UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JUAN SERGIO GALICIA, individually and in behalf of all other persons similarly situated,

Plaintiff,

-against-

34TH STREET COFFEE SHOP INC. d/b/a LUCKY'S CAFÉ and NIKIFOROS ANAGNOSTOPOULOS, jointly and severally,

Defendants.

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16 Civ. 1170 (RWS)

OPINION and ORDER

A P P E A R A N C E S:

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Sweet, D.J.

Plaintiff Juan Sergio Garcia ("Garcia" or the "Plaintiff") has moved pursuant to 29 U.S.C. § 216(b) to conditionally certify his lawsuit against Defendants 34th Street Coffee Shop, Inc., doing business as Lucky's Café ("Lucky's) and Nikiforos Anagnostopoulos ("Anagnostopoulos" and, together with Lucky's, "Defendants") as a collective action under the Fair Labor Standards Act ("FLSA") and to authorize the distribution of a notice regarding Plaintiff's collective action. Based on the reasons set forth below, Plaintiff's motion is granted.

Prior Proceedings

Plaintiff filed his complaint on February 16, 2016 (the "Complaint," Dkt. No. 1). The Complaint alleged that Defendants violated FLSA, 29 U.S.C. § 201 *et seq.*, and New York labor laws by failing to pay minimum wages, pay overtime compensation, provide notice of pay rates, and post notices of employees' rights.

On March 29, 2017, Plaintiff filed the instant motion. (Dkt. No. 20.) The motion was heard on May 10, 2017. On June 12, 2017, Defendants wrote the Court to supplement the record, (Dkt.

No. 33), and the motion was marked fully submitted on June 13, 2017.

Facts

The following is based on Plaintiff's Complaint and affidavit submitted in support of the instant motion. They do not constitute factual findings of the Court.

Plaintiff was employed as a busboy by Anagnostopoulos at Lucky's, a full-service restaurant located in Kips Bay, from Spring 2015 through September 2015. During this time, Plaintiff was paid approximately $240 per week in cash for working approximately sixty-nine hours per week. Plaintiff states he was not paid proper minimum wages or overtime and that, while he was employed, Defendants did not provide information about employee pay rates or keep notices posted of employees' legal wage rights. While employed at Lucky's, Plaintiff observed several other Lucky's employees, who were employed as waitresses and delivery persons and whose names and working hours Plaintiff details, not being paid proper wages[1]; Plaintiff specifically

[1] In his supporting affidavit, Plaintiff identifies Arietta, a waitress who Plaintiff saw worked from 6 a.m. to 4 p.m., five or six days a week, and Benito, a deliveryman, who worked from 6 a.m. to 4 or 5 p.m. (Pl.'s Aff. ¶¶ 2-3.) Plaintiff names two

identifies a conversation he had with one of these other employees, Arietta, who described being paid her pay and tips in cash and which totaled a sum "'a hundred and something' dollars per week." (Affidavit of Plaintiff in Support of Motion to Conditionally Certify Collective Action dated February 23, 2017 ("Pl.'s Aff.") ¶ 4, Dkt. No. 24.)

Applicable Standards

The FLSA provides that an employee whose rights under the FLSA were violated may file an action in any federal or state court of competent jurisdiction "for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). Although not required, under the FLSA, "district courts have discretion, in appropriate cases, to implement § 216(b) by facilitating notice to potential plaintiffs of the pendency of the action and of their opportunity to opt-in as represented plaintiffs." Myers v. Hertz Corp., 624 F.3d 537, 554 (2d Cir. 2010) (alterations and internal quotation marks omitted).

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additional waitresses, Carmen and Irene, without providing their working hours, and an unnamed delivery person, who worked from 10 a.m. to 9 p.m.. (Pl.'s Aff. ¶¶ 2-3.)

The Second Circuit has endorsed a two-step process for determining whether an action may proceed collectively under Section 216(b). See, e.g., Myers, 624 F.3d at 554. In the first stage of the analysis, a district court must make an initial determination as to whether the named plaintiffs are "similarly situated" to the putative collective members. Id.; see also Gauman v. DL Rest. Dev. LLC, No. 14 Civ. 2587 (RWS), 2015 WL 6526440, at *1 (S.D.N.Y. Oct. 28, 2015) ("The Court is not concerned with weighing the merits of the underlying claims, but rather with determining whether there are others similarly suited who could opt into the lawsuit and become plaintiffs."); Cunningham v. Elec. Data Sys. Corp., 754 F. Supp. 2d 638, 644 (S.D.N.Y. 2010) (quoting Lynch v. United Servs. Auto. Ass'n, 491 F. Supp. 2d 357, 368 (S.D.N.Y. 2007)). If a plaintiff makes a "modest factual showing" that she and the potential opt-in plaintiffs "together were victims of a common policy or plan that violated the law," conditional certification and court-facilitated notice is appropriate. Myers, 624 F.3d at 555 (citation omitted); see also Cunningham, 754 F. Supp. 2d at 644; Lynch, 491 F. Supp. 2d at 368. This initial phase is often termed the "notice stage." Lynch, 491 F. Supp. 2d at 368.

The second stage, after discovery is completed, is where "if it appears that some or all members of a conditionally

certified class are not similarly situated," a "defendant may move to challenge certification, at which point a court will conduct a more searching factual inquiry as to whether the class members are truly similarly situated." Viriri v. White Plains Hosp. Med. Ctr., No. 16 Civ. 2348 (KMK), 2017 WL 2473252, at *2 (S.D.N.Y. June 8, 2017) (internal quotation marks omitted) (quoting Jenkins v. TJX Cos., 853 F. Supp. 2d 317, 320-21 (E.D.N.Y. 2012)). At that time, "[i]f the claimants are indeed similarly situated, the collective action proceeds to trial, and if they are not, the class is decertified, the claims of the opt-in plaintiffs are dismissed without prejudice, and the class representative may proceed on his or her own claims." Malloy v. Richard Fleischman & Assocs. Inc., No. 09 Civ. 322 (CM), 2009 WL 1585979, at *2 (S.D.N.Y. June 3, 2009) (citing Lee v. ABC Carpet & Home, 236 F.R.D. 193, 197 (S.D.N.Y. 2006).

The instant motion is the first stage, while a "modest factual showing" cannot "be satisfied simply by unsupported assertions," but nevertheless remains a "low standard of proof because the purpose of this first stage is merely to determine whether similarly situated plaintiffs do in fact exist." Myers, 624 F.3d at 555 (internal quotation marks omitted). "Plaintiffs may satisfy this requirement by relying on their own pleadings, affidavits, declarations, or the affidavits and declarations of

other potential class members." Hallissey v. Am. Online, Inc., No. 99 Civ. 3785 (KTD), 2008 WL 465112, at *1 (S.D.N.Y. Feb. 19, 2008). A district court "does not resolve factual disputes, decide substantive issues going to the ultimate merits, or make credibility determinations. Indeed, a court should not weigh the merits of the underlying claims in determining whether potential opt-in plaintiffs may be similarly situated." Amador v. Morgan Stanley & Co. LLC, No. 11 Civ. 4326 (RJS), 2013 WL 494020, at *3 (S.D.N.Y. Feb. 7, 2013) (internal quotation marks omitted) (quoting Lynch, 491 F. Supp. 2d at 368, and collecting cases). Given this "fairly lenient standard," courts "typically grant[ ] conditional certification." Ravenell v. Avis Budget Car Rental, LLC, No. 08 Civ. 2113 (SLT) (ALC), 2010 WL 2921508, at *2 (E.D.N.Y. July 19, 2010) (quoting Malloy, 2009 WL 1585979, at *2).

Plaintiff's Motion for Conditional Certification is Granted

Plaintiff needs only to present a modest showing at this stage, a burden that has been met. Between his pleading and affidavit, Plaintiff has identified by name other employees at Lucky's who were employed in similarly situated jobs as he and whose working hours and pay would, as described, have constituted subminimum wages and unpaid overtime hours similar

to Plaintiff's alleged situation. See Shajan v. Barolo, Ltd., No. 10 Civ. 1385 (CM), 2010 WL 2218095, at *1 (S.D.N.Y. June 2, 2010) (granting conditional certification holding that named "waiters, bartenders and busboys" were "similarly situated" to one another as service employees who qualify for tips). Moreover, Plaintiff identifies a conversation he had with Arietta, one of the identified Lucky's employees, about her wages, which supports Plaintiff's other observations, such as witnessing the underpayment of those other employees and the absence of proper posted notices in Lucky's. "Nothing more is needed at this stage" to warrant conditional certification. Id., 2010 WL 2218095, at *1; see Wraga v. Marble Lite, Inc., No. 05 Civ. 5038 (JG) (RER), 2006 WL 2443554, at *2 (E.D.N.Y. Aug. 22, 2006) ("Courts routinely grant such motions based upon employee affidavits setting forth a defendant's plan or scheme to not pay overtime compensation and identifying by name similarly situated employees.") (collecting cases).

Defendants contend that this showing has not established similarly situated putative class members or a showing of wrong-doing, and in part undergird their arguments by pointing to Anagnostopoulos' own affidavit, Defendants' attached exhibits, and a portion of Plaintiff's deposition transcript. Defendants' position in incorrect for two reasons.

First, Defendants' reliance on materials outside Plaintiff's submissions invites a consideration of facts and adjudication of credibility—for example, did Plaintiff actually have conversations with other Lucky's employees as he alleges—merits determinations that are "improper at this preliminary stage." Valerio v. RNC Indus., LLC, 314 F.R.D. 61, 72 n.4 (E.D.N.Y. 2016) (rejecting consideration of defendants' submission of plaintiff's deposition at conditional certification stage); see also Bijoux v. Amerigroup N.Y., LLC, No. 14 Civ. 3891 (RJD) (VVP), 2015 WL 4505835, at *13 (E.D.N.Y. July 23, 2015) ("[T]he focus of the court's inquiry is not on the defendants' evidence, but on whether the plaintiffs have made their requisite showing."); Garcia v. Four Bhd. Pizza, Inc., No. 13 Civ. 1505 (VB), 2014 WL 2211958, at *6 (S.D.N.Y. May 23, 2014) (holding the same); Shajan, 2010 WL 2218095, at *1 (stating that, at the conditional certification stage, a "[w]eighing of the merits is absolutely inappropriate").

Second, unlike the authority cited by Defendants where the court denied conditional certification, Plaintiff here has submitted an affidavit in support of his Complaint and has provided some details in support of his allegations, such as names and a conversation with a similarly situated employee. By

contrast, Defendants' authority demonstrates that allegations completely devoid of detail warrant denial of conditional certification. See Sanchez v. JMP Ventures, L.L.C., No. 13 Civ. 7264 (KBF), 2014 WL 465542, at *2 (S.D.N.Y. Jan. 27, 2014) ("Plaintiff does not, however, provide any detail as to a single such observation or conversation. As a result, the Court does not know where or when these observations or conversations occurred, which is critical in order for the Court to determine the appropriate scope of the proposed class and notice process. (emphasis in original)); Prizmic v. Armour, Inc., No. 05 Civ. 2503 (DLI) (MDG), 2006 WL 1662614 (E.D.N.Y. June 12, 2006) ("Here, plaintiff has not submitted any evidence by affidavit or otherwise to demonstrate that he and other potential plaintiffs were victims of a common policy or plan that violated the law."); Morales v. Plantworks, Inc., No. 05 Civ. 2349 (DC), 2006 WL 278154, at *2 (S.D.N.Y. Feb. 2, 2006) ("The affidavit and exhibits, however, contain no reference to any Plantworks employee other than plaintiffs, and they make no allegations of a common policy or plan to deny plaintiffs overtime.") Such is not the case here. While Plaintiff's allegations are not replete with detail, they do not have to be; as is, they are sufficient to merit conditional certification. See Gauman, 2015 WL 6526440, at *2 ("The case law denying certification holds that total lack of factual allegations supporting a conclusion that other

employees are similarly situated is the basis upon which to deny a motion for conditional certification.").[2]

Plaintiff's Proposed Notice is Approved

Plaintiff has also requested that the Court approve the proposed notice submitted by Plaintiff and that such notice be distributed to all putative collective action plaintiffs and posted in Defendants' employees' workplaces where statutory notices are posted.

The Supreme Court has recognized that the benefits of collective action accrue to plaintiffs only if they "receiv[e] accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." Hoffman-La Roche Inc. v. Sperling, 493 U.S. 165, 170 (1989). "[I]t lies within the discretion of a district court to begin its involvement [in the

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[2] Defendants' argument that Plaintiff's allegations are conclusory because, at present, no other employee has joined him in his action bears almost no mention because it has no relevancy to the present inquiry. "FLSA plaintiffs are not required to show that putative members of the collective action are interested in the lawsuit in order to obtain authorization for notice of the collective action to be sent to potential plaintiffs." Amendola v. Bristol-Myers Squibb Co., 558 F. Supp. 2d 459, 466 (S.D.N.Y. 2008) (citing Neary v. Metro. Prop. & Cas. Ins. Co., 517 F. Supp. 2d 606, 622-23 & n.7 (D. Conn. 2007)).

notice process] early, at the point of the initial notice." Id. at 171.

Here, "court-authorized notice is appropriate, to prevent erosion of claims due to the running statute of limitations, as well as to promote judicial economy." Khamsiri v. George & Frank's Japanese Noodle Rest. Inc., No. 12 Civ. 265 (PAE), 2012 WL 1981507, at *2 (S.D.N.Y. June 1, 2012). Having reviewed Plaintiff's notice and consent forms, the documents are authorized and Plaintiff may send them to all putative party plaintiffs similarly situated to Plaintiff. See id.; see also Lynch, 491 F. Supp. 2d at 371. Interested putative party plaintiffs shall be required to file their consents within 65 days of the mailing. See Malloy, 2009 WL 1585979, at *4 (finding 65 days "consistent with established practice under the FLSA").

With regard to the posting of the approved notice, "[s]uch posting at the place of employment of potential opt-in plaintiffs is regularly approved by Courts." Hernandez v. Bare Burger Dio Inc., No. 12 Civ. 7794 (RWS), 2013 WL 3199292, at *5 (S.D.N.Y. June 25, 2013) (collecting cases). Plaintiff's request is granted.

Conclusion

For the foregoing reasons, Plaintiff's motion to conditionally certify as a class action is granted, Plaintiff's proposed notice is approved and authorized for distribution as described, and Defendants are directed to post the approved notice in the workplaces of their employees.

It is so ordered.

New York, NY
August 30, 2017

ROBERT W. SWEET
U.S.D.J.