all members is impracticable. Although the precise number of such persons is unknown, and the facts are presently within the sole knowledge of the defendant, there are hundreds of home health care workers employed by the defendant as of the date this complaint was filed. Since the Class also includes former employees since January 26, 2007, the class is sufficiently numerous to warrant certification.

12. There are questions of law or fact common to the Class that predominate over any questions affecting individual members. Those questions include but are not limited to the following:

a. whether defendant has and is engaged in a pattern or practice of not paying all wages due for work performed and overtime, that is, one and one half times the minimum hourly rate for all hours worked in excess of 40 in a work week;

b. whether defendant violated and is violating the New York Labor Law by failing to pay plaintiff and the Class overtime wages and an extra hour's pay for the "spread of hours" worked;

c. whether defendant violated and is violating the New York Labor Law by failing to pay plaintiff and the Class all wages, including overtime wages, in the proper pay period;

d. whether defendant should be enjoined from continuing the alleged wrongful practices in violation of New York Labor Law and applicable regulations; and

e. what is the proper measure of damages for the type of injury and losses commonly suffered by plaintiff and the class.

13. Plaintiff's claims are typical of the claims of the Class, because they are all current or former hourly paid home health care employees of defendant who sustained damages, including underpayment of wages, as a result of defendant's compensation policies and practices. The defenses that likely will be asserted by the defendant against plaintiff are typical of the defenses that defendant will assert against the Class members.

14. Plaintiff will fairly and adequately protect the interests of the Class and has retained counsel experienced in pursuing complex and class action litigation who will adequately and vigorously represent the interests of the class.

15. Class action treatment is superior to other available methods for the fair and efficient adjudication of the controversy alleged herein. Treating this as a class action will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the duplication of effort and expense that numerous individual actions would entail. As a practical matter, absent a class action, there

will be no lawsuits to recover the unpaid wages due the Class because the amounts due and owing to each class member are too small to warrant the filing of individual litigation. Moreover, class members would be reluctant to file individual claims for fear of retaliation. No difficulties are likely to be encountered in the management of this class action that would preclude its maintenance as a class action, and no superior alternative exists for the fair and efficient adjudication of this controversy. The Class is readily identifiable from records that defendant is legally required to maintain. Each class member's damages can similarly readily be computed using these required records.

16. On information and belief, no individual class member has any interest in individually controlling the prosecution of a separate individual action. On information and belief, no other suits or complaints have been filed by any class member. In order to pursue these claims in a class action, plaintiff is waiving any claim on his own behalf or on behalf of the Class in this lawsuit for liquidated damages under the New York Labor Law.

17. Prosecution of separate actions by individual Class members would create the risk of inconsistent or varying adjudications with respect to individual members of the Class that would establish incompatible standards of conduct for First Care.

18. Defendant has acted, or failed to act, on grounds generally applicable to the Class.

19. Without a class action, defendant will likely retain the benefit of its wrongdoing and will continue a course of action which will result in further damages to the members of the Class.

STATEMENT OF FACTS

20. Plaintiff Gendri Castillo, a resident of Bronx County, is and was at all times relevant a home health care worker employed by defendant to work in and around the City of New York to provide personal home health care and assistance to disabled and elderly clients of First Care. Plaintiff worked for defendant as a home health care worker for approximately three years, beginning on January 26, 2007. At the direction of First Care, he provided personal care and assistance to homebound clients based upon a schedule set and dictated by First Care.

21. From approximately January 26, 2007 until June 30, 2007, plaintiff was paid \$7.50 per hour, slightly above the New York State minimum wage of \$7.15 per hour. At the end of June 2007, plaintiff's hourly rate increased to \$7.55 per hour. Near the end of June 2008, plaintiff's hourly rate increased to \$7.60 per hour. At some point between November 2008 and January 2009, plaintiff's hourly rate increased to \$7.65 per hour. Plaintiff frequently was assigned and worked more than 40 hours during the course of a work week providing direct care to clients of defendant. Plaintiff has worked as many as eighty four (84) hours in a work week providing care to clients of First Care. For those work hours in excess of 40 hours, plaintiff was not paid the correct overtime premium by defendant. Rather, he was paid for all hours worked at his regular straight-time rate and additional \$0.25 for any hours over forty.

22. At all times relevant, defendant was and is required to establish, maintain and preserve for not less than six years, weekly payroll records that show for each employee, among other information, the number of hours worked daily and weekly including the time of arrival and departure of each employee working a split shift or spread of hours exceeding ten hours (New York Labor Law § 195 and 12 NYCRR §§ 142-2.6 (a) (4) and 142-2.18).

23. At all relevant times, plaintiff and the class frequently worked a “spread of hours” or a shift longer than ten hours per day but were not paid for an additional hour of work at the minimum wage as required by New York Labor Law and applicable regulations (Department of Labor Regulations [12 NYCRR] § 142-2.4 (a)).

24. As part of his duties as an employee of First Care, plaintiff was assigned to care for clients and performed services including changing bed linens, helping clients bathe, dress and perform other basic functions, picking up clients’ prescriptions at the pharmacy, accompanying clients to medical appointments, grocery shopping, laundry, and house-cleaning.

25. First Care provides home health care to infirm individuals residing in New York City and Westchester County. First Care provides services essential to the care for eligible individuals at the homes of those individuals.

26. In order to conduct their home health care business, First Care employs and assigns home health care workers, such as plaintiff, to provide personal care and assistance to medically needy clients who have selected First Care as their provider. Pursuant to a written or oral schedule, First Care assigns plaintiff to provide this direct care at the respective homes of the clients.

27. First Care has the right to control and in fact does control the hours, hourly pay, assignments, and schedules of plaintiff and the other class members. First Care requires plaintiff and the other class members to record the identity of each client visited, the tasks performed for the client, and time spent with each client through the use of an automated telephone system, which plaintiff and other class members would call in to at the beginning and at the end of each shift.

28. Plaintiff and the other members of the Class often were assigned to spend more than 40 hours in a given work week providing care to these home-bound clients. First Care paid for work performed in excess of 40 hours per week at an employee's regular rate of pay plus an additional \$0.25. First Care, as a matter of policy and practice, did not pay plaintiff and the Class one and one-half times the New York State minimum wage rate for work in excess of 40 hours in a work week.

29. First Care's actions, as alleged herein, were intentional and not made in good faith.

CLAIMS FOR RELIEF

COUNT I

New York Labor Law, Article 19: Unpaid Wages and Overtime Wages

30. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

31. During the Class Period, plaintiff and members of the Class were "employees" within the meaning of New York Labor Law §§ 190 (2) and 651(5), and 12 NYCRR § 142-2.14.

32. During the Class Period, defendant was an employer within the meaning of New York Labor Law § 651(6).

33. Throughout the Class Period, defendant failed to pay plaintiff and the Class overtime wages of not less than one and one-half times the New York State minimum wage rate for each hour worked in excess of 40 hours in a workweek in violation of the New York Labor Law, Article 19, § 650, *et seq.*, and 12 NYCRR § 142-2.2.

34. Due to defendant's violations of the New York Labor Law, plaintiff and members of the Class are entitled to recover from defendant all of the wages due them for hours worked at their regular rate of pay and unpaid overtime wages of not less than one and one-half times the

New York State minimum wage rate for each hour worked in excess of 40 hours in a workweek, reasonable attorney's fees, costs, and pre-judgment and post-judgment interest.

COUNT II
New York Labor Law, Articles 6 and 19 – Spread of Hours Pay

35. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

36. During the Class Period, defendant failed to pay plaintiff and the members of the Class an additional hour's pay at the basic minimum hourly wage rate for every day that they worked a spread of hours that exceeded 10 hours or a shift in excess of 10 hours, in violation of N.Y. Labor Law § 190, *et seq.*, and 650, *et seq.*, and 12 NYCRR § 142.

37. Due to defendant's violations of the New York Labor Law, plaintiff and the members of the Class are entitled to recover from defendant their unpaid wages, reasonable attorney's fees, costs, and pre-judgment and post-judgment interest.

WHEREFORE, plaintiff, on behalf of himself and the Class, respectfully requests that this Court grant the following relief:

A. Allow this action to proceed as a class action under CPLR Article 9 for all claims alleged, designate plaintiff as the representative of the class and the undersigned counsel as counsel for the class;

B. Enter judgment against defendant and in favor of plaintiff and each member of the Class, in the amount of their individual unpaid wages, actual and compensatory damages, and pre-and post judgment interest as allowed by law;

D. Award plaintiff the attorney's fees and costs incurred in this litigation; and

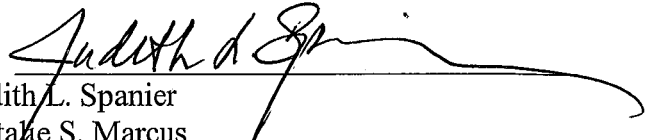
E. Grant plaintiff such further relief as this Court deems just and proper.

JURY DEMAND

Plaintiff demands a trial by jury.

Dated: New York, New York
January 25, 2013

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