

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **HON. ROLANDO T. ACOSTA**

PART 61

0114451/2002

ASGAR-ALI, ASSIF
VS
HILTON HOTELS

SEQ 01
CV

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ ~~Order to Show Cause~~ - Affidavits - Exhibits ...
Answering Affidavits - Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
1-2 (A-D)
3 (A-B)

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion be denied inasmuch as Plaintiff's allegations are irrelevant in the context of this case. See attached decision and order dated August-6, 2004, for a detailed discussion.

This warrants the decision and order of this court.

rwf/A

FILED

NOV 25 2004

CLERK

SO ORDERED

[Signature]

Dated: 8/6/04

Check one: FINAL DISPOSITION **ROMAN PAT ACOSTA** J.S.C. DISPOSITION

Check if appropriate: DO NOT POST

FOR THE FOLLOWING REASON(S):



**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 61**

ASSIF ASGAR-ALI,

Index No. 114451/02

PLAINTIFF,

Seq. No. 1

-- against--

DECISION/ORDER

HILTON HOTELS CORPORATION,

Present:

DEFENDANT.

Hon. Rolando T. Acosta
Supreme Court Justice

HILTON HOTEL CORPORATION,

THIRD-PARTY PLAINTIFF

Index No. 591138/02

- against -

GPA MECHANICAL INC. d/b/a GPA,
MECHANICAL PIPING OF NEW YORK, INC.,

THIRD-PARTY DEFENDANTS.

The following documents were considered in reviewing defendant third-party plaintiff's motion for an order compelling disclosure pursuant to C.P.L.R. § 3120 of plaintiff's immigration status and documentation establishing plaintiff's eligibility for employment in the United States, or in the alternative, striking plaintiff's claim for lost earnings:

Papers

Numbered

**Defendant Third-Party Plaintiff's
Notice of Motion, Good Faith Affirmation
& Affirmation**

1 - 3 (Exhibit A-D)

**Plaintiff's Affirmation in
Opposition**

4 (Exhibits A -B)

Defendant third-party plaintiff's motion is denied.

Background

Plaintiff, an employee of GPA Mechanical, third-party defendant, was injured on April 2, 2002 while working as a steamfitter in the basement of the New York Hilton Hotel. In his Verified Bill of Particulars, plaintiff claimed lost earnings in the amount of \$35,000. Citing Hoffman v. N.L.R.B., 535 U.S. 137 (2002), and Majlinger v. Casino Contracting Corp., 1 Misc. 3d 659 (Sup. Ct. Richmond Co. 2003), defendant third-party plaintiff (Hilton) seeks disclosure of plaintiff's immigration status in the United States pursuant to the Immigration Reform and Control Act (IRCA) and that plaintiff document his eligibility for employment in the United States, or in the alternative, dismissal of his lost earnings claim. Plaintiff asserts that he has provided the appropriate information to Hilton. Specifically, he was working "on the books" for GPA Mechanical and paid Federal and State income taxes and

social security. Plaintiff's W-2 form from GPA Mechanical and copies of his tax returns for the years 2000 and 2001 are attached as Exhibit B to his opposition.

Analysis

In Hoffman v. N.L.R.B., 535 U.S. 137 (2002), an employee of Hoffman had obtained employment by using false documents in violation of the Immigration Reform & Control Act of 1986 (IRCA), which makes it unlawful for employees to use fraudulent documents to establish employment eligibility and specifically makes it a crime for an unauthorized alien to subvert the employer verification system by using false documents. At issue was whether the employee, who had used fraudulent documents to obtain employment and who had been unlawfully discharged in violation of the National Labor Relations Act (NLRA), could be awarded back pay as an appropriate remedy. The Supreme Court held that awarding back pay to the employee would run counter to the IRCA. Hoffman v. N.L.R.B., *supra*, 535 U.S. at 151. As Vilensky & Sapir, Undocumented Aliens' Right to Recover From Lost Earnings, Outside Counsel, N.Y.L.J., 12/19/03, p.4, col. 4., noted, the Hoffman decision "is not very broad. The Court decided that when an alien commits a crime to gain employment under the IRCA, and is subsequently discharged from employment in violation of the NLRA, that alien has no remedy."

"[N]o where in Hoffman does it state [,however,] that New York courts can

never award illegal aliens with common law remedies such as lost earnings.” Id. Indeed, in Madeira v. Affordable Housing Foundation, Inc., 315 F. Supp 2d 504, 507 (S.D.N.Y. 2004), a post-Hoffman case, the court held that “[p]laintiff’s alien status does not prevent him from recovering compensatory damages for defendant’s violation of New York Labor Laws,” citing Public Administrator of Bronx County v. Equitable Life Assurance Society of the United States, 192 A.D.2d 325, 325-26 (1st Dept. 1993); Mazur v. Rock-McGraw, Inc., 246 A.D.2d 515 (2nd Dept. 1998); Cano v. Mallory Management, 195 Misc. 2d 666 (Sup. Ct. Richmond Co. 2003); see also Collins v. New York City Health and Hospitals Corporation, 201 A.D.2d 447 (2nd Dept. 1994); Guzman v. American Ambulette Corp, N.Y.L.J., 2/1/01, p. 30, col. 1 (Sup Ct Kings Co). The court in Madeira went on to note that:

Indeed, a post-Hoffman Official Opinion [of] the Attorney General of New York concluded that Hoffman does not prevent the New York Department of Labor from enforcing the State’s wage payment laws on behalf of illegal immigrants as long as no federal Constitutional or statutory right was implicated. See Formal Opinion No. 2003-F3, N.Y. Op. Atty. Gen. No. F3, 2003 WL 22522840 (N.Y.A.G. October 21, 2003) citing Balbuena v. IDR Realty, LLC, N.Y.L.J., May 28, 2003, at 18 (Sup Ct. N.Y. County May 16, 2003)(Hoffman does not inhibit State court’s ability to award lost wages to an illegal immigrant in tort action brought under state common law); Cano, 195 Misc. 2d 666, 760 N.Y.S.2d 816 (holding under federal law in Hoffman does not bar illegal immigrants from using New York State court system to “seek civil redress from alleged tortious conduct”).

Madeira v. Affordable Housing Foundation, Inc., *supra*, 315 F. Supp 2d at 507. Thus,

Hoffman does not prevent an undocumented alien from claiming lost earnings in New York.¹

New York courts, however, have found alien status to be relevant, since it is “for the jury to weigh defense proof that [plaintiff] would have earned those wages, if at all, by illegal activity.” Public Administrator of Bronx County, supra, 192 A.D.2d at 325-326; see also Cano v. Mallory Management, 195 Misc. 2d 666 (Sup. Ct. Richmond Co. 2003)(plaintiff’s status may be a factual item to be presented to the jury); Collins v. New York City Health and Hospitals Corporation, 201 A.D.2d at 448 (whether wages were the product of illegal activity “as well as the length of time during which the decedent might have continued earning wages in the United States . . . and the likelihood of his potential deportation, are factual issues for resolution by the jury”).

A few years after Public Administrator of Bronx County and Collins were

1. Except for Majlinger v. Casino Contracting Corp., 1 Misc. 3d 659 (Sup. Ct. Richmond Co. 2003), which dismissed plaintiff’s claim for lost wages since he could not prove that he was eligible for employment in the United States, no other New York court has found Hoffman to preclude an alien from claiming lost earnings. For the reasons outlined in the decision, this Court refuses to follow Majlinger. As Vilensky & Sapir noted, Majlinger “flies in the face of every other decision rendered subsequent to Hoffman in that it shifts the burden of proof to plaintiff” to prove that “he was authorized for employment in the United States. Hoffman and its interpretation of the IRCA does not require this reading.” See also Cano v. Mallory Management, supra, 195 Misc 2d at 666 (every case citing Hoffman since it was rendered has either distinguished itself from it or has limited it greatly).

decided, Justice Miller, in Klapa v. O & Y Liberty Plaza Co., 168 Misc. 2d 911, 912 (Sup Ct. N.Y. Co. 1996), addressed the issue of whether undocumented alien status, absent other indicia establishing likelihood of deportation, would aid a jury in making a determination for lost future earnings. She went on to note that:

In reviewing [cases in other jurisdictions] it becomes apparent that a plaintiff's status as an illegal alien, in and of itself, cannot be used to rebut a claim for future lost earnings (See, Clemente v. State [40 Cal 3d 202 (Sup. Ct. 1985)]; Gonzalez v. City of Franklin [137 Wis 2d 109 (Sup Ct. 1987)]; Hagl v. Stern & Sons, [396 F. Supp 779 (E.D. Pa 1975)]; Peterson v. Neme, [222 Va 477 (Sup Ct 1981)]. The fact that a plaintiff is deportable does not mean that deportation will actually occur. Further, whatever probative value illegal alien status may have is far outweighed by its prejudicial impact (See, Gonzalez v. City of Franklin, *supra*; Hagl v. Stern & Sons, *supra*; Peterson v. Neme, *supra*.) Therefore, in order to rebut such a claim defendants must be prepared to demonstrate something more than just the mere fact that the plaintiff resides in the United States illegally. Absent such a showing, a defendant will be precluded from presenting to the jury evidence which would indicate a plaintiff's immigration status.

Id. at 913. Other New York courts have followed the Klapa decision. See, e.g., Liu v. Donna Karen International, Inc., 207 F. Supp. 2d 191, 192-93 (S.D.N.Y. 2002)(in a post-Hoffman case alleging a violation of the Fair Labor Standards Act, court held that even if alien status were relevant, "the risk of injury to the plaintiff if such information were disclosed outweighs the need for disclosure . . . Even if the parties were to enter into a confidentiality agreement restricting the disclosure of such discovery, . . . there would still remain 'the danger of intimidation, the danger of

destroying the cause of action' and would inhibit plaintiff's in pursuing their rights"(citations omitted)); Guzman v. American Ambulette Corp, N.Y.L.J., 2/1/01, p. 30, col. 1 (Sup Ct Kings Co)(defendant precluded from introducing evidence of plaintiff's alien status where no indication that plaintiff was being deported or that a deportation hearing was imminent). As Justice Rivera noted in Guzman, "undocumented immigrants may sue and recover for future lost earnings at the rate of pay they were receiving in the United States so long as they are not subject . . . [to] imminent deportation hearings. . . . [D]efendants bear the burden of demonstrating with concrete evidence that plaintiff's deportation is imminent and not just speculative or conjectural." Id. (emphasis added); see also Vilensky & Sapir, Undocumented Aliens' Right to Recover From Lost Earnings, Outside Counsel, supra. This Court adopts the reasoning in Klapa, especially in cases where there is no indication that the plaintiff violated IRCA in obtaining employment.

In the present case, there is no indication that plaintiff used fraudulent documents to obtain employment with GPA Mechanical. Cf. Ulloa v. Al's All Tree Service, 2 Misc. 3d 262 (Dist. Ct. Nassau Co. 2003)("there being no . . . evidence of fraudulent documents . . . plaintiff's claim is allowed to the extent of recovery of minimum wages [pursuant to FLSA] for the days worked."). Moreover, defendant third-party plaintiff did not establish that a deportation proceedings had begun or

were contemplated or that plaintiff's alien status was relevant for any other reason.

If Hilton were really interested in plaintiff's alien status it would have established a process consistent with IRCA to ascertain third-party defendant's employees authorizations to work in the United States. Indeed, until plaintiff filed suit, there is no indication in the record that Hilton expressed an interest in determining employment authorizations. Inasmuch as plaintiff has provided Hilton with information that he was "working on the books," paid Federal and State income taxes, and social security, and provided tax returns, Hilton's interest in plaintiff's alien status can only be construed as an attempt to deny plaintiff access to the courts through intimidation; this is intolerable to this Court.

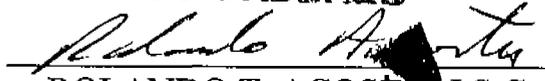
Accordingly, plaintiff's alien status is irrelevant and plaintiff does not have to disclose it. If it appears at some later juncture that such discovery would be relevant, and more relevant than harmful, Hilton may seek to renew this request. Liu v. Donna Karen International, Inc., 207 F. Supp. 2d at 193. Without more than what was introduced here, however, this Court would be suspect of any attempt to discover any information related to plaintiff's immigration status.

Parties are directed to attempt to resolve further discovery disputes by telephone conference with the Court prior to filing a motion. See Part 61 Rules.

This constitutes the decision and order of the Court.

August 6, 2004

SO ORDERED


ROLANDO T. ACOSTA, J.S.C.
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J.S.C.

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