IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH, DEPARTMENT OF LABOR & INDUSTORY, BUREAU OF LABOR LAW COMPLIANCE o/b/o Carol Schneider & Lori DeCuio,	:	**NO. CV-19-1602**
Plaintiff	:	
vs.	:	
MARKET STREET SOUTH, INC. d/b/a BRIGHT BANNERS and KATHRYN MARCELLO, individually,	:	
Defendants	:	**CIVIL ACTION - LAW**

OPINION and ORDER

I. Relevant Facts

Claimants, Carol Schneider and Lori DeCuio, filed Wage Complaints with the Pennsylvania Department of Labor and Industry on November 6, 2017. Both Complaints list Market Street South/Bright Banners as the company involved and Kathryn Marcello as the person against whom the claim is filed. Ms. Schneider was hired on September 6, 1993 and Ms. DeCuio was hired on March 31, 2008. Both Claimants list 33 weeks ranging between April 17, 2016 and November 5, 2017 that they claim went unpaid. Ms. Schneider states the reason for refusal of payment as "payed to [sic] many personal bills on company money" and Ms. DeCuio states the reason for refusal of payment as "her son needed rent money; she was on a cruise and tour of Europe; fraud alert: co. debit card used in Europe, draining account, etc."

Plaintiff alleges in its Brief in Opposition that, in November of 2017, an investigator with the Department contacted Defendant Marcello via

telephone, spoke with her directly, and notified her of both claims. Defendant Marcello sold Bright Banners on January 25, 2018. On May 1, 2018, two letters were sent via certified mail to Kathryn Marcello/Bright Banners, which notified them of the claims. Both mailings were unclaimed by Ms. Marcello. Ms. Marcello refused the letters because they listed Bright Banners on the second line. The claimed unpaid wages remain outstanding.

II. Procedural History

This action to collect unpaid wages was initiated by Complaint on September 19, 2019 pursuant to the Pennsylvania Wage Payment and Collection Law [hereinafter referred to as the "WPCL"]. The Complaint was served on Defendant Marcello on September 26, 2019 and was served on Defendant Market Street South, Inc. d/b/a Bright Banners on September 27, 2019. Defendants filed Preliminary Objections on November 6, 2019 to which Plaintiff responded on November 26, 2019. On the same date, Plaintiff filed Preliminary Objections to Defendants' Preliminary Objections. Oral argument was held on January 24, 2020. During the argument, the Court granted Defendants' request for additional time to file a supplemental brief on the issue relating to the statute of limitations, which was to be filed by February 24, 2020. Having received no such brief, the Court will now rule on Defendants' Preliminary Objections to Plaintiff's Complaint.

III. Defendants' Preliminary Objections

Defendants set forth eight preliminary objections to support their position that Plaintiff's Complaint be dismissed.

"When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections." *Richmond v. McHale*, 35 A.3d 779, 783 (Pa. Super. 2012).

The Court will address each of the eight objections individually.

A. Failure to Timely File

Defendants first argue that Plaintiff's Complaint must be dismissed for failure to adhere to the three-year statute of limitations required by 43 P.S. § 260.9a(g). In two of their exhibits attached to the Complaint, Claimants identify seven "week ending dates" worked that were before September 19, 2016 – three years before Plaintiffs' Complaint was filed.[1] Defendants assert that the inclusion of these wages invalidates the entire claim. While it is true that there are dates listed that fall outside the three-year period, Defendants' first objection fails.

First, the affirmative defense of statute of limitations must be plead in New Matter. Pa.R.C.P. No. 1030(a). Raising this defense in preliminary objections is not proper. *See, e.g., Devine v. Hutt*, 863 A.2d 1160, 1167 (Pa. Super. 2004).

Second, even if Defendants properly raised the statute of limitations defense, they have provided no case law to support their assertion that all of Plaintiff's claims should be dismissed. To the contrary, the three-year limitation is measured from the date the delinquent payment was due. *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1181 (3d. Cir. 1991). Section 260.9a(g) states that "[n]o administrative proceedings or legal action shall be instituted under the provisions of this act for the collection of unpaid wages or liquidated damages more than three years *after the day on which such wages were due and payable* . . . ." 43 P.S. § 260.9a(g) (emphasis added). Further, as noted in Plaintiff's Brief in Opposition, Plaintiff does not claim any unpaid wages due prior to three years from the time the Complaint was filed. *Brief In Opposition at page 4.*

While the Court could find no case law and Defendants have failed to point to any directly addressing this issue, it can be compared to the general principle of Pennsylvania law regarding contracts:

"[I]f less than an entire agreement is invalid, and the invalid provision is not an essential part or the primary purpose of the agreement, then the remaining portions of the agreement are enforceable." *Freedman v. Tozzoli*, 71 Pa.D.&C.4th 353, 368 (C.P. Lehigh 2005), *citing*

[1] Those dates are 4/17/16, 4/24/16, 7/10/16, 7/17/16, 7/24/16, 7/31/16, and 9/18/16.

Restatement (Second) of Contracts § 184(1) (1981). As Judge Aldisert stated, to accept Defendants' position is to "throw the baby out with the bath water." *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 223 (3d Cir. 2003).

Based on the clear wording of the statutory language, the Court is not convinced that a few dates that fall outside the three-year statute of limitations will bar the entire claim. However, any wages that would have been due and payable prior to September 19, 2016 cannot be recovered under the WPCL.

For these reasons, regarding the unpaid wages that were due and payable after September 19, 2016, Defendants' first preliminary objection is overruled.

B. Failure to Notify

Next, Defendants argue that Plaintiffs failed to give them notice, pursuant to Section 260.9a(c) which states:

> The employe or group of employes, labor organization or party to whom any type of wages is payable may, in the alternative, inform the secretary of the wage claim against an employer or former employer, and the secretary shall, unless the claim appears to be frivolous, immediately **notify the employer or former employer of such claim by certified mail.**

43 P.S. § 260.9a(c) (emphasis added).

Plaintiff has averred that notices were sent to Defendants by certified mail on May 1, 2018. The letters were addressed as follows:

> Ms. Kathryn Marcello
> Bright Banners
> 1765 Ravine Road
> Williamsport, PA 17701

According to Plaintiff, the notices were sent to Defendant Marcello in her capacity as an employer or former employer. Both certified envelopes were returned as “Unclaimed.” Defendant Marcello has admitted to refusing the notice and claims that she could not open the mail because she no longer owned Bright Banners and that Plaintiff should have been aware of this fact. However, Defendant Marcello had spoken with Plaintiff’s investigator prior to receiving the mailings and was informed that they were intended for her.

“Notice” is not defined in the relevant Chapter and thus, it is worth a short discussion regarding the meaning of notice. We therefore look to a the common definitions. Notice is defined as, “Legal notification required by law or agreement . . . .” Black's Law Dictionary (11th ed. 2019). Actual notice is defined as, “Notice given directly to, or received personally by, a party.” *Id.* Finally, constructive notice is defined as, “Notice arising by presumption of law from the existence of facts and circumstances that a party had a duty to take notice of . . . .” *Id.* Here, it is conceivable that Defendant Marcello received actual notice of the claims since she not only had been personally told about the claims but also because she knew that the mailings were intended for her yet nevertheless intentionally refused them.

Even so, the bottom line is that the statute only requires that the notice of the claim be sent by certified mail to the employer or former employer. There is no indication in the statute that the certified mail had to be successfully received by the former employer. Plaintiff’s Complaint

clearly establishes that the notices were sent by certified mail to Defendant Marcello and Bright Banners – the employer or former employer of Claimants. By Defendant's own admission, the notices were refused. The facts as plead in Plaintiff's Complaint are sufficient to survive preliminary objections.

Therefore, Defendants' second preliminary objection is overruled.

C. Failure to Immediately Notify

Defendant next points out that, despite Section 260.9a(c) requiring *immediate* notification, the written, certified notices were sent to Defendants nearly six months after the claims were filed with the Department and approximately three months after Defendant Marcello sold Bright Banners. Defendants claim that, because of this gap, the notice was "mailed to the wrong entity, business files were inaccessible to these named Defendants, the employees had all moved with the business to a new location under new ownership defeating any attempts that might have been made to investigate the matter or effectively defend it." *Defendants' Brief in Support at page 11.*

In response, Plaintiff asserts that immediate notification by certified mail is not a prerequisite for bringing a claim for unpaid wages under the WPCL but rather is a step the Department must take before it can recover the ten percent penalty for failure to pay the claim.

The relevant section, in its entirety, states:

> The employe or group of employes, labor organization or party to whom any type of wages is payable may, in the alternative, inform

> the secretary of the wage claim against an employer or former employer, and the secretary shall, unless the claim appears to be frivolous, **immediately notify the employer or former employer of such claim by certified mail.** If the employer or former employer fails to pay the claim or make satisfactory explanation to the secretary of his failure to do so within ten days after receipt of such certified notification, thereafter, the employer or former employer shall be liable for a penalty of ten percent (10%) of that portion of the claim found to be justly due. A good faith dispute or contest as to the amount of wages due or the good faith assertion of a right of set-off or counter-claim shall be deemed a satisfactory explanation for nonpayment of such amount in dispute or claimed as a set-off or counter-claim. The secretary shall have a cause of action against the employer or former employer for recovery of such penalty and the same may be included in any subsequent action by the secretary on said wage claim or may be exercised separately after adjustment of such wage claim without court action.

43 P.S. § 260.9a(c) (emphasis added).

"Under Pennsylvania rules of statutory construction the civil provisions of the WPCL are to be ***liberally*** construed." *Bowers v. NETI Techs., Inc.*, 690 F. Supp. 349, 354 (E.D. Pa. 1988); 1 Pa.C.S.A. § 1928(c) (emphasis added). Section 260.9a is titled "Civil Remedies and Penalties." It does not speak to the elements of a cause of action under the WPCL but rather addresses the options Claimants have as it relates to the process of recovery and penalties. Finding no case law on the matter, we turn our attention to the Rules of Statutory Construction.

If possible, the goal in interpreting a statute is to determine the legislative intent. 1 Pa.C.S.A. § 1921(a). In doing so, the Court may consider the following assumptions:

(1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.

(2) That the General Assembly intends the entire statute to be effective and certain.

(3) That the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth.

(4) That when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language.

(5) That the General Assembly intends to favor the public interest as against any private interest.

1 Pa.C.S.A. § 1922.

The Court agrees that the "immediate notification" provision applies only to the ability to recover a 10% penalty, and not to the right to bring a claim at all. "The underlying purpose of the WPCL is to remove some of the obstacles employees face in litigation by providing them with a statutory remedy when an employer breaches its contractual obligation to pay wages . . . and the primary goal of the WPCL is to make whole again, employees whose wages were wrongfully withheld by their employers." *Oberneder v. Link Computer Corp.*, 674 A.2d 720, 722 (Pa. Super. 1996), *aff'd*, 696 A.2d 148 (Pa. 1997).

Clearly, the legislature's intent was to make it easier for employees to recover unpaid wages and thus, it seems counter-intuitive to hold that failure to provide immediate notice by certified mail of a claim will bar the

entire claim. To hold to the contrary would be unreasonable and against public interest.

Plaintiff further argues that, even though not written, Defendant Marcello did receive immediate *verbal* notice. In November of 2017 – the month that the wage claims were filed and three months before the business was sold – Plaintiff's investigator notified Ms. Marcello via telephone and "had additional contact with Marcello in the following months in an effort to secure her cooperation in paying Claimants their wages." *Plaintiff's Brief in Opposition at page 9*. Defendant has shown nothing to dispute this assertion.

Again, "immediately" is not defined in the chapter. Black's Law Dictionary provides two definitions:

1. Notice given as soon as possible.

2. More commonly . . . notice that is reasonable under the circumstances.

Black's Law Dictionary (11th ed. 2019).

Defendants received verbal notice of the claims in the same month that the claims were filed and received written, certified notice about six months later. As Defendants state, "immediate notification avoids mishaps such as a business being sold, its records being removed to another business, and corporate officers being changed." *Defendants' Brief in Support at page 10*. The Court finds this argument frivolous since Defendant Marcello knew of the claims prior to selling the business and thus could have avoided the very "mishaps" she identifies. That being

said, section 260.9a(c) is very clear that the immediate notice must be by **certified mail** and mentions no other means of notification. Plaintiff gave immediate verbal notice but failed to give immediate written notice by certified mail as required.

Therefore, due to Plaintiff's failure to provide immediate notice by certified mail, Defendant's preliminary objection is sustained to the extent that Plaintiff cannot recover a 10% penalty but is overruled to the extent that the remainder of Plaintiff's suit is not barred.

D. Inappropriate Damages of Penalty and Liquidated Damages

In its Complaint, Plaintiff alleges a total of $8,480 of liquidated damages pursuant to 43 P.S. § 260.10 and a 10% penalty of the wages due which totals $3,392 pursuant to 43 P.S. § 260.9a(c). Defendant argues that, because she received no notice of the Claimants' Wage Complaints, the inclusion of Penalty and Liquidated damages is inappropriate.

Regarding additional damages and penalties, the Wage Payment and Collection Law states:

> If the employer or former employer fails to pay the claim or make satisfactory explanation to the secretary of his failure to do so **within ten days after receipt of such certified notification**, thereafter, the employer or former employer shall be liable for a penalty of **ten percent (10%) of that portion of the claim found to be justly due.**

43 P.S. § 260.9a(c) (emphasis added).

> Where wages remain unpaid for **thirty days beyond the regularly scheduled payday**, or, in the case where no regularly scheduled

> payday is applicable, for **sixty days beyond the filing by the employe of a proper claim** or for sixty days beyond the date of the agreement, award or other act making wages payable, or where shortages in the wage payments made exceed five percent (5%) of the gross wages payable on any two regularly scheduled paydays in the same calendar quarter, and no good faith contest or dispute of any wage claim including the good faith assertion of a right of set-off or counter-claim exists accounting for such non-payment, the **employe shall be entitled to claim, in addition, as liquidated damages an amount equal to twenty-five percent (25%) of the total amount of wages due**, or five hundred dollars ($500), whichever is greater.

43 P.S. § 260.10 (emphasis added).

Our analysis will begin with Section 260.9a(c). In the Complaint, Plaintiff alleges that it notified Defendants of the wage claims by certified mailings on May 1, 2018, which were returned as unclaimed on May 18, 2018. As discussed in more detail above, the Court finds that, while Plaintiff did provide immediate verbal notice to Defendants, it did not provided immediate notice by certified mail as required by the statute. Therefore, a ten percent (10%) penalty is inappropriate under the circumstances.

Plaintiff additionally avers in paragraphs 13 and 24 that the "wages have remained unpaid for more than 30 days beyond [both Claimants'] regular paydays or more than 60 days after proper claim was made without the existence of any good-faith contest or dispute that they are due and owing to [Claimants]." Since the Complaint sufficiently pleads these statutory liquidated damages, they penalty is appropriately asserted.

Therefore, Defendants' preliminary objection is sustained as it relates to § 260.9a(c) and overruled as it relates to § 260.10.

E. Failure to Plead Necessary Contractual Elements

Defendants next argue that Plaintiff failed to sufficiently plead all of the necessary elements of a contract claim. Specifically, Defendants argue that Plaintiff's Complaint is lacking in that it does not state whether the employment agreement was written or oral and does not describe the terms of the agreement with more specificity.

"Pennsylvania is a fact-pleading state; a complaint must not only give the defendant notice of what the plaintiff's claim is and the grounds upon which it rests, but the complaint must also formulate the issues by summarizing those facts essential to support the claim." *Lerner v. Lerner,* 954 A.2d 1229, 1235 (Pa. Super. 2008).

To establish a claim under the WPCL, Plaintiff must first establish the existence of a contract between the employee and employer. *Blackwell-Murray v. PNC Bank*, 963 F.Supp.2d 448, 470 (E.D. Pa. 2013). "'[T]to sustain [a] wage-payment claim[ ], [the plaintiff] must demonstrate that he was contractually entitled to compensation and that he was not paid.'" *Id.*, *citing Divenuta v. Bilcare, Inc.,* No. Civ.A.09–3657, 2011 WL 1196703, at *9 (E.D.Pa. Mar. 30, 2011).

In its Complaint, the Department sufficiently pleads the above necessary facts. Plaintiff pled the following:

a. That Defendant Marcello is a statutory employer pursuant to the WPCL (Compl. ¶ 4);
b. That Claimants delivered to Plaintiff assignments of their wage claims (Compl. ¶¶ 7 and 18);

c. The dates of each Claimants' employment with Defendants (Compl. ¶¶ 8 and 9);

d. The agreed-upon hourly rate and bi-weekly hours worked by each Claimant (Compl. ¶¶ 9-10 and 20-21);

e. The specific wage loss calculation for each Claimant (Compl. ¶¶ 11-12 and 22-23);

f. The calculation of additional damages (Compl. ¶¶ 13, 15-16, 24, and 26-27; and

g. That Plaintiff provided notice of the claims to Defendants by certified mail (Compl. ¶¶ 14 and 25).

The exhibits attached to the Complaint state that no written employment agreement existed between the employees and employer and further demonstrate the exact weeks and hours worked as well as the rate of pay and total gross wages earned. This information and documentation is sufficient to give Defendants notice of what grounds the claims are based and enough information to allow them to prepare a defense.

Defendant also argues that they are prejudiced because they are unsure of whether the vacation time, holiday time, sick leave, and health coverage claimed is part of the contract or otherwise demanded. They are also unsure by which entity Claimants were employed. As pointed out in its Brief in Opposition, Defendants are not only unprejudiced, they are in the best position to determine this information. "A more specific pleading should not be required as to matters about which the objecting party has,

or should have, as much or better knowledge than the pleader." *Paz v. Com., Dep't of Corr.*, 580 A.2d 452, 456 (Pa.Cmwlth. 1990). The issues complained of by the Defendants can be resolved through the discovery process, as the Plaintiff has pled sufficient details to allow meaningful discovery to be conducted.

Again, the Court must consider all material facts set forth in the Complaint pleadings as true, as well as all inferences reasonably deducible therefrom, when deciding how to rule on preliminary objections. Thus, accepting all facts plead as true, the Plaintiff has a well-plead Complaint. Defendants' arguments and concerns are better addressed through the discovery process and, if applicable, in a later dispositive motion. For these reasons, Defendants' fifth preliminary objection is overruled.

F. Failure to Invite a Good Faith Dispute or Contest of Claims

Defendants next argue that Plaintiff failed to exhaust a statutory remedy by failing to engage in a good-faith dispute or contest of claims, as required by 43 P.S. 260.9a(c). However, the Court's reading of this statute does not suggest that Plaintiff ***must*** engage in a good faith dispute or contest of claims with the Defendants. In fact, the statute is silent except to say that "[a] good faith dispute or contest as to the amount of wages due or the good faith assertion of a right of set-off or counter-claim shall be deemed a satisfactory explanation for nonpayment of such amount in dispute or claimed as a set-off or counter-claim." 43 P.S. § 260.9a(c).

Thus, the “good faith dispute or contest” argument only applies when Defendant asserts an explanation for nonpayment.

Regardless, Plaintiff alleges that it mailed a certified letter to Defendants and states in its Brief in Opposition that it even made direct contact with Defendant Marcello via telephone in an attempt to discuss the claims.

Defendants’ sixth preliminary objection is overruled.

G. Failure to Plead Elements Necessary to Pierce the Corporate Veil

Defendants argue that, in order to hold Defendant Marcello liable, Plaintiff must first pierce the corporate veil. They further state that the Complaint is devoid of any averments to support the claim that Ms. Marcello should be held individually liable because there are no allegations to show that she had an active role in the policy-making or decision-making of the business.

Section 260.2a defines “employer” to include “every person, firm, partnership, association, corporation, receiver or other officer of a court of this Commonwealth and any agent or officer of any of the above-mentioned classes employing any person in this Commonwealth.” 43 P.S. § 260.2a. “The legislature had some purpose for including an agent or officer of a corporation employing persons in the Commonwealth within the definition of employer, and the only apparent purpose was to subject these persons to liability in the event that a corporation or similar entity

failed to make wage payments. Its reason for doing so is obvious. Decisions dealing with personnel matters and the expenditure of corporate funds are made by corporate officers and it is far more likely that the limited funds of an insolvent corporation will be used to pay wages and that a work force will be reduced while the corporation is still capable of meeting its obligations to its employee if personal liability is imposed on the persons who make these decisions." *Ward v. Whalen*, 18 Pa. D.&C.3d 710, 712 (C.P. Alleghany 1981). Further, to hold an agent or officer liable, they must have played an active role in the decision making including advisement on matters of pay or compensation. *Hirsch v. EPL Techs., Inc.*, 910 A.2d 84, 88 (Pa. Super. 2006).

As stated above, when ruling on preliminary objections, the Court must accept all well-plead facts as true as well as all reasonably deducible inferences therefrom. When viewed in this light, Plaintiffs' Complaint is sufficiently plead to sustain a claim against Defendant Marcello. There are averments contained in Plaintiff's Complaint that are sufficient to establish at this stage of the proceedings that Defendant Marcello was the owner of the business who set policies and made the decisions, particularly regarding the employees' pay.

Plaintiff avers facts specific enough to meet the statutory definition of an employer. It is directly averred, and therefore is accepted as true, that Defendant Marcello "is a statutory employer pursuant to the definition of 'employer' . . . ." Complt. ¶ 4. It is further averred that Ms. Marcello "was an officer and agent of Market Street South, Inc. with respect to the

matters alleged in this Complaint." Complt. ¶ 3. Kathryn Marcello is listed in both Wage Complaints as the "contact person (against whom wage claim is filed)." The Wage Complaint also states that the reason for refusal of payment is "payed to [sic] many personal bills on company money." The second Wage Complaint states that the employer's reason for refusal was: "Her son needed rent money; she was on a cruise and tour of Europe; Fraud alert: Co. Debit Card used in Europe, draining account, etc." It can be reasonably inferred from these statements that Ms. Marcello was in charge of the decision making as it related to compensation, since it is alleged that she was spending corporate funds on personal matters.

Even if Plaintiff is required to "pierce the corporate veil," there are sufficient facts plead. The purpose of the doctrine of piercing the corporate veil is to remove the statutory protection otherwise insulating an individual from liability. *Newcrete Prod. v. City of Wilkes-Barre*, 37 A.3d 7, 12–13 (Pa.Cmwlth. 2012), *as amended* (Feb. 24, 2012). It is an extraordinary remedy and there is a strong presumption against it. *Lumax Indus., Inc. v. Aultman,* 669 A.2d 893 (Pa. 1995). Pennsylvania has no bright-line test for when it is appropriate to pierce the corporate veil; however, the Courts consider a number of factors when making this determination. *Id.*at 895. The factor most relevant to the present case is the "substantial intermingling of corporate and personal affairs." *Id.* Courts have held that allegations of intermingling is sufficient to state a claim against an individual Defendant. *Com. by Preate v. Events Int'l, Inc.*, 585 A.2d 1146, 1150 (Pa.Cmwlth. 1991).

As discussed above, it is clear that Plaintiff has alleged that Ms. Marcello co-mingled the business' money with her personal money from the written statements made by both Claimants in their Wage Complaints attached to Plaintiff's Complaint. For these reasons, Plaintiff's Complaint is sufficiently plead. This is a subject that can be more developed through the discovery process and dealt with in a dispositive motion if warranted. Defendants' seventh preliminary objection is overruled.

H. Failure to Join an Indispensable Party

Finally, Defendants argue that Bright Banners is an indispensable party to the present action and, because Plaintiff does not name Bright Banners as party, the action should be dismissed entirely.

Defendants assert that Bright Banners was created on February 22, 1985 and Market Street South, Inc. was created on December 7, 1994. Claimant Schneider states she was hired on September 6, 1993 – before Market Street South, Inc. was in existence.

The Defendants as listed are: "Market Street South, Inc. d/b/a Bright Banners and Kathryn Marcello, Individually." The Commonwealth of Pennsylvania's Department of State website records indicate that Market Street South, Inc. is currently an active, incorporated business created in 1995. Bright Banners is listed as a "fictitious name" which was incorporated in 1985 and remains active. Finally, there is also an entity titled "Bright Banners, Inc." which was incorporated in 1986; however, the status is listed as cancelled. Therefore, although no explanation has been

provided by Defendant, it is conceivable that Bright Banners, Inc. was created first and was doing business as Bright Banners. At some point, Bright Banners Inc. was cancelled and Market Street South, Inc. was incorporated and began doing business as Bright Banners. How the businesses were structured at the time of Claimants' hire is irrelevant to the present cause of action.

Defendants state that Bright Banners is the entity that should have been listed as a Defendant to this action. However, a corporation may assume another name for business purposes and be sued either in the corporate name or in the assumed name. *Philadelphia Sch. of Beauty Culture v. Haas*, 78 Pa.D.&C. 97, 100–01 (C.P. Philadelphia 1952). Defendants nevertheless assert that Bright Banners is an unnamed, indispensable party.

"The guiding inquiry . . . of indispensability is whether justice can be done in the absence of the parties asserted to be necessary. Such an inquiry entails an assessment of the particular facts and circumstances presented in each case." *City of Phila. v. Commonwealth*, 838 A.2d 566, 584 (Pa. 2003). Preliminary objections raising an issue regarding failure to join a party cannot be determined from facts of record. *Note* Pa.R.C.P. No. 1028(c)(2).

Plaintiff states in its Brief in Opposition that it is in possession of paystubs issued by Market Street South, Inc. including a paystub issued after the sale of Bright Banners on January 25, 2018. *Brief in Opposing at page 17*. Both Claimants state in their Wage Complaints that their

employer is Market Street South/Bright Banners. It is clear that Market Street South, Inc. and Bright Banners were treated as one entity and the names used interchangeably at all times relevant to Claimants' wage claims.

Even assuming Plaintiff incorrectly named the Defendant, it would have an opportunity to amend the pleading. "If the proper party was sued but under the wrong designation, the correction will be allowed. However, where the wrong party was sued and the amendment is designed to substitute another, distinct party, it will be disallowed." *Anderson Equip. Co. v. Huchber*, 690 A.2d 1239, 1241 (Pa. Super. 1997), *citing Hamilton v. Bechtel,* 657 A.2d 980 (Pa. Super. 1995). Important in this determination is whether different assets will be subject to liability by allowing the amendment. *Anderson*, 690 A.2d at 1241, *citing Powell v. Sutliff,* 189 A.2d 864 (Pa. 1963).

Defendants have admitted that Bright Banners ceased to exist independently from Mark Street South, Inc. What is relevant is, at the times relevant to each claim, Bright Banners and Market Street South, Inc. were interchangeable names and treated as one entity. Without additional documents, it cannot be presumed by the Court that the person or entity that bought Bright Banners also inherited the prior debts and liabilities. Only Defendant is in a position to provide this information. Should this be the case, Defendant has the option to join Bright Banners as an additional Defendant.

Defendants' final objection is overruled.

ORDER

And now, this 6th day of March, 2020, it is hereby ordered that Defendants' Preliminary Objections to Plaintiff's Complaint are **SUSTAINED** to the extent it relates to Plaintiff's ability to recover the 10% penalty, as described in Section D above. The remainder of the objections are **OVERRULED**.

BY THE COURT,

_____
Hon. Ryan M. Tira, Judge

RMT/ads

CC: Tara Taylor, Esquire
Commonwealth of Pennsylvania
Department of Labor and Industry
Office of Chief Counsel
Tenth Floor, Labor & Industry Bldg.
Harrisburg, PA 17121
Matthew J. Marcello, Esquire
Marcello Law Office
11676 Perry Highway, Suite 1302
Wexford, PA 15090
Gary Weber, Esquire, Lycoming Reporter