Macaluso v Woodbury Intl., Inc.
2013 NY Slip Op 34211(U)
September 9, 2013
Supreme Court, Nassau County
Docket Number: 003216-12
Judge: Arthur M. Diamond
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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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LISA MACALUSO AND CHRISTINE PICA, individually and for and on behalf of all similarly situated persons who were employed by WOODBURY INTERNATIONAL, INC, d/b/a WOODBURY COUNTRY CLUB, and/or WOODBURY COUNTRY CLUB, INC.,

Plaintiffs,

-against-

WOODBURY INTERNATIONAL, INC., d/b/a WOODBURY COUNTRY CLUB and/or Woodbury Country Club, Inc., and/or any other entities affiliated with or controlled by WOODBURY INTERNATIONAL, INC. d/b/a WOODBURY COUNTRY CLUB and/or WOODBURY COUNTRY CLUB, INC.,

Defendants.

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TRIAL PART: 10

NASSAU COUNTY

INDEX NO: 003216-12

MOTION SEQ. NO# 3

SUBMIT DATE: 8/7/13

The following papers having been read on this motion:

Notice of Motion.....1
Memorandum of Law.....2
Affirmation in Opposition.....3
Memorandum of Law in Opposition....4
Reply Memorandum.....5

Motion pursuant to CPLR Article 9, by the plaintiffs Lisa Macaluso and Christine Pica, *et., al.*, for class action certification, is granted.

The plaintiffs Lisa Macaluso, Christine Pica and other similarly situated individuals, allege that from approximately March of 2006, they were employed by the various affiliated Woodbury defendants as, *inter alia*, servers, bussers, captains, bridal attendants and bartenders in Woodbury's restaurants and catering establishments (Cmplt., ¶¶ 3-9; 17-19; Pltffs' Brief at 2-3).

The plaintiffs further allege that the defendants engaged in the practice of adding an 18-20%, mandatory service charge or gratuity to the prices charged for various catered events (Cmplt., ¶¶ 4,

10;18-20; Macaluso Aff., ¶¶ 7-9; Pica Aff., ¶ 7; Brown Aff., Exh., "2"). The plaintiffs contend, however, that the service charges or gratuities collected were never remitted to them but instead, unlawfully retained by defendants in violation of Labor Law § 196-b)(Cmplt., ¶¶ 20-21; Macaluso Aff., ¶¶ 8-9). Notably, Labor Law § 196-d provides that it is a violation of the law to "retain any part of a gratuity or * * * any charge purported to be a gratuity for an employee" (*Samiento v. World Yacht*, 10 NY3d 70, 78-79 [2008] *see also, Barenboim v. Starbucks Corp.*, ___NY3d___, 2013 WL 3197602 [2013] *cf., Martin v. Restaurant Associates Events Corp.*, 35 Misc.3d 215, 221-222 [Supreme Court, Westchester County 2012], *aff'd,* 106 AD3d 785; *Reilly v Richmond County Country Club*, 77 AD3d 718; *Ramirez v. Mansions Catering, Inc.*, 74 AD3d 490, 491-492; 12 NYCRR § 146-2.18[a],[b]).

According to the plaintiffs, the customers who engaged the catering halls from the defendants believed that the service charges would be distributed to the defendants' employees when, in fact, they were not (Cmplt., ¶¶ 3-4; 19-20).

In March of 2012, the plaintiffs commenced the within, putative class action pursuant to CPLR Article 9. The complaint contains a single cause of action predicated upon the alleged unlawful withholding of the service charges (Cmplt., ¶¶ 25-32). The plaintiffs' proposed class is comprised of, *inter alia*, wait staff personnel and other employees who serve in customarily tipped trades and occupations (Cmplt., ¶¶ 10-16).

The plaintiffs now move for class certification. The defendants have opposed the application. "Upon a balanced consideration of all relevant circumstances," the Court agrees that the plaintiffs' motion should be granted (*Emilio v Robison Oil Corp.*, 63 AD3d 667, 668; *Beller v. William Penn Life Ins. Co. of New York*, 37 AD3d 747, 748; CPLR 901[a]).

"In order to certify a lawsuit as a class action, the court must be satisfied that questions of law or fact common to the class predominate over any question affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy" (*Osarczuk v. Associated Universities, Inc.*, 82 AD3d 853, 855, *quoting from, Aprea v. Hazeltine Corp.*, 247 AD2d 564, 565; *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 91 *see, City of New York v. Maul*, 14 NY3d 499, 508 [2010]; *Globe Surgical Supply v. GEICO Ins. Co.*, 59 AD3d 129, 137; CPLR 901[a], 902). In sum, the "[t]he primary issue on a motion for class

certification is whether the claims as set forth in the complaint can be efficiently and economically managed by the court on a classwide basis" (*Globe Surgical Supply v. GEICO Ins. Co.*, *supra*, 59 AD3d 129, 136-137).

"In determining whether an action should proceed as a class action, it is appropriate to consider whether the claims have merit * * * although this 'inquiry is limited'" and "not intended to be a substitute for summary judgment or trial" (*Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 422; *Bloom v Cunard Line*, 76 AD2d 237, 240). Rather, "[c]lass action certification is thus appropriate if on the surface there appears to be a cause of action which is not a sham" (*Pludeman v Northern Leasing Sys., Inc.*, *supra*; *Kudinov v Kel-Tech Constr. Inc.*, 65 AD3d 481, 482). Although the plaintiff bears the burden of establishing that the class exists (*Argento v. Wal-Mart Stores, Inc.*, 66 AD3d 930, 933-934), nevertheless "[a]ppellate courts in this State have repeatedly held that the class action statute should be liberally construed" (*Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 21 *see*, *City of New York v. Maul*, *supra*, 14 NY3d 499, 508; *Dowd v. Alliance Mortg. Co.*, 74 AD3d 867, 869; *Liechtung v. Tower Air, Inc.*, 269 AD2d 363, 364), and "where the case is doubtful, the benefit of any doubt should be given to allowing the class action" (*Krebs v. Canyon Club, Inc.*, ___Misc.3d ___, 2009 WL 440903, at 3 [Supreme Court, Westchester County 2009] *see*, *Hurrell-Harring v. State*, 81 AD3d 69, 72; *Wilder v. May Dept. Stores Co.*, 23 AD3d 646, 650; *Brandon v Chefetz*, 106 AD2d 162, 168; *Martin v. Restaurant Associates Events Corp.*, ___Misc.3d___, 2013 WL 4351788 at 21 [Supreme Court, Westchester County 2013]). "Whether the facts presented on a motion for class certification satisfy the statutory criteria is within the sound discretion of the trial court" (*Pludeman v Northern Leasing Sys., Inc.*, *supra*, 74 AD3d 420, 422; *Dowd v. Alliance Mortg. Co.*, *supra*, 74 AD3d 867, 869 *see*, *Corsello v. Verizon New York, Inc.*, 18 NY3d 777, 791 [2012]).

With these principles in mind, the Court agrees upon the exercise of its discretion, that the motion for class certification should be granted (*see, Lopez, et., al., v. Bethpage Associates, LLC., et., al*, ___Misc.3d.___, Index No. 3465-12 [Supreme Court, Nassau County, August 13, 2013]).

A review of the record indicates, *inter alia*, that: (1) common questions exist "as to whether defendants have unlawfully withheld gratuities from their employees" and (2) that "a class action appears to be the superior method for fair and efficient adjudication (*see generally, Martin v*

Restaurant Assoc. Events Corp., supra; *Krebs v. Canyon Club, Inc., supra*). More specifically, and resolving any doubt in favor of class certification (*Globe Surgical Supply v. GEICO Ins. Co., supra*, 59 AD3d at 135), the Court finds that the numerosity, commonality and typicality requirements are satisfied upon the record presented, since the proposed class is: (1) of a sufficiently significant size – over 100 potential members – (Macaluso Aff., ¶¶ 5-6; Pica Aff., ¶ 5)(*Kudinov v. Kel-Tech Const. Inc.*, 65 AD3d 481, 482; *Martin v Restaurant Assoc. Events Corp., supra,* Slip Opn., at 21-22; CPLR 901[a][1]); and (2) common questions predominate over individual issues with respect to the named plaintiffs, who aver in sum that they worked at the defendants' locations and were impermissibly deprived of gratuities and overtime pay in essentially the same fashion (*see generally, Dabrowski v. Abax Inc.*, 84 AD3d 633, 634; *Kudinov v. Kel-Tech Const. Inc., supra*; *Martin v Restaurant Assoc. Events Corp., supra*; *Lopez, et., al., v. Bethpage Associates, LLC., et., al, supra*).

Notably, the commonality prong of the inquiry contemplates "predominance not identity or unanimity among class members" (*Pludeman v. Northern Leasing Systems, Inc., supra*, 74 AD3d 420, 423; *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 98), and may be satisfied even where "each of the plaintiffs and proposed class members possesses his or her own unique factual circumstances" (*City of New York v. Maul, supra*, 14 NY3d at 512 *see also*, *Globe Surgical Supply v. GEICO Ins. Co., supra*, 59 AD3d at 139; *Branch v Crabtree,* 197 AD2d 557; *Super Glue Corp. v Avis Rent A Car Sys.*, 132 AD2d 604; *Lopez v. Bethpage Associates, LLC., supra; Martin v. Restaurant Associates Events Corp., supra*, 2013 WL 4351788 at 23).

Further, the Court agrees that the plaintiffs have adequately established that, *inter alia*, they are typical of those of the class; that they can fairly and adequately protect its interests; and that a class action appears to be superior to other potential available methods of adjudicating the controversy. Nor does "[a] consideration of the factors contained in CPLR 902 * * * warrant a different result" (*Emilio v. Robison Oil Corp., supra*, 63 AD3d 667, 669).

Lastly, while the parties have submitted sharply differing versions of the governing facts (*see e.g.*, Bonsignore Aff., ¶¶ 3-5; Macaluso Aff.,¶¶ 8-9), the Court's function on the plaintiffs' motion is not to weigh facts or render a summary judgment-type conclusion with respect to the substance of the plaintiffs' claims; rather, the Court's inquiry is limited, and focuses upon whether, "on the surface there appears to be a cause of action which is not a sham" (*Pludeman v Northern Leasing*

Sys., Inc., supra, 74 AD3d at 422; *Brandon v. Chefetz*, 106 AD2d 162, 168; *Super Glue Corp. v. Avis Rent A Car System, Inc., supra*, 132 AD2d 604, 607; *Simon v Cunard Line, supra*, 75 AD2d 283, 288).

Here, the record does not support the conclusion that the plaintiffs' allegations are sham-like in character so as to otherwise warrant the denial of class certification (*see, Pludeman v. Northern Leasing Systems, Inc., supra,* 74 AD3d at 422; *Jim & Phil's Family Pharmacy, Ltd. v. Aetna U.S. Healthcare, Inc.*, 271 AD2d 281, 282; *Krebs v Canyon Club, Inc., supra*, 2009 WL 440903, at 3-4).

The Court has considered the defendants' remaining contentions and concludes that they are insufficient to defeat the plaintiffs' application for class certification.

Accordingly, it is,

ORDERED that the motion pursuant to CPLR Article 9 by the plaintiffs Lisa Macaluso and Christine Pica, individually and on behalf of all other persons similarly situated, for class action certification, is granted.

This constitutes the decision and order of this Court.

ENTER

DATED: September 9, 2013

ENTERED

SEP 12 2013

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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