NEW YORK STATE SUPREME COURT
COUNTY OF QUEENS

Mohamad Fatchmahamad, Plaintiff, -v- U. S. Security Associates, Inc., Defendant.	**Index #: 709766/2015** **Hon. Timothy J. Dufficy, JSC** **OPPOSING MEMORANDUM OF LAW (Motion to Dismiss)**

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COMPLAINT

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I. PRELIMINARY STATEMENT

Plaintiff Mohamad Fatchmahamad, ("Plaintiff" or "Fatchmahamad") respectfully submits the instant memorandum of law in opposition to the motion to dismiss of defendant U.S. Security Associates, Inc. ("Defendant" or "U.S. Security").

II. SUMMARY OF FACTS AND ARGUMENTS

The factual allegations as laid out in the Complaint must be taken as true on this pre-answer motion to dismiss and are incorporated herein. The complaint is attached to the affirmation of defense counsel Philip Davidoff as Exhibit 1, is incorporated herein, and the facts are summarized below.

Defendant operates a business providing security services within New York State, throughout the United States and internationally. Plaintiff, like other similarly-situated current and former employees, were employed by Defendant as a security guard. In order to provide security services, Plaintiff, and the putative class, were each required to wear security guard uniforms each day they showed up to work. In order to perform their job, Plaintiff, and the putative class, incurred costs in laundering and cleaning their uniforms. To provide an illustrative example of the costs of such cleaning, Plaintiff spent approximately $10-$12 to wash/clean his uniform per month.

Defendant argues that the only part of the New York Labor Law ("NYLL") that deals with uniform maintenance costs falls under 12 NYCRR §142, which contains a provision that governs uniform maintenance allowances for individuals receiving the minimum wage. See 12 NYCRR § 142-2.5(c). However, while Defendant makes a spirited argument that 12 NYCRR § 142-2.5(c) should not apply, this regulation is simply not the controlling authority in this case. Instead, Defendant here is liable to Plaintiff under NYLL § 193 because unreimbursed work-

related expenses are the type of deductions that are improper under NYLL § 193. *Pachter v. Bernard Hodes Group, Inc.,* 10 N.Y.3d 609, 614, 617 (2008).

III. THE STANDARD ON A MOTION TO DISMISS

In *Leon v. Martinez*, 84 N.Y.2d 83, 87-88, 638 N.E.2d 511, 51, 614 N.Y.S.2d 972, 974 (1994), the New York Court of Appeals explained the standard on a pre-answer motion to dismiss and stated in relevant part as follows:

> On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit *88 (Cite as: 84 N.Y.2d 83, *88, 638 N.E.2d 511, **513, 614 N.Y.S.2d 972, ***974) within any cognizable legal theory (*Morone v. Morone*, 50 N.Y.2d 481, 484, 429 N.Y.S.2d 592, 413 N.E.2d 1154; *Rovello v. Orofino Realty Co*., 40 N.Y.2d 633, 634, 389 N.Y.S.2d 314, 357 N.E.2d 970). Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (see, e.g., *Heaney v. Purdy*, 29 N.Y.2d 157, 324 N.Y.S.2d 47, 272 N.E.2d 550). In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*Rovello v. Orofino Realty Co., supra*, 40 N.Y.2d at 635, 389 N.Y.S.2d 314, 357 N.E.2d 970) and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17; *Rovello v. Orofino Realty Co., supra*, 40 N.Y.2d at 636, 389 N.Y.S.2d 314, 357 N.E.2d 970). In light of these principles, we agree with the majority at the Appellate Division that the instant complaint and supporting affidavit, although inartfully drafted, adequately alleged for pleading survival purposes that the instrument prepared by Futterman was intended by all parties to effectuate a present assignment to plaintiffs of interests in the future settlement.

As explained herein, the Defendant's motion to dismiss must fail based on the above standard as well as the substantive law governing the claim.

IV. ARGUMENT

1. DEFENDANT'S FAILURE TO REIMBURSE EMPLOYEES FOR JOB-RELATED EXPENSES VIOLATES NYLL § 193

The entire thrust of Defendant's argument in this motion to dismiss is that Plaintiff was not a minimum wage employee and thus is not entitled to receive an allowance for uniform maintenance under 12 NYCRR § 142-2.5(c). (Def. Mot., p. 5). This Plaintiff readily admits – Plaintiff clearly states in his Complaint that he was paid at a regular rate of $8 - $8.62 per hour, an amount above the NY minimum wage for all relevant times. (Complaint, ¶ 13). As such, Defendant states that, even accepting the allegations in the complaint as true, Plaintiff does not demonstrate a set of facts which would entitle him to relief under 12 NYCRR § 142-2.5(c). CPLR 3211(a)(1) and (a)(7); *see also Rovello,* 40 N.Y.2d 633; *Guggenheimer*, 43 N.Y.2d 268. However, considering Plaintiff does not assert his claim for relief under 12 NYCRR § 142-2.5(c), this Court must deny this motion to dismiss the complaint.

Contrary to Defendant's assertion, (Def. Mot., p. 2), and as alleged in the Complaint, (Complaint, ¶, 25), NYLL § 193 pertains to circumstances, like here, where an employer fails to reimburse an employee for necessary and required work-related expenses. This statute states in pertinent part: "No employer shall make any charge against wages, or require an employee to make any payment by separate transaction unless such charge or payment is [(a) made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency; or (b) expressly authorized in writing by the employee and are for the benefit of the employee]". NYLL § 193; *Hudacs v. Frito-Lay, Inc.*, 90 N.Y.2d 342, 347(1997). As the language of NYLL § 193 specifically prohibits indirect deductions by "separate transaction" in addition to direct deductions, it does not matter whether the employer pays the employee and then makes the deduction or if the employer just fails to reimburse the employee for the covered

expense in the first place. *Hart v. Rick's Caberet Intern., Inc*., 967 F.Supp.2d 901, 954 (S.D.N.Y., Sept. 10, 2013) ("Requiring employees to pay [working expenses] from their own funds and in separate transactions is precisely the harm at which [NYLL § 193] was aimed."). Very significantly, Defendant concedes that the costs of cleaning uniforms paid by the employee and required by the employer is considered a wage deduction – the only question is whether this wage deduction is also prohibited by NYLL § 193. While this statute was amended, such amendments simply clarified what deductions an employer is permitted to take and the procedures for making such deductions, both of which are not material to this case.

However, the NYSDOL issued regulations clarifying NYLL § 193 to show several types of business related expenses were not the type of acceptable deductions contemplated by the statute and which have constituted unlawful wage deductions under NYLL § 193 all along. *See* 12 NYCRR § 195-4.5. Among these, 12 NYCRR § 195-4.5(b) makes clear that wage deductions stemming from "[e]mployee purchases of tools, equipment and attire required for work," are unlawful under NYLL § 193. Here, Plaintiff's uniform was an attire required for his work with Defendant. Plaintiff's upkeep of his uniform, thus constituted a required business and work-related expense, estimated by Plaintiff to amount to $10-$12 per month. As such, the failure of Defendant to reimburse Plaintiff for this amount would constitute an unlawful deduction from Plaintiff's wages.

Interestingly, the regulation at 12 NYCRR § 195-4.5(c) also clarifies that NYLL § 193 prohibits deductions for "unauthorized expenses." Logically, if an employer cannot make deductions for "unauthorized expenses" under NYLL § 193, that employer certainly cannot make deductions for expenses, such as the uniform expenses, in this case which are required for the performance of the duties assigned by the employer.

The list of prohibited deductions is not new – these types of deductions have been prohibited under NYLL § 193 for decades. See *Pachter*, 10 N.Y.3d at 613, The NY Court of Appeals in *Pachter*, 891 N.E.2d at 284, reinforced the impermissible nature of unreimbursed business expenses and stated in relevant part as follows:

> It is undisputed that the charges Hodes made to determine Pachter's final compensation are not within the categories of permissible deductions delineated in section 193.

Because of an unusual work arrangement and agreement not present in this case, the NY Court of Appeals concluded that the business expenses in *Pachter* were deducted before the wages were earned and thus did not violate NYLL § 193. The Court in *Pachter* also settled a major dispute as to whether highly paid workers such as the plaintiff in that case who earned about $200,000 annually were covered by NYLL § 193 – the Court ruled that *all employees*, from minimum wage workers to highly paid executives, are indeed covered by NYLL § 193. As such, *Pachter* totally destroys Defendant's argument that only minimum wage workers are protected from unauthorized wage deductions such as unreimbursed work-related expenses for washing/cleaning uniforms.

Plaintiff's already strong arguments are made even stronger by the liberal and broad construction that must be given to NYLL § 193. The wage laws are remedial legislation and are to be "liberally construed so as to permit as many individuals as possible to take advantage of the benefits it offers." *Settlement Home Care, Inc. v. Industrial Bd. of Appeals of Dept. of Labor*, 151 A.D.2d 580, 581, 542 N.Y.S.2d 346, 347 (2d Dep't 1989). *See also Red Hook Cold Storage Co. v. Department of Labor*, 295 N.Y. 1, 7 (1945) (NY Court of Appeals ruling that labor law should be interpreted "liberally" to provide protections broadly.). Therefore, if the court is faced

with two permissible interpretations – one broad and one narrow, the Court is required to adopt the broad interpretation.

Significantly, the interpretation of NYLL § 193 urged by Plaintiff is compelled by the policy and purpose of NYLL § 193. In *Hudacs, supra.*, 90 N.Y.2d at 347, the NY Court of Appeals found that NYLL 193 was "designed primarily to ensure full and prompt payment of wages to employees." Requiring Plaintiff and the putative class members to pay a portion or more of their wages to cover expenses associated with Defendant's operations obviously did not result in "full and prompt payment of wages" as required by NYLL § 193 as set forth by the New York Court of Appeals.

Defendant's position is also seriously undermined by the absurdity doctrine which was invoked by the NY Court of Appeals in *Pachter*, 10 N.Y.3d at 615, in finding that NYLL § 193 covers all employees regardless of whether they are executives or professionals etc. There, the Court stated as follows:

> under the interpretation of "employee" proposed by Hodes, Labor Law § 194 would not prohibit employers from paying similarly situated executives at different rates of compensation solely on account of their gender—an absurd proposition that the Legislature surely did not intend

Pachter, 10 N.Y.3d at 615.

Likewise, under the argument asserted by Defendant, NYLL § 193 would require an employer to reimburse an employee who spends $50 a year to purchase a tool to do the employer's work but would not require an employer to reimburse an employee who spends $150 a year in laundry fees to do the employer's work. Borrowing from the Court of Appeals logic in the above excerpt, this is "an absurd proposition that the Legislature surely did not intend." For these reasons as well, Plaintiff satisfactorily states a cognizable claim under the NYLL based on the facts alleged in the Complaint.

V. CONCLUSION

Based on the foregoing, plaintiff kindly requests that this Honorable Court deny Defendant's motion to dismiss in its entirety and with prejudice, together with such other, further and different relief, as this Court deems just and proper.

Dated: Queens Village, New York
April 1, 2016

Respectfully submitted,

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