

Ramirez v Mansions Catering, Inc.

2009 NY Slip Op 31100(U)

April 27, 2009

Supreme Court, New York County

Docket Number: 602381/08

Judge: Jane S. Solomon

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

PRESENT: JANE B. SOLOMON

PART 55

Index Number : 602381/2008

RAMIREZ, LUIS

vs

MANSIONS CATERING, INC.

Sequence Number : 001

ORDER MAINTAIN CLASS ACTION

INDEX NO. _____

MOTION DATE 2/2/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4-9

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in annexed decision settle order.

Dated: 4/27/09

JANE B. SOLOMON
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

- - - - - X

LUIS RAMIREZ and JAIME DIAZ, Individually
and on behalf of All Other Persons
Similarly Situated,

Index No. 602381/08

Plaintiffs,

DECISION AND ORDER

- against -

MANSIONS CATERING, INC.,
SAM MILLIKEN, and JOHN DOES # 1-10,
Jointly and Severally;

Defendants.

- - - - - X

JANE S. SOLOMON, J.:

Defendants Mansions Catering, Inc. (Mansions) and Sam Milliken, its president, operate an "off-premises catering service" for events such as weddings and other large celebrations. Defendants hired plaintiffs Luis Ramirez and Jaime Diaz to work as waiters for some of these events. In bringing this action, plaintiffs claim that, in violation of the Labor Law, defendants withheld gratuities that were paid to Mansions by its clients, which were intended to be paid to plaintiffs.

Plaintiffs now move, pursuant to Article 9 of CPLR, for (1) an order granting class certification of plaintiffs' state law claims, certifying a class of all "wait staff" employees of defendants from August 14, 2002,¹ through the present, and who

¹ Plaintiffs' papers refer to both May 23, 2002 and August 14, 2002 as the start date for the class period, but it is apparent that the intended date is August 14, 2002, which is six years prior to the commencement of this action.

have not been paid gratuities to which they are entitled, in violation of New York law; (2) an order, if such class is certified, directing that notice of the certification of the class be provided to the class members by first class mail addressed to their last known addresses; and (3) an order appointing Ramirez and Diaz as class representatives, and appointing their counsel, the Law Office of William Coudert Rand and co-counsel Gottlieb & Associates as class counsel.

Factual Background and Allegations

Defendants own and operate a restaurant and catering facility. Milliken is Mansions' founder and president. He characterizes the business as an off-premises custom catering service designed for the individual preferences of clients who retain Mansions to cater parties in special venues that do not have commercial kitchens, and the clients are provided with a "unique party experience," for which Mansions is "paid in accord with the invoices they provide to their clients which includes a 20% service charge for the extensive executive service provided by the Defendants" (Answer, at ¶ 7). The other defendants--"John Does #1-10"--represent the officers, directors and/or managing agents of Mansions, whose identities are presently unknown, but who participated in the alleged wrongdoing.

Plaintiffs allege that the 20% "service charge" separately itemized on defendants' invoices actually is a gratuity, which the clients believed defendants were collecting

for payment to the wait staff. The practice of retaining the service charge is said to violate Labor Law § 196-d, which, among other things, prohibits employers from retaining "any part of a gratuity or any charge purported to be a gratuity for an employee."

Plaintiffs Ramirez and Diaz both state that defendants employed them as waiters--from 2001 until the present, in the case of Ramirez, and from 1999 until December 2007, in the case of Diaz. Ramirez states in his affidavit that he generally works about one to two events each week, working about six to seven hours at each event. Defendants paid him \$17-\$18 per hour, and he never received any tip or gratuity for his work.

Ramirez further states that he discovered a copy of an email, dated January 24, 2008, that was left on a table near the bar area of the Manhattan Penthouse space, located at 80 Fifth Avenue. The email was from Jenö Steiner, defendants' "Catering Executive," to one of defendants' clients. The email states, in relevant part:

"Catering rate: \$100.00 to \$130.00 per person, plus 20% gratuity and 8.375% sales tax with 100 guests guaranteed.

"Saturdays the site fee is \$5,500.00 and the catering with 100 guests minimum would be between \$135.00-165.00 per person + grat and tax."

Ramirez alleges this illustrates plaintiffs' claim of a 20% surcharge on invoices which the customers believed was a gratuity. He also states that, many times, customers thanked him

for doing a great job, and they indicated that his tip was included in the total charge from defendants.

The complaint contains two causes of action; the first alleges a violation of Section 196-d of the Labor Law, and the second seeks damages based upon a theory of unjust enrichment. In addition to an award of unpaid tips and gratuities due under the Labor Law, interest, and attorney's fees, plaintiffs seek injunctive relief, enjoining defendants from engaging in the alleged unlawful practices.

As for the class action component of the complaint, plaintiffs bring these claims:

"on behalf of all persons who were employed by Defendants as wait staff employees at any time since August 14, 2002, to the entry of judgment in this case (the 'Class Period'), who were wait staff employees of Defendants within the meaning of the New York Labor Law and were not paid tips and gratuities which were paid to Defendants related to work performed by Plaintiffs in violation of the New York Labor Law and the common law (the 'Class'). The term wait staff employees includes all employees who served customers, including bartenders"

(Complaint, ¶ 13).

Defendants deny retaining any monies that were intended to be paid to plaintiffs, and contend that they never represented to a client that a mandatory service charge was intended as a gratuity for employees. Defendants state that, in the email referred to above, Steiner used the term "grat" and "gratuity" to mean "administrative service charge to the company." They assert

further that the named plaintiffs do not have any knowledge about the emails that defendants exchange with clients, defendants' conversations with clients, the written proposals and final invoices for each event, or the representations made during the course of negotiations. Defendants characterize their "waiters" (such as the named plaintiffs) as persons who are hired to carry plates of pre-arranged food to tables, and then to bus those plates, thereby making them more like "dish transporters" or "bus boys," and Steiner states that she has never given an impression to a client that a service charge is a gratuity for the wait staff (Affidavit of Jenő Steiner, sworn to December 15, 2008, at 8-9).

Discussion

As a preliminary matter, the inquiry on a motion for class certification pertaining to the merits is "limited to a determination as to whether on the surface there appears to be a cause of action which is not a sham" (*Super Glue Corp. v Avis Rent A Car Sys.*, 132 AD2d 604, 607 [2d Dept 1987]). Consideration of the motion for class certification is warranted where, as here, the underlying claim has merit (*Matros Automated Elec. Constr. Corp. v Libman*, 37 AD3d 313 [1st Dept 2007]).

Section 196-d of the Labor Law provides, in relevant part:

"No employer or his agent or an officer or agent of any corporation or any other person 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."

Labor Law § 196-d forbids an employer from retaining any part of a charge purported to be a gratuity for an employee, and "the statutory language of Labor Law § 196-d can include mandatory charges when it is shown that employers represented or allowed their customers to believe that the charges were in fact gratuities for their employees" (*Samiento v World Yacht Inc.*, 10 NY3d 70, 79, 81 [2008]).

According to Steiner, she formerly used the terms "grat" and "gratuity" to mean administrative service charge to the company," but that she stopped doing so in the summer of 2008, when it was brought to her attention that, under certain circumstances, there may be legal differences between these terms. The ultimate issue is not what defendants intended when they used these terms, however, but the meaning that their clients attributed to them under the "reasonable patron standard" (*id.* at 79). The claims have merit because it is reasonable to assume that a client might deem the term "gratuity" to mean "gratuity," as this word is used in Labor Law § 196-d.

Furthermore, defendants state that they classify all of their temporary and part-time workers as "employees," rather than as independent contractors, paying all applicable taxes, making all applicable contributions, and providing employee benefits

such as 401 (k) contributions to the employees who work the most. Notably, if they are not employees, plaintiffs would have no claim within the ambit of Section 196-d (see *Bynog v Cipriani Group*, 1 NY3d 193 [2003], *rearg denied* 2 NY3d 794 [2004]).

Plaintiffs propose a class consisting of all wait staff employees, similar to plaintiffs, in defendants' employ from August 14, 2002 (the date six years prior to the filing of the complaint) to the present, who received no tips or gratuities. Defendants contend that the applicable period should date back only to mid-February 2008, when the Court of Appeals rendered its decision in *Samiento v World Yacht Inc.* (10 NY3d 70, *supra*). Defendants argue that earlier court decisions interpreted Labor Law § 196-d as pertaining only to voluntary tips left by customers, and not to mandatory service charges collected by employers.

This assertion is unpersuasive. The statute of limitations for a violation of Article 6 of the Labor Law (which encompasses Section 196-d) is six years (see Labor Law § 198-c (3); *Gottlieb v Kenneth D. Laub & Co.*, 82 NY2d 457, 464 [1993], *rearg denied* 83 NY2d 801 [1994]; *Dragone v Bob Bruno Excavating, Inc.*, 45 AD3d 1238, 1239 [3d Dept 2007]). In effect, defendants are erroneously attempting to shorten the statute of limitations by asserting a defense on the merits.

As for the crux of this motion, the propriety of

certifying the proposed class, CPLR 901 authorizes a class action if: (1) the class is so numerous that joinder of all members is impracticable, (2) questions of law or fact common to the class predominate over 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 (*Friar v Vanguard Holding Corp.*, 78 AD2d 83 [2d Dept 1980]). Plaintiffs have the burden of establishing compliance with these prerequisites (*CLC/CFI Liquidating Trust v Bloomingdale's, Inc.*, 50 AD3d 446 1st Dept 2008]). Plaintiffs have met their burden.

Plaintiffs contend upon information and belief that defendants failed to pay gratuities at least to 40 wait staff employees, thereby satisfying the numerosity requirements, under *Friar's* "common sense assumptions" (*Friar v Vanguard Holding Corp.*, 78 AD2d at 96, see also *Consolidated Rail Corp. v Town of Hyde Park*, 47 F3d 473, 483 [2d Cir], cert denied 515 US 1122 [1995]).

According to Ramirez, he generally worked with 15-20 others at each catered event; he believes that defendants hired in excess of 40 such staffers in each of the past six years, and

catered events two to five times a week. Ramirez also states that there was a high turnover among so that, in any given year, at least 40 different wait staff employees worked for defendants. In addition, he states that he talked with other wait staff employees who told him that they had not received tips or gratuities.

Counsel for defendants states in the opposition Memorandum of Law that the temporary and part-time employees who worked for defendants since mid-February 2008 number fewer than 20. This assertion, without evidence, has no probative value (*Lewis v Safety Disposal Sys. of Pa.*, 12 AD3d 324 [1st Dept 2004]). None of three (fact) affidavits submitted in opposition (by Milliken, Steiner, and Monika Nemeth, defendants' director of catering) opine as to the size of the proposed class. To be sure, all three make identical statements that only nine employees average working more than two days a week, only eight employees average working once a week, and some employees work less than once a month (Affidavit of Steiner, at ¶ 14; Affidavit of Nemeth, at ¶ 14; and Affidavit of Milliken at ¶ 13). These assertions, however, do not support counsel's statement. While defendants argue that Ramirez relies upon unfounded presumptions to satisfy the numerosity criteria, that he worked with other wait staff during the catered events indicates that his assertions are of probative value, and his so-called "presumption" carries more weight than defense counsel's surmise.

Secondly, questions of law or fact common to the class predominate over any questions affecting only individual members. These include: (1) whether defendants employed the members of the proposed class within the meaning of the Labor Law; (2) whether defendants received tips or gratuities related to work that the class members performed; (3) whether the clients of defendants believed that the monies they were paying to defendants were gratuities; and (4) whether defendants failed to pay the tips or gratuities that they received to the appropriate employees.

Many of the individual issues that defendants identify are irrelevant for purposes of class certification, because they pertain to the merits of the action, and do not indicate a lack of issues common to the class. These include, among others (1) whether defendants misrepresented the nature of the mandatory charge, (2) whether defendants treated the charge as a "gratuity for employees" for tax purposes, and (3) whether defendants discouraged tipping at the event in question.

Defendants have not asserted any defenses to the claims of the named plaintiffs that differ from that of the other members of the proposed class. While there would be individual damages calculations, it would seem that the parties could rely on defendants' records, and defendants do not contend otherwise (see *Weinberg v Hertz Corp.*, 116 AD2d 1, 4 [1st Dept 1986], *affd* 69 NY2d 979 [1987]). The requirement that common issues predominate over individual ones does not mean that the situation

of each member must be identical, or that there be no individual issues (*Ackerman v Price Waterhouse*, 252 AD2d 179, 201 [1st Dept 1998]).

Thirdly, the claims or defenses of the representative parties are typical of the claims or defenses of the class, in that they arise out of the same course of conduct as the class members' claims and are based on the same cause of action (*Lamarca v Great Atl. & Pac. Tea Co., Inc.*, 55 AD3d 487 [1st Dept 2008]; *Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14 [1st Dept 1991]). That named plaintiff Jaime Diaz has not worked for defendants since December 2007, is inconsequential, because it is based upon the erroneous premise that the class period begins in mid-February 2008 (see above discussion of *Samiento v World Yacht Inc.*, 10 NY3d 70).

Fourthly, the record indicates that the representative parties will fairly and adequately protect the interests of the class. The Law Office of William Coudert Rand submitted a resume demonstrating that it has extensive experience in the practice of class actions. With respect to co-counsel Gottlieb & Associates, there is only a conclusory statement in the Memorandum of Law that "Co-counsel Jeffrey Gottlieb & Associates has also prosecuted numerous class action." Plaintiffs have not met their burden of establishing that the Gottlieb firm should be appointed co-counsel, but this may be remedied with an affidavit of counsel

providing more detail submitted with the settled order directed below. If an appropriate affidavit is not provided, only the Rand firm will be approved.

As for the named plaintiffs, Ramirez worked during the entire class period, and as set forth above, he described the frequency with which he worked. His pay stubs for the period covering the last week in September 2007 show gross year-to-date earnings of \$4,381 which, using a typical event pay of \$120, averages approximately one event per week. Milliken's statement that Ramirez is one of the less frequently used employees in the pool and currently works less than once a week is conclusory and unsupported. That Ramirez may have also worked for defendants as a bartender does not, by itself, disable him from representing the wait staff class. The Diaz affidavit, together with the supporting evidence, also indicates that he has sufficient working experience with defendants, and that both he and Ramirez have adequate familiarity with the issues presented, and are similarly situated with the class members. Furthermore, there does not appear to be any conflict between the class representatives and the class.

As for the last requirement, the record indicates that a class action would be superior to other available methods for the fair and efficient adjudication of the controversy here because of the relatively small damages incurred by an individual member, making it financially difficult for them to bring

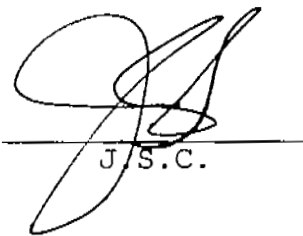
separate actions.

Notice of the certification of the class is to be provided to the class members by first class mail addressed to their last known addresses, with the cost to be born by plaintiffs, as set forth in CPLR 904 (d).

Settle order pursuant to the foregoing, including a proposed notice to class members.

Dated: April 27, 2009

ENTER:



J.S.C.

JAMES R. BOLTON