19-P-761 Appeals Court

KHRIS HOVAGIMIAN & another[1] vs. CONCERT BLUE HILL, LLC,[2] & others.[3]

No. 19-P-761.

Norfolk. February 4, 2020. - July 16, 2020.

Present: Meade, Milkey, & Desmond, JJ.

Tips. Labor, Wages. Statute, Construction. Practice, Civil, Judgment on the pleadings. Words, "Service charge."

Civil action commenced in the Superior Court Department on May 7, 2018.

The case was heard by Elaine M. Buckley, J., on motions for judgment on the pleadings.

Paul Holtzman (Janet Steckel Lundberg also present) for the plaintiffs.

Paul G. King (Geoffrey P. Wermuth also present) for the defendants.

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[1] Dilma Silva. Both plaintiffs bring the action individually and on behalf of all other persons similarly situated.

[2] Doing business as Blue Hill Country Club.

[3] Peter Nanula, Gregg Deger, Bryan Elliott, Francisco Ventura, and Tom Gibson.

DESMOND, J. This case arises out of a dispute between defendant Blue Hill Country Club (club) and its restaurant servers over the application of the safe harbor provision of G. L. c. 149, § 152A (Tips Act or act). See G. L. c. 149, § 152A (d), second par. The plaintiffs, two of the club's servers, contend that because the club collected a fee that was described as a nongratuity "administrative" or "overhead charge" in the club's event contract but later grouped as a "service charge" on two club invoices, they are owed the fee pursuant to the Tips Act, and that the safe harbor provision of the act is inapplicable. The defendants, on the other hand, argue that the use of the term "service charge" on the invoices was simply poor labeling. They assert that the clear and repeated definitions of the terms, which are contained in the event contract, control, and thus the safe harbor provision applies. We conclude that on these facts the language in the event contract indeed controls, and that the challenged charge was not a "service charge" under the meaning of the act.

Background. The facts are undisputed. Defendant Blue Hill Country Club does business hosting banquets and other events requiring food and beverage service. To that end, the club employs dozens of nonmanagerial wait staff employees, including the plaintiffs, who are paid on an hourly basis. When patrons

wish to use the club's facilities, they must first execute a nine-page "Blue Hill Country Club Event Contract" (contract). The contract goes into great detail delineating, inter alia, deposit and payment schedules, event hours, menu selections and pricing, and club liability. In two separate places within the contract, the club states that patrons will be charged both a ten percent gratuity on all food and beverages and a separate ten percent administrative or overhead charge on all food and beverages. The contract states in clear, plain language that the administrative or overhead charge is not a gratuity.[4]

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[4] Under the heading "Menu Selections & Pricing," the contract provides:

> "All food and beverage is subject to ten percent (10%) gratuity which is distributed one hundred percent (100%) to the wait staff employees, service employees and service bartenders working on the function and an overhead charge of an additional ten percent (10%) administrative charge is also added on all food and beverage purchases which is held by the house to be used for administration and other overhead costs and does not represent or constitute any form of gratuity to the wait staff, service employees and service bartenders working on the function."

Additionally, on a page titled "Schedule of Charges and Fees," the contract states:

> "A 10% gratuity and a 10% overhead charge are applied to all food and beverage charges together with the 7% Massachusetts Meals and Sales Tax. The 10% gratuity is distributed 100% to the wait staff employees, service employees and service bartenders serving the function. The overhead charge is retained by [the club] for administrative and overhead costs only. The 10% overhead charge does <u>not</u> represent a gratuity or tip to wait and service staff."

Once the contract is signed, patrons receive and sign an "Event Order Invoice" that notifies the club of the number of expected guests and the amount of food requested for the event.[5] On the invoice, the estimated costs are broken down and divided into three categories: "Charges," "Taxes," and "Service Charges & Gratuities." The ten percent administrative charge is not labeled specifically as such, but appears to be included within the "Service Charges & Gratuities" section. Additionally, patrons also receive a final "Invoice" after the event is held. On that bill, under the heading "Service & Tax Charges," there are three line items for "Tax," "Gratuity," and "Service." The "Gratuity" line item charge and the separate "Service" line item charge are the same amount: ten percent of the food and beverage charges. As a result, it appears that the nongratuity overhead or administrative charge is listed under "Service" on the final invoice.

The plaintiffs, in their Superior Court complaint, asserted that the club violated the Tips Act by failing to remit those charges labeled as "service" to the wait staff. See Bednark v. Catania Hospitality Group, Inc., 78 Mass. App. Ct. 806, 814

[5] We contest the dissent's assertion that the subsequent "Event Order Invoice" served as an addendum to the event contract "in both form and function," post at , as the invoice did not amend or modify any of the contract terms.

(2011), quoting Cooney v. Compass Group Foodservice, 69 Mass. App. Ct. 632, 637 (2007) (any fee identified as "service charge" is "automatically rendered a 'service charge' under . . . G. L. c. 149, § 152A [a]"). The defendants filed a motion for judgment on the pleadings, and the plaintiffs countered with their own cross motion for judgment on the pleadings. After a hearing, the judge allowed the defendants' motion, reasoning that the plaintiffs' argument was "correct as far as it goes," but that the end result would contravene the Legislature's intent with regard to the Tips Act. The judge concluded that the most reasonable interpretation of the Tips Act's safe harbor provision would be to consider the "gratuity" charge as the service charge, and the additional "service" charge to be the "house or administrative fee in addition to . . . [the gratuity] charge." The plaintiffs timely appeal.

Discussion. The plaintiffs argue that because the statutory language defines "[s]ervice charge" as, inter alia, "any fee designated as a service charge, tip, [or] gratuity," G. L. c. 149, § 152A (a), the invoices provided by the club automatically make the fees in question a service charge under the act. We disagree. When reviewing a ruling on a motion for judgment on the pleadings, we do so under de novo review. Ridgeley Mgt. Corp. v. Planning Bd. of Gosnold, 82 Mass. App. Ct. 793, 797 (2012). "A fundamental tenet of statutory

interpretation is that statutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result." Sullivan v. Brookline, 435 Mass. 353, 360 (2001). "A court may not add words to a statute that the Legislature did not put there." Commonwealth v. Clerk-Magistrate of the W. Roxbury Div. of the Dist. Court Dep't, 439 Mass. 352, 355 (2003).

As summarized in Norrell v. Spring Valley Country Club, Inc., 97 Mass. App. Ct. , (2020), the 2004 amendment to the Tips Act states that any service charge or tip must be remitted to the staff or service employees.[6] However, in order to preserve the right of employers to impose a supplemental charge without running afoul of the act, a "safe harbor provision" was also included, stating:

> "Nothing in this section shall prohibit an employer from imposing on a patron any house or administrative fee in addition to or instead of a service charge or tip, if the employer provides a designation or written description of that house or administrative fee, which informs the patron that the fee does not represent a tip or service charge for wait staff employees, service employees, or service bartenders."

G. L. c. 149, § 152A (d), second par.

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[6] "If an employer or person submits a bill, invoice or charge to a patron or other person that imposes a service charge or tip, the total proceeds of that service charge or tip shall be remitted only to the wait staff employees, service employees, or service bartenders in proportion to the service provided by those employees." G. L. c. 149, § 152A (d), first par.

In Bednark, we clarified that the safe harbor provision "requires an employer to do something more than simply label a fee as 'house' or 'administrative,' in order to dispel the possibility that a patron would reasonably believe that the fee is a gratuity." Bednark, 78 Mass. App. Ct. at 815.

Here, we acknowledge that the club's invoices can be seen as inviting the type of confusion the Tips Act was designed to avoid. Nonetheless, the club took adequate steps to invoke the safeguards of the safe harbor provision. Looking to the agreement between the club and its patrons, the club's contract twice states that it will assess a ten percent gratuity fee on food and beverage charges that goes entirely to the staff or servers, and an additional ten percent administrative or overhead charge that the club retains. In both clauses, the administrative charge was stated to not represent a gratuity for the wait and service staff. By its plain meaning, we can quickly conclude that the contract's language more than sufficed to "inform[] the patron that the fee does not represent a tip or service charge for wait staff employees, service employees, or service bartenders." G. L. c. 149, § 152A (d), second par.

That the club mislabeled the administrative fee on the subsequent invoices is not enough to remove the safe harbor's protections given that a patron who had read and signed the contract could not reasonably believe the fee was meant to be a

gratuity. This is most apparent by studying the final invoice, which listed the fee at issue -- labeled "service" -- immediately beneath a different fee labeled "gratuity."[7] The existence of two separate charges alone supports the conclusion that the "service" charge was something other than a gratuity.[8]

Our reading is consistent with the statutory language of the Tips Act and the legislative intent behind it. General Laws c. 149, § 152A (d), first par., states that the service staff is owed the total proceeds of a service charge or tip "[i]f an employer or person submits a bill, invoice or charge to a patron or other person that imposes a service charge or tip" (emphasis added). Here, the invoices do not impose new fees -- they are derivatives and summaries of the same transaction governed by the event contract. Likewise, "[t]he Legislature's intent in enacting the act can be plainly discerned from its language and history -- to ensure that service employees receive the tips, gratuities, and service charges that customers intend them to

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[7] Here, crucially, the club charged and collected a separate gratuity fee for the club's waitstaff and employees, which the defendants in Bednark, Cooney, and DiFiore v. American Airlines, Inc., 454 Mass. 486 (2009), did not do. See DiFiore, supra at 488; Bednark, 78 Mass. App. Ct. at 808 n.9; Cooney, 69 Mass. App. Ct. at 635-636.

[8] This is true regardless of the synonymy between "service charge" and "gratuity," as found in Cooney. See Cooney, 69 Mass. App. Ct. at 637.

receive." Bednark, 78 Mass. App. Ct. at 809, quoting DiFiore v. American Airlines, Inc., 454 Mass. 486, 491 (2009). Notably, the plaintiffs did not allege that any patrons had been confused as to the assessed charges or had complained of any ambiguity in the documents. The Tips Act is intended to protect servers and waitstaff from being taken advantage of by their employer, and here the club collected a separate gratuity fee for the employees' benefit. Notwithstanding the club's haphazard labeling on invoices, the club's clear and painstaking language in the event contract was sufficient to afford it the protections of the Tips Act's safe harbor.[9]

Judgment affirmed.

[9] Even if the provisions in the event contract were not sufficient to entitle the club to a judgment on the pleadings, the contract language certainly would have been sufficient to raise a jury question.

MILKEY, J. (dissenting). My disagreement with the majority, while outcome determinative, is narrow. In drafting its initial contract with its patrons, defendant Blue Hill Country Club (club) sought to chart a course under which it would be able to reach the safe harbor offered by the Tips Act (act). See G. L. c. 149, § 152A (d), second par. Had the club stayed on that course, it would have been entitled to retain the second ten percent supplemental fee that it charged. However, for whatever reason, the club abruptly changed tack and, as a result, veered away from its intended destination. As a result, weeks before the events occurred, the club began to characterize the fees at issue in a manner that unequivocally triggered per se liability under the act. Because the majority opinion is at odds with the plain language of the act and our case law, I respectfully dissent.

Background. 1. The three-step contracting process. The uncontested, representative documents in the record reveal that the club's contractual relationship with its patrons went through a three-step process. After summarizing that process, I will lay out how the supplemental charges the club levied were addressed at each stage.

In step one, the patron reserved the facility space, paid a deposit, and signed what was denominated an "Event Contract." In that contract, the club agreed to host the event, and the

patron agreed to pay both a flat room charge and a minimum amount for food and drink. The parties also agreed to abide by various terms, including an attached schedule of fees.

In step two of the process, which occurred two weeks before the scheduled event, the patron provided the club with a final head count, based upon which the club would order the food and beverages. As part of this step, the patron was presented with, and asked to sign, a "Banquet Event Order Invoice," which itemized the specific charges that the patron was committing to pay. Despite its being called an "Invoice," this key pre-event document executed by both parties served as an addendum to the event contract in both form and function.

After the event had concluded and the club thereby had supplied the services to which the parties agreed, a third document was generated. This final document (labeled simply "Invoice") was not signed by either party. It functioned simply as the final bill, that is, the club's demand that the patron pay the amount previously agreed upon.

2. How the club characterized its supplemental charges. As the majority accurately notes, one paragraph in the original event contract, captioned "Menu Selections & Pricing," identified two specific charges for which patrons would be responsible: a ten percent "gratuity" charge and a ten percent "overhead charge" (with the gratuity charge going to service

employees and the overhead charge going to the club). Similar language was also included in the schedule of charges and fees appended to the event contract.

Because of this just-referenced language, the majority maintains that the event contract is crystalline in laying out the nature of the two supplemental charges that patrons were committing to pay. That is not entirely accurate, because whatever clarity that language provided was at least somewhat muddied by language appearing in a different paragraph of the contract. That paragraph was captioned "Taxes, Tips and Additional Charges," a title that suggested that it was the obvious place in the form contract where a patron would learn what additional charges he or she might end up bearing. This paragraph stated that the food and drink minimums that the patron agreed to pay did not include various enumerated additional charges. Nowhere in that lengthy list was the "overhead charge" referenced under "Menu Selections & Pricing." Rather, the list included, among others, charges denominated as "service charges" or "gratuities," as well as "charges for services and items not included in the contracted minimum charges and other additional charges applicable to the Event." In this manner, the "Taxes, Tips and Additional Charges" language served to inform patrons that they were potentially responsible for paying various "service charges" on top of the

food and drink minimums that were the principal focus of the event contract. When the two relevant paragraphs of the initial event contract are taken together, they create at least some confusion over what kinds of charges the patron ultimately will bear.

In any event, in contrast to the ungainly structure of the event contract, the banquet event order invoice provided seeming clarity as to exactly what the patron was committing to pay. This document made no mention whatsoever of the "overhead charge" referenced in the original event contract. Instead, it referenced a single category of supplemental charges labeled as "Service Charges & Gratuities." Under that heading, the document treated service charges and gratuities together as one charge, in an amount that equaled twenty percent of the items on which it was based. Thus, weeks before the events occurred, patrons committed by contract to pay twenty percent in supplemental charges that the club itself denominated as "Service Charges & Gratuities."

Like the banquet event order invoice, the final bill also classified the extra twenty percent levied as "gratuity" and "service" charges, again without the "overhead charge" referenced at the beginning of the process ever being mentioned. This time, the formatting of the charges was slightly different. Instead of one category of "Service Charges & Gratuities" set at

twenty percent, there were separate line items for "gratuity" and "service" charges, each listed as ten percent.

Discussion. Under these undisputed facts, the club's liability is plain. Before each event was held, the club extracted from its patrons a promise to pay twenty percent in charges that the club itself expressly denominated as "Service Charges & Gratuities," and then following the event, patrons were billed for and paid such charges. The language that the club itself chose triggered per se liability under the act, as our cases have long established and as we reaffirm this very day. See Norrell v. Spring Valley Country Club, Inc., 97 Mass. App. Ct. , (2020).

To be sure, the club initially took steps to seek protection under the act's safe harbor provision. However, the club veered off course, and even the majority acknowledges that the club's subsequent communications with its patrons were "haphazard" and "can be seen as inviting the type of confusion the Tips Act was designed to avoid," ante at . Nevertheless, the majority holds that the club was entitled to judgment in its favor on the pleadings, in effect concluding that -- as a matter of law -- the club's efforts were "close enough." See ante at . This is starkly at odds with the act and our cases interpreting it.

Regardless of whether the club's failure to stay on course was inadvertent, the club has only itself to blame for falling asleep at the tiller. In light of the clarity of the act's per se liability provisions, I fail to discern any justification for rescuing the club from its own errors. Indeed, we have previously held that the possibility that service employees might receive a windfall does not invalidate the protections that the act offers. Cooney v. Compass Group Foodservice, 69 Mass. App. Ct. 632, 639 (2007). As we explained in Cooney, we must presume that by embracing strict liability with respect to those charges that facilities themselves choose to label as tips, gratuities, or service charges, the Legislature was aware that "from time to time service employees may reap seemingly unfair benefits from an invoicing entity's honest misstep." Id. (rejecting facility owner's argument that evidence showed that charge it labeled as "service charge" in fact was never intended as tip or gratuity for service staff).[1] Whether patrons in fact understood that the second ten percent "service charge" would be paid to service staff or instead to the club itself similarly is

[1] I recognize that Cooney rested principally on a version of the act that has been amended. However, the amendments retained the provisions imposing per se liability as to those particular charges that the facility itself chooses to label as tips, gratuities, or service charges. See Norrell, 97 Mass. App. Ct. at .

beside the point where, as here, the per se liability provisions apply. Thus, the plaintiffs hardly can be faulted for failing to "allege that any patrons had been confused as to the assessed charges or had complained of any ambiguity in the documents." Ante at .[2]

In sum, under the undisputed facts, the club's liability under the per se provisions of the act is clear as a matter of law. Accordingly, judgment on the pleadings should have entered for the plaintiffs, not the club. I therefore dissent.

[2] Even if this case were not viewed as one of per se liability, allowing the club's motion for judgment on the pleadings still would have been error. The club would be entitled to a ruling in its favor as a matter of law only if we confidently could say that any reasonable patron could not have believed that the twenty percent in "Service Charges & Gratuities" that patrons committed to pay would go to service employees. At the very least, the conflicting documents that the club itself drafted were sufficient to raise a jury question on that point. See Norrell, 97 Mass. App. Ct. at .