SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. DANIEL PALMIERI, J.S.C.

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JUAN BARAHONA, on behalf of himself and all others similarly situated, ERIK RIOS, and MELBI MORALES, individually

Plaintiffs,

-against-

INTERNATIONAL WAREHOUSE GROUP, INC.,

Defendant.

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TRIAL/IAS PART 16

Index No.: 603305-17

Mot. Seq. 001
Mot. Date: 7-26-17

Submit Date: 8-3-17

The following papers have been read on this motion:

Notice of Motion, dated 6-19-17.....1
Affirmation in Opposition, dated 7-19-17.....2
Memorandum of Law in Opposition, dated 7-19-17....3
Affirmation in Reply, dated 8-2-17.. 4

This motion by the defendant pursuant to CPLR 3211 for an order dismissing the Fourth cause of action alleged in the complaint is denied.

In their complaint alleging a class action as well as individual claims, plaintiffs set forth four causes of action. This present motion concerns the Fourth, which in substance alleges that the defendant, plaintiffs' employer, failed to comply with Labor Law § 195(1) in that plaintiffs were not provided at the time of hiring with a notice containing the information required by that section.

Defendant moves to dismiss pursuant to CPLR 3211(a)(1), documentary evidence, and (a)(7), failure to state a cause of action. It presents three documents bearing the names of the plaintiffs in support of its motion; each is entitled "PAYCHEX" at the top left, with the words "New Employee Packet" to the right. Each contains a check box for the full or part-time status, rate of pay, and job category.

The law regarding dismissals for failure to state a cause of action is well established. In evaluating a motion made pursuant to CPLR 3211(a)(7), the Court must look within the four corners of the complaint, and if any cause of action is discernable therefrom the motion should fail. *See, e.g., Guggenheimer v Ginzburg,* 43 NY2d 268, 275 (1977). In making this determination, the factual allegations asserted in the pleading are to be accepted as true, and the plaintiff is to be accorded the benefit of every favorable inference that may be drawn therefrom. *Konidaris v Aeneas Capital Mgt., LP,* 8 AD3d 244 (2d Dept. 2004); *Leon v Martinez,* 84 NY2d 83 (1994). Inartfully drawn complaints may be supplemented by affidavits on such a motion in order to sustain a claim. *Rovello v Orofino Realty Co.,* 40 NY2d 633, 635 (1976). Where such evidence is submitted, the question becomes whether the proponent of the pleading has a cause of action, not whether he has stated one. *Guggenheimer v Ginzburg, supra. See also F & M General Contracting v Orcel*, 132 AD3d 946 (2d Dept. 2015) and *Congel v Mafitano,* 61 AD3d 807, 808 (2d Dept. 2009).

In order to dismiss a complaint founded on documentary evidence, CPLR 3211(a)(1), the documents submitted must conclusively establish a defense to the claims alleged as a matter of law. *Goldfarb v. Schwartz*; 26 AD3d 462 (2d Dept. 2006); *Gorilla Realty, LLC v. SLK Westbury, LLC* 288 Ad2d 344 (2d Dept. 2001); *Tougher Indus. v Northern Westchester Joint Water Works,* 304 AD2d 822 (2d Dept. 2003) Affidavits cannot be considered in evaluating this ground, as they do not constitute documentary proof. *Berger v Temple Beth-El of Great Neck,* 303 AD2d 346 (2d Dept. 2003).

Applying the foregoing law to the record presented on this motion, the Court concludes that dismissal of the Fourth cause of action is inappropriate. The documentary proof submitted, the forms allegedly given to plaintiffs at the time of hire, is not authenticated, and even if they were, fall short of eliminating all issues regarding compliance with Labor Law § 195(1). It is clear that the forms presented do not contain the employer's address, telephone number, or state when wages will be paid, all of which is required under this section. In the case of plaintiffs Barahona and Morales, there are no check marks clarifying whether the rate stated is for each

hour worked or for a time period.

Further, each of the plaintiffs are identified therein as being Hispanic. Although this does not necessarily mean that Spanish rather than English is the primary language of each of these plaintiffs, the statute requires that the form be provided in his primary language. In view of the identification of the plaintiffs as aforesaid, and that the defendant is relying on its form to demonstrate compliance with the statute, it was incumbent on defendant to have advanced proof either that the form was offered in Spanish, or that English was the primary language of the plaintiffs.

In sum, given the strict requirements for dismissal based on documentary evidence under CPLR 3211(a)(1), this evidence is insufficient to ground dismissal of the subject cause of action.

Nor can the Court dismiss the Fourth cause of action for failure to state a cause of action. It cannot be said as a matter of law that no cause of action exists, given the conclusion that the documentary evidence does not dispose of the allegation that defendant was not in compliane with Labor Law § 195. The Labor Law itself provides for a cause of action for violation of § 195(1). Labor Law § 198(1-b).

Accordingly, the motion is denied.

All contentions not discussed either are unnecessary to the conclusions reached here or are without merit. Any requests for relief not specifically addressed are denied.

This shall constitute the Decision and Order of this Court.

DATED: September 28, 2017
Mineola, New York

ENTERED

OCT 03 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:

HON. DANIEL PALMIERI
Supreme Court Justice

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