SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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MARIANELLA VELASQUEZ, individually and on behalf of those similarly situated,

Plaintiffs,

-against-

SUNSTONE RED OAK, LLC d/b/a RENAISSANCE WESTCHESTER HOTEL, SUNSTONE RED OAK LESSEE, INC., SUNSTONE HOTEL TRS LESSEE, INC., HIGHGATE HOTELS, L.P., JOHN V. ARABIA; PAUL R. WOMBLE; RICKEY WHITWORTH; BRYAN A. GIGLIA; ROBERT SPRINGER; and any other related entities,

Defendants.

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DECISION & ORDER

INDEX NO.: 51015/2016

Motion Sequences 3 & 4

BLACKWOOD, A.J.S.C.

The following papers (e-filed documents 71-129, 179-190, 192-204, 206-209) were read on the E-filed motion by defendants SUNSTONE RED OAK, LLC d/b/a RENAISSANCE WESTCHESTER HOTEL, SUNSTONE RED OAK LESSEE, INC., SUNSTONE HOTEL TRS LESSEE, INC., HIGHGATE HOTELS, L.P., JOHN V. ARABIA, PAUL R. WOMBLE, RICKEY WHITWORTH, BRYAN A. GIGLIA, and ROBERT SPRINGER, for an order granting summary judgment and dismissing the complaint filed against them in this action (Motion Sequence #3) and on the E-filed motion by plaintiffs, MARIANELLA VELASQUEZ, individually and on behalf of those similarly situated, for an order granting partial summary judgment in their favor, for an adverse inference, and for a preclusion order (Motion Sequence #4):

Papers

Notice of Motion, Affirmation in Support/Memorandum ov Law (Exhibits 1-11) (Motion Sequence 3)

Affidavit of Peter Maruzzella (Exhibits 1-11) (Motion Sequence 3)

Affidavit of Nerissa Joven (Exhibits 1 & 2) (Motion Sequence 3)

Affirmation in Opposition/Memorandum of Law (Exhibits A-EE) (Motion Sequence 3)

Affirmation in Reply/Memorandum of Law (Exhibits 1-4) (Motion Sequence 3)

Notice of Motion, Affirmation in Support/Memorandum of Law (Exhibits A-AA) (Motion Sequence 4)

Affirmation in Opposition (Exhibits 1-6) (Motion Sequence 4)

Affirmation in Reply/Memorandum of Law (Exhibits FF-JJ) (Motion Sequence 4)

Upon reading the foregoing papers it is

ORDERED that the motion filed by SUNSTONE RED OAK, LLC d/b/a RENAISSANCE WESTCHESTER HOTEL, SUNSTONE RED OAK LESSEE, INC., SUNSTONE HOTEL TRS LESSEE, INC., HIGHGATE HOTELS, L.P., JOHN V. ARABIA, PAUL R. WOMBLE, RICKEY WHITWORTH, BRYAN A. GIGLIA, and ROBERT SPRINGER, for an order granting summary judgment and dismissing the complaint filed against them in this action is denied; and it is further

ORDERED that the branch of the motion by MARIANELLA VELASQUEZ, individually and on behalf of those similarly situated, for an order granting partial summary judgment in their favor is denied; and it is further

ORDERED that the branch of the motion by MARIANELLA VELASQUEZ, individually and on behalf of those similarly situated, for an adverse inference, and for a preclusion order is denied; and it is further

ORDERED the parties are directed to appear on March 12, 2019, at 9:15 am in the Settlement Conference Part, Courtroom 1600, Westchester County Supreme Court, 111 Dr. Martin Luther King Boulevard, White Plains, New York, prepared to conduct a settlement conference.

MARIANELLA VELASQUEZ, individually and on behalf of those similarly situated ("plaintiffs") filed a summons and complaint against SUNSTONE RED OAK, LLC d/b/a RENAISSANCE WESTCHESTER HOTEL, SUNSTONE RED OAK LESSEE, INC., SUNSTONE HOTEL TRS LESSEE, INC., HIGHGATE HOTELS, L.P., JOHN V. ARABIA, PAUL R. WOMBLE, RICKEY WHITWORTH, BRYAN A. GIGLIA, and ROBERT SPRINGER ("defendants") alleging that the defendants unlawfully withheld gratuities from the plaintiffs in violation of section 196-d of the New York State Labor Law ("LL"), as well as 12 NYCRR 146-2.18 and 12 NYCRR 146-2.19. Specifically, the plaintiffs were employed by Interstate Staffing, Inc. ("Interstate"), a company that provided servers for banquet events at the Renaissance Westchester Hotel (the "Hotel"), owned by SUNSTONE RED OAK, LLC d/b/a RENAISSANCE WESTCHESTER HOTEL, SUNSTONE RED OAK LESSEE, INC., SUNSTONE HOTEL TRS LESSEE, INC. ("Sunstone") and managed by HIGHGATE HOTELS, L.P. ("Highgate"). The plaintiffs allege that while employees of the defendants, the defendants were collecting a 23% service charge from the customers that hosted banquet events at the hotel, that this service charge amounted to a gratuity, and that the defendants were not distributing this gratuity to the plaintiffs.

The defendants move for summary judgment on the single cause of action, arguing that the plaintiffs were not employed by the defendants, and so LL §196-d is inapplicable. Furthermore, in support of their motion, the defendants contend that even if it is determined that the plaintiffs were their employees, the claim should be dismissed since the defendants' customers were made aware that the service charge was not a gratuity.

Conversely, the plaintiffs move for summary judgment, arguing that there are no issues of fact as to the cause of action contained in the complaint. Furthermore, they contend that the defendants have committed several discovery violations, warranting an adverse inference and a preclusion order.

"A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact" (Pinto v. Pinto, 308 A.D.2d 571, 571 [2d Dept. 2003]). Should the moving party meet this burden, the burden then shifts to the non-moving party to show that there exists a material issue of fact, thus defeating the motion (see Alvarez v. Prospect Hosp., 68 N.Y.2d 320 [1986]). Furthermore, summary judgment is a "drastic remedy which should only be employed whether there is no doubts as to the absence of triable issues" (Andre v. Pomeroy, 35 N.Y.2d 361, 364 [1974]).

To that end, the court finds that the plaintiffs have established that there are material issues of fact as to whether or not the defendants were the employers of the plaintiffs, as that term is used in LL §196-d, thus defeating the defendants motion for summary judgment. These triable issues of fact exist particularly with respect to whether or not the plaintiffs were under the direction and control of the defendants while they were working at the hotel (see, Bynog v.

Cipriani Group, Inc., 1 N.Y.3d 193 [2003]). Furthermore, the plaintiffs have established that there are triable issues of fact as to whether or not the defendants adequately advised their patrons as to the exact nature of the service charge at issue. To be sure, 12 NYCRR 146-2.18 advises that "[t]here is 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 146-2.18). The court finds that the defendants' failure to include an explanation of the service charge on all documents shared with the patrons, particularly the final banquet invoice, creates an issue of fact as to whether or not the "reasonable customer" would understand that the service charge was not a gratuity (see, Spicer v. Pier Sixty LLC, 269 F.R.D. 321 [2010]). For these reasons, the defendants' motion for summary judgment must be denied.

Conversely, the same triable issues of fact exist to defeat the plaintiff's motion for summary judgment. The defendants have established questions as to whether or not they employed the plaintiffs, and whether or not they sufficiently advised banquet hosts as to the nature of the service charge. Therefore, the plaintiff's motion for summary judgment must be denied, as well.

Finally, with respect to the plaintiffs' motion for sanctions based upon the defendants' spoilation of evidence, such motion is denied. Sanctions for spoliation are warranted when evidence is destroyed in contravention of a court order, after a demand for production, or otherwise intentionally and in bad faith (see, Cabasso v. Goldberg, 288 A.D.2d 116 [1st Dept. 2001] (answer stricken for spoliation in violation of court orders to permit inspection); Weiss v. Connecticut Mut. Ins. Co., 287 A.D.2d 400 [1st Dept. 2001] (dismissal based on spoliation of evidence was appropriate sanction for insured's actions of continuing to dispose of appointment

books after insurer had requested them). The plaintiffs have failed to provide any evidence of bad faith or improper motive on the part of the defendants in the alleged destruction of documents. Moreover, the plaintiffs have failed to show that the documents in question are such essential or key pieces of evidence that the plaintiffs are unable to maintain this action without them. In fact, the plaintiffs were able to depose the defendants' employees about the allegedly destroyed documents. Therefore, the court declines to order any sanctions.

This constitutes the decision, and order of this Court.

Dated: White Plains, New York
February 5, 2019

HON. HELEN M. BLACKWOOD
Acting Justice of the Supreme Court

Via E-filing to the attorneys of record