

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

-----X 18-CV-6418

THOMAS EARL MCKENZIE,

Plaintiff,

COMPLAINT

- against -

FINGER LAKES DISTILLING, LLC,
and BRIAN A. MCKENZIE, *Individually*,

**PLAINTIFF DEMANDS
A TRIAL BY JURY**

Defendants.

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Plaintiff, THOMAS EARL MCKENZIE, by his attorneys, LAW OFFICE OF YURIY MOSHES, P.C., hereby complains of Defendants, upon information and belief, as follows:

NATURE OF THE CASE

1. Plaintiff brings this action against Defendants pursuant to the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* (“FLSA”) and the New York State Labor Law, Articles 6 & 19 (“NYLL”) for failure to pay minimum wage and overtime wages due and owed for hours worked in excess of forty (40) hours per workweek. As a result of Defendants’ violation of the NYLL and FLSA, Plaintiff is entitled to (a) the full amount of underpayment, (b) attorneys’ fees and costs, (c) prejudgment interest, and (d) an additional amount as liquidated damages equal to one hundred percent of the total amount of the wages found to be due.
2. Plaintiff also complains pursuant to the Wage Theft Prevention Act, New York Labor Law § 195, *et seq.*, and seeks to redress the damages he has suffered as a result of Defendants’ failure to give him written notice of wage rates, including, *inter alia*, his rate of pay.

JURISDICTION AND VENUE

3. Jurisdiction of this Court is proper under §216(b) of the FLSA (29 U.S.C. § 216 (b)) and 28 U.S.C. §§ 1331 and 1343.
4. The Court has supplemental jurisdiction over the claims of Plaintiff brought under state law pursuant to 28 U.S.C. §1367.
5. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) as it is a judicial district in which a substantial part of the events or omissions giving rise to the claims have occurred.

PARTIES

6. That at all times relevant hereto, Plaintiff THOMAS EARL MCKENZIE (“THOMAS EARL”) was a resident of the State of New York and the County of Steuben.
7. That at all times relevant hereto, Defendant FINGER LAKES DISTILLING, LLC (“FINGER LAKES”) was a domestic liability company, duly existing pursuant to, and by virtue of the laws of the State of New York, with its principal place of business located at 4676 NYS RTE 414, Burdett, New York 14818.
8. That at all times relevant hereto, Defendant FINGER LAKES was a craft distillery that produces various spirits, such as whiskey, vodka, gins, and other liqueurs.
9. That at all times relevant hereto, Plaintiff THOMAS EARL was a full-time employee of Defendant FINGER LAKES.
10. That at all times relevant hereto, Defendant BRIAN A. MCKENZIE (“BRIAN”) was an employee of Defendant FINGER LAKES, holding the position of “Owner.”
11. That at all times relevant hereto, Defendant BRIAN was Plaintiff THOMAS EARL’s

supervisor and/or had supervisory authority over Plaintiff THOMAS EARL.

12. That at all times relevant hereto, Defendant FINGER LAKES and Defendant BRIAN are collectively referred to herein as “Defendants.”
13. At all times relevant hereto, Defendants had the power to, and were responsible for, determining the wages to be paid to Plaintiff THOMAS EARL.
14. At all times relevant hereto, Defendants had the power to, and did in fact, establish the terms of Plaintiff THOMAS EARL’s employment, including Plaintiff THOMAS EARL’s schedule and rate of pay.
15. The FLSA defines “employer” to include any person acting directly or indirectly in the interest of an employer in relation to an employee and an employee is anyone who is suffered or permitted to work. As a result, including as further described below, all Defendants are liable as “employers” under the FLSA.
16. Defendants are also jointly and severally liable as joint employers under 29 C.F.R. §791.2 for the violations complained of herein.
17. Upon information and belief, Defendants were engaged in interstate commerce within the meaning of the FLSA in that Defendants: (a) had and have employees engaged in commerce or in the production of goods for commerce, and handles, sells, or otherwise works on goods or materials that have been moved in or produced for commerce by any person; and (b) had and have an annual gross volume of sales of not less than \$500,000.00. Further, during Plaintiff THOMAS EARL’s employment with Defendants, Plaintiff THOMAS EARL routinely engaged in activities which facilitate or relate to interstate or foreign commerce.

MATERIAL FACTS

18. On or about January 1, 2007, Plaintiff THOMAS EARL began working for Defendants as a “Distiller,” earning an annual salary of \$45,000.00, with a weekly salary of approximately \$865.38.
19. As a “Distiller,” Plaintiff THOMAS EARL was responsible for: (1) cleaning the interior of metal drums or interiors of barrels by rinsing them with water and alcohol; (2) stenciling and/or painting identifying information on barrelheads; (3) rolling barrels into position for filling; (4) receiving grain shipments of corn, rye, barley; (5) operating the cooker to produce a mash; (6) operating the still; (7) emptying barrels or drums filled with liquor into dumping trough; and (8) cleaning and sanitizing all equipment and production work spaces.
20. At all times relevant hereto, the work performed by Plaintiff THOMAS EARL required no capital investment.
21. At all times relevant hereto, Plaintiff THOMAS EARL did not have any supervisory or managerial responsibilities.
22. On or about January 3, 2016, Plaintiff THOMAS EARL resigned from his employment with Defendants.
23. Throughout Plaintiff THOMAS EARL’s employment, Plaintiff THOMAS EARL was an exemplary employee, was never disciplined, and always received compliments for his work performance.
24. As an employee of Defendants, Plaintiff THOMAS EARL was always required to work on Sundays from 3:00am to 8:00pm, Mondays from 4:00am to 8:00pm, Tuesdays from 4:00am to 8:00pm, Wednesdays from 4:00am to 8:00pm, Thursdays from 4:00am to

8:00pm, Fridays from 4:00am to 7:00pm, and Saturdays from 4:00am to 6:00pm. Accordingly, Plaintiff THOMAS EARL regularly and habitually worked approximately 110 hours per week for Defendants.

25. Insofar as is relevant, from on or about June 8, 2012 to on or about December 30, 2013, the New York State minimum wage was \$7.25 per hour. From on or about December 31, 2013 to on or about December 30, 2014, the New York State minimum wage was \$8.00 per hour. From on or about December 31, 2014 to on or about December 30, 2015, the New York State minimum wage was \$8.75 per hour. From December 31, 2015 to December 30, 2016, the New York State minimum wage was \$9.00 per hour
26. As Plaintiff THOMAS EARL was a non-exempt employee, he should have been paid time-and-a-half his regular hourly rate for the 70 hours of overtime that Plaintiff THOMAS EARL worked each week.
27. However, throughout Plaintiff THOMAS EARL's employment, although Defendants required Plaintiff THOMAS EARL to work approximately 110 hours each week, Defendants wholly failed to compensate Plaintiff THOMAS EARL at a rate of one and one-half times his regular hourly rate of pay for all hours worked in excess of 40 hours each week, in violation of the FLSA and the NYLL.
28. By way of example, beginning on or around June 8, 2012, at the end of every week, rather than paying Plaintiff THOMAS EARL for 40 hours at his regular hourly rate of \$7.87 (\$865.38/110 hrs.) and 70 hours at his overtime hourly rate of \$11.80 for a total of \$1,140.72, Defendants instead always provided Plaintiff THOMAS EARL with a paycheck in the amount of \$865.38.
29. In fact, since on or around June 8, 2012, regardless of the number of hours worked each

week, Defendants always paid Plaintiff THOMAS EARL the same amount - \$865.38.

30. Thus, from on or about June 8, 2012 through on or about December 30, 2013, which is a period of approximately 82 weeks ("the 2012-2013 period"), Defendants have blatantly violated the NYLL and FLSA by denying Plaintiff THOMAS EARL approximately \$275.34 in wages each week ($\$1,140.72 - \$865.38 = \$275.34$).
31. Therefore, in total, during the 2012-2013 period, **Defendants underpaid Plaintiff THOMAS EARL a total of \$22,577.88.**
32. From on or about December 31, 2013 through on or about December 30, 2014, which is a period of approximately 52 weeks ("the 2014 period"), Plaintiff THOMAS EARL continued to work approximately 110 hours each week for Defendants.
33. However, during the 2014 period, rather than paying Plaintiff THOMAS EARL for 40 hours at the minimum wage hourly rate of \$8.00 and 70 hours at the overtime hourly rate of \$12.00, for a total of \$1,160.00 per week, Defendants instead always paid Plaintiff THOMAS EARL \$865.38 per week.
34. Thus, during the 2014 period, Defendants underpaid Plaintiff THOMAS EARL approximately \$294.62 in wages each week ($\$1,160.00 - \$865.38 = \$294.62$).
35. Therefore, in total, during the 2014 period, **Defendants underpaid Plaintiff THOMAS EARL a total of \$15,320.24.**
36. From on or about December 31, 2014 through on or about December 30, 2015, which is a period of approximately 52 weeks ("the 2015 period"), Plaintiff THOMAS EARL continued to work approximately 110 hours each week for Defendants.
37. However, during the 2015 period, rather than paying Plaintiff THOMAS EARL for 40 hours at the minimum wage hourly rate of \$8.75 and 70 hours at the overtime hourly rate

of \$13.13, for a total of \$1,268.75 per week, Defendants instead always paid Plaintiff THOMAS EARL \$865.38 per week.

38. Thus, during the 2015 period, Defendants underpaid Plaintiff THOMAS EARL approximately \$403.37 in wages each week ($\$1,268.75 - \$865.38 = \$403.37$).
39. Therefore, in total, during the 2015 period, **Defendants underpaid Plaintiff THOMAS EARL a total of \$20,975.24.**
40. From on or about December 31, 2015 through on or about January 3, 2016, which is a period of approximately 4 days (“the 2016 period”), Plaintiff THOMAS EARL worked approximately 62 hours for Defendants.
41. However, during the 2016 period, rather than paying Plaintiff THOMAS EARL for 40 hours at the minimum wage hourly rate of \$9.00 and 22 hours at the overtime hourly rate of \$13.50, for a total of \$657.00, Defendants instead did not pay Plaintiff THOMAS EARL any wages that week.
42. Thus, during the 2016 period, **Defendants underpaid Plaintiff THOMAS EARL a total of \$657.00.**
43. As a result, since the statute of limitations under the NYLL is six (6) years, from on or about June 8, 2012 until on or about January 3, 2016, Plaintiff THOMAS EARL is owed a total of **\$59,530.36** in **unpaid wages** for work performed for Defendants.
44. Furthermore, Defendants did not provide Plaintiff THOMAS EARL with any sort of written notice regarding: his regular rate of pay, overtime rate of pay, how he was to be paid, his “regular payday,” the official name of the employer and any other names used for business, the address and phone number of the employer’s main office or principal location, nor, allowances taken as part of the minimum wage (including, *inter alia*, tips).

45. Plaintiff THOMAS EARL has been damaged by Defendants' failure to pay his lawfully earned overtime wages.
46. Defendants' failure to pay Plaintiff THOMAS EARL his earned overtime wages required by law was willful.
47. Defendants' conduct was malicious, willful, outrageous, and conducted with full knowledge of the law. As such, Plaintiff THOMAS EARL demands Liquidated Damages as against all Defendants, jointly and severally.

AS A FIRST CAUSE OF ACTION
VIOLATION OF THE FAIR LABOR STANDARDS ACT
OVERTIME

48. Plaintiff repeats and realleges each and every paragraph above as if said paragraph was more fully set forth herein at length.
49. Defendants willfully employed Plaintiff for workweeks longer than forty (40) hours and failed to compensate Plaintiff for his employment in excess of forty (40) hours per week at a rate of at least one-and-one-half times the rate at which he was employed.
50. Defendants failed to pay overtime wages to Plaintiff as required by the FLSA, 29 U.S.C. §201, *et seq.*, and its implementing regulations.
51. Defendants' failure to pay Plaintiff overtime pay in accordance with the FLSA is a direct violation of the FLSA, specifically 29 U.S.C. §207.
52. Defendants' failure to pay proper overtime wages for each hour worked over forty (40) per week was willful within the meaning of 29 U.S.C. §255.
53. Defendants' failure to comply with the FLSA has caused Plaintiff to suffer a loss of wages.

**AS A SECOND CAUSE OF ACTION
VIOLATION OF NEW YORK LABOR LAW
OVERTIME**

54. Plaintiff repeats and realleges each and every paragraph above as if said paragraph was more fully set forth herein at length.
55. Defendants employed Plaintiff within the meaning of NYLL §§ 2, 190, and 651.
56. Defendants failed to pay Plaintiff a premium for hours worked in excess of forty (40) hours per week, in violation of NYLL §170.
57. Defendants have violated Plaintiff's rights to overtime pay under Title 12 NYCRR 142-2.2.
58. Defendants' failure to comply with the NYLL overtime requirements has caused Plaintiff to suffer loss of wages and interest thereon.
59. Defendants' failure to pay proper overtime wages is willful.
60. Due to Defendants' NYLL violations, Plaintiff is entitled to recover from Defendants his unpaid overtime wages in an amount to be determined at trial, plus an amount equal to 100% of Plaintiff's unpaid overtime wages in the form of liquidated damages, as well as attorneys' fees and costs of the action, including pre- and post- judgment interest, pursuant to NYLL §§ 198 and 663(1).

**AS A THIRD CAUSE OF ACTION
VIOLATION OF THE FAIR LABOR STANDARDS ACT
MINIMUM WAGE**

61. Plaintiff repeats and realleges each and every allegation made in the above paragraphs of this complaint as if same were set forth herein fully at length.
62. Defendants willfully employed Plaintiff in the aforementioned enterprise and failed to

compensate Plaintiff at the required minimum hourly rate for her employment.

63. Defendants' failure to pay Plaintiff the mandated minimum hourly pay in accordance with the FLSA was a direct violation of the FLSA, specifically 29 U.S.C. § 206.
64. Defendants' failure to pay proper minimum wages for each hour worked was willful within the meaning of 29 U.S.C. § 255.
65. Defendants' failure to comply with the FLSA has caused Plaintiff to suffer loss of wages.

**AS A FOURTH CAUSE OF ACTION
VIOLATION OF NEW YORK LABOR LAW § 652(1)
MINIMUM WAGE**

66. Plaintiff repeats and realleges each and every allegation made in the above paragraphs of this complaint as if same were set forth herein fully at length.
67. Plaintiff was an employee of Defendants within the meaning of the NYLL.
68. Defendants failed to pay Plaintiff the required minimum hourly wage rate for one hour of work.
69. Defendants violated Plaintiff's right to minimum wage pay under § 652(1); New York Labor Law, Article 19.
70. Defendants also violated New York's Minimum Wage Order of 12 NYCRR Part No. 142.
71. Defendants' actions were willful.
72. Due to Defendants' NYLL violations, Plaintiff is entitled to recover from Defendants his unpaid minimum wage in an amount to be determined at trial, plus an amount equal to 100% of Plaintiff's unpaid wages in the form of liquidated damages, as well as attorneys' fees and costs of the action, including pre- and post- judgment interest, pursuant to NYLL

§§ 198 and 663(1).

**AS A FIFTH CAUSE OF ACTION
VIOLATION OF THE NEW YORK LABOR LAW
WAGE NOTICE REQUIREMENT**

73. Plaintiff repeats and realleges each and every allegation made in the above paragraphs of this complaint as if same were set forth herein fully at length.
74. The NYLL and supporting regulations require employers to provide written notice of the rate or rates of pay and the basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; allowances, if any, claimed as a part of minimum wage, including tip, meal, or lodging allowances; the regular pay day designated by the employer; the name of the employer; any “doing business as” names used by the employer; the physical address of employer’s main office or principal place of business, and a mailing address if different; the telephone number of the employer. NYLL §195-1(a).
75. Defendants intentionally failed to provide notice to Plaintiff in violation of NYLL §195, which requires all employers to provide written notice in the employee’s primary language about the terms and conditions of employment related to rate of pay, regular pay cycle and rate of overtime on his or her first day of employment.
76. Defendants not only did not provide notice to Plaintiff at time of hire, but failed to provide notice to Plaintiff even after the fact.
77. Due to Defendants’ violations of NYLL, Plaintiff is entitled to recover from Defendants, jointly and severally, \$50 for each workday that the violation occurred or continued to occur, up to \$5,000, together with costs and attorneys’ fees pursuant to NYLL. NYLL

§198(1-b).

WHEREFORE, Plaintiff respectfully requests a judgment against Defendants:

- A. Declaring that Defendants engaged in unlawful employment practices prohibited by the FLSA and the NYLL by failing to pay Plaintiff his earned overtime wages;
- B. Declaring that Defendants engaged in unlawful employment practices prohibited by the NYLL by failing to give proper wage notice;
- C. Awarding damages to Plaintiff for all unpaid wages due under the FLSA and the NYLL;
- D. Awarding damages to Plaintiff as a result of Defendants' failure to provide proper wage notice as required under the NYLL;
- E. Awarding Plaintiff liquidated damages as a result of Defendants' willful failure to pay overtime wages;
- F. Awarding Plaintiff attorneys' fees, costs, and expenses incurred in the prosecution of the action; and
- G. Awarding Plaintiff such other and further relief as the Court may deem equitable, just and proper to remedy Defendants' unlawful employment practices.

Dated: New York, New York
June 8, 2018

**LAW OFFICE OF
YURIY MOSHES, P.C.**

By:


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