SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: COMMERCIAL DIVISION

PRESENT: **HON. JENNIFER G. SCHECTER** **PART** 54

Justice

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VICENTE TORIBIO, JENNIFER ARRIGO, JENNIFER BECHEM, BRENDAN BURKE, LIAM BUSH, RIGDZIN COLLINS, JENNY CRUZ, PENELOPE CRUZ, RENEE CRUZ, VANESSA CRUZ, ALEXIS DAVID, QUERLIM FRANCO, MIEKO GAVIA, ALBERT GOOLD, CHARLES GOOLD, STEPHANIE HENRIQUEZ, KERRI KENDER, KAMILA NAREWSKA, LILY NUNEZ, JOSE PEREZ, ANGEL PIMENTEL, STEPHANIE PON, ALEXIS RUBIN, ALLAN RUBENSTEIN, ANTHONY THAMBYNAYAGAM, HUI-SHURN YONG,

Plaintiffs,

- v -

FELDOR BILLIARDS, INC. D/B/A FAT CAT BILLIARDS, NOAH SAPIR, CHARLES H BERG,

Defendants.

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INDEX NO. 153384/2014

DECISION AFTER TRIAL

Background

Plaintiffs are former employees of defendant Feldor Billiards, Inc. (Fat Cat or the Club), who principally seek damages from the Club and its two owners, defendants Noah Sapir and Charles Berg, under the New York Labor Law (NYLL) for unlawful retention of gratuities between July 2008 and July 2014. Plaintiffs were awarded partial summary judgment on liability on the following issues: "1) defendant Sapir was an employer of the Plaintiffs for purposes of the NYLL; 2) between July 2008 and July 2014, Sapir and Fat Cat collected customer gratuities and failed to disburse them to Plaintiffs; 3) between July 2008 and July 2014, each of Plaintiffs were tip-eligible, excluding Alexis David and [Alexander] Rubin, as to whom there [remained] a triable issue of material fact over their tip-eligibility during this timeframe; and 4) between July 2008 and July 2014, defendants failed to submit paystubs in violation of NYLL § 195(3) and have failed to prove the affirmative defense of 'complete and timely payment of all wages due' for any pay periods in which Plaintiffs were eligible to receive tips" (Dkt. 603 at 12 [October 27, 2020 decision and order]). Facing the prospect of joint and several liability at trial, Sapir and Berg asserted cross-claims against each other, including claims regarding which of them is responsible for the Club's illegal compensation policy (*see* Dkt. 600).

DECISION AFTER TRIAL

Before trial, plaintiffs settled with Berg, the Club defaulted (Dkt. 674), and the parties stipulated to a bench trial on the remaining issues (Dkt. 637), which are: (1) plaintiffs' damages under NYLL § 196-d; (2) whether David and Rubin were tip-eligible employees; (3) whether Sapir's and Fat Cat's violations of the NYLL between July 2008 and November 23, 2009 were willful; (4) statutory penalties under NYLL §§ 195(1) & 195(3); and (5) the cross-claims.

Trial was held from August 8-18, 2022 (Dkts. 895-902), and thereafter the parties filed post-trial submissions (Dkts. 893, 894, 904).

Decision

Based on the evidence and assessments of witness credibility, the court finds that plaintiffs are entitled to all of the damages that they seek and that Sapir and Berg are not entitled to any recovery on their cross-claims.

Defendants had the legal obligation to maintain records of plaintiffs' tips and the burden of proving that plaintiffs were actually paid what they were owed. Defendants' failure to maintain or produce such records in discovery resulted in partial summary judgment on liability (Dkt. 603 at 7; *see* Dkt. 618). Defendants also lacked that evidence at trial. Even if the burden was entirely on the plaintiffs though, the court finds that they have submitted compelling fact and expert evidence on the amounts that they are owed.

After considering the testimony of each of the plaintiffs, the court finds them to be credible witnesses. Their candid and consistent testimony on cross-examination about their experience, practices, roles and hours at the Club was believable and came across as more credible than Sapir's testimony. Their testimony provides a solid factual underpinning for the assumptions and conclusions of their expert. Nothing that was elicited at trial gives credence to Sapir's unfounded suggestion that they misrepresented the hours that they worked. Rather, plaintiffs presented a clear and compelling factual record based on admissible evidence demonstrating the amounts that they are owed.

By contrast, Sapir did not submit any relevant credible evidence, testimony or arguments on damages. His one-page direct-testimony affidavit is devoid of any useful information, aside from vouching for the accuracy of the Club's records on which plaintiffs rely (Dkt. 791). Despite the Club's earlier disclosure of a rebuttal expert report (*see* Dkt. 511), Sapir elected not to call that or any other expert at trial. Sapir is not an expert and lacks the qualifications to proffer his own damages model. Nor did he convince the court through cross-examination that plaintiffs' fact or expert witnesses--who testified consistently and were credible--were not worthy of belief. Plaintiffs' damages model is thus essentially unrebutted. Regardless, Sapir's critiques of plaintiffs' model and his "alternative methodologies" are uncompelling (*see* Dkt. 894 at 4).

Sapir's argument that he was prejudiced by the timing of plaintiffs' supplemental expert report by Dr. Madden (Dkt. 784 [the Madden Report]), which was provided due to the death of plaintiffs' initial expert, Dr. Crawford (*see* Dkt. 724 [the Crawford Report]), is rejected. The Madden Report does not rest on any new methodology; it merely addresses and often accepts certain critiques raised in the Club's previously submitted expert rebuttal report (by Mr. Coffman) and "update[d] Dr. Crawford's report with respect to data concerns discussed at Dr. Crawford's deposition ... and [made] some changes arising from [Dr. Madden's] review of data records, and update[d] the interest due to the current date" (Dkt. 784 at 3). The court finds the reports of Dr. Crawford and the testimony and report of Dr. Madden, which she incorporated in her direct-testimony affidavit, to be persuasive (*see id.* 4-5 [explaining Dr. Crawford's methodology], 5-10 [explaining adjustments]). After observing Dr. Madden's demeanor and considering her trial testimony including her responses to questions on cross examination, the court finds Dr. Madden highly credible and her opinions to be very persuasive. Nothing Sapir elicited undermined Dr. Madden's analysis and there was no expert testimony rebutting Dr. Madden's conclusions. The court does not credit Sapir's belated unfounded-by-admissible-evidence suggestion that there is a reason to question the reliability of the Club's records, particularly as that is inconsistent with Sapir's own sworn testimony that "the records of hours worked in tipped positions are generally accurate, with exception for periods when records may not have been properly maintained or preserved" (Dkt. 791 ¶ 3). Sapir himself vouched for the accuracy of the very data on which plaintiffs' expert model is based.

Sapir's objection that some of the plaintiffs' damages increased in the Madden Report is also rejected. In total, Dr. Madden concludes that Sapir's liability is actually less than the amount calculated by Dr. Crawford. Dr. Madden, moreover, provides clear explanations for each of the adjustments she made to the hours worked by plaintiffs and Sapir did not proffer any credible evidence to rebut those adjustments, which were based on the Club's records, the deposition testimony and Coffman's own suggestions, all of which has long been available to Sapir. Nor did Sapir elicit any testimony at trial that credibly undercut Dr. Madden's adjustments. Sapir also does not dispute that, at trial, an expert may testify that their opinions have changed based on critiques proffered in a rebuttal report and depositions, particularly when they make a net downward adjustment that favors the other side. Plaintiffs, to their credit, conceded issues with some of Dr. Crawford's conclusions even though Sapir did not directly challenge them. Ultimately, Sapir can hardly complain about a new report, which he had every opportunity to discredit, that credibly results in a decrease in the amount he owes plaintiffs.

Sapir's attempts to again proffer defenses to liability (e.g., plaintiffs' waiver or having been paid more under the illegal compensation policy) are unavailing as they were already rejected before trial (*see* Dkt. 603 at 8-11). Despite being repeatedly cautioned not to do so, Sapir made the strategic decision to principally focus his time at trial on trying to develop a factual basis for these already-rejected legal theories. Sapir--though not always credible--is clearly quite intelligent and demonstrated a much greater understanding of the

proceedings than a typical self-represented litigant. His questioning at trial evinced a deliberate strategy of mostly eschewing a legitimate challenge to plaintiffs' damages model in favor of interjecting the record with factual matters that have no bearing on the actual relevant issues (and even if they could be considered post-summary judgment--and they absolutely cannot--they have already been rejected and nothing elicited would justify a contrary determination based on the Labor Law). Because most of the testimony Sapir elicited was irrelevant, it is not addressed here. But even if the court credited Sapir's narrative, that would not change the legal outcome. For instance, it does not matter whether the withheld tips were placed into pint glasses or whether some of the plaintiffs did or could have counted them. Defendants had the legal obligation to keep records of the tips, they failed to do so, and they have no basis to blame plaintiffs for not keeping their own records when the law deliberately obligates defendants to do so. In any event, as discussed, plaintiffs' expert presented a compelling damages model based on admissible evidence that is sufficient to calculate plaintiffs' hours and the amount of tips they are owed. Sapir asks the court to "take a common sense, ethics-based approach in considering decisions on the matters of this case, and in doing so, [] deliver justice appropriately" (Dkt. 894 at 7). The court will do exactly that. The Labor Law must be followed. It wasn't. Legally-mandated recovery is not a windfall. It is justice.

David and Rubin Were Tip Eligible

While it was undisputed that David and Rubin "cleared tables in and around the stage area," there were questions of fact about whether doing so was "merely occasional or incidental" to their regular duties (Dkt. 603 at 11). At trial, David "testified that his work as a buser was a 'principal, regular, and consistent aspect of [his] duties as an employee of Fat Cat'" and that he would 'help bus around – well, definitely around the music area, the music stage area, but also around the whole club in general,'" and Rubin also "testified that his work as a buser was a 'regular and consistent aspect of [his] duties as an employee of Fat Cat" (Dkt. 904 at 24; *see* Dkts. 777, 782; *see also* Dkt. 784 at 7, 9). "An employee whose personal service to patrons is a principal **or regular** part of his or her duties may participate in an employer-mandated tip-allocation arrangement under Labor Law § 196-d, even if that employee possesses limited supervisory responsibilities" (*Barenboim v Starbucks Corp.*, 21 NY3d 460, 473 [2013] [emphasis added]). Sapir did not submit any credible evidence that their work as a buser was not a regular part of their duties. Indeed, Sapir's post-trial brief does not even address the question of whether David and Rubin were tip eligible. While Sapir tried to develop a record on their supervisory roles (*see, e.g.,* Dkt. 900 [Tr. at 559]), by altogether ignoring the issue in his post-trial brief, Sapir failed to establish how they "exercised 'meaningful authority' over other servers under the test set forth in *Barenboim*" (*Matter of Marzovilla v New York State Indus. Bd. of Appeals*, 127 AD3d 1452, 1454-55 [3d Dept 2015]). The court finds that they were tip eligible.

Willful Violation

Based on the evidence, the court also finds that Sapir willfully violated the Labor Law before November 24, 2009 (*see* Dkt. 603 at 11-12 [finding that he acted in bad faith after that date]). "At trial, Sapir admitted that as of at least June 25, 2008 he was concerned that the tip system he implemented was unlawful" (Dkt. 904 at 25, citing Dkt. 901 at 28-29 [Tr. at 729-30] [Sapir directed deletion of emails about tip system in 2008 because it could "become an issue" and that he was "concerned" that "the system (he was) implementing was unlawful"]; *see also* Dkt. 683 at 1 ["THIS PREVIOUS EMAIL FROM SAMANTHA MUST BE DELETED FROM EVERYONE'S INBOX (AND SAMANTHA'S SENT BOX) IMMEDIATELY AFTER REVIEW. IT WOULD BE HIGHLY INCRIMINATING TO PRESERVE THIS PARTICULAR COMMUNICATION AND ALL FURTHER COMMUNICATON REGARDING PAY STRUCTURE MUST BE CONDUCTED IN PERSON"] [capitalization in original]). While taking an adverse inference as a spoliation sanction is justified on this record, having assessed Sapir's credibility at trial, the court finds that credible evidence establishes that the illegal compensation plan was Sapir's idea and that he knew from the outset that it was illegal. Plaintiffs have therefore demonstrated entitlement to all of the statutory liquidated damages that Dr. Madden calculated (*see Gamero v Koodo Sushi Corp.*, 272 F Supp 3d 481, 507 [SDNY 2017], *affd* 752 F Appx 33 [2d Cir 2018]).

Statutory Penalties

Plaintiffs are entitled to statutory penalties (*see* NYLL §§ 198[1-b], [1-d]). Based on their undisputed testimony, plaintiffs Jennifer Bechem, Rigzin Collins, Mieko Gavia, Kamila Narewska, Penelope Cruz, Jose Perez, Alexander Rubin, and Vanessa Cruz--who each began their employment with Fat Cat on or after April 9, 2011, and worked there for more than 25 weeks--are entitled to a $2,500 penalty under NYLL § 195(1) due to not having been provided wage notices (Dkt. 904 at 27). Moreover, "based on the evidence adduced at trial and the court's prior finding as to defendants' liability, Vincente Toribio, Jennifer Bechem, Brendan Burke, Liam Bush, Rigzin Collins, Jenny Cruz, Penelope Cruz, Renee Cruz, Vanessa Cruz, Alexis David, Quirlem Franco, Mieko Gavia, Kamila Narewska, Jose Perez, Angel Pimentel, and Alexander Rubin all worked more than 25 weeks after NYLL § 195(3) went into effect entitling each of them to the statutory cap of $2,500" and "Kender, Nunez, and Thambynayagam all worked for Fat Cat after NYLL § 195(3) went into effect for twelve, eight, and three weeks, respectively and are therefore entitled to $1,200.00, $800.00, and $300.00 in statutory damages, respectively" (*id.* at 26-27).

The court therefore finds that plaintiffs are entitled to the tips, interest, and liquidated damages set forth on Table 2 of the Madden Report (Dkt. 784 at 11), the discussed statutory penalties and, pursuant to NYLL § 198(1-a), the reasonable costs and attorneys' fees incurred in this litigation (*see Tezoco v GE & LO Corp.*, 199 AD3d 541 [1st Dept 2021] ["As defendants failed to show a good faith basis to believe that their underpayment of wages was in compliance with the law, plaintiffs are entitled to liquidated damages, prejudgment interest, and attorneys' fees"]).

Cross-Claims

Although the credible evidence establishes that "Sapir created and instituted the compensation policy at [the Club] which is complained of by the Plaintiffs" (Dkt. 893 at 10), the court credits Sapir's testimony that Berg was aware of the policy but did not meaningfully try to prevent it. The court finds that Sapir and Berg are in pari delicto (*New Greenwich Litig. Trust, LLC v Citco Fund Servs. (Eur.) B.V.*, 145 AD3d 16, 23 [1st Dept 2016]; *see VA Mgt., LP v Odeon Cap. Group, LLC*, 189 AD3d 525 [1st Dept 2020] [benefit to company by wrongful "acts of its employees renders the adverse interest exception to the in pari delicto defense unavailable"]). But even if Sapir was a "willful wrongdoer [] suing someone who is alleged to be merely negligent" (*Kirschner v KPMG LLP*, 15 NY3d 446, 464 [2010]), Berg also had fiduciary duties to the Club as its co-owner but made no meaningful efforts to stop Sapir's illegal policies until this lawsuit was filed (*see Blake v Blake*, 225 AD2d 337 [1st Dept 1996]). They both have unclean hands (*see Ross v Moyer*, 286 AD2d 610, 611 [1st Dept 2001]). Thus, the court rejects the cross-claims by both Sapir and Berg to hold each other liable for any portion of what they and the Club owe plaintiffs (*Diamond v Diamond*, 307 NY 263, 266-67 [1954] ["When stockholders are individually estopped from questioning wrongs done their corporation, they cannot redress those same wrongs through a suit brought directly by the corporation or derivatively, by themselves, for the corporation. So it was rightly held here that this plaintiff, estopped by knowledge, ratification and participation, could not, by way of a stockholder's suit, have judgment against her coconspirator, for those wrongs"]; *see also Robinson v Great Performances/Artists as Waitresses, Inc.*, 195 AD3d 140, 143 [1st Dept 2021] ["an employer has no right to contractual indemnification from a third party for claims brought pursuant to NYLL 196-d because indemnification under that statute, whether contractual or otherwise, is against public policy"], 146 ["indemnification under that statute, whether contractual or otherwise, is against public policy"]).

Berg's cross-claim based on Sapir's decision not to approve the settlement that was negotiated during the mediation, which would have resolved this case years ago for much less money, is rejected as well. Deciding whether or not to settle a dispute is a matter of business judgment (*Pomerance v McGrath*, 124 AD3d 481, 483 [1st Dept 2015]). Berg has not proven that Sapir's decision was anything other than the product of poor strategic judgment, and that is not enough to hold him liable (*see Wenger v L.A. Wenger Contr. Co.*, 114 AD3d 694, 695 [2d Dept 2014]).

Berg also claims that "the testimony of Plaintiff Renee Cruz ... established that Defendant Sapir took tote bags full of cash from Fat Cat, and that she also observed Ben Gee, manager of Fat Cat, FedExing cash to Defendant Sapir," that "she was told by Ben Gee that Defendant Sapir was putting the cash in his offshore accounts" and that "the financial weekly spreadsheets maintained in the regular course of business by bookkeepers also show that cash was taken by Defendant Sapir from Fat Cat" (Dkt. 893 at 13-14). Even assuming there is a proper evidentiary basis for these assertions, Berg does not assert--and certainly has not proven--how much money was misappropriated, nor did he submit an

expert report of a forensic accountant opining on how much cash was taken. Since there is no evidence of the amount of damages, this claim is altogether rejected.

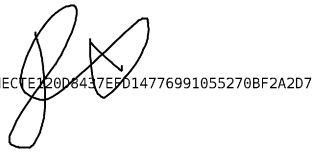
Finally, Sapir's claim that Berg committed corporate waste by making improper payments to Dora Sabella is rejected. The court finds that Sapir was aware of these payments and ratified them (Dkt. 893 at 7, citing Dkt. 896 at 32-33 [Tr. at 208-09], Dkt. 899 at 81 [Tr. at 437]; *Blake*, 225 AD2d at 337; *see Winter v Bernstein*, 177 AD2d 452, 453 [1st Dept 1991]; *see also Murphy v CWR Mfg. of Cent. New York, LLC*, 188 AD3d 1587, 1589 [4th Dept 2020]).

Defendants' remaining assertions regarding the cross-claims are unavailing.

Accordingly, it is ORDERED that, upon plaintiffs filing a proposed judgment to the Clerk, the Clerk is directed to enter judgment against defendants Noah Sapir and Feldor Billiards, Inc., jointly and severally, in favor of plaintiffs: (1) Jennifer Bechem in the amount of $195,757, with 9% statutory pre-judgment interest from August 2, 2022 to the date judgment is entered, plus $5,000; (2) Brendan Burke in the amount of $439,241, with 9% statutory pre-judgment interest from August 2, 2022 to the date judgment is entered, plus $2,500; (3) Liam Bush in the amount of $701,462, with 9% statutory pre-judgment interest from August 2, 2022 to the date judgment is entered, plus $2,500; (4) Rigzin Collins in the amount of $54,996, with 9% statutory pre-judgment interest from August 2, 2022 to the date judgment is entered, plus $5,000; (5) Jenny Cruz in the amount of $284,658, with 9% statutory pre-judgment interest from August 2, 2022 to the date judgment is entered, plus $2,500; (6) Penelope Cruz in the amount of $184,927, with 9% statutory pre-judgment interest from August 2, 2022 to the date judgment is entered, plus $5,000; (7) Renee Cruz in the amount of $195,458, with 9% statutory pre-judgment interest from August 2, 2022 to the date judgment is entered, plus $2,500; (8) Vanessa Cruz in the amount of $71,504, with 9% statutory pre-judgment interest from August 2, 2022 to the date judgment is entered, plus $5,000; (9) Alexis David in the amount of $72,006, with 9% statutory pre-judgment interest from August 2, 2022 to the date judgment is entered, plus $2,500; (10) Querlim Franco in the amount of $868,250, with 9% statutory pre-judgment interest from August 2, 2022 to the date judgment is entered, plus $2,500; (11) Mieko Gavia in the amount of $130,146, with 9% statutory pre-judgment interest from August 2, 2022 to the date judgment is entered, plus $5,000; (12) Stephanie Henriquez in the amount of $59,151, with 9% statutory pre-judgment interest from August 2, 2022 to the date judgment is entered; (13) Kerri Kender in the amount of $99,610, with 9% statutory pre-judgment interest from August 2, 2022 to the date judgment is entered, plus $1,200; (14) Kamila Narewska in the amount of $37,569, with 9% statutory pre-judgment interest from August 2, 2022 to the date judgment is entered, plus $5,000; (15) Lily Nunez in the amount of $255,323, with 9% statutory pre-judgment interest from August 2, 2022 to the date judgment is entered, plus $800; (16) Jose Perez in the amount of $149,465, with 9% statutory pre-judgment interest from August 2, 2022 to the date judgment is entered, plus $5,000; (17) Angel Pimentel in the amount of $906,822, with 9% statutory pre-judgment

interest from August 2, 2022 to the date judgment is entered, plus $2,500; (18) Stephanie Pon in the amount of $91,118, with 9% statutory pre-judgment interest from August 2, 2022 to the date judgment is entered; (19) Alexander Rubin in the amount of $9,934, with 9% statutory pre-judgment interest from August 2, 2022 to the date judgment is entered, plus $5,000; (20) Anthony Thambynayagam in the amount of $89,088, with 9% statutory pre-judgment interest from August 2, 2022 to the date judgment is entered, plus $300; and (21) Vincente Toribio in the amount of $869,516, with 9% statutory pre-judgment interest from August 2, 2022 to the date judgment is entered, plus $2,500; and the Clerk is further directed to enter judgment dismissing the cross-claims of defendants Noah Sapir and Charles Berg with prejudice; and plaintiffs' claims for the reasonable costs and attorneys' fees incurred in this action are hereby severed and shall continue; and it is further

ORDERED that plaintiffs and Sapir shall promptly meet and confer to see if they can agree on a reasonable award of costs and attorneys' fees and they shall e-file and email the court a joint letter if they agree on the amount, and if they do not reach an agreement, plaintiffs shall e-file a fee application (billing records and affirmations of reasonableness) by January 10, 2023, Sapir may e-file objections by January 31, 2023, and plaintiffs shall notify the court by email when their fee application is fully submitted.



DATE: 12/14/2022 **JENNIFER G. SCHECTER, JSC**

Check One: [X] **Case Disposed** [ ] **Non-Final Disposition**