

**Wachter v Dow Kim**

2013 NY Slip Op 34172(U)

January 11, 2013

Supreme Court, New York County

Docket Number: 650532/08

Judge: Charles E. Ramos

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: CE Ramos  
Justice

PART 53

Index Number : 650532/2008  
WACHTER, KARL J.  
vs.  
KIM, DOW  
SEQUENCE NUMBER : 005  
REARGUMENT/RECONSIDERATION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s) _____
Answering Affidavits — Exhibits _____	No(s) _____
Replying Affidavits _____	No(s) _____

Upon the foregoing papers, it is ordered that this motion is

*Is decided in accordance with  
accompanying memorandum decision and order.*

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

Dated: 1/11/13

Charles E. Ramos J.S.C.  
**CHARLES E. RAMOS** J.S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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KARL J. WACHTER,

Plaintiff,

Index No.  
650532/08

- against -

DOW KIM

Defendant.

-----x

**Charles E. Ramos, J.S.C.:**

Plaintiff Karl Wachter moves for leave to reargue both his and defendant Dow Kim's prior summary judgment motions solely as they relate to the narrow ground upon which this Court dismissed Wachter's claims under Labor Law §§ 193 and 198.

Upon reargument, Wachter requests this Court vacate its prior decision as they relate to Wachter's claims under the Labor Law, and deny Kim's motion for summary judgment.

The Court grants leave to reargue, and upon reargument, this decision shall stand in the place and stead of this Court's prior determination, dated July 18, 2012 (Decision).

For a full recitation of the factual background in this action, see this Court's prior Decision.

Previously, Wachter moved for summary judgment on his claim for violation of Labor Law §§ 193(1) and 198 on the ground that his 2007 and 2008 guaranteed minimum compensation are "wages" within the meaning of the statute. Wachter argued that Kim's failure to pay Wachter the unpaid balance of the 2007 and 2008

Compensation at the termination of his employment constituted an unlawful deduction from WACHTER's wages within the meaning of Labor Law § 193. Wachter sought the full amount of his "wages," and argues that the amounts improperly deducted totals \$450,000 of the 2007 Compensation and \$1,869,231 of the 2008 Compensation. Wachter testified at his deposition that his base salary was \$200,000 a year, and that he was paid \$180,000 for the ten months that he was employed (Ex. B, annexed to Kim's Motion, Transcript [Tr.], at 379).

Kim separately moved for summary judgment to dismiss this claim on the basis that Wachter is not an "employee" and Kim is not an "employer" within those provisions of the Labor Law.

Previously, the First Department determined that the 2007 and 2008 compensation of not less than \$2,000,000 in 2008 and a prorated portion thereof in 2007 constituted guaranteed sums certain that 'Diamond Lake' must pay to plaintiff and has no discretion not to pay. On this basis, that court determined that Wachter sufficiently stated a claim for protected "wages" under Labor Law § 193 (1) and § 198 (*Wachter v Kim*, 82 AD3d 658 [1<sup>st</sup> Dept 2011]).

Section 193 of the Labor Law prohibits an employer from making "any deduction from the wages of an employee" unless permitted by law or authorized by the employee for certain payments made for the employee's benefit. Section 198 of the

Labor Law entitles the employee to an award of attorney's fees.

In its decision, the First Department did not address whether the non-payment of Wachter's wages qualifies as a "deduction from wages," within the meaning of section 193 of the Labor Law.

Under well-established precedent, section 193 of the Labor Law does not apply when a plaintiff merely alleges a failure to pay wages and cannot cite to a specific deduction from wages (see *Kletter v Fleming*, 32 AD3d 566, 567 [3d Dept 2006]; *Monagle v Scholastic, Inc.*, 2007 WL 766282, \*2 [SD NY 2007]; *Malinowski v Wall Street Source, Inc.*, 2012 WL 279450, fn 5 [SD NY 2012]; *Moras v Marco Polo Network, Inc.*, 2012 WL 6700231 [SD NY 2012]).

Because Wachter merely alleges the failure to pay wages rather than a specific unauthorized deduction from his wages, his claim for violation of section 193 of the Labor Law fails. Consequently, the request for attorney's fees under Labor Law § 198 also fails (see *Gottlieb v Kenneth D. Laub & Co.*, 82 NY2d 457, 459 [1993], *rearg. denied* 83 NY2d 801 [1994]).

Accordingly, it is hereby

ORDERED that plaintiff's motion for leave to reargue is granted, and upon reargument, it is hereby


ORDERED that plaintiff's motion for summary judgment is denied, and it is further

ORDERED that defendant's motion for summary judgment is

granted as to the claim for violations of the Labor Law Section 193, which is hereby dismissed and severed.

Dated: January 11, 2013

ENTER:

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J.S.C.

**CHARLES E. RAMOS**