

**Lynch v Upper Crust, Inc.**

2001 NY Slip Op 30040(U)

March 15, 2001

Supreme Court, New York County

Docket Number: 0060376/2000

Judge: Paula J. Omansky

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: PAULA J. OMANSKY  
*Justice*

PART 47

James L. Gual  
*v.*  
Upper Court

INDEX NO. 603769/00

MOTION DATE: \_\_\_\_\_

MOTION SEQ. NO. 001

MOTIONICAL NO. \_\_\_\_\_

The following papers numbered 1 to \_\_\_\_\_ were read on this motion and/or

PAPERS NUMBERED

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is denied on all grounds with  
costs to be paid by moving party.*

Dated: 2/15/14

*[Signature]*

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE \_\_\_\_\_

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 47

-----X  
JAMES E. LYNCH, PAUL BIEL, TREVOR DENTON,  
JACQUELINE GIBSON, RICHARD HAWK, SUZETTE  
KAMINSKI, JOHN KEVIN KENNEDY, SARA LAI,  
JUAN LOPES, ROBERT MEYERS, DAWN ROGALSKI,  
EDGAR SOTO, and WILLIAM VASQUEZ

Index No. 603769/00

Plaintiffs,

DECISION AND ORDER

-against-

THE UPPER CRUST, INC. DANIEL M. FEHLIG,  
BANKERS TRUST COMPANY, and DEUTSCHE BANK

Defendant.

----- X  
PAULA J. OMANSKY, J.:

Defendants The Upper Crust ("TUC") and Daniel M. Fehlig move, pursuant to CPLR 3211 (5) and (7)<sup>1</sup>, to dismiss the complaint, in its entirety, on the grounds of res judicata and failure to state a cause of action and award of costs.

FACTS

This is an action for unpaid wages in violation of section 190-199 of the Labor Law, breach of contract, breach of third-party beneficiary contract, unjust enrichment, conversion, and fraud. Plaintiffs are 13 former employees of defendant TUC. According to plaintiffs, their wages with TUC consisted of base salary, hourly wages, benefits (health and medical insurance), paid vacation days, sick days, and personal days.

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<sup>1</sup>In a stipulation dated January 12, 2001, moving defendants agreed to withdraw that portion of their application to dismiss on the basis of lack of jurisdiction and on the condition that plaintiffs serve the corporation through service on the Secretary of State.

In February 1993, defendant TUC, a catering firm, entered into a service agreement with defendant Bankers Trust Company ("Bankers Trust") to manage its executive dining room at 130 Liberty Street, New York N.Y. (the "Food Service Contract") Pursuant to the Food Service Contract TUC, as operator, retained the right

to exercise full control of and supervision over the performance of Operator's obligations hereunder, and full control over the employment, direction, compensation and discharge of all employees; that Operator will be solely responsible for all matters relating to the payment of such employees including compliance with workers' compensation insurance, unemployment and disability insurance, Social Security, withholding taxes and all other Federal and State Laws.

(Food Service Contract, § 4.01). Bankers Trust also agreed that, in the event of the termination of the Food Service Contract, it would promptly pay "all supplier bills, payroll, taxes, fringe benefits and other costs due" (Food Service Contract, § 9.03).

Upon the execution of the Food Service Contract, TUC agreed to assign cooks, waiters and managers to work at the bank. TUC assigned each of the plaintiffs to work in Bankers Trust's Executive Dining Room. The original term of the Food Service Contract was for a three-year period, commencing February 1993 and Terminating January 1996.

This term was extended by letter agreements between the parties. The last letter agreement, which was dated March 1998, extended the contract for an additional three-year period. However, the March 1998 agreement included an amendment to section 9 of the Food Service Contract provision which provided that the agreement

may be terminated at any time during such term by either party for any reason upon sixty (60) days prior written notice to the other party, or by the Firm pursuant to Section 6.06 (which provides for immediate termination for unsafe food management).

In March 1999, Bankers Trust was purchased by defendant Deutsche Bank. TUC's president, Mr. Fehlig, was advised by officers of Deutsche Bank that his company's services were no longer required and that Deutsche Bank wanted to terminate the Food Service Contract. Deutsche Bank offered to pay TUC's management fee for two months.

Mr. Fehlig stated that TUC would accept ~~the~~ the conversation as a 60-day termination notice. However, Mr. Fehlig rejected Deutsche Bank's offer to pay only management fees as insufficient, under the terms of the Food Service Contract.

On March 26, 1999, TUC and the defendant banks reached a settlement which provided that

Bankers Trust agrees to pay The Upper Crust a two month management fee in the amount of sixteen thousand, six hundred and sixty-six dollars and sixty-six cents (\$16,666.66) in lieu of the sixty day termination notice. Additionally, Bankers Trust agrees to pay to the Upper Crust the sum equal to 60 days of full-time salaries, wages, and applicable benefits. Also, Bankers Trust will pay an additional one thousand dollars (\$1,000) in out placement fees for each full-time employee.

Upper Crust may invoice Bankers Trust for the amount set forth herein and Bankers Trust shall remit payment within 14 days of receipt of such invoice.

Mr. Fehlig states that he then tried to settle the labor cost issue with his employees by meeting in March 1999 with plaintiff James Lynch and Suzette Kaminski, who were the manager and the executive chef assigned to Bankers Executive Dining Room. Mr.

Fehlig offered to employ Mr. Lynch and Ms. Kaminski at TUC's new division, Simple Fare, at their present salaries of \$48,519 and \$52,000, respectively. According to Mr. Fehlig, all other employees who had been assigned to the Executive Dining Room, including secondary managers, waiters, cooks and dishwashers, would be paid at a set rate. Secondary managers which were salaried, plaintiff Sara Lei (Sous Chef) and Richard Hawk (Assistant Manager) would receive three weeks salary. All hourly employees would receive two weeks wages. All employees would receive continued health coverage up to May 1, 1999. TUC would not enforce the clause in the contract with Bankers Trust which precluded the bank from hiring any of TUC's former staff. TUC also offered out-placement counseling to its employees.

According to Mr. Fehlig, Bankers eventually agreed to pay TUC an additional \$175,644.52, to allegedly compensate the caterer for monetary and other "intangible losses." On April 30, 1999 TUC submitted two invoices to Bankers Trust which totaled \$175,644.52. TUC's invoice clearly stated that the 60-day payroll for the Executive Dining Room totaled \$111,394.80. Health insurance and disability costs were also based on two-month period.

The moving defendants maintain that, on May 14, 1999, TUC received a payment of \$121,576.25 from the Bankers Trust. Along with its payment, Bankers Trust allegedly submitted a letter to TUC outlining discrepancies between the parties' agreement and actual labor costs:

Enclosed you will find a check in the amount of \$121,576.25, representing the final payment between The

Upper Crust and Bankers Trust Company.

I have attached a copy of your invoice with handwritten changes which reflect the revised amount. The revisions were based on the following;

◆ The intent of the agreement was to provide your staff two months (sixty calendar days or eight weeks) of salaries and wages and applicable benefits. Your invoice reflects sixty working days.

◆ Your waitstaff standard schedules were based on a thirty five hour work week. Therefore, their daily wages should have been calculated on a seven hour day instead of eight.

◆ One of your servers, John Hightower, [sic] wage was listed as \$16.10 per hour. According to your payroll register, his hourly wage was \$15.60.

◆ Tom Humphrey was included on your payroll listing. Your records indicate he was a part-time employee, and therefore ineligible for compensation or out placement service.

◆ You included a \$7.60 charge for insurance premium cost, on the Advanced Technologies Inc. invoice. This charge was removed.

Although TUC disputed the sum paid, no further monies were received from the bank. The statements in May 1999 letter, which was allegedly issued by an employee of Bankers Trust, are the basis of plaintiffs' claim that they are entitled to receive 60-days salary and benefits from TUC.

Moving defendants maintains that TUC never agreed to pay 60-days' wages to its employees and there is no company policy which entitles TUC's employees to receive unused sick days or personal days upon separation from the company. According to TUC, any vacations days that had been accrued by plaintiffs at the time of their separation were fully compensated for by the company when it gave each plaintiff two to three weeks pay in April 1999. Mr.

Fehlig also alleges that the terms of his actual agreement with Bankers Trust do not comport with the statements made in the letter dated May 14, 1999. Furthermore, Mr. Fehlig avers that he called Elliot Cohen, the person with whom he conducted the final negotiations regarding the settlement of the Food Service Contract (Fehlig 11/17/2000 Aff, at 2, ¶ 3). Mr. Fehlig states that during that conversion, Mr Cohen advised that

(1) he has no memory of the substance of our meeting; (2) he cannot confirm that it is his signature that appears on the letter annexed to plaintiffs' papers as Exhibit I; and (3) he cannot confirm that he even authored the letter. I raised the issue of the letter's authenticity with Mr. Cohen because the letter did not contain the actual terms of our agreement and because other TUC letters received from Mr. Cohen while he was employed at Bankers Trust were written on his personal stationary

(id., ¶ 4).

#### DISCUSSION

##### Res Judicata

The instance action is not barred by virtue of Mr. Lynch's June 1999 proceeding in Small Claims Court which sought an award of \$2,797.39 for the 12 vacation days earned in 1998 since the New York City Civil Court Act specifically provides that a small claims judgment "'may be pleaded as res judicata only as to the amount involved in the [small claim] and shall not otherwise be deemed an adjudication of any fact at issue or found therein in any other action or court" (Purnavel v Tel-A-Car of New York, Inc., 204 AD2d 297 [2d Dept 1994], quoting CCA 1808). TUC has also failed to show that the issues presently before this Court were determined in the prior proceeding before the small claims court since all claims in

the case at bar concern wages and benefits allegedly owed by TUC in 1999 (Lukowsky v Shalit, 110 AD2d 563, 566 [1st Dept 1985], citing Reilly v Reid, 45 NY2d 24, 27 [1978]).

Therefore, that branch of the motion of TUC and Mr. Fehlig to dismiss the complaint on the ground of res judicata is denied.

#### Contract Claims

Absent a written or otherwise concrete expression of the duration, terms, and conditions of employment such as, for example, a collective bargaining agreement, all employment in New York is deemed to be at will, terminable for whatever reason, by either employee or employer (De Soiza v Unz & Co., NYLJ 8/12/99 at 22, col2 [Sup Ct, NY County 1999], citing Sabetay v Sterling Drug, Inc. 69 NY2d 329 [1987] [remaining citations omitted]).

Vague oral assurances are insufficient to overcome the presumption that employment is terminable at will (Ullmann v Norma Kamali, Inc., 207 AD2d 691, 692 [1st Dept 1994]).

The record does not indicate that plaintiffs were subject to a collective bargaining agreement or had a contractual right to be employed for 60 days after the termination of the Food Service Contract. It is clear that plaintiffs were not signatories to the agreements between the banks and TUC. The Food Service Contract only required that Bankers Trust pay TUC's payroll invoices upon termination. There was no written guarantee that a particular employee would receive 60 days pay regardless of the fact of whether he or she worked during the notice period. Therefore, plaintiffs, as at-will employees, cannot allege that they were

prematurely terminated from their job assignment at Bankers Trust's Executive Dining Room (De Soiza v Unz & Co., supra, NYLJ 8/12/99). Therefore, the second cause of action for breach of contract fails.

However, mere lack of privity does not automatically preclude relief since it is long established in New York that a third party may sue as a beneficiary on a contract made for his or her benefit (Port Chester Elec. Constr. Corp. v Atlas, 40 NY2d 652, 655 [1976]). In order for plaintiffs to assert rights as third-party beneficiaries, they must establish the existence of a valid and binding contract between other parties, that the contract was intended for their benefit and (3) that the benefit to them is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate them if the benefit is lost (State of California Pub. Employs. Retirement Sys. v Shearman & Sterling, 95 NY2d 427, 435 [2000]).

It is clear that TUC and Bankers Trust/Deutsche Bank entered into a settlement to satisfy the latter's failure to give TUC a 60-day service cancellation notice. However, in order for plaintiffs to sustain a claim that they were the intended beneficiaries of the settlement of the Food Service Contract, they must state sufficient facts which show that "'performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary' or that 'the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance'" (Fourth Ocean Putnam Corp. v Interstate Wrecking Co., Inc., 66 NY2d 38, 44 [1985]). The fact that Bankers Trust/Deutsche Bank agreed to pay

TUC for up to two months of salary for each of the caterer's employees does not make every employee an intended beneficiary of the settlement agreement (cf. Rekis v Lake Minnewaska Mountain Houses, Inc., 170 AD2d 124, 128-129 [3d Dept 1991], appeal dismissed 79 NY2d 851, rearg denied 79 NY2d 978 [1992]). Rather, the bank's promise to pay was intended as a means to reimburse TUC for expenses incurred during what would have been the 60-day notice period. The terms of the Food Service Contract clearly shows that plaintiffs would have no right to look to either Bankers Trust or its successor, Deutsche Bank, for payment of their wages in the event that the bank breached its contract with TUC. Furthermore, the settlement letters submitted on this application did not modify the employment relationship between plaintiffs and TUC. As the employer, TUC would still be liable for any unpaid wages or benefits for time actually worked by an employee. Therefore, the third cause of action for breach of contract under a third-party beneficiary theory fails.

#### Wage Claims

In their first cause of action plaintiffs allege that defendants violated sections 191(1), 191(3) and 198 of the Labor Law by failing to compensate them for 60 days salary and benefits as well as outplacement services and for all accrued and unused vacation days, sick days and personal days.

In New York, the term "wages" is broadly defined as "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece,

commission or other basis" (Labor Law § 190[1]). Wages in this State include "benefits or wage supplements" (ibid.) which is defined by statute to include "reimbursement for expenses; health, welfare and retirement benefits; and vacation, separation or holiday pay" (Labor Law § 198-c[2]). In New York, non discretionary payments are generally considered wages (Westheim v Elkay Indus., 166 AD2d 318 [1st Dept 1990]). Therefore, mandatory severance pay is within the definition of wages found in section 190(1) of the Labor Law (De Soiza v Unz & Co., supra, NYLJ 8/12/99, citing Tischmann v ITT/Sheraton Corp., 882 F Supp 1358, 1369 [SD NY 1995] [remaining citation omitted]). Unearned future payments, however, are not wages under the statute (see, Tuttle v Geo. McQuesten Co., Inc., 227 AD2d 754, 756 [3d Dept 1996]).

Contrary to TUC's allegations, plaintiffs fall within the category of workers protected by statute. New York State permits all employees, even those in managerial positions, to bring wage claims against employers who violate the provisions of the Labor Law (Labor Law § 191; 198[1]). Furthermore, nothing in the statute bars at-will employees for bringing claims for improperly withheld wages or benefits (see., Epelbaum v Nefesh Achath B'Yisrel, Inc., 237 AD2d 327, 328-239 [2d Dept 1997]). The limitation found in section 198-c(3) of the Labor Law<sup>2</sup> does not apply to the present claim since this provision applies only to section 198-c which

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<sup>2</sup>Section 198-c(3) of the Labor Law provides, in pertinent part, "[t]his section shall not apply to any person in a bona fide executive, administrative, or professional capacity whose earnings are in excess of six hundred dollars a week."

makes it a misdemeanor for persons or corporate entities to withhold benefits or wage supplements (Labor Law § 198[1]; De Soiza v Unz & Co., supra, NYLJ 8/12/99).

However, in order for plaintiffs to assert a valid claim for wages and/or wage supplements, they must plead sufficient facts to show that they have an enforceable contractual right to those wages and benefits (Tierney v Capricorn Investors, L.P., 189 AD2d 629, 632 [1st Dept], appeal denied 81 NY2d 710 [1993]). In this instance, TUC never required plaintiffs to work an additional 60 days after the termination of the service contract or specifically informed the workers that they would be entitled to 60 days of severance pay. Since there is no indication that any of the plaintiffs actually worked for TUC or the defendant banks during the 60-day period, they have not raised a viable claim for unpaid wages and benefits for the 60 day-notice period.

In addition, plaintiffs have not stated sufficient facts to indicate that they were not fully compensated for work actually performed. Plaintiffs do not allege that TUC still owed them wages or vacation pay which accrued prior to the termination of the Food Service Contract. Hence, the present claim for violation of the wage provisions of the Labor Law is insufficient.

Since plaintiffs have failed to show they are entitled to additional wages and related benefits, they are also not entitled to reasonable attorneys' fees, ordinary costs, and liquidated damages for willful withholding of wages due (Labor Law §§ 198[1] and 198 [1-a]).

Therefore, that branch of TUC's motion to dismiss the first cause of action for insufficiency is granted.

#### Unjust Enrichment

An entity is unjustly enriched if it receives property or money under circumstances that in equity and good conscience it ought not to retain (Simonds v Simonds, 45 NY2d 233, 242 [1978]). Here, plaintiffs have not stated sufficient facts which indicate that they bestowed a benefit to TUC or to the defendant banks and that their employer failed to adequately compensate them (Tarrytown House Condominiums, Inc. v Hainje, 161 AD2d 310, 313 [1st Dept 1990]). The fact that TUC did not employ all of the plaintiffs for the full 60-day period does not give plaintiffs, at will employees, a right to relief. Any right to receive a reimbursement for a discrepancy in the invoices presented to the settling banks, may only be enforced by Bankers Trust or Deutsche Bank. Plaintiffs do not have a right to claim a portion of the alleged overpayment or to be paid salary or benefits for time which they did not actually work (see, Heller v Kurz, 228 AD2d 263, 265 [1st Dept 1996]). Therefore, TUC's motion to dismiss the fourth cause of action is granted.

#### Conversion and Fraud

Since plaintiffs do not plead sufficient facts to show that they had a legal right to the sums paid by Bankers Trust to TUC as a settlement of the Food Service Contract, plaintiffs' fifth cause of action for conversion also fails (Ahles v Aztec Enters., Inc. 120 AD2d 903 [3d Dept], lv denied 68 NY2d 611 [1986]).

In order to sustain their sixth cause of action for fraud, plaintiff must allege more than mere promissory statements about what is to be done in the future; they must allege some misstatement of material fact or promises with a present, albeit undisclosed intent not to perform them (Shlang v Bear's Estates Development of Smallwood, N.Y., Inc., 194 AD2d 914, 915-916 [3d Dept. 1993]). The pleading do not state that TUC misrepresented the status of their Food Service contract (cf., Gabriel v Therapists Unlimited, L.P., 218 AD2d 614, 616 [1st Dept 1995]). Moreover, general allegations that defendants entered into a contract while lacking the intent to perform it are insufficient to support a separate fraud claim (New York University v Continental Ins. Co., 87 NY2d 308, 318 [1995]). The sixth cause of action is also legally unsupportable because, as at will employees, plaintiffs may not claim justifiable reliance since they had no right to expect that TUC would continue to employ them after Deutsche Bank terminated the Food Service Contract (Montchal v Northeast Sav. Bank, 243 AD2d 452 [2d Dept 1997]).

Since the court has dismissed all of causes of action, plaintiffs claim for punitive damages also fails

Accordingly, it is

ORDERED that defendants' motion to dismiss for insufficiency is granted and the complaint is dismissed, in its entirety, with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: March 19, 2001



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PAULA J. OMANSKY  
J.S.C.