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Picard v Bigsbee Enters., Inc.
2014 NY Slip Op 51113(U)
Decided on June 24, 2014
Supreme Court, Albany County
Platkin, J.
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Decided on June 24, 2014

Supreme Court, Albany County

Ryan Picard, on behalf of himself and others similarly situated, Plaintiff,

against

Bigsbee Enterprises, Inc. d/b/a/ MALLOZZI'S RESTAURANT, FAIRWAY VIEW LLC d/b/a THE CLUBHOUSE AT WESTERN TURNPIKE, JRC OF ROTTERDAM, LLC, GOLDEN TOQUE, INC., MALLOZZI'S DISTRIBUTING LLC d/b/a MALLOZZI'S AT COLONIE COUNTRY CLUB, MORELLI IMPORTERS AND DISTRIBUTORS LLC, THE MALLOZZI GROUP LLC, JOHN MALLOZZI, and JOSEPH MALLOZZI, Defendants.

1984-13

APPEARANCES:

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Richard M. Platkin, J.

In this action premised on alleged violations of New York Labor Law § 196-d, plaintiff moves pursuant to CPLR article 9 for certification of this matter as a class action, for appointment as the class representative and for appointment of his counsel as class counsel. Defendants oppose the motion.

BACKGROUND

According to the Class Action Complaint ("Complaint") filed in this action, plaintiff Ryan Picard was employed as a server by defendants from March 2011 through December 2012. As amplified by his affidavit in support of the instant motion, plaintiff alleges that during this employment, he regularly worked as a banquet server at each of the named defendant entities.

Throughout plaintiff's employment, defendants allegedly charged banquet customers a mandatory "service charge" or "service personnel charge" in addition to their catering bill. The complaint alleges that banquet customers reasonably would have believed this charge, which generally amounted to twenty percent of the total food and drink bill, to be a gratuity. However, defendants retained these funds and did not distribute them to the servers, who were paid a flat hourly rate. Starting in early 2013, defendants began modifying the language in its promotional materials and contracts regarding the charges at issue herein.

It is plaintiff's contention that defendants' retention of "service charges" and "service personnel charges" violates Labor Law § 196-d, which provides: "No employer or his agent or an officer or

agent of any corporation . . . 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 . . . ." In *Samiento v World Yacht Inc.* (10 NY3d 70, 80 [2008]), the Court of Appeals held that a mandatory service charge may fall within the quoted statute "when it is shown that employers represented or allowed their customers to believe that the charges were in fact gratuities for their employees."

In March 2010, the New York State Department of Labor ("DOL") issued an opinion letter ("2010 Opinion Letter") setting forth an "illustrative" list of factors that banquet operators should consider in assessing whether a reasonable customer would believe a particular service charge to be a gratuity. Later, DOL promulgated regulations that became effective January 1, 2011 ("the 2011 Regulations"), which established additional protections for servers, including "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 [b]).

In his Complaint, plaintiff seeks to maintain this action on behalf of himself and a class of similarly-situated present and former employees. Plaintiff and the putative class members seek an injunction restraining defendants from continuing their allegedly unlawful practices, recovery [*2]of the alleged gratuities retained by defendants and an award of attorney's fees. The Complaint expressly waives liquidated damages on behalf of plaintiff and the proposed class.

In a Decision & Order dated September 12, 2013 ("Prior Decision"), the Court denied defendants' motion to dismiss the Complaint pursuant to CPLR 3211 (a) (7) . As pertinent here, the Court rejected the branch of the motion seeking dismissal of the class allegations of the complaint under CPLR 901 (b), which prohibits the use of a class action lawsuit "to recover a penalty, or minimum measure of recovery created or imposed by statute." While recognizing that the liquidated damages available under Labor Law § 198 (1-a) represent a "penalty" within the meaning of CPLR 901 (b), the Court held that plaintiff may waive the liquidated damages on behalf of himself and putative class members in order to maintain the action on a class-wide basis, provided that putative class members are properly notified of the waiver and given the opportunity to opt-out to pursue individual claims.

Following limited disclosure, plaintiff now moves to certify a class of all persons employed by defendants as banquet/catering servers at Mallozzi's Restaurant, Treviso by Mallozi's, The Clubhouse at the Western Turnpike Golf Course and Colonie Golf & County Club at any time from

March 19, 2007 to the present. Plaintiff also seeks appointment as class representative and the appointment of his counsel as class counsel.

Oral argument on the motion was held on June 12, 2014. This Decision & Order follows.

ANALYSIS

The CPLR lists five prerequisites to class certification (CPLR 901 [a] [1-5]). The ultimate determination is discretionary, and the burden of proof lies with plaintiff to show that each of the statutory prerequisites has been met (*Beller v William Penn Life Ins. Co. of New York*, 37 AD3d 747, 748 [2d Dept 2007]; *cf. Casey v Prudential Sec.*, 268 AD2d 833, 834 [3d Dept 2000]).

A.Numerosity

The first prerequisite to certification is that the class be "so numerous that joinder of all members . . . is impracticable" (CPLR 901 [a] [1]). In seeking to establish this essential element, plaintiff offers the following averment: "Based on the number of servers employed, I believe it is probable that over the last six years, defendants employed more than 100 servers."

Defendants recognize that it generally is accepted that a putative class of forty members is sufficiently numerous for certification (*see Hoerger v Board of Educ. of Great Neck Union Free School Dist.*, 98 AD2d 274, 282 [2d Dept 1983] [44 teachers]; *Consolidated Rail Corp. v Town of Hyde Park*, 47 F3d 473, 483 [2d Cir 1995] ["numerosity is presumed at a level of 40 members"]; *Lee v ABC Carpet & Home*, 236 FRD 193, 203 [SDNY 2006] [44 carpet installation technicians]). However, defendants assert that plaintiff has failed to come forward with an adequate evidentiary basis upon which to find numerosity.

The Court concludes that plaintiff has not met his burden of establishing numerosity on the present record. Plaintiff fails to offer a sufficient foundation for his belief as to the number of servers employed by defendants at pertinent times. Indeed, plaintiff was not employed by defendants during the first four years of the proposed class period, and plaintiff's affidavit does not demonstrate personal knowledge of that period. Further, the equivocal nature of plaintiff's averment — a mere belief regarding probability — is problematic. And contrary to the contention [*3]of plaintiff's counsel, it is not defendants' burden to establish the absence of numerosity, even if the

relevant data may be within their possession. In fact, plaintiff was given the opportunity to take limited discovery on issues pertaining to class certification, but did not pursue data concerning numerosity. Finally, plaintiff may not offer new evidence for the first time in reply to meet his initial burden.

Accordingly, while it may well be that the proposed class is sufficiently numerous that the joinder of all members is impracticable, this essential prerequisite to certification has not been established on the present record.

B.Commonality/Predominance

The second prerequisite to class certification is that "there are questions of law or fact common to the class which predominate over any questions affecting only individual members" (CPLR 901 [a] [2]). Plaintiffs must satisfy two distinct, but related, elements here: the commonality of issues and the predominance of those common issues over issues that require individualized consideration (*see e.g. Freeman v Great Lakes Energy Partners, L.L.C.*, 12 AD3d 1170, 1171 [4th Dept 2004]).

Plaintiff argues that each class member's claim is premised upon the same legal theory: the service charge imposed by defendants represent a "gratuity" that was withheld from servers in violation of Labor Law § 196-d. Plaintiff further contends that the claims arise out of the same operative facts: defendants' common policy and practice of describing the service charges in promotional materials and contract documents and retaining the collected charges. In this connection, plaintiff avers that one sales team handled banquet events for all of the catering venues operated by defendants. Plaintiff contends that the foregoing common issues of law and fact predominate over any issues affecting only individual class members, including damages.

In opposition, defendants first argue that there is no predominance of legal issues, relying upon changes to the governing legal standard during the proposed class period. In particular, the 2011 Regulations and the rebuttable presumption established therein alter the manner in which claims under Labor Law § 196-d must be analyzed. However, this legitimate concern could be addressed, as plaintiff suggests, through the establishment of two sub-classes: one for claims predating the 2011 Regulations and another for events governed by the 2011 Regulations. As so divided, members of each sub-class would be making identical legal arguments to establish defendants' liability.

Defendants further contend that there is no predominance of common factual issues. Specifically, they rely upon alleged differences in each banquet customer's reasonable expectations concerning the service charge. In this connection, defendants cite "the multitude of different iterations of the service charge' language in a variety of brochures, contracts and invoices" and the need for individualized inquiries into how particular banquet customers reasonably would interpret particular promotional and contract language."

For the most part, the Court does not find this line of argument to be persuasive. While adjudication of the claims of the putative class members may require application of Labor Law § 196-d to a large number of banquet events, the liability claims of class members who served at any particular event stand or fall together without the need for individualized inquiry. Further, [*4]the record shows that defendants used only a limited number of contract forms and promotional brochures through 2012, and it does not appear that the service charge was the subject of individualized communications on a regular or routine basis (*cf. Morrissey v Nextel Partners, Inc.*, 72 AD3d 209, 214 [3d Dept 2010]). Moreover, the relevant legal standard is an objective one that looks to the expectation of reasonable consumers (*see World Yacht,*10 NY3d at 79 [2008]; *Krebs v Canyon Club, Inc.*, 880 NYS2d 873 [Sup Ct Westchester County 2009]; *see also Maldonado v BTB Events & Celebrations, Inc.*, 2013 US Dist LEXIS 166598 [SDNY]). Finally, settled law holds that individualized issues of damages do not defeat class certification where, as here, damages are easily measured, computed and allocated.

Based on the foregoing, the Court is satisfied that the predominance requirement has been established for the vast majority of the requested class period. However, the record shows that starting in early 2013, defendants substantially altered the manner in which they communicated with their customers regarding the service charge. In order to maintain predominance, the class period should end on December 31, 2012.

C.Typicality

The third prerequisite to class certification is that "the claims or defenses of the representative parties are typical of the claims or defenses of the class" (CPLR 901 [a] [3]). In order to satisfy this requirement, plaintiff need not share every claim asserted on behalf of every member of every class (*see Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 22 [1st Dept 1991]). Further, "it is not necessary that the claims of the named plaintiff be identical to those of the class" (*id*, quoting *Super*

Glue Corp. v Avis Rent-A-Car Sys., 132 AD2d 604, 607 [2d Dept 1987]).

Plaintiff maintains that his claims are virtually identical to those of the putative class members. He and the class members worked as servers for defendants and claim to have been denied gratuities to which they were entitled. However, as defendants observe, plaintiff worked for only twenty months of the more than 87-month period for which class certification is sought, and he is not a member of the sub-class of workers whose claims predate the effectiveness of the 2011 Regulations.

In an effort to remedy this conceded defect, plaintiff proposes a second class representative: Kyra Thornton, who worked as a banquet server for defendants from September 2010 through August 2011. However, this proposal was made for the first time in reply, and defendants have not been accorded an opportunity to formally respond. Moreover, CPLR 901 (a) contemplates that a class representative shall be a "part[y]" to the action, and no application for joinder or intervention has been made.

Accordingly, the Court finds, upon the present record, that plaintiff satisfies the typicality requirement only as to the sub-class of servers whose claims are subject to the 2011 Regulations.

D.Adequacy of Representation

The fourth prerequisite to class certification is that "the representative parties will fairly and adequately protect the interest of the class" (CPLR 901 [a] [4]). To meet this requirement plaintiff must show both that class counsel is qualified and capable of seeing this litigation through to its ultimate conclusion and that no conflict of interest exists that would pit the nominative plaintiff against other members of the classes or subclasses (*see In re Drexel Burnham Lambert Group, Inc.*, 960 F2d 285, 291 [2d Cir 1992], citing *Eisen v Carlisle and [*5]Jacquelin*, 391 F2d 555, 562 [2d Cir 1968]).

Plaintiff argues that he can and will adequately represent the interests of the class, has no known conflict with any of the putative members and will be able to oppose the adverse interests asserted by others. Further, plaintiff asserts that he has adequate knowledge of the facts underlying this action based on his employment with defendants from March 2011 to December 2012. Additionally, plaintiff's counsel affirm that they have extensive experience in prosecuting wage and hour class actions against restaurants in New York State and have obtained substantial recoveries in

certain cases. Thus, counsel argue that they have the requisite experience, vigor and financial resources to sufficiently and adequately represent the class.

Defendants respond principally that plaintiff is not an adequate class representative because he waived legal remedies belonging to putative class members. Specifically, defendants assert that there is an inherent conflict in plaintiff alleging that defendants have willfully violated the Labor Law, but then purporting to waive the liquidated damages available in such cases. Relatedly, defendants argue that the form of notice proposed by plaintiff fails to adequately apprise putative class members of the waiver of liquidated damages.

As stated above, this Court's Prior Decision held that plaintiff may waive liquidated damages on behalf of himself and class members in order to maintain this action on a class-wide basis, provided that putative class members are adequately notified of the waiver and given the opportunity to opt-out. As defendants acknowledged at oral argument, this holding is consistent with the precedents of the Appellate Divisions to have considered the issue, which are binding on this Court (*see generally Matter of Patrick BB*, 284 AD2d 636, 639 [3d Dept 2001]; *Mountain View Coach Lines v Storms*, 102 AD2d 663, 664 [2d Dept 1984]). Accordingly, the adequacy element as been established.[FN1]

E.Superiority

The final prerequisite to class certification is that plaintiff must prove that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy" (CPLR 901 [a] [5]). Plaintiff argues that adjudicating this case on a class-wide basis will eliminate the possibility of inconsistent outcomes and eliminate the impediment to litigating relatively modest claims.

In opposition, defendants argue that there exist at least two superior fora in which aggrieved servers can obtain the benefit of liquidated damages. First, they could pursue a simplified, administrative process before DOL. Alternatively, an individual could commence his or her own action under Labor Law § 196-d and be eligible for both liquidated damages and attorney's fees.

While defendants' arguments are not without some force, the Court finds that plaintiff has made an adequate showing of superiority under the facts and circumstances of this action. Unlike *Alix v Wal-Mart Stores, Inc.* (57 AD3d 1044 *aff'g* 16 Misc 3d 844 [Sup Ct Albany County

[*6]2007]), adjudication of the employees' claims does not call for the type of intensive individualized inquiries that are highly problematic in the context of a class-wide adjudication, but well suited for administrative review. And, as stated above, the claims of all servers who worked a particular banquet stand or fall together. Accordingly, assuming that the proposed class were shown to be sufficiently numerous that joinder of all members is impracticable, the element of superiority would be established.

F.CPLR 902 Factors

Had the prerequisites of CPLR 901 been satisfied, consideration of the additional factors enumerated in CPLR 902 would also have been necessary prior to the certification of a class action (*Fleming v Barnwell Nursing Home and Health Facilities*, 309 AD2d 1132, 1134 [3d Dept 2003]). This analysis is obviated, however, by plaintiff's failure to establish numerosity and the other defects in his application identified herein.

CONCLUSION

Accordingly, it is

ORDERED that the motion for class certification is denied.

This constitutes the Decision and Order of the Court. The original Decision and Order is being transmitted to counsel for defendants; all other papers are being transmitted to the Albany County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220, and counsel is not relieved from the applicable provisions of that Rule.

Dated: Albany, New York

June 24, 2014

RICHARD M. PLATKIN, A.J.S.C.

Papers Considered:

Notice of Motion, undated;

Plaintiff's Memorandum of Law, undated;

Affidavit of Jeanette Bowers, sworn to February 20, 2014;

Affidavit of Ryan Picard, sworn to February 26, 2014;

Affirmation of D. Maimon Kirschenbaum, Esq., dated February 27, 2014,

with attached exhibits A-P;

Affirmation of Clemente J. Parente, Esq., dated March 31, 2014,

with attached exhibits A-K;

Defendants' Memorandum of Law, dated March 31, 2014;

Affidavit of Kyra Thornton, sworn to April 8, 2014;

Plaintiff's Reply Memorandum of Law, dated April 11, 2014;

Affirmation of D. Maimon Kirschenbaum, Esq., dated April 11, 2014.

Footnotes

Footnote 1: Defendants' remaining contentions regarding adequacy merit little discussion. Plaintiff's complaint and the prior motion practice conclusively establish that plaintiff has waived liquidated damages on behalf of himself and class members. Plaintiff's counsel has consented to meet-and-confer with defense counsel to work out a mutually agreeable form of notice, and the alleged false statement seized upon by defendants is merely a typographical error.

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