

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

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MOHAMMED TAJUL ISLAM,
Plaintiff,

- against -

DECISION & ORDER

SALMA HOSSAIN dba LUFTA and
MOHAMMAD ANWER HOSSAIN "MD",
Defendants.

&

SYED SERAJI,
Plaintiff,

- against -

MOHAMMAD ANWER HOSSAIN;
MUSAMMAT KHATOON; and RAHIMA
BEGUM,
Defendants.

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**CIVIL COURT
OF THE
CITY OF NEW YORK
JUL 14 2014
ENTERED
NEW YORK COUNTY**

This is an action by two food cart employees for unpaid wages and overtime, and for the failure to reimburse fines issued to plaintiffs while they worked defendants' food carts.

On March 22, 2010, plaintiff Mohammed Tajul Islam filed an action against Salma Hossain d/b/a Lufta and her husband Mohammad Anwer Hossain "MD." In his amended complaint, Mr. Islam alleges: (1) violation of Fair Labor Standards Act, 29 USC §206 et al; (2) violation of NY Labor Law §2 and 651 for failure to pay minimum wage and overtime; (3) NY Labor Law §191 violation for failure to pay wages owing after termination; (4) spread of hours pay Labor Law 650 and 12 NYCRR142-2.4; (5) labor law penalties of 25% and attorneys' fees; (6) employment records violations of 29 USC §211, 29 CFR §516.2, Labor Law §195(4) and 12 NYCRR 137-2.1 and 137-2.2; (7) reimbursement of fines paid by plaintiffs which constitute illegal deductions from

wages a violation of Labor Law §193 or illegal kickbacks a violation of Labor Law §198-b; (8) retaliation for filing a legal action a violation of Labor Law §215; (9) and breach of contract.

Ms. Hossain denies proper service and that she ever employed Mr. Islam. Both defendants admit that they paid Mr. Islam to run errands. Defendants claim damages of \$5,000 against Mr. Islam alleging: (1) claims are untrue and malicious; (2) claims are fraudulent; (3) conspiracy. Defendants seek punitive damages of \$15,000.

On July 8, 2011, plaintiff Syed Seraji filed an action in Queens County defendants Mohammad Anwer Hossain, Rahima Begum and Musammat Khatoon for (1) breach of contract; (2) failure to pay wages; and (3) failure to reimburse for fines against.¹ Defendants claim fraud and seek damages of \$25,000. Their affirmative defenses include: (1) failure to state a claim; (2) res judicata; (3) Ms. Khatoon denies service; (4) lack of standing because employment is denied; and (5) defective complaint.

On July 30, 2012, Judge Moulton ordered a joint trial in New York County.² After a four day non-consecutive trial with the assistance of Bengali translators, the parties submitted closing briefs and replies.

FINDINGS OF FACT

Mr. Islam testified that he first met defendant Houssain in April 2009. He worked at defendants' food carts from May 2009 until March 2010. He worked in all types of

¹In April 2010, Mr. Seraji filed a complaint for unpaid wages against Salma Hossain in Queens County which was dismissed in April 2011.

²Joint Trial is not consolidation. CPLR 602. Rather, in a joint trial, the actions maintain their separate nature.

weather including one day with about 15 inches of snow.³ He worked approximately six days a week for approximately 12 hours a day. He and Mr. Hossain agreed to a salary of \$100 a day for his work. He was paid in cash weekly. Mr. Hossain agreed to pay fines if they were his fault. Otherwise, Mr. Islam would be expected to pay his own fines. Mr. Islam's salary would begin following two weeks of training. Instead, defendants began paying him on his third training day. He kept track of all payments in a notebook he kept in his backpack.

Mr. Islam knew the big gyro cart to be Mr. Hossain's cart because the official government papers inside said the cart listed Mr. Hossain's name. Mr. Islam also saw a license in Ms. Hossain's name in another cart in which he worked. In yet another cart to which he was assigned, he saw Ms. Khatoon's name on a license. He knew Ms. Khatoon to be Mr. Hossain's mother-in-law. During his ten month tenure, Mr. Islam saw Ms. Khatoon at her cart twice. Mr. Islam also saw a license for Ms. Begum in a cart Mr. Hoassain rented from her. Mr. Islam testified that Mr. Hossain employed eight people, four during the day and four at night. Up to three people could work the big gyro cart at one time. Sometimes, Ms. Hossain worked the gyro cart with Mr. Islam. She instructed him how to prepare food and how to avoid waste, and advised him on how to maximize profit. Sometimes she paid him.

While working on Mr. Hossain's big gyro cart or one of the other three carts controlled by Mr. Hossain, Mr. Islam observed revenue of \$400 to \$500 per day on weekdays and \$600 to \$700 on weekends. Revenues on Sundays, holidays and days

³The court takes judicial notice of NOAA.gov which records a snowstorm on February 26, 2010 of up to 20.9 inches of snow. Exhibit 8 in evidence shows that Mr. Islam did not work on February 26, 2010, but worked on February 27, 2010. <http://www.erh.noaa.gov/okx/StormEvents/storm03022009.html>

with parades were even higher.

While working for defendants at their carts, Mr. Islam received tickets from police and health inspectors. On August 19, 20, September 9, 26 and October 24, 2009 he was fined at Mr. Hossain's cart due to the location of the cart for a total of \$350. On March 18, 2010, he was fined \$1,000 while working at Ms. Begum's cart for its location.

Mr. Islam testified to keeping a notebook where he recorded the days he worked and amounts paid. His documentary evidence establishes that he worked 269 days for which he was paid \$10,630. When Mr. Islam complained about defendant's failure to pay what was promised, Mr. and Ms. Hossain said to "let business prosper and you will be paid." Mr. Islam admitted that he had received vendor tickets that remained unpaid and overdue. The court found Mr. Islam's testimony to be credible.

Next, Mohammad Fayzur Rahman testified for the plaintiffs. Mr. Rahman knew Mr. Islam who helped him get a job with defendants. Mr. Rahman testified that he usually worked the gyro cart from 8 pm to 8 am and that his sales increased \$50 to \$250 at night if the cart was in front of a night club. He was trained for two weeks. He was paid \$80 per night sometimes less. Sometimes he was assigned by defendants to a different cart if an employee did not report for work. Mr. Rahman testified that Mr. Hossain told him that he operated four carts. Mr. Rahman's testimony corroborated Mr. Islam's testimony regarding employee compensation and work hours as well as the customary practices of working at a food cart. He also testified that he often saw Mr. Islam working defendants' cart because he would replace him at the end of shifts. The court found Mr. Rahman's testimony credible.

Mr. Seraji worked at the food carts from late February 2009 until November 2009. He met Mr. Islam when Mr. Islam started working for defendants in May 2009. Ms.

Hossain directed Mr. Seraji to get a food vendor license. A few days later, he did. He began training on February 24, 2009 for a few days. She said he would not be paid for 1 to 2 weeks of training. However, defendants began paying his salary of \$80 per day began on March 3, 2009. Mr. Hossain assigned him each day to a cart. Mr. Seraji observed Mr. Hossain paying nine different workers. He was aware that Mr. Hossain rented a cart from Ali Asab. Mr. Seraji worked primarily at Ms. Khatoon's cart. Mr. Seraji noted that revenue at Ms. Khatoon's cart was about \$300 per day in the winter and \$500 to \$700 otherwise. He worked approximately six days a week for approximately 12 hours a day. Mr. Hossain directed Mr. Seraji which day he had off, usually Tuesday or Wednesday and slow days.

Mr. Seraji kept two notebooks where he recorded the amounts he was paid by defendants. One was in his bag and another was at home. His notebook in evidence establishes that he worked 229 days and was paid \$7,030. He showed one notebook to Mr. Hossain who refused to return it to Mr. Seraji. Mr. Seraji observed Mr. and Ms. Hossain keeping records of hours and receipts in a book kept in a bag. Mr. Seraji received tickets on July 29 (\$100), September 11 (\$300), and October 2 (\$300 and \$50), 2009 for which he was fined a total of \$750. The court found Mr. Seraji's testimony credible.

Plaintiffs' most powerful and reliable evidence are the tickets which are listed in the following chart.

Permitee	Last Name	First
40529708	Hussain	Mohammed ("HM")

40922121	BegumRahima ("RB")
41168236	MiahMatahir ("MM")
41221023	AliAsab ("AA")

Incident Date	Permitee CAMIS # (Cart owner)	Vendor (Worker)	
2/7/2009	41221023	Islam, Mohammad	
7/2/2009	40922121	Ahmed, Jalul	
7/29/2009	The decision/order does not list which cart the violation occurred	Seraji, Syed	
8/12/2009	41221023	Hakim, MD Abdul	
8/13/2009	40922121	Bhuiyan, Paparun	
8/13/2009	40529708	Saleh, Mohammad	
8/19/2009	40529708	Islam, Mohammad	
8/20/2009	40529708	Islam, Mohammad	
8/26/2009	40529708	Tayabi, Said	
8/26/2009	41168236	Seraji, Syed	
8/26/2009	41221023	Hakim, MD Abdul	
8/31/2009	40529708	Tayabi, Said	
9/9/2009	40529708	Islam, Mohammad	
9/11/2009	41221023	Hassan, ABM R	
9/11/2009	The decision/order does not list which cart the violation occurred	Seraji, Syed	
9/11/2009	The decision/order does not list which cart the violation occurred	Seraji, Syed	

9/26/2009	The decision/order does not list which part the violation occurred	Isla Tajul	
10/2/2009	41221023	Hassan, ABM R	
10/7/2009	40922121	Hossain, MD	
10/24/2009	40529708	Islam, Mohammad	
10/26/2009	41221023	Hassan, ABM R	
10/28/2009	40922121	Hossain, MD	
10/29/2009	41221023	Islam, Mohammad	
11/4/2009	40529708	Rahman, ASM Abdur	
11/4/2009	41221023	Hassan, ABM R	
11/12/2009	40922121	Hossain, MD	
11/12/2009	41221023	Hassan, ABM R	
11/17/2009	40922121	Hossain, MD	
11/17/2009	41221023	Hassan, ABM R	
11/23/2009	40922121	Islam, AKM N	
11/23/2009	40529708	Islam, Mohammad	
12/1/2009	40529708	Ahmed, Mustaque	
12/1/2009	40529708	Islam, Mohammad	
12/7/2009	40529708	Islam, Mohammad	
12/7/2009	41221023	Islam, Mohammad	
12/8/2009	40922121	Islam, AKM N	
12/9/2009	40922121	Islam, AKM N	
12/9/2009	40529708	Islam, Mohammad	
12/30/2009	41221023	Biswas, Prodip	
1/15/2010	41221023	Rahman, Sultana	
1/26/2010	40529708	Jabbar, Abdul	
2/1/2010	40922121	Islam, AKM N	
2/9/2010	40529708	Islam, Mohammad	
2/25/2010	40922121	Islam, Mohammad	
3/5/2010	40922121	Laakairi, Mounir	
3/5/2010	40529708	Islam, Mohammad	
3/16/2010	40529708	Lillah, Sharafate	
3/17/2010	40922121	Hakim, MD Abdul	
3/17/2010	40529708	Hussain, Luthfa	
3/18/2010	The decision/order does not list which part the violation occurred	Islam, Mohammad	

4/9/2010	40922121	Zakaria, Mohammad
4/15/2010	40922121	Zakaria, Mohammad
4/21/2010	40529708	Bhuiyan, MD
6/18/2010	40529708	Islam, Mohammad
7/26/2010	41221023	Ismail, Tahera
8/2/2010	41221023	Begum, Nilufa
10/14/2010	40529708	Hussain, Mohammed
10/21/2010	40922121	Begun, Rahima
10/21/2010	41221023	Lem, Shalem
10/29/2010	40529708	Hossain, Syeed
10/29/2010	41221023	Rashid, MD Aminur
11/8/2010	40529708	Ahmed, Mustaque
11/24/2010	40529708	Lem, Shalem
12/1/2010	40529708	Ahmed, Mustaque
12/14/2010	40922121	Hossain, Syeed
1/3/2011	40529708	Begum, Nilfua
1/4/2011	40922121	Islam, Mohammad
1/13/2011	40529708	Ahmed, Mustaque
2/10/2011	40922121	Hossain, Syeed
2/10/2011	40529708	Ahmed, Mustaque
2/11/2011	405708	Ahmed, Mustaque
2/14/2011	40922121	Hossain, Syeed
2/22/2011	40529708	Ahmed, Mustaque
3/4/2011	40539708	Ahmed, Mustaque
3/14/2011	40529708	Ahmed, Mustaque
3/24/2011	40922121	Hossain, Syeed
3/24/2011	40529708	Ahmed, Mustaque
5/27/2011	40922121	Begum, Nilfula

At the conclusion of plaintiff's case, defendant's moved for a directed verdict dismissing the action for failure to make a prima facie case. Defendants attacked plaintiffs' credibility. Defendants also argued for dismissal of the FLSA claim because there was no proof of income over \$500,000. In light of the overwhelming credible evidence, that motion is denied except that the FLSA claim is dismissed for the reasons discussed below.

Defendants' witness Mohammad Mofizur testified to the custom and practice of setting compensation for food cart vendors in which they were paid 35% of the daily

profits. He was employed by defendant from 10 am to 6 pm for one to four days a week for two years. Mr. Mofizur corroborated plaintiffs' testimony as to working at different carts. He testified that it was customary for him to work at one specific cart, but Mr. Hossain, the owner of the carts, would occasionally have him work at other carts under Mr. Hossain's control. He also testified that he knew Mr. Hossain because "he has carts in that area." If profits were \$285 and vendors are paid 35%, then Mr. Mofizur wages would be \$100 per day. The court found Mr. Mofizur's testimony credible.

Defendants' witness, Mohammed Anu Miah, who worked in a store on Canal Street and Broadway near the food carts in March and April of 2009, testified that he saw plaintiffs operating a food cart in front of the store. He also testified that plaintiffs and defendants worked at carts in front of the store and at times the placement of the carts would impede access to his store. Mr. Seraji was admittedly working for defendants during these two months. The court found his testimony credible, but not relevant to the issue of unpaid wages.

Defendants' next witness was Asm Abdur Rahman who occasionally worked in Mr. Hossain's food carts on the weekends. He testified that it was customary for food cart owners to pay their employees 35% of the "daily sales" and that they would be paid daily at the end of their shift. If sales were \$250 during his shift, Mr. Rahman got paid \$85. Mr. Rahman testified that he saw plaintiffs together set up a cart next to Mr. Hossain's cart or directly in front of Mr. Hossain's cart. Mr. Rahman testified that he never spoke to an inspector. (However, tickets in evidence shows that he received two tickets on November 4, 2009.) Therefore, the court rejects his testimony as not credible.

The next witness was defendant Rahima Begum. Ms. Begum testified that she

got her license (51782) in 1997 and won a vendor license to own a cart in 2003 and a vending permit in 2007. She testified that she and her husband were the only people who worked her cart. (Tickets in evidence show that many other people worked on Ms. Begum's cart.) Ms. Begum testified that she would work nine-hour shifts on average. She denied ever getting a ticket on her cart. (Twenty-three of the tickets in evidence list Ms. Begum's cart as the offending cart.) She insisted that her revenue was \$100 to \$200 a day. She paid a driver \$20 to pick up and drop off her cart. She admitted that Mr. Islam had worked her cart but only once. (Tickets in evidence show that Mr. Islam worked on Ms. Begum's cart on at least three occasions.) She denied ever meeting Mr. Seraji. Ms. Begum's testimony was interrupted at one point because she began to cry.

Based on her quick recovery, the crying appeared to be contrived. Further, Ms. Begum testified that she first became acquainted with Mr. Hossain when they were renewing their food cart permits. This is directly contradicted by Mr. Hossain's signed affidavit submitted to the court in which Mr. Hossain stated that Ms. Begum is his sister. Thus, the court rejects her testimony as not credible.

Defendant Salma Hossain was next to testify. She is married to Mr. Hossain with whom she has five children. She testified that she almost exclusively ran her cart, and on the rare occasion when she was unable to operate her own cart she would leave it in the garage. It was only when someone "begged" her to operate in her absence that someone else ran the cart. When she hired someone it was from 10 am to 5 pm for 35% of revenue. She estimated her revenue for her cart at \$100 to \$125 per day. After expenses, she grossed \$20 per day. She denied that Mr. Seraji ever worked for her. She knew Mr. Seraji because he delivered ice to carts from the garage. She paid \$5 for ice and \$2 or \$3 to the delivery person. Ms. Hossain operates a hot dog cart. She has

a six month seasonal permit from April to October. Ms. Hossain did not answer direct questions. Ms. Hossain's credibility was also undermined when she became overwrought very briefly which the court concluded was insincere. The court found Ms. Hossain's testimony regarding revenue unreliable because it is farfetched that she would continue to work a cart making only \$20 per day for over 20 years when she has five children to support. Ms. Hossain's testimony was not credible.

Defendant Mohammad Anwer Hossain testified next. He is married to Ms. Hossain. Ms. Khatoon is his mother who is 68 to 70 years of age. His food cart license is 51133. He has been a food vendor for 22 years. He bought his own cart in 1994. He works his own cart beginning his day at 8 am at the garage. He finishes his day between 4 to 6 pm. He finishes earlier if weather is bad. He does not work at all if bad weather is predicted. He said it is permissible to work in snow but not rain. When his absence is necessitated to pay tickets or go to his children's school, he hires others for four to six hours and pays 35% of revenue. He said he would hire Mr. Islam, but not Mr. Seraji because Mr. Islam is smart, but he was concerned about Mr. Seraji's hygiene. He denied he controlled his wife's cart. However, Mr. Hossain admitted that one day he left Mr. Islam in charge of his cart. When he returned, he found Mr. Islam working his wife's hot dog cart and Mr. Seraji working his cart.

Daily sales revenue at his cart ranged from \$200 to \$250 to \$300 to \$500 to \$1000 per day. Mr. Hossain testified both that his supplies cost \$40 to \$80 and \$60 to \$80. This does not include the cost of ice or paying the garage \$10 per day or a cart pusher \$20 per day. Mr. Hossain admitted that he has no record of paying sales tax. He insisted that employee records were not necessary because he paid workers the same day they work.

He met plaintiffs in April 2009 when they put their cart too close to his cart. He lost business to Mr. Islam for two months who sold food at a lower price and called customers to his cart.

Mr. Hossain admitted that Mr. Islam worked for two days in March 2010 when Mr. Hossain was sick. When Mr. Hossain recovered, he returned to collect at 5:30 pm. Mr. Islam left allegedly to use the bathroom, but he never responded and took two days of proceeds with him. Mr. Hossain called Mr. Islam, but he never returned and never returned the proceeds. The court notes that there is no claim for these alleged stolen funds.

Documentary evidence submitted during trial also contradicts Mr. Hossain. He claimed that he and his wife almost exclusively worked their carts between May 2009 and March 2010. However, numerous inspection reports in evidence from that period of time, conducted by the Department of Health & Mental Hygiene and the Environmental Control Board show that on the date of inspection Mr. Hossain was not operating his food cart.

Mr. Hossain's testimony was contradictory and thus unreliable. Mr. Hossain testified that he never had to learn the law because he never hired employees. Mr. Hossain said he did not know Mr. Islam until April 2009 yet he also testified that Mr. Islam's parents resided in his wife's uncle's "place." Mr. Hossain made other contradictory statements during his testimony. For example, Mr. Hossain claimed that Mr. Islam and Mr. Seraji took advantage of his "simplicity." However, Mr. Hossain testified he was an accountant in his home country, took accounting classes in English, and is university educated. Mr. Hossain testified both that he sets the food prices on his own cart and that those business decisions are left to the people who make the

signs for the food cart. Mr. Hossain testified that he has a small child, yet the record establishes that his youngest child is in high school. Taken as a whole, Mr. Hossain's testimony is not credible.

Defendant Musammat Khatoon was the last witness. She testified that she began working as a food vendor in 1997 starting with a hot dog cart. She last ran a coffee and doughnut cart in 2011. She began the day at 10 or 11 am and worked for four hours. She never asked Mr. Seraji to work for her. She asked Mr. Islam to work for her perhaps once a month. If her revenue is \$400, then she paid him \$30. In court, Ms. Khatoon appeared fragile. She had severe difficulty ambulating which undermines her testimony that she operated her cart most days of the week. The court questions why a coffee and doughnut cart would open at 10 or 11 am. The court found Ms. Khatoon's testimony not credible and her crying episode manipulative.

CONCLUSIONS OF LAW

Mr. Islam has established a claim for breach of contract. In an action for breach of contract, plaintiff has the burden of proof. The court requires proof of "(1) a contract; (2) performance of the contract by one party; (3) breach by the other party; and (4) damages." *WorldCom, Inc. v Sandoval*, 182 Misc 2d 1021, 1023 (Sup Ct, NY County, 1999). Plaintiffs' reliable testimony and documentary evidence establish that the Mr. Islam agreed to work 12 hours per day for Mr. Hossain for \$100 per day. Mr. Islam worked for Mr. Hossain at a variety of food carts, some owned by Mr. Hossain and others controlled by Mr. Hossain. Mr. Hossain paid Mr. Islam, but less than the agreed upon amount which constitutes breach of contract.

Mr. Seraji testified that Ms. Hossain agreed to pay him \$80 in the beginning. He testified that at some point, his agreed wages increased to \$100. However, Mr. Seraji

failed to identify with whom he made such an agreement. Ms. Hossain is not a defendant in Mr. Seraji's action. Therefore, Mr. Seraji's breach of contract claim must be dismissed.

Next, the court addresses plaintiffs' labor law violations. As a threshold issue for a NY Labor Law claim, plaintiffs must establish that an employment relationship exists. *Bynog v Cipriani Group, Inc.*, 1 NY 3d 193, 198 (2003). Defendants deny that plaintiffs were their employees, though admit that they hired Mr. Islam once, monthly or for two consecutive days. "The critical inquiry in determining whether an employment relationship exists pertains to the degree of control exercised by the purported employer over the results produced or the means used to achieve the results." *Hernandez v Chefs Diet Delivery, LLC*, 81 AD 3d 596, 597 (2nd Dept 2001) quoting *Bynog v Cipriani Group, Inc.*, 1 NY 3d at 198. Factors relevant to determining the amount of control are whether the worker: "(1) worked as his [or her] convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule." *Bynog*, 1 NY 3d at 198. "Minimal or incidental control over an employee's work product without the employer's direct supervision or input over the means used to complete the work is insufficient to establish a traditional employment relationship." *Bhanti v Brookhaven Mem. Hosp. Med. Ctr.*, 260 AD 2d 334, 335 (2nd Dept 1999).

The court concludes that plaintiffs were employees of some of the defendants. Mr. and Ms. Hossain, Ms. Khatoon and Ms. Begum all admitted to hiring Mr. Islam. The tickets in evidence establish that Mr. Islam worked at Mr. Hossain's cart (40529708) more than two consecutive days and more than monthly, as defendants asserted. Defendants' universally testified that they were the owners of their carts and repeatedly

testified that they had operational control over the carts, who worked the carts and under what conditions. Plaintiffs credibly testified that they worked the food carts that defendants assigned them. Defendants set the prices for the food they were to sell and provided job training. It is also uncontested that defendants set plaintiffs' compensation although the parties disagree on the amount of compensation and how it was to be determined. Defendants had more than minimal or incidental control over the plaintiffs' work product and an employment relationship existed under the NYLL.

Thus, the court finds that Mr. Islam was an employee of Mr. and Ms. Hossain. The court finds that plaintiff Mr. Seraji was an employee of Mr. and Ms. Hossain and Ms. Khatoon. However, Ms. Hossain was not a named defendant in Mr. Seraji's action.

Both plaintiffs testified credibly that they had an oral agreement with their respective defendants to work for \$100 per day, for approximately 12 hours a day, six days a week. Plaintiffs' testimony also established that defendants did not pay their full wages. Plaintiffs testified credibly that they often received partial payment for their work, and at times were never paid for their work. For example, Mr. Seraji testified that he trained for a week in February 2009 without pay.

Section 193 of Labor Law permits an employee to sue their employer for unpaid wages for recovery of the full amount of unpaid wages owed. New York law requires employers to maintain records of employees' hours worked and wages paid. NYLL § 195(4). If any employer does not maintain these records, it is the burden of the uncompensated employee to show the amount of uncompensated work completed "as a matter of just and reasonable inference." *Anderson v Mt. Clemens Pottery Co.*, 328 US 680, 687 (1946). (Superseded by statute on different grounds - preliminary and incidental activities not previously considered part of a compensable workday were

subject to FLSA.) An employee may make a credible estimation of their hours and wages due. *Heenam Bae v Industrial Bd. Of Appeals*, 104 AD 3d 571 (1st Dept 2013). If the employee is able to meet this initial burden, the burden then shifts to the employer to disprove the employee's estimation of hours worked and wages paid. *Id.* Employers may rebut these claims with precise evidence of hours worked or evidence that challenges any inferences necessary for an employees' estimation. *Kaloo v Unlimited Mechanical Co. of NY, Inc.*, 2013 WL 5574774 (EDNY).

Defendants testified that they did not keep employment records in direct violation of NYLL. Plaintiffs testified credibly as to the hours they worked and also maintained their own records in notebooks noting the hours they worked and the wages they were paid. Copies of plaintiffs' records were admitted into evidence during the trial. The records satisfy plaintiffs' burden of making a credible estimation of the hours they worked and the wages they were entitled to for their work. Defendants failed to rebut plaintiffs' testimony. Generalized statements of denial as to the hours worked and wages paid are insufficient.

Mr. Islam established that he worked 269 days for which he earned \$26,900 but was only paid \$10,630. Accordingly, Mr. Islam is owed \$16,270 for unpaid wages. Plaintiff Seraji established that he worked 229 days for which he earned \$22,900 but was only paid \$7,030. Plaintiff Seraji is owed \$15,870 for unpaid wages.

Plaintiffs also seek unpaid overtime wages under NYLL for all work exceeding a 40-hours in a workweek. NYCRR § 142-2.2. The standard overtime rate is one and one-half the basic minimum hourly rate. Plaintiffs testified that they each worked 12 hours a day, six days a week. Thus, their workweek was 60 hours long, and plaintiffs are entitled to 20 hours of overtime per week. Plaintiff's regular hourly rate was \$8.33

(\$100 /12 hours). Their overtime premium is \$12.50 (\$8.33 + 4.16) per hour for each the hours they worked in excess of a 40 hour week. Plaintiff Islam is owed \$10,500 (42 weeks X 20 hours X \$12.50) in overtime wages. Plaintiff Seraji is owed \$8,500 (34 weeks X 20 hours X \$12.50) in overtime wages.

NY Labor Law also allows for the award of liquidated damages when the employer did not act in good faith. Liquidated damages under NYLL are intended to be punitive in nature. *Yu G. Ke v Saigon Grill, Inc.*, 595 F Supp 2d 240 (SD NY 2008). At the time of the plaintiffs' employment, NYLL § 198(1-a) provided that employers may be liable for liquidated damages of 25% of the unpaid wages unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law. NYLL § 198(1-a); L. 2009, c. 372, § 1, eff. Nov 24, 2009. Liquidated damages include both unpaid regular wages and unpaid overtime. *Id.*

Here, plaintiffs are entitled to liquidated damages. Mr. Hossain, a defendant in both actions, testified at trial that he did not know the law and that he was merely a simple man. Mr. Hossain's ignorance on basic labor laws will not shield him from penalties associated with complying with the law. Further, defendants testified that they did not keep any records for their business, including employment records, nor did they take any steps to learn what was required of them by the law. Accordingly, plaintiff Islam is awarded \$5,282.50 in liquidated damages ((unpaid wages, \$10,630 + unpaid overtime, \$10,500) x .25). Plaintiff Seraji is awarded \$6,092.50 in liquidated damages ((unpaid wages, \$15,870 + unpaid overtime, \$8,500) x .25).

Plaintiffs' claim for violations of minimum wage under NY Labor Law are dismissed because plaintiffs failed to submit any evidence at trial in support of this claim.

As the successful parties, plaintiffs are entitled to attorneys' fees under NYLL § 198(1-a). Parties shall appear for an inquest on attorneys' fees on August 28, 2014 at 10 am in room 1254, 111 Centre Street.

The court finds that defendants violated NYLL § 193 by requiring plaintiffs to pay fines assessed against defendants' food carts. NYLL § 193 prohibits employers from making "any deduction from the wages of an employee" unless permitted by law or by the employee. Tickets in evidence show violations for placement of the carts, littering, food temperature, use of gloves, and availability of water in the cart. These are all issues controlled by the owners of the carts. Defendants are thus responsible for the fines or penalties. However, plaintiffs failed to offer any evidence showing how much they paid and thus are not entitled to reimbursements. Civil Court lacks jurisdiction to order defendants to pay the fines assessed to plaintiffs.

Plaintiffs also argued that defendants violated NYLL § 198-b(2) for requiring the plaintiffs to pay for any violations they received while working at the food carts. NYLL § 198-b(2) prohibits employers from requiring an employee to "request, demand, or receive...a return, donation or contribution of any part or all of said employee's wages...[for] retaining employment." Plaintiffs argue "defendants' failure to pay tickets effectively demanded such a kickback, since plaintiffs could not work without a license." The court finds that this claim is duplicative of the illegal deduction argument.

Plaintiffs allege that the defendants violated the Fair Labor Standards Act ("FLSA") for failure to pay federal minimum wage and overtime violations. Workers are entitled to time and a half for any time worked that exceeds 40 hours. 29 USC § 207. Employees must prove that the employer is an "enterprise" which is "engaged in commerce or ...handling, selling, or otherwise working on goods or material that have

been moved in or produced for commerce...and is an enterprise whose annual gross volume of sales made or business done is not less than \$500,000.” 29 USC § 203(s)(1). Under the FLSA a single “enterprise” composed of multiple entities may combine their gross volumes of sales to meet the revenue requirement. *Chao v A-One Medical Services, Inc.*, 346 F 3d 908, 915 (9th Cir 2003). Therefore, the court must determine if the plaintiffs were employees and the defendants constitute an enterprise under the FLSA.

While plaintiffs have established that they are employees of defendants, the FLSA claims must be dismissed. The court rejects defendants argument that as a family business they are exempted. The FLSA exempts coverage from “mom-and-pop establishments.” This exemption requires that all employees are family members. *Velez v Sanchez*, 693 F 3d 308 (2d Cir 2012). See 29 USC § 203(s)(2). The tickets in evidence completely undermine defendants credibility and establish that many non-family members were employed by defendants.

Nonetheless, the FLSA claims are identical to the state labor law claims for which damages are awarded and for this reason must be dismissed.

Second, even if the court draws a negative inference from defendants failure to maintain or produce records, plaintiffs’ testimony on the topic of revenues, periods of time for which estimates of revenue are made, and number of carts, was unclear and unorganized. There is no evidence of which carts operated 24 hours or seven days a week. The only consistency between the parties in regards to the volume of sales is that sales fluctuated because of the weather or the day of the week.

DEFENDANTS’ COUNTERCLAIMS

Mr. and Ms. Hossain asserted four affirmative defenses against plaintiff Islam.

The first is that there was no personal jurisdiction over the defendants. This defense is dismissed because it was not timely asserted. CPLR 3211(e).

The second is that Mr. Islam was not an employee. The third affirmative defense stated, "plaintiff did occasional errands for which he was paid the same day." The fourth affirmative defense stated that the plaintiff "never worked on any schedule, never received any salary, and was paid per errand." All of the above affirmative defenses are rejected as contradicted by credible evidence.

The court also notes that the defendants failed to answer Mr. Islam's amended complaint and thus failed to raise any viable defenses.

Defendants Mr. and Ms. Hossain asserted three counterclaims against Mr. Islam. The first counterclaim was that the Mr. Islam's claims were made "maliciously and without any factual basis." The second and third counterclaims were that the plaintiff had conspired with another person (Seraji) to make fraudulent claims in more than one jurisdiction.

All of defendants' counterclaims against Mr. Islam are dismissed. Defendants' repeated statements that this is a "false case" does not make it so. Otherwise, defendants' testimony was not credible. Without any claims, defendants cannot have punitive damages.

Defendants Mohammad Hossain, Musammat Khatoon, and Rahima Begum asserted a number of defenses and counterclaims in their answer against Mr. Seraji. The first for failure to state a cause of action is contradicted by the facts at trial. The third for lack of person jurisdiction was not timely raised. The fourth for lack of legal capacity to sue was contradicted by the overwhelming credible evidence that Mr. Seraji worked for defendants.

The second affirmative defense is res judicata. Seraji filed a cause of action in Queens County Civil Court against Salma Hossain. On April 12, 2011, Judge Buggs issued a "Judgment for Defendant (dismissed)." *Syed Seraji v Salma Lufta Hossain*, Index No. CV-029065-10/QU. Res judicata bars future litigation between the same parties on the same cause of action. *Triboro Fastener & Chemical Products Corp. v Lee*, 236 AD 2d 603 (2nd Dept 1997). "The party seeking to invoke res judicata must demonstrate that the critical issue in a subsequent action was decided in the prior action and that the party against whom estoppel is sought was afforded a full and fair opportunity to contest such issue." *Gomez v Brill Sec., Inc.*, 95 AD 3d 32, 35 (1st Dept 2012).

Defendants' res judicata defense fails. The copy of the 2011 decision is incomplete and useless. The copy of the decision provided to the court does not include Judge Buggs' reason for the dismissal. The court's copy includes some typed information and some handwritten information. It was also not photocopied completely and some of the typed information was cut off from the copy provided to the court.

The fifth affirmative defense is for non-compliance with 22NYCCRR 130-1, 1-a. Defendants assert that the summons and complaint were unsigned or certified by Mr. Seraji and that failure to do so renders the complaint defective. Defendants failed to provide a copy of the complaint they received. The court's copy is signed by the plaintiff.

Finally, defendants' answer included a counterclaim for fraud. The elements of a claim for fraud are a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the party, and damages. *Eurycleia Partners, LP v Seeward & Kissel, LLP*, 12 NY 3d 553, 559 (2009). The answer provides

"plaintiff has conspired with another individual known to the defendant to make a similar fraudulent claim against defendants in another county claiming wages for virtually identical period of time." Defendants' testimony that plaintiffs competed with defendants, forcing defendants to hire plaintiffs, was contradicted by plaintiffs' credible testimony that they met while working for defendants. Competition does not constitute fraud. There was no evidence at trial of fraud.

Accordingly, it is

ORDERED, that Mr. Islam shall have judgment for breach of contract against Mr. and Ms. Hossain, joint and several liability, in the amount of \$10,630 with interest from March 22, 2010;

ORDERED, that Mr. Islam shall have judgment against Mr. and Ms. Hossain, joint and several liability, for overtime in the amount of \$10,500 with interest from March 22, 2010; and it is further

ORDERED, that Mr. Islam shall have judgment against Mr. and Ms. Hossain, joint and several liability, for \$5,282.50 for liquidated damages with interest from March 22, 2010, costs and disbursements; and it is further

ORDERED, that Mr. Seraji shall have judgment against Mr. Hossain and Ms. Khatoon, joint and several liability, in the amount of \$ 15,870 for unpaid wages; \$8,500 for overtime; \$6,092.50 for liquidated damages with interest from July 8, 2011, costs and disbursements; and it is further

ORDERED, that plaintiffs are entitled to attorneys' fees and the parties shall appear on August 28, 2014 at 10 am in Room 1254, 111 Centre Street for an inquest; and it is further

ORDERED, that plaintiffs' other claims are dismissed; and it is further

ORDERED, that Ms. Begum is dismissed from the action; and it is further
ORDERED, that defendants' counterclaims are dismissed.

The clerk shall enter judgment accordingly. This constitutes the order and
judgment of the court.

Date: _____

7/11/14

ENTER: _____

Judge Andrea Masley

HON. ANDREA MASLEY