Salzmann v Coveleigh Club, Inc.
2018 NY Slip Op 32539(U)
April 19, 2018
Supreme Court, Nassau County
Docket Number: 608525/17
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X	**TRIAL/IAS PART 12**
ALEX SALZMANN and VICTOR VILLASIN, individually and on behalf of other similarly situated,	**INDEX # 608525/17**
Plaintiffs,	**Mot. Seq. 1**
-against-	**Mot. Date 3.22.18**
	Submit Date 3.22.18
COVELEIGH CLUB, INC.; THEODORE HENNES; and any other related entities,	
Defendants.	
----------X	

The following papers were read on this motion: Documents Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	12, 18
Answering Affidavit	21, 25
Reply Affidavit.....	26

Defendants Coveleigh Club, Inc. and Theodore Hennes move pursuant to CPLR 3211(a) (1) and (a) (7) dismissing the complaint.

In this putative class action brought pursuant to Labor Law § 196-d, plaintiffs allege that beginning in approximately August 2011, defendants have engaged in a policy and practice of unlawfully retaining employees' gratuities at all of defendants' restaurant and catering venues located in New York. Plaintiffs allege that during the relevant period, defendants charged a mandatory fee in connection with the administration of a banquet and/or catered event, at times referred to a service charge, in the amount of approximately 20%. Plaintiffs assert that a reasonable customer would have believed these service charges to be gratuities for the staff but defendant failed to pay the fees over to the staff and instead retained the money for their own benefit. Thus, plaintiffs allege that they were paid only an hourly wage and did not receive all of their tips to which they were entitled. Plaintiff Alex Salzmann states that he worked for defendants in food and service capacities during the relevant period, including in or around 2012, at the Coveleigh Club. Plaintiff Victor Villasin asserts that he worked for the defendants in food

and service capacities during the relevant period, including in or around 2015, at the Coveleigh Club. Plaintiffs further assert that the individual defendant Hennes had control over, and the power to change compensation and other business practices at Coveleigh Club, including the power to determine employee policies.

Plaintiffs asserts a cause of action for the unlawful withholding of gratuities pursuant to Labor Law Article 6 § 196-d and the supporting regulations, which section states "[n]o employer or her agent or an officer or agent of any corporation, or any other person 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."

On this motion, defendants contend that the plaintiffs cannot maintain this action because neither plaintiff was employed by the defendants. Each plaintiff worked at events for the defendants on only a single occasion through third party staffing contractors, with insufficient indicia of an employment relationship. With respect to plaintiff Salzmann, the single event at which he worked was a members-only event, for which no service charge was collected. Moreover, defendants contend that the claims against defendant Hennes must be dismissed in all events as he is neither an officer nor owner of Coveleigh.

In support of this motion, defendants submit the affidavit of Theodore Hennes. By his affidavit, Mr. Hennes states that he is the general manager of Coveleigh Club, which is a private family club located in Rye, New York. Mr. Hennes states that plaintiff Salzmann was never employed by Coveleigh but was employed by Mack Staffing and dispatched to Coveleigh to fill in as a server at a single event held on December 21, 2013, which was a Christmas party for club members. Mr. Hennes states that the club did not charge its members an administrative/service fee for attending the Christmas party. Mr. Hennes attaches an invoice from the sole shift at Coveleigh and a copy of the calendar from December 2013, which he states confirms that the Club's Christmas party occurred on the only day that plaintiff Salzmann worked at the club. In addition, Mr. Hennes states that plaintiff Vilasin was employed by TemPositionsEden Hospitality and dispatched to Coveleigh to fill in as a server for a single event held on May 22, 2016.

The court notes that Exhibit A is a heavily redacted document confirming that Alex Salzmann worked at an event on December 21, 2013. Exhibit B includes a calendar for December 2013, which indicates that a luncheon was held at 12-2:30 p.m. and Coveleigh's Christmas Dinner was held from 6-9 p.m. Exhibit B likewise includes either an invitation or a flyer advertising the Christmas dinner. It does not indicate any price, let alone a service fee.

In opposition, plaintiffs contend that the complaint explicitly pleads facts tending to show an employment relationship and any dismissal on this ground in advance of discovery is premature. Plaintiffs point out that the definitions of employee and employer in New York are expansive and that the complaint alleges that the defendants had control and oversight over the employees. Further, plaintiffs contend that the Hennes affidavit is insufficient on a motion to dismiss to foreclose their claims.

Plaintiffs annex the affidavit of Alex Salzmann to amplify their complaint. Mr. Salzmann states that he worked for Coveleigh at a catered event in December 2013. He states that to the best of his recollection, he worked at an event at which most of the attendees were non-members and the event description provided by the defendants does not match the details of the event that he recalls working at. He further states that he was supervised by a manager employed by Coveleigh and that the third-party staffing agency did not have anyone on site to supervise him. In addition, Mr. Salzmann states that he wore the same uniform as Coveleigh's regular employees.

To succeed on a motion to dismiss based on documentary evidence under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law," thereby definitively disposing of the opposing party's claims. (*Leon v. Martinez,* 84 NY2d 83, 88 [1994]; *see also Fischbach & Moore v. Howell Co.*, 240 AD2d 157 [1st Dept 1997]). Thus, a motion to dismiss based on documentary evidence may be granted only where the documentary evidence "utterly refutes" the plaintiff's factual allegations. (*Sabre Real Estate Group, LLC v. Ghazvini*, 140 AD3d 724, 724-725 [2d Dept 2016]; *Kolchins v. Evolution Markets, Inc.*, 128 AD3d 47, 57-58 [1st Dept 2015]).

"'On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" (*Siracusa v. Sager,* 105 AD3d 937 [2d Dept 2013] quoting *Breytman v. Olinville Realty, LLC,* 54 AD3d 703, 703–704 [2008]). "In assessing a motion under CPLR 3211(a)(7) . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint . . . ." (*Leon*, 84 NY2d at 88 [citing *Rovello v. Orofino Realty Co.*, 40 NY2d 633, 635 [1976]]).

> A court is, of course, permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211 (a) (7) (*see* CPLR 3211 [c]). If the court considers evidentiary material, the criterion then becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg* , 43 NY2d [268] at 275). Yet, affidavits submitted by a defendant "will almost never warrant dismissal under CPLR 3211 unless they 'establish conclusively that [the plaintiff] has no cause of action' " (*Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008], quoting *Rovello v Orofino Realty Co.*, 40 NY2d [633]at 636 [emphasis and alterations of original quotation omitted]). Indeed, a motion to dismiss pursuant to CPLR 3211(a) (7) must be denied "unless it has been shown that a material fact as claimed by the pleader to be

> one is not a fact at all and unless it can be said that no significant dispute exists regarding it" (*Guggenheimer v Ginzburg*, 43 NY2d at 275).

(*Sokol v. Leader*, 74 AD3d 1180 [2d Dept 2010]).

> "In New York, 'a plaintiff may not proceed with an action in the absence of standing' " (*Raske v. Next Mgt., LLC*, 40 Misc.3d 1240(A), 2013 WL 5033149 [Sup.Ct.N.Y.Co., 2013] *quoting Ryan, Inc. v. New York State Dept. of Taxation and Fin.*, 26 Misc.3d 563, 567, 890 N.Y.S.2d 306 [Sup.Ct.N.Y.Co., 2009]). "The plaintiff must have an injury in fact in order to bring a cause of action against a particular defendant" (*Id., citing Silver v. Pataki*, 96 NY2d 532, 539 [2001]). "The existence of an injury in fact — an actual legal stake in the matter being adjudicated — ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute in a form traditionally capable of judicial resolution. Under the injury in fact analysis[,] standing exists when the plaintiff has sustained actual injury, meaning that he/she has an actual legal stake in the in the matter being litigated" (*Collateral Loanbrokers Assn. of NY, Inc. v. City of New York*, 47 Misc.3d 1225(A), 2015 WL 3500068 [Sup.Ct. Bronx Co.2015] *quoting Soc'y of Plastics Indus. v. County of Suffolk*, 77 NY2d 761, 773 [1991]).
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> "In the class action context, plaintiffs 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.' (*Whalen v. Michael Stores Inc.*, 153 F.Supp.3d 577 [E.D.N.Y.2015] *quoting Warth v. Seldin*, 422 U.S. 490, 503, 95 S.Ct. 2197, 45 L.Ed.2d 343 [1975]). "Thus, 'if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of [herself] or any other member of the class.' " (*Id. quoting O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 [1974]).

(*Manning v. Pioneer Sav. Bank*, 56 Misc.3d 790 [Sup. Ct. Rensselaer County 2016]).

In *Bynog v. Cipriani Group*, 1 NY3d 193 [2003], the Court of Appeals dismissed an action commenced by temporary workers pursuant to Labor Law § 196-d on the basis that the plaintiffs were independent contractors and not employees of the defendants. The court explained that "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." (*Bynog*, 1 NY3d at 198). "Factors relevant to assessing

control include 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.*). Important to the Court's consideration, was that the defendants did not provide uniforms or any necessary apparatus to the plaintiffs, the temporary employment agency conducted interview and hired the workers and provided them with training and a handbook. The temporary workers reported to a representative of the temporary agency and were instructed by the handbook not to "contact the client directly." (*Id.* at 199).

As noted above and as recognized by the parties, an affidavit submitted in support of a motion pursuant to CPLR 3211(a) (1) or (7) will only be sufficient where it utterly refutes the plaintiff's allegations. Here, the exhibits attached to the Hennes affidavit do not conclusively establish that no service fee was charged for the December 2013 event.

Nor does the Hennes affidavit establish that Coveleigh did not supervise or control the work of staff hired through the third-party recruiters. The factors critical to the *Bynog* Court's inquiry have not been fully addressed by the parties, in particular the level of control over the temporary staff's performance. While the Salzmann affidavit states that he was managed by Coveleigh employees and wore the same uniforms as regular employees, the Hennes affidavit is silent on these issues. Accordingly, on this motion to dismiss, the Hennes affidavit fails to utterly refute plaintiff's claims or conclusively establish a defense. (*See Connor v. Pier Sixty, LLC*, 23 Misc.3d 435, 437-438 [Sup. Ct. N.Y. County 2009] ["The extent of this control is a matter which should be explored in discovery and is not an issue which is amenable to a motion to dismiss for failure to state a cause of action."]).

Finally, with respect to defendant Hennes, the complaint alleges that he was, at the relevant times, an officer and/or owner of the Coveleigh Club and that he exercised control over employees and other business practices at Coveleigh Club. His affidavit states that he is the general manager but says nothing further about his role or responsibilities. Whether an individual is personally liable as an employer, turns on "'whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.'" (*Dudley v. Hanzon Homecare Services, Inc.*, 15-cv-8821, 2018 WL 481884, *2 [SDNY January 17, 2018] [quoting *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 [2d Cir. 1984]; *see also Zhi Yong Zheng v. Nanatori Japanese Restaurant Corp.*, 15-cv-1222, 2017 WL 758489, *4 [SDNY January 9, 2017]). Because the Hennes affidavit does not adduce facts to establish that he did not act as plaintiffs' employer, dismissal as against him must be denied as well. (*See Maor v. Hornblower N.Y., LLC*, 51 Misc.3d 1231(a) [Sup. Ct. N.Y. County 2016]).

For the foregoing reasons, the defendants' motion to dismiss is **denied**; and it is hereby

ORDERED, that counsel shall appear at a preliminary conference at the supreme courthouse, 100 Supreme Court Drive, Mineola, N.Y., lower level, on **May 8, 2018, at 9:30 a.m.** No adjournments of this conference will be permitted absent the permission of or order of this court. All parties are forewarned that failure to attend the conference may result in judgment by default, the dismissal of pleadings (see 22 NYCRR 202.27) or monetary sanctions (22 NYCRR 130-2.1 et seq.).

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
April 19, 2018

ENTER:

HON. JEFFREY S. BROWN
J.S.C.

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