Kehn v Plainview Hospitality, LLC
2014 NY Slip Op 33985(U)
April 8, 2014
Supreme Court, Nassau County
Docket Number: 9866/12
Judge: Anthony L. Parga
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SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY

PRESENT:

HON. ANTHONY L. PARGA

JUSTICE

----------X **PART 6**

RICHARD KEHN, on behalf of himself and others similarly situated,

INDEX NO.9866/12

Plaintiff,

MOTION DATE: 02/25/14
SEQUENCE NO. 001

-and-

PLAINVIEW HOSPITALITY, LLC d/b/a HOLIDAY INN PLAINVIEW, PLAINVIEW HOSPITALITY II, LLC d/b/a HOLIDAY INN PLAINVIEW, VIRAL PATEL and/or NILESH P. PATEL,

Defendants.

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Upon the foregoing papers, it is ordered that the motion by the plaintiffs for an order, pursuant to CPLR 901 and 902, (1) certifying this action as a class action, (2) designating Leeds Brown Law, P.C. and Virginia & Ambinder, LLP, as class counsel, (3) requiring defendants to turn over a full and complete list of all Class Members with names and last known addresses within 15 days, and (4) approving the Proposed Notice of Pendency and authorizing publication to all Class Members within 30 days of defendants providing the Class List, is granted to the extent directed below.

Plaintiff contends that this action is brought on behalf of Richard Kehn and a putative class of individuals who worked in service trades that customarily receive gratuities, including waiters, servers, head waiters, bussers, bartenders, captains matre d's, and bridal attendants ("service employees") at the banquet facilities known as the Holiday Inn Plainview, which is

operated and managed by defendants. Plaintiffs allege that Holiday Inn Plainview violated New York Labor Law Article 6 §196-d, because reasonable customers who hosted events there believed that the service charges that they paid and the maitre d' tips that they disbursed were gratuities that would be paid to service employees who worked the events, but said charges were instead kept in whole or part by defendants.

Plaintiffs allege that defendants failed to distribute service charges and maitre d' tips to service employees who worked at events at defendants' catering facility. Section 196-d of the Labor Law provides that:

> "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. This provision shall not apply to the checking of hats, coats or other apparel. Nothing in this subdivision shall be construed as affecting the allowances from the minimum wage for gratuities in the amount determined in accordance with the provisions of article nineteen of this chapter nor as affecting practices in connection with banquets and other special functions where a fixed percentage of the patron's bill is added for gratuities which are distributed to employees, nor to the sharing of tips by a waiter with a busboy or similar employee."

Section 196-d of the Labor Law has been held to apply to mandatory service charges when it is shown that employers represented or allowed their customers to believe that the service charges were gratuities for their employees and an employer may not retain such service charges (*Samiento v World Yacht Inc.*, 10 NY3d 70, 81 [2008]).

The named plaintiffs seek an order allowing this action to proceed as a class action for the following class:

> "All individuals employed by Holiday Inn Plainview from August 2006 to the present in such trades, classifications and professions that customarily receive gratuities including but not limited to waiters, servers, head waiters, bussers, bartenders, captains, maitre d's, and bridal attendants. The putative class does not include maintenance workers, corporate officers, salespersons, cooks, food preparers, chefs, dishwashers, directors, clerical, office workers or any other person employed by Holiday Inn Plainview whose trade, classification or profession does not customarily receive gratuities."

In support of the motion, plaintiff submits the affidavits of named plaintiff, Richard Kehn, and former Holiday Inn Plainview employee, Ronald Vogel. Mr. Kehn attests that he was employed by defendants in various capacities, including as a bartender, server/waiter, and maitre d' in 2010 and 2011 for a total of approximately 15 months. Mr. Vogel attests that he was employed by defendants in various capacities, including as a banquet manager and catering sales manager from 2009 until 2011. Both Mr. Kehn and Mr. Vogel attest that during their tenures, Holiday Inn Plainview assessed a mandatory 20% service charge for all catering events and that none of the language in the contracts, bills, invoices or menus explained that the service charge was not a gratuity. They also attest that from their conversations with customers and employees that the customers believed said charge was a gratuity that went to service employees and that Holiday Inn Plainview kept some, if not all, of the service charge and same was not distributed in its entirety to the service employees that worked a particular event. Both men attest that they received only an hourly pay rate and were not provided all of the service charge.

Defendants oppose the instant application, contending that defendants did not own or operate the hotel before July 2009, and, as such, was not the "employer" of the plaintiff or any individuals similarly situated. Defendants argue that pursuant to an Agreement of Sale, effective July 13, 2009, Plainview Hospitality purchased the assets of the hotel from Plainview Enterprises, and that the Agreement provides that Plainview enterprises "shall terminate (i) all housekeeping personnel as of 3:00 pm on the Closing Date and all other hotel personnel as of midnight as of the day before Closing." As such, defendants contend that all of Plainview Enterprise's employees were terminated before Plainview Hospitality owned and operated the hotel. Defendants contend that neither Richard Kehn and Ronald Vogel, the two individuals who submitted supporting affidavits, were employed by any of the defendants prior to 2009. As such, while defendants do not specifically oppose the certification of the class, defendants argue that in light of the evidence demonstrating the lack of any involvement of the defendants with the subject hotel or the employment of the plaintiff prior to July 2009, the plaintiff should not be permitted to assert these pre-July 2009 claims against these defendants.

In Reply, plaintiff states that in the event that the Court grants certification, plaintiff agrees to amend the class definition to reflect the time period in which defendants owned and

operated the hotel, and agree that the proposed definition of the class, as amended, is:

> "All individuals employed by Holiday Inn Plainview from July 13, 2009 to the present in such trades, classifications and professions that customarily receive gratuities including but not limited to waiters, servers, head waiters, bussers, bartenders, captains, maitre d's, and bridal attendants. The putative class does not include maintenance workers, corporate officers, salespersons, cooks, food preparers, chefs, dishwashers, directors, clerical, office workers or any other person employed by Holiday Inn Plainview whose trade, classification or profession does not customarily receive gratuities."

CPLR 901(a) provides that:

> "One or more members of a class may sue or be sued as representative parties on behalf of all if:
> 1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
> 2. there are questions of law or fact common to the class which predominate over any 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 ajudication of the controversy."

Once the prerequisites under CPLR 901 have been satisfied, CPLR 902 requires the court to consider the following matters in determining whether the action may proceed as a class action:

> "1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;
> 2. The impracticability or inefficiency of prosecuting or defending separate actions;
> 3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
> 4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum;
> 5. The difficulties likely to be encountered in the management of a class action."

CPLR article 9 is to be liberally construed and the determination as to whether to grant

class certification rests in the discretion of the trial court (*Beller v William Penn Life Ins. Co. of N.Y.*, 37 AD3d 747, 748 [2d Dept 2007]). "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 [2d Dept. 2011], quoting, *Aprea v. Hazeltine Corp.*, 247 AD2d 564 [2d Dept 1998]; *Friar v. Vanguard Hoding Corp.*, 78 AD2d 83 [2d Dept 1980]). The plaintiff has the burden of establishing the statutory prerequisites for certification (*Emilio v Robison Oil Corp.*, 63 AD3d 667 [2d Dept 2009]), but "the policy of this rule is to favor the maintenance of class actions" (Brandon v. Chefetz, 106 AD2d 162 [1st Dept 1985]). Further, "'any error, if there is to be one, should be...in favor of allowing the class action'" (*Pruitt v. Rockefeller Center Properties, Inc.*, 167 AD2d 14 (1st Dept. 1991)(quoting, *Esplin v. Hirschi*, 402 F.2d 94, cert. denied 394 U.S. 928), and "where the case is doubtful, the benefit of any doubt should be given to allowing the class action" (Krebs v. Canyon Club, Inc., 22 Misc.3d 1125(A), 880 N.Y.S.2d 873 [Sup. Ct. Westchester Cty. 2009]).

The Court has reviewed the submissions of all of the parties hereto. Plaintiff has met the specific requirements of numerosity, commonality, typicality and adequacy set forth in CPLR 901(a). The affidavits submitted by plaintiffs in support of their motion for class certification indicate that during their tenures, Mr. Kehn worked with 25 service employees and that Mr. Vogel worked with 100 service employees. There is no set rule for the number of prospective class members which must exist to satisfy the numerosity requirement of CPLR 901(a)(1), however, a class of 40 or more has been found to raise a presumption of numerosity (*Weinstein v Jenny Craig Operations, Inc.*, 41 Misc3d 1220[A] [Sup Ct, New York County 2013]).

Plaintiff has also satisfied the commonality requirement of CPLR 901(a)(2), which requires predominance of common questions of law or fact, not identity or unanimity among class members (*City of New York v Maul*, 14 NY3d 499, 514 [2010]; *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 98 [2d Dept 1980]). The affidavits submitted by plaintiff in support of the motion indicate that there was a common policy regarding the mandatory service charge at the Holiday Inn Plainview and that service employees were paid a flat hourly fee and were not paid

all of the service charges collected.

Similarly, plaintiffs have also fulfilled the typicality requirement of CPLR 901(a)(3) because the individual plaintiff's claims derive from the same practices and course of conduct that give rise to the claims of the other members of the putative class and are based on the same legal theory. Here, Mr. Kehn seeks the same relief as the class members - to receive the gratuities allegedly collected by defendants and owed to him. Further, the named plaintiff's claims need not be identical to those of the class (*Krebs v Canyon Club, Inc.*, 22 Misc3d 1125(A) [Sup Ct, Westchester County 2009]). Mr. Kehn has also attested that he wishes to represent other Holiday Inn Plainview service employees to help them recover unpaid tips and gratuities.

Plaintiff has also established his ability to fairly and adequately represent the interests of the proposed class as required by CPLR 901(a)(4).

Finally, plaintiff has satisfied the superiority requirement of CPLR 901(a)(5) by demonstrating that a class action will be the most efficient method for handling the claims of the similarly situated putative class members.

In meeting the prerequisites of CPLR 901(a), plaintiff has also satisfied the factors set forth in CPLR 902 and defendants have failed to offer any persuasive argument to the contrary.

Accordingly, it is, ORDERED that:

(1) the plaintiff's motion for class certification, as amended in its Reply to include qualified individuals employed from July 13, 2009 to present, is GRANTED;

(2) Leeds Brown Law, P.C. and Virginia & Ambinder, LLP, are designated as class counsel;

(3) defendants shall provide to plaintiff a full and complete list of all Class Members, with names and last known addresses, within 15 days of the date of this Order;

(4) plaintiff shall amend the class definition, as noted in its Reply, to include qualified individuals employed from July 13, 2009 to present, only, and shall amend its Proposed Notice of Pendency (Plaintiff's Exhibit "I") in accordance with same prior to publication; and

(4) the Proposed Notice of Pendency (Plaintiff's Exhibit "I") is hereby approved upon amendment to the class definition as noted in plaintiff's Reply to include qualified

individuals employed from July 13, 2009 to present, only, and plaintiff's publication is authorized to all Class Members within 30 days of defendants providing the Class List to plaintiff, in accordance with the Publication Order of this Court, dated April 8, 2014.

This constitutes the decision and order of this Court.

Dated: April 8, 2014

Anthony L. Parga, J.S.C.

Cc: Leeds Brown Law, P.C.
One Old Country Road
Carle Place, NY 11514

Certilman Balin Adler & Hyman, LLP
90 Merrick Avenue, 9th Floor
East Meadow, NY 11554