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

CASE NO. 12-CV-23609-JLK

ALFREDO OCAMPO PINO and all others
similarly situated under 29 U.S.C. 216(B),

Plaintiff,

v.

PAINTED TO PERFECTION CORP., et al,

Defendants.
_____/

**FINAL SUMMARY JUDGMENT**

**THIS CAUSE** comes before the Court upon Defendants' Motion for Summary Judgment (DE 7), filed July 8, 2013.[1] Therein, Defendants state that summary judgment is appropriate on their behalf in this action under the Fair Labor Standards Act ("FLSA") because they never grossed more than $500,000, which is insufficient to qualify under FLSA coverage. 29 U.S.C. § 203(s)(1)(A)(i) (mandating coverage exists only where "an enterprise whose annual gross volume of sales made or business done is not less than $500,000…"). Plaintiff opposes summary judgment, both on the basis that Defendants' gross volume of sales may exceed $500,000 for the relevant time period and because he believes he is covered as an individual doing business in interstate commerce.

[1] Defendants' Motion for Summary Judgment has been fully briefed by the parties, as Plaintiff filed his Response in Opposition (DE 8) on July 19, 2013, to which Defendants filed their Reply (DE 12) on July 30, 2013.

## I. Factual Background

According to the Complaint (DE 1), Plaintiff was at all relevant times a resident of Miami, Florida. *Id.* at ¶ 2. He worked as a yacht painter in Defendants' marine services company, which the record reflects is located in Miami-Dade County, Florida. *Id.* at ¶ 3, 9. His Complaint is based upon his allegations that he did not receive overtime pay to which he is entitled under the FLSA.

## II. Legal Standard for Summary Judgment

Summary judgment is appropriate where the pleadings and supporting materials establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If the record as a whole could not lead a rational fact-finder to find for the nonmoving party, there is no genuine issue of fact for trial. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The moving party bears the burden of pointing to the part of the record that shows the absence of a genuine issue of material fact. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997). Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the nonmoving party to go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324; *see also Chanel, Inc. v. Italian Activewear of Fla., Inc.*, 931 F.2d 1472, 1477 (11th Cir. 1991)

(holding that the nonmoving party must "come forward with significant, probative evidence demonstrating the existence of a triable issue of fact.").

On a motion for summary judgment, the court must view the evidence and resolve all inferences in the light most favorable to the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, a mere scintilla of evidence in support of the nonmoving party's position is insufficient to defeat a motion for summary judgment. *See id.* at 252. If the evidence offered by the nonmoving party is merely colorable or is not significantly probative, summary judgment is proper. *See id.* at 249–50.

## III. Discussion

Defendants now move for summary judgment on the basis that Plaintiff cannot meet his burden of showing that the FLSA applies to Defendants. In particular, Defendants note that under the explicit terms of the FLSA, for a business to qualify as an "enterprise" the following conditions must be met:

> (i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and
>
> (ii) is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level that are separately stated)

29 U.S.C. §203(s)(1)(A). Unless both those conditions are met, there can be no enterprise liability under the FLSA.

Here, Defendants have produced evidence demonstrating that the business in which Plaintiff was employed never grossed $500,000 or more. In particular, Defendants have produced their tax returns for 2008, 2009, 2010, and 2011, a profit and loss statement prepared by Defendants' accountant for 2012, and a sworn affidavit, all of which reflect that Defendants never had an annual revenue exceeding $482,266.74 during the relevant time period. *See, e.g.*, (DE 7-1, 7-2).

Plaintiffs have not rebutted that production,[2] and assert no basis for this Court to find that enterprise coverage under the FLSA is appropriate. In response to Defendants' production, Plaintiffs state that "Defendants dealt with many transactions involving cash payments" and "Defendant Nazario asked me to cash checks written out to 'Cash' into my bank account and to return the cash specifically to him." (DE 9 at ¶ 3). However, after nearly a year of discovery, Plaintiff has produced no evidence supporting these statements.

This cannot serve as a sufficient basis to create an issue of material fact for resolution by a jury. Plaintiff failed to produce any credible evidence to this Court that would support Plaintiff's contention that Defendants had an annual gross volume of sales made or business done in excess of $500,000. 29 U.S.C. § 203(s)(1)(A)(ii). Thus, Plaintiff has adduced no evidence to support a finding of enterprise coverage under the FLSA.

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[2] Indeed, Plaintiff concedes in his Statement of Material Facts in Opposition to Defendants' Motion for Summary Judgment (DE 9) that, "I cannot admit or deny that Defendants are not an enterprise engaged in commerce as I cannot verify if the tax returns are accurate." *Id.* at ¶ 3.

Given the totality of the unrebutted evidence submitted to the Court by the parties and a review of the tax returns and financial statement attached by Defendants, the Court finds that Defendants do not qualify as an "enterprise" within the meaning of the FLSA. Therefore, the FLSA cannot apply in the absence of an alternative avenue of coverage.

In its Response in Opposition to Summary Judgment, Plaintiff claims that individual coverage under the FLSA represents such an avenue of recovery. Plaintiff cites several cases which permit a certain type of employee to be covered by the FLSA even in the absence of a finding of enterprise. So, for example, Plaintiff cites *Thorne v. All Restoration Services, Inc.*, 448 F.3d 1264, 1266-67 (11th Cir. 2006), which denied FLSA coverage but held the FLSA may apply to employees working for an instrumentality of interstate commerce or one who regularly uses instrumentalities of interstate commerce in their employment, regardless of the gross revenue of the business for which the employee works.

Plaintiff contends that he was an employee who regularly worked on boats destined for interstate commerce, and therefore he qualifies for individual coverage under the FLSA. In support, Plaintiff swears that he worked on boats with non-domestic registrations, that he spoke with certain captains of the boats he worked on, who informed him that upon completion of his work the boats would be traveling to other states or foreign nations, and that Defendant Nazario was known to travel outside of Florida to perform work on boats. (DE 8 at 3-4).

Neither Plaintiff's work in a Miami boat yard painting a yacht with a foreign registration, Plaintiff's interactions in a Miami boat yard with captains of yachts with foreign registrations, nor Defendant's travel outside the state of Florida to perform work supports Plaintiff's claim of individual FLSA coverage. Furthermore, where the only evidence before the Court suggests that any involvement Plaintiff had with the foreign-registered yachts and their captains was limited to intrastate activities, (DE 9, ¶ 6; DE 7-1) he cannot be considered an employee who regularly uses instrumentalities of interstate commerce or an employee working for an instrumentality of commerce within the meaning of *Thorne*. *Accord Thorne*, 448 F.3d at 1265-69; *Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1316 (11th Cir. 2011) (denying FLSA coverage on similar basis).

Therefore, notwithstanding the FLSA's liberal intent to "protect all covered workers from substandard wages and oppressive working hours," such intent cannot be broadened to cover even those employees that fall outside the scope of FLSA coverage. Therefore, summary judgment is appropriately entered on Defendants' behalf on all counts.

## IV. Conclusion

Accordingly, after considering the parties' filings and the record before it, it is **ORDERED**, **ADJUDGED** and **DECREED** that:

1. Summary Judgment **(DE 7)** be, and the same is, hereby **GRANTED** in favor of Defendants and the case is **DISMISSED with prejudice,** with jurisdiction retained for determination of fees and costs, if any.
2. The Pre-Trial Conference and Trial, set for October 4, 2013 and November 18, 2013, respectively, be, and the same are, hereby **CANCELLED.**
3. All pending motions are **DENIED as moot** and the Clerk shall **CLOSE** the case.

**DONE AND ORDERED** in Chambers at the James Lawrence King Federal Justice Building and United States Courthouse, Miami, Florida, this 25th day of September, 2013.

JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE

**cc: All counsel of record.**