

Membrives v HHC TRS FP Portfolio LLC

2018 NY Slip Op 32538(U)

July 23, 2018

Supreme Court, Nassau County

Docket Number: 607828/15

Judge: Stephen A. Bucaria

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This opinion is uncorrected and not selected for official publication.



SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA
Justice

PEDRO MEMBRIVES and MICHELE
SPERO, individually and on behalf of others
Similarly situated,

TRIAL/IAS, PART 1
NASSAU COUNTY

Plaintiff,

INDEX No. 607828/15

MOTION DATE: 7/17/18
Motion Sequence 005-007

-against-

HHC TRS FP PORTFOLIO LLC; REMINGTON
LODGING & HOSPITALITY, LLC REMINGTON
HOLDINGS LLC; REMINGTON LONG ISLAND
EMPLOYERS, LLC; MARK A. SHARKEY; ARCHIE
BENNETT JR.; MONTY J. BENNETT; CHRISTOPHER
PECKHAM; and any other related entities,

Defendant.

The following papers read on this motion:

- Notice of Motion.....XXX
- Affirmation in Support.....XXX
- Memorandum of Law in Opposition.....XX
- Memorandum of Law in Support.....XX
- Reply Affirmation.....XX
- Reply Memorandum.....X

Motion (seq # 5) by plaintiffs for summary judgment is **granted** to the extent indicated below. Motion (seq # 6) by defendants for summary judgment and decertification of the class is **denied**. Motion (Seq # 7) by plaintiffs to supplement the record is **granted**.

This is an action by catering employees to recover gratuities allegedly misappropriated by defendants. Defendant Remington Long Island Employers, LLC

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operates the Hyatt Regency hotel in Hauppauge. The hotel is owned either by Remington Long Island Employers, or one of its affiliates; defendants HHC TRS FP Portfolio LLC FP, Remington Lodging & Hospitality, LLC, or Remington Holdings LLC.

On October 9, 2008, Hyatt Corporation, as agent for HHC TRS FP Portfolio, doing business as Hyatt Regency Long Island, entered into a staffing services agreement with non-party Hospitality Staffing Solutions. The agreement granted Hospitality Staffing the non-exclusive right to provide banquet, housekeeping, stewarding, and room service staff to Hyatt.

The agreement provides that Hospitality Staffing shall provide “a contact person with Hyatt who shall supervise and coordinate all contract employees’ work.” The agreement provides that Hospitality Staffing shall be responsible for all aspects of contract employees’ work performance, including...hiring, scheduling...wage determination..., provided that said supervision and direction is consistent with the standards maintained by Hyatt.” The agreement provides that Hospitality Staffing was to pay its employees in accordance federal and state wage and hour laws, including minimum wage and overtime. The agreement provides that Hospitality Staffing “shall provide labor on a schedule as agreed to by Hyatt.”

Hospitality Staffing was required to submit a weekly invoice, showing name of employee, hours worked, rate per hour, and area worked for all personnel. Hospitality Staffing was responsible for payroll. The contract provided that labor would be provided at a rate of \$12.60 per hour, including insurance and benefits. Hospitality Staffing was required to provide workers compensation insurance. The contract contains an indemnity provision that Hospitality Staffing was to indemnify Hyatt for all claims arising from the services performed by Hospitality Staffing, including claims by employees.

On August 21, 2012, HHC TRS entered into a temporary labor services agreement with Hospitality Staffing. The temporary labor agreement provided that labor would be provided at the rate of \$14.84 per hour and contained a similar indemnification provision.

Plaintiff Pedro Membrives worked at the Hyatt in various food and service capacities during 2013-2014. The Hyatt Regency’s catering agreement provides under “Gratuities and taxes,” that all “banquet charges” are subject to an “administrative fee” of 23% (Doc 163). Membrives alleges that the administrative fee was understood as a fund to provide gratuities for the catering employees but was misappropriated by defendants.

Hyatt Regency’s Group Sales Agreement has a provision for “food and beverage minimum revenue requirement,” which excludes “service fees, gratuities, and taxes.”

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(Doc 164, 177, 178). Hyatt Regency's Itemized Advance Deposit form refers to a 23% administrative fee (Doc 173). Hyatt Regency's information invoice refers to a "banquet service charge" (Doc 174). Its "banquet check," another form of invoice refers to a service charge of 22% (Doc 205). Finally, Hyatt Regency's credit card receipts for a room rental of \$500 include an administrative fee of \$115 (23%), immediately above an item of "tip" 0.00 (Doc 175).

This action was commenced on December 4, 2015. In the amended class action complaint, plaintiff asserts a single claim for unlawful retaining of gratuities in violation of Labor Law § 196-d. By order dated March 10, 2017, plaintiff's motion for class certification was granted to the extent that plaintiff may maintain the action on behalf of all service employees, including waiters, servers, captains, bussers, bartenders, food runners, bridal attendants, and maître d's who were employed at the Hyatt Regency in Hauppauge since December 4, 2009.

By notice of motion dated April 5, 2018, plaintiffs move for summary judgment. Plaintiffs argue that on its face the catering agreement provides that the 23% fee was a gratuity.

By notice of motion dated April 5, 2018, defendants move for summary judgment dismissing the amended complaint and for decertification of the class. Defendants submit what they refer to as the Hyatt Regency "menu," which appears to be actually a series of price lists for group events. For example, the Hyatt Regency document entitled "Continental Breakfast" lists various options, including the "Early Bird" assortment of juices, pastries, and coffee and tea selections, with a charge of "\$17.00 per guest." Various other continental breakfast options are available with prices up to \$24.00 per guest. Similar options are available for "breakfast buffet," "breaks," "buffet lunches," "hors d'oeuvres," "presentation stations," "carving stations," "reception packages," "dinner buffet," and "bar packages," giving various prices "per guest."

All of these price lists provide at the bottom of the page in small print, "All prices are subject to a 24% administrative fee (which is not a gratuity for wait staff, service bartenders or service employees), and a 8.625% State" (Doc 99). Defendants claim that they disclosed the nature of the administrative fee to "every customer" who booked an event during the relevant period.

On a motion for summary judgment, it is the proponent's burden to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (**JMD Holding Corp. v. Congress Financial Corp.**, 4 NY3d 373, 384 [2005]). Failure to make such a prima

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facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers(Id). However, if this showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial (**Alvarez v. Prospect Hospital**, 68 NY2d 320, 324 [1986]).

Labor Law § 196-d provides that, “No employer or his agent...or any other person shall demand or accept...any part of the gratuities, received by an employee....or any charge purported to be a gratuity....” The statute provides that, “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....”

Service charges which are held out to the customer as a substitute for a tip, but are not voluntary payments, may be gratuities within the meaning of the statute (**Samiento v World Yacht, Inc.**, 10 NY3d 70 [2008]). “If the employer’s agents lead the patron who purchases a banquet or other special function to believe that the contract price includes a fixed percentage as a gratuity, then the percentage of the contract price must be paid in its entirety to the waiters, busboys and similar employees who work at that function, even if the contract makes no reference to such a gratuity” (Id at 79-80). As the Court of Appeals stated clearly, “An employer cannot be allowed to retain these monies” (Id at 81).

The last sentence of the statute does not exempt service charges intended as gratuities for banquet employees, but rather confirms the legitimacy of existing practices concerning the pooling and distribution of such gratuities (Id).

Pursuant to Labor Law regulations, there is a rebuttable presumption that a charge “in addition to charges for food, beverage, lodging...is a charge purported to be a gratuity” (12 NYCRR § 146-2.18[b]). In **Ahmed v Morgan’s Hotel Group**, 2018 N.Y. App. Div. LEXIS 2687 [1st Dept. 2018]), the First Depart affirmed the dismissal of a Labor Law § 196-d complaint on the ground that defendant’s banquet event order, which served as the detailed contract and bill for catered events, clearly identified the administrative charge so that a reasonable customer would understand that the charge was not purported to be a gratuity. However, in **Ahmed**, there was an additional separate charge which was intended to be a gratuity.

Based upon the regulatory presumption and the documents submitted to the court, plaintiffs have established prima facie that the patrons who booked affairs at the Hyatt

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Regency believed that the 23% administrative fee and similar charges were intended as gratuities for the plaintiffs.

Professional banquet waiters are not entitled to recover service charges intended as gratuities, if the waiters are not employees, but independent contractors (**Bynog v Cirpirani Group**, 1 NY3d 193 [2003]). The critical inquiry in determining whether an employment relationship exists pertains to the degree of control exercised by the purported employer over the results produced or the means used to achieve the results (Id at 198). Factors relevant to assessing control 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 (Id).

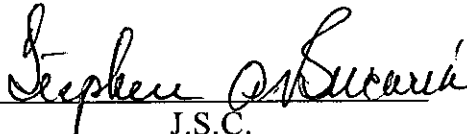
Defendants required many of the plaintiff class members to sign "temporary service contracts" (Doc 112). The temporary service contracts refer to the worker as an "independent contractor," and provide that he or she will "properly perform" his/her work, and will take the jobs "provided by the agency" (non-party DBS Express Staffing). The "initial term" of the contract was for a period of ten years. The temporary service contracts are clearly adhesion contracts meant to provide a facade that defendants did not control the work. Defendants have failed to carry their burden on the summary judgment motion. Plaintiffs' motion for summary judgment is **granted** to the extent of declaring that plaintiffs are entitled to the 23% administrative fees and similar charges charged to the patrons who booked banquets at the Hyatt Regency Hotel from December 4, 2009 to the present.

A hearing as to the damages incurred by each class member shall be held upon a date to be set by the court.

So ordered.

JUL 23 2018

Date: _____


J.S.C.

ENTERED

JUL 24 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE