ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

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FILED
JUL 18 2016
COUNTY CLERK
QUEENS COUNTY

MOHAMAD FATCHMAHAMAD
Individually, and on behalf of all other similarly situated,

Plaintiff,

-against-

Index No. 709766/15
Mot. Cal. Date: 4/18/16

U. S. SECURITY ASSOCIATES, INC.,
Defendant.

Mot. Cal. No: 61
Mot. Seq. 1

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The following papers numbered EF 2 to 5 and EF 7 to 10 read on this motion by defendant **U.S. SECURITY ASSOCIATES, INC.** for an order pursuant to CPLR 3211(a)(2) for an order dismissing the plaintiff's complaint as against it.

	PAPERS NUMBERED
Notice of Motion-Exhibits.....	EF 2 -5
Memorandum of Law in Opposition.....	EF 7-8
Reply Memorandum of Law.....	EF 9-10

Upon the foregoing papers, it is ordered that the motion is granted.

This is an action brought by plaintiff, pursuant to New York Labor Law § 190 *et seq.*, to recover damages for the costs of maintaining and laundering of his security guard uniform during his employment with defendant U.S. Security Associates, Inc. (USSA) and, *inter alia*, other fees and costs. The plaintiff alleges in his Complaint, that while he was employed as a security guard for USSA (for approximately five years), he was required to launder and clean his uniform for work costing him $10.00-$12.00 per month and should have been reimbursed for those expenses incurred for cleaning his uniform.

USSA now moves to dismiss the complaint as a matter of law because the plaintiff fails to state a claim which the requested relief can be granted.

In considering a motion to dismiss a complaint for failure to state a cause of action (see CPLR 3211[a][7]), the criterion is whether the proponent of the pleading has a cause

of action, not whether it has stated one (see Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]). Under CPLR 3211(a)(7), the Court addresses only the pleading itself, keeping in mind that the motion should be denied if the facts alleged by the plaintiff fit within any cognizable legal theory (see Leon v Martinez, 84 NY2d 83 [1994]). Under a CPLR 3211 (a)(1) claim, the party seeking dismissal has the burden of submitting evidence that "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." (See Nevin v. Laclede Professional Prods., 273 AD2d 453, 453 [2d Dept. 2000]).

USSA argues that the plaintiff is not entitled to reimbursement from it for the costs of maintaining his uniform because the plaintiff made more than the minimum wage. USSA further argues that it did not deduct cleaning costs from the plaintiff's wages. (cf. Hudacs v Celebrity Limo. Serv. Corp., 205 AD2d 155 [3d Dept. 1994]). Thus, the plaintiff has no claim under the broad use of New York Labor Law § 193 or under the more specific rule regarding uniform deductions under 12 NYCRR § 142-23.

> New York Labor Law § 193(1)(a) states that "[n]o employer shall make any deduction from the wages of an employee, *except deductions which: a) are made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency . . .* " (emphasis added).

Furthermore,

> New York Labor Law § 193(3) states that "[n]o employer shall make any charge against wages or require an employee to make any payment by separate transaction unless such charge or payment is permitted as a deduction from wages."

The plain language of New York Labor Law § 193(1)(a)(b) allows for an employer to make deductions from an employee's wages so long as they are in accordance with *any rule issued by any governmental agency* (emphasis added) or expressly authorized in writing for the employee's benefit (see Ackerman v NY Hosp. Med. Ctr. of Queens, 127 AD2d 794,795 [2d Dept. 2015]). The New York Statizede Department of Labor's Minimum Wage Order for Miscellaneous Industries and Occupations is exactly the type of rule that is applicable under New York Labor Law § 193(1)(a). (See 12 NYCRR §§ 142); see also Ayres v 127 Restaurant Corp.,

12 F.Supp2d 305 [S.D.N.Y. 1998]) (The Court uses the definition of "uniform" from 12 NYCCR 137-2.1 while also applying New York Labor Law § 652).

12 NYCRR § 142-2.5(c) states, 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 employee purchases a required uniform, he shall be reimbursed by the employer for the cost thereof not later than the time of the next payment of 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: (2) $9.00 per week on and after July 24, 2009, if the employee works more than 30 hours weekly"

Therefore, an employer has to pay an employee for the supply, maintenance or laundering of required uniforms *only* if the employee's wages fall below minimum wage (see Chan v Sung Yue Tung Corp., 2007 WL 313483 (S.D.N.Y. Feb., 1, 2007); see also Ayres v 127 Restaurant Corp., 12 F.Supp2d 305 [S.D.N.Y. 1998]) ("Both New York law and federal law require employers to compensate employees for the purchase and maintenance of required uniforms if the employees' expenditures for these purposes would reduce their wages to below minimum wage").

USSA has met its burden of pointing to "documentary evidence that utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (McCully v Jersey Partners, Inc., 60 AD3d 562 [1st Dept. 2009]; see generally CPLR 3211[a][1]). Here, defendant has proffered evidence that resolves all factual disputes.

The plaintiff's opposition fails to support his causes of action. Plaintiff admits that he made between $8.00 and $8.62 per hour during the period while he was employed by USSA (see Verified Complaint of Mohamad Fatchmahamad "Complaint" ¶ 13), but claims that he is due reimbursement for his costs of $10.00 - $12.00 per month.

Plaintiff argues that USSA is liable under New York Labor Law § 193 and that 12 NYRCC § 142 is not the controlling authority in this matter. Plaintiff claims that unreimbursed work expenses are the types of deductions that Labor law

§ 193 addresses. The Court agrees that New York Labor law § 193 is applicable, however, 12 NYRCC § 142 is an exception that is incorporated to the application of New York Labor Law § 193.

As stated above, the plaintiff does not argue that he earned minimum wage or below minimum wage. During the applicable period covered by plaintiff's Complaint, the minimum wage was $7.15 per hour on and after January 1, 2007, and $7.25 per hour on and after July 24, 2009 (see 12 NYCCR § 142-2.1). Thus, the plaintiff made, *at the minimum* rate, $320.00 per week, or roughly $1,280.00 per month ($8.00 per hour x 40 hours), and the minimum wage at the time would have been at most $290.00 per week, or approximately $1,160.00 per month ($7.25 per hour x 40 hours). Thus, the plaintiff was paid above minimum wage and his claim falls.

While the plaintiff's assertion that New York Labor Law § 193 applies here is correct, USSA is also correct in stating that 12 NYCRR § 142-2.1 also applies as a specific rule for the cleaning and laundering of uniforms and is therefore controlling (see Chan v Sung Yue Tung Corp., 2007 WL 313483 [S.D.N.Y. Feb. 1, 2007]). Plaintiff is unable to show that the defendant's requirement for him to launder and keep his uniform clean causes him to incur wage deductions to the point that he is earning less than minimum wage.

Accordingly, it is hereby,

ORDERED, that the motion by the defendant U.S. Security Associates, Inc. is granted; and it is further

ORDERED, that the plaintiff's complaint as against defendant USSA is hereby dismissed.

The foregoing constitutes the decision and order of this Court.[1]

Dated: June 29, 2016

TIMOTHY J. DUFFICY, J.S.C.

FILED
JUL 18 2016
COUNTY CLERK
QUEENS COUNTY

[1] The Court gratefully acknowledges the the assistance of intern Kyle Monaghan, a second year student at St. John's Law School, with the legal research and the draft preparation in this matter.