



Not Reported in F.Supp.2d, 2008 WL 926375 (S.D.Fla.)  
(Cite as: 2008 WL 926375 (S.D.Fla.))

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United States District Court, S.D. Florida,  
Miami Division.

Jorge GUZMAN, Plaintiff,  
v.

IRMADAN, INC.; and Dan Pasqualucci, Defendants.

No. 07-23289-CIV.  
March 4, 2008.

Jamie H. Zidell, Miami Beach, FL, for Plaintiff.

Chris Kleppin, Glasser Boreth Ceasar & Kleppin,  
Barry G. Feingold, Plantation, FL, for Defendant.

### ORDER

CECILIA M. ALTONAGA, District Judge.

\*1 **THIS CAUSE** came before the Court upon Defendants' Motion to Dismiss Plaintiff's Complaint for Lack of Subject Matter Jurisdiction, [or] in the Alternative, Request to Convert Motion to Dismiss into a Motion for Summary Judgment (the "Motion") [D.E. 23], filed on February 27, 2008. On December 18, 2007, Plaintiff, Jorge Guzman, filed his Complaint alleging Defendants violated the overtime provisions of the Fair Labor Standards Act ("FLSA"). Defendants' Motion seeks dismissal of the Complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction under the FLSA. In the alternative, Defendants request their Motion be treated as a motion for summary judgment under Rule 56. A status conference was held on March 4, 2008 to determine the proper course to proceed in this action.

To establish jurisdiction for an overtime violation under the FLSA, the plaintiff employee must show either, (1) individual coverage-that the employee was engaged in commerce or in the production of goods for commerce; or (2) enterprise coverage-that the employer was engaged in commerce

or in the production of goods for commerce. *See* 29 U.S.C. § 207(a)(1). The plaintiff employee is covered individually if the employee is "directly participating in the actual movement of persons or things in interstate commerce." *Thorne v. All Restoration Servs., Inc.*, 448 F.3d 1264, 1266 (11th Cir.2006). The employer is subject to enterprise coverage where it "has employees engaged in commerce or in the production of goods for commerce ... and is an enterprise whose annual gross volume of sales made or business done is not less than \$500,000." 29 U.S.C. § 203(s). In their Motion, Defendants assert that neither basis for jurisdiction under the FLSA exists here.

Determining the existence of individual or enterprise coverage implicates both the jurisdictional basis and a requisite element of Plaintiffs claim. A finding that Guzman is not engaged in commerce within the meaning of the FLSA or that Defendant's gross sales are less than \$500,000 are factual determinations relevant both to subject matter jurisdiction and the merits of the claim. "Where, as here, a factual attack on subject matter jurisdiction also implicates an element of the cause of action, a district court should 'find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiffs case' under the Rule 56 summary judgment standard." *Navarro v. Broney Automotive Repairs, Inc.*, No. 07-cv-21014, 2008 WL 320326, at \*3 n. 2 (S.D.Fla. Jan.29, 2008) (quoting *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir.1990)).

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

(1) Defendants' Motion [D.E. 23] is converted into a motion for summary judgment under Rule 56.

(2) The parties may engage in limited discovery regarding the issues relevant to subject matter jurisdiction under the FLSA between the date of

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this Order and **April 7, 2008**.

\*2 (3) Plaintiff shall file a memorandum in opposition to Defendants' Motion **on or before April 7, 2008**. Defendants may file a reply in the time permitted by the Federal Rules.

**DONE AND ORDERED.**

S.D.Fla.,2008.  
Guzman v. Irmadan, Inc.  
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