

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
(ALEXANDRIA DIVISION)

FAHIMEH NABAVI,)
)
Plaintiff,)
)
v.)
)
ME & AN, Inc.)
)
Defendant.)
)
_____)

2007 JAN 10 A 11: 57

CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA

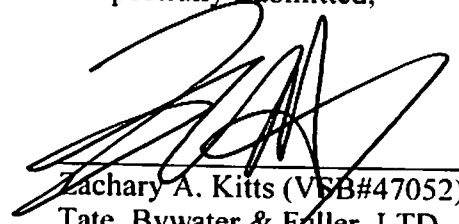
CASE NO. 1:07cv0001—LMB/LO
MOTION TO DISMISS

DEFENDANT'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6)

Defendant ME & AN, Inc., by counsel, brings this Motion to Dismiss Count One of the Complaint and the demand for attorney's fees found in counts three and four pursuant to Fed. R. Civ. P. 12(b)(6).

Defendant directs to the Court to the attached Memorandum of Points and Authorities in support of its Motion, and respectfully requests that this Court enter an Order dismissing count one of the Complaint and the demand for attorney's fees in counts three and four.

Respectfully Submitted,




Zachary A. Kitts (VEB#47052)
Tate, Bywater & Fuller, LTD.
2740 Chain Bridge Road
Vienna, Virginia 22181
Phone: (703) 938-5100
Fax: (703) 255-1097

DATED: 1/10/07

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 2007, the foregoing Motion to Dismiss was served via Regular Mail to Stephen H. Ratliff, Esq., 10511 Judicial Drive, Suite 102, Fairfax, VA 22030, and by facsimile to (703) 691-3175.

A handwritten signature in black ink, appearing to read 'Zachary A. Kitts', written over a horizontal line.

Zachary A. Kitts

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Defendant ME & AN, Inc., by counsel, brings this Motion to Dismiss count one of the Complaint and the demand for attorney’s fees in counts three and four pursuant to Fed. R. Civ. P. 12(b)(6), and in support states as follows.

BACKGROUND

Plaintiff filed a four count Complaint in the Circuit Court for Loudoun County, Virginia, alleging violations of the Virginia Wage Payment Statute (Virginia Code § 40.1-29 *et seq.*) in count one, violations of the Fair Labor Standards Act (29 U.S.C. § 201 *et seq.*) (“FLSA”), in count two, and common law claims for quantum meruit and breach of contract in counts three and four.

The factual allegations of all four alleged causes of action are identical: Plaintiff is alleged to have worked from January 16, 2006 through August 6, 2006 without receiving compensation. The relief requested by Plaintiff is also identical under all four counts: she requests payment for a total number of hours she alleges that she worked

during these months, as well as her attorney's fees and costs. Defendant was served, through its registered agent, on December 14, 2006.

The FLSA claim asserted by Plaintiff brought this case under the jurisdiction of this Court. Pendent jurisdiction over the state law claims is proper as the entire Complaint arises out of a common nucleus of operative fact. Defendant thus removed the case to this Court on January 3, 2007. Defendant now moves to dismiss count one of the Complaint, as well as the demand for attorney's fees found in counts three and four.

LEGAL STANDARD

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the complaint. Miller v. Washington Workplace, Inc., 298 F.Supp.2d 364, 370 (E.D.Va. 2004). In considering a motion to dismiss under 12(b)(6), the Court must view the allegations in the Complaint in the light most favorable to the Plaintiff. Estate Const. Co. v. Miller & Smith Holding Co., 14 F.3d 213 (4th Cir. 1994).

ARGUMENT

I. VIRGINIA CODE § 40.1-29 DOES NOT CREATE A PRIVATE RIGHT OF ACTION FOR AN INDIVIDUAL PLAINTIFF, AND COUNT ONE OF THE COMPLAINT MUST THEREFORE BE DISMISSED.

In Count One of her Complaint, Plaintiff attempts to assert a cause of action under the Virginia Wage Payment Statute. The Virginia Wage Payment Act does not provide for a private right of action to an individual Plaintiff, however, and Courts have consistently refused to read an implied right of action into the plain language of the statute. See, Pallone v. Marshall Legacy Institute Inc., 97 F.Supp.2d 742 (E.D. Va.

2000)(Ellis, J.); Eslami v. Global One Communications, 48 Va. Cir. 17, 1999 WL 51864 (Va. Cir. Ct. 1999).

Courts have refused to read an implied private right of action into the Wage Payment Act because it is well settled under Virginia law that where a statute creates a right and then provides a mechanism for enforcement of that right, the statutory remedy is the sole remedy available in the absence of other statutory language to the contrary. Pallone, 97 F.Supp.2d at 744 citing City of Norfolk v. Giannoutsos, 238 Va. 144, 147, 380 S.E.2d. 647, 649 (1989). The language of the Virginia Wage Payment Act contains no language to indicate that the statutory remedy is not the exclusive remedy. Rather, the statute creates an enforcement mechanism for enforcement by the Commissioner of Labor and Industry, either through a private attorney retained by the Commissioner or through the administrative process. See, Miller v. Washington Workplace, Inc., 298 F.Supp.2d 364 (E.D.Va. 2004)(Cacheris, J.)(recognizing that the Virginia statute does not create a right to be paid for work performed and does not permit an implied private right of action.)

Because there is no private right of action under the Virginia Wage Payment Act, Plaintiff will be unable to prove any set of facts that will allow her to recover under count one. Count one of the Complaint should therefore be dismissed for failure to state a claim upon which relief can be granted.

II. THERE IS NO BASIS FOR THE PLAINTIFF TO SEEK HER ATTORNEY'S FEES AND COSTS UNDER THE COMMON LAW THEORIES OF QUANTUM MERUIT AND BREACH OF CONTRACT, AND THE PRAYER FOR

ATTORNEY'S FEES AND COSTS SHOULD BE STRUCK FROM COUNTS THREE AND FOUR.

Plaintiff's common law claims both contain prayers for relief that request payment of her attorney's fees; such prayers for relief should be struck from the Complaint. Virginia adheres to the "American rule" regarding recovery of attorney's fees in civil litigation. The American rule stands for the proposition that, absent a specific contractual or statutory provision providing for attorney's fees, attorney's fees are not recoverable by a prevailing litigant from the losing litigant. Mullins v. Richlands National Bank, 403 S.E.2d 334, 241 Va. 447 (1991); Lannon v. Lee Conner Realty Co., 385 S.E.2d 380, 238 Va. 590 (1989).

On the facts of this case, Plaintiff has alleged common law claims for quantum meruit and breach of contract, and has demanded her reasonable attorney's fees for both counts. Plaintiff has not, and cannot, allege that there is any contractual provision that would entitle her to attorney's fees under these theories of recovery; nor is there any right at common law for her to claim attorney's fees for these counts. The demand for attorney's fees in counts three and four should therefore be dismissed for failure to state a claim upon which relief can be granted.

CONCLUSION

For the reasons stated, Defendant ME & AN, Inc., moves this Court to dismiss count one of the Plaintiff's Complaint, and to dismiss the demand for attorney's fees in counts three and four of the Complaint.

Respectfully Submitted,

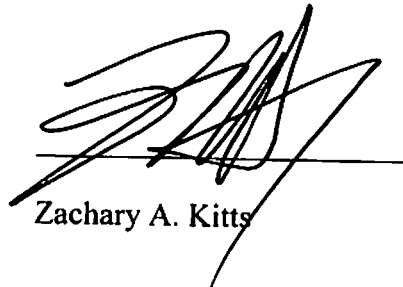


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