

MICHAEL FAILLACE & ASSOCIATES, P.C.
Michael Faillace, Esq.
NM 60 EAST 42ND STREET, SUITE 4510
NEW YORK, NEW YORK 10165
PHONE: 212-317-1200
FAX: 212-317-1620
ATTORNEYS FOR PLAINTIFF

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
VICTOR R. RUBI CABRERA, *individually
and on behalf of others similarly situated,*

Plaintiff,

-against-

GUITA CONSTRUCTION CORP. (d/b/a
GUITA CONSTRUCTION), FELIX
CONSTRUCTION CORP. (d/b/a FELIX
CONSTRUCTION), and JOSE FELIX
GOMES,

Defendants.

-----X

COMPLAINT

**COLLECTIVE ACTION UNDER
29 U.S.C. § 216(b)**

ECF Case

Plaintiff Victor R. Rubi Cabrera (“Plaintiff Cabrera”), individually and on behalf of others similarly situated, by and through his attorneys, Michael Faillace & Associates, P.C., upon his knowledge and belief, and as against Defendants Guita Construction Corp. (d/b/a Guita Construction), Felix Construction Corp. (d/b/a Felix Construction), and Jose Felix Gomes (collectively the “Defendants”), alleges as follows:

NATURE OF THE ACTION

1. Plaintiff Cabrera is a current employee of Guita Construction Corp. (d/b/a Guita Construction), Inc., Felix Construction Corp. (d/b/a Felix Construction) (“Defendant

Corporations”), and Jose Felix Gomes.

2. Defendants own, operate, and/or control two construction companies located at 3 Gotthardt Street, Newark, NJ 07105 under the names “Guita Construction” and “Felix Construction.”

3. Upon information and belief, Defendant Jose Felix Gomes serves or served as owner, manager, principal or agent of Defendant corporations and through these corporate entities operates or operated the construction companies known as “Guita Construction” and “Felix Construction” as joint or unified enterprises.

4. Plaintiff Cabrera has been employed to work as a construction worker.

5. Plaintiff Cabrera has worked for Defendants in excess of 40 hours per week, without appropriate compensation for the hours over 40 per week that he worked.

6. Defendants have failed to maintain accurate recordkeeping of his hours worked, and have failed to pay Plaintiff Cabrera appropriately for any hours he has worked over 40.

7. Defendants’ conduct extends beyond Plaintiff Cabrera to all other similarly situated employees.

8. At all times relevant to this Complaint, Defendants have maintained a policy and practice of requiring Plaintiff Cabrera and other employees to work in excess of forty (40) hours per week without providing the overtime compensation required by federal and state law and regulations.

9. Plaintiff Cabrera now brings this action on behalf of himself, and other similarly situated individuals, for unpaid overtime wages pursuant to the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq. (“FLSA”), and for violations of the N.Y. Labor Law §§ 190 et seq. and 650 et seq. (the “NYLL”), including applicable liquidated damages, interest, attorneys’ fees

and costs.

10. Plaintiff Cabrera seeks certification of this action as a collective action on behalf of himself, individually, and all other similarly situated employees and former employees of Defendants pursuant to 29 U.S.C. § 216(b).

JURISDICTION AND VENUE

11. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 (federal question); 29 U.S.C. §§ 201 *et seq.* (FLSA); and 28 U.S.C. § 1367(a) (supplemental jurisdiction over state law claims).

12. Venue is proper in this District under 28 U.S.C. § 1391(b) and (c) because all or a substantial part of the events or omissions giving rise to the claims occurred in this district, Defendants maintain their headquarters and offices within this district, and Defendants operate construction companies located in this district. Further, Plaintiff Cabrera has been employed by Defendants in this district.

THE PARTIES

Plaintiff Victor R. Rubi Cabrera

13. Plaintiff Cabrera is an adult individual residing in Hudson County, New Jersey.

14. Plaintiff Cabrera has been employed by Defendants from approximately November 16, 2011 until the present date.

15. Plaintiff Cabrera consents to being a party plaintiff pursuant to 29 U.S.C. 216(b), and brings these claims based upon the allegations herein as a representative party of a prospective class of similarly situated individuals under 29 U.S.C. 216(b).

Defendants

16. At all times relevant to this complaint, Defendants own, operate, and/or control a construction company located at 3 Gotthardt Street, Newark, NJ 07105, under the names “Guita Construction” and “Felix Construction.”

17. Upon information and belief, Guita Construction Corp. and Felix Construction Corp. are corporations organized and existing under the laws of the State of New Jersey.

18. Upon information and belief, these corporations maintain their principal place of business at 3 Gotthardt Street, Newark, NJ 07105.

19. Defendant Jose Felix Gomes is an individual engaging in business in this judicial district during the relevant time period.

20. Defendant Jose Felix Gomes is sued individually in his capacity as, on information and belief, an owner, officer and/or agent of Defendant Corporations.

21. Upon information and belief, Defendant Jose Felix Gomes possesses or possessed operational control over Defendant Corporations, possesses or possessed an ownership interest in Defendant Corporations, and controls or controlled significant functions of Defendant Corporations.

22. Jose Felix Gomes has determined the wages and compensation of the employees of Defendants, including Plaintiff Cabrera, and established the schedules of the employees, maintained employee records, and had the authority to hire and fire employees.

FACTUAL ALLEGATIONS

Defendants Constitute Joint Employers

23. As alleged above, Defendants operate two construction companies located in Hudson County, New Jersey. However, most of the construction projects were situated throughout New York City.

24. Defendants maintain, as their principal place of business, a centralized office located at 3 Gotthardt Street, Newark, NJ 07105.

25. Upon information and belief, Defendant Jose Felix Gomes has possessed operational control over Defendant Corporations, possessed an ownership interest in Defendant Corporations, and controlled significant functions of Defendant Corporations.

26. Defendants are associated and joint employers, act in the interest of each other with respect to employees, pay employees by the same method, and share control over the employees.

27. Each Defendant has possessed substantial control over Plaintiff Cabrera's (and other similarly situated employees') working conditions, and over the policies and practices with respect to the employment and compensation of Plaintiff Cabrera, and all similarly situated individuals referred to herein.

28. Defendants have jointly employed Plaintiff Cabrera, and all similarly situated individuals, and were his (and all similarly situated individuals') employers within the meaning of 29 U.S.C. 201 *et seq.* and the NYLL.

29. In the alternative, Defendants constitute a single employer of Plaintiff Cabrera and/or similarly situated individuals.

30. Upon information and belief, Individual Defendant Jose Felix Gomes operates Defendant Corporations as either alter egos of himself, and/or fails to operate Defendant Corporations as entities legally separate and apart from himself by, among other things:

- a. failing to adhere to the corporate formalities necessary to operate Defendant Corporations as separate and legally distinct entities;

- b. defectively forming or maintaining Defendant Corporations by, among other things, failing to hold annual meetings or maintaining appropriate corporate records;
- c. transferring assets and debts freely as between all Defendants;
- d. operating Defendant Corporations for his own benefit as the sole or majority shareholder;
- e. operating Defendant Corporations for his own benefit and maintaining control over these corporations as closed corporations or closely held controlled entities;
- f. intermingling assets and debts of his own with Defendant Corporations; and
- g. other actions evincing a failure to adhere to the corporate form.

31. At all relevant times, Defendants were Plaintiff Cabrera's employers within the meaning of the FLSA and NYLL.

32. Defendants have had the power to hire and fire Plaintiff Cabrera, have controlled the terms and conditions of employment, and have determined the rate and method of any compensation in exchange for his services.

33. In each year from 2011 to the present, Defendants, both separately and jointly, have had a gross annual volume of sales of not less than \$500,000 (exclusive of excise taxes at the retail level that are separately stated).

34. In addition, upon information and belief, Defendants and/or their enterprise have been directly engaged in interstate commerce. For example, numerous items that have been used in the construction companies on a daily basis, such as paint and sandpaper, are produced outside of the State of New York.

Plaintiff Victor R. Rubi Cabrera

35. Plaintiff Cabrera is a current employee of defendants, primarily employed in performing the duties of a construction worker.

36. Plaintiff seeks to represent a class of similarly situated individuals under 29 U.S.C.216(b).

37. Plaintiff Cabrera has been employed by Defendants from approximately November 16, 2011 until the present date.

38. At all times relevant to this complaint, Defendants have employed Plaintiff Cabrera to work as a construction worker.

39. Plaintiff Cabrera's work duties have required neither discretion nor independent judgment.

40. Plaintiff Cabrera has regularly handled goods in interstate commerce, such as cement, construction tools, sandpaper and other supplies produced outside of the State of New York.

41. Throughout his employment with Defendants, Plaintiff Cabrera has regularly worked in excess of 40 hours per week.

42. From approximately November 2011 until on or about December 2016, Plaintiff Cabrera worked most of the time in construction projects in Manhattan from approximately 7:00 a.m. until on or about 5:00 p.m. Mondays through Saturdays (typically 60 hours per week).

43. From approximately December 2016 until on or about March 2017, Plaintiff Cabrera worked most of the time in construction projects in Manhattan from approximately 7:00 a.m. until on or about 4:00 p.m. three days a week and from approximately 7:00 a.m. until on or 5:00 p.m. for another three days a week (typically 57 hours per week).

44. From approximately March 2017 until the present date, Plaintiff Cabrera has worked most of the time in construction projects in Manhattan from approximately 8:00 a.m. until on or about 5:30 p.m. Mondays through Saturdays (typically 57 hours per week).

45. Throughout his employment with defendants, Plaintiff Cabrera has been paid his wages in cash.

46. From approximately November 2011 until on or about September 2016, Defendants paid Plaintiff Cabrera \$14.00 per hour.

47. From approximately September 2016 until the present date, Defendants have paid Plaintiff Cabrera \$17.00 per hour.

48. Plaintiff Cabrera has not been required to keep track of his time, nor to his knowledge have Defendants utilize any time tracking device, such as sign in sheets or punch cards, to accurately reflect his actual hours worked.

49. Defendants have not provided Plaintiff Cabrera with an accurate statement of wages with each payment of wages, as required by NYLL 195(3).

50. No notification, either in the form of posted notices or other means, has ever been given to Plaintiff Cabrera regarding overtime and wages under the FLSA and NYLL.

51. Defendants have not provided any notice to Plaintiff Cabrera, in English and in Spanish (Plaintiff Cabrera's primary language), of his rate of pay, employer's regular pay day, and such other information as required by NYLL §195(1).

52. Defendants have required Plaintiff Cabrera to purchase "tools of the trade" with his own funds—including 30 pairs of shoes and hammers.

Defendants' General Employment Practices

53. At all times relevant to this Complaint, Defendants have maintained a policy and practice of requiring Plaintiff Cabrera and all similarly situated employees to work in excess of forty (40) hours per week without paying them appropriate overtime compensation as required by federal and state laws.

54. Defendants have not paid Plaintiff Cabrera and similarly situated employees their overtime pay.

55. Defendants have failed to post required wage and hour posters in the workplace, and have not provided Plaintiff Cabrera and all similarly situated employees with statutorily required wage and hour records or statements of their pay received, in part so as to hide Defendants' violations of the wage and hour laws, and to take advantage of the employees' relative lack of sophistication in wage and hour laws.

56. Defendants willfully have disregarded and purposefully evaded the recordkeeping requirements of the FLSA and NYLL by failing to maintain accurate and complete timesheets and payroll records.

57. Defendants have not provided Plaintiff Cabrera and all similarly situated employees with any document or other statement accurately accounting for their actual hours worked and setting forth the minimum wage rate and overtime wage.

58. Plaintiff Cabrera and all similarly situated employees have been paid their wages in cash.

59. Plaintiff Cabrera has been a victim of Defendants' common policy and practices which have violated his rights under the FLSA and New York Labor Law by, *inter alia*, not paying him the wages he is owed for the hours he has worked.

60. Defendants have habitually required Plaintiff Cabrera to work additional hours beyond his regular shifts but have not provided him with any additional compensation.

61. As part of their regular business practice, Defendants have intentionally, willfully, and repeatedly harmed Plaintiff Cabrera by engaging in a pattern, practice, and/or policy of violating the FLSA and the NYLL.

62. Defendants have also failed to provide Plaintiff Cabrera with statutorily required wage and hour records or statements of his pay received, in part so as to hide Defendants' violations of the wage and hour laws, and to take advantage of Plaintiff Cabrera's relative lack of sophistication in wage and hour laws.

63. Upon information and belief, these practices by Defendants have been done willfully to disguise the actual number of hours Plaintiff Cabrera (and similarly situated individuals) have worked, and to avoid paying Plaintiff Cabrera properly for his full hours worked, including overtime compensation.

64. Defendants have engaged in their unlawful conduct pursuant to a corporate policy of minimizing labor costs and denying employees compensation by knowingly violating the FLSA and NYLL.

65. Defendants' unlawful conduct has been intentional, willful, in bad faith, and caused significant damages to Plaintiff Cabrera and other similarly situated current and former employees.

66. Plaintiff Cabrera's experience is representative of all those who were similarly situated, who have worked for Defendants, who have been paid in cash and never received any document or statement that accurately stated the rate of pay or actual number of hours worked.

67. Defendants have failed to provide Plaintiff Cabrera and other employees with wage statements, at the time of each payment of wages, containing: the dates of work covered by that payment of wages; name of employee; name of employer; address and phone number of employer; rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; gross wages; deductions; allowances, if any, claimed as part of the minimum wage; net wages; the regular hourly rate or rates of pay; the overtime rate or rates of pay; the number of regular hours worked, and the number of overtime hours worked, as required by NYLL §195(3).

68. Defendants have failed to provide Plaintiff Cabrera and other employees, at the time of hiring and on or before February 1 of each subsequent year, a statement in English and the employees' primary language, containing: the rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; allowances, if any, claimed as part of the minimum wage, including tip, meal, or lodging allowances; the regular pay day designated by the employer; the name of the employer; any "doing business as" names used by the employer; the physical address of the employer's main office or principal place of business, and a mailing address if different; and the telephone number of the employer, as required by New York Labor Law §195(1).

FLSA COLLECTIVE ACTION CLAIMS

69. Plaintiff Cabrera brings his FLSA overtime compensation and liquidated damages claims as a collective action pursuant to FLSA Section 16(b), 29 U.S.C. § 216(b), on behalf of all similarly situated persons (the "FLSA Class"), *i.e.*, persons who are or were employed by Defendants or any of them, on or after the date that is three years before the filing of the complaint in this case (the "FLSA Class Period").

70. At all relevant times, Plaintiff Cabrera and other members of the FLSA Class were similarly situated in that they have had substantially similar job requirements and pay provisions, and have been subject to Defendants' common practices, policies, programs, procedures, protocols and plans including willfully failing and refusing to pay them the required overtime wages and willfully failing to keep records required by the FLSA.

71. The claims of Plaintiff Cabrera stated herein are similar to those of the other similarly situated employees.

FIRST CAUSE OF ACTION
(VIOLATION OF THE OVERTIME PROVISIONS OF THE FLSA)

72. Plaintiff Cabrera repeats and re-alleges all paragraphs above as though fully set forth herein.

73. Defendants, in violation of 29 U.S.C. § 207(a)(1) of the FLSA, have failed to pay Plaintiff Cabrera and the FLSA class members overtime compensation at rates of one and one-half times the regular rate of pay for each hour worked in excess of forty hours in a workweek.

74. Defendants' failure to pay Plaintiff Cabrera and the FLSA Class members overtime compensation has been willful within the meaning of 29 U.S.C. § 255(a).

75. Plaintiff Cabrera and the FLSA class members have been damaged in an amount to be determined at trial.

SECOND CAUSE OF ACTION
**(VIOLATION OF THE OVERTIME PROVISIONS OF THE
NEW YORK LABOR LAW)**

76. Plaintiff Cabrera repeats and re-alleges all paragraphs above as though fully set forth herein.

77. Defendants, in violation of the NYLL Art. 19 and 12 N.Y.C.R.R. § 142-2.2, have failed to pay Plaintiff Cabrera overtime compensation at rates of one and one-half times the regular rate of pay for each hour worked in excess of forty hours in a workweek.

78. Defendants' failure to pay Plaintiff Cabrera overtime compensation has been willful within the meaning of NYLL § 663.

79. Plaintiff Cabrera has been damaged in an amount to be determined at trial.

THIRD CAUSE OF ACTION
(VIOLATION OF THE NOTICE AND RECORDKEEPING
REQUIREMENTS OF THE NEW YORK LABOR LAW)

80. Plaintiff Cabrera repeats and re-alleges all paragraphs above as though fully set forth herein.

81. Defendants have failed to provide Plaintiff Cabrera with a written notice, in English and in Spanish (Plaintiff Cabrera's primary language), of his rate of pay, regular pay day, and such other information as required by NYLL §195(1).

82. Defendants are liable to Plaintiff Cabrera in the amount of \$5,000, together with costs and attorneys' fees.

FOURTH CAUSE OF ACTION
(VIOLATION OF THE WAGE STATEMENT PROVISIONS
OF THE NEW YORK LABOR LAW)

83. Plaintiffs repeat and re-allege all paragraphs above as though set forth fully herein.

84. Defendants have not provided Plaintiff Cabrera with a wage statement with each payment of wages, as required by NYLL 195(3).

85. Defendants are liable to Plaintiff Cabrera in the amount of \$5,000, together with costs and attorneys' fees.

FIFTH CAUSE OF ACTION
(RECOVERY OF EQUIPMENT COSTS)

86. Plaintiff Cabrera repeats and re-alleges all paragraphs above as though set forth fully herein.

87. Defendants have required Plaintiff Cabrera to pay, without reimbursement, the costs and expenses for purchasing and maintaining equipment and “tools of the trade” required to perform his job, such as tools and boots, further reducing his wages in violation of the FLSA and NYLL. 29 U.S.C. § 206(a); 29 C.F.R. § 531.35; N.Y. Lab. Law §§ 193 and 198-b.

88. Plaintiff Cabrera has been damaged in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Cabrera respectfully requests that this Court enter judgment against Defendants:

(a) Designating this action as a collective action and authorizing prompt issuance of notice pursuant to 29 U.S.C. § 216(b) to all putative class members, apprising them of the pendency of this action, and permitting them promptly to file consents to be Plaintiffs in the FLSA claims in this action;

(b) Declaring that Defendants have violated the overtime wage provisions of, and associated rules and regulations under, the FLSA as to Plaintiff Cabrera and the FLSA class members;

(c) Declaring that Defendants have violated the recordkeeping requirements of, and associated rules and regulations under, the FLSA with respect to Plaintiff Cabrera’s and the FLSA class members’ compensation, hours, wages, and any deductions or credits taken against wages;

(d) Declaring that Defendants' violation of the provisions of the FLSA has been willful as to Plaintiff Cabrera and the FLSA class members;

(e) Awarding Plaintiff Cabrera and the FLSA class members damages for the amount of unpaid overtime wages, and damages for any improper deductions or credits taken against wages under the FLSA as applicable;

(f) Awarding Plaintiff Cabrera and the FLSA class members liquidated damages in an amount equal to 100% of their damages for the amount of unpaid overtime wages, and damages for any improper deductions or credits taken against wages under the FLSA as applicable pursuant to 29 U.S.C. § 216(b);

(g) Declaring that Defendants have violated the overtime wage provisions of, and rules and orders promulgated under, the NYLL as to Plaintiff Cabrera and the members of the FLSA Class;

(h) Declaring that Defendants have violated the recordkeeping requirements of the NYLL with respect to Plaintiff Cabrera's compensation, hours, wages; and any deductions or credits taken against wages under the NYLL;

(i) Declaring that Defendants' violations of the NYLL have been willful as to Plaintiff Cabrera and the FLSA Class members;

(j) Declaring that Defendants have violated the provisions of section 191 of the NYLL;

(k) Awarding Plaintiff Cabrera and the FLSA class members damages under the NYLL for the amount of unpaid overtime wages as well as damages for violations of section 191 of the NYLL;

(l) Awarding Plaintiff Cabrera and the FLSA class members liquidated damages in

an amount equal to one hundred percent (100%) of the total amount of unpaid overtime compensation shown pursuant to NYLL § 663 and 198-d;

(m) Awarding Plaintiff Cabrera and the FLSA class members pre-judgment and post-judgment interest as applicable;

(n) Awarding Plaintiff Cabrera and the FLSA class members the expenses incurred in this action, including costs and attorney's fees; and

(o) Providing that if any amounts remain unpaid upon the expiration of ninety days following issuance of judgment, or ninety days after expiration of the time to appeal and no appeal is then pending, whichever is later, the total amount of judgment shall automatically increase by fifteen percent, as required by NYLL § 198(4); and

(p) All such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiff Cabrera demands a trial by jury on all issues triable by a jury.

Dated: New York, New York
December 1, 2017

By: /s/ Michael Faillace
Michael Faillace
MICHAEL FAILLACE & ASSOCIATES, P.C.
60 East 42nd Street, Suite 4510
New York, New York 10165
Telephone: (212) 317-1200
Facsimile: (212) 317-1620
Attorneys for Plaintiff

Michael Faillace & Associates, P.C.

Employment and Litigation Attorneys

60 E 42nd Street, Suite 4510
New York, New York 10165

Telephone: (212) 317-1200
Facsimile: (212) 317-1620

Faillace@employmentcompliance.com

November 27, 2017

BY HAND

TO: Clerk of Court,

I hereby consent to join this lawsuit as a party plaintiff.

(Yo, por medio de este documento, doy mi consentimiento para formar parte de la demanda como uno de los demandantes.)

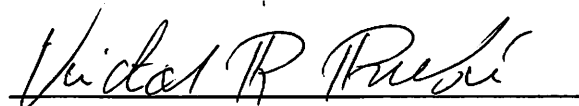
Name / Nombre:

Victor R. Rubi Cabrera

Legal Representative / Abogado:

Michael Faillace & Associates, P.C.

Signature / Firma:



Date / Fecha:

27 de noviembre de 2017

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Construction Worker's Lawsuit Seeks Allegedly Unpaid Overtime Wages](#)
