Carlin v Singh Hospitality Group, Inc.
2013 NY Slip Op 34200(U)
December 20, 2013
Supreme Court, Nassau County
Docket Number: 14702/12
Judge: Robert A. Bruno
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

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GEANCARLO CARLIN, LUIS PORTILLO; individually and on behalf of all other persons similarly situated who were employed by SINGH HOSPITALITY GROUP, INC.; S.R.B. CONVENTION & CATERING CORP.; QUINN RESTAURANT CORP.; SRB CATERING CORP.; SRB CONSESSION INC.; BRS CONCESSION INC.; RAJ & RAJ REALTY LTD.; SINGH R & H REALTY INC.; and/or any other entities affiliated with or controlled by SINGH HOSPITALITY GROUP, INC. and/or HARENDRA SINGH,

TRIAL/IAS PART 20
INDEX No.: 14702/12
Motion Date: 08/12/13
Motion Sequence: 001

DECISION & ORDER

Plaintiffs,

-against-

SINGH HOSPITALITY GROUP, INC.; S.R.B. CONVENTION & CATERING CORP.; QUINN RESTAURANT CORPORATION: SRB CATERING CORP.; SRB CONSESSION INC.; BRS CONCESSION INC.; RAJ & RAJ REALTY LTD.; SINGH R & H REALTY INC.; HARENDRA SINGH, and/or any other entities affiliated with or controlled by SINGH HOSPITALITY GROUP, INC. and/or HARENDRA SINGH,

Defendants.

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Papers Numbered

Sequence #001

Notice of Motion, Affirmations & Exhibits..... 1
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Upon the foregoing papers, it is ordered that this motion by the plaintiffs for an order, pursuant to CPLR 901 and 902, certifying this action as a class action, is decided as follows:

Plaintiff Geancarlo Carlin worked as a server and busser from approximately July 2008

until December 2010 at the Woodlands, Woodlands at the Greens and Water's Edge, catering facilities owned and/or operated by the defendants (Carlin Affidavit, Plaintiffs' Exhibit B). Plaintiff Luis Portillo worked as a server from approximately June 2009 until August 2010 at the Woodlands (Portillo Affidavit, Plaintiffs' Exhibit B).

Plaintiffs allege that defendants violated Labor Law § 196-d by failing to distribute service charges and maitre d' tips to service employees who worked at events at defendants' catering facilities. Section 196-d of the Labor Law provides that:

> No employer or his agent or an officer or agent of any corporation, or any other person shall demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee. This provision shall not apply to the checking of hats, coats or other apparel. Nothing in this subdivision shall be construed as affecting the allowances from the minimum wage for gratuities in the amount determined in accordance with the provisions of article nineteen of this chapter nor as affecting practices in connection with banquets and other special functions where a fixed percentage of the patron's bill is added for gratuities which are distributed to employees, nor to the sharing of tips by a waiter with a busboy or similar employee.

Section 196-d of the Labor Law has been held to apply to mandatory service charges when it is shown that employers represented or allowed their customers to believe that the service charges were gratuities for their employees and an employer may not retain such service charges (*Samiento v World Yacht Inc.*, 10 NY3d 70, 81 [2008]).

The named plaintiffs seek an order allowing this action to proceed as a class action on behalf of:

> All individuals employed by Defendants from July 15, 2005 to the present in such trades, classifications and professions that customarily receive gratuities including but not limited to waiters, bussers, banquet servers, runners, captains, bartenders, and maitre d's. The putative class does not include maintenance workers, corporate officers, salespersons, cooks, food preparers, chefs, dishwashers, directors, clerical staff, office workers or any other person employed by Defendants whose trade, classification or profession does not customarily receive gratuities and/or who did not work at catered or banquet events.

Analysis

CPLR 901(a) provides that:

> One or more members of a class may sue or be sued as representative parties on behalf of all if:
> 1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

> 2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
> 3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
> 4. the representative parties will fairly and adequately protect the interests of the class; and
> 5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Once the prerequisites under CPLR 901 have been satisfied, CPLR 902 requires the court to consider the following matters in determining whether the action may proceed as a class action:

> 1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;
> 2. The impracticability or inefficiency of prosecuting or defending separate actions;
> 3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
> 4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum;
> 5. The difficulties likely to be encountered in the management of a class action.

CPLR article 9 is to be liberally construed and the determination as to whether to grant class certification rests in the discretion of the trial court (*Beller v William Penn Life Ins. Co. of N.Y.*, 37 AD3d 747, 748 [2d Dept 2007]). The plaintiffs have the burden of establishing the statutory prerequisites for certification (*Emilio v Robison Oil Corp.*, 63 AD3d 667 [2d Dept 2009]).

In support of their motion for class certification, the named plaintiffs have submitted their own affidavits, as well as the affidavits of other service employees of defendants, who each aver that to their knowledge, they typically did not receive a portion of the service charge which defendants required customers to pay (Affidavits, Plaintiffs' Exhibit B). Plaintiffs have also submitted an affidavit from a former catering director who worked at defendants' facilities at the Woodlands, Woodlands at the Greens, Seafood Shack at Tobay Beach, Water's Edge and H.R. Singletons and who avers that defendants imposed a 20% service charge for catered events. She further avers that defendant Singh stated that the customers should believe that the service charge was going to the wait staff, but to her knowledge, none of the service employees received a portion of the service charge. (Laino Affidavit, Exhibit C) Plaintiffs also offer the affidavit of a former director of operations for catering and restaurants at the Water's Edge who reiterated that defendants' catering facilities required customers to pay a mandatory service charge of 20%, which, to his knowledge, was not distributed to defendants' service employees (Grady Affidavit, Exhibit C).

Defendants argue that plaintiffs' affidavits are inadequate to establish any gratuity violations. While it is appropriate on a motion for class certification to consider whether

plaintiffs' claims have merit, this inquiry is limited to whether on the surface there appears to be a cause of action which is not a sham (*Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 422 [1st Dept 2010]). The affidavits proffered by plaintiffs, taken collectively, meet this threshold.

Plaintiffs have also met the specific requirements of numerosity, commonality, typicality and adequacy set forth in CPLR 901(a). The affidavits submitted by plaintiffs in support of their motion for class certification indicate that anywhere from 40 to 150 service employees worked at defendants' catering facilities during the subject time period. There is no set rule for the number of prospective class members which must exist to satisfy the numerosity requirement of CPLR 901(a)(1), however, a class of 40 or more has been found to raise a presumption of numerosity (*Weinstein v Jenny Craig Operations, Inc.*, 41 Misc3d 1220[A] [Sup Ct, New York County 2013]). Defendants' contention that the class is so large that it will dilute the alleged aggrieved individuals' claims is unfounded.

Plaintiffs have also satisfied the commonality requirement of CPLR 901(a)(2), which requires predominance of common questions of law or fact, not identity or unanimity among class members (*City of New York v Maul*, 14 NY3d 499, 514 [2010]; *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 98 [2d Dept 1980]). Defendants argue that there is no commonality because the named plaintiffs worked in different restaurants as compared to other members of the proposed class. However, the respective affidavits of the catering director and the director of operations submitted by plaintiffs in support of their motion (Plaintiffs' Exhibit C) indicate that there was a common policy regarding the mandatory service charge at each of defendants' catering facilities. Contrary to defendants' position, the fact that there were multiple catered events does not defeat commonality since the basis for the putative class members' recovery of any gratuity paid for such events is the same.

Similarly, plaintiffs have also fulfilled the typicality requirement of CPLR 901(a)(3) because the individual plaintiffs' claims derive from the same practices and course of conduct that give rise to the claims of the other members of the putative class and are based on the same legal theory. Despite defendants' argument to the contrary, the named plaintiffs' claims need not be identical to those of the class (*Krebs v Canyon Club, Inc.*, 22 Misc3d 1125(A) [Sup Ct, Westchester County 2009]).

Plaintiffs have established their ability to fairly and adequately represent the interests of the proposed class as required by CPLR 901(a)(4). The fact that certain of the proposed members of the class may have additional claims against the defendants does not create a fundamental conflict of interest among the members of the class that would defeat the adequacy of the named plaintiffs' representation (*Weinstein v Jenny Craig Operations, Inc.*, 41 Misc3d 1220(A) [Sup Ct, New York County 2013]).

Finally, plaintiffs have satisfied the superiority requirement of CPLR 901(a)(5) by demonstrating that a class action will be the most efficient method for handling the claims of the similarly situated putative class members. While defendants argue that plaintiffs have failed to prove superiority because the proposed members of the class could bring proceedings before the Department of Labor, the Labor Law does not provide the exclusive remedy, nor is there any requirement that administrative remedies be exhausted before a private cause of action may be maintained (*Nawrocki v Proto Constr. & Dev. Corp.*, 82 AD3d 534, 536 [1st Dept 2011]; *Krebs v Canyon Club, Inc.*, 22 Misc3d 1125(A) [Sup Ct, Westchester County 2009]).

In meeting the prerequisites of CPLR 901(a), plaintiffs have also satisfied the factors set forth in CPLR 902 and defendants have failed to offer any persuasive argument to the contrary.

Defendants take the position that if the Court does decide to certify the class, it should be limited to employees of those facilities where the named plaintiffs actually worked because the named plaintiffs have no personal knowledge of the defendants' policies at its other facilities. This argument ignores the respective affidavits of the catering director and the director of operations submitted by plaintiffs in support of their motion (Plaintiffs' Exhibit C), which demonstrate that there was a common policy at each of defendants' catering facilities.

Accordingly, it is hereby:

ORDERED, that the plaintiffs' motion for class certification is GRANTED.

All applications not specifically addressed are herewith denied.

This constitutes the decision and order of this Court.

Dated: December 20, 2013
Mineola, New York

ENTER:

Hon. Robert A. Bruno, J.S.C.