SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Mohamad Fatchmahamad
Individually, and on behalf of all others similarly situated

Index No. 709766/2015

Plaintiff,

v.

U.S. Security Associates, Inc.,

Defendant.

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

Defendant U. S. Security Associates, Inc. ("USSA" or "Defendant") by and through its attorneys FordHarrison LLP, submits this Memorandum of Law in support of its motion to dismiss, pursuant to CPLR §§ 3211(a)(1) and (a)(7), the Verified Complaint ("Complaint") of Plaintiff Mohamad Fatchmahamad ("Fatchmahamad" or "Plaintiff"). (A copy of the Verified Complaint is annexed as Exhibit 1 to the accompanying Affirmation of Philip K. Davidoff, Esq., dated January 22, 2016 (hereinafter "Davidoff Aff.").)

PRELIMINARY STATEMENT

Defendant USSA is engaged in the business of providing security services within New York State, throughout the United States and internationally. (Complaint, ¶¶ 6, 9.) Plaintiff worked for USSA as a security guard for approximately five years until he was discharged on or about January 24, 2013. (Compl., ¶¶ 11, 12.)

The crux of Plaintiff's Complaint is his allegation that, throughout his employment with

USSA until in or around October 2012, he was not properly reimbursed for the costs of cleaning, washing and maintaining his uniform, purportedly in violation of New York Labor Law, Article 19, §§ 650 *et seq.* (Compl., ¶¶ 15, 16.) At all times relevant to his Complaint, Plaintiff allegedly was paid a regular rate of pay between $8.00 and $8.62 per hour (Compl., ¶ 13.), and that he paid between $10.00 and $12.00 per month to clean and maintain his uniform. (Compl., ¶ 14.)

Defendant respectfully submits that the Court must dismiss Plaintiff's Complaint as a matter of law because it fails to state a claim upon which the requested relief can be granted. Under the circumstances alleged in Plaintiff's Complaint, USSA was under no legal obligation under the New York Labor Law ("NYLL") to reimburse Plaintiff for his uniform maintenance costs or otherwise provide uniform maintenance allowance under NYLL.

ARGUMENT

A. Motion to Dismiss Standards

A defendant's motion to dismiss under CPLR 3211(a)(1) and (a)(7) should be granted if it appears that the plaintiff can prove no set of facts in support of its claim, which would entitle it to relief. N.Y.C.P.L.R 3211(a)(1) and (a)(7); *see also Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (N.Y. 1977). The court must accept the allegations in the complaint as true as well as all reasonable inferences implied from such allegations. *See Rovello v. Orfino Realty, Co.*, 40 N.Y.2d 633 (N.Y. 1976). If all the allegations are taken as true and there exists no cause of action based upon those allegations the claim must be dismissed. *See generally, id.*

B. New York Labor Law /Uniform Maintenance Requirements

The NYLL does not contain any statutory provisions governing uniform maintenance costs or requirements, rather, in accordance with its authority under NYLL Sections 653 and

655,[1] the Commissioner of Labor has determined that, in connection with the NYLL's minimum wage requirements, some level of uniform maintenance allowances to employees is appropriate. In order to implement that determination, the New York State Department of Labor ("NYSDOL") promulgated its Minimum Wage Order for Miscellaneous Industries and Occupations codified at 12 NYCRR Part 142 ("Wage Order"),[2] which contains provisions governing uniform maintenance allowances. *See* 12 N.Y.C.R.R. §§ 142-2.5(c). (A copy of the relevant portions of the Wage Order is attached as Exhibit 2 to Davidoff Aff.)

Specifically, the Wage Order provides, in relevant part:

> No allowance for the supply, maintenance or laundering of required uniforms shall be permitted as part of the minimum wage. . . . Where an employer fails to launder or maintain required uniforms for any employee, he shall pay such employee in addition to the minimum wage prescribed herein [$9.00 per week on and after July 24, 2009, if the employee works more than 30 hours weekly].

Id.

This regulatory provision has long been held to apply *only* "if the employees' expenditures for [uniform maintenance] purposes would reduce their wages below minimum wage." *See Chan v. Sung Yue Tung Corp.,* 2007 WL 313483 (S.D.N.Y. Feb., 1, 2007) (*quoting Ayres v. 127 Restaurant Corp.,* 12 F.Supp.2d 305 (S.D.N.Y. 1998)), *abrogated on other grounds by Barenboim v. Starbucks Corp.,* 698 F.3d 104 (2d Cir.2012); *see also Flores v. Anjost Corp.,* 284 F.R.D. 112 (S.D.N.Y. 2012).

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1 NYLL § 653 specifically provides the Commissioner of Labor with the power to investigate the sufficiency of the minimum wage, and if the Commissioner is of the opinion that the minimum wage is insufficient, he must appoint a wage board to inquire into and report and recommend adequate minimum wages. In addition to making recommendations regarding minimum wages, the wage board may recommend such regulations as it deems appropriate with respect to, *inter alia*, overtime rates. *See* NYLL § 655(5)(b).

2 It should be noted that there are additional wage orders for the Hospitality, Farming and Building Services industries, but those wage orders are inapposite here. In any event, other than the wage order governing the Hospitality Industry, these other industry-specific wage orders provide for the same rules governing uniform maintenance allowances as the Wage Order applicable here.

Put another way, as other courts have observed, while the uniform maintenance allowance provision in the Wage Order requires that *certain* employees receive allowances for the maintenance of their uniforms, "[t]he provision, however, applies only to workers earning the minimum wage." *See Franklin v. Breton International, Inc.*, 2006 U.S. LEXIS 88893 (S.D.N.Y. Dec. 11, 2006) (citing N.Y.C.R.R. Title 12 § 142-2.2)); *citing Heng Chan v. Triple 8 Palace, Inc.*, 2006 U.S. Dist. LEXIS 15780 (S.D.N.Y. Mar. 30, 2006) (citing N.Y.C.R.R. Title 12 § 137-1.8)). Although these cases involved the uniform maintenance provisions contained in the Hospitality Industry Wage Order then in effect, the language of that former Wage Order is *identical in all respects* to the language of the Wage Order currently applicable in this case. (A copy of the relevant portions of the 2009 Minimum Wage Order for the Restaurant Industry, codified at 12 N.Y.C.R.R. Part 137 is attached as Exhibit 3 to Davidoff Aff.)

Further buttressing Defendant's position, the New York Department of Labor subsequently promulgated a revised Hospitality Industry Wage Order, *codified at* N.Y.C.R.R. Tit. 12, § 146. Effective January 1, 2011, the Hospitality Industry Wage Order provides that "all employees in restaurants ... *regardless of a given employee's regular rate of pay*" must be furnished with a uniform maintenance allowance. *See* 12 N.Y.C.R.R. §§ 146-1.7, 146-1.8. (Emphasis added) (A copy of the relevant portions of the 2011 Hospitality Industry Wage Order is attached as Exhibit 4 to Davidoff Aff.). In other words, *in the Hospitality Industry*, uniform maintenance allowances no longer "phase out" as the employee's wages rise. (*See* NYSDOL Summary attached as Exhibit 5 to Davidoff Aff.)

Notably, the language in the Wage Order applicable in this case (as well as in the Building Services and Farming wage orders) has remained unchanged even those it has subsequently been amended. Had the NYSDOL thought it appropriate to apply the same

uniform maintenance allowance rules governing the Hospitality Industry to other industries clearly it had every opportunity to amend the relevant wage orders. It has not done so.

Here, Plaintiff does not plead that he earned minimum wage, rather he alleges that he was paid between $8.00 and $8.62 per hour (*see* Complaint ¶13). His wages clearly were sufficiently in excess of New York's then-applicable minimum wage to render the uniform maintenance allowances inapplicable to him. Specifically, during the relevant period covered by Plaintiff's Complaint, the applicable minimum wages was $7.15 per hour on and after January 1, 2007, and $7.25 per hour on and after July 24, 2009. *See* 12 NYCRRR § 142-2.1. Thus, Plaintiff, a full time employee, made *at least* $320.00 per week ($8.00 per hour x 40 hours), while the minimum wage would yield *at most* $290.00 per week ($7.25 per hour x 40 hours). Plaintiff was paid at least $30.00 per week in excess of the minimum wage. Clearly, this amount exceeds the $9.00 per week uniform maintenance allowance provided for in the wage order. Moreover, Plaintiff alleges that he paid monthly uniform maintenance costs of $10.00 to $12.00. (Compl., ¶ 14.) Thus, under any circumstance, Plaintiff's uniform maintenance costs plainly did not reduce his wages below the minimum wage. Accordingly, his claim must be dismissed.

CONCLUSION

For all of the foregoing reasons, Defendant respectfully moves this Court to dismiss the Plaintiff's Complaint in its entirety.

Dated: January 27, 2016
New York, NY

Respectfully submitted,

/S/
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum of Law in Support of Defendant's Motion to Dismiss was served upon the following via the New York State efile system and U.S. Mail, this 27th day of January, 2016:

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