SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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TRICIA ROBERTS, individually and on behalf of all other persons similarly situated who were employed by DEPENDABLE CARE, LLC d/b/a HOPETON CARE and HOPETON CARE CDPAP, LLC along with other entities affiliated or controlled by DEPENDABLE CARE, LLC d/b/a HOPETON CARE and HOPETON CARE CDPAP, LLC,

Plaintiff,

- v -

DEPENDABLE CARE, LLC d/b/a HOPETON CARE and HOPETON CARE CDPAP, LLC,

Defendants.

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INDEX NO. 161481/2017

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16

were read on this motion to dismiss.

By notice of motion, defendants move pursuant to CPLR 3211(a)(1) and (7) for an order dismissing the claims asserted against them. Plaintiff opposes.

I. COMPLAINT (NYSCEF 10)

Plaintiff worked for defendants as a home attendant from June 2014 through June 2015, tasked with providing personal care services to homebound and elderly people. Although plaintiff did not reside in her clients' homes, she worked more than 40 hours per week, generally, three to seven 24-hour shifts a week, and occasional 4-hour shifts.

When working a 24-hour shift, plaintiff was required to stay overnight at the client's home and be ready and available to provide assistance. The shifts made sleeping difficult and

obliged her to rearrange her meal times, as her clients needed continual supervision and personal care while they ate. Plaintiff was not given a one-hour break for her three daily meals.

Plaintiff was paid a flat rate of $140 for approximately 12 hours of her 24-hour shifts, and received no overtime wages. Thus, she was not compensated for the other 12 hours. She also did not receive a spread-of-hours premium of one additional hour at the minimum wage rate for the days in which she worked 10 or more hours and was required to attend uncompensated six-hour orientation and training sessions.

Defendants maintained a policy of compensating their employees for only 12 of their 24-hour shifts, not paying overtime for hours worked in excess of 40 hours per week, and never giving the spread-of-hours premium. They required employees, including plaintiff, to wear uniforms while working, and neither laundered nor compensated them for laundering the uniforms.

Plaintiff initiated this putative class action on December 29, 2017 alleging a breach of contract and violations of the Labor Law.

II. CONTENTIONS

A. Defendants (NYSCEF 8-12)

Defendants contend that plaintiff is precluded from bringing a cause of action for breach of contract under the Home Care Worker Wage Parity Law which applies only to work performed under the Consumer Directed Personal Assistance Program (CDPAP) after July 1, 2017, well after plaintiff's period of employment, and that all claims under the New York Labor Law for minimum wage, overtime, and spread-of-hours pay are insufficiently pleaded. According to defendants, plaintiff fails to state the number of hours worked, the amount she was paid, and the amounts of hours she slept or how often she had to attend to a client. They also

maintain that plaintiff's Labor Law claim for uniform maintenance pay is insufficiently specific, absent any indication of whether the uniforms were purchased by her, whether she received uniform maintenance pay, and if she did, the amount and frequency of the payments.

Plaintiff's other breach of contract claim, asserted under New York City Administrative Code § 6-109, is also insufficiently pleaded as plaintiff's allegations are made solely based "upon information and belief," and she fails to allege any contract between defendants and New York City.

B. Plaintiff (NYSCEF 13-15)

Plaintiff argues that although the Wage Parity Law does not apply to CDPAP for the period during which she worked for defendants, she was employed as a home attendant, not as a consumer directed personal assistant. Likewise, defendants' claim to provide services only under CDPAP constitutes a misrepresentation, as they are also a home care agency, which falls within the scope of the Wage Parity Law.

In light of the liberal pleading standards of the Labor Law, plaintiff maintains that her claims are sufficiently pleaded as she provides the hours she worked and services she provided. Moreover, she asserts, nonresidential home attendants are entitled to be paid for every hour worked during a 24-hour shift regardless of whether they were afforded opportunities for sleep and meals.

Plaintiff also denies having failed to state a claim for uniform maintenance pay, as she alleges that defendants never laundered the required uniform nor compensated her for her additional laundry costs. And, having alleged that defendants failed to comply with the city service contracts that mandate that she be paid living wages and health benefits, she maintains that she states a cause of action for breach thereof, and denies any obligation to plead the specific

provisions violated or to attach the contact to her complaint. Moreover, that her allegations are pleaded under information and belief does not warrant dismissal at this stage of the litigation.

C. Reply (NYSCEF 16)

Defendants assert that plaintiff disingenuously denies having worked for a CDPAP as she alleges to have been employed simultaneously by both defendants, one of which uses the acronym CDPAP in its name. They reiterate their arguments pertaining to the specificity of plaintiff's claims under the Labor Law and the breach of contract claim under Administrative Code § 6-109.

III. ANALYSIS

A pleading may be dismissed for a failure to state a cause of action. (CPLR 3211[a][7]). In deciding the motion, the court must liberally construe the pleading, "accept the alleged facts as true, accord [the non-moving party] the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable theory." (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). However, "[f]actual allegations presumed to be true on a motion pursuant to CPLR 3211 may be properly negated by affidavits and documentary evidence." (*Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 [1st Dept 2005], quoting *Biondi v Beekman Hill House Apt., Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]).

Although defendants claim in their notice of motion that they also move pursuant to CPLR 3211(a)(1), they offer no documentary evidence.

A. Public Health Law § 3614-c (Wage Parity Law)

Plaintiff concedes that the Wage Parity Law does not apply to CDPAP prior to July 2017, and thus, the only issue is whether she worked for defendants as a consumer directed personal assistant or as a home attendant. That one of the defendant's names contains the acronym

CDPAP does not constitute evidence. In any event, plaintiff alleges that she was employed as a home care attendant, a classification covered by the Wage Parity Law. Absent any documentary evidence to the contrary and accepting all allegations in the complaint as true (*Leon*, 84 NY2d at 87), defendants fail to sustain their burden of proof on this issue.

B. Labor Law

Wage claims under the Labor Law are to be construed liberally. (*Settlement Home Care, Inc. v Indus. Bd. of Appeals of Dep't of Labor*, 151 AD2d 580, 581 [2d Dept 1989]).

Plaintiff alleges that she worked more than 40 hours per week in three to seven 24-hour shifts a week, and that she was paid a flat rate of $140 for 12 of the 24 hours per shift that she worked and was not paid for the other 12 hours. At this stage of the litigation, such allegations state a cause of action under either the federal or state pleading standards, and plaintiff need not state the number of hours she slept or how often her sleep was interrupted, as she did not live at the clients' premises. Thus, defendants fail to demonstrate that plaintiff is not entitled to minimum wage payments for her entire 24-hour shift. (*See Tokhtaman v Human Care, LLC*, 149 AD3d 476, 477 [1st Dept 2017], *lv dismissed* 30 NY3d 1010 [2017] [nonresidential employees may recover unpaid wages for hours worked in excess of 13 hours a day]; *Andryeyeva v New York Health Care, Inc.*, 153 AD3d 1216, 1218-1219 [2d Dept 2017] [same]).

As it is undisputed that defendants required that plaintiff wear a uniform and that they neither laundered the uniform nor compensated her for the additional cost of laundering it, they fail to demonstrate that plaintiff's allegations are insufficient as a matter of law.

C. Breach of city service contracts

Plaintiff states a cause of action for breach of contract, having referenced the sections that must be included in every city service contract. (*Tokhtaman*, 149 AD3d at 478).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss is denied; it is further

ORDERED, that defendants are directed to serve and file an answer to the complaint within 30 days of the date of this order; and it is further

ORDERED, that the parties appear for a preliminary conference on March 27, 2019 at 2:15 pm, at 60 Centre Street, Room 341, New York, New York.

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1/3/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE