SUPREME COURT OF THE STATE OF NEW YORK – NASSAU COUNTY
P R E S E N T: HON. NORMAN JANOWITZ,

Justice.

JONATHAN LOPEZ, MARY JANE LANE, and DAVID CAMPOS; individually and on behalf of all other persons similarly situated,

Plaintiffs,

-against-

BETHPAGE ASSOCIATES LLC. d/b/a CARLYLE ON THE GREEN; CARLYLE AT THE PALACE INC; CARLYLE AT THE OMNI, INC.; CARLYLE OFF THE GREEN, INC. and/or any other entities affiliated with or controlled by BETHPAGE ASSOCIATES LLC d/b/a CARLYLE ON THE GREEN; CARLYLE AT THE PALACE INC.; CARLYLE AT THE OMNI, INC., CARLYLE OFF THE GREEN, INC.; and/or STEVEN MARK CARL,

Defendants.

Trial/ Ias Part 21
Index No.: 3465-2012
Motion Seq. # : 002
Submit Date: July 1, 2013

DECISION AND ORDER

The following papers having been read on the instant motion for a class action certification:

Notice of Motion.....1
Memorandum of Law in Support of Plaintiff's Motion.....2
Affirmation of Ladonna Lusher and Exhbits.....3
Affirmation of Jeffrey K. Brown.....4
Memorandum of Law in Opposition 5
Affidavit of Thomas Kellermann and Exhibits.....6
Reply Affirmation of Ladonna Lusher and Exhibits.....7
Reply Memorandum in Support of Plaintiff's Motion.....8

Motion pursuant to CPLR Article 9 by the plaintiffs Jonathon Lopez, Mary Jane Lane and David Campos, individually and on behalf of all other persons similarly situated, for class action certification.

At stated points in time, the plaintiffs Lane, Lopez and Campos allege that they were employed by the defendants – who operate various catering and restaurant establishments – as part of the defendants' catering staff as waiters and/or as servers, bussers, food runners, hostesses or bartenders (2nd A. Cmplt., ¶¶ 27-282).

The plaintiffs further allege, in sum, that the defendants regularly engaged in the practice

of adding an 18-22%, mandatory "service charge" or gratuity to the prices charged for various catered events (2nd A. Cmplt., ¶¶ 22-23; Layne Aff., ¶¶ 7-8; Lusher Aff., Exh., "E"). The plaintiffs contend, however, that the service charges or gratuities collected were never remitted to them but instead, unlawfully retained by defendants in violation of Labor Law § 196-b (*see also*, Labor Law § 663; 12 NYCRR § 142-2.2)(2nd A. Cmplt., ¶¶ 36-37; 40-46; 47-54)(Kellermann Aff., ¶¶10-11). Notably, Labor Law § 196-d provides that it is a violation of the law to "retain any part of a gratuity or * * * any charge purported to be a gratuity for an employee" (*Samiento v. World Yacht*, *supra,* 10 NY3d at 78-79 *see also, 12 Barenboim v. Starbucks Corp.*, ___NY3d___, 2013 WL 3197602 [2013] *cf., Martin v. Restaurant Associates Events Corp.*, 35 Misc.3d 215, 221-222 [Supreme Court, Westchester County 2012], *aff'd,* 106 AD3d 785; *Reilly v Richmond County Country Club*, 77 AD3d 718; *Ramirez v. Mansions Catering, Inc.*, 74 AD3d 490, 491-492).

According to the plaintiffs, the customers who engaged the catering halls from the defendants believed that the service charges would be distributed to the restaurant's workers (Layne Aff., ¶¶ 9, 11-12) when, in fact, they were not (2nd A. Cmplt., ¶¶ 3, 33). The defendants argue, however, that their catering contracts contained a disclaimer stating that the service charge imposed is not a gratuity and would not be distributed the employees – a claim vigorously disputed by the plaintiffs (Defs' Brief at 1-2; Montanaro Reply Aff., ¶¶ 5-17).

In March of 2012, the plaintiffs commenced the within, putative class action. The complaint as subsequently amended, contains two causes of action predicated upon: (1) the unlawful withholding of gratuities; and (2) the failure to pay lawful over time wages (2nd A. Cmplt., ¶¶ 39-54)(Labor Law § 663; 12 NYCRR § 142-2.2). The plaintiffs' proposed class is comprised of, *inter alia*, wait staff personnel, busssers, bartenders hosts, food runners, Maitre D's and other employees who serve in customarily tipped trades and occupations (2nd A. Cmplt., ¶¶ 27-282).

In October of 2012, the plaintiffs moved (without opposition) for leave to extend their time to move for class certification. By order dated January, 2013, Justice Bucaria granted the plaintiffs' application, observing in part that, "[t]here appear to be common questions as to whether defendants have unlawfully withheld gratuities from their employees and whether defendants have failed to pay required overtime compensation. Moreover, a class action appears to be the superior method for fair and efficient adjudication, and there appears to be little need for pre-certification discovery" (Order at 2 [Lusher Aff., Exh., "A").

The plaintiffs now move for class certification. The defendants have opposed the application. "Upon a balanced consideration of all relevant circumstances" (*Emilio v Robison Oil Corp.*,63 AD3d 667, 668), the Court agrees that the plaintiffs' motion should be granted.

"In order to certify a lawsuit as a class action, the court must be satisfied that questions of law or fact common to the class predominate over any question affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy" (*Osarczuk v. Associated Universities, Inc.*, 82 AD3d 853, 855,

quoting from, Aprea v. Hazeltine Corp., 247 AD2d 564, 565; *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 91 *see*, *City of New York v. Maul*, 14 NY3d 499, 508 [2010]; *Emilio v. Robison Oil Corp., supra*, 63 AD3d 667, 668; *Globe Surgical Supply v. GEICO Ins. Co.*, 59 AD3d 129, 137; *Jacobs v. Macy's East, Inc.*, 17 AD3d 318, 319; *Kidd v. Delta Funding Corp.*, 289 AD2d 203; *Canavan v Chase Manhattan Bank*, 234 AD2d 493; CPLR 901[a], 902). In sum, the "[t]he primary issue on a motion for class certification is whether the claims as set forth in the complaint can be efficiently and economically managed by the court on a classwide basis" (*Globe Surgical Supply v. GEICO Ins. Co., supra*, 59 AD3d 129, 137; *Geiger v American Tobacco Co.*, 181 Misc.2d 875, 883 [Supreme Court, Queens County 1999], *aff'd*, 277 AD2d 420 *see, Pesantez v Boyle Envtl. Servs.*, 251 AD2d 11, 12).

"In determining whether an action should proceed as a class action, it is appropriate to consider whether the claims have merit * * * although this 'inquiry is limited'" and "not intended to be a substitute for summary judgment or trial" (*Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 424). Rather, "[c]lass action certification is thus appropriate if on the surface there appears to be a cause of action which is not a sham" (*Pludeman v Northern Leasing Sys., Inc., supra*; *Kudinov v Kel-Tech Constr. Inc.*, 65 AD3d 481, 482). Although the plaintiff bears the burden of establishing that the class exists (*Osarczuk v. Associated Universities, Inc., supra*, 82 AD3d 853, 855; *Canavan v. Chase Manhattan Bank, N.A., supra*, 234 AD2d 493), nevertheless, CPLR article 9 is to be liberally construed (*City of New York v. Maul, supra*, 14 NY3d 499, 508; *Jacobs v. Macy's East, Inc., supra*, 17 AD3d 318, 319), and "where the case is doubtful, the benefit of any doubt should be given to allowing the class action" (*Krebs v. Canyon Club, Inc.*, ___Misc.3d ___, 2009 WL 440903 [Supreme Court, Westchester County 2009] *see, Brandon v Chefetz*, 106 AD2d 162, 168). "Whether the facts presented on a motion for class certification satisfy the statutory criteria is within the sound discretion of the trial court" (*Pludeman v Northern Leasing Sys., Inc., supra*, 74 AD3d 420, 422; *Dowd v. Alliance Mortg. Co.*, 74 AD3d 867, 869 *see, Corsello v. Verizon New York, Inc.*, 18 NY3d 777, 791 [2012]).

With these principles in mind, the Court agrees upon the exercise of its discretion, that the motion for class certification should be granted. As Justice Bucaria previously observed upon the plaintiffs' unopposed motion to extend their time to file for class certification, the record indicates, *inter alia*, that: (1) common questions exist "as to whether defendants have unlawfully withheld gratuities from their employees and whether defendants have failed to pay required overtime compensation;" and (2) that "a class action appears to be the superior method for fair and efficient adjudication, and there appears to be little need for pre-certification discovery" (*see generally, Martin v Restaurant Assoc. Events Corp.*, ___Misc.3d ___, Index No. 63700-11 [Supreme Court, Westchester County January 7, 2013]; *Krebs v. Canyon Club, Inc., supra*).

More specifically, and resolving any doubt in favor of class certification (*Globe Surgical Supply v. GEICO Ins. Co., supra*, 59 AD3d at 135; *Krebs v. Canyon Club, Inc., supra*), the Court finds that the numerosity, commonality and typicality requirements are satisfied upon the record

presented, since the proposed class is: (1) of a sufficiently significant size (over 100 potential members) (*Kudinov v. Kel-Tech Const. Inc.*, 65 AD3d 481; *Martin v Restaurant Assoc. Events Corp.*, *supra,* Slip Opn., at 21-22); and (2) common questions predominate over individual issues with respect to the named plaintiffs, who commonly aver in sum that they worked at all of the defendants' locations and were impermissibly deprived of gratuities and overtime pay in essentially the same fashion (*Kudinov v. Kel-Tech Const. Inc.*, *supra*; *Martin v Restaurant Assoc. Events Corp.*, *supra; Tosner v. Town of Hempstead*, 12 AD3d 589). The Court notes that the commonality prong of the inquiry contemplates "predominance not identity or unanimity among class members" (*Pludeman v. Northern Leasing Systems, Inc.*, *supra*, 74 AD3d 420, 423; *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 98), and may be satisfied even where "each of the plaintiffs and proposed class members possesses his or her own unique factual circumstances" (*City of New York v. Maul, supra*, 14 NY3d at 512 *see also, Mimnorm Realty Corp. v. Sunrise Federal Sav. and Loan Ass'n*, 83 AD2d 936, 938; *Martin v Restaurant Assoc. Events Corp.*, *supra,* Slip Opn., at 22-23). Moreover, "the courts have uniformly certified breach of contract class actions, notwithstanding differing individual damages" (*Globe Surgical Supply v. GEICO Ins. Co.*, *supra*, 59 AD3d at 139; *Emilio v. Robison Oil Corp.*, *supra*, 63 AD3d 667, 668-669).

Further, the Court agrees that the plaintiffs have adequately established that they are typical of those of the class and that they can fairly and adequately protect its interests. As Justice Bucaria previously observed, the class action procedure appears to be superior to other potential available methods of adjudicating the controversy" (Order at 2). Nor does "[a] consideration of the factors contained in CPLR 902 * * * warrant a different result" (*Emilio v. Robison Oil Corp.*, *supra*, 63 AD3d 667, 669).

The Court disagrees that the record supports the need for pre-class certification discovery, which conclusion is in accord with Justice Bucaria's observation that "there appears to be little need for pre-certification discovery" (Order at 2). Lastly, while the parties have submitted sharply differing versions of the governing facts, the Court's function on the plaintiffs' motion is not to weigh facts or render a summary judgment-type conclusion with respect to the substance of the plaintiffs' claims; rather, the Court's inquiry is limited, and focuses upon whether, "on the surface there appears to be a cause of action which is not a sham" (*Pludeman v Northern Leasing Sys., Inc., supra*, 74 AD3d at 422; *Brandon v. Chefetz*, 106 AD2d 162, 168). Here, the record does not support the conclusion that the plaintiffs' claims are sham-type in nature so as to otherwise warrant the denial of class certification (*see, Martin v. Restaurant Associates Events Corp.*, *supra*, 35 Misc.3d at 224, *aff'd*, 106 AD3d 785; *Jim & Phil's Family Pharmacy, Ltd. v. Aetna U.S. Healthcare, Inc.*, 271 AD2d 281; *Krebs v Canyon Club, Inc.*, *supra*, 2009 WL 440903, at 4).

The Court has considered the defendants' remaining contentions and concludes that they are insufficient to defeat the plaintiffs' application for class certification.

Accordingly, it is,

ORDERED that the motion pursuant to CPLR Article 9 by the plaintiffs Jonathon Lopez, Mary Jane Lane and David Campos, individually and on behalf of all other persons similarly situated, for class action certification, is **GRANTED.**

The foregoing constitutes the decision and order of the Court.

DATED: August 13, 2013
Mineola, NY

ENTER:

HON. NORMAN JANOWITZ
J.S.C