UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERIC GLATT, *et al.*,	11 Civ. 6784 (WHP)
Plaintiffs,	MEMORANDUM & ORDER
-against-	
FOX SEARCHLIGHT PICTURES INC., *et ano.*,	
Defendants	

Plaintiffs Eric Glatt, Alexander Footman, Kanene Gratts, and Eden Antalik bring this putative class action under the Fair Labor Standards Act ("FLSA"), New York Labor Law ("NYLL"), and California Unfair Competition Law ("CAUCL") against Defendants Fox Searchlight Pictures Inc. ("Searchlight") and Fox Entertainment Group, Inc. ("FEG"). Plaintiffs contend that Searchlight and FEG violated federal and state labor laws by classifying them as unpaid interns instead of paid employees.

Glatt, Footman, and Gratts move for summary judgment that (1) they were "employees" covered by the FLSA and NYLL and (2) Searchlight was their employer. Antalik moves for class certification of her NYLL claims and conditional certification of a collective action for her FLSA claims. Defendants move for summary judgment that (1) Gratts's claims are time-barred; (2) Searchlight did not employ Glatt, Footman, or Gratts; (3) FEG did not employ Antalik; and (4) Searchlight did not employ any of the production interns on five films financed by Searchlight. For the following reasons, Plaintiffs' summary judgment motion is granted in part and denied in part, Defendants' summary judgment motion is granted in part and denied in part, and Antalik's motions for class certification of her NYLL claims and conditional certification of an FLSA collective action are granted.

BACKGROUND

The Parties

Glatt and Footman were unpaid interns who worked on production of the film Black Swan in New York. After production ended, Glatt took a second unpaid internship relating to Black Swan's post-production. Gratts was an unpaid intern who worked on production of the film 500 Days of Summer in California. Antalik was an unpaid intern at Searchlight's corporate offices in New York.

FEG is the parent corporation of approximately 800 subsidiaries, including co-defendant Searchlight. Searchlight produces and distributes feature films. Searchlight does not produce the films itself. Rather, it enters into Production-Distribution-Finance Agreements ("Production Agreements") with corporations created for the sole purpose of producing particular films.

The Film Productions

Black Swan began as a collaboration between director Darren Aronofsky and producer Scott Franklin. Aronofsky and Franklin incorporated Lake of Tears, Inc. for the purpose of producing Black Swan. On November 2, 2009, Searchlight and Lake of Tears entered into a Production Agreement for Black Swan.

500 Days of Summer was produced by 500 DS Films, Inc., a corporation created solely to produce that film. Searchlight entered into a Production Agreement with 500 DS Films for 500 Days of Summer. The Production Agreements for Black Swan and 500 Days of Summer

do not differ materially from one another.[1] They gave Searchlight the power to hire and fire production personnel, set budgets, and monitor the progress of films.

FEG's Internship Program

Antalik claims she was part of a "centralized unpaid internship program" in which unpaid interns at FEG's subsidiaries were subject to a single set of policies administered by a small team of intern recruiters. She maintains that two employees oversaw FEG's internship program during the relevant periods and their responsibilities included soliciting "intern request forms" from supervisors at subsidiaries interested in hiring interns, approving those requests, screening internship applicants, and processing interns' paperwork. According to Antalik, she and the members of her proposed class and collective action were victims of a common policy of using unpaid interns to perform work that required them to be paid.

Defendants deny there was any "centralized" internship program. They argue internships varied considerably among various FEG subsidiaries and departments, and interns' experiences were shaped by the particular supervisors they were matched with.

DISCUSSION

Summary Judgment Motions

I. Legal Standard

Summary judgment should be granted if the record 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); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The burden of demonstrating the absence of any genuine dispute as to a material fact rests with the moving party. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). Once the moving

[1] May 10, 2013 Tr. at 52:23-53:4.

party has made an initial showing that there is no genuine dispute of material fact, the non-moving party cannot rely on the "mere existence of a scintilla of evidence" to defeat summary judgment, Liberty Lobby, 477 U.S. at 252, but must set forth "specific facts showing that there is a genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (emphasis in original); see also Niagara Mohawk Power Corp. v. Jones Chem., Inc., 315 F.3d 171, 175 (2d Cir. 2003) (citation omitted). "A dispute about a 'genuine issue' exists for summary judgment purposes where the evidence is such that a reasonable jury could decide in the non-movant's favor." Beyer v. Cnty. of Nassau, 524 F.3d 160, 163 (2d Cir. 2008) (quoting Guilbert v. Gardner, 480 F.3d 140, 145 (2d Cir. 2007)). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Scott v. Harris, 550 U.S. 372, 380 (2007) (quoting Matsushita, 475 U.S. at 586-87).

The Court resolves all factual ambiguities and draws all inferences in favor of the non-moving party. See Liberty Lobby, 477 U.S. at 255; see also Jeffreys v. City of N.Y., 426 F.3d 549, 553 (2d Cir. 2005). A party opposing summary judgment "is not entitled to rely solely on the allegations of her pleading, but must show that there is admissible evidence sufficient to support a finding in her favor on the issue that is the basis for the motion." Fitzgerald v. Henderson, 251 F.3d 345, 361 (2d Cir. 2001). "Conclusory allegations, conjecture, and speculation . . . are insufficient to create a genuine issue of fact." Kerzer v. Kingly Mfg., 156 F.3d 396, 400 (2d Cir.1998).

II. Statute of Limitations for Gratts's CAUCL Claim

Defendants argue Gratts's CAUCL claim is time-barred. The CAUCL has a four-year statute of limitations. Cal. Bus. & Prof. Code § 17208. Gratts was not a plaintiff when the

action was filed in September 2011.[2] Pursuant to this Court's individual practices, Plaintiffs filed a pre-motion letter on August 2, 2012 requesting leave to move to file an amended complaint.[3] The pre-motion letter attached a proposed amended complaint, adding Gratts as a plaintiff. On September 5, 2012, Plaintiffs filed a motion to amend the complaint.[4] On October 19, 2012, Plaintiffs filed their amended complaint.

Gratts's claims do not relate back to the filing of the original complaint.[5] Defendants contend that Gratts's action was "commenced" on September 5, 2012 because "the date of the filing of the motion to amend constitutes the date the action was commenced for statute of limitations purposes." Rothman v. Gregor, 220 F.3d 81, 96 (2d Cir. 2000); see also Nw. Nat'l Ins. Co. v. Alberts, 769 F. Supp. 498, 510 (S.D.N.Y. 1991). But "[t]he theory underlying this rule is that a . . . defendant is on notice at the time a plaintiff files its motion because the plaintiff attached the proposed amended complaint to the motion." In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., MDL No. 1358 (SAS), 2007 WL 2979642, at *4 (S.D.N.Y. Oct. 10, 2007). Here, Defendants were on notice of Gratts's claims when Plaintiffs submitted their pre-motion letter and included a draft amended complaint. See Reza v. Khatun, No. 09 Civ. 233 (MKB), 2013 WL 596600, at *4 (E.D.N.Y. Feb. 15, 2013); Lekic v. 222 E. 8th St. LLC, No. 11 Civ. 1242, 2012 WL 4447625, at *1, 4 (E.D.N.Y. Sept. 25, 2012). Thus, Gratts commenced her claim on August 2, 2012.

Accordingly, Gratts's claim is timely only if she worked on the 500 Days of Summer production on or after August 2, 2008. The amended complaint alleges, somewhat

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[2] Compl. (Docket Entry #1).
[3] Docket Entry #24.
[4] Docket Entry #27.
[5] Oct. 9, 2012 Tr. at 14:17-15:4 (Docket Entry # 51).

unconfidently, that Gratts's internship lasted from May 1, 2008 "through approximately August 2008."[6] The only evidence that Gratts's internship in fact continued into August is her testimony that when she performed her last internship task, taking down movie sets, "the weather was really hot. It was warm and it was at the end of summer. It was in August."[7] When asked whether she would have any basis to dispute records indicating her internship ended earlier, she conceded "I'm just going by what I remember, so if your records say one thing, I'm going by . . . the way I remember it . . . It was in the first week of August."[8]

Defendants have produced records demonstrating Gratts's internship ended before August. Gratts testified there were approximately six weeks of shooting followed by a "wrap party," about a two week break, and then about five days of taking down sets.[9] Charles Varga, the art director for 500 Days of Summer, maintains that shooting wrapped on June 21, 2008.[10] And the invitation to the wrap party announces June 22, 2008 as the event date.[11] Giving full credit to Gratts's testimony that she worked for five days two weeks after shooting wrapped, her internship would have ended July 9, 2008.

But there is reason to believe Gratts's internship may have ended even sooner. Steven Fox, head of the construction department for 500 Days of Summer, claims that his involvement with the film did not end until the sets were dismantled.[12] His time sheets show that June 25, 2008 was the last date he worked on the film.[13] And Varga moved to other projects in

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[6] Am. Compl. ¶ 148 (Docket Entry #58).
[7] Dep. of Kanene Gratts dated Dec. 5, 2012 ("Gratts Tr.") at 45:7-9.
[8] Gratts Tr. 45:19-23.
[9] Gratts Tr. 93:19-22, 95:17-97:6.
[10] Declaration of Charles Varga ("Varga Decl."), dated Feb. 13, 2013 ¶ 5 (Docket Entry #100).
[11] Varga Decl. Ex. A.
[12] Declaration of Steven Fox ("Fox Decl."), dated Feb. 14, 2013 ¶ 9 (Docket Entry #101).
[13] Fox Decl. ¶ 5, Ex. A.

July 2008.[14] As art director, all set work—including dismantling sets—was completed before he moved on.[15]

Moreover, Gratts testified that she only worked at one film location during her internship, where she helped to build sets and then dismantle them.[16] She recalled that they built cubicles and other rooms to create an office for a greeting card company and built an apartment upstairs.[17] That construction occurred at the historic Fenton Building, at 833 South Spring Street in Los Angeles.[18] The call sheets for 500 Days of Summer show that filming at the Fenton Building was completed on May 17, 2008.[19] The location rental agreement shows that the building was rented by the production only until May 23, 2008.[20]

In sum, the only evidence that Gratts worked in August 2008 is her recollection, four years later, that when her internship ended, "the weather was really hot . . . it was in August."[21] This "scintilla of evidence" is not "evidence on which the jury could reasonably find for the plaintiff." Liberty Lobby, 477 U.S. at 252. This conclusion does not require a credibility determination, given her concession that she could be persuaded by documentary evidence.[22]

Plaintiffs argue that even if Gratts's internship ended before August 2008, her claims should be saved by the doctrine of equitable tolling. "[E]quitable tolling is only appropriate 'in rare and exceptional circumstances in which a party is prevented in some extraordinary way from exercising [her] rights." Zerilli-Edelglass v. N.Y.C. Transit Auth., 333

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[14] Varga Decl. ¶ 7, Exs. B-C.
[15] Varga Decl. ¶ 6.
[16] Gratts Tr. 74:24-78:3.
[17] Gratts. Tr. 76:1-10.
[18] Fox Decl. ¶¶ 6-7.
[19] Decl. of Elise M. Bloom, Esq. ("Bloom SJ Decl.") dated Feb. 15, 2013 (Docket Entry #109), Ex. DD.
[20] Decl. of Steven Wolfe ("Wolfe Decl."), dated Feb. 13, 2013 (Docket Entry #99), Ex. A.
[21] Gratts Tr. 45:7-9.
[22] Gratts Tr. 45:19-23.

F.3d 74, 80 (2d Cir. 2003) (internal quotations and alterations omitted). Equitable tolling is appropriate when the plaintiff (1) filed a defective pleading that otherwise would have been timely, (2) was unaware of her cause of action due to the misleading conduct of the defendant, or (3) has a medical or mental condition preventing her from proceeding in a timely fashion. Zerilli-Edelglass, 333 F.3d at 80. If one of those conditions applies, the plaintiff must show she "(1) has acted with reasonable diligence during the time period she seeks to have tolled, and (2) has proved that the circumstances are so extraordinary that the doctrine should apply." Zerilli-Edelglass, 333 F.3d at 80-81 (internal quotation omitted).

Gratts has a weaker claim to equitable tolling than her co-plaintiffs because she is the only plaintiff who was aware of her potential wage claim nearly from the day it accrued. Gratts testified that she understood she would earn minimum wage at her internship.[23] After her internship, she left several messages at the production office and even went to the Fox Studios lot to try to get her paycheck.[24] Unlike an unpaid intern who does not realize she may be entitled to compensation, Gratts was aware of her claim since 2008 and did not act with reasonable diligence in the time period she seeks to have tolled.

Gratts's CAUCL claim is time-barred because her internship ended before August 2008 and she is not entitled to equitable tolling.

III. Was Searchlight the Employer of Glatt and Footman?

Plaintiffs and Defendants each move for summary judgment on the issue of whether Searchlight was the "employer" of Glatt and Footman as that term is defined in the FLSA and NYLL. The FLSA defines "employ" as "to suffer or permit to work." 29 U.S.C. §

[23] Gratts Tr. at 66:12-19; 69:12-70:8; 149:19-25.
[24] Gratts Tr. 74:6-19; 185:6-186:5.

203(g). The law allows for the possibility of joint employers, and "all joint employers are responsible, both individually and jointly, with all the applicable provisions of the [FLSA]." 29 C.F.R. § 791.2(a).

"[T]he 'striking breadth' of the FLSA's definition of 'employ' 'stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles.'" Barfield v. N.Y.C. Health & Hosps. Corp., 537 F.3d 132, 141 (2d Cir. 2008) (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992)). "[W]hether an employer-employee relationship exists for purposes of the FLSA should be grounded in 'economic reality rather than technical concepts.'" Barfield, 537 F.3d at 141 (quoting Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961)). "Employment" under the FLSA is "to be determined on a case-by-case basis by review of the totality of the circumstances." Barfield, 537 F.3d at 141-42. "Above and beyond the plain language, moreover, the remedial nature of the statute further warrants an expansive interpretation of its provisions so that they will have 'the widest possible impact in the national economy.'" Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 139 (2d Cir. 1999) (quoting Carter v. Dutchess Cmty. Coll., 735 F.2d 8, 12 (2d Cir. 1984)).

"When it comes to 'employer' status under the FLSA, control is key." Lopez v. Acme Am. Envtl. Co., No. 12 Civ. 511(WHP), 2012 WL 6062501, at *3 (S.D.N.Y. Dec. 6, 2012). The Second Circuit has set out different tests to aid in determining whether an employment relationship exists under the FLSA. Carter adopted a four-factor test to determine whether an alleged joint employer exercised "formal control" over an employee: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of

payment, and (4) maintained employment records." 735 F.2d at 12 (quoting Bonnette v. Cal. Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983)).

Zheng v. Liberty Apparel Co., 355 F.3d 61 (2d Cir. 2003) articulated another set of factors for determining whether an alleged employer exercised "functional control" over an employee even if it lacked formal control: "(1) whether the [alleged employer's] premises and equipment were used for the plaintiffs' work; (2) whether the [subcontractors] had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which plaintiffs performed a discrete line-job that was integral to [the alleged employer's] process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the [alleged employer] or [its] agents supervised plaintiffs' work; and (6) whether plaintiffs worked exclusively or predominantly for the [alleged employer]." 355 F.3d at 72.

The NYLL's definitions are nearly identical to the FLSA's. See N.Y. Lab. Law § 2(7); see also Garcia v. La Revise Assocs. LLC, No. 08 Civ. 9356 (LTS) (THK), 2011 WL 135009, at *5 (S.D.N.Y. Jan. 13, 2011). Courts use the same tests to determine joint employment under both the NYLL and the FLSA. See Paz v. Piedra, No. 09 Civ. 03977 (LAK) (GWG), 2012 WL 121103, at *5 (S.D.N.Y. Jan. 12, 2012); Ansoumana v. Gristede's Operating Corp., 255 F. Supp. 2d 184, 189 (S.D.N.Y. 2003).

A. Formal Control Test

1. Hiring and Firing Power

This factor focuses on the "the power to hire and fire," not whether that power was exercised. See Carter, 735 F.2d at 12. The Black Swan Production Agreement required Searchlight's approval to hire key production staff, including the department heads where Glatt

and Footman interned.[25] Though Searchlight did not hire the line producers or department heads on Black Swan, it often did on other films with similar Production Agreements.[26] Searchlight's ability to hire managerial staff is enough to satisfy this factor. See Herman, 172 F.3d at 140 (Although Defendant's "hiring involved mainly managerial staff, the fact that [Defendant] hired individuals who were in charge of the [Plaintiffs] is a strong indication of control."); Torres v. Gristede's Operating Corp., No. 04 Civ. 3316 (PAC), 2011 WL 4571792, at *2 (S.D.N.Y. Sept. 23, 2011) ("There is no evidence that [Defendant] hired any class member, but there does not have to be. It stands uncontradicted that he hired managerial employees.").

Searchlight's power to fire Black Swan production staff was unbridled. Searchlight reserved the right, "in its sole reasonable discretion," to "require [Lake of Tears] to dispense with the services of any person rendering services with respect to [Black Swan]."[27] Because Searchlight acquired the power to fire, it is irrelevant that Glatt was offered his internship and Footman began his before Searchlight became involved with Black Swan. Glatt's supervisor told Glatt he needed "to clear with the Fox production executive for interns to be working for free and getting no college credits."[28]

Defendants argue that Searchlight had the right to fire employees "only if certain conditions were met."[29] But Searchlight had the right to require Lake of Tears to fire any worker

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[25] Decl. of Rachel Bien in Supp. of Pls.' Mot. For Partial Summ. J., dated Feb. 15, 2013, ("Bien SJ Decl.") (Docket Entry #92), Ex. 22 ("Production Agreement").

[26] Dep. of Elizabeth Sayre dated Aug. 15, 2012 ("Sayre Tr.") 22:5-11; 53:5-55:12. The Court may consider evidence of Searchlight's control over the productions of films other than Black Swan, because as Defendants conceded, Searchlight's rights with respect to the films did not differ materially. May 10, 2013 Tr. at 52:23-53:4; see also Herman, 172 F.3d at 139 ("Since economic reality is determined based upon all the circumstances, any relevant evidence may be examined so as to avoid having the test confined to a narrow legalistic definition." (emphasis in original)).

[27] Production Agreement (emphasis added).

[28] Bien SJ Decl. Ex. 14.

[29] Mem. of Law in Opp. to Pls.' Mot. for Partial Summ. J. ("Defs.' SJ Opp. Br.") (Docket Entry #118) at 11.

at Searchlight's "sole reasonable discretion."[30] Regardless, "[c]ontrol may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA, since such limitations on control do not diminish the significance of its existence." Herman, 172 F.3d at 139.

2. Searchlight's Ability to Supervise or Control Work Schedules or Conditions

Searchlight closely supervised work on Black Swan. The production sent Searchlight "crew lists" with the contact information for all staff, including interns.[31] Searchlight required them to send daily "call sheets" listing the scenes to be filmed the next day and the work schedules for all personnel.[32] The production also sent Searchlight daily "wrap reports" listing scenes scheduled to be filmed that day, scenes actually filmed, and the hours worked by production employees.[33] Searchlight Executive Vice President Elizabeth Sayre required production employees to call her each morning to let her know what time filming began and again each evening to let her know what time shooting wrapped.[34] The production sent Searchlight weekly schedules and cost reports detailing expenses.[35] It needed Searchlight's permission to incur cost overruns.[36]

Status as a joint employer "does not require continuous monitoring of employees, looking over their shoulders at all times." Herman, 172 F.3d at 139. In Herman, the Second Circuit affirmed the district court's finding that the defendant supervised and controlled employee work schedules where he "kept himself apprised of [] operations by receiving periodic

[30] Production Agreement.
[31] Sayre Tr. 78:1-79:1.
[32] Sayre Tr. 46:21-48:10.
[33] Sayre Tr. 50:11-51:1, 81:15-82:16.
[34] Sayre Tr. 82:3-22.
[35] Sayre Tr. 125:1-22; Production Agreement; Bien SJ Decl. Ex. 6 Ex. B, Ex. 27.
[36] Sayre Tr. 177:22-179:5.

reports from employees," including phoning managerial employees "reasonably frequently." Herman, 172 F.3d at 137.

3. Whether Searchlight Determined the Rate and Method of Payment

Searchlight set the overall budget for Black Swan and set the allocations for each line item.[37] Glatt and Footman argue that through its control of the budget, Searchlight "de facto" set wages for all production workers.[38] In Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947), the Supreme Court held that a slaughterhouse jointly employed meat de-boners even though they were directly controlled by a boning supervisor who contracted with the slaughterhouse. In Zheng, the Second Circuit discussed Rutherford and noted that "the slaughterhouse de facto set the workers' wages, because the boners did no meat boning for any other firm and shared equally in the funds paid to the boning supervisor." Zheng, 355 F.3d at 72. Here, the crucial factor of equally sharing wages is absent. An increase in the wages budget would not necessarily result in across the board raises; the production might have hired additional workers or increased pay to particular employees.

But even though Lake of Tears hired Glatt, it needed Searchlight's permission to have an unpaid intern who was not receiving college credit.[39] Moreover, Searchlight withheld employees' pay until they signed Searchlight-approved employment agreements.[40] While Searchlight may not have had the power to set employees' rate of pay, it was involved in their method of pay. Cf. Herman, 172 F.3d at 140 ("little evidence" showed defendant determined plaintiffs' rate of payment, "[b]ut he did participate in the method of payment").

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[37] Sayre Tr. 17:11-18:12.

[38] Mem. of Law in Support of Pls.' Mot. For Partial Summ J. ("Pls.' SJ Br.") (Docket Entry #90) at 26 (citing Zheng, 355 F.3d at 72).

[39] Bien SJ Decl. Ex. 14.

[40] Sayre Tr. 75:24-76:11; Bien Decl. Ex. 19.

4. Whether Searchlight Maintained Employment Records

Searchlight required production staff to sign confidentiality agreements and employment agreements known as "deal memos." Moreover, Searchlight insisted that Black Swan employees sign revised deal memos it drafted even if they had signed memos before Searchlight's involvement.[41] Searchlight did not allow production employees to be paid until they signed one of Searchlight's deal memos.[42] After shooting wrapped, Searchlight required Lake of Tears to send it the signed memos.[43]

Searchlight takes a narrow view, pointing out there is no evidence that Glatt, Footman, or any other unpaid intern signed a deal memo.[44] But the fact that Searchlight required memos from the paid employees who oversaw the unpaid interns is evidence of control over the interns.

B. Functional Control Test

A district court must "look beyond an entity's formal right to control the physical performance of another's work before declaring that the entity is not an employer under the FLSA." Zheng, 355 F.3d at 69. "[A]n entity can be a joint employer under the FLSA even when it does not hire and fire its joint employees, directly dictate their hours, or pay them." Zheng, 355 F.3d at 70.

1. Whether Searchlight's Premises and Equipment Were Used for Plaintiffs' Work

Glatt and Footman's internships were based at Lake of Tears' offices, which it leased before signing the Production Agreement with Searchlight.[45] There is no evidence either

[41] Bien SJ Decl. Ex. 21; Sayre Tr. 172:9-74:4, 115:8-23.
[42] Sayre Tr. 75:24-76:11; Bien Decl. Ex. 19.
[43] Bien Decl. Ex. 42.
[44] Defs.' SJ Opp. Br. at 17.
[45] Dep. of Alexander Footman, dated May 7, 2012 ("Footman Tr.") at 198:2-4.

Glatt or Footman ever visited Searchlight offices or used its equipment. The fact that Lake of Tears' office space and equipment may have been rented or purchased in part by funds from Searchlight does not transform them into Searchlight's premises or equipment.

2. Whether Lake of Tears Could Shift From One Putative Joint Employer to Another

This factor is derived from Rutherford, where the plaintiff meat boners "had no business organization that could or did shift as a unit from one slaughterhouse to another." Rutherford, 331 U.S. at 730. The Second Circuit observed this is relevant to joint employment "because a subcontractor that seeks business from a variety of contractors is less likely to be part of a subterfuge arrangement than a subcontractor that serves a single client." Zheng, 355 F.3d at 72.

The Black Swan production could not shift from one film studio to another. The Production Agreement prohibited Lake of Tears from taking Black Swan elsewhere unless Searchlight abandoned the project or failed to advance funds.[46] It is irrelevant that the Production Agreement did not prohibit Lake of Tears from working on other projects. This ignores economic reality in the film industry, where a film is produced by a single-purpose entity whose operations cease after the film is made.[47]

3. Extent to Which Plaintiffs Performed a Discrete Line-Job That Was Integral to Searchlight's Process of Production

In Rutherford, the meat boners' work was "a part of the integrated unit of production" at the slaughterhouse. Rutherford, 331 U.S. at 729. "Interpreted broadly, this factor could be said to be implicated in every subcontracting relationship, because all subcontractors perform a function that a general contractor deems 'integral' to a product or service." Zheng,

[46] Production Agreement.
[47] See Franklin Tr. 16:5-14.

355 F.3d at 73 (emphasis in original). But the Second Circuit has held this factor "to mean that work on a production line occupies a special status under the FLSA." Zheng, 355 F.3d at 73. Glatt and Footman's work was not part of an "integrated production unit" comparable to a production line. Zheng, 355 F.3d at 73.

4. Whether Responsibility Could Pass From One Subcontractor to Another Without Material Changes

In Rutherford, "even when the boning supervisor abandoned his position and another supervisor took his place . . . the same employees would continue to do the same work in the same place." Zheng, 355 F.3d at 74 (emphasis in the original). "[T]his factor weighs in favor of a determination of joint employment when employees are tied to an entity such as the slaughterhouse rather than to an ostensible direct employer such as the boning supervisor." Zheng, 355 F.3d at 74.

The crew of Black Swan was tied to Searchlight, not Lake of Tears. Searchlight, in its "sole reasonable discretion," had the power to replace key production personnel without material changes to those underneath them.[48] Searchlight could even have dismissed Lake of Tears and taken over the production.[49] The crew was not tied to Lake of Tears, which everyone knew would cease operations after delivering Black Swan to Searchlight.

5. Degree to Which Searchlight Supervised the Plaintiffs' Work

Supervision "weighs in favor of joint employment only if it demonstrates effective control of the terms and conditions of the plaintiff's employment." Zheng, 355 F.3d at 75 (citing Rutherford, 331 U.S. at 726)). "By contrast, supervision with respect to contractual warranties of quality and time of delivery has no bearing on the joint employment inquiry."

[48] Production Agreement.
[49] Production Agreement.

Zheng, 355 F.3d at 75. As discussed above, Searchlight closely monitored work on the Black Swan production and exercised effective control over it.

6. Whether Plaintiffs Worked Exclusively or Predominantly for Searchlight

As Defendants concede, Footman and Glatt worked exclusively on Black Swan, which weighs in favor of finding joint employment.[50]

In sum, the formal and functional control tests "state no rigid rule" and "provide 'a nonexclusive and overlapping set of factors' to ensure that the economic realities test mandated by the Supreme Court is sufficiently comprehensive and flexible to give proper effect to the broad language of the FLSA." Barfield, 537 F.3d at 143 (quoting Zheng , 355 F.3d at 75-76). Summary judgment may be granted to the plaintiffs "even when isolated factors point against imposing joint liability." Zheng, 355 F.3d at 77. Searchlight emphasizes the lack of evidence that Glatt or Footman themselves were ever "controlled" by Searchlight, but "[s]uch a contention ignores the relevance of the totality of the circumstances." Herman, 172 F.3d at 140 (rejecting argument that overall operational control is irrelevant "and that only evidence indicating [] direct control over [Plaintiffs] should be considered").

The fact that all four formal control factors weigh in favor of finding Searchlight was a joint employer is sufficient to find Searchlight was Plaintiffs' employer even if no functional control factors were satisfied. That conclusion is bolstered by the finding that Searchlight also exercised significant functional control. And, in the end, it is all about control. Lopez, 2012 WL 6062501, at *3.

[50] Defs.' SJ Opp. Br. at 22.