

In the  
United States Court of Appeals  
For the Second Circuit

AUGUST TERM, 2017

SUBMITTED: JUNE 22, 2018  
DECIDED: OCTOBER 1, 2018

No. 17-2718-cv

VALENTIN TAPIA, ROMULO RICANO BALDERAS, EUFEMIA CASTILLO, individually  
and on behalf of others similarly situated,

*Plaintiffs-Appellants,*

*v.*

BLCH 3RD AVE LLC, DBA Brick Lane Curry House, AJIT BAINS, SATINDER SHARMA,  
*Defendants-Appellees.\**

Appeal from the United States District Court  
for the Southern District of New York.  
No. 14-cv-8529 – Alison J. Nathan, *District Judge*.

Before: WINTER, CALABRESI, and LIVINGSTON, *Circuit Judges*.

\* The Clerk of Court is respectfully directed to amend the official caption as set forth above.

1 Appellants appeal from a judgment entered in the United States District  
2 Court for the Southern District of New York (Alison J. Nathan, J.) This is an  
3 action to recover under federal and state minimum wage laws. We affirm that  
4 Appellants are not entitled to a double recovery of liquidated damages and that a  
5 shareholder of the employer is not personally liable.

6 Judge Calabresi concurs in a separate opinion.

7 SHAWN RAYMOND CLARK  
8 Michael Faillace & Associates  
9 New York, NY  
10 *for Plaintiffs-Appellants*  
11 \_\_\_\_\_  
12

13 PER CURIAM:

14 Plaintiffs-Appellants Valentin Tapia, Romulo Ricano Balderas, and Eufemia  
15 Castillo (collectively, “Appellants”) are former employees of Brick Lane Curry  
16 House, a Manhattan restaurant. The restaurant is owned and operated by  
17 Defendant-Appellee BLCH 3rd Ave. LLC (“BLCH”), which in turn is owned by  
18 Defendants-Appellees Ajit Bains (“Bains”) and Satinder Sharma (“Sharma”).  
19 On October 24, 2014, Appellants brought suit against BLCH, Bains, and Sharma,  
20 alleging violations of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 *et seq.*,  
21 and the New York Labor Law (“NYLL”), N.Y. Lab. Law § 190 *et seq.* Appellants

1 claimed that defendants had failed to pay minimum, overtime, and spread-of-  
2 hours wages; failed to provide Appellants with required statements and  
3 notifications; and failed to reimburse them for costs of purchasing and  
4 maintaining equipment. After a bench trial, the United States District Court for  
5 the Southern District of New York (Nathan, J.) found for Appellants on all of their  
6 claims. *See Tapia v. Blch 3rd Ave. LLC*, No. 14-CV-8529, 2016 WL 4581341 (S.D.N.Y.  
7 Sept. 1, 2016). Despite finding in favor of Appellants, however, the district court  
8 also determined, *inter alia*, that (1) Appellants were not entitled to double recovery  
9 of liquidated damages; and (2) Sharma could not be held personally liable for  
10 BLCH's labor law violations. Appellants now appeal from both of those  
11 determinations. We assume the parties' familiarity with the underlying facts and  
12 the procedural history of the case, to which we refer only as necessary to explain  
13 our decision to affirm.

#### 14 **I. Liquidated Damages**

15 Absent a showing of good faith, the FLSA provides for liquidated damages  
16 equal to unpaid wages and overtime recovered. 29 U.S.C. §§ 216(b), 260. The  
17 NYLL also provides for liquidated damages on the same terms, though its  
18 damages calculation is different. NYLL §§ 198(1-a), 663(1). The district court

1 awarded only the NYLL liquidated damages; Appellants contend that they are  
2 entitled to both the NYLL *and* FLSA damages. Appellants' argument for double  
3 recovery, however, is squarely foreclosed by our recent decision in *Rana v. Islam*,  
4 887 F.3d 118, 123 (2d Cir. 2018), which vacated a judgment under the FLSA in favor  
5 of a larger judgment under the NYLL on the ground that the FLSA did not allow  
6 duplicative liquidated damages. Although *Rana* contains dicta regarding the  
7 NYLL's treatment of duplicative recovery, we rely solely upon its holding with  
8 regard to the FLSA. We therefore conclude that the district court properly  
9 declined to award cumulative liquidated damages.

## 10 **II. Sharma's Personal Liability**

11 Appellants also argue that the district court erred in concluding that Sharma  
12 was not an "employer" within the meaning of the FLSA and NYLL, and thus could  
13 not be held personally liable for BLCH's labor law violations. This argument is  
14 meritless. "The Second Circuit has treated employment for FLSA purposes as a  
15 flexible concept to be determined on a case-by-case basis by review of the totality  
16 of the circumstances; we have identified different sets of relevant factors based on  
17 the factual challenges posed by particular cases."<sup>1</sup> *Irizarry v. Catsimatidis*, 722

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<sup>1</sup> Appellants argue that Sharma was an "employer" by citing exclusively to cases that interpret

1 F.3d 99, 104 (2d Cir. 2013) (internal quotation marks omitted). The underlying  
 2 inquiry in determining “employer” status is whether the individual possessed  
 3 operational control over employees: “control over a company’s actual ‘operations’  
 4 in a manner that relates to a plaintiff’s employment.” *Id.* at 109. “A person  
 5 exercises operational control over employees if his or her role within the company,  
 6 and the decisions it entails, directly affect the nature or conditions of the  
 7 employees’ employment.” *Id.* at 110. The following *Carter* factors are often  
 8 relevant to this inquiry: “[W]hether the alleged employer (1) had the power to  
 9 hire and fire the employees, (2) supervised and controlled employee work  
 10 schedules or conditions of employment, (3) determined the rate and method of  
 11 payment, and (4) maintained employment records.” *Barfield v. N.Y.C. Health &*  
 12 *Hosps. Corp.*, 537 F.3d 132, 142 (2d Cir. 2008) (quoting *Carter v. Dutchess Cmty. Coll.*,  
 13 735 F.2d 8, 12 (2d Cir. 1984)). “No one of the four factors standing alone is  
 14 dispositive.” *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999). The  
 15 district court’s “findings of historical fact and . . . findings as to the existence and

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FLSA’s definition of “employer.” For purposes of this appeal, we assume, without deciding, that “the tests for ‘employer’ status are the same under the FLSA and the NYLL . . . .” *Irizarry*, 722 F.3d at 117 (observing that “this question has not been answered by the New York Court of Appeals”).

1 degree of each factor—are findings of fact that must be accepted on appeal unless  
2 clearly erroneous.” *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 76 (2d Cir. 2003).  
3 We review *de novo* “the [district court’s] ultimate decision as to whether a party is  
4 an employer . . . .” *Id.*

5 The district court did not clearly err in concluding that “[o]nly the fourth  
6 *Carter* factor is even partially satisfied.” *Tapia*, 2016 WL 4581341, at \*8. As to the  
7 first factor, Appellants admit that there is no direct evidence that Sharma had the  
8 power to hire or fire employees. Moreover, Appellants did not testify that  
9 Sharma hired or disciplined them, and Sharma testified that the general manager,  
10 Vivek Deora, was the one responsible for hiring the floor manager. *See, e.g., RSR*,  
11 172 F.3d at 140 (finding first factor satisfied based on evidence that the defendant  
12 actually hired three employees); *Irizarry*, 722 F.3d at 114 (finding first factor  
13 satisfied based on evidence that the defendant actually hired at least one manager,  
14 interviewed a potential manager, promoted at least two employees, and was  
15 notified of firings).

16 Nor was it clear error to find that the second *Carter* factor was not satisfied.  
17 Although Appellants testified that Sharma regularly visited the restaurant, tasted  
18 the food, and directed employees to clean, they did not testify that Sharma

1 controlled work schedules or other personnel decisions, or that Sharma was  
2 personally aware of Appellants' hours or other conditions of employment. *See*  
3 *Irizarry*, 722 F.3d at 113–15 (finding second factor was not satisfied even though  
4 the defendant visited stores regularly and “address[ed] problems that occurred in  
5 individual stores”). Instead, Sharma testified that the general manager, Deora,  
6 was the one who managed overall operations and “actually r[a]n the show  
7 completely,” J.A. 65, and Appellants also confirmed that the floor manager, not  
8 Sharma, was the one that set their work schedules. *See RSR*, 172 F.3d at 140  
9 (finding second factor satisfied based on evidence that the defendant assigned  
10 employees to work locations and oversaw the revision of employment application  
11 forms).

12 It also was not clearly erroneous to find that the third *Carter* factor was not  
13 satisfied. There was no evidence that Sharma determined employees' rates and  
14 methods of payment or signed employees' paychecks, as the Appellants attested  
15 that the floor manager, not Sharma, paid them in cash every week. *See Irizarry*,  
16 722 F.3d at 115 (noting that “the key question is whether the defendant had the  
17 authority to sign paychecks throughout the relevant period” (quoting *RSR*, 172  
18 F.3d at 140) (brackets omitted)). Appellants argue that financial control is

1 relevant to application of the third *Carter* factor, but aside from Sharma's status as  
2 a significant shareholder, they point to no evidence (nor can we discern any such  
3 evidence) in the record to support the assertion that Sharma exercised or possessed  
4 financial control over BLCH. *See, e.g., RSR*, 172 F.3d at 136 (defendant exercised  
5 financial control by signing loans, approving purchases, and leasing vehicles on  
6 behalf of corporation); *Irizarry*, 722 F.3d at 115 (defendant exercised financial  
7 control by keeping track of payroll, arranging a meeting with an outside payroll  
8 company, and staying informed about whether employees were paid on time); *see*  
9 *also RSR*, 172 F.3d at 141 (observing that in *Wirtz v. Pure Ice Co.*, 322 F.2d 259, 262–  
10 63 (8th Cir. 1963), “stock ownership, in and of itself, was held insufficient to give  
11 rise to employer status”); *Gray v. Powers*, 673 F.3d 352, 355–56 (5th Cir. 2012)  
12 (rejecting proposition that “merely being an officer or shareholder subjects an  
13 individual to FLSA liability”).

14 While the fourth *Carter* factor might be construed as partially weighing in  
15 Appellants' favor because Sharma reviewed payroll records, there was no  
16 evidence that he actively maintained the records. In any event, this factor alone  
17 is not dispositive. *RSR*, 172 F.3d at 139.



1       Reviewing *de novo* the district court's application of these factors in the  
2   particular circumstances of this case, we discern no error in its determination that  
3   Sharma is not an employer.

4                                   \*       \*       \*

5       We have considered Appellants' remaining arguments and find them to be  
6   without merit. Accordingly, we **AFFIRM** the judgment of the district court.