Fernandez v Masterpiece Caterers Corp.
2016 NY Slip Op 32265(U)
November 4, 2016
Supreme Court, New York County
Docket Number: 155970/2015
Judge: Ellen M. Coin

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

DICKSON FERNANDEZ, individually and on behalf of others similarly situated,

Plaintiffs,

—against—

MASTERPIECE CATERERS CORP.; INDIA HOUSE, INC.; JOHN LOWMAN; JUDITH ROSE GODFREY; HERBERT A. LEWIS; LAWRENCE RUTKOWSKI; MARSHALL P. KEATING; GJIETO NICAJ; and any other related entities,

Defendants.

Index No.: 155970/2015
Mot. Date: Aug. 17, 2016
Mot. Seq. No.: 001

DECISION AND ORDER

Appearances:

For Plaintiff:
Leeds Brown Law, P.C.
By Brett R. Cohen, Esq.
Jeffrey K. Brown, Esq.
One Old Country Road, Suite 347
Carle Place, New York 11514
Tel: (516) 873-9550

For Defendants Masterpiece Caterers and Nicaj:
Tilem & Associates, PC
By Cindy Brown, Esq.
188 East Post Road, 3rd Floor
White Plains, New York 10601
Tel: (914) 833-9785

Papers Submitted on This Motion to Dismiss:

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Ellen M. Coin, A.J.S.C.,

In this proposed class action, plaintiff asserts one cause of action for violation of Labor Law § 196-d, seeking unpaid gratuities. Plaintiff alleges that from November 2014 through May 2015, he worked for defendants in food and service capacities at their catering locations at 1 Hanover Square and 55 Water Street, New York County (Compl. at ¶8). The complaint alleges

the following: beginning in June 2009, defendants Masterpiece Caterers Corp. ("Masterpiece") and India House, Inc. ("India House") both operated a catering business out of the premises located at One Hanover Place, employing the putative class members, including wait staff, servers, captains, bus persons, bartenders, food runners, maitre d's, and bridal attendants, capacities that customarily receive tips. (*id.* at ¶30). [1] The catering agreements provided for a service charge in an amount equal to 20-22% of the total contract price (*id.* at ¶35). Masterpiece and India House "provided customers with other documents—such as menus, bills, and invoices —that conveyed a 'service charge,' 'administrative fee' or other mandatory charges for administration of catered events," without disclaiming that these mandatory charges were not gratuities for the staff (*id.* at ¶36). Defendants' sales/event staff represented or allowed the customers to believe that the service charge was a gratuity (*id.* at ¶40). The service staff were paid hourly wages, and did not receive any portion of the service charges (*id.* at ¶41).

The complaint further alleges that defendants "willfully disregarded and purposefully evaded record keeping requirements of applicable New York State law by failing to maintain proper and complete records of service charges in the nature of gratuities, as required under 12 NYCRR §146-2" (*id.* at ¶46). The complaint designates individual defendants as plaintiff's employers pursuant to Labor Law §190 (3), because they allegedly had the power to hire and fire employees of Masterpiece, set work schedules and wages for them and exercised control over their tasks and job duties (*id.* at ¶53).

Defendants Masterpiece and Gjieto Nicaj move to dismiss the complaint based on a defense established by documentary evidence pursuant to CPLR 3211(a)(1) and for failure to

[1] Plaintiff discontinued this action against India House and the individual defendants affiliated with it by stipulation dated September 13, 2016. Only defendants Masterpiece and Gjieto Nicaj remain in the case.

state a cause of action pursuant to CPLR 3211(a)(7). They offer six sample agreements, entitled "Contract For Event," two from 2013, two from 2014 and two from 2015 (Ex. C to the Brown Aff.) Defendants do not clarify whether these agreements cover banquets at which plaintiff worked or are merely representative of agreements that Masterpiece issued to its customers. Defendants rely on paragraph 11 of the terms of each contract. Paragraph 11 in the first sample contract states:

> **20% ADMINISTRATIVE FEE** is used at MC's discretion for payroll (office/sales staff, maintenance, kitchen, stewards, host(ess), utilities, repairs and maintenance, capital improvements, etc. [sic] The Administrative fee is subject to 8.875% NY State Sales Tax.

The five subsequent agreements contain a slightly amended version, increasing the chargeable percentage to 22% in the event of payment by credit or debit card:

> **22% ADMINISTRATIVE FEE** is used at MC's discretion for payroll (office/sales staff, maintenance, kitchen, stewards, host(ess), utilities, repairs and maintenance, capital improvements, etc. [sic] The Administrative fee is subject to 8.875% NY State Sales Tax. If the event deposit and the the event balance are paid by cash or check, the **Administrative Fee** will be **20%**.

Defendants argue that paragraph 11 clearly rebuts the presumption of a gratuity set forth in 12 NYCRR §146-2.18(b) by identifying the separate mandatory charge as an administrative charge and by detailing the numerous applications of the mandatory fee to the implicit exclusion of a gratuity. Defendants argue that this is sufficient notice to customers that the administrative fee will not be used in place of a customary gratuity in accordance with 12 NYCRR §146-2.19(b). With the presumption rebutted, defendants maintain, plaintiff has no claim to assert under the Court of Appeals' decision in *Samiento v World Yacht Inc.* (10 NY3d 70, 81 [2008]), because no customer could reasonably conclude that the separate 20-22% mandatory charge was a gratuity.

In opposition, plaintiff argues that the administrative fee disclosure language, at most, rebuts the presumption contained in the Minimum Wage Order regulation, but does not entitle Masterpiece to dismissal of the Section 196-d claim, which is purportedly based on *Samiento*'s separate "reasonable patron" standard. Plaintiff also argues that in any event, a fair reading of Paragraph 11 does not make clear to a patron that no portion of the 20% "administrative fee" will be treated as a gratuity and therefore does not rebut the presumption under 12 NYCRR §§146-2.18(b) and 146-2.19 (b).

Analysis

On a motion to dismiss based on the ground that the defenses are founded upon documentary evidence pursuant to CPLR 3211(a)(1), the evidence must be unambiguous, authentic, and undeniable (*see Fontanetta v Doe*, 73 AD3d 78 [2d Dept. 2010]). To succeed a defendant must show that the "'documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law'" (*Held v Kaufman*, 91 NY2d 425, 430-31 [1998], quoting *Leon v Martinez*, 84 NY2d at 88; *Foster v Kovner*, 44 AD3d 23, 28 [1st Dept 2007]["[t]he documentary evidence must resolve all factual issues and dispose of the plaintiff's claim as a matter of law"][citations omitted]).

In considering a CPLR 3211 (a) (7) motion to dismiss, the court is to determine whether plaintiff's pleading states a cause of action. "The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Richbell Info. Servs., Inc. v Jupiter Partners*, 309 AD2d 288, 289 [1st Dept 2003]), quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 [2002] [internal quotation marks omitted]). The pleadings are to be afforded a "liberal

construction," and the court is to "accord plaintiffs the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Labor Law § 196-d, entitled "Gratuities," provides, in relevant part, that no "employer or his agent . . . shall demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee." The Court of Appeals, in *Samiento v World Yacht Inc.*, held that mandatory charges can be considered gratuities under Labor Law section 196-d "when it is shown that employers represented or allowed their customers to believe that the charges were in fact gratuities for their employees" (10 NY3d 70, 81 [2008]). Essentially, *Samiento* held that "[t]he standard under which a mandatory charge or fee is purported to be a gratuity should be weighed against the expectation of the reasonable customer" (*id.* at 79). The fact finder must decide "whether a banquet patron would understand a service charge was being collected in lieu of a gratuity" (*id*).

In the wake of *Samiento*, the New York Department of Labor (DOL) promulgated regulations that create 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 gratuity (12 NYCRR 146-2.18 [b]). The regulations carve out a caveat in 12 NYCRR §146-2.19 for an administrative charge, provided that the customers are notified that such charge is not a gratuity or a tip. However, "[t]he employer has the burden of demonstrating, by clear and convincing evidence, that the notification was sufficient to ensure that a reasonable customer would understand that such charge was not purported to be a gratuity" (12 NYCRR §146-2.19 [b]). This regulation further specifies what constitutes adequate notification to rebut the presumption of gratuity:

> *Adequate notification* shall include a statement in the contract or agreement with the customer, and on any menu and bill listing prices, that the administrative charge is for administration of the banquet, special function, or package deal, is not purported to be a gratuity, and will not be distributed as gratuities to the employees who provided service to the guests. The statements shall use ordinary language readily understood and shall appear in a font size similar to surrounding text, but no smaller than a 12-point font

(12 NYCRR §146-2.19 [c] [emphasis in text]).

The court's research has not yielded any case applying the criteria of 12 NYCRR § 146-2.19. Thus, this appears to be a matter of first impression. Paragraph 11 of defendants' sample agreements fails to meet the standard of section146-2.19(b), as it does not expressly state that the fee is for administration and will not be distributed as a gratuity to the employees providing service. While it lists uses of the fee that do not include a gratuity, it leaves other uses unspecified by adding the abbreviation "etc." Indeed, the 20-22% fee mirrors the rate of gratuity considered appropriate in the catering and restaurant environment; thus, Paragraph 11 could mislead Masterpiece's customers to assume that what Masterpiece labels an administrative fee in fact is a gratuity.

As defendants' exhibits fail, on their face, to rebut the presumption of a gratuity contained in regulation 12 NYCRR §146-2.19 (b), the motion to dismiss based on documentary evidence is denied. In addition, plaintiff's factual allegations demonstrate his cause of action, requiring denial of so much of the motion as seeks dismissal for failure to state a cause of action.

In accordance with the foregoing, it is hereby

ORDERED that the motion of defendants Masterpiece Caterers Corp. and Gjieto Nicaj to dismiss the complaint pursuant to CPLR 3211 (a)(1), (7) is denied; and it is further

ORDERED that the parties shall appear for a preliminary discovery conference on January 18, 2017 at 2:00 p.m. in Room 311, 71 Thomas Street, New York, New York.

This constitutes the decision and order of the Court.

Date: Nov. 4, 2016

ENTER:

Ellen M.Coin, A.J.S.C.