SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

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MARSHALL MAOR, on behalf of himself and others similarly situated,

DECISION AND ORDER

Index No. 158840/2014

Plaintiffs,

-against-

ONE FIFTY FIFTY SEVEN CORP d/b/a RUSSIAN TEA ROOM; RTR FUNDING GROUP, INC., GERALD LIEBLICH and any other related entities,

Defendants,

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JENNIFER G. SCHECTER, J.:

Motion sequence numbers 004 and 005 are consolidated for disposition. In motion sequence number 004, pursuant to CPLR 3212, defendants One Fifty Fifty Seven Corp. d/b/a The Russian Tea Room (The Russian Tea Room), RTR Funding Group, Inc., (RTR) and Gerald Lieblich (collectively Defendants), move for summary judgment dismissing the action. In motion sequence number 005, plaintiff moves for an order certifying this case as a class action and granting leave to amend the complaint to include Gina Garcia as a named plaintiff.

Background

Defendants operate a restaurant and event venue known as The Russian Tea Room. Permanent wait staff are employed for the main dining room, which serves primarily as a restaurant

(Memorandum in Support 004 [Sup] at 3). For all banquets and catered events, Defendants hire workers through Ambitious Staffing (Ambitious)(Sup at 3). Before each banquet or catered event, Defendants inform Ambitious of the date and time of the event and the number of wait staff needed.

The wait staff hired for each event arrive at the Russian Tea Room in their own uniforms. They sign in and participate in a pre-event meeting conducted by The Russian Tea Room managers to discuss the event, tasks, assignments and menu (Sup at 4-6, 10-11; Memorandum in Opposition 004 [Opp] at 5-6).

After the event, Defendants pay Ambitious a flat rate per waiter or waitress and Ambitious then pays the wait staff (Sup at 4-5, 9). Banquet wait staff are paid three to four times the tipped minimum wage amount (Sup at 4).

Named plaintiff Marshall Maor and proposed named plaintiff Gina Garcia are professional banquet waiters (Sup at 5). Maor worked at approximately three events at The Russian Tea room over a two month period in 2009 (Sup at 1; Opp at 7). Garcia also worked as a banquet server at Defendants' catered events on numerous occasions from 2008 through 2010 (Opp at 17).

Maor commenced this action, on behalf of himself and others similarly situated, seeking recovery of unpaid gratuities pursuant to New York Labor Law § 196-d (Sup at 1; Opp at 7). Plaintiff alleges that customers seeking a banquet or catered event are provided a contract that includes a "service charge," typically 22%, without disclosing that the collected fees are not paid to the wait staff (Opp at 10, 12-13). Plaintiff maintains that without a disclaimer on Defendants' banquet "service charge," a reasonable customer would presume that such a charge was, in fact, a gratuity, and that, because he and other wait staff were not paid these gratuities, Defendants violated the Labor Law.

Defendants move for summary judgment urging that the action should be dismissed because Maor was an independent contractor, not an employee; therefore, the statute does not apply to him. Plaintiff contends that because Defendants maintained sufficient control over banquet wait staff, a question of fact precludes summary judgment particularly at this early stage before discovery has been completed.

Plaintiff moves for class certification and for leave to amend the complaint to add Gina Garcia as a named plaintiff.

Analysis

Summary Judgment

Summary Judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of material triable issues(*see Glick & Dolleck v Tri-Pac Export Corp*, 22 NY2d 439, 441 [1968] [denial of summary judgment appropriate where an issue is "arguable"]; *Sosa v 46th Street Develop. LLC*, 101 AD3d 490, 493 [1st Dept 2012]). The burden, which is a "heavy one," is on the movant to make a prima facie showing of entitlement to judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any disputed material facts (*see William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). Once the movant has made this showing, the burden then shifts to the opponent to establish, through competent evidence, that there is a material issue of fact that warrants a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Plaintiff seeks recovery pursuant to New York Labor Law (NYLL) § 196-d. The statute provides:

> "No employer or his agent or an officer or agent of any corporation, or any other person shall demand, 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. . . .

> Nothing in this subdivision shall be construed . . . as affecting practices in connection with banquets and other special functions where a fixed percentage of the patron's bill is added for gratuities which are distributed to employees . . ."

(NYLL § 196-d).[1]

Defendants urge that this action must be dismissed as Maor was not an employee of Defendants, but rather, an independent contractor not covered under the statute (Sup at 13-14).

"In determining whether an employment relationship exists for section 196-d purposes, a court looks to the 'degree of control exercised by the purported employer over the results produced or the means used to achieve the results.' As to assessing control in this context, *Bynog* outlined five relevant non-exhaustive factors: 'whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule'" (*Maor v Hornblower New York, LLC*, 51 Misc 3d 1231[A] [Sup Ct, New York County 2016]; *Bynog v Cipriani Group*, 1 NY3d 193, 198 [2003]).

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[1] Mandatory charges can be considered gratuities under Labor Law § 196-d "when it is shown that employers represented or allowed their customers to believe that charges were in fact gratuities for their employees" (*Samiento v World Yacht Inc.*, 10 NY3d 70, 81 [2008]).

In *Bynog*, the Court found that the workers were independent contractors rather than employees for section 196-d purposes. Critical to the Court's reasoning was that plaintiffs worked at their own discretion, worked for defendants' competitors and were under the "exclusive direction and control" of the temporary service that hired and paid them (*Bynog*, 1 NY3d 193).

Defendants contend that the facts in this case are similar to those in *Bynog*. Maor was not hired by Defendants, provided services at other catering halls, provided his own uniform, did not have a fixed schedule with Defendants, did not receive any fringe benefits and was not on Defendants' payroll (Sup at 5- 10, 15-16).

Although a number of factors reflect lack of control, plaintiff urges that Defendants directly and exclusively exercised direction, supervision and control over banquet staff and that Ambitious served "merely as a paymaster - invoicing [The Russian Tea Room] for workers' services - and nothing else" (Opp at 18). Unlike in *Bynog*, plaintiff claims that Ambitious had no role in controlling or supervising the wait staff's work at the Russian Tea Room. Maor and Garcia testified that Defendants were present at events monitoring and checking that "everybody was doing everything they were

supposed to do" and would instruct the wait staff 15-20 times "throughout the whole night" (Opp at 18-19).

Defendants have not met their "heavy burden" of establishing that plaintiff was not an employee covered by the Labor Law as a matter of law because there is a question of fact as to the control Defendants exercised "over the results produced or the means used to achieve the results" (*contrast Bynog*, 1 NY3d at 199 [staffing agency controlled and directed the work, was present at events and provided staff with training and handbooks on how to conduct themselves]; *see Connor v Pier Sixty, LLC*, 29 Misc 3d 1220[A] [Sup Ct, New York County 2010] [determination of whether a worker is an employee within the meaning of Labor Law § 196-d requires a factual assessment of the degree of control exercised by defendants]).

In addition and based on the limited discovery conducted, Defendants have not established that the action should be dismissed as against Gerald Lieblich and RTR and that as a matter of law they are not "employers" under Labor Law Article 6 (*see Bonito v Avalon Partners, Inc.*, 106 AD3d 625 [1st Dept 2013]; *Picard v Bigsbee Enters., Inc.*, 55 Misc 3d 1221[A] [Sup Ct, Albany County 2017] [summary judgment denied because record did not establish whether there was actual exercise and

control over the operations of defendant businesses and plaintiff employees]).

Defendants have, however, demonstrated that the unjust enrichment claim must be dismissed. Significantly, the cause of action is based on the exact same allegations that form the basis of the Labor-Law claim. If ultimately there is no viable claim pursuant to Labor Law § 196-d, it would be because the Legislature did not intend for workers such as Maor to receive a portion of the service charge as a gratuity and there would be no injustice or inequity to be redressed.[2]

Class Action

Plaintiff commenced this action on behalf of himself and a putative class of individuals (Plaintiffs) who worked in food-service capacities for Defendants since September 2008 (Memorandum in Support 005 [Supp] at 6). Plaintiff seeks an order (1) certifying this action as a class action, (2) designating Virginia & Ambinder, LLP and Leeds Brown Law, PC as class counsel, (3) approving for publication the proposed Notice of Class Action Lawsuit and Publication Order and (4) leave to amend the complaint to add Gina Garcia as a named plaintiff.

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[2] Plaintiff has withdrawn the breach of contract cause of action (Opp at 24 n 9).

Plaintiff's motion for class certification is governed by CPLR 901 and 902 requiring common questions of fact or law to predominate over issues that are specific to individual class members (*City of New York v Maul*, 14 NY3d 499, 508 [2010]). CPLR 901(a) sets forth prerequisites for class certification: "(1) the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable; (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy." These factors are often "referred to as the requirements of numerosity, commonality, typicality, adequacy of representation and superiority" (*City of New York*, 14 NY3d at 508). The criteria for class certification are broadly and liberally construed (*id.* at 509). Significantly, courts have held that "'the merits of the claim are not at issue' on a motion to certify a class, but that, instead plaintiffs must 'satisfy the minimal threshold of establishing that their claim is not a sham'"

(*Maor v Hornblower New York, LLC*, 51 Misc 3d 1231[A] at *2 [Sup Ct, New York County 2016] citing *Weinstein v Jenny Craig Operations, Inc.*, 138 AD3d 546, 547 [1st Dept 2016]).

A class action is an appropriate method of adjudication given that the damages suffered by individual class members may be insignificant and the costs of prosecuting individual actions would result in the class members not having their day in court (*id.* at *3).

Plaintiffs have satisfied the prerequisites of CPLR 901. Plaintiffs allege that "as many as 40 servers could work at a single event" and that joinder is both impracticable and undesirable (Supp at 18). Questions of law and fact are common and predominate over questions affecting only individual class members. Specifically, Plaintiffs claim that whether Defendants imposed charges upon banquet customers that were gratuities, whether Defendants had an obligation to pay the funds to Plaintiffs and whether the class members should receive compensation are all common questions to the class and are at the core of the action (Supp at 20).[3] Additionally, in

[3] Defendants urge that there is no commonality because each class member must first demonstrate employment status. However, the record indicates that at a minimum all banquet wait staff were hired through Ambitious and the critical determination will be whether these workers are to be considered "employees" under the Labor Law. Certification of this class will ultimately generate common answers for its members (Memorandum in Opposition

this action plaintiff and proposed plaintiffs' claims are typical of the members of the class as they worked for Defendants in food service roles at various times from 2008 through the present. Maor and Garcia allege that Defendants imposed a service charge at banquets and catered events that the Plaintiffs would be entitled to. Because Maor and Garcia seek to recover unpaid gratuities for themselves and the members of the proposed class and would be represented by competent counsel, they may adequately and fairly represent the interests of the class (see Supp at 24-26). A class action is the most efficient method for the fair adjudication of this controversy.[4]

Finally, leave to amend the complaint to add Gina Garcia is granted pursuant to CPLR 3025(b) as she has sufficient knowledge of the claims, is similarly situated to the class members and her addition as a named representative in no way prejudices Defendants (CPLR 3025[b]).

Accordingly, it is

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005 at 19-20; *compare Corsello v Verizon New York, Inc.*, 18 NY3d 777 [2012]).

[4] Plaintiffs' counsel has represented that "no other individual instituted an action against Defendants in New York State court for underpayment of wages" (Supp at 28-29; CPLR 902).

ORDERED that Defendants' motion for summary judgment (motion sequence 004) is granted to the limited extent that the unjust enrichment cause of action is dismissed. The breach of contract cause of action, moreover, has been withdrawn and is therefore no longer part of the action. It is further

ORDERED that plaintiff's motion for leave to amend the complaint to add Gina Garcia as a named plaintiff (motion sequence 005) is granted and the caption shall be amended accordingly. Plaintiffs are to serve a copy of this order on the Clerk of the Court and the Clerk of the Trial Support Office who are directed to amend the court's records; it is further

ORDERED that plaintiff's motion for class certification under CPLR 901 and 902 (motion sequence 005) is granted.

This is the decision and order of the court.

Dated: April 11, 2018

HON. JENNIFER G. SCHECTER