

Samiento v World Yacht, Inc.

2006 NY Slip Op 30283(U)

August 11, 2006

Supreme Court, New York County

Docket Number:

Judge: Marylin G. Diamond

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. MARYLIN G. DIAMOND **PART 48**
Justice

ARNEL SAMIENTO et al.,

Plaintiffs,

-against-

WORLD YACHT, INC. et al.,

Defendants.

INDEX NO. 117224/05

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

Cross-Motion: Yes No

FILED
AUG 18 2006
COUNTY CLERK
NEW YORK COUNTY

Upon the foregoing papers, it is ordered that: This action involves a dispute over the payment of gratuities to waiters who are employed on boats in New York harbor owned and/or operated by defendant World Yacht, Inc. which offer dining cruises. There are three types of World Yacht dining cruises: (1) banquet cruises in which private patrons contract with World Yacht to charter an entire vessel and provide meals in connection with a private or corporate event; (2) general public dining cruises attended by members of the public who purchase individual tickets; and (3) special event dining cruises held on major holidays such as July 4th and New Year's Eve. Special event cruise tickets are available to the general public, but at a significantly higher price than general public cruises.

Plaintiffs are World Yacht employees who are paid an hourly wage in an amount which varies according to the type of cruise on which they work. Plaintiffs also receive gratuities. The complaint asserts six causes of action. The first cause of action alleges that World Yacht, in violation of Labor Law § 196-d, has withheld gratuities from its waiters with respect to each of the three types of dining cruises. As to the banquet cruises, the complaint alleges that World Yacht imposes a 20% mandatory "service charge" on its patrons, none of which is paid to the plaintiffs although the "service charge" is really nothing other than a gratuity. As to the public dining cruises, the complaint alleges that although patrons who book tickets for the cruises are told that gratuities are included in the ticket price, World Yacht only remits \$4 per ticket to the waiters which, they claim, is the equivalent of a mere 4% to 7% gratuity. The complaint alleges that because World Yacht represents to its public dining cruise patrons that gratuities are included in their ticket price, plaintiffs are deprived of what they claim would be a higher gratuity that the patrons would have left if they knew that the plaintiffs were receiving a gratuity of only 4% to 7%. Finally, the complaint alleges that although World Yacht adds a gratuity to the price of special event cruise tickets, it has failed to remit all of the amount received as a gratuity to plaintiffs. In addition to recovering the amount of gratuities which World Yacht allegedly retained, plaintiffs seek attorney's fees and liquidated damages equal to 25% of the gratuities found to be due.

The second cause of action alleges that World Yacht has violated General Business Law § 349 by (1) falsely representing to its banquet patrons that the service charge would be remitted to the waiters, (2) falsely representing to the general public dining patrons that the gratuity was included in the ticket price and (3) falsely representing to the special events patrons that an automatic gratuity was added to the price of the ticket at the time of purchase. The third cause of action is for unjust enrichment. It asserts that the plaintiffs supply a service for which the customary compensation includes tips as well as wages and that, by retaining gratuities, World Yacht has received the benefit of waiters' services without paying the appropriate compensation. The fourth and fifth causes of action allege that World Yacht has violated the

federal Fair Labor Standards Act and the New York State Labor Law, respectively, by failing to pay plaintiffs overtime. The sixth cause of action alleges that World Yacht violated Labor Law § 191(1)(a) by failing to pay plaintiffs on a weekly basis.

Defendants have now moved for an order, pursuant to CPLR 3211(a)(7), dismissing the first, second and third causes of action in their entirety for failure to state a cause of action.

Discussion

1. First Cause of Action - As already noted, World Yacht imposes a 20% service charge on its banquet cruise patrons who contract to charter a vessel. The patrons are advised of this charge well before the start of the cruise. Plaintiffs claim that the service charge is really a gratuity within the meaning of Labor Law §196-d, which provides that "No employer . . . 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 moving to dismiss, the defendants rely primarily on the First Department's decision in *Bynog v. Cipriani Group, Inc.*, 298 AD2d 164 (1st Dept. 2002), *aff'd on other grounds*, 1 NY3d 193 (2003). In *Bynog*, the First Department found that a contractual 22% service charge that a banquet hall operator imposed on its customers was not in the nature of a voluntary gratuity given by the customer in recognition of good service and therefore need not be distributed to the waiters pursuant to Labor Law § 196-d. In affirming this decision on the ground that the waiters at issue were independent contractors to whom section 196-d was inapplicable, the Court of Appeals expressly reserved judgment as to whether the waiters would otherwise be entitled to a share of the "service charge" under section 196-d if they were employees. *See Bynog v. Cipriani Group, Inc.*, 1 NY3d 193, 199 n. 4 (2003).

This court is constrained by the First Department's standing decision in *Bynog* to find that the plaintiffs' claim with respect to banquet cruises fails to state a cause of action. As in *Bynog*, the charge is called a "service charge," not a gratuity, and, as such, must be deemed to be paid by the patron not in recognition of good service but as a contractually imposed term fixed in advance of the cruise. Plaintiffs attempt to distinguish *Bynog* by pointing out that the First Department also emphasized that the waiters in that case received a much higher hourly wage to compensate them for not receiving the benefit of the service charge. However, as plaintiffs acknowledge, they, too, receive a higher hourly rate (\$12 to \$15 per hour) on banquet cruises than they receive on general public dining cruises (\$5 to \$6.50 per hour).

Plaintiffs also argue that defendants are estopped from treating the service charge as anything other than a gratuity because, for tax purposes, they segregate the service charge from the other banquet charges and treat it as a gratuity exempt from sales tax. Although defendants' treatment of these service charges for tax purposes may well be improper and/or unlawful, the court is nevertheless precluded from finding that these charges are a gratuity under Labor Law §196-d when the binding caselaw holds otherwise. Finally, plaintiffs' reliance on two unpublished decisions of the Industrial Board of Appeals, as well as on pamphlets issued by the New York State Attorney General's Office, is misplaced. Although these decisions and pamphlets support the plaintiffs' contention that banquet service charges are, in fact, gratuities and must be distributed to waiters, they do not carry the force of law and cannot be used to overrule the First Department's clear holding in *Bynog*. The court thus finds that the portion of the first cause of action which addresses the defendants' banquet service charge must be dismissed.

As to the public dining cruises, although patrons who purchase tickets for such cruises are told that gratuities are included in the price of their tickets, World Yacht only pays the waiters \$4 per patron. Plaintiffs claim that defendants' actions unfairly deprive them of what would be a customary gratuity of 15%-20% because the patrons mistakenly believe that they have already paid a normal gratuity when they

purchased their ticket. Plaintiffs assert that this practice is unlawful under Labor Law §196-d because it allows a employer to circumvent the statute by advising customers that the gratuity is included and then discharging its obligations to the employees by paying them whatever it wishes. Plaintiffs argue that in order to avoid rendering the statute meaningless, a defendant which adds a gratuity to the general price must either remit to the wait staff an amount considered a customary gratuity or must disclose to the patron the amount of the gratuity which is included in the price. World Yacht argues that since it is not obligated to collect any gratuity at all under the Labor Law, it is not required, under the circumstances, to pay its waiters a gratuity in any amount other than what it deems appropriate. The Labor Law, however, prohibits employers from retaining, directly or indirectly, "any part of a gratuity or of any charge purported to be a gratuity." There is a factual question as to whether World Yacht, by adding the gratuity to the general price without informing the patron of the actual amount remitted to the waiters, manipulated the process so as to circumvent its statutory obligation to remit all gratuities to its staff. The court therefore declines to dismiss that portion of the first cause of action which addresses gratuities on the public dining cruises.

Finally, as already discussed, World Yacht adds a gratuity to the price of its special event cruise tickets but allegedly fails to remit all of the gratuity to plaintiffs. In moving to dismiss, defendant argue that this gratuity is comparable to the banquet service charge and, like that charge, is beyond the scope of Labor Law §196-d since it, too, is a contractually required payment fixed in advance of any service rendered by the waiters and not therefore intended as an expression of appreciation. The court disagrees. Unlike the banquet service charge which was the subject of *Bynog* and unlike World Yacht's own banquet service charge, the patrons of special event cruises are told that the added charge is a gratuity. As such, the charge is not a payment directed to World Yacht for providing service to its customers but, rather, a payment directed to its wait staff. Under the circumstances, the court is persuaded that the portion of the first cause of action which addresses special event cruises is not controlled by *Bynog* and adequately states a cause of action.

2. Second cause of action - The second cause of action asserts that World Yacht has violated GBL § 349 by representing to its patrons that an added charge was being imposed for service and gratuities, thus falsely suggesting that this added amount would be paid over to the wait staff. GBL § 349 provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service" are unlawful. In order to make a valid claim under GBL § 349, a plaintiff must allege (1) a deceptive act or practice directed toward consumers, (2) that such act or practice resulted in injury to a plaintiff and (3) that the acts the plaintiff complains of are consumer-oriented in the sense that they potentially affect similarly situated consumers. See *Blue Cross v. Philip Morris*, 3 NY3d 200, 206 (2004); *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 NY2d 20, 25-26 (1995).

In moving to dismiss this cause of action, defendants argue, *inter alia*, that GBL § 349 is inapplicable because plaintiffs cannot establish that any of the defendants' conduct at issue was intended to deceive consumers to their detriment and succeeded in doing so. The court agrees. Although GBL § 349 is essentially a consumer protection device, non-consumers such as the plaintiffs herein nevertheless have standing to assert a claim under the statute where they were injured by the alleged deceptive act and "there was some harm to the public at large..." *Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc.*, 786 F Supp 182, 215 (EDNY), *vacated in part on other grounds*, 973 F2d 1033 (2nd Cir 1992). See also *Securitron Magnalock Corp. v. Schnabolk*, 65 F3d 256, 264 (2nd Cir 1995); *Blue Cross v. Philip Morris*, 3 NY3d at 207. Here, the plaintiffs do not claim that the defendants' alleged deceptive conduct has been detrimental to World Yacht customers. Indeed, the charge for service or gratuities which was added to the patrons' bill was paid by them in lieu of a voluntary gratuity which they otherwise would have paid to the wait staff. The mere possibility that some patrons may have paid the staff less as a voluntary gratuity than they paid to the defendants involuntarily is entirely speculative and cannot, by itself, support the assertion of a GBL § 349 claim. This cause of action must therefore be dismissed.

3. Third Cause of Action - In asserting a claim for unjust enrichment, the complaint alleges that plaintiffs supply a service for which the customary compensation includes tips as well as wages and that, by retaining some or all of the gratuities, World Yacht obtained services without paying the appropriate compensation and received monies which the patrons intended as payment to the wait staff for work which they performed. A valid cause of action for unjust enrichment alleges that a legal relationship between two parties may be inferred despite the absence of a written contract in order to prevent one party who has obtained a benefit from another party from unjustly enriching itself at the other party's expense. *See Clark-Fitzpatrick Inc., v. Long Island R. Co.*, 70 NY2d 382, 388 (1987).

On their motion to dismiss, defendants argue that this claim must be dismissed because the plaintiffs' compensation is determined by a specific agreement. Plaintiffs dispute this contention and assert that there is no written agreement concerning their compensation, but only an oral agreement that they are allowed to accept tips, which naturally includes an implied obligation on defendants' part to refrain from affirmatively thwarting plaintiffs' ability to do so. On a motion to dismiss for failure to state a cause of action, the court must accept the plaintiffs' allegations as true. *See Leon v. Martinez*, 84 NY2d 83, 87-88 (1994). In view of defendants' contention that there was no written agreement between them and World Yacht, the defendants' motion to dismiss this cause of action must be denied.

Accordingly, defendants' motion to dismiss is granted to the extent that the portion of the first cause of action which addresses banquet service charges, as well as the second cause of action, are hereby dismissed. The motion is otherwise denied. Defendants shall serve an answer to the complaint within 20 days of service of a copy of this order with notice of entry.

The parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on September 19, 2006 at 10:00 a.m. for a preliminary conference.

ENTER ORDER

Dated: 8/10/06 _____

Check one: FINAL DISPOSITION

MARYLIN G. DIAMOND, J.S.C.
 NON-FINAL DISPOSITION

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NEW YORK