Ahmed v Morgans Hotel Group Mgt., LLC
2017 NY Slip Op 30372(U)
February 27, 2017
Supreme Court, New York County
Docket Number: 153841/15
Judge: Reed Robert
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 43

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JAHANGIR AHMED, on behalf of himself and others similarly situated,

Plaintiffs,

-against- Index No. 153841/15

MORGANS HOTEL GROUP MANAGEMENT, LLC; RICHARD SZYMANSKI; and any other related entities,

Defendants.

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ROBERT R. REED, J.:

In this action, plaintiff Jahangir Ahmed alleges, on behalf of himself and others similarly situated, that defendants Morgans Hotel Group Management, LLC (Morgans) and Richard Szymanski violated Labor Law § 196-d (the Labor Law) and the Department of Labor's Hospitality Wage Order 12 NYCRR 146-2.18 and 2.19 (the Wage Order) by representing their banquet service charges as gratuities, and then failing to pay their employees such gratuities. Plaintiff also seeks recovery of minimum wages allegedly owed to him, and other similarly situated persons who are presently or were formerly employed by defendants at hotel and catering venues located in New York. Motion sequence nos. 002 and 003 are consolidated for disposition.

In motion sequence no. 002, defendants move, pursuant to CPLR 3212, for summary judgment dismissing the first amended class action complaint (the complaint). Defendants also move, pursuant to CPLR 2304, for an order quashing the subpoena issued to a nonparty, and, pursuant to CPLR 3103, for the grant of a protective order, as well as sanctions, attorneys' fees and costs. Plaintiff cross-moves for partial summary judgment on the complaint.

In motion sequence no. 003, plaintiff moves for an order certifying this action as a class

action and granting him leave to amend the complaint to include Sharif Uddin as a named plaintiff.

For the reasons set forth below, defendants' motion for summary judgment is granted, and the complaint is dismissed. Plaintiff's motions for class certification and to amend the complaint are denied.

FACTS

Beginning in April 2009, defendants employed, in furtherance of their catering business, numerous individuals, including plaintiff and the putative class members, in trades including wait staff, waiters, servers, captains, bussers, bartenders, food runners, maitres d', bridal attendants, and in various other related customarily tipped trades (complaint, ¶ 22). Beginning in April 2009 and continuing through the present, defendants contracted with customers to cater events such as parties, birthdays, gatherings, holidays, celebrations, weddings, anniversaries, and other parties or occasions at its hotel and catering venues, including, but not limited to, Hudson New York, Mondrian Soho, Morgans New York and Royalton New York (*id.*, ¶ 24). For each catered event, defendants employed a staff of numerous service workers to perform food and service related tasks (*id.*, ¶ 25). Many of these service workers would perform services under the same contracts at the same catered events to the same guests (*id.*, ¶ 26).

Plaintiff worked for Morgans as a server's assistant from 2013 until March 2015 at the former Mondrian Soho (no longer operated by Morgans), located at 9 Crosby Street, New York, NY (*id.*, ¶ 10). According to plaintiff, since April 2009, Morgans has engaged in a policy and practice of charging its banquet customers a mandatory 23% "Service Charge," without disclosing that this service charge is not a gratuity for employees (*id.*, ¶¶ 3-4, 27-30). Plaintiff

alleges that, without such a disclaimer, a reasonable customer would presume that such charge was, in fact, a gratuity, and that, because he and other employees were not paid these "gratuities," defendants violated the Labor Law and the Wage Order (*id.*, ¶¶ 5-6, 31, 51-54).

In response to plaintiff's discovery demands, defendants produced the Banquet Event Order forms for the events that plaintiff worked. Each of these forms contains clear language stating:

> "16% of food, beverage & room rental total for the event will be added to your account as gratuity and is fully distributed to service staff assigned to your event. 7% of food, beverage & room rental total for the event will be added to your account as an administrative charge. The administrative charge is not a gratuity and is the property of the Hotel to cover the discretionary costs of your event"

(*see* aff of James A. Bryant, III, exhibit A).

In addition, in response to defendants' first set of interrogatories and request for admissions, plaintiff does not identify a single instance in which the customer was misled as to the percentages being paid for gratuity and service charge (*see* aff of Francis Cook, exhibit B, interrogatory no. 8). In fact, plaintiff admits in his response to the request for admissions that he was unaware of any such event (*see id.*, request no. 8). Plaintiff also does not identify a single instance in which he or his coworkers were not paid the gratuities that were charged to the customer (*see id.*, interrogatory no. 9).

Plaintiff alleges that he and other members of the putative class were paid an hourly wage (complaint, ¶ 33). Plaintiff alleges that, while employed by defendants, he was paid $5.00 per hour in checks that failed to show allowances – including any tip credit – taken against his earnings by defendants (*id.*, ¶ 34). Plaintiff alleges that other members of the putative class were also paid at a rate lower than minimum wage on checks that failed to show allowances –

including any tip credit – taken against their earnings by defendants (*id.*, ¶ 35). Plaintiff alleges that he and other members of the putative class did not receive their portion of the service charge, and that defendants retained the service charge for themselves (*id.*, ¶¶ 36-38).

Plaintiff also alleges that defendants violated the Labor Law by failing to pay him minimum wage (*id.*, ¶¶ 55-58). However, in response to defendants' discovery demands, plaintiff could not identify any period in which his or his coworkers' taxable income was below the standard minimum wage (*see* interrogatory nos. 14 and 15). Defendants also produced all of plaintiff's payroll records, which confirm that plaintiff was always paid an amount equal to or greater than the minimum wage (*see* Bryant aff, exhibit B). Plaintiff was also provided with notice via a Department of Labor approved form that his wages were subject to a tip credit (*see* Bryant aff, exhibit C).

Plaintiff filed his original complaint on April 17, 2015 and an amended complaint on July 8, 2015. On July 28, 2015, defendants moved to dismiss the amended complaint. On November 13, 2015, this court denied the motion, but recognized that "there are certain, strong questions that have been raised about the veracity of [plaintiff's] position based on the motion presented to the court."

DISCUSSION

Motion Sequence No. 002

"'[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993] [citation omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). "Failure to make such

showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]). The court is required to examine the evidence in a light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Summary judgment may be granted only when it is clear that no triable issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), and "should not be granted where there is any doubt as to the existence of a triable issue" of fact (*American Home Assur. Co. v Amerford Intl. Corp.*, 200 AD2d 472, 473 [1st Dept 1994]).

Unlawful Withholding of Gratuities (First Cause of Action)

Section 196-d of the Labor Law prohibits employers from demanding, accepting or retaining, directly or indirectly, any part of an employee's gratuity or any charge purported to be a gratuity. Relevant portions of the Wage Order – enacted in 2011 – supplement and clarify that provision, and state that there is "a rebuttable presumption that any charge in addition to charges for food, beverage, lodging, and other specified materials or services, including but not limited to any charge for 'service' or 'food service,' is a charge purported to be a gratuity" (12 NYCRR 146-2.18 [b]). However, an employer can conclusively rebut this presumption by "demonstrating, by clear and convincing evidence" that it provided notification that was "sufficient to ensure that a reasonable customer would understand that such charge[s] [were] not

purported to be a gratuity" (12 NYCRR 146-2.19 [b]).

An employer meets this burden by clearly stating in the contract or agreement with the customer, and on any menu and bill listing prices, that an administration or service charge: (1) is for the administration of the banquet, special function or package deal; (2) is not purported to be a gratuity; and (3) will not be distributed as gratuities to the employees who provide service to the guests (12 NYCRR 146-2.19 [c]). When an employer utilizes a combination charge, part of which is for the administration of a banquet, special function, or package deal, and part of which is to be distributed as gratuities to the employees who provided service to the guests, the "gratuity presumption" is rebutted when the employer breaks down in writing the specific percentages or portions of the charge that is for the administration/service, and the portion of the charge that is to be paid as gratuity to the staff (12 NYCRR 146-2.19 [d]).

Here, plaintiff claims that defendants violated the Labor Law and the Wage Order because they did not notify their customers that the banquet "Service Charge" is not a gratuity and, absent such notification, the service charge is presumed to be a gratuity – one that has not been paid. This cause of action must be dismissed, however, as defendants present documentary evidence that Morgans did not lead its customers to believe that the "Service Charge" is a gratuity and, therefore, did not unlawfully withhold these purported gratuities. Instead, Morgans, in its regular course of business, makes the requisite service charge disclaimers/notifications. For each of the customer contracted events in which plaintiff worked, all of the Banquet Event Order forms specifically state "16% of food, beverage & room rental total for the event will be added to your account as gratuity . . . *[and that the remaining] administrative charge is not a gratuity and is the property of the Hotel to cover the discretionary costs of your event"* (emphasis added).

Significantly, plaintiff is admittedly unaware of any instance in which a customer was not expressly made aware of this distinction (*see* interrogatory nos. 8 and 9; request no. 6).

In opposition to defendants' motion, and in support of his § 196-d claim, plaintiff states that the "reasonable patron" standard set forth in *Samiento v World Yacht, Inc.* (10 NY3d 70 [2008]) "should govern when determining whether a banquet patron would understand a service charge was being collected in lieu of a gratuity" (*id.* at 79), rather than the actual statute upon which his claims are brought. Plaintiff argues that, even though the requisite notification language was provided to customers, there is still some question as to whether a "reasonable patron" would have understood the language set forth in the Banquet Event Order form.

Samiento, however, is completely inapposite, as it predates the Wage Order. Moreover, this argument is irrelevant, as plaintiff admits that he is unaware of any such instance of confusion, or of any instance in which the gratuities collected from customers were not distributed to him and his coworkers. These are prerequisites for bringing such a claim.

In any event, the Wage Order, mirroring the same logic set forth in *Samiento*, directs that an employer can demonstrate compliance with the Labor Law by showing that it provided notification sufficient to "ensure that a reasonable person would understand that such charge[s] are not purported to be a gratuity" (12 NYCRR 146-2.19 [b]). Indeed, it is improbable that a reasonable person would believe that a service charge was a tip when the banquet provider affirmatively tells them that the service charge is not a tip.

In an effort to save his claim, plaintiff submits a self-serving affidavit that states:

> "After working these banquet events, I received a paycheck that reflected only an hourly rate of pay of $5.00 per hour with no indication that I had received any portion of a "service charge" that was being assessed to the customer hosting the

banquet"

(aff of Jahangir Ahmed, ¶ 8).

There are several problems with this statement. First, no "service charge" was assessed to customers. That term was never used on the Banquet Event Order form for the events that plaintiff worked (*see* Bryant aff, exhibit A). Instead, the Banquet Event Order refers to a "Gratuity & Administrative Charge" to avoid any confusion. It designates a percentage marked as a gratuity, and then separately designates an administrative charge (*see id.*).

Second, whether plaintiff's paycheck "indicated" which portion of his earned tips were from a banquet event is irrelevant, as there is no requirement for that information to be delineated on his paystub. Plaintiff's paystubs referred to his entire earned tips, which included the tips earned from banquet events (*see* Bryant aff, exhibit B).

Finally, even in his self-serving affidavit, plaintiff still does not identify any instance in which the gratuities were not distributed, only that he did not receive any indication of it on his paystub. In contrast, defendants present evidence that these gratuities were, in fact, distributed, by providing the records showing the distribution for the events that plaintiff worked (*see* Bryant supplemental aff, exhibit A).

Accordingly, plaintiff cannot sustain his claim for failure to be paid gratuities as Morgans specifically notified its customers that the administrative charges were not gratuities, and defendants have demonstrated that all of the gratuities were properly distributed. Thus, summary judgment must be granted dismissing the first cause of action.

Minimum Wage Violation (Second Cause of Action)

Defendants move for summary judgment on plaintiff's minimum wage claim on the

ground that plaintiff's payroll records unequivocally demonstrate that plaintiff earned an amount equal to or above the minimum wage for his entire employment. Plaintiff cross-moves for summary judgment on the ground that defendants paid plaintiff and the other members of the putative class at a rate below the minimum wage, and were not entitled to take a tip credit against the minimum wage, given their failure to adhere to the prerequisites for taking such a credit.

Pursuant to the Wage Order, plaintiff, and those similarly situated to him, are considered "food service workers" (12 NYCRR 146-3.4). Under this classification, Morgans was required to pay plaintiff an hourly minimum wage of at least $5.00, but could satisfy the remaining amount of the minimum wage through a tip credit, which it did. Indeed, at the time he started working for Morgans, plaintiff acknowledged, in writing, that he was receiving $5.00 per hour as his base wage, and $2.25 in tips per hour to meet the minimum wage in effect at that time (*see* Bryant aff, exhibit C). Moreover, plaintiff's payroll records reveal that plaintiff earned an amount equal to or above the minimum wage throughout his entire employment (*see* Bryant aff, exhibit B), and in plaintiff's responses to discovery, he could not identify a single instance in which he, or any of his coworkers, was paid below the minimum wage.

However, as a prerequisite for taking a tip credit against the minimum wage, an employer must provide its employee with written notice explicitly stating that "extra pay is required if tips are insufficient to bring the employee up to the basic minimum hourly rate" (12 NYCRR 146-2.2 [a]). Plaintiff contends that the "Notice and Acknowledgment of Pay Rate and Payday" provided to him upon his hiring does not demonstrate that defendants were entitled to avail themselves of the tip credit (*see* Cook aff, exhibit C). Plaintiff claims that, as a result, he did not receive the proper notices pursuant to the Wage Order, and defendants are not permitted to take a "tip credit"

because he did not receive the proper notices pursuant to the Wage Order. Plaintiff contends that, thus, he is entitled to summary judgment on his second cause of action.

Plaintiff fails, however, to address the fact that the Labor Law was recently amended to protect employers from a mere technical violation of the notice provision, and that this amendment provides a complete defense to his minimum wage claim. Labor Law § 198 (1-b) and (1-d) provide that, when an individual is not provided with the requisite notice, the employer will not be liable where the employee was always paid an amount equal to or above the minimum wage throughout his employment. In other words, if the employee suffered no actual injury as a result of not being given the notice, there is no liability. That is exactly what happened here – the documentary evidence demonstrates that plaintiff was always paid at least the minimum wage. This fact provides a complete defense to plaintiff's claim (*see* Labor Law § 198 [1-b]). Accordingly, summary judgment must also be granted dismissing the second cause of action.

In sum, it is clear that plaintiff has suffered no injury, and there is no basis for any claim against defendants. Plaintiff, therefore, cannot be a class representative, and the action must be dismissed in its entirety.

Quashing of Non-Party Subpoena and the Imposition of a Protective Order

Plaintiff served a nonparty subpoena on ADP, Morgans' payroll processor, demanding production of all payroll records for the putative class members. Defendants move to quash this subpoena, and for a protective order.

As summary judgment has been granted dismissing the entire complaint, these branches of the motion are denied as moot.

Costs, Fees and Sanctions

22 NYCRR 130-1.1 (a) authorizes the court to award any party "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorneys' fees, resulting from frivolous conduct as defined in this Part." Defendants' motion for sanctions is denied. The imposition of sanctions is not appropriate here, as there is no indication that plaintiff's position is completely frivolous and without merit (*see Benishai v Benishai*, 83 AD3d 420, 420 [1st Dept 2011]; *Matter of L&M Bus Corp. v New York City Dept. of Educ.*, 83 AD3d 432, 433 [1st Dept 2011]).

Motion Sequence No. 003

Motion for Class Certification

Plaintiff moves for certification of a class of service workers to recover unpaid gratuities and unpaid wages. Plaintiff's motion for class certification is denied. Pursuant to CPLR 901 (a), in order to certify the putative class, plaintiff must show, inter alia, that the representative parties will fairly and adequately protect the interests of the class (*Small v Lorillard Tobacco*, 94 NY2d 43, 53 [1997]). Here, plaintiff cannot show that he suffered any injury, because he admittedly is unaware of any instance in which he was not actually paid the gratuities for those events that he worked, and because he always earned above the minimum wage. Where a named plaintiff cannot show any injury, New York courts deny class certification (*see Lewis v Hertz Corp.*, 212 AD2d 476, 477 [1st Dept 1995] [representative plaintiff who "failed to adduce any proof of having suffered the injuries she alleges on behalf of the class[] thus is 'simply not eligible to represent'" the class] [citation omitted]; *see also Rivkin v Heraeus Kulzer GmbH*, 289 AD2d 27, 28 [1st Dept 2001] ["to allow the two individual plaintiffs who moved for class action

certification to maintain a class action in spite of their total lack of damages violates the requirement that class actions be brought in the name of a particular plaintiff who has a cause of action and is representative of the interests of the class"]).

Accordingly, the motion for class certification is denied.

Motion to Amend the Complaint

Pursuant to CPLR 3025 (b), "[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties." As a general proposition, leave to amend pleadings "should be freely granted" (*RBP of 400 W42 St., Inc. v 400 W. 42nd St. Realty Assoc.*, 27 AD3d 250, 250 [1st Dept 2006]), although the court retains the sound discretion over whether to permit the amendment (*see Pellegrino v New York City Tr. Auth.*, 177 AD2d 554, 557 [2d Dept 1991]). When the court is presented with a motion to amend the pleadings, "in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted" (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009]).

On a motion for leave to amend, plaintiff must establish "that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]; *see also Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 [1st Dept 2011]). A motion for leave to amend in response to a dispositive motion is "futile" and should be denied where "the defects [in the complaint] are [not] cured by the proposed . . . amended complaint" (*Meimeteas v Carter Ledyard & Milburn LLP*, 105 AD3d 643, 643 [1st Dept 2013], and/or the proposed amendment "suffers from the same fatal deficiency as the original claims" (*"J. Doe No. 1" v CBS Broadcasting Inc.*, 24 AD3d 215, 216 [1st Dept

2005]; *see also CARI, LLC v 415 Greenwich Fee Owner, LLC*, 91 AD3d 583, 583 [1st Dept 2012]; *Pearl Cash, LLC v EMD Produce Corp.*, 2013 WL 3389349, *4, 2013 NY Misc LEXIS 2839, *7 ("[i]f the proposed amended complaint contains the same defects as the original complaint, leave should be denied as futile"]).

Plaintiff seeks leave to amend the complaint to add Sharif Uddin as a named plaintiff and class representative. Plaintiff contends that Uddin meets all of the prerequisites to serve as a class representative because he "performed work for Defendants as a service employee subject to the same alleged unlawful policies as Named Plaintiff Ahmed" (plaintiff's memorandum at 28).

However, like plaintiff, Uddin has failed to demonstrate that he suffered any injury, and thus, he is not qualified to serve as a class representative. Uddin's affidavit submitted in support of the motion is virtually identical to that of the self-serving affidavit submitted by plaintiff. In this affidavit, Uddin does not identify a single instance in which he was not paid a gratuity, and he does not allege that he ever earned below the minimum wage. Uddin, thus, does not demonstrate that he suffered any actual injury. Indeed, the payroll records provided for Uddin shows that he was always paid gratuities, and earned above the minimum wage throughout his employment (*see* Bryant aff, exhibit A).

Accordingly, adding Uddin as a class representative would be futile, as Uddin's claims suffer from the same fatal deficiencies and defects as those of Ahmed, and are thus equally devoid of merit. Therefore, plaintiff's motion for leave to amend is palpably insufficient, and must be denied (*see Carol v Madison Plaza Assoc., LLC*, 95 AD3d 735 [1st Dept 2012]).

The court has considered the remaining arguments, and finds them to be without merit.

Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing the complaint (motion sequence no. 002) is granted, and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the remaining branches of defendants' motion for (1) an order quashing the nonparty subpoena, (2) for the grant of a protective order, and (3) for sanctions, attorneys' fees and costs (motion sequence no. 002) are denied; and it is further

ORDERED that plaintiff's cross motion for summary judgment (motion sequence no. 002) is denied; and it is further

ORDERED that plaintiff's motion for class certification (motion sequence no. 003) is denied; and it is further

ORDERED that plaintiff's motion to amend the complaint (motion sequence no. 003) is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: February 27, 2017

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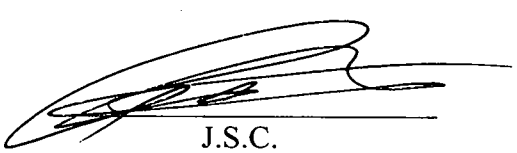

J.S.C.