

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 12-CV-21799-MGC

JERRY ROBIN REYES,

Plaintiff,

vs.

June 11, 2013

MIAMI, FLORIDA

GOYA FOODS, INC. d/b/a GOYA FOODS of
FLORIDA, FUTURE FORCE, INC., FRANK
R. UNANUE, and ADELA GONZALEZ,

Defendants.

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TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE MARCIA G. COOKE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Tuesday, June 11, 2013

1 having stipulated to FLSA jurisdiction, the plaintiff would
2 rest his case, at this time.

3 THE COURT: All right.

4 Ladies and gentlemen, I have it is approximately
5 3:15, 3:15. I'm going to let you take your afternoon break,
6 at this time.

7 Remember, you know a lot more than you did this
8 morning when you first came in, a lot more than you did even
9 when we came back from lunch. That makes the temptation
10 really strong to want to discuss this case amongst yourselves.
11 Remember you can't. I'll see you all back at 3:15.

12 All rise for the ladies and gentlemen of the jury.

13 THE JURY: 3:15, Your Honor?

14 THE COURT: 3:30, I'm sorry. You know, sooner or
15 later, I'm going to learn to tell time.

16 (The jury retired from the courtroom 3:13 p.m.)

17 THE COURT: Counsel for defendant, are there any
18 motions before we proceed to defense case?

19 MR. ELKINS: Yes, Your Honor. May I approach the
20 podium?

21 THE COURT: You may.

22 MR. ELKINS: Thank you.

23 Your Honor, at this time, the Defense moves for a
24 judgment as a matter of law in this case arguing that through
25 the plaintiff's case, the Defense exemptions -- the outside

1 sales exemption has been proven such that no reasonable jury
2 could find in favor of the plaintiff.

3 In order to prove up the outside sales exemption,
4 *Gregory versus First American Title, Inc.*, the 11th Circuit is
5 pretty clear as to what the exemption is. An outside sales
6 employee is an employee whose primary duty --

7 THE COURT: Slow down a little bit, Counsel. My ears
8 don't work that fast.

9 MR. ELKINS: I'm sorry. My apologies, Your Honor.

10 An outside sales employee is an employee whose
11 primarily duty is making sales or obtaining orders or
12 contracts for services, or for the use of facilities for which
13 consideration will be paid by the client or customer, and who
14 is customarily and regularly engaged away from the employer's
15 place or places of business in performing such primary duty.

16 In this case, Your Honor, during the plaintiff's case
17 in chief and through witnesses that were listed by the
18 plaintiff as supporting the plaintiff's job duties, it is
19 clear that no reasonable jury could find in favor of this
20 plaintiff.

21 Raul Necuze and Vladamir Fouchard, listed as
22 employees who would support the plaintiff's position, stated
23 clearly and unambiguously that their main and primary duty was
24 to make sales. Not only, Your Honor, did they sell product
25 that was out of stock or already in the stores, but they

1 testified clearly that they were also required to and in fact
2 did sell new product to the store managers, and that these
3 orders were approved by those managers.

4 They testified very clearly that they worked with
5 little to no supervision. They testified that they were paid
6 on a commission basis, and they testified that they did not
7 report to Goya's offices for their regular customary duties.
8 In fact, what they stated was that they only reported to
9 Goya's offices once a month to attend sales meetings.
10 Additionally, Goya's corporate representative, Armando
11 Martinez, and the plaintiff's direct supervisor, supported
12 these exact statements. Every single witness called by
13 plaintiff who works for Goya has testified that the primary
14 duty of these employees is to sell Goya Food products.

15 Interestingly, these witnesses also testified about
16 those duties that plaintiff claims are not part of sales:
17 Stocking the product, rotating the product, and cleaning the
18 product. Plaintiff's own witnesses, again, witnesses provided
19 by plaintiff, testified that the stocking, the rotation, and
20 the cleaning is also part of the sales process.

21 THE COURT: Mr. Elkins, what should I make, if
22 anything, of the fact that the plaintiff himself admitted
23 under oath he never met one sales goal, he never sold
24 anything, but he worked in the job for, what?

25 MR. ELKINS: Five years.

1 THE COURT: Four or five years?

2 MR. ELKINS: That's a very good question, Your Honor.
3 The fact of the matter is the plaintiff just didn't do his
4 job. You're right, he testified that he didn't make sales.
5 That doesn't mean that he converts himself to a nonexempt
6 employee by not performing a job that is exempt.

7 THE COURT: So incompetence doesn't exempt you from
8 the -- incompetence doesn't exempt you from the exemption.

9 MR. ELKINS: Ever more succinctly said, yes, that's
10 exactly my point. His being incompetent doesn't then convert
11 him to being a nonexempt employee. And, in fact, if you look
12 at the job description, which has been admitted into evidence
13 in this case, and I know job descriptions aren't conclusive,
14 but the testimony supports it, the first line in summary of
15 the job is sells Goya Food products.

16 The only thing that's happening here is that the
17 plaintiff just didn't do the sales. He testified under oath
18 that he was provided sales goals every day by Roberto
19 Echavarria. He testified that his coworkers were provided
20 those same sale goals. His coworkers support that testimony.
21 It doesn't make any sense that a reasonable jury would find
22 that he received sales goals every day, his coworkers received
23 sales goals every day, but he is not a salesman, and he is not
24 supposed to sell.

25 The fact of the matter is he just didn't do the job;

1 and therefore, no reasonable jury could find in favor of this
2 plaintiff at this juncture. He has effectively proven the
3 outside sales exception through his case.

4 THE COURT: All right. Let me hear from the
5 Plaintiff.

6 MR. ELKINS: Thank you, Your Honor.

7 MR. ZIDELL: Yes, Judge.

8 The outside sales exemption is an affirmative defense
9 that the defendant has to prove by clear and affirmative
10 evidence, and that's the Eleventh Circuit case of *Klinedinst*
11 *versus Swift Investments*, 260 F.3d 1251. It is not the duty
12 of the plaintiff to disprove it, it's the duty of the
13 defendant to actually prove this exemption.

14 Now, this is -- the courts have --

15 THE COURT: What more would the Plaintiff --
16 Defendant have to produce? Even though there were witnesses
17 called in your case, they called the area manager, they called
18 the direct supervisor, they called -- you called those two
19 individuals who are the supervisor, you called other people
20 who have the same job title, all of whom said, I have the same
21 job that the plaintiff -- the supervisor -- so let's say the
22 supervisor has got it all wrong, that for whatever reason,
23 they thought this should be -- which we know happens in FLSA
24 litigation all the time, the employer, for whatever reason,
25 wants to keep a job as an outside salesperson, and they really

1 should be under the FLSA requirements. That happens, that's
2 why we have litigation. That's why we have these cases.

3 But the other salesmen said, This is my job, this is
4 what I do; when I go there, I do these things.

5 You have Mr. Fouchard who has been doing this for, I
6 think he said 18 or 19 years. I would have to disbelieve
7 every witness except your client.

8 MR. ZIDELL: Judge, I respectfully disagree on that,
9 and I'll tell you why. Number one, putting aside bias for
10 these witnesses who are full-time employees currently --

11 THE COURT: You called them.

12 MR. ZIDELL: Judge, whether I called them or not, it
13 doesn't matter.

14 THE COURT: But I have them in front of me, and I
15 have the ability to look at them and judge is there something
16 about them that makes the fact that they are employees, in and
17 of themselves, biased. And I have no other evidence, other
18 than your client, to contradict what the area manager says,
19 what the direct supervisor says, what his own coworkers say.

20 MR. ZIDELL: Can I --

21 THE COURT: No, but I'm just saying, point me to it.

22 MR. ZIDELL: I'm trying, I'm trying. If I can just
23 be heard on this one point.

24 The case law originating back in the Fifth Circuit in
25 1975, the *Skipper* case, that we have cited to in our summary

1 judgment pleadings, as well as I'll do now, at 512 F.2d 409,
2 which is a Fifth Circuit case, 1975 -- it's binding on the
3 Eleventh Circuit because it was decided prior to that 1980
4 case -- states that route men who are delivering products to
5 preestablished clients on preestablished routes and merely
6 restocking goods and not engaging in meaningful sales are not
7 part of this exemption. And it has been --

8 THE COURT: I agree with you, but that's not what he
9 was doing.

10 MR. ZIDELL: Well, he said --

11 THE COURT: The only reason that's -- the only reason
12 that he was doing that is because he just wasn't doing his
13 job.

14 Now, if we want to come down on, and I'm certain by
15 the time we finish this case, depending on how I rule, there
16 might be someone in the HR department who is going to become
17 much more active in how they discipline and go over these sale
18 workers, but the only reason he was a, quote unquote, route
19 man was because that's what he did.

20 MR. ZIDELL: But, Judge, they haven't produced --

21 THE COURT: He was incompetent.

22 MR. ZIDELL: But none of the witnesses who have
23 testified have stated that they know what the plaintiff has
24 done. Matter of fact, I asked them. Mr. Fouchard, do you
25 know what the plaintiff did? Did you ever work with him? Can

1 you tell us what he did? How much time he spent selling
2 versus --

3 THE COURT: He never met a sales goal.

4 MR. ZIDELL: Right.

5 THE COURT: Never.

6 MR. ZIDELL: So how could --

7 THE COURT: So that meant he wasn't selling.

8 MR. ZIDELL: So how could sales be his primary duty
9 if he wasn't selling?

10 THE WITNESS: He was incompetent.

11 MR. ZIDELL: Judge, that's your opinion, but we have
12 a jury deciding credibility here.

13 I mean, this is a classic case where you have a
14 plaintiff who is no longer working for the defendant. The
15 defendant has its full-time employees coming and testifying as
16 to what they do and --

17 THE COURT: Full-time employees, sir, that you
18 subpoenaed. If there was anyone else who you thought might
19 have supported your client, you could have subpoenaed a Publix
20 manager. You could have subpoenaed -- they said that the Goya
21 products are located throughout the Publix store. You have
22 them in grocery -- make grocery aisles. There is all -- there
23 are a number of people. The mere fact that you called the
24 witness, in your case, does not lead me to believe to discount
25 the testimony. I don't have one shred of evidence, other than

1 the fact that your client never met a sales goal, that all he
2 was was a simple route man.

3 MR. ZIDELL: But he said that that's all he did,
4 ninety-five percent of the time, was just --

5 THE COURT: Because he didn't do his job.

6 MR. ZIDELL: But, Judge, that's your opinion.

7 THE COURT: No, it is not my opinion, it is the
8 facts.

9 MR. ZIDELL: What if --

10 THE COURT: I asked Mr. Echavarria, can you tell me
11 how this compensation is computed. What did he say to me? He
12 said, Judge, this amount comes about because whether Mr. Reyes
13 sold one can of beans, this is what Publix would have paid
14 regardless. This is the just -- just for being on the shelf.

15 He was able to eke out a living from this sales job
16 because by virtue of the town that we live in with a large
17 population that seeks out Goya products. The products move
18 themselves off the shelves.

19 MR. ZIDELL: Right, that is our point is that --

20 THE COURT: But he didn't -- listen, his job, he just
21 didn't do it. Now, what you are trying to do is back door an
22 exemption in the incompetence, and that doesn't work.

23 MR. ZIDELL: But, Judge, I don't think it's
24 incompetence. I think that for the defendant --

25 THE COURT: Not meeting your sales goal once during

1 the two-year period for which you are obligated under this
2 lawsuit isn't incompetence -- not once?

3 MR. ZIDELL: But Mr. Echavarria doesn't have any
4 documents to prove that, that's based on his memory; and the
5 plaintiff denies that that ever happened.

6 THE COURT: He said he didn't. Your own client, out
7 of his own lips, said, I never met sales goal.

8 MR. ZIDELL: No. The question was did you -- did
9 Mr. Echavarria ever tell you that you didn't meet a sales
10 goal; and at first he said, "Yes, many times." And then he
11 backtracked and said, "I didn't understand the question. No,
12 he never told me." And that was his own response to that
13 question, Judge.

14 THE COURT: Never sold, he said he never sold; he
15 never met a goal; that he got the -- he got the voice mail
16 messages from Mr. Echavarria all of the time, but he never
17 once met a goal.

18 MR. ZIDELL: So doesn't it lead to a conclusion then,
19 at least arguably, for purposes --

20 THE COURT: No. You know what it leads to a
21 conclusion? It leads me to the conclusion of two things:
22 One, for whatever reason -- and I don't know -- your client
23 did not do his job; and two, for whatever reason -- I'm
24 certain after this lawsuit, it will not happen again -- Goya
25 Foods did not actively discipline him on his failure to sell.

1 His incompetence of selling does not create the exemption.

2 MR. ZIDELL: But why isn't that an argument for the
3 jury, at closing, for Defense Counsel to make as much as it is
4 ours to say that --

5 THE COURT: Because the law allows me --

6 MR. ZIDELL: Yes.

7 THE COURT: -- when I look at the exemptions here,
8 Plaintiff's primary duty was to make sales; didn't. He was
9 given a sales goal each week; didn't do that. He was paid
10 upon the sales that he secured; he didn't do that.

11 He was just paid, basically, on the run-of-the-mill
12 whatever normally that Publix ordered, he got it.

13 He set his own schedule. In fact, he himself said he
14 took off every Wednesday. All of his work was performed away
15 from Goya's place of business. He said that. He said that on
16 his own. And everybody else backed up the fact that they only
17 went to Goya's headquarters, at the most, once a month for
18 these sales meetings.

19 The cleaning of the shelves -- I said this at sidebar
20 because I was having great concern. I'm hired at Macy's as a
21 sales clerk. I'm hired to sell dresses, but if Mr. Macy, if
22 such a person, God rest his soul, still exists, if he came
23 into my department and he saw the dresses hanging hither and
24 yon, he would say how are you going to sell dresses when they
25 are not hanging neatly? They are not pressed. They are not

1 clean. Yes, my major job is selling, but no one is going to
2 buy a dress that's balled up on the floor or unclean or not
3 orderly. If you want to sell yourself or sell your goods,
4 they have to be presented.

5 Echavarria talked about the day he went there when
6 your client was sick. The goods were expired. The cans were
7 dirty. The shelves were in disarray. If I were the shopper
8 and I came to buy Goya Foods at that store, I would pass to
9 the next product.

10 If I were the manager of that store, and I had a
11 choice between Goya products and whoever else sold me the next
12 kind of thing that I needed, I wouldn't buy that one because
13 the area is in disarray.

14 MR. ZIDELL: Well, Judge, I think you are taking the
15 evidence in the light most favorable to the Defendant, and I
16 think that for purposes --

17 THE COURT: If I took all of the evidence, which I
18 should do, in your favor. I only have one witness, your
19 client. All of the other evidence contradicts your client.

20 MR. ZIDELL: Even though Mr. Martinez, the vice
21 president of sales, says that Mr. -- that he agrees that our
22 client could have sold, just by punching into his computer and
23 sending it back to Goya without getting the manager's
24 approval, and he said that that was something that happened
25 all of the time.

1 THE COURT: That it happened all of the time.

2 MR. ZIDELL: Right. And that's what the *Skipper*
3 decision says.

4 THE COURT: No, no, no. It happens, but that does
5 not mean that that was his primary duty. He is still able to
6 earn a living by being lazy.

7 MR. ZIDELL: But, Judge, he is not doing it by
8 selling. And for the Defendant to enjoy this exemption --

9 THE COURT: But it's the duty.

10 MR. ZIDELL: -- they have to prove that sales was his
11 primary duty.

12 THE COURT: But it is his duty. He just didn't do
13 it.

14 MR. ZIDELL: But, Judge, he was employed there for
15 five years. Are you -- is that the Court's opinion is that he
16 could be employed for five years as a lazy bum, incompetent,
17 and just get by on the system because he lives in a Hispanic
18 community, and he --

19 THE COURT: I didn't say that. I said, he lives in a
20 community where the products are very popular, which he does.

21 MR. ZIDELL: Right. And so you think that for five
22 years Goya just put up with this for no good reason and just
23 kept him on the books.

24 THE COURT: Mr. Echavarria basically said that. He
25 said he should have been gone.

1 MR. ZIDELL: Well, then --

2 THE COURT: But that I finally had my last straw,
3 like so often happens in the employment arena, it is not the
4 thing, it's the cumulation of things, and that's what happened
5 in this case.

6 That day he went to the store and he realizes, my
7 goodness, not only do I have an employ that never met their
8 sales goal, not only do I have an employee where the managers
9 keep calling me and telling me he is not doing his work, I
10 come in, and basically, he is under my supervision, and I can
11 imagine if Mr. Martinez had shown up at that store instead of
12 Mr. Echavarria that day, that Mr. Echavarria would have had
13 something to answer to. So in order to keep his job,
14 Mr. Echavarria says, I got to clean this place up. I have got
15 to sell product because he is -- his men are answering to him.

16 The incompetence of the employee to sell does not
17 change the nature of the position.

18 MR. ZIDELL: But it does the exemption, and that's
19 what we are trying to say is that when the employee's primary
20 duty is not sales, for whatever reason --

21 THE COURT: This is what would happen --

22 MR. ZIDELL: -- they can't claim the exception.

23 THE COURT: This is what would happen.

24 MR. ZIDELL: Yeah.

25 THE COURT: All that someone -- their job would be to

1 be an outside commissioned salesman, which is your client's
2 job, and they would not do their job and then rely on the
3 exemption, and that's not what it was for. That's not what --
4 the exemption was not meant to protect lazy people.

5 MR. ZIDELL: Well, then why didn't they pay him by
6 the hour?

7 THE COURT: Because that wasn't his job.

8 MR. ZIDELL: What was his job then?

9 THE COURT: His job was to sell.

10 MR. ZIDELL: But he didn't do that, and so,
11 therefore, they can't assert the exemption, Judge. And none
12 of their witnesses even know what he did.

13 THE COURT: Well, maybe somewhere there might be a
14 judge that agrees with you. I'm not that judge today,
15 Mr. Zidell.

16 MR. ZIDELL: Okay.

17 THE COURT: For the record, taking the evidence in
18 the light most favorable to the nonmoving party, because I
19 have only evidence from the Plaintiff that his job was
20 different, and based upon every account, the only reason his
21 job was different was that the Plaintiff failed to do his job.
22 The Defendant's motion is granted.

23 The case is dismissed.

24 Mr. Blanford, I need to go and discuss with the jury,
25 please.