SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

LIDIANA AMORIM et al.

INDEX NO. 650008/16

MOT. DATE

- v -

MOT. SEQ. NO. 007 and 008

THE METROPOLITAN CLUB, INC.

STUART BUTTON et al., and all others similarly situated

INDEX NO. 656625/17

MOT. DATE

- v -

MOT. SEQ. NO. 001 and 003

METROPOLITAN CLUB, INC.

The following papers were read on this motion to/for compel (007), cons & SJ (008), set date (001) and class cert & SJ (003)

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____

Replying Affidavits NYSCEF DOC No(s)._____

In these two actions, plaintiffs seek to recover unpaid wages and tips under the Labor Law. The first action is entitled *Amorim et al. v. Metropolitan Club of New York*, Index Number 650008/16 (Action No. 1) and the second action is entitled *Button et al. v. Metropolitan Club, Inc.*, Index Number 656625/17 (Action No. 2). There are four motions presently before the court that are the subject of this decision/order.

In motion sequence number 007 under Action No. 1, plaintiffs move for an order compelling defendant to produce its president, Robert J. Strang, for a deposition, to comply with a stipulation dated November 14, 2017 to produce the results of a search of email and contract files for events plaintiffs worked, for sanctions and to answer interrogatories and produce responses to demands served November 22, 2017. Defendant opposes that motion.

In motion sequence number 008 under Action No. 1, defendant moves for an order consolidating these two actions. Plaintiff cross-moves for partial summary judgment on liability on count two of the amended complaint in favor of plaintiffs and against defendant finding that defendant violated Labor Law § 196-d and 12 NYCRR §§ 146-2.18 and 146-2.19 over the period from 2010 through 2017 with respect to a 22% "administrative" surcharge imposed on food and beverage amounts for banquets/special events. Defendant then also cross-moves for partial summary judgment dismissing plaintiff's second cause of action, as well as for attorneys fees and costs.

Dated: 12/11/18

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☐ **GRANTED** ☐ **DENIED** ☒ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

In motion sequence number 001 under Action No. 2, plaintiffs move for "an order to set time April 24, 2018, as the date to file their motion papers, pursuant to CPLR § 902, for class certification." That motion is submitted without opposition.

Finally, in motion sequence number 003 under Action No. 2, plaintiffs move for class certification. Defendant opposes class-certification and cross-moves for partial summary judgment in its favor dismissing plaintiffs' Labor Law §196-d claim as to defendant's mandatory administrative surcharge as well as attorneys' fees and costs. Plaintiffs, in turn, also cross-move for partial summary judgment in their favor.

These four motion sequences are hereby consolidated for the court's consideration and disposition in this single decision/order. The court's decision follow.

At the outset, the motion to consolidate is granted. These actions are related and therefore consolidation is appropriate to conserve the parties' and court's resources.

The court will next consider the motion to compel. After oral argument and due consideration, the court does not find that plaintiffs are entitled to a deposition of defendant's president. Defendant has already produced six employees for deposition who have given testimony concerning the administrative surcharge. Any testimony Strang might offer would be duplicative, to the extent that he can even offer relevant and material testimony. Accordingly, that portion of the motion is denied. The balance of the motion to compel is also denied, since plaintiff has failed to demonstrate a good faith effort to resolve the subject discovery dispute. The parties are advised to meet and confer and come up with a "coordinated discovery plan" as defense counsel urges. Any further discovery disputes shall be raised at the next compliance conference to be held on January 29, 2019 at 9:30am.

The remaining applications before the court are [1] plaintiff's motion to set a date for class certification and for class certification in Action No. 2; and [2] the parties' applications for partial summary judgment with respect to plaintiffs' causes of action pursuant to Labor Law § 196-d. The court, in its discretion, will first determine the motions for summary judgment since the requested relief bears on whether class certification is appropriate.

Summary judgment

The relevant factual claims are as follows. Defendant (sometimes the "Club") is a private social club which operates a banquets/special events department and a restaurant. Plaintiffs were employed by Hospitality Staffing, LLC and Gotham Personnel, LLC to serve guests at banquets and special events. Plaintiffs were waitstaff and bartenders who worked in the Club's banquet/special events department. On time records, plaintiffs are called waiters, bartenders, bar-waiter, bar back, and food runner.

The Club adds a surcharge of 22% to the food and beverage charges for banquets/special events, or approximately $2.1 million in 2015. The surcharge is set forth in both an offer letter and a document entitled Banquet Conditions and Terms contract (the "contract") which are entered into by all customers for banquets and special events held at the Club. Paragraph 7 of the contract provides as follows:

> 7. Administrative Surcharge: Twenty-two percent (22%) of the aggregate food and beverage charges of the Event (the "Administrative Surcharge") will be added to your account as a surcharge. The Administrative Surcharge is not a gratuity, will not be distributed to Club employees and is subject to sale tax.

There is no dispute that upon receipt of the surcharge, the proceeds are deposited in the Club's general operating account, from which the Club pays the direct and indirect costs of hosting banquet events, such as food and beverage costs, utility costs, and employee compensation. Defendant has provided the affidavit of its General Manager, Anthony Nuttall, who states based upon personal

knowledge that defendant's unionized workers have never claimed that they are entitled to a portion of the surcharge. Rather, Nuttall maintains unionized workers' compensation is agreed upon pursuant to a collective bargaining agreement, "which does not include gratuities or the 'sharing of tips.'"

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; Ayotte v. Gervasio, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Plaintiffs' (Action No. 1) second cause of action alleges that defendant violated the Labor Law and 12 NYCRR §§ 146-2.18 and 146-2.19. Plaintiffs in Action No. 2 also allege violations of Labor Law §196-d claim as to defendant's mandatory administrative surcharge. Plaintiffs maintain that the 22% surcharge "is intended to mislead guests that the surcharge is for the persons who participated in serving them."

Labor Law § 196-d prohibits an employer from "retain[ing] any part of a gratuity or of any charge purported to be a gratuity for an employee." The Court of Appeals has held that a mandatory service charge added to a bill may be considered a gratuity within the meaning of Labor Law § 196-d (*Samiento v World Yacht Inc.* 10 NY3d 70, 74 [2008]). "[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).

12 NYCRR § 146-2.18 says in relevant part:

> Section 196-d of the New York State Labor Law prohibits employers from demanding, accepting, or retaining, directly or indirectly, any part of an employee's gratuity or any charge purported to be a gratuity.
>
> (a) A charge purported to be a gratuity must be distributed in full as gratuities to the service employees or food service workers who provided the service.
>
> (b) There shall be 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 charge purported to be a gratuity.

12 NYCRR § 146-2.19 states in relevant part:

> (a) A charge for the administration of a banquet, special function, or package deal shall be clearly identified as such and customers shall be notified that the charge is not a gratuity or tip.
>
> (b) The 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.

> (c) 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.

Plaintiffs specifically argue that defendant violated the aforementioned regulations because: [1] the 22% surcharge is not for administration of the event; [2] the contract is not in 12-point font; [3] the surcharge is distributed to employees, including management, but not distributed to staffing agency employees who serve guests at banquets/special events; and [4] defendant's documents do not say the surcharge will not be distributed as gratuities to the employees who provided services to the guests, such employees being the servers and bartenders such as plaintiffs.

Meanwhile, defendant points to paragraph 7 of the contract, and rely upon *Ahmed v. Morgan's Hotel Grp. Mgmt., LLC* (160 AD3d 555 [1st Dept Apr. 19, 2018]). In that case, the First Department held that Labor Law § 196–d and 12 NYCRR 146–2.18 were not violated where the subject contract clearly stated that "the administrative charge was not a gratuity" and "[n]o reasonable customer would have been confused" by it.

The court must reject plaintiffs' argument that paragraph 7 of the contract was insufficient "to ensure that a reasonable customer would understand that such charge was not purported to be a gratuity." *Ahmed* is informative. The language in that contract is substantially similar to the language in paragraph 7. Based upon *Ahmed*, defendants have met their burden on this motion and rebutted the presumption that the surcharge is a gratuity.

Plaintiffs, however, argue that the contract at its smallest is only in 8-point type, and therefore, paragraph 7 does not comply with 12 NYCRR § 146-2.19. Plaintiffs maintain that they are entitled to summary judgment on the second cause of action because of this non-compliance. The court disagrees. Paragraph 7, which is identical in each of the exemplars of the contract which have been provided to the court, is part of a 2-4 page document in each case. The language is not buried therein or otherwise difficult to read and is of equal prominence to all the other terms of the contract. While defendant failed to comply with subsection 3 of 12 NYCRR § 146-2.19 by utilizing a font smaller than 12-point, this fact standing alone cannot lead a reasonable person to believe that the surcharge was a gratuity to be shared by plaintiffs and/or defendant's unionized banquet servers. Accordingly, this argument fails to raise a triable issue of fact.

Plaintiffs' remaining arguments are equally unavailing. Plaintiffs contend that defendant has failed to offer a sufficient justification for dividing the price for food and beverage into a list price and a 22% surcharge. However, plaintiffs misconstrue defendant's burden on this motion. Defendant is generally entitled to charge for its goods and services as it sees fit, so long as it does not mislead a customer into believing that any component of payment is a gratuity when it is in fact not. Moreover, defendant represents that it has always maintained a no-tipping policy in its 100+ years of existence. The only issue here is whether plaintiffs have established a triable issue of fact as to whether a reasonable person would consider the surcharge a gratuity. Here, the court finds that plaintiffs have failed to meet their burden.

Further, it is of no moment that a portion of the surcharge goes towards a Christmas fund. While a gratuity must be distributed to defendant's employees, there is no requirement that an administrative charge cannot. Relatedly, plaintiffs' argument that the Christmas fund only benefits defendant's unionized employees rather than plaintiffs lacks merit.

Since defendant has established entitlement to partial summary judgment dismissing plaintiffs' second cause of action in Action No. 1 and the Labor Law 196-d claims in Action No. 2, and plaintiffs'

have failed to raise a triable issue of fact, defendant's cross-motions for partial summary judgment are granted and plaintiff's cross-motion for partial summary judgment in Action No. 1 is denied. That portion of defendant's motion which seeks attorneys fees and costs, however, is denied. Reimbursement for attorneys fees and costs is ordinarily not recoverable absent a contractual obligation or statutory authorization for same.

Class certification

In light of the court's decision *supra*, the court denies as moot both plaintiffs' motion in Action No. 2 to set a date for class certification as well as the motion for class certification as to plaintiff's surcharge claim. Plaintiff's remaining claims in Action No. 2 arises from the following allegations. Defendant allegedly collected over $150,000 in gratuities which it withheld from plaintiffs and class members. Instead, defendant allegedly paid this sum to sales managers and captains in the special events department. Plaintiffs further allege that defendant collected approximately $200,000 yearly in response to solicitation letters which was paid out to unionized and other direct employees, but was withheld from plaintiffs and the proposed class members.

Defendant argues that class certification is not warranted because there are "highly-individualized inquiries required to determine plaintiff's voluntary tip claims." The court disagrees. CPLR § 901[a] sets forth five statutory prerequisites before a class action may be maintained:

> 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.

Plaintiffs bear the burden of providing an evidentiary basis from which the court can conclude that the requirements of CPLR § 901[a] have been met (*Kudinov v. Kel-Tech Constr. Inc.*, 65 AD3d 481 [1st Dept 2009]).

Once the requirements of CPLR § 901 have been met, courts then must consider the additional factors promulgated by CPLR § 902 such as "the individual class members' interest in maintaining separate actions and the feasibility thereof; the existence of pending litigation regarding the same controversy; the desirability of the proposed class forum; and the difficulties likely to be encountered in managing the class action" (*Pludeman v. Northern Leasing Sys., Inc.*, 74 AD3d 420-422 [1st Dept 2010] [internal citations omitted]). CPLR §§ 901[a] and 902 should be liberally construed (*Englade v. HarperCollins Publs., Inc.*, 289 AD2d 159 [1st Dept 2001]) and the determination of whether a class should be certified rests within the sound discretion of the court (*Kudinov, supra*).

Here, the court finds that class certification is warranted. The class of non-unionized waiters, bartenders, bar-waiter, bar back, and food runner is numerous and joinder would be onerous. Despite defendant's arguments to the contrary, questions of law and fact common to each proposed class member exist. Although the exact calculations of monies to which each class member would be entitled to may vary, such calculations do not mandate individual trials. Further, this case is distinguishable from *Alix v. Wal-Mart Stores, Inc.* (57 AD3d 1044 [3d Dept 2008]). While both cases involve fact-specific inquiries,

the allegations in *Alix* concerned employment practices which specifically targeted the named plaintiffs. Here, the allegations generally concern all proposed class members.

The named plaintiffs' claims are typical of the proposed class members, and the named plaintiffs have demonstrated that they will fairly and adequately represent the interests of the class. Finally, a class action is superior to other available methods.

Since plaintiffs have otherwise met their burden and defendant cannot demonstrate that a class action is not warranted, the motion for class certification is granted.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that defendant's motion-in-chief under sequence number 008, Action No. 1 (to consolidate) is granted and Actions No. 1 and No. 2 are hereby consolidated for all purposes and the pleadings in both actions shall stand as the pleadings in the consolidated actions; and it is further

ORDERED that defendant is directed to serve a copy of this order with notice of entry on the County Clerk (Room 141B), who shall consolidate the papers in the actions hereby consolidated and shall mark the records to reflect the consolidation; and it is further

ORDERED that defendant is directed to serve a copy of this order with notice of entry on the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the court's records to reflect the consolidation; and it is further

ORDERED that motion sequence number 007 under Action No. 1 (to compel) is denied in its entirety; and it is further

ORDERED that motion sequence number 001 under Action No. 2 (to set a date to move for class certification) is denied as moot; and it is further

ORDERED that plaintiff's motion-in-chief, motion sequence number 003 under Action No. 2 (for class certification) is granted in its entirety and the parties are directed to settle order as to this motion, only; and it is further

ORDERED that defendant's cross-motions for partial summary judgment are granted and plaintiff's cross-motions for partial summary judgment are denied (motion sequence number 007, Action No. 1 and motion sequence number 003, Action No. 2) and plaintiffs' claims that defendant violated Labor Law § 196-d and 12 NYCRR §§ 146-2.18 and 146-2.19 arising from the 22% administrative surcharge are severed and dismissed; and it is further

ORDERED that the parties are directed to appear for a status conference on January 8, 2019 at 9:30am.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 12/12/18
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.