SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
COUNTY OF NEW YORK: IAS PART 3

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DERIC MENGA and WILFRED IGNACE, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

Index No. 650081/2011
Motion Date: 5/2/12
Motion Seq. No.: 001

CLARK DODGE & COMPANY, INC. d/b/a CLARK DODGE & COMPANY, INC. and CLARK DODGE & COMPANY BROKERS, and JOSEPH VINCENT DIMAURO,

Defendants.

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The following papers, numbered 1 to 3, were read on this motion to dismiss.

	Papers Numbered
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes X No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

Dated: November 29, 2012

Hon. Eileen Bransten, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(s): _____

Check One: ☐ FINAL DISPOSITION x NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMITORDER/JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

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Plaintiffs,

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BRANSTEN, J.

This matter comes before the Court on defendants Clark Dodge & Company d/b/a Clark Dodge & Company, Inc. and Clark Dodge & Company Brokers ("Clark Dodge"), and Joseph Vincent DiMauro's (collectively "defendants") motion to dismiss plaintiffs Deric Menga and Wildred Ignace's ("plaintiffs") putative class action complaint, pursuant to CPLR 3211(a)(1) and (a)(7). Plaintiffs oppose.

Background

Plaintiffs are stockbrokers, who were formerly employed by defendant Clark Dodge. Plaintiffs bring the instant putative class action on behalf of current and former Clark Dodge stockbrokers, asserting claims for unpaid overtime compensation in violation of 12 N.Y.C.R.R. § 142-2.2 and for impermissible wage deductions in violation of N.Y. Labor Law §§ 191, 193, and 198-b. In their Complaint, plaintiffs allege that they

were classified by defendants as "exempt" employees and did not receive overtime compensation for hours worked in excess of forty per week. (Compl. ¶¶ 27-28.) In addition, plaintiffs contend that defendants did not pay their earned monthly wages and commissions in the agreed upon timeframe and also made illegal deductions from plaintiffs' wages. (Compl. ¶¶ 24-25.) Defendants seek dismissal of the Complaint in its entirety, and in the alternative, request that venue be changed to Westchester County pursuant to CPLR 510(3).

I. Defendants' Motion to Dismiss

Plaintiffs assert four claims in their complaint: (1) failure to pay overtime, in violation of 12 NYCRR § 142-2.2; (2) impermissible wage deductions, contrary to N.Y. Labor Law § 193; (3) illegal pay deductions and deductions from wages, in violation of N.Y. Labor Law § 198-b; and, (4) failure to pay wages and commissions on a timely basis, contrary to N.Y. Labor Law § 191.

Defendants make two principal arguments in favor of dismissal: (1) plaintiffs assert their claims in the wrong forum and should be compelled to arbitrate this dispute before the Financial Industry Regulatory Authority, Inc. ("FINRA") and (2) plaintiffs are "exempt" employees that are not entitled to overtime. In addition, defendants argue that

the complaint lacks specificity and that plaintiffs lack standing to assert a recordkeeping claim. Each of these arguments will be considered in turn.

A. *Standard of Law*

Defendants move to dismiss the four counts of plaintiffs' Complaint pursuant to CPLR 3211(a)(1) and (7).

> On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. 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. 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 and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.

Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994) (internal quotations and citations omitted); *see also Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 326 (2002); *Prichard v. 164 Ludlow Corp.*, 14 Misc.3d 1202(A), *3 (Sup. Ct., N.Y. Cty. 2006). "It is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence ... are not presumed to be true on a motion to dismiss for legal insufficiency. *O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st Dep't 1993). The court is not required to accept factual allegations that are contradicted

by documentary evidence or legal conclusions that are unsupported in the face of undisputed facts. *Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 496 (1st Dep't 2006) (citing *Robinson v. Robinson*, 303 A.D.2d 235, 235 (1st Dep't 2003).

B. *Defendants' Motion to Dismiss – Request to Compel Arbitration*

Defendants first argue that plaintiffs' action should be dismissed in its entirety given plaintiffs' agreement to arbitrate any and all disputes with Clark Dodge before FINRA. Defendants cite to an agreement, known as a "U-4," which was signed by plaintiffs Menga and Ignace at the beginning of their employment with Clark Dodge. Pursuant to Section 15(A) of the U-4, plaintiffs agreed to arbitrate any dispute "that is required to be arbitrated under the rules, constitutions, or by-laws of [FINRA] as may be amended from time to time . . ." (Affidavit of Joseph DiMauro ("DiMauro Aff."), Ex. C at § 15(A), ¶ 5.) Pointing to this provision, defendants contend that FINRA is not the proper forum to hear plaintiffs' claims and that plaintiffs should be compelled to arbitration.

In response, plaintiffs note that the FINRA arbitration rules expressly disclaim class action litigations and that Section 15(A) of the U-4 therefore does not compel arbitration of their claims. Specifically, plaintiffs refer to FINRA Rule 13204(d), which prohibits arbitration of class action claims and specifically prohibits enforcement of "any

arbitration agreement against a member of a . . . putative class action with respect to any claim that is the subject of the . . . class action" until certain conditions are met: (1) denial of class certification; (2) decertification of the class; or (3) exclusion of a member of the certified or putative class from the action by either the court or the member's determination. None of these conditions are satisfied here.

Since an agreement to arbitrate is a contract, whether arbitration is mandated turns entirely on the language of the agreement between the parties. *Gomez v. Brill Sec., Inc.*, 95 A.D.3d 32, 37 (1st Dep't 2012). When the language of the agreement is clear, the contract shall "be enforced according to its terms." *Id.* Here, the U-4 agreement, by its terms, clearly precludes arbitration when arbitrable claims are brought as a class action. Since the three conditions listed above are not satisfied, plaintiffs cannot be required under the U-4 to arbitrate their putative class action claims.

The facts of the instant case fall squarely within the First Department's holding in *Gomez v. Brill Securities, Inc.* Considering the same U-4 arbitration provision and the same FINRA rule in the context of class action claims, the First Department likewise held that such claims were not arbitrable "until such time as class certification is denied," the class is decertified, or a member is excluded from the class. *Gomez*, 95 A.D.3d at 39. Defendants offer no basis to deviate from the First Department's ruling in *Gomez*.

Accordingly, defendants' motion to dismiss based on the arbitration provision in the U-4 is denied.

Defendants' argument that plaintiffs should be "judicially estopped" from denying the arbitrability of its class action claims does nothing to rescuscitate their dismissal argument. Defendants argue that plaintiffs' counsel conceded the arbitrability of state law wage claims in a separate lawsuit brought on behalf of different plaintiffs against different defendants in federal court. Even assuming that defendants' argument is factually correct and that plaintiffs' counsel indeed stated that such state claims are subject to arbitration before FINRA, judicial estoppel still would be inapplicable. The doctrine of judicial estoppel "precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her own favor from assuming a contrary position in another action simply because his or her interests have changed." *Jones Lang Wooton USA v. LeBoeuf, Lamb, Greene & MacRae*, 243 A.D.2d 168, 177 (1st Dep't 1998), *lv. dismissed* 92 N.Y.2d 962 (1998); *Pierre v. Mary Manning Walsh Nursing Home Co., Inc.*, 93 A.D.3d 541, 542 (1st Dep't 2012). Here, defendants concede that a different party made the federal court arbitrability argument and that the party did not prevail. (Defs.' Memorandum of Law in Support of Motion to Dismiss, p. 10-11.)

Accordingly, judicial estoppel is plainly unavailing, and defendants' motion to dismiss is denied.[1]

C. *Defendants' Motion to Dismiss Based on Plaintiffs' Employment Status*

Defendants next argue that plaintiffs are not "exempt" employees under the New York Labor Law and thus are not entitled to overtime compensation. Further to this argument, Defendants contend that plaintiffs were not hourly workers, but instead were salaried employees, falling under either the executive, administrative and/or professional overtime exemptions established in the Labor Law. *See* 12 N.Y.C.R.R. § 142-2.14(c)(4).

1. Executive and Administrative Exemptions

The test used to determine whether an employee falls under the executive or administrative exemptions focuses on two elements: salary and primary duties. 12 N.Y.C.R.R. §§ 142-2.14(c)(4)(i), (ii). In support of their motion to dismiss, defendants rely upon extrinsic evidence attached to the DiMauro affidavit, as well as factual assertions by defendant DiMauro the same affidavit, that address both elements.

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[1] Defendants also assert that the Complaint should be dismissed since it is "forum shopping in the extreme." Having found that the litigation at this juncture may be heard in this Court, defendants' argument is moot; however, the Court notes that defendants offer no legal support for this as a basis for dismissal under CPLR 3211(a)(1) or (7).

Defendants point to copies of Clark Dodge checks issued to Menga and Ignace, as well as purported ledger entries recording payments to plaintiffs to demonstrate that plaintiffs' salaries qualified for the executive and administrative exemptions. (DiMauro Aff. Exs. F, H.) While defendants underscore that this evidence alone demonstrates plaintiffs' exempt status, these documents are not "documentary evidence" that can be considered by the court on a CPLR 3211(a)(1) motion. *See Flowers v. 73rd Townhouse LLC*, 99 A.D.3d 431 (1st Dep't 2012) (citing *Granada Condominium III Assn. v. Palomino*, 78 A.D.3d 996, 997 (2d Dep't 2010) (refusing to consider checks attached to affidavit on the basis that they were not documentary evidence within the meaning of CPLR 3211(a)(1)).

Further, even if considered, the checks and ledger entries do not "conclusively establish[ ] a defense to the asserted claims as a matter of law." *Correa v. Orient-Express Hotels, Inc.*, 84 A.D.3d 651 (1st Dep't 2011). Defendants point to the ledgers to assert that plaintiffs Menga and Ignace were paid more than the requisite amount per week to fall under the exempt employee classification. During plaintiff Menga's employment, the minimum weekly "salary" required to qualify as "exempt" was $536.10 per week. 12 N.Y.C.R.R. § 142-2.14(4). As Menga highlights, the records submitted by defendants appear to state that he regularly earned less than this amount per week from Clark Dodge. (DiMauro Aff. Ex. E.) In addition, the ledger entries and checks submitted by defendants

as to plaintiff Ignace fail to demonstrate that he received "more than the required salary each week." (DiMauro Aff. ¶ 20.) In fact, the ledger of payments to Ignace submitted by defendants shows no payments for most weeks of Ignace's employment. (DiMauro Aff. Ex. H.)

In addition, defendants assert that plaintiffs' job responsibilities exempt them from the overtime law. Defendants rely upon factual assertions in the DiMauro affidavit. *See* DiMauro Aff. ¶ 25 ("Both Menga and Ignace were considered professional staff while employed at Clark Dodge and afforded the privileges and responsibilities given to staff within that category. The type of tasks which they performed were not the type of tasks assigned to hourly workers . . ."); *see also id.* ¶¶ 19, 24. These factual assertions by defendant DiMauro in his affidavit are not "documentary evidence" under CPLR 3211 and are not an adequate basis for dismissal. *See Solomons v. Douglas Elliman LLC*, 94 A.D.3d 468 (1st Dep't 2012) (finding that affidavit "which do[es] no more than assert the inaccuracy of plaintiffs' allegations, may not be considered in the context of a motion to dismiss for the purpose of determining whether there is evidentiary support for the complaint."); *Tsimerman v. Janof*, 40 A.D.3d 242 (1st Dep't 2007) (affirming denial of CPLR 3211(a)(7) motion where based on defendant's affidavits disputing plaintiff's allegations). Further, the "pre-hire questionnaires" attached to the DiMauro affidavit, Exs. G & I, even if considered as documentary evidence, do not conclusively establish

that plaintiffs' responsibilities once employed by defendants satisfy the requisite job responsibilities element for the executive and administrative exemptions. *See Leon v. Martinez,* 84 N.Y.2d 83, 88 (1994) ("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."). If anything, this evidence raises questions of fact, underscoring why dismissal under CPLR 3211 would be inappropriate. *See, e.g., Khayyam v. Doyle*, 231 A.D.2d 475, 476 (1st Dep't 1996).

2. Professional Exemption

Defendants make no separate argument as to whether or why plaintiffs fall under the "professional" exemption to the overtime law. Pursuant to 12 N.Y.C.R.R. § 142-2.14(c)(iii), to qualify for the "professional exemption," the occupation must require "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from general academic education . . ." or be "original and creative in character in a recognized field of artistic endeavor." Defendants make no showing as to either requirement.

For the foregoing reasons, defendants' motion to dismiss based on plaintiffs' exempt status is denied.

D. *Defendants' Remaining Arguments*

Defendants offer two additional arguments in favor of dismissal: (1) that the complaint lacks specificity and (2) that plaintiffs lack standing to assert a claim under 12 N.Y.C.R.R. § 142-2.6.

First, defendants claim that the complaint lacks the requisite specificity because it fails to detail both the number of hours that plaintiffs worked per week and the job responsibilities of each plaintiff. While the Complaint would not be considered overly detailed, the Court finds that it proves notice of plaintiffs' claims as required by CPLR 3013. Under the CPLR, "the emphasis with respect to pleading is placed, where it should be, upon the primary function of pleadings, namely, that of adequately advising the adverse party of the pleader's claim . . ." *Foley v. D'Agostino*, 21 A.D.2d 60, 62-63 (1st Dep't 1964). Here, the Complaint gives defendants notice of plaintiffs' claim that they regularly worked over 40 hours in a week and that defendants purportedly failed to pay them the requisite amount for those overtime hours. (Compl. ¶ 28.) Further, the complaint states that defendants mischaracterized plaintiffs and other class members as "exempt" to avoid making overtime payments. (Compl. ¶ 29.) Plaintiffs' claim meets the threshold for notice pleading.

Next, defendants contend that plaintiffs lack standing to assert a recordkeeping violation under 12 N.Y.C.R.R. § 142-2.6. While Section 142-2.6 does not provide for

monetary compensation to private plaintiffs for violations thereof, the provision "lowers the burden of proof for those employees for whom records were not properly kept to demonstrate they were not paid proper minimum wage, overtime, and spread of hours." *Mendez v. Pizza on Stone,* Civ. No. 11-6316, 2012 WL 3133547, at *3 (S.D.N.Y. Aug. 1, 2012). Thus, Section 142-2.6 may be relevant to plaintiffs' overtime payments claim; however, it is not its own cause of action for which plaintiffs can seek compensation.

II. **Defendants' Request to Change Venue**

Defendants seek to have this action transferred to Westchester County pursuant to CPLR 510(3). In support of their motion, defendants highlight that all of its payroll records are in Westchester County and that its satellite office in New York County has closed. (DiMauro Aff. ¶¶ 36, 39-40.) However, defendants fail to set forth a basis for a discretionary change in venue, as their request lacks "affidavits or other proofs from material witnesses claiming that they would be inconvenienced by testifying in New York County." *Manzari v. Burrows*, 89 A.D.3d 440 (1st Dep't 2011). Accordingly, defendants' request is denied.

Conclusion

For the reasons set forth above, it is hereby

ORDERED that Defendants Clark Dodge & Company d/b/a Clark Dodge & Company, Inc. and Clark Dodge & Company Brokers, and Joseph Vincent DiMauro's motion to dismiss counts one through four of the Complaint is denied in its entirety; and it is further

ORDERED that Defendants Clark Dodge & Company d/b/a Clark Dodge & Company, Inc. and Clark Dodge & Company Brokers, and Joseph Vincent DiMauro's motion for a change of venue is denied; and it is further

ORDERED that Defendants Clark Dodge & Company d/b/a Clark Dodge & Company, Inc. and Clark Dodge & Company Brokers, and Joseph Vincent DiMauro will answer the Complaint within twenty (20) days after filing of the Notice of Entry.

Dated: New York, New York
November 29, 2012

ENTER:

Hon. Eileen Bransten, J.S.C.