UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ALVARO MARIN and FERNANDO MARIN, on behalf of themselves and others similarly situated current and former manual laborers employed by defendants,

Plaintiffs,

- v -

JMP RESTORATION CORP. JMP MAINTENANCE CORP. and VICTOR GONZALEZ,

Defendants.

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REPORT AND RECOMMENDATION

09-CV-1384 (CBA) (VVP)

POHORELSKY, Magistrate Judge:

Following discovery, plaintiffs Alvaro Marin, Fernando Marin, Lino H. Avila, Hugo Sanchez, and Tomas Rosas have moved for partial summary judgment on their claims against the defendants for unpaid overtime wages. The plaintiffs' claims are brought pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, and the New York Labor Law, N.Y. Labor L. § § 2, 651, 663(1); *see also* N.Y. Comp. Codes R. & Regs. tit. 12, § 142–2.2 (2003) ("NYLL"). The corporate defendants, JMP Restoration Corp. and JMP Maintenance Corp, are not represented by counsel and the individual defendant Victor Gonzalez is proceeding *pro se*. None of the defendants have filed any opposition to the motion. Chief Judge Carol Bagley Amon has referred the motion to me for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). For the reasons that follow, I recommend that summary judgment be granted in part and denied in part.

I. BACKGROUND & PROCEDURAL HISTORY

In setting out the facts, the court relies on the plaintiffs' Local Civil Rule 56.1 Statement of Fact, to the extent it is supported by citations to the record, as well as the exhibits attached to

the plaintiffs' moving papers, and the pleadings, admissions, and prior rulings that have occurred.

During the time period in issue, the defendants operated a construction business that contracted with owners of commercial and residential buildings in New York City to restore building exteriors. The plaintiffs worked for the defendants as manual laborers for varying periods of time in the six years preceding the filing of the lawsuit. The plaintiffs' work consisted of demolition work, roofing, water proofing, and general exterior building restoration. While employed by the defendants, the plaintiffs received hourly wages ranging from $10.00 to $27.95 per hour and regularly worked more than forty hours per week. Although the plaintiffs were paid for all of the hours they worked, they were generally paid their regular hourly rate, rather than one and one half times their regular hourly rate, for those hours they worked above 40 hours per week.

The defendant Victor Gonzalez managed the defendant corporations, JMP Restoration Corporation and JMP Maintenance Corporation, while the plaintiffs were employed there. Although the plaintiffs received their paychecks from the corporate defendants, Gonzalez set the schedule for employees, set their rates of pay, instructed employees about their job duties and responsibilities, and was responsible for hiring and firing.

The plaintiffs Alvaro Marin and Fernando Marin commenced this action in April of 2009 on behalf of themselves and others similarly situated, asserting two causes of action, one for recovery of unpaid overtime compensation under the FLSA and an identical claim under the NYLL. After the filing of the Complaint, several additional plaintiffs filed notices to opt-in to the action as plaintiffs with claims similar to those asserted in the Complaint. The plaintiffs thereafter sought to certify the case as a collective action under the FLSA, 29 U.S.C. § 216(b), so that other similarly situated employees of the defendants could be notified of their ability to opt-in as party plaintiffs to this action. That motion was granted and notice was sent to potential

plaintiffs. *See* D.E. 28 and 2/16/2010 Order Approving Form of Notice. Although there are now ten opt-in plaintiffs in addition to the Marin plaintiffs listed in the caption, the current motion seeks summary judgment against the defendants only as to five plaintiffs: Alvaro Marin, Fernando Marin, Lino H. Avila, Hugo Sanchez, and Tomas Rosas. The plaintiffs seek to recover the unpaid overtime wages as well as liquidated damages.

II. SUMMARY JUDGMENT STANDARD

Summary judgment will be granted if no genuine issue of material fact remains to be decided and the undisputed facts warrant judgment for the moving party as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Inst. for Shipboard Educ. v. Cigna Worldwide Inc. Co.*, 22 F.3d 414, 418 (2d Cir. 1994). The burden is on the moving party to establish that there is no factual issue in dispute. *Celotex*, 477 U.S. at 323. If the moving party discharges its burden of proof under Rule 56(c), the non-moving party must then "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Where the non-movant has failed to respond to the motion for summary judgment, the court must still be satisfied that the moving party has met its burden of proof on the motion. Thus, the standard for granting summary judgment under Rule 56 against a non-opposing party is stricter than that for a default under Rule 55.

The Second Circuit set out the standard for assessing an unopposed motion for summary judgment:

> Federal Rule of Civil Procedure 56 provides that if a non-moving party fails to oppose a summary judgment motion, then "summary judgment, *if appropriate*, shall be entered against" him. Fed.R.Civ.P. 56(e) (emphasis added). This Court has made clear, however, that where the non-moving party "chooses the perilous path of failing to submit a response to a summary judgment motion, the district court may not grant the motion without first examining the moving party's submission to determine if it has met its burden of demonstrating that no material issue of fact remains for trial." [*Amaker v. Foley*, 274 F.3d 677, 681 (2d Cir. 2001)]. If the evidence submitted in support of the summary judgment motion does not meet the movant's burden of production, then "summary judgment must

> be denied even if no opposing evidentiary matter is presented." *Id.* (internal quotation marks omitted); [*Giannullo v. City of New York*, 322 F.3d 139, 141 (2d Cir. 2003)] (noting that the "non-movant is not required to rebut an insufficient showing"). Moreover, in determining whether the moving party has met this burden of showing the absence of a genuine issue for trial, the district court may not rely solely on the statement of undisputed facts contained in the moving party's Rule 56.1 statement. It must be satisfied that the citation to evidence in the record supports the assertion. *Giannullo*, 322 F.3d at 143 n.5 (stating that not verifying in the record the assertions in the motion for summary judgment "would derogate the truth-finding functions of the judicial process by substituting convenience for facts").

Vermont Teddy Bear Co., Inc. v. 1-800 Beargram Co., 373 F.3d 241, 244 (2d Cir. 2004). The court thus will grant summary judgment for the plaintiffs where the record establishes that they have discharged their burden of proof on their claims.[1]

In support of their motion for summary judgment, the plaintiffs have submitted a Memorandum of Law in Support of Motion for Summary Judgment [DE 57] ("Pls. Mem."); a Rule 56.1 Statement of Material Facts [DE 63] ("Pls. Rule 56.1 Statement"); their attorney's declaration in support of damages with supporting exhibits, Declaration of Jennifer Smith [DE 58] ("Smith Decl."), and the declarations of four of the plaintiffs with supporting exhibits: Declaration of Alvaro Marin [DE 59] ("A. Marin Decl."), Declaration of Fernando Marin [DE 60] ("F. Marin Decl."), Declaration of Tomas Rosas [DE 61] ("Rosas Decl."), and Declaration of Lino H. Avila [DE 62] ("Avila Decl."). The plaintiffs have not submitted a current declaration by Hugo Sanchez but instead rely on the declaration he submitted in connection with the motion for conditional certification

[1] Where the non-moving party is *pro se*, this court's local rules require the moving party to advise the *pro se* litigants of the consequences of a failure to respond. *See* Local Rule 56.2 ("Notice to Pro Se Litigant Who Opposes a Summary Judgment"); *see also Jova v. Smith*, 582 F.3d 410, 414 (2d Cir. 2009) ("failure to give actual notice to a pro se litigant of the consequences of not responding adequately to a summary judgment motion will usually constitute grounds for vacatur"); *Vital v. Interfaith Medical Center*, 168 F.3d 615, 620-21 (2d Cir. 1999). The plaintiffs have submitted a letter dated March 10, 2011 that indicates that they provided the plaintiff the Notice required by Local Rule 56.2. *See* DE 55.

under the FLSA. *See* Declaration of Hugo Sanchez in Support of Conditional Certification, [DE 58-5], Ex. D to Smith Decl. at pp. 30-36 ("Sanchez Decl.").

As noted above, the plaintiffs seek to recover unpaid overtime wages as well as liquidated damages under the FLSA and NYLL.[2] Under the standards above, the court concludes that (1) the plaintiffs are not entitled to summary judgment on their FLSA claims, (2) they are entitled to unpaid overtime wages under the NYLL except for plaintiff Avila, and (3) they are not entitled to summary judgment on their liquidated damages claims.

III. THE PLAINTIFFS HAVE NOT ESTABLISHED THAT THE DEFENDANTS VIOLATED THE FLSA

The plaintiffs' motion for summary judgment on their FLSA claims should be denied because they have not put forth undisputed facts to demonstrate that they are "covered employees" for purposes of the FLSA. The minimum-wage and overtime provisions of the FLSA apply only to employees who (1) are personally engaged in interstate commerce or in the production of goods for interstate commerce ("individual coverage") or (2) are employed by an enterprise that is engaged in interstate commerce or in the production of goods for interstate commerce ("enterprise coverage"). *See* 29 U.S.C. § 207(a)(1); *see also Wirtz v. Melos Construction Corp.*, 408 F.2d 626, 627 (2d Cir. 1969). The FLSA defines "commerce" as "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." 29 U.S.C. § 203(b). An "enterprise engaged in commerce or in the production of goods for commerce" is one that has "employees engaged in

[2] The plaintiffs also assert that the defendants failed to pay the plaintiffs "premium pay" (also known as "spread of hours" wages) required under the NYLL for those days where they worked more than ten hours. Complaint ¶¶ 2, 37; Pls. Mem. at 1. The plaintiffs have not included any discussion of this issue in their briefs nor have they sought any monetary recovery based on it. Indeed, they would not be entitled to such an award because the plaintiffs do not contend that they were earning at or below the minimum wage during the period in question. *See Ellis v. Common Wealth Worldwide Chauffeured Transp. of NY, LLC*, No. 10-CV-1741, 2012 WL 1004848, at *6 (E.D.N.Y. Mar. 23, 2012) (finding "strong weight of authority and the plain statutory language lead this court to the conclusion that an employer need only pay spread of hours wages to employees making minimum wage"); *Zubair v. EnTech Eng'g, P.C.*, 808 F. Supp. 2d 592, 601 (S.D.N.Y. 2011).

commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person," and whose annual gross volume of sales equals or exceeds $500,000. *Id.* §§ 203(s)(1)(A)(i)-(ii) (emphasis added).

There is no support in the record for a finding of individual or enterprise coverage. Indeed, the plaintiffs' summary judgment papers do not address this issue at all. In their Complaint, the plaintiffs allege generally that the plaintiffs were engaged in "commerce" and that the defendants were "enterprises engaged in commerce," Complaint ¶ 30, but such allegations are insufficient on their own to establish either individual or enterprise liability. The Complaint also alleges that the defendants' construction business is operated within New York. Complaint ¶ 14 (defendants "operate a construction business that contracts with owners of substantial commercial and residential high rise buildings throughout the City of New York to restore building exteriors"). Thus, since the plaintiffs are alleged to have worked on construction projects within New York there is clearly no basis for finding that they were involved in interstate commerce or the production of goods for interstate commerce and thus bring them under "individual coverage." In the same vein, there is no basis for a finding of the first type of enterprise coverage since the defendants are not alleged to have any employees engaged in any commerce outside of New York.

Although they might be able to do so, the plaintiffs have also failed to produce evidence to establish the second type of enterprise coverage – that the defendants' employees handled goods moved in commerce and the defendants' annual gross sales equaled or exceeded $500,000 during the time period in question. The plaintiffs allege that their work for the defendants involved the use of building materials. Courts have held that the use of materials that may have originated out of state can be sufficient to satisfy the commerce element. *See, e.g., Shim v. Millennium Grp.*, No. 08-CV-4022, 2009 WL 211367, at *3 (E.D.N.Y. Jan. 28, 2009) ("[T]he

test is met if employees . . . merely handled supplies or equipment that originated out-of-state"); *Archie v. Grand Cent. P'ship*, 997 F. Supp. 504, 530 (S.D.N.Y. 1998) (sanitation workers using "bags, brooms, shovels, pails, scrapers . . . radios, books . . . [and] flashlights" handled goods "undoubtedly moved in interstate commerce"). In addition to not addressing whether the materials they handled may have originated outside of New York, there are no facts or submissions before the Court regarding the amount of the defendants' gross sales. The monetary threshold must be established to demonstrate enterprise liability. *See Smith v. Nagai*, 2012 WL 2421740, at *2 (S.D.N.Y. May 15, 2012), *report and recommendation adopted* 2012 WL 2428929 (S.D.N.Y. June 27, 2012); *Shim*, 2009 WL 211367, at *3 ("virtually every enterprise in the nation *doing the requisite dollar volume of business* is covered by the FLSA") (emphasis added) (quoting *Archie*, 997 F. Supp. at 530); *Padilla v. Manlapaz*, 643 F. Supp. 2d 298, 301 (E.D.N.Y. 2009) (in order for the claims "to ultimately succeed on a theory of enterprise liability" plaintiff would have to prove that the defendant "grossed more than $500,000 in annual sales during the relevant time period").

The plaintiffs' failure to put forth undisputed facts in support of the commerce element of their FLSA claim creates an issue of fact that precludes summary judgment on this claim.

IV. PLAINTIFF LINO H. AVILA MAY BE EXEMPT FROM THE FLSA AND THE NYLL

There is also an issue of fact as to whether the plaintiff Lino H. Avila was exempt from the FLSA and NYLL's overtime requirements. In the defendants' opposition to the motion for conditional certification they argued that Avila under the executive exemption to the FLSA, which applies to employees "employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). The NYLL adopts this FLSA exemption, N.Y. Comp. Codes R. & Regs. tit. 12, § 142–2.2, and the court evaluates both the FLSA and NYLL exemption by reference to the FLSA and its attendant regulations. *See Ramos v. Baldor Specialty Foods, Inc.*, -- F.3d --, 2012 WL 2849656, at *1 n.1 (2d Cir. July 12, 2012) ("Like the FLSA, the NYLL

'mandates overtime pay and applies the same exemptions as the FLSA.'") (quoting *Reiseck v. Universal Commc'ns of Miami, Inc.*, 591 F.3d 101, 105 (2d Cir. 2010)); *Scott v. SSP America, Inc.*, No. 09–CV–4399, 2011 WL 1204406, at *6 & n.7 (E.D.N.Y. Mar. 29, 2011). The determination of exempt status typically rests on the employee's day-to-day duties, and often requires an individual analysis of each employee. 29 C.F.R. §§ 541.2, 541.700. Managers may perform a large number of nonexempt duties yet keep their exempt status, so long as the exempt duties are primary. The executive exemption requires a showing that 1) Avila received a salary at a rate of at least $455 per week; 2) his primary duty was management; 3) he customarily and regularly directed the work of two or more other employees; and 4) he had the authority to hire or fire other employees or his suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees were given particular weight. *See* 29 C.F.R § 541.100(a). The issue of how the employees spend their time working for purposes of deciding the exemption is a question of fact, but whether a particular activity excludes them from overtime benefits is a question of law. *See Ramos*, 2012 WL 2849656, at *3 (discussing exemption as a mixed question of law and fact).

The plaintiffs have failed to establish that Avila's primary duty while he was working for the defendants was not management. In support of the contention that Avila is exempt, the defendants submitted an affidavit of Victor Gonzalez where he asserted that Avila was a "manager for JMP Restoration," was responsible for supervising other workers, made recommendations regarding hiring and firing of other workers, and was paid a weekly salary rather than by an hourly rate. Gonzalez also asserted that he often made employment decisions based solely on Avila's recommendations and that Avila did not perform manual labor. *See* Affidavit of Victor Gonzalez in Opp. to Class Cert., Dec. 11, 2009, ¶ 6 [DE 24]. In his declaration in support of certification, Avila attested that he did perform manual labor, including demolition work, roofing, water proofing, general exterior building restoration and some driving.

Avila Decl. in Supp. of Class Cert., Oct. 27, 2009 [DE 22-6]. The plaintiffs' uncontested Rule 56.1 Statement also asserts that Avila and the other plaintiffs all performed this type of manual labor. Pls. Rule 56.1 Stmt. ¶ 4. None of the plaintiffs' submissions address the other contentions in Gonzalez's declaration as to Avila's duties. The plaintiffs instead simply assert that the Gonzalez declaration is insufficient to create a genuine issue for trial as to Avila's primary duties. Pls. Mem. at 4; Reply Mem. in Supp. of Class Cert., at 6 [DE 26]. The court disagrees. While their submissions establish that Avila did do manual labor, they have not submitted any evidence, either in the form of affidavits or otherwise, to dispute Gonzalez's contentions regarding Avila's supervision of other workers and alleged role as a manager. Also, while the plaintiffs' assert that Avila was paid on an hourly basis, their submissions also demonstrate that he was paid more than $455 per week. *See* Ex. C to Smith Decl. Therefore, because there is a disputed issue of fact in the record as to Avila's exempt status, the court should deny summary judgment on his overtime claims.

V. THE PLAINTIFFS, OTHER THAN AVILA, ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR NYLL CLAIMS

The plaintiffs, other than Avila, however, are entitled to summary judgment on their NYLL claims. Unlike the FLSA, the NYLL claims do not have a commerce element. *See Smith*, 2012 WL 2421740, at *2 (Under the NYLL "an [employee] need not 'show either a nexus with interstate commerce or that the employer has any minimum amount of annual sales'"). Rather, as long as the plaintiffs here can establish that the defendants were their employers and that they failed to pay them overtime at one and one-half times their regular hourly rate, they can recover damages under the NYLL.[3]

[3] If the court were ultimately to find that the plaintiffs' FLSA claims are without merit because of a failure to meet the commerce element, that would not defeat federal subject matter jurisdiction in this court. The commerce inquiry is an element of the FLSA claim and not a jurisdictional threshold. *See Padilla*, 643 F. Supp. 2d at 301.

A. The Defendants Were the Plaintiffs' "Employers"

The plaintiffs have established, on the basis of undisputed facts, that both the corporate defendants and the individual defendant Gonzalez were the plaintiffs' joint employers. The FLSA and NYLL both broadly define "employer." *Compare* 29 U.S.C. § 203(d) *with* N.Y. Lab. Law §§ 2(6), 190(3). Moreover, courts determining whether joint-employment exists under the FLSA and NYLL use the same standards. *See Hernandez v. La Cazuela de Mari Rest., Inc.*, 538 F. Supp. 2d 528, 534-35 (E.D.N.Y. 2007) ("[W]hether an individual is an 'employer' under New York law involves the same legal considerations as those under federal law."); *see also Yu G. Ke v. Saigon Grill, Inc.*, 595 F. Supp. 2d 240, 264 n.48 (S.D.N.Y. 2008); *Chen v. St. Beat Sportswear, Inc.*, 364 F. Supp. 2d 269, 278 (E.D.N.Y. 2005). To inform the determination of whether a person is an employer, courts conduct an "economic reality" test, using four primary factors: whether the alleged employer "(1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Zheng v. Liberty Apparel Co., Inc.*, 355 F.3d 61, 67 (2d Cir. 2003). "Courts have consistently held that 'a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages.'" *Hernandez*, 538 F. Supp. 2d at 534 (quoting *Moon v. Kwon*, 248 F. Supp. 2d 201, 237 (S.D.N.Y. 2002)).

In support of their claim that all of the defendants were their employers, the plaintiffs assert that they received their paychecks from both JMP Restoration Corp. and JMP Maintenance Corp., and that defendant Victor Gonzalez managed the corporate entities. Pls. Rule 56.1 Statement ¶¶ 3-4. As manager, Gonzalez set the schedule for employees, set their rates of pay, instructed the employees about job duties and responsibilities and was responsible for hiring and firing decisions. *Id.* ¶ 4. The defendants do not dispute these facts. The defendants have also

affirmatively acknowledged that Gonzalez is a majority shareholder of JMP Restoration Corp. Answer, ¶ 13 [DE 9]. Thus, the plaintiffs have sufficiently established that the defendant Gonzalez exercised operational control over the corporation and that all three defendants are jointly responsible for the statutory violations alleged here.

B. The Failure To Pay The Plaintiffs At The Overtime Rate Is Undisputed

The plaintiffs have also sufficiently established that the defendants failed to pay them the overtime rate for those hours they worked above forty hours per week.[4] Both the FLSA and NYLL provide for full recovery of unpaid overtime wages. *See* 29 U.S.C. § 207(a); N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.2; N.Y. Lab. Law § 160. To determine NYLL overtime damages, courts use the same burden-shifting scheme employed in FLSA actions. *See e.g.*, *Canela-Rodriguez v. Milbank Real Estate*, No. 09-CV-6588, 2010 WL 3701309, at *2 (S.D.N.Y. Sept. 20, 2010); *see also* N.Y. Lab. Law § 196-a (2009) (where an employer fails "to keep adequate records . . . the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements"). "To establish liability under the FLSA on a claim for unpaid overtime, a plaintiff must prove that he performed work for which he was not properly compensated, and that the employer had actual or constructive knowledge of that work." *Kuebel v. Black & Decker Inc.*, 643 F.3d 352, 361 (2d Cir. 2011) (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87 (1946); *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 287 (2d Cir. 2008); *Grochowski v. Phoenix Const.*, 318 F.3d 80, 87 (2d Cir. 2003)). "[A]t summary judgment, if an employer's records are inaccurate or inadequate, an employee need only present 'sufficient evidence to show the amount and extent of [the uncompensated work] as a matter of just and reasonable inference,'" *Kuebel*, 643 F.3d at 362

[4] Should the district court disagree with the conclusion above that summary judgment should be denied on the plaintiffs' FLSA claims, the plaintiffs' damages recovery set forth here would be equally applicable to their FLSA claim, but they would not be able to recover under both statutes for the same claims.

(quoting *Anderson*, 328 U.S. at 687). The employer's duty to maintain accurate time records is "non-delegable." *Id.* at 363 (citing 29 U.S.C. § 211(c)). Thus, the plaintiff-employee can satisfy its burden through "estimates based on [the employee's] own recollection." *Id.*; *see also Canela-Rodriguez*, 2010 WL 3701309, at *2. The burden then shifts to the employer to come forward with evidence to negate the reasonableness of the plaintiff's evidence. "If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." *Anderson*, 328 U.S. at 688.

Here, the plaintiffs have submitted declarations attesting to the hours they worked and the manner in which they were paid and assert that the records produced by the defendants are incomplete and inaccurate. All of the plaintiffs have testified that they regularly worked for more than forty hours per week and that they did not clock in or out when they went to work. Pls. Rule 56.1 Statement ¶¶ 5-6 (citing plaintiffs' declarations). They assert that while they were paid for all of the hours they worked, they were not paid one and one half times their hourly rate for their overtime hours. *Id.* ¶ 9. The plaintiffs received their wages partly in cash and partly by check, with the exception of Tomas Rosas, who was paid entirely in cash. *Id.* ¶ 7. Thus, the plaintiffs' check stubs do not accurately reflect the number of hours they worked because they did not reflect the hours for which they were paid in cash. *Id.* ¶ 8. The plaintiffs have also submitted the "time sheets" produced by the defendants in discovery but assert that these time sheets do not reflect the number of hours any of them actually worked for the defendants. *See* A. Marin Decl. ¶ 8; F. Marin Decl. ¶ 8; Rosas Decl. ¶ 8; Avila Decl. ¶ 8. The plaintiffs assert that their correct hours are reflected on sticky notes they received when they were paid, which noted the total hours worked, broken down by the amount paid by check and the amount paid in cash. *See* Pls. Rule 56.1 Statement ¶¶ 11, 14, 17. Thus, the plaintiffs rely on the sticky notes they kept to prove damages, and to the extent they no longer have a sticky note for a particular period, they rely on their recollection of the hours they worked. *See* Smith Decl. ¶¶ 10-33. They request

damages as the difference between what they were actually paid for overtime hours and the amount they were entitled to using the statutory overtime rate. The defendants do not dispute the plaintiffs' submissions or method of calculations, and the court finds them to be reasonable.

Alvaro Marin

Alvaro Marin requests $3,876.88 in unpaid overtime, for overtime hours he worked beginning in March 2006, the first date there is written proof of his working for the defendants, through July 2008. Pls. Rule 56.1 Statement ¶ 10; Smith Decl. ¶ 11. For the period between May 5, 2006 and December 31, 2006, plaintiffs' counsel calculated overtime based on the sticky notes Alvaro Marin kept. For the weeks during this first time period that sticky notes were not saved, the plaintiffs' counsel calculated damages based on a 54.5 hour work-week, which is the average number of hours he worked during this time period. *Id.* ¶ 12-16. For the next period, from January 1, 2007 through July 2008, plaintiffs' counsel calculated the overtime owed based only on the sticky notes that were saved and did not calculate overtime for those periods where notes were missing. *Id.* ¶ 17. Based on the hourly rates reflected on the plaintiff's pay stubs, the plaintiffs' counsel calculated Alvaro Marin's hourly wage as $12.50 with an overtime rate of $18.75 through May 30, 2008 and an hourly wage of $13.00 per hour with an overtime rate of $19.50 for the remaining weeks. *See* Ex. A to Smith Decl. (chart showing damages calculations for Alvaro Marin by week). Having reviewed the records and found them to be both reasonable and undisputed, the court recommends that Alvaro Marin is entitled to summary judgment as to $3,876.88 in unpaid overtime compensation.

Tomas Rosas and Hugo Sanchez

In support of their claims for $2,080 in unpaid overtime, plaintiffs Rosas and Sanchez rely solely on their recollection of the hours they worked. They both assert that they worked for the defendants for approximately 52 weeks. Rosas worked for the defendants from September 2007 through September 2008 and was paid only in cash. Rosas Decl. ¶¶ 3-4. Sanchez worked

for the defendants from approximately May 2006 through June 2007 and was paid partly in cash and partly by check. Sanchez Dec. ¶ 2, 7. Sanchez did not keep the sticky notes he got from the defendants, Smith Decl. ¶ 32, but asserts that the paycheck stubs he received from the defendants did not accurately reflect the hours that he worked, Sanchez ¶ 7. Both plaintiffs assert that they always worked more than 48 hours per week. Rosas Decl. ¶ 5; Sanchez Decl. ¶ 6; *see also* Pls. Rule 56.1 Statement ¶¶ 19-22. During the time they worked for the defendants, Rosas and Sanchez were paid $10.00 per hour. Smith Decl. ¶ 31, 33; Rosas Collective Action Decl. ¶ 4, attached as Ex. 1 to Rosas Decl., [DE 61-2]; Sanchez Decl. ¶ 4. The plaintiffs have made a reasonable estimate of these plaintiffs' damages, based on a 48-hour work week over 52 weeks. Smith Decl. ¶¶ 30-33 & Ex. F. The court finds this calculation to be reasonable and undisputed and therefore these plaintiffs are entitled to $5 per hour for 416 hours of overtime, for a total of $2,080 each.

Lino H. Avila

As discussed above, there are issues of fact as to Avila's exempt status that should preclude summary judgment on his claims for overtime compensation. However, because plaintiff Fernando Marin relies on Avila's documentation to establish his claims, the court addresses the sufficiency of that documentation. Avila asserts that he worked for the defendants from approximately April 2005 through January 2008 and seeks $8,767.25 in overtime compensation within that time period. Pls. Rule 56.1 Statement ¶ 16. Most of the sticky notes provided by Avila have dates on them, but some do not. *See* generally Ex. E to Smith Decl. The court finds that the sticky notes without dates nonetheless can provide a basis for damages because they contain his name, the number of hours he worked and a number indicating how much he was paid in total. The records provided also reflect that when Avila began working for the defendants he received an hourly rate of $20.00, which increased to $22.50 in May of 2006 and to $23.75 in June 2007. *See* Ex. C to Smith Decl. The plaintiffs' counsel calculated the

unpaid overtime wages only for those dates where Avila had either sticky notes and paycheck stubs or only sticky notes. Counsel did not calculate damages for periods where there was no documentation. *See* Smith Decl. ¶ 27-28. The court finds these calculations to be both reasonable and undisputed and that they would be a proper basis for damages should Avila be shown not to be exempt from the FLSA.

Fernando Marin

Fernando Marin requests $7,025.68 in unpaid overtime. He asserts that although he received sticky notes from the defendants, he did not save them. He testified that he worked approximately the same hours as Lino. H. Avila. F. Marin Decl. ¶ 6. In calculating damages for Fernando Marin, the plaintiffs' counsel relied on paycheck stubs Marin received and the sticky notes received by Lino H. Avila. Although there is evidence that Fernando Marin started working for the defendants in August 2004, plaintiffs' counsel calculated unpaid wages for him starting in December 2005, which is the first date that sticky notes exist for Lino H. Avila, through November 2007. For dates that there were no sticky notes, plaintiffs' counsel assumed no damages. The plaintiffs' counsel determined Marin's hourly rate from his paycheck stubs. These reflect that from 2006 through July 4, 2007, he was paid $18.16 per hour and that from that point forward he was paid $27.95 per hour. *See* F. Marin Collective Action Decl. ¶ 4, attached as Ex. 1 to F. Marin Decl. [DE 60-2]; Ex. B to Smith Decl. The court finds that this method of calculating Fernando Marin's hours is reasonable and undisputed and recommends that he is entitled to summary judgment for $7,025.68 in unpaid overtime compensation.

VI. NYLL LIQUIDATED DAMAGES: WILLFULNESS IS NOT ESTABLISHED

The plaintiffs have also moved for summary judgment on their claim that the defendants' violations were "willful" under the FLSA and the NYLL. A finding of willfulness affects the plaintiffs' recovery in two ways. Should they be able to establish their asserted FLSA violations, a finding of willfulness would extend the FLSA statute of limitations from two to three years.

See 29 U.S.C. § 255(a).[5] Further, a finding of willfulness would entitle the plaintiffs to liquidated damages on their NYLL recovery equal to 25% of the unpaid wages. *See* N.Y. Lab. Law § 198(1-a) (McKinney 2008).[6]

Willfulness "is generally understood to refer to conduct that is not merely negligent." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). Under this standard, conduct is willful if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by statute." *Id.*; *see also Kuebel*, 643 F.3d at 366; *Saigon Grill*, 595 F. Supp. 2d at 258 (citing *McLaughlin*, 486 U.S. at 133). The test for willfulness under the NYLL is whether the employer "knowingly, deliberately, or voluntarily disregard[ed] its obligation to pay wages." *See Moon*, 248 F. Supp. 2d at 235. There is no material difference between the FLSA and NYLL standard for willfulness. *See Saigon Grill*, 595 F. Supp. 2d at 261 (citing *Moon*, 248 F. Supp. 2d at 235); *see also Kuebel*, 643 F.3d at 366 (finding that district court "reasonably

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[5] While the NYLL provides for a six-year statute of limitations, N.Y. Lab. Law § 198(3), its liquidated damages only amounts to 25% of the unpaid wages as opposed to the FLSA's liquidated damages of 100% of the unpaid wages. *See* N.Y. Lab. Law § 198(1-a) (McKinney 2008); 29 U.S.C. § 216(b), 260 (allowing recovery of 100% liquidated damages unless the employer demonstrates that it acted in good faith). Since the plaintiff cannot doubly recover either the unpaid wages or liquidated damages under both statutes for the same claims, they have an interest in extending their FLSA unpaid wages recovery to take advantage of the greater corresponding liquidated damages award. *See Jin v. Pac. Buffet House, Inc.*, No. 06–CV-579, 2009 WL 2601995, at *9 (E.D.N.Y. Aug. 24, 2009).

[6] The current version of NYLL § 198(1-a), amended in 2009 and 2010, relieves the plaintiff from the burden of proving willfulness to receive liquidated damages and shifts the burden to the defendant to prove that it had a "good faith basis" for believing that the wages paid complied with the law. N.Y. Lab. Law § 198(1-a) (McKinney 2012). *See Kuebel*, 643 F.3d at 366 n.9. This would put the NYLL in line with the FLSA's standard on liquidated damages. Although the plaintiff quotes from the amended version of the NYLL and appears to assert its applicability, there is no basis for retroactively applying it to the conduct here, which all occurred prior to 2009. *See Paz v. Piedra*, No. 09 Civ. 03977, 2012 WL 121103, at *12 n.10 (S.D.N.Y. Jan. 12, 2012) (citing *Wicaksono v. XYZ 48 Corp.*, No. 10-CV-3635, 2011 WL 2022644, at *6 n.2 (S.D.N.Y. May 2, 2011) [*report and recommendation adopted* 2011 WL 2038973 (S.D.N.Y. May 24, 2011)]). The labor law violations alleged by the plaintiffs in this case occurred prior to the effective dates of the amendments to the NYLL and thus the burden remains on the plaintiff to establish willfulness to recover NYLL liquidated damages. The current amendment to the NYLL also allows an employee to recover 100% of overtime wages as liquidated damages, but the plaintiff has not sought that recovery and it would not be available for the same reasons relating to retroactivity discussed above.

concluded . . . that the NYLL's willfulness standard does not appreciably differ from the FLSA's willfulness standard") (internal quotation marks and citation omitted).

The plaintiffs have failed to establish that the defendants' violation of the statutory overtime requirements was willful. The plaintiffs' only basis for such a finding is a general allegation of willfulness in the Complaint, Complaint ¶ 25, and a statement in their moving brief that the "Defendants do not dispute that they did not pay overtime, and there is no justification for their failure to do so." Pls. Mem. at 7. There is nothing in the Plaintiffs' Rule 56.1 Statement or in the other submissions in support of their motion for the conclusion that the defendants knowingly, deliberately or recklessly failed to comply with the statutes. *C.f. Paz*, 2012 WL 121103, at *12 (on unopposed motion for summary judgment, finding that undisputed allegation in Rule 56.1 Statement that the defendants acted willfully was sufficient for purposes of NYLL). Nor is the fact that the defendants do not dispute the plaintiffs' claims for unpaid overtime sufficient on its own to establish willfulness. Courts assessing willfulness require some showing of awareness beyond mere negligence. *See McLean v. Garage Management Corp.*, No. 10-CV-3950, 2012 WL 1358739, at *7 (S.D.N.Y. Apr. 19, 2012) ("Mere negligence is insufficient. . . . An employer may act unreasonably and yet not recklessly."); *Azkour v. Little Rest Twelve, Inc.*, No. 10-CV-4132, 2012 WL 402049, at *9 (S.D.N.Y. Feb. 7, 2012), *report and recommendation adopted* 2012 WL 1026730 (S.D.N.Y. Mar. 27, 2012) (granting summary judgment for plaintiffs where one defendant's declaration established the defendants' awareness of their obligation to pay the plaintiffs in accordance with federal and state laws and a knowing disregard of that obligation); *Copantitla v. Fiskardo Estiatorio, Inc.*, 788 F. Supp. 2d 253, 317-18 (S.D.N.Y. 2011) (discussing standard and finding that cases required a "greater awareness" than the standard proposed by the plaintiff in that case); *see also Jin v. Pacific Buffet House, Inc.*, No. 06-CV-579, 2009 WL 2601995, at *5 (E.D.N.Y. Aug. 24, 2009) ("Because the defendant [ ] was aware of the requirements of law concerning the payment of minimum and overtime wages, any

failure to pay the required wages must be considered willful . . . "); *Moon*, 248 F. Supp. 2d at 231 ("Since the defendants knew that they had violated federal and state minimum wage and overtime laws and that they had not compensated [the plaintiff] in accordance with those laws, the defendants' violations were willful."). On a motion for summary judgment, the burden is on the plaintiff to come forward with evidence that the defendants willfully violated the law. *See Azkour*, 2012 WL 402049, at *3 n.1. The plaintiffs' allegation of willfulness is disputed, Answer ¶ 25, and "[c]ourts in this Circuit have generally left the question of willfulness to the trier of fact." *Ramirez v. Rifkin*, 568 F. Supp. 2d 262, 268 (E.D.N.Y. 2008) (citing cases). The plaintiffs have thus not met their burden to establish willfulness.

The plaintiffs' citation to the decision in *Kopec v. GMG Const.*, No. 09–CV–2187, 2010 WL 3925210 (E.D.N.Y. Sept. 10, 2010), *report and recommendation adopted* 2010 WL 3909273 (E.D.N.Y. Sep. 30, 2010), *judgment vacated on other grounds*, 2011 WL 2650597 (E.D.N.Y. July 06, 2011). That case involved a motion for default judgment, not an unopposed summary judgment motion. Unlike a motion for default judgment under Rule 55 where a plaintiff can rest on the allegations in the Complaint to establish liability, a plaintiff must actually prove liability to prevail on a motion for summary judgment under Rule 56. *See Vermont Teddy Bear*, 373 F.3d at 246. Moreover, in *Kopec*, the plaintiffs had alleged that the defendants "withheld all compensation and fired some Plaintiffs when they insisted on their compensation." *See Kopec*, 2010 WL 3925210, at *4. That stands in contrast to the facts asserted here, which are that the defendants paid the plaintiffs for all of their time, but failed to pay them the proper overtime wage for the hours they worked over 40 hours in one week. There is no statement or allegation in the record that the plaintiffs requested but were denied overtime pay at the statutorily mandated rate. The plaintiffs may be able to show at some future stage that the

defendants' violation of the law was willful, but they have failed to establish that they are entitled to summary judgment on this issue at this stage.[7]

CONCLUSION

In accordance with the above considerations, I recommend that the plaintiffs' motion for summary judgment as to their NYLL overtime claims be granted as follows:

- Alvaro Marin should be awarded $3,876.88 in damages,
- Fernando Marin should be awarded $7,025.68 in damages,
- Tomas Rosas should be awarded $2,080.00 in damages, and
- Hugo Sanchez should be awarded $2,080.00 in damages.

The plaintiffs' motion for summary judgment should otherwise be denied. Issues of fact preclude summary judgment as to whether the defendants were subject to the FLSA, whether Lino H. Avila is exempt from the statutory overtime rate under both the federal and state statutes, and whether the defendants' violation of the law was willful.

* * * * *

Any objections to the Report and Recommendation above must be filed with the Clerk of the Court within 14 days of receipt of this report. Failure to file objections within the specified time waives the right to appeal any judgment or order entered by the District Court in reliance on this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see, e.g.*, *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d

[7] The plaintiff need not show willfulness to recover FLSA liquidated damages, but as discussed above, the plaintiffs have not established any FLSA violation and thus their motion for summary judgment as to FLSA liquidated damages should be denied for the same reason.

1049, 1054 (2d Cir. 1993); *Frank v. Johnson*, 968 F.2d 298, 299 (2d Cir. 1992); *Small v. Secretary of Health and Human Serv.*, 892 F.2d 15, 16 (2d Cir. 1989) (per curiam).

Counsel for the plaintiffs shall serve a copy of this Report and Recommendation on the defendants by regular mail and file proof of such service in the record.

Respectfully Recommended,

Viktor V. Pohorelsky

VIKTOR V. POHORELSKY
United States Magistrate Judge

Dated: Brooklyn, New York
August 24, 2012