SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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RICKEY GARDNER

Plaintiff,

- v -

D&D ELECTRICAL CONSTRUCTION COMPANY INC.,

Defendant.

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INDEX NO. 160249/2018

MOTION DATE 08/07/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13

were read on this motion to/for DISMISS.

D&D Electrical Construction Company Inc.'s (**D&D**) motion to dismiss the complaint of Rickey Gardner pursuant to CPLR § 3211 (a) (1), (2) and (7) is granted for the reasons set forth below.

Mr. Gardner was employed by D&D as an electrical technician and auto mechanic from approximately April 21, 2016 to September 27, 2016, during which time he performed manual and physical work attendant to his duties (Complaint, ¶¶ 11, 13). In the six-year period prior to the commencement of this action, D&D paid its employees, including Mr. Gardner, salary and overtime compensation on a bi-weekly basis (*id.*, ¶ 16).

Mr. Gardner commenced this putative class action on behalf of himself and all other similarly situated current and former employees of D&D asserting claims under the New York Labor Law for failure to pay members of the putative class on a weekly basis and for failure to provide them with proper notice and wage statements. Specifically, Mr. Gardner asserts causes of action for

(i) untimely overtime payments under Labor Law § 650 *et seq.*, (ii) untimely wage payments under Labor Law §§ 191 and 198, and (iii) failure to provide the required notices and wage statements under Labor Law §§ 190, 191, 195, and 198. D&D now moves to dismiss the complaint in its entirety.

A party may move for judgment dismissing one or more causes of action on the ground that the pleadings fail to state a cause of action for which relief may be granted (CPLR § 3211 [a] [7]). On a motion to dismiss pursuant to CPLR § 3211 (a) (7), the court must afford the pleadings a liberal construction and accept the facts alleged in the complaint as true, according the plaintiff the benefit of every favorable inference (*Morone v Morone*, 50 NY2d 481, 484 [1980]). The court's inquiry on a motion to dismiss is whether the facts alleged fit within any cognizable legal theory (*id.*). Bare legal conclusions are not accorded favorable inferences, however, and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]). A party may also move to dismiss based on documentary evidence pursuant to CPLR § 3211 (a) (1). A motion to dismiss pursuant to CPLR § 3211 (a) (1) will be granted only where the documentary evidence conclusively establishes a defense to the plaintiff's claims as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]). Moreover, pursuant to CPLR § 3211 (a) (2), a party may move for dismissal for lack of subject matter jurisdiction.

The complaint asserts causes of action under the Labor Law for untimely wage and overtime payments and violations of notice requirements. Labor Law § 191 provides, in relevant part, that

"[a] manual worker shall be paid weekly and not later than seven calendar days after the end of the week in which the wages are earned" (Labor Law § 191 [1] [a] [i]).

Labor Law § 663 provides:

> If any employee is paid by his or her employer less than the wage to which he or she is entitled under the provisions of this article, he or she shall recover in a civil action *the amount of any such underpayments*, together with costs all reasonable attorney's fees, prejudgment interest as required under the civil practice law and rules, and unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law, *an additional amount as liquidated damages equal to one hundred percent of the total of such underpayments found to be due*. Any agreement between the employee, and the employer to work for less than such wage shall be no defense to such action (NY Labor Law § 663 [1] [emphasis added]).

Additionally, Labor Law § 198 (1-a) provides:

> In any action instituted in the courts upon a wage claim by an employee or the commissioner in which the employee prevails, the court shall allow such employee to recover *the full amount of any underpayment*, all reasonable attorney's fees, prejudgment interest as required under the civil practice law and riels, and, unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law, *an additional amount as liquidated damages equal to one hundred percent of the total amount of the wages found to be due . . . .* (emphasis added).

Both §§ 198 and 663 allow for recovery only for underpayments found to be due. Here, Mr. Gardner does not allege that he is owed any unpaid regular or overtime wages. Mr. Gardner cannot bring an independent action to enforce the substantive provisions of the Labor Law because he was paid in full prior to the commencement of this action (*Beshty v General Motors*, 327 F Supp 2d 208, 223 [WD NY 2004]). Without any allegations of unpaid wages, the first and second causes of action cannot be sustained (*Hussain v Pakistan Intl. Airlines Corp.*, 2012 WL 5289541, *3 [ED NY, Oct. 23, 2012, No. 11-CV-932 [ERK] [VVP]); *Hunter v Planned Bldg.*

Servs. Inc., 2018 WL 3392476, *2-3 [Sup Ct, Queens County, June 20, 2018, No. 715053/2017]).

As to the causes of action in the complaint relating to notice violations, the documentary evidence utterly refutes the plaintiffs' allegations. Labor Law § 195 (1) requires employers to provide employees, at the time of hiring, with a notice listing: (i) the rate of pay and the basis thereof, (ii) any allowances claimed as part of the minimum wage, (iii) the regular payday, (iv) the name of the employer (including any "doing business as" names), and (v) the employer's address and telephone number. In addition to the initial notice at the time of hiring, Labor Law § 195 (3) requires employers to furnish employees with wage statements with each payment of wages listing: (i) the dates of work for which payment is made, (ii) the employee's name, (iii) the employer's name, (iv) the employer's address and phone number, (v) the rate of pay and the basis thereof, (vi) deductions, (vii) allowances claimed as part of the minimum wage, and (viii) net wages.

In support of its motion to dismiss, D&D submits a Notice and Acknowledgment of Wage Rate (the **Notice**) and paystubs (Moran aff, exhibits 2 and 3). Both the Notice and the paystubs contain all of the statutorily-required information. Accordingly, the documentary evidence utterly refutes the causes of action alleging § 195 notice violations and conclusively establishes a defense as a matter of law.

The plaintiffs also seek class certification pursuant to CPLR § 901. CPLR § 901 (b) provides that actions to recover a penalty may not be maintained as class actions unless explicitly

authorized by statute. Labor Law § 198 allows for liquidated damages but does not expressly allow for the recovery of liquidated damages in a class action (*see* Labor Law § 198 [1-a]). Liquidated damages under § 198 constitute a penalty for the purposes of CPLR § 901 (b) and therefore any claims seeking liquidated damages for violations of the Labor Law cannot be maintained as class actions (*Griffin v Gregorys Coffee Mgt., LLC*, 2019 WL 1877207, *2 [Sup Ct, NY County, April 26, 2019, No. 153397/2018]). As the first and second causes of action alleging untimely wage and overtime payments seek only liquidated damages and are pled as class action claims, they cannot be sustained as a matter of law.

Accordingly, it is

ORDERED that the defendant's motion to dismiss the complaint is granted.

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8/7/2019
DATE

ANDREW BORROK, J.S.C.

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