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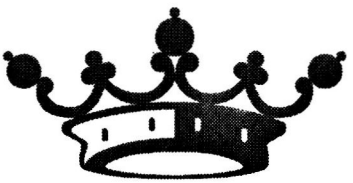

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Recent Decisions in New York Evidentiary Law

Over the course of the past decade, the courts have addressed the growing issue of the right of an undocumented alien plaintiff to recover lost earnings. At a national level, the Supreme Court addressed this issue in 2002 and held that an undocumented alien plaintiff could not recover lost earnings since such a recovery would unduly infringe upon the prohibitions set forth in federal immigration policy. Since that time, the New York courts have addressed this issue at all levels and the Court of Appeals held in 2006 that an undocumented alien plaintiff may recover lost earnings if the plaintiff did not tender fraudulent work authorization documents to the employer. Since that time, the New York courts have struggled with the issue of whether the employer needs to have relied on the false documentation submitted by the undocumented alien plaintiff during the employment process in order to prevent the plaintiff from recovering lost earnings. The Court determinations and the practical implications for anyone handling a claim involving an undocumented alien plaintiff who is pursuing a claim for lost earnings are addressed in this chapter.

In *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 122 S. Ct. 1275 (2002), the plaintiff, an undocumented alien, brought an unfair labor practice claim against the NLRB and, among other damages, sought lost earnings. The Supreme Court of the United States concluded that an award of back pay on an unfair labor practices claim by an undocumented alien who submitted fraudulent documents to obtain the job was prohibited. Id. at 140, 122 S. Ct. at 1278. The Supreme Court concluded that "allowing the National Labor Relations Board to award back pay to illegal aliens would unduly trench upon explicit statutory prohibitions crucial to federal immigration policy, as expressed in IRCA." Id. at 151-53, 122 S. Ct. at 1284-85; see Immigration Reform Control Act of 1986 ("IRCA"), 8 U.S.C. §§ 1324a(b)(1)(A)-(D). In so holding, the Supreme Court reasoned that IRCA "creates a comprehensive scheme prohibiting the employment of undocumented workers in the United States, by establishing an extensive employment verification system." *Hoffman Plastic*, 535 U.S. at 137, 147-48, 122 S. Ct. at 1282; see also *Thorpe v. City of New York*, No. 116924/03 (Sup. Ct. App. Term, 1st Dep't 2005). Accordingly, the Supreme Court ruled that the National Labor Relations Board had no discretion to fashion such a remedy because "awarding back pay to illegal aliens runs counter to policies

underlying IRCA." *Hoffman Plastic,* 535 U.S. at 152, 122 S. Ct. at 1284-85. The Supreme Court further reasoned that "awarding back pay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations because, among other things, the alien cannot mitigate damages, a duty our cases require, without triggering new IRCA violations and breaking United States Immigration Law." Id. at 150-51, 122 S. Ct. at 1284.

The Supreme Court noted IRCA established an extensive employment verification system and "to enforce it, IRCA mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work." Id. at 147, 122 S. Ct. at 1282; *see also* Immigration Reform Control Act ("IRCA"), 8 U.S.C. §§ 1324a(b). If an alien applicant is unable to present the required documentation, the unauthorized alien cannot be hired. *Hoffman Plastic,* 535 U.S. at 147; 8 U.S.C. §§ 1324a (a)(1). An employer may satisfy the verification requirement of IRCA by "examining a document evidencing an individual's employment authorization, including a Social Security card, and a document establishing an individual's identity, such as a State driver's license containing a photograph." *Thorpe*, No. 116924/03; see also Immigration Reform Control Act ("IRCA"), 8 U.S.C. §§ 1324a(b)(1)(A)-(D). "Employers who violate IRCA can be punished by civil penalties" and may be subject to criminal prosecution. 8 U.S.C. §§ 1324a(e)(4)(A), (f)(1). IRCA also makes it a crime for an individual to subvert the verification system by tendering fraudulent documents concerning his or her identity and immigration status, including "any forged, counterfeit, altered, or falsely made document, or any document lawfully issued to or with respect to a person other than the possessor (including a deceased individual) . . . " *Thorpe*, No. 116924/03, *quoting* 8 U.S.C. §§ 1324c(a)(1)-(3); 18 U.S.C. § 1546(b) (2002); see also *Hoffman*, 535 U.S. at 148, 122 S. Ct. at 1282.

Although the *Hoffman* decision related to an award of back pay for an unfair labor practices claim, the decision "reopened the previously well-settled issue of entitlement to lost wages awards in state statute-based or common-law tort actions even though the plaintiff was not legally entitled to work in the United States." *Oro v. 23 East 79th Street Corp.*, 10 Misc. 3d 82, 810 N.Y.S.2d 779 (N.Y. Sup. Ct. App. Term 2005). Prior to *Hoffman*, this issue under New York law, "had been a factor for the jury to consider in

rendering any lost wages award, but did not bar such an award." Id. at 83-84, 810 N.Y.S.2d at 781. After the *Hoffman* decision, the New York Appellate Divisions decisions reached different conclusions as to whether an undocumented worker may maintain a claim for lost earnings based upon projected earnings in this country as an element of damages in a personal injury action.

The Appellate Division, First Department ruled that undocumented workers could recover lost wages only to the extent of earnings they could have made in their home country. See *Sanango v. 200 East 16th Street Housing Corp.*, 15 A.D.3d 36, 788 N.Y.S.2d 314 (N.Y. App. Div. 2004); *Balbuena v. IDR Realty LLC*, 13 A.D.3d 285, 787 N.Y.S.2d 35 (N.Y. App. Div. 2004), *rev'd* 812 N.Y.S.2d 416, 6 N.Y.3d 338 (2006). However, the Second Department held that Hoffman "simply does not apply to awards of damages in personal injury actions." *Majlinjer v. Cassino Contracting Corp.*, 25 A.D.3d 14, 31, 802 N.Y.S.2d 56, 69 (N.Y. App. Div. 2005).

In *Sanango*, the plaintiff, an undocumented laborer, brought an action to recover damages pursuant to N. Y. LAB. LAW § 240(1) (McKinney 2009) for personal injuries he sustained when he fell from a ladder while working on a construction project. *Sanango*, 15 A.D.3d 36, 788 N.Y.S.2d 314. The Appellate Division, First Department concluded that an undocumented worker cannot maintain a claim for future lost earnings in this country, as such a claim is preempted, pursuant to the Supremacy Clause of the United States Constitution, by federal immigration policy embodied in IRCA. *Sanango*, 15 A.D.3d 36, 44, 788 N.Y.S.2d 314, 321; see also 8 U.S.C. §§ 1324a et seq.

The Appellate Division, First Department further concluded that, "[l]ike the Hoffman back pay award, a lost earnings award in this case would compensate an undocumented alien for the United States wages he could have earned only by remaining in the United States illegally, and continuing to work illegally, all the while successfully evading apprehension by immigration authorities . . ." *Sanango*, 15 A.D.3d at 41, 788 N.Y.S.2d at 319. The court noted that "although we previously have held it permissible for the administrator of an undocumented alien's estate to recover wages the decedent might have earned in the United States in *Public Adm'r of Bronx County v Equitable Life Assur. Socy. of U.S.*, 192 A.D.2d 325, 595 NYS2d 478

[1993], we find this holding no longer tenable after *Hoffman*." Id. at 41-42, 788 N.Y.S.2d at 319. Thus, the First Department held that "any such award—including the lost earnings damages at issue here—would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [in enacting IRCA]." Id. In so holding, the court reasoned that "since a state law that so 'frustrate[s] the accomplishment of a federal objective' is preempted by virtue of the Supremacy Clause, it follows ineluctably from Hoffman that New York law, to the extent it would permit plaintiff to recover the wages he would have earned illegally in the United States, is preempted by IRCA." Id. at 42-43, 788 N.Y.S.2d at 319. The First Department further observed, ". . . we believe that plaintiff's acceptance of unlawful employment should be deemed to constitute misconduct contravening IRCA's policies whether or not he submitted false documents so as to expose himself to potential criminal liability." Id. at 42, 788 N.Y.S.2d at 319-20. The court noted that this holding did not bar an undocumented worker from recovering lost earnings based upon projected earnings in their country of origin. Id. at 44, 788 N.Y.S.2d at 321.

The Appellate Division, Second Department disagreed with the conclusion of the First Department in *Sanango*, holding that "IRCA does not preempt an award of lost earnings to an undocumented worker, based upon his projected earnings in the United States." *Majlinjer*, 25 A.D.3d 14, 802 N.Y.S.2d 56. According to the Second Department in *Majlinger*, the First Department's construction of *Hoffman*, (535 U.S. 137, 122 S. Ct. 1275) "to support federal preemption of claims for lost earnings by undocumented workers in state tort actions is overly broad and could be applied to eliminate all rights and protections currently accorded to such individuals." Id. at 23-24, 802 N.Y.S.2d at 64-65. The Second Department observed that "allowing undocumented workers to recover lost earnings, based upon their projected earnings in this country, would further, rather than conflict with, federal immigration policy by denying employers an economic incentive to hire such workers, and would also advance important State policies, including the provisions of the Labor Law requiring employers to maintain safe workplaces." Id. The *Majlinger* court found "no evidence that IRCA, as construed by *Hoffman*, operated to preempt state law governing the right of undocumented aliens to recover damages of any sort in state court, noting that Congress had neither expressly preempted state law in enacting IRCA, nor entirely occupied the fields of workplace safety and common-

law torts." Id. at 21, 802 N.Y.S.2d at 62. The Second Department did, however, conclude that a jury may take into account the plaintiff's undocumented status, "along with the myriad other factors relevant to a calculation of lost earnings." Id. at 30-31, 802 N.Y.S.2d at 68-69.

The holding in *Majlinger* provided guidance to the trial courts in the Second Department on lost earnings claims in personal injury actions as well as in cases where some employers attempted to use *Hoffman* as an excuse to avoid paying undocumented aliens wages for work actually performed, which had been repeatedly rejected by New York courts. See *Oro v. 23 East 79th Street Corp.*, 10 Misc. 3d 82, 810 N.Y.S.2d 779 (N.Y. Sup. Ct. App. Term 2005) ("clarifying that IRCA is not designed to prevent compensation of undocumented aliens either for work already performed or for work to be performed but to prevent the employment of undocumented aliens in the first instance"); *Garcia v. Pasquareto*, 11 Misc. 3d 1, 812 N.Y.S.2d 216 (N.Y. Sup. Ct. App. Term 2004) ("courts construing Hoffman have consistently held that it has no effect on claims for wages earned but not paid"); *Gomez v. Falco*, 6 Misc. 3d 5, 792 N.Y.S.2d 769 (N.Y. Sup. Ct. App. Term 2004) ("while back pay awards to undocumented workers for periods of unemployment following, e.g., wrongful termination for union activity, are barred by federal immigration law, the award in the present case properly represents payment due and owing for work actually performed"). The *Majlinger* case also demonstrated the Appellate Division, Second Department's adherence to its prior decisions that a plaintiff who may be an undocumented alien is entitled to recover lost wages, but that an undocumented alien's immigration status is relevant to a jury's determination of such claims. *Collins v. New York City Health & Hospital Corp.*, 201 A.D.2d 447, 607 N.Y.S.2d 387 (N.Y. App. Div. 1994).

As a result of the apparent inconsistencies in the holdings of the First and Second Departments, the Court of Appeals decided the case of *Balbuena*, 6 N.Y.3d 338, 812 N.Y.S.2d 416. In *Balbuena*, the plaintiff admitted that he did not possess work authorization documents, but argued that *Hoffman* was distinguishable from his legal claims since he did not produce any false documentation and, therefore, his claim for lost earnings was not barred. Id. In distinguishing *Hoffman*, the Court of Appeals did not dismiss the plaintiff's lost earnings claim noting that "there is no crime to be an employed but undocumented alien, unless the alien secured employment

through the use of false work authorization documentation." Id. at 361-62, 812 N.Y.S.2d at 429 (emphasis added).

The Court of Appeals further reasoned that "any conflict with IRCA's purposes that may arise from permitting an alien's lost wage claim to proceed to trial can be alleviated by permitting a jury to consider immigration status as one factor in its determination of damages. A defendant could allege that a future wage award is not appropriate because work authorization has not been sought or approval was sought but denied." Id. at 362-63, 812 N.Y.S.2d at 429. In other words, "a jury's analysis of a future wage claim proffered by an undocumented alien is similar to a claim asserted by any other injured person in that the determination must be based on all of the relevant facts and circumstances." Id. The Court of Appeals was clear that "in the absence of proof that plaintiffs tendered false work authorization documents to obtain employment, IRCA does not bar maintenance of a claim for lost earnings by an undocumented alien." Id. at 363, 812 N.Y.S.2d at 430 (emphasis added). However, this determination applies only to the undocumented alien plaintiff who did not submit false work authorization to obtain the employment. Where an undocumented alien plaintiff secured employment through the use of false work authorization documentation, "civil recovery is foreclosed." Id. at 363, 812 N.Y.S.2d at 430.

Thus, the precedent set by the Court of Appeals was that an undocumented alien plaintiff is not barred from maintaining a lost earnings claim for wages he/she would have earned in the United States unless the undocumented alien plaintiff submitted fraudulent documentation to obtain the employment. In those instances, the claim for lost earnings would be barred.

Recently, however, the Second Department expanded the Court of Appeals holding in *Balbuena*. In *Coque v. Wildflower Estates Developers, Inc.*, 31 A.D.3d 484, 818 N.Y.S.2d 546 (N.Y. App. Div. 2006) ("*Coque I*"), the defendants filed a motion to dismiss an undocumented worker's lost earnings claim because he was an undocumented alien, which was denied. The Appellate Division, Second Department affirmed the lower court's denial of the defendant's motion finding that "while an undocumented alien may be precluded from recovering for lost wages if he or she obtained employment by submitting false documentation to the employer, the evidence submitted

by the defendants failed to demonstrate that absence of a triable issue of fact as to whether the plaintiff did so in this case." Id. at 487, 818 N.Y.S.2d at 550.

At trial in the Supreme Court, Queens County, the plaintiff admitted that he was undocumented and that he had submitted a fraudulent Social Security card to his employer at the time he was hired. The employer had in its file an Employment Eligibility Verification Form (Form I-9) which required the employer to "[e]xamine one document from List A OR examine one document from List B *and* one from List C." *Coque v. Wildflower Estates Developers, Inc.*, 58 A.D.3d 44, 47, 867 N.Y.S.2d 158, 161 (N.Y. App. Div. 2008) ("*Coque II*") (emphasis in original). The person who completed the Form I-9 on the employer's behalf indicated that he or she had examined only one document, i.e., the plaintiff's Social Security card, a "List C" document, which does not comply with the employment eligibility requirements. Id. At the conclusion of the trial, the jury awarded the plaintiff damages in the sums of $42,000 for past lost wages and $60,000 for future lost wages over a period of five years (damages for pain and suffering and medical care were also awarded, but are not discussed herein). Id. at 48, 867 N.Y.S.2d at 162.

The plaintiff subsequently appealed the denial of his N.Y. C.P.L.R. § 4404(a) (McKinney 2009) motion to set aside the damages verdict as inadequate and the defendants cross-appealed, seeking to vacate the awards for past and future lost wages, or to dismiss the complaint in its entirety. Id. One of the issues raised by the defendants on appeal following the entry of judgment was "whether an undocumented alien who submitted a fraudulent Social Security card when applying for a job is barred, by virtue of that fact alone, from recovering damages for lost wages when he is injured in the performance of that job." Id. at 46, 867 N.Y.S.2d at 160. Notwithstanding the Court of Appeals previous holding in *Balbuena*, the Second Department held that "a worker's submission of false documentation is sufficient to bar recovery of damages for lost wages **only** where that conduct actually induces the employer to hire the worker, and that this circumstance is not present where the employer knew or should have known of the worker's undocumented status or failed to verify the worker's eligibility for employment as required by federal legislation." *Coque II*, 58 A.D.3d at 46, 867 N.Y.S.2d at 160 (emphasis added).

The *Coque II* court noted that "the evidence at trial showed that the plaintiff submitted a false Social Security card to [his employer] at the time he was hired. It also appears, however, that [the employer] violated the IRCA because it listed only the plaintiff's Social Security card on the Form I-9 it completed, when it was required (as explained on the form itself) to verify additional documentation." Id. at 52, 867 N.Y.S.2d at 164. The court further stated that "although the *Balbuena* decision made clear that the plaintiffs' conduct could not be equate[d] [to] the criminal misconduct of the employee in *Hoffman*, if it was the employers who violated IRCA by failing to inquire into plaintiffs' immigration status or employment eligibility, the Court of Appeals was not called upon to determine whether an award of damages for lost wages would be preempted under the circumstances this Court faces now, where it appears that both the plaintiff and the employer violated the IRCA." Id. at 52, 867 N.Y.S.2d at 164-65. The court found that the employer did not rely upon the fraudulent documents in hiring the plaintiff by virtue of the fact that the I-9 form had not been fully completed. Id. at 46, 867 N.Y.S.2d at 160.

In allowing the undocumented alien plaintiff's claim for lost earnings, the Second Department reasoned that "barring recovery for lost earnings only where the plaintiff's submission of fraudulent documentation actually induced the employer to hire the plaintiff is consistent with the objectives of both federal immigration policy and New York's Labor Law. Clearly, an employer should not be rewarded for its failure to comply with federal immigration law by being relieved of liability for its failure to provide a safe workplace. Moreover, where an employer is complicit in an illegal hire, foreclosing the employee from recovering damages for lost wages does not discourage violations of federal immigration law, but has exactly the opposite effect, from the employer's perspective." Id. at 54, 867 N.Y.S.2d at 166. The result of this Second Department holding is it placed the burden on the employer to prove that it fulfilled its statutory obligations in hiring the undocumented alien plaintiff and that it relied upon the false documentation provided by the plaintiff in reaching the decision to hire the plaintiff.

Since the *Coque II* decision, however, trial courts have struggled with the issue of whether an undocumented alien plaintiff, who submits fraudulent documentation (regardless of whether the employer relied upon those

documents), should be precluded from maintaining a lost earnings claim and what burden should be placed upon the employer to establish that it fulfilled its obligations in the hiring of the plaintiff. See *Macedo v. J.D. Posillico, Inc.*, 872 N.Y.S.2d 691 (N.Y. Sup. Ct. 2008) (denying an undocumented worker's future lost earnings claim where the plaintiff submitted fraudulent documents to obtain the employment even where there were allegations that the employer did not rely upon the documents in the hiring process); *Ambrosi v. 1085 Park Avenue LLC*, No. 06-CV-8163, 2008 WL 4386751 (S.D.N.Y. Sept. 25, 2008) (denying claim for lost wages, holding, pursuant to *Balbuena*, that "undocumented workers who violate IRCA by falsifying employment documentation may not recover lost wages in a personal injury action").

The trial courts in the First Department appear to be following the trend that if the undocumented worker obtained the employment with false documents, then the plaintiff is precluded from maintaining the claim. See *Macedo*, 872 N.Y.S.2d 691 (denying an undocumented worker's future lost earnings claim where the plaintiff submitted fraudulent documents to obtain the employment even where there were allegations that the employer did not rely upon the documents in the hiring process). The Second Department trend appears to be that an undocumented worker who submits fraudulent documentation to obtain employment will not be precluded from maintaining a future lost earnings claim if it cannot be proven that the employer relied upon those documents in the hiring process. See *Jara v. Strong Steel Door, Inc.*, 58 A.D.3d 600, 871 N.Y.S.2d 363 (N.Y. App. Div. 2009) (affirming Supreme Court, Kings County's denial of motion to dismiss the lost earnings claim as there were triable issues of fact as to whether the employer was actually induced to offer the plaintiff employment as a result of his admitted production of a forged alien registration card as well as a forged Social Security card). Although there is no specific Third Department decision relating to an undocumented alien plaintiff's lost earnings claim where the plaintiff has submitted fraudulent documentation, the Third Department has determined that an undocumented alien is permitted to receive an award of worker's compensation benefits despite the submission of fraudulent documents. See *Amoah v. Mallah Management, LLC*, 57 A.D.3d 29, 866 N.Y.2d 797 (N.Y. App. Div. 2008). The Fourth Department has not addressed the issue since the *Hoffman* or *Balbuena* decisions, but had previously held that an