IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

WEI GUO SHI and LI MING YAN, individually and on behalf of all other employees similarly situated,

Plaintiffs,

v. Case No. 17-cv-2900-MSN-cgc

YUM'S CHINESE RESTAURANT D/B/A YUM'S SUBS and MEI LING LIN A/K/A MEI LING CHEN,

Defendants.

ORDER GRANTING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56

Before the Court is the Motion of Defendants, Mei Ling Lin a/k/a Mei Ling Chin and Yum's Chinese Restaurant d/b/a Yum's Subs, for Summary Judgment Pursuant to Rule 56, filed October 25, 2018 ("Motion"). (ECF No. 27.) Plaintiffs responded on November 20, 2018. (ECF No. 30.) Defendants filed a reply on December 11, 2018.

For the following reasons, Defendants' Motion is **GRANTED,** except insofar as it requests the Court award Defendants their costs and reasonable attorney's fees.

BACKGROUND

Defendant Mei Ling Lin is the owner of Yum's Chinese Restaurant, which she operates as a sole proprietorship. (ECF No. 30-1 at PageID 249.) Defendant Yum's Chinese Restaurant is in the business of selling food to consumers at its location in Memphis, TN. (ECF No. 30-1 at PageID 255.) Plaintiffs allege that they were employed by Defendants as cooks from May 2016 to October

2016[1] and worked approximately seventy-five and a half (75.5) hours per week during that time. (ECF No. 1 at PageID 2, 4; ECF No. 30-3 at PageID 267; ECF No. 30-4 at PageID 270.) Plaintiffs allege that they were paid a fixed rate of $3,100 per month for their work. (ECF No. 1 at PageID 4.) Defendants deny this and assert that the only time Plaintiffs worked in the restaurant was for less than a full week in 2016 when Plaintiffs visited the Memphis area for the purpose of exploring the possibility of opening their own restaurant. (ECF No. 27-2 at PageID 84.) Defendants allege that during Plaintiffs' visit to Memphis, Plaintiffs helped Defendant Lin's husband in the restaurant's kitchen as cooks, and that Defendant Lin paid them cash as casual labor. (ECF No. 27-2 at PageID 84.)

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[1] On April 23, 2019, Plaintiffs filed a Motion for Leave to File an Amended Complaint. (ECF No. 37.) The stated purpose of the amendment is to reflect that Plaintiff Yan's employment with Defendant commenced in September 2016 instead of May 2016. (*Id.* at PageID 470.) Attached to the motion is a redline of the Proposed First Amended Collective Action Complaint. (ECF No. 37-1.) The redline reflects proposed changes to be made to paragraph 6 of the original Complaint as follows:

> 6. Plaintiffs Wei Guo Shi and Li Ming Yan worked as restaurant workers for Defendants at its 3141 Perkins Road, Memphis TN 38118 restaurant location. ~~They worked primarily as cooks where they prepared and cooked food from May 2016 to October 2016.~~ Plaintiff Wei Guo Shi was employed as a cook from May 2016 to October 2016. Plaintiff Li Ming Yan was employed as a cook from September 2016 to October 2016. Plaintiffs regularly worked in excess of 40 hours per week without receiving all the compensation they were due under the FLSA. Plaintiffs Wei Guo Shi's and Li Ming Yan's consent are attached as Exhibit A.

Rule 15(a) declares that leave to amend "shall be freely given when justice so requires." The Supreme Court has held that leave to amend should normally be granted unless there is some "apparent or declared reason" not to allow the amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962). One reason for not allowing an amendment is that the amendment would be futile. *Id.* This Court finds that Plaintiffs' proposed amendment would be futile because it would not alter the analysis on the issue of Defendants' annual gross volume of sales. Even if Plaintiff Yan worked for Defendants for four fewer months, this does not change the year at issue, 2016, or any other part of the analysis herein. Accordingly, Plaintiff's Motion for Leave to File an Amended Complaint is **DENIED**.

On December 14, 2017, Plaintiffs filed an action against Defendants to recover unpaid overtime compensation and liquidated damages. (ECF No. 1 at PageID 1.) Plaintiffs assert that Defendants failed to pay them overtime compensation as required by the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"). Plaintiffs allege that Defendants employ other restaurant workers who also work in excess of forty hours per week without being paid overtime compensation. (ECF No. 1 at PageID 5–6.)

In the instant motion before the Court, Defendants assert that Plaintiffs have failed to show Defendants are covered under the FLSA's enterprise coverage.[2] (*See* ECF Nos. 27-4 & 34.) Defendants assert that they are not engaged in interstate commerce and that they do not have an annual gross volume of sales in excess of $500,000. (ECF No. 27-4 at PageID 158–60; ECF No. 34 at PageID 282, 287–88.) In support, Defendants attached an affidavit along with several tax and business records. (ECF Nos. 27-2, 27-3, 27-5.)

In their response in opposition, Plaintiffs contend that Defendants' submission of tax returns is insufficient for purposes of summary judgment on the issue of annual dollar volume for enterprise coverage under the FLSA. (ECF No. 30 at PageID 244–46.) Plaintiffs also offer their own estimate of Defendants' gross volume of sales. (ECF No. 30 at PageID 247.)

Defendants' reply brief reasserts its arguments as to each element of enterprise coverage under the FLSA, and Defendants provide under seal a minimally redacted copy of Defendants' Schedule C from Defendants' 2016 Federal Income Tax Return in support thereof. (ECF Nos. 34 & 35.)

[2] Defendants' initial motion also asserts there is no individual coverage under FLSA, but Plaintiffs concede in their response that individual coverage does not apply in this case. (ECF No. 30 at PageID 239 n. 1.)

JURISDICTION

The Court has federal-question jurisdiction. Under 28 U.S.C. § 1331, United States district courts have original jurisdiction "of all civil actions arising under the Constitution, laws, or treaties of the United States." Plaintiffs allege Defendant violated provisions of the FLSA. (ECF No. 1 at PageID 1.) That claim arises under the laws of the United States. *See* 28 U.S.C. § 1331.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56, on motion of either party, the court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party "bears the burden of clearly and convincingly establishing the nonexistence of any genuine [dispute] of material fact, and the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." *Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128, 1133 (6th Cir. 1986); *see* Fed. R. Civ. P. 56(a). "A fact is 'material' for purposes of summary judgment if proof of that fact would establish or refute an essential element of the cause of action or defense." *Bruederle v. Louisville Metro Gov't*, 687 F.3d 771, 776 (6th Cir. 2012).

When confronted with a properly supported motion for summary judgment, the nonmoving party must set forth *specific facts* showing that there is a genuine dispute for trial. *See* Fed. R. Civ. P. 56(c) (emphasis added). A genuine dispute for trial exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). It must provide "significant probative evidence" to defeat a proper summary judgment motion. *Anderson*, 477 U.S. at 249. The district court has no duty to

search the record for such evidence. *See* Fed. R. Civ. P. 56(c)(3); *InterRoyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989). The nonmovant has the duty to identify specific evidence in the record that would be sufficient to justify a jury decision in its favor. *See* Fed. R. Civ. P. 56(c)(1); *InterRoyal Corp.*, 889 F.2d at 111. "When the non-moving party fails to make a sufficient showing of an essential element of his case on which he bears the burden of proof, the moving parties are entitled to judgment as a matter of law and summary judgment is proper." *Martinez v. Cracker Barrel Old Country Store, Inc.*, 703 F.3d 911, 914 (6th Cir. 2013) (quoting *Chapman v. UAW Local 1005*, 670 F.3d 677, 680 (6th Cir. 2012) (en banc)).

"Summary judgment is an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action[,] rather than a disfavored procedural shortcut." *FDIC v. Jeff Miller Stables*, 573 F.3d 289, 294 (6th Cir. 2009) (internal quotation marks and citations omitted).

DISCUSSION

A. Coverage under the FLSA

There are two ways in which employees may demonstrate coverage under the FLSA. First, employees may enjoy "enterprise coverage" if they are "employed in an enterprise engaged in commerce or the production of goods for commerce." *Kowalski v. Kowalski Heat Transfer Co.*, 920 F. Supp. 799, 083 (N.D. Ohio 1996). Alternatively, employees may have "individual coverage" if they are directly "engaged in commerce or in the production of goods for commerce." *Id.* In this case, Plaintiffs concede that individual coverage does not apply. (ECF No. 30 at PageID 239 n. 1.) Instead, Plaintiffs assert that there is enterprise coverage. (ECF No. 30 at PageID 239.)

Relevant to the claim of enterprise coverage here, the FLSA provides that an "[e]nterprise engaged in commerce or in the production of goods for commerce" to be an enterprise that

> (A)(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)(i) & (ii). In other words, there are two prongs that must be met to establish enterprise coverage: (1) the "commerce" prong, and (2) the "annual gross volume" prong. According to Plaintiffs' Complaint, Plaintiffs were employed by Defendant for approximately six months in 2016 (ECF No. 1 at PageID 2), so the two prongs for enterprise coverage must be satisfied for 2016. The Court will first address the second prong regarding Defendant's annual gross volume of sales.

Defendants assert that Defendants' annual gross volume of sales for 2016 was well below the requisite $500,000. (ECF No. 27-4 at PageID 153.) Defendants have provided copies of Schedule C from Defendants' 2016 Federal Income Tax Return, which reflects gross receipts or sales of $225,637 for 2016. (ECF No. 27-5 at PageID 162; ECF No. 35 at PageID 423.) Defendants have also submitted copies of Defendants' Tennessee State and Local Sales and Use Tax Return SLS 450 from January 1, 2016 through December 31, 2016. (ECF No. 27-3.) These returns reflect total gross sales of $225,637 for 2016. (*Id.*) Finally, with their reply, Defendants submitted copies of business records for sales in 2016 along with copies of billing statements from Defendants' credit/debit card processer. (ECF No. 34-4; ECF No. 34-2 at PageID 296.) These records reflect nearly identical amounts of gross sales as those shown on Defendants' monthly Tennessee State and Local Sales and Use Tax Returns. (ECF No. 34-4.) Defendants have

submitted an affidavit verifying the authenticity of the Schedule C and other business records and that they accurately reflect Defendants' gross sales. (ECF No. 27-2 at PageID 82–83; ECF No. 34-2 at PageID 295–98.)

In response to this evidence, Plaintiffs submit their own affidavits in which they assert that they each made approximately 150-200 dishes each day; that each order would consist of two to three dishes on average; and that each order generally cost $20 to $30. (ECF No. 30-3 at PageID 268; ECF No. 30-4 at PageID 271.) Plaintiffs also assert that Defendants took over ten orders of party platters each week and that those party platters cost approximately $100 to $200 per order.[3] (ECF No. 30-3 at PageID 268; ECF No. 30-4 at PageID 271.) Based on these numbers, Plaintiffs provide the following formula and estimate annual gross sales to be at least $780,000: "50 orders x $25 x 6 days x 52 weeks x 2 Plaintiffs = $780,000." (ECF No. 30 at PageID 247 & n. 4.)

Considering the evidence in the light most favorable to Plaintiffs, this Court cannot find that there is a genuine issue of material fact as to whether Defendants' annual gross volume of sales in 2016 was sufficient to meet the FLSA threshold. Plaintiffs' estimates regarding Defendants' gross sales are pure speculation. Plaintiffs were employed solely as cooks for Defendant Lin's restaurant. (ECF No. 30-1 at PageID 259–60.) Plaintiffs never worked as cashiers, and there are no facts in either Plaintiff's affidavit to support that he had knowledge of amounts paid by customers. (*Id*; ECF Nos. 30-3 & 30-4.) Plaintiff's responsibilities in the restaurant were limited to setting up workstations, chopping, peeling, and cutting up vegetables and meat, cooking, checking food while cooking, and "ensuring great presentation before serving dishes." (ECF Nos. 30-3 & 30-4.)

[3] Defendants assert that they do not provide "party platters." (ECF No. 34-2 at PageID 298.) However, Plaintiffs do not appear to include party platter revenue in their annual gross volume of sales estimates.

Nevertheless, Plaintiffs contend that Defendants' tax returns are unreliable and that tax returns are not conclusive evidence of the annual dollar volume amount under the FLSA. (ECF No. 30 at PageID 244.) However, none of the cases Plaintiffs cite in support of their argument are convincing. First, Plaintiffs cite to *Amaya v. Superior Tile & Granite Corp.*, No. 10 Civ. 4525 (PGG), 2012 WL 130425 (S.D.N.Y. Jan. 17, 2012), and argue that, like the defendants in *Amaya*, the Defendant's Schedule C contains inconsistencies and is therefore unreliable. (ECF No. 30 at PageID 244–45.) *Amaya* involved a bench trial, not a motion for summary judgment, and the court found, based upon evidence presented during the bench trial, including the testimony of the defendant's general manager regarding its sales, that the defendant's tax returns were "not reliable indicator's of [the] [defendant's] income and expenses." *Amaya*, 2012 WL 130425, at *5. In contrast, Plaintiffs here have not presented any evidence other than their affidavits to contradict Defendant's tax returns.

Moreover, Plaintiffs' assertions regarding inconsistencies in Defendants' tax returns are not substantiated and appear to result from a misunderstanding regarding the extent of redaction in Defendants' tax returns. Defendants initially submitted the 2016 Schedule C with all amounts in Part I and Part II redacted except for Line 1 in Part I showing gross receipts or sales. (ECF No 27-5 at PageID 162.) Plaintiffs, apparently not realizing these amounts had been redacted, asserted that the lack of normal business expenses on Defendants' tax return made the return unreliable. (ECF No. 30 at PageID 246.) In response, with their reply, Defendants submitted under seal a copy of Defendants' 2016 Schedule C in which these amounts are not redacted. (ECF No. 35.) Without revealing the specifics of the information filed under seal, Defendants' Schedule C contains amounts for insurance expenses, utilities, wages, and other expenses. (*Id.*) Therefore,

Plaintiffs' argument that Defendants' Schedule C is unreliable because it is missing these amounts is unavailing.

Next, Plaintiffs cite to *Arilus v. Joseph A. Deimmanuele, Jr., Inc.*, 895 F. Supp. 2d 1257 (S.D. Fla. 2012). In *Arilus*, the defendant used tax returns, along with affidavits, to establish that its gross receipts for several years were less than the requisite $500,000. 895 F. Supp. 2d at 1262. For one year, however, the defendant's tax return showed gross receipts in excess of $500,000, and the defendant sought to present additional evidence that its gross receipts for that year were not in fact in excess of $500,000. *Id.* at 1264–66. The court noted that "a corporate income tax return provides *strong evidence* of an employers' 'gross volume of sales made or business done,'" but allowed the defendant to nevertheless present evidence to explain why its gross receipts were less than the amount shown on the tax return, saying, "[c]learly, the FLSA does not require a party to prove annual sales only through reliance on a corporate income tax return." *Id.* at 1266 (emphasis added).

Equally unconvincing is Plaintiffs' reliance on *Lopez v. Pereyra*, No. 09-60734-CIV, 2009 WL 3586907 (S.D. Fla. Oct. 27, 2009). In *Lopez*, the plaintiffs served subpoenas *duces tecum* seeking production of the defendants' financial records in order to determine the defendants' "'annual gross volume of sales made or business done' . . . and to challenge the figures on [the] [d]efendants' tax returns." 2009 WL 3586907, at *1. The defendants sought to have the subpoenas quashed and argued they had already provided plaintiffs with copies of their tax returns showing that they did not have at least $500,000 in gross revenue during the years at issue. *Id.* The court refused to quash the subpoenas and noted that "[t]o avoid summary judgment, the non-[moving] party must 'make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. . . [the] [p]laintiffs,

therefore, should be permitted to take discovery of [the] [d]efendants' financial matters to demonstrate, if possible, a genuine issue of material fact as to enterprise coverage." *Id.* at *3.

Unlike the plaintiffs in *Lopez*, Plaintiffs here had five months to conduct discovery to demonstrate that there is a genuine issue of material fact as to the annual dollar volume requirement for enterprise coverage, and yet, the only evidence Plaintiffs offer to rebut Defendants' tax returns and business records is their own affidavits that provide their estimates of the revenue produced by Defendants' business.[4] Simply put, Plaintiffs bare allegations do not amount to the "significant probative evidence" necessary to defeat Defendants' properly supported motion for summary judgment. *See Anderson*, 477 U.S. at 249. Because Defendants have shown that there is no genuine issue of material fact that Defendants' annual gross volume of sales for 2016 was less than the $500,000 threshold amount for enterprise coverage under the FLSA, i.e. that the annual gross volume prong has not been met, the Court need not reach the question of whether Defendant Lin's restaurant was engaged in interstate commerce in 2016.

B. Request for Costs and Fees

In the prayer for relief, Defendants request in conclusory fashion "that the [C]ourt, pursuant to 28 U.S.C. §§ 1914, 1919, 1920, and 1927 award . . . costs and reasonable attorney's fees. (ECF

[4] Plaintiffs' citations to *Monterossa v. Martinez Restaurant Corp.*, No. 11 Civ. 3689 (JMF), 2012 WL 3890212 (S.D.N.Y. Sept. 7, 2012), and *Turcios v. Delicias Hispanas Corp.*, 275 F. App'x 879 (11th Cir. 2008), are also not persuasive. In *Monterossa*, the court found that there was a genuine issue of material fact regarding whether the defendants met the annual dollar volume requirement because the defendant's tax returns were inconsistent with the defendant's own records showing wages and expenses paid in excess of $500,000. 2012 WL 3890212, at *3–4. In *Turcios*, the Eleventh Circuit found that the district court erred in applying the Rule 12(b)(1) standard to find that the plaintiff had not proved the defendant had at least $500,000 in gross sales during the year is issue. 275 F. App'x at 883–84. Among other things, the Eleventh Circuit noted this finding was in error, especially given that the defendant was operated as a cash-only restaurant with no documentation regarding its gross revenue. *Id.* Neither case speaks to the reliability of tax returns, or that tax returns are insufficient for purposes of establishing the annual dollar volume requirement for summary judgment.

No. 27-4 at PageID 160.) Defendants do not provide any factual basis or other support for their request in the Motion. Accordingly, the request for costs and reasonable attorney's fees is **DENIED**.

CONCLUSION

For the foregoing reasons, Defendants are entitled to judgment as a matter of law on the issue of enterprise coverage under the FLSA. Defendants have not, however, provided any support for their request for costs and reasonable attorney's fees pursuant to 28 U.S.C. §§ 1914, 1919, 1920, and 1927. Defendants' Motion for Summary Judgment Pursuant to Rule 56 is therefore **GRANTED IN PART**. All claims in this matter are **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED, this 26th day of April, 2019.

s/ Mark S. Norris
MARK S. NORRIS
UNITED STATED DISTRICT JUDGE