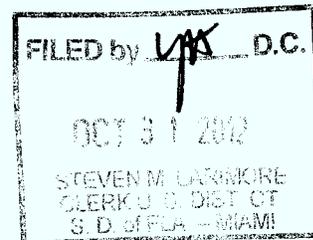


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO: 12-23614-CIV-HUCK/BANDSTRA



YESENIA ESTRADA,
Plaintiff

v.

LUZ M. RANGEL, d/b/a KING
MULTISERVICES
RICARDO MORENO
Defendants

DEFENDANTS' ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIM

Defendants Luz M. Rangel d/b/a King Multiservices (Rangel) and Ricardo Moreno (Moreno) (collectively called Defendants) hereby file their answer and affirmative defenses to Plaintiff's complaint, and state:

1. Defendants admit that Plaintiff purports to bring a cause of action under 29 U.S.C. §§ 201-216. (FLSA) Defendants deny that the Plaintiff can maintain such an action or is entitled to any relief.

2. Admitted.

3. Denied.

4. Denied.

5. Admitted that venue is in Dade County, Florida

6. Defendants admit that Plaintiff purports to bring a cause of action under the laws of the United States. Defendants deny that the Plaintiff can maintain such an action or is entitled to any relief.

7. Denied.

8. Defendants admit that Plaintiff purports to quote a section of the FLSA.

9. Defendants admit that Plaintiff worked for the Defendants from February to September 2012, all other allegations in this paragraph are denied.

10. Denied.

11. Denied.

12. Denied.

13. Denied.

14. Denied.

15. Denied.

16. Denied.

17. Defendants admit that Plaintiff purports to quote a section of the FLSA, and to set forth minimum wage rates, otherwise denied.

18. Denied.

19. Denied

20. Denied.

All allegations not specifically admitted are specifically denied.

AFFIRMATIVE DEFENSES

FIRST DEFENSE

All claims asserted in the Complaint are barred because the Plaintiff fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Plaintiff was an exempt employee pursuant to several FLSA exemptions and Defendants are not covered entities/employers under the FLSA.

THIRD DEFENSE

Plaintiff's damages claims are barred by the provisions of Section 11 of the Portal to Portal Act, 29 U.S.C. § 260, because the acts or omissions complained of were done in good faith and with reasonable grounds for believing that the acts or omissions were not in violation of the FLSA.

FOURTH DEFENSE

Plaintiff's claims are barred by the provisions of Section 4 of the Portal-to-Portal Act, 29 U.S.C. § 254, as to all hours during which she was engaged in certain activities that were preliminary or post-liminary to her principle activities.

FIFTH DEFENSE

Plaintiff's claims are barred in whole or in part by the exemptions, exclusions, or exceptions, and credits provided by the FLSA, 29 U.S.C. § 207. Additionally, Plaintiff was not an employee. Plaintiff was an independent contractor

SIXTH DEFENSE

Plaintiff's claims are barred by the provisions of Section 4 of the Portal-to Portal Act, 29 U.S.C. § 254, as to all hours during which she was engaged in certain activities which were non-compensable, such as taking breaks, taking care of her own personal business, or traveling to the Plaintiff's actual place of performance.

SEVENTH DEFENSE

Plaintiff's claims are barred to the extent that Plaintiff did not work more than forty (40) hours in one workweek.

EIGHTH DEFENSE

Plaintiff's claims are barred by the provisions of Section 101 of the Portal-to-

Portal Act, 29, U.S.C. § 259, because all actions taken in connection with the Plaintiff's compensation were done in good faith in conformity with and in reliance upon written administrative regulations, orders, rulings, approvals, interpretations, and written and unwritten administrative practices or enforcement policies of the Administrator of the Wage and Hour Division of the United States Department of Labor.

NINTH DEFENSE

Some or all of the purported claims in the Complaint are barred because the time for which compensation is sought is *de minimis*, and therefore not compensable.

TENTH DEFENSE

Plaintiff's claims are barred in whole or in part by the fact that they were conducting personal and other business activities during the hours she was ostensibly and supposedly performing work for Defendants.

ELEVENTH DEFENSE

Defendants did not suffer or permit Plaintiff to work overtime hours.

TWELFTH DEFENSE

Defendants are not employers under the FLSA

COUNTERCLAIM

Defendants /Counter Plaintiffs Luz M. Rangel and Ricardo Moreno (called Rangel and Moreno, respectively; and "Counter Plaintiffs", collectively) file this counterclaim against Plaintiff/ Counter Defendant Yesenia Estrada (called "Estrada" or "Counter Defendant") and allege:

21. This is an action for tortuous interference with business relationships and conversion, and for damages.

22. This Court has jurisdiction over the subject matter of this counterclaim under the doctrine of ancillary and/or pendent jurisdiction.

23. Venue is proper in this district pursuant to 28 U.S.C. §1391 as Estrada's acts, omissions and events giving rise to Counter Plaintiffs' causes of action occurred within this district, and Estrada resides in this district.

24. Counter Plaintiffs are married and rented and operated a small kiosk inside a supermarket in Hialeah, Florida where they engaged in the business of transferring money and packages to Latin America (hereafter called "the business").

25. On or about February 25, 2012, Counter Plaintiff Moreno hired Estrada as an independent contractor to manage the business. Estrada was so engaged until around September 25, 2012 when she quit and went to work for one of Counter Plaintiffs competitors.

26. During her employment at the business, Estrada had unfettered access to Counter Plaintiffs' confidential accounting information and customer lists, among other things, which were considered confidential trade secrets by Counter Plaintiffs. In fact, the Estrada's use, in paragraph 13 of her complaint, of the figure of "\$375,000" appears to have been obtained from Counter Plaintiffs' confidential accounting documents.

27. Estrada quit her employment with Counter Plaintiffs when the supermarket where Counter Plaintiffs had their business closed, and Counter Plaintiffs had to relocate the business to another location.

28. After Estrada quit her employment with Counter Plaintiffs, and continuing to this day, Estrada began a course of action designed to sabotage and damage Counter Plaintiffs' business, by stealing Counter Plaintiffs' trade secrets and by interfering with the advantageous business relationships between Counter Plaintiffs and their customers. Estrada's actions were

unjustified and illegal. Her specific actions included but were not necessarily limited to the following.

29. Counter Plaintiffs learned from their previous supermarket landlord that a sign had been placed at the Counter Plaintiffs' old business location advising their clients that their business had relocated and directing said clients to a Counter Plaintiffs' purported new business location. Counter Plaintiffs, however, did not place such signs and later learned that the signs directed Counter Plaintiffs' customers to the location of a business competitor for whom Estrada started to work after she quit working for Counter Plaintiffs.

30. After Counter Plaintiffs relocated their business, they also learned from customers that Estrada was calling their customers and asking them to take their business to Estrada who worked at another location, without disclosing that she no longer worked for the Counter Plaintiffs and instead worked for one of their business competitors. Upon information and belief, Estrada obtained the names and telephone numbers of Counter Plaintiffs customers from the customer lists that Counter Plaintiffs maintained while Estrada was employed by them.

31. After Counter Plaintiff Moreno learned that Estrada was placing signs at Counter Plaintiffs' old business location directing their clients to the location of her current employer, and that Estrada was soliciting Counter Plaintiffs' clients by phone, Counter Plaintiff Moreno advised Estrada to cease and desist or he would file a suit against Estrada for stealing Counter Plaintiffs' confidential trade secrets and interfering with Counter Plaintiffs' business relationships.

32. It was after Counter Plaintiff Moreno threatened Estrada with a lawsuit that she filed her lawsuit alleging violations of the FLSA. Upon information and belief, Estrada filed such a

lawsuit not because she had a legitimate FLSA claim but instead to deter a lawsuit by Counter Plaintiff Moreno.

33. The illegal acts of Estrada describe above have greatly harmed Counter Plaintiffs' business and caused Counter Plaintiff's significant business losses.

COUNT I

TORTIOUS INTERFERENCE WITH A BUSINESS RELATIONSHIP

34. Counter Plaintiffs reallege paragraphs 21 through 33 as is fully set forth herein.

35. Counter Plaintiffs have and had significant advantageous business relationships with numerous clients with which they had legal rights.

36. Estrada knew of these advantageous business relationships existing between Counter Plaintiffs and their clients.

37. Estrada intentionally, unjustifiably and tortiously interfered with those advantageous business relationships through her actions.

38. As a direct and proximate result of Estrada's interference, Counter Plaintiffs have been damaged.

WHEREFORE, Counter Plaintiffs respectfully request this Court enter judgment against Estrada and in favor of Counter Plaintiffs for the following:

a. Precluding Estrada from contacting customers of Counter Plaintiffs and/or using Counter Plaintiffs customer lists or other trade secrets.

b. Awarding Counter Plaintiffs compensatory and punitive damages for the intentional interference by Estrada with Counter Plaintiffs' business relationships and the consequent loss of business; and

c. Granting any further relief this Court finds equitable and just.

COUNT II

CONVERSION

39. Counter Plaintiffs reallege paragraphs 21 through 33 as is fully set forth herein.

40. On dates unknown to Counter Plaintiffs but known by Estrada, Estrada converted to her own use Counter Plaintiffs' customer lists, financial documents, and other trade secrets, said actions causing damage to Counter Plaintiffs.

WHEREFORE, Counter Plaintiffs demand judgment for damages against Estrada including but not limited to punitive damages, and such other relief as the Court deems proper.

WE HEREBY CERTIFY that a copy of this document was served this 10-31-12 by U.S. mail on Christopher Cochran, Esq., J.H. Zidell, P.A. , Attorneys for Yesenia Estrada, 300 71st Street, #605, Miami Beach, Florida 33141.



Luz M. Rangel
Pro Se
Defendant/Counter Plaintiff
6870 W 12 Avenue
Hialeah, Florida 33014



Ricardo Moreno
Pro Se
Defendant/Counter Plaintiff
6870 W 12 Avenue
Hialeah, Florida 33014

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 12-23614-CIV-HUCK/BANDSTRA

YESENIA ESTRADA,)
)
Plaintiff,)
vs.)
)
LUZ M. RANGEL d/b/a KING)
MULTISERVICES)
RICARDO MORENO,)
)
Defendants.)
_____)

PLAINTIFF’S MOTION TO DISMISS COUNTERCLAIMS

COMES NOW Plaintiff, through the undersigned, and moves the Court to Dismiss Defendants Counterclaims (incorporated into [DE 8]) as follows:

INTRODUCTION

1. This matter fall under federal jurisdiction pursuant to the Fair Labor Standards Act (“FLSA”), and includes claims for overtime and minimum wages.
2. Defendants’ Answer [DE 8] incorporates Counterclaims predicated upon Florida law, including Tortious Interference with a Business Relationship and Conversion.
3. Defendants’ Counterclaims ought be dismissed as a matter of law as this Court should not exercise supplemental jurisdiction over the state law claims, and because the Counterclaims do not arise out of a common nucleus of operative facts with the FLSA claim. Even if supplemental jurisdiction is permissible in this action, the Court should not exercise such jurisdiction because the Counterclaims raise novel and complex issues of state law, and those state law issues predominate over Plaintiff’s wage claims. Also the

Defendants have failed to acknowledge whether the counterclaims are permissive or compulsory.

MEMORANDUM OF LAW AND ARGUMENT

This Court has original jurisdiction over the federal law FLSA claim under 29 U.S.C. Section 1331 (civil actions under the Constitution, laws and treaties of the United States). However, Defendants' Counterclaims concern state legal theories and laws. This Court's jurisdiction over such state claims would have to come under the doctrine of supplemental or pendent jurisdiction. *See, United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), 28 U.S.C. 1367, and *Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733 (11th Cir. 2006). Determination of whether the Court will consider the state law claims, is ordinarily based upon the pleadings. *Gibbs*, 383 U.S. at 728-29.

A supplemental jurisdiction inquiry under 28 U.S.C. Section 1367 is "twofold". *Baggett v. First Nat'l Bank of Gainesville*, 117 F.3d 1342, 1352 (11th Cir. 1997), citing *Gibbs*, 383 U.S. at 725-26. The Court must first determine if it has the power to hear the state law claim, and then second decide in its discretion if it will decline supplemental jurisdiction. 28 U.S.C. Sections 1367(a), (c).

A. THIS COURT DOES NOT HAVE SUPPLEMENTAL JURISDICTION OVER THE COUNTERCLAIM BECAUSE IT DOES NOT ARISE OUT OF A COMMON NUCLEUS OF OPERATIVE FACTS IN RELATION TO THE FLSA CLAIM.

A federal court may exercise supplemental or pendant jurisdiction over state law claims deriving from a common nucleus of operative facts with a substantial federal claim. *L.A. Draper and Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 427 (11th Cir. 1984). In the Eleventh Circuit, a common nucleus of operative facts exists when both the state and federal claims arise from the same events and involve the same witnesses,

presentation of the same evidence, and determination of the same, or very similar, facts. *Palmer v. Hosp. Auth.*, 22 F.3d 1559, 1563-64 (11th Cir. 1994). *See also, Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451, 455 (11th Cir. 1996)(no supplemental jurisdiction regarding state law breach claim as such did not arise out of same case or controversy as ERISA action); *see also, Lucero v. Trosch*, 121 F.3d 591, 598 (11th Cir. 1997)(common nucleus of common facts found as they relied on identical actions of the defendants).

In the instant case, Defendants' counterclaims do not arise out of a common nucleus of operative facts in relation to the FLSA claims, and would not otherwise involve the same or similar evidence or facts. Further, such state claims are not the type that would be expected to be tried in the same proceeding as the FLSA claim. Neither the factual circumstances surrounding Defendants' allegations that Plaintiff tortiously interfered with Defendants' business relationships or converted customer lists etc. correlate to the FLSA wage claims. The FLSA claims are separate and not related, as the Counterclaims do not concern the issue of whether the Plaintiff was merely paid in accordance with the legally mandated rates; therefore this Court does not have the power to exercise supplemental jurisdiction. Thus, the Counterclaim must be dismissed. *See* attached Order from the this Court in *Palma v. Safe Hurricane Shutters, Inc.*, 07-22913-CIV-HUCK/SIMONTON (consent case)(S.D. Fla. 2008), which is discussed in more detail *infra*.

B. EVEN IF THE COURT CAN INVOKE SUPPLEMENTAL JURISDICTION, THE COUNTERCLAIM PRESENTS NOVEL OR COMPLEX ISSUES OF STATE LAW AND PREDOMINATES OVER THE FEDERAL FLSA CLAIM.

When the court has the power to invoke supplemental jurisdiction, such is discretionary. Such discretion ought be exercised in a manner that serves economy,

convenience, fairness and comity. *See, City of Chicago v. International College of Surgeons*, 522 U.S. 156, 172-73 (1997).

Under 28 U.S.C. Section 1367©, this Court may decline supplemental jurisdiction in four situations: (1) the claim raises a novel or complex issue of state law; (2) the state claim substantially predominates over the federal claim or claims pursuant to which the district court has original jurisdiction; (3) the district court has dismissed all claims over which it has original jurisdiction; or (4) under unusual circumstances, there are compelling reasons for declining jurisdiction.

Any one of the said 1367© factors is a sufficient basis for the district court to dismiss a supplemental state law claim. *Parker*, 468 at 743. In the instant case, the state claims substantially predominate over the federal claim or claims pursuant to which the district court has original jurisdiction.

In *Gibbs*, 383 U.S. at 727-27, the United States Supreme Court set forth the guideline the district court should follow in making discretionary judgments with respect to pendant jurisdiction: “if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution in state tribunals.”

If it appears that there is a possibility of state issues and proofs predominating over the federal claims, supplemental jurisdiction should be denied. *See Carabollo v. South Stevedoring, Inc.*, 932 F. Supp. 1462 (S.D. Fla. 1996)(common law claims regarding emotional distress involve state law issues not appropriate in federal ADEA

actions, as trial of issues together would confuse the jury and the state common law claims would predominate over the federal claims).

In *Beard v. Netco Title, Inc.*, 2005 WL 2072055 (E.D. Mich. 2005), a RICO action involving state claims of fraud, conversion, negligent misrepresentation, and negligence, the court, in declining supplemental jurisdiction, stated that “[e]ven if the federal and state claims in this action arise out of the same factual situation, litigating these claims together may not serve judicial economy or trial convenience.” In the instant case, should the jury be required to consider the Counterclaims, such would cause confusion, among other things, and the state claims could therefore predominate over the FLSA claims. *See* attached Order from the this Court in *Palma, supra*.

C. DEFENDANTS FAIL TO STATE WHETHER THE COUNTERCLAIMS WERE FILED AS A COMPULSORY OR PERMISSIVE COUNTERCLAIMS AND DEFENDANTS CANNOT ASSERT THE COUNTERCLAIMS.

Defendants, in their counterclaim fail to state whether said counterclaim was filed as a compulsory or permissive counterclaim.

Federal Rules of Civil Procedure 13(a) states: “Compulsory Counterclaim. (1) *In General*. A pleading must state as a counterclaim any claim that at the time of its service the pleader has against an opposing party if the claim: (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and (B) does not require adding another party over whom the court cannot acquire jurisdiction.”

Federal Rules of Civil Procedure 13(b) states: “Permissive Counterclaim. A pleading may state as a counterclaim against an opposing party any claim that is not compulsory.”

In determining whether a counterclaim is compulsory or permissive, the Eleventh Circuit has stated that courts

should apply the "logical relationship" test. *Republic Health Corp. v. Lifemark Hospitals of Florida, Inc.*, 755 F.2d 1453, 1455 (11th Cir. 1985). Under the "logical relationship" test, a logical relationship exists between the plaintiff's claim and the counterclaim when "the same operative facts serve as the basis of both claims or the aggregate core of facts upon which the claim rests activates additional legal rights, otherwise dormant, in the defendant." *Id.* (quoting *Plant v. Blazer Financial Services, Inc.*, 598 F.2d 1357, 1361 (5th Cir. 1979)).

Hutton v. Grumpie's Pizza & Subs, Inc., 2008 U.S. Dist. LEXIS 37425 (S.D. Fla. May 6, 2008).

If a counterclaim is permissive rather than compulsory, the court must find an independent jurisdictional basis, such as federal question or diversity jurisdiction, for the counterclaim to proceed in federal court. *See East-Bibb Twiggs Neighborhood Assoc. v. Macon Bibb Planning & Zoning Commission*, 888 F.2d 1576, 1578 (11th Cir. 1989);

Hutton v. Grumpie's Pizza & Subs, Inc., 2008 U.S. Dist. LEXIS 37425 (S.D. Fla. May 6, 2008). Analogously, the court in both the Southern District of Florida as well as the Middle District of Florida have held that a claim for breach of contract is not a compulsory counterclaim but at best a permissive counterclaim.

Kirby v. Tafco Emerald Coast, Inc., 05CV341 (RV), 2006 U.S. Dist. LEXIS 6088, 2006 WL 228880, at *2 (N.D.Fla. 2006) (finding no supplemental jurisdiction over breach of contract and failure to pay promissory note counterclaims to plaintiff's FLSA claim); *Lecik v. Nost*, 05 CV 1040 ORL (KRS), 2005 U.S. Dist. LEXIS 34727, 2005 WL 3307192, at *2-3 (M.D.Fla. 2005) (finding no supplemental jurisdiction over breach of contract counterclaim to plaintiff's FLSA claim).

Carvalho v. Door-Pack, Inc., 565 F. Supp. 2d 1340, 1341 (S.D. Fla. 2008). The Courts have gone on to hold that although the Court lacks independent basis for jurisdiction, there is an exception for the Court to hear a permissive counterclaim when the

counterclaim merely seeks a setoff that would not reduce Plaintiff's average hourly wage below the minimum wage.

The Court finds that under the logical relationship test, all three of RSM's counterclaims are permissive, because they are not based on the same core facts as Plaintiff's FLSA claim. See *Kirby*, 2006 U.S. Dist. LEXIS 6088, 2006 WL 228880, at *2 (finding the defendant's breach of contract claim and failure to repay promissory notes claim to be permissive counterclaims to the plaintiff's FLSA claim); *Mercer*, 2005 U.S. Dist. LEXIS 28290, 2005 WL 3019302, at *1 (finding the defendant's conversion claim to be a permissive counterclaim to the plaintiff's FLSA claim); *Lecik v. Nost*, 2005 U.S. Dist. LEXIS 34727, 2005 WL 3307192, at *3 (M.D. Fla. Dec. 6, 2005) v. *Nost*, 2005 U.S. Dist. LEXIS 34727, 2005 WL 3307192, at *3 (M.D. Fla. Dec. 6, 2005)(finding the defendant's breach of contract claim to be a permissive counterclaim to the plaintiff's FLSA claim). However, the Court's finding that the counterclaims are permissive does not end the Court's inquiry as to whether the counterclaims should be dismissed due to there being no independent basis for subject matter jurisdiction.

There is an exception to the requirement that permissive counterclaims require an independent basis for jurisdiction when the permissive counterclaim is seeking only a setoff. See *Cole*, 2007 U.S. Dist. LEXIS 42507, 2007 WL 1696029, at *4; *Kirby*, 2006 U.S. Dist. LEXIS 6088, 2006 WL 228880, at *1 n.1; *Mercer*, 2005 U.S. Dist. LEXIS 28290, 2005 WL 3019302, at *2. However, under the exception, the counterclaim for setoff must be used solely to defeat or reduce the plaintiff's recovery and cannot seek affirmative relief. See *Cole*, 2007 U.S. Dist. LEXIS 42507, 2007 WL 1696029, at *4; *Kirby*, 2006 U.S. Dist. LEXIS 6088, 2006 WL 228880, at *1 n.1; *Mercer*, 2005 U.S. Dist. LEXIS 28290, 2005 WL 3019302, at *2.

Robinson v. Roofs, Structures & Mgmt., 2007 U.S. Dist. LEXIS 92644, 5-7 (M.D. Fla. Dec. 18, 2007). See also *Dejesus v. Emerald Coast Connections of St. Petersburg, Inc.*, 2010 U.S. Dist. LEXIS 68845 (M.D. Fla. June 17, 2010) (allowing setoff for the purchase

of a pizza oven so long as said setoff did not result in Plaintiff's wage rate falling below the applicable minimum wage rate).

Furthermore, in *Goings v. Advanced Sys.*, 2008 U.S. Dist. LEXIS 74331 (M.D. Fla. Sept. 12, 2008) after Plaintiff was injured and could not work, Defendants loaned Plaintiff money so that Plaintiff could continue to pay for his health insurance benefits and Plaintiff promised to repay the loan. Plaintiff never returned to work and ultimately asserted a claim for overtime wages under the Fair Labor Standards Act. Thereafter, Defendants filed a counterclaim for breach of contract. The Court in *Goings* went on to find that the claim for breach of contract is a permissive counterclaim for which the Court did not have any independent basis for subject matter jurisdiction.

This Court has given careful consideration to this matter, and determines that most of the facts needed for the prosecution and defense of Plaintiff's FLSA claims are distinct from the facts needed to litigate Defendant's counterclaim for breach of contract regarding an unpaid loan. For that reason, separate trials of these separate claims would not "involve substantial duplication of effort and time by the parties and the courts." See *Revere Copper & Brass, Inc.*, 426 F.2d at 714. Broadly, the aggregate core of facts upon which Plaintiff's claims rest are the hours worked by Plaintiff and the amount that he was paid for those hours, an issue quite distinct from the alleged loan between Plaintiff and Defendant. In addition, the elements of proof for each claim are distinct from one another. Thus applying the logical relationship test, the Court finds that Defendant's counterclaim is permissive rather than compulsory.

Goings v. Advanced Sys., 2008 U.S. Dist. LEXIS 74331, 7-8 (M.D. Fla. Sept. 12, 2008).

However, the Court went on to state that Defendant could use the breach of contract claim solely for the purpose of setoff to reduce the recovery but cannot be used to seek affirmative relief.

In the case at hand, Defendants' Counterclaims do not seek setoff but rather seek affirmative relief regarding Tortious Interference and Conversion theories. It is Plaintiff's position that Defendants' counterclaims should be found to be neither compulsory nor permissive. The elements needed to prove an FLSA claim and the elements needed to prove Tortious Interference and Conversion are separate and distinct for the underlying FLSA claim. Therefore, the elements needed to prove Defendants counterclaims do not meet the "logical relationship" test as the same operative facts do not serve as the basis for both claims. Even if the Court find the Counterclaims are permissive, Defendants have not established any independent basis for the Court's subject matter jurisdiction.

Moreover, attached are orders from this Court in the matters of *Mejia v. Cambridge Specialty Construction Corp.*, 09-22105-CIV-KING (S.D. Fla. 2009) and *Palma supra*. In *Mejia*, at 2, this Court dismissed the conversion count *with prejudice* because a party cannot attempt to enforce an obligation to pay money with via a conversion count. In *Palma*, at 4, this Court found a lacking common nucleus of operative facts (among other reasons for dismissal). "See also, e.g., *O'Donnell v. Billy's Stone Crabs, Inc. et al.*, Case No. 98-6039-Civ, slip op. at 3 (S.D. Fla. Jan. 21, 1998)(Zloch, J.)(declining to exercise supplemental jurisdiction over plaintiff's state law claims for battery, assault, defamation, **tortious interference with business relationship**, negligent training and supervision and negligent retention, pursuant to 28 U.S.C. § 1367(c)(1)and (2), because those claims present novel and complex questions of state law which would predominate over plaintiff's Title VII sexual harassment claim)."

Richardson v. Trainer, 2003 U.S. Dist. LEXIS 13829 (S.D. Fla. July 1, 2003)(emphasis added).

WHEREFORE, PLAINTIFF RESPECTFULLY MOVES THIS COURT TO DISMISS ALL OF DEFENDANTS' COUNTERCLAIMS WITH PREJUDICE.

Respectfully submitted,

**K. DAVID KELLY, ESQ.
J.H. ZIDELL, P.A.
ATTORNEY FOR PLAINTIFF
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EMAIL: DAVID.KELLY38@ROCKETMAIL.COM
F.B.N. 0123870
BY: /s/ K. David Kelly
K. DAVID KELLY, ESQ.**

CERTIFICATE OF SERVICE

**I HEREBY CERTIFY THAT A TRUE AND CORRECT
COPY OF THE FOREGOING WAS PROVIDED
SUBSEQUENT TO E-FILING VIA CM/ECF ON 11/1/12 TO THE FOLLOWING:**

ALL LISTED CM/ECF RECIPIENTS

**(VIA U.S. MAIL)
LUZ M. RANGEL d/b/a KING MULTISERVICES
RICARDO MORENO
6870 W. 12 AVENUE
HIALEAH, FL 33014**

**BY: /s/ K. David Kelly
K. DAVID KELLY, ESQ.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 12-23614-CIV-HUCK/BANDSTRA

YESENIA ESTRADA,)
)
Plaintiff,)
vs.)
)
LUZ M. RANGEL d/b/a KING)
MULTISERVICES)
RICARDO MORENO,)
)
Defendants.)
_____)

**ORDER GRANTING PLAINTIFF’S MOTION TO DISMISS
COUNTERCLAIMS**

This cause, having come before the Court on Plaintiff’s above-described motion, and the Court being duly advised in the premises, it is ORDERED, and ADJUDGED that said motion is granted and therefore:

DEFENDANTS’ COUNTERCLAIMS SET FORTH IN [DE 8] ARE HEREBY DISMISSED IN THEIR ENTIRETY WITH PREJUDICE.

DONE AND ORDERED in chambers in Miami-Dade, Florida, on this _____ day of _____, 2012.

PAUL C. HUCK
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

CASE NO. 09-22105-CV-KING

JOSE MEJIA, and all others
similarly situated,

Plaintiffs,

vs.

CAMBRIDGE SPECIALTY
CONSTRUCTION CORP.,
TORY WATSON, AND SEAN
TANNER,

Defendants.

ORDER DISMISSING COUNT III WITH PREJUDICE

THIS CAUSE comes before the Court upon Defendants' Motion to Dismiss Count III, which is a claim for Conversion (DE #15).¹ For the reasons detailed below, the Court determines that the motion should be **GRANTED**.

Plaintiffs' complaint is brought under the Fair Labor Standards Act (FLSA), alleging that Defendants failed to pay Plaintiffs in accordance with the applicable minimum wage, and that Defendants failed to pay Plaintiffs the overtime wages that they were due. Under Count III, Plaintiffs advance a claim for conversion, alleging that "Defendants intentionally and purposefully deprived Plaintiff of his wages with no intent to ever return such funds." (DE #14, ¶ 18). However, the Court concludes that Plaintiffs have not sufficiently stated a claim for conversion.

¹ Defendants' first Motion to Dismiss (DE #9) was granted as to Count III for failure to state a claim (DE #13), and Plaintiffs were given leave to file an amended complaint, which Plaintiffs did (DE #14). Defendants subsequently filed the instant Motion to Dismiss (DE #15).

Under Florida law, the elements of conversion are (1) dominion wrongfully asserted, (2) over another's property, (3) inconsistent with ownership. *Del Monte Fresh Produce v. Dole Food Company*, 136 F.Supp.2d 1271 (S.D. Fla. 2001). "However, 'a mere obligation to pay money, generally, may not be enforced by a conversion action.'" *Advanced Surgical Technologies, Inc. v. Automated Instruments, Inc.*, 777 F.2d 1504, 1507 (11th Cir. 1985) (quoting *Douglas v. Braman Porsche Audi, Inc.*, 451 So. 2d 1038, 1039 (Fla. 3d DCA 1984)). See also *Misabec Mercantile, Inc. de Panama v. Donaldson, Lufkin & Jenrette ACLI Futures, Inc.*, 853 F.2d 834, 838 (11th Cir. 1988) ("[A] conversion action is not an appropriate means of vindicating a claim which essentially alleges breach of contract.").

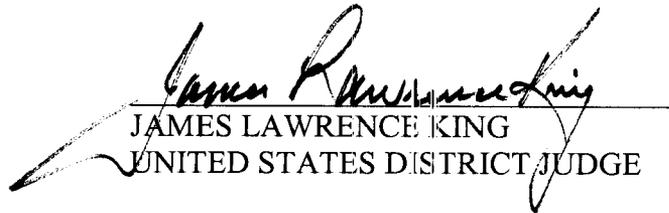
Here, Plaintiffs' claim is brought simply to enforce an obligation to pay money, which, under Florida law, may not be enforced by a conversion action. Moreover, in this Court's Order Granting Motion to Dismiss in Part (DE #15), the Court specifically noted that the original complaint "contains no facts that would support a claim for conversion or civil theft; it merely states Defendants willfully and intentionally failed to pay Plaintiff's wages." However, Plaintiffs' Amended Complaint contains no new facts that would support a claim for conversion. Therefore, Plaintiffs have failed to state a claim for Conversion.

Accordingly, after careful consideration and the Court being otherwise fully advised, it is **ORDERED, ADJUDGED, and DECREED** that:

1. Defendants' Motion to Dismiss Count III (Conversion) (DE #15) is hereby **GRANTED**. Count III is hereby **DISMISSED WITH PREJUDICE**.
2. Defendants shall file an Answer to the remaining counts **on or before November 2, 2009**.

DONE AND ORDERED in Chambers, at Miami, Miami-Dade County, Florida, this

19th day of October, 2009.


JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE

Cc:

Counsel for Plaintiff

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LEAD ATTORNEY
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-22913-CIV-HUCK/SIMONTON

CONSENT CASE

LUIS A. PALMA, et al.,

Plaintiffs,

v.

SAFE HURRICANE
SHUTTERS, INC., et al.,

Defendants.

_____ /

ORDER DISMISSING COUNT II OF THE AMENDED COMPLAINT

This matter is before the Court *sua sponte*. This case is referred to the undersigned Magistrate Judge based upon the parties' consent (DE # 40). Pursuant to this Court's Order (DE # 45), Plaintiffs filed a memorandum in support of the Court's exercise of jurisdiction over their state-law conversion count (DE # 47). Based upon a review of record, it is hereby **ORDERED** that Plaintiffs' state law civil theft claim be **DISMISSED**, for lack of jurisdiction.

I. BACKGROUND

Luis Palma, Roberto Sanso, Fernando Acuna, Yerko Aguirre, Rolando Ibacache, Armando Catalan and Gabriel Antinao filed a lawsuit requesting relief pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq.* According to their Amended Complaint, Plaintiffs worked for defendant, Safe Hurricane Shutters, Inc., without being paid at all for weeks at a time and without being paid overtime wages for the hours that they worked in excess of forty hours per week. The Amended Complaint adds Edward

Leiva, Steve Heidelberger and Francis McCarroll as defendants, based upon the allegation that they are the corporate officers, owners and/or managers responsible for running the day-to-day operations of Safe Hurricane Shutters, Inc.; and, that they were responsible for paying Plaintiffs' wages (DE # 17).

In addition to the FLSA claim that forms the core of the Amended Complaint, Plaintiff Luis A. Palma also alleges the following:

**COUNT II: CONVERSION (CIVIL THEFT) AGAINST PLAINTIFF LUIS A. PALMA BY
DEFENDANT EDWARD LEIVA**

. . . .

17. In July 2007, Plaintiff Luis A. Palma received a check for \$17,000 from a prior employer of his in New York for work performed before Plaintiff worked for the Defendants. Defendant [Edward] Leiva apparently knew Plaintiff's prior employer in New York who issued the check to the Plaintiff.

18. Edward Leiva offered to cash Plaintiff's check for \$17,000 and, based on Mr. Leiva's request, Plaintiff endorsed the check at that time and Mr. Leiva deposited the Plaintiff's check into Leiva's personal bank account.

19. Defendant Leiva then refused to pay Plaintiff the \$17,000 after the check was deposited into Leiva's account and thereafter converted those funds belonging to the Plaintiff.

20. Defendant Leiva owes Plaintiff Palma \$17,000.00 that is due with interest since J[uly] 2007

(DE # 1 at 5-6). There is no dispute that this claim for civil theft arises under state, not federal, law.

II. LEGAL STANDARD

The test for supplemental jurisdiction requires any supplemental state-law claims to be so related to the claims giving rise to federal jurisdiction that the state-law claims "form part of the same case or controversy" as the federal claims. 28 U.S.C. § 1367(a). "The constitutional 'case or controversy' standard confers supplemental jurisdiction

over all state law claims which arise out of a common nucleus of operative fact with a substantial federal claim.” *Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 742-43 (11th Cir. 2006) (citing *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966)).¹

III. THE PARTIES’ POSITIONS

Plaintiffs contend that “a common nucleus of operative facts exists when both the state and federal claims arise from the same events and involve the same witnesses, presentation of the same evidence, and determination of the same, or very similar, facts;” and, that the case at bar presents such a scenario because:

this FLSA matter concerns the employment relationship between Defendant Leiva and Plaintiff Palma. At the very heart of this case are the payment practices of the Defendants. In this matter, the facts surrounding the [alleged] conversion involve another instance where Defendant Leiva wrongfully withheld funds from Plaintiff Palma during the employment relationship

(DE # 47 at 4).

Plaintiffs also argue that the Court should favorably exercise its discretion to

¹ Assuming the supplemental claims arise from a common nucleus of operative fact as the federal claims, the Court retains the discretionary authority to decline jurisdiction over any supplemental state-law claim that:

- (1) . . . raises a novel or complex issue of State law,
- (2) . . . substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) [remains after] the district court has dismissed all claims over which it has original jurisdiction, or
- (4) [is present] in exceptional circumstances, [where] there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c).

assert jurisdiction over the supplemental state-law civil theft claim. First, Plaintiffs argue that the civil theft claim is neither novel nor complex and it would therefore preserve judicial resources to resolve the conversion claim together with the FLSA claim. Second, Plaintiffs argue that the civil theft claim does not substantially predominate over the federal claim and is therefore unlikely to cause juror confusion because the allegation that Defendant Leiva converted a check addressed to Plaintiff Palma “is very similar to [Defendant Leiva’s] failure to pay the FLSA mandated wages to [Plaintiff Palma]” (DE # 47 at 7).

IV. ANALYSIS

The state-law civil theft claim does not arise from a common nucleus of operative fact as the FLSA claim and, therefore, it does not form part of the same case or controversy as the FLSA claim. See 28 U.S.C. § 1367(a); *Parker*, 468 F.3d at 742-43. Mr. Palma’s civil theft claim is an entirely discrete and independent tort that bears no relation to Defendants’ alleged failure to adequately compensate Plaintiffs pursuant to the FLSA. Plaintiffs’ argument that the claims arise from a common nucleus of operative fact because they both concern the “wrongful withholding of funds during an employment relationship” is not persuasive.

The record establishes that the “employment relationship” between Mr. Palma and Mr. Leiva has no bearing on Mr. Palma’s civil theft claim. How Mr. Palma came to know Mr. Leiva is irrelevant to whether Mr. Leiva committed (1) an act of dominion wrongfully asserted (2) over Mr. Palma’s property which was (3) inconsistent with Mr. Palma’s ownership therein. See *Del Monte Fresh Produce Co. v. Dole Food Co.*, 136 F. Supp. 2d 1271, 1294 (S.D. Fla. 2001) (applying Florida law). Plaintiffs’ FLSA claims involve Mr. Leiva acting in his capacity as a corporate representative of Safe Hurricane

Shutters, Inc., whereas the alleged conversion was an act independent of Mr. Leiva's role as a corporate actor. There is not the slightest hint in the record that Mr. Leiva's alleged conversion was dependent upon, or even related to, Mr. Palma's employment at Safe Hurricane Shutters, Inc. or to the wages he was entitled to collect for his labor as an employee.

In a related vein, Plaintiffs' suggest, unconvincingly, that Defendants' "payment practices" which form the "very heart of this case" are similar to Mr. Leiva's alleged conversion of Mr. Palma's check (DE # 47 at 4) . Equating a "payment practice" with the civil theft described in Count II of the Amended Complaint requires an unacceptably contorted construction of those terms and fails to satisfy this Court that Defendants' alleged FLSA violations comprise the same case or controversy as Mr. Leiva's alleged conversion of Mr. Palma's check.

In conclusory fashion, Plaintiffs propose that the federal and state-law claims involve "the same or similar evidence or facts" (DE # 47 at 4) but the record belies such an assertion, as there is no substantive nexus between the two claims. To prove their FLSA claim, for instance, Plaintiffs will have to establish that they are employed by Defendants; that Plaintiffs worked a certain number of hours; and, that Defendants failed to pay them in accordance with the FLSA. Defendants' affirmative defenses, among other things, raise issues relating to the existence of enterprise or individual coverage under the FLSA; the applicability of various FLSA exemptions, exclusions, exceptions and credits; as well as defenses included in the Portal-to-Portal Act. None of these issues are intuitively germane to Mr. Palma's civil theft claim, and Plaintiffs fail to explain the similarities they share. Similarly, the evidence needed to prove or defend the state-law civil theft claim does not appear to overlap with Plaintiffs' FLSA claims, and

Plaintiffs have not explained how it will overlap. See *Roper v. Edwards*, 815 F.2d 1474, 1477 (11th Cir. 1987) (affirming dismissal of state-law claims that “contained divergent legal theories and very different measures of proof” than the federal claims at issue). Whatever shallow similarities the two claims share is outweighed by their substantial differences and, thus, there is little reason to believe that trying these two claims together would serve the primary policy objectives of supplemental jurisdiction by promoting judicial economy and convenience.

In light of the foregoing, it is not necessary to address whether this Court would be inclined to act on its discretionary authority to exercise jurisdiction over Mr. Palma’s supplemental state-law civil theft claim. However, to the extent that the Court would have such discretion, the undersigned finds that this is not an appropriate case to exercise that discretion.² The civil theft count applies to only one of the Defendants and would needlessly protract this case and distract the jurors from the FLSA issues. It is, therefore,

ORDERED AND ADJUDGED that Count II of Plaintiffs’ Amended Complaint (DE # 17) is **DISMISSED**, for lack of jurisdiction.

DONE AND ORDERED in Chambers in Miami, Florida on July 25, 2008.



ANDREA M. SIMONTON
UNITED STATES MAGISTRATE JUDGE

² The undersigned notes that the District Judge assigned to this case prior to the consent by the parties to the exercise of jurisdiction by the undersigned Magistrate Judge, orally stated at a status conference that the civil theft count would be dismissed, although this ruling was never reduced to writing (DE # 6).

Copies to:
All counsel and *pro se* parties of record