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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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KONG SHUN NI,

Plaintiff,

11 Civ. 6483 (KBF)

-v-

ORDER

TIAN YU INC. d/b/a AKI SUSHI and ZHAO YU
CHEN,

Defendants.
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KATHERINE B. FORREST, District Judge:

Plaintiff brought this action against defendants in connection with their alleged failure to pay plaintiff the minimum wages and overtime compensation to which he is entitled under state and federal law. (See Compl., ECF No. 1.) Both parties have now moved for summary judgment on those claims, and for the reasons set forth below, the Court GRANTS defendant’s motion and DENIES plaintiff’s motion.

The relevant facts are undisputed. In 2010, the U.S. Department of Labor (“DOL”) conducted an investigation of Aki Sushi regarding wage and hour violations. (Defs.’ Rule 56.1 Statement Material Facts ¶ 1, ECF No. 38-9 (“DSOF”); Pl.’s Rule 56.1 Counterstatement Material Facts ¶ 1, ECF No. 46 (“PCSOF”).)¹ DOL investigated the period from February 16, 2008, to February 20, 2010, and determined that Aki Sushi owed plaintiff \$2,640.96 in back wages. (PCSOF ¶¶ 6-7.)

¹ For the sake of simplicity, the Court will henceforth cite only to plaintiff’s Rule 56.1 counterstatement, admitting all of defendants’ statements and denying only the last, rather than citing to both plaintiff and defendants’ statements.

Both parties signed a DOL WH-58 form, which, among other things, represented that plaintiff had received payment in full for his unpaid compensation under the Fair Labor Standards Act and that plaintiff waived his right to bring suit for that compensation. (Id. ¶¶ 10-12.) Defendants wrote a check to plaintiff for the agreed-upon sum and tender it to DOL, which would then provide the check to plaintiff. (Id. ¶¶ 11, 13.) However, DOL was unable to locate Ni, so it returned the check to defendants and requested a money order for the full amount of the settlement “for further processing and conclude [sic] this case.” (Id. ¶ 13.) Defendants provided DOL with the money orders, as requested. (Id. ¶ 14.)

On September 16, 2011, Ni filed this lawsuit. (Id. ¶ 15.) He seeks unpaid wages, liquidated damages, and attorneys’ fees for defendant’s alleged wage and hour violations during the period from February 2008 through November 2009.²

Defendants’ motion turns on the question of whether defendants made “payment in full” of the settlement for purposes of 29 U.S.C. § 216(c). Plaintiff unquestionably agreed to accept \$2,640.96 in exchange for his right to bring suit under FLSA for the claims compromised. Consequently, if there is no genuine issue of material fact that defendants made “payment in full,” then plaintiff’s claims under FLSA must be dismissed. See Sneed v. Sneed’s Shipbuilding, Inc., 545 F.2d 537, 539 (5th Cir. 1977) (holding that there is a valid waiver of FLSA claims if (a)

² Plaintiff argues that his claims extend beyond the period covered by the DOL investigation, but he cites no admissible evidence that would allow a jury to so find. The only material plaintiff cites is a deposition, in which plaintiff appears to recall starting to work for Aki Sushi some time near the beginning of 2008, and his unverified complaint. (PCSOFF ¶ 16.) But the DOL investigation also covered the period near the beginning of 2008. (See id. ¶ 6 (noting that the DOL investigation covered the period beginning February 16, 2008).)

the employee agrees “to accept the payment which the Secretary determines to be due” and (b) there is “payment in full”).

Here, payment has been made in full, and defendant’s motion for summary judgment must be GRANTED. Defendants tendered a check to DOL for the full amount of the settlement, and — when DOL informed defendants that it could not locate plaintiff — defendants tendered money orders to DOL for the full amount of the settlement.

The Court finds that there is no genuine issue of material fact as to the question of whether defendant made payment in full for two independent reasons. First, the Court holds that the undisputed fact of defendants’ tender of both the check and the money orders (for \$2,640.96) fulfills its substantive obligation to make payment in full for purposes of compromising plaintiff’s FLSA claims under the auspices of a DOL-approved settlement. Any other determination would make little sense: a defendant could otherwise make payment in full after fully executing settlement documents but nevertheless be required to defend a subsequent FLSA lawsuit for the same period.

Second, the Court holds that even if defendants’ tender of the check and money orders were insufficient to constitute payment in full, it would (in combination with plaintiff’s representation in the DOL waiver) suffice to shift the burden to plaintiff to show facts that would allow a jury to conclude that payment had not been made in full. Plaintiff did not meet that burden. Indeed, he put forward no evidentiary materials on this issue at all.

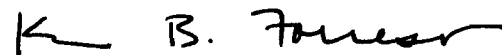
The DOL waiver compromising plaintiff's claims under FLSA is therefore valid, and plaintiff's FLSA claims are dismissed. The Court declines to exercise supplemental jurisdiction over plaintiff's state law claims.

Finally, for the reasons discussed above, plaintiff's motion for summary judgment is DENIED. His motion is denied for the independent reason that plaintiff failed to comply with Local Rule 56.1, as his statement of facts in support of his motion contained no citations whatsoever.³ (See Pl.'s Rule 56.1 Statement Material Facts, ECF No. 44.)

The Clerk of Court is directed to terminate the motions at Docket Nos. 37 and 40 and to terminate this action.

SO ORDERED

Dated: New York, New York
February 5, 2013



KATHERINE B. FORREST
United States District Judge

³ Local Rule 56.1 requires that any motion for summary judgment must be accompanied by a "short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried. Failure to submit such a statement may constitute grounds for denial of the motion." Local Rule 56.1(a). That rule further provides that "[e]ach statement by the movant or opponent pursuant to Rule 56.1(a) and (b) . . . must be followed by citation to evidence which would be admissible, set forth as required by Fed. R. Civ. P. 56(c)." Local Rule 56.1(d). Courts in this district may refuse to consider assertions in a Rule 56.1 statement, if they are unsupported by proper citation. See *Shepard v. Frontier Commc'ns Servs., Inc.*, 92 F. Supp. 2d 279, 284 (S.D.N.Y. 2000).