

<b>Lopez v Dinex Group, LLC</b>
2015 NY Slip Op 31074(U)
June 23, 2015
Supreme Court, New York County
Docket Number: 155706/2014
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
EDISON LOPEZ, CARLOS CRUZ CACILDO, and  
JUSTIN WANDS, on behalf of themselves and all others  
similarly situated,

Plaintiffs,

- v -

Index No.  
155706/2014

**DECISION  
and ORDER**

Mot. Seq. 002

THE DINEX GROUP, LLC, 44TH STREET  
RESTAURANT, LLC, BOWERY RESTAURANT,  
LLC, 64 WEST RESTAURANT, LLC, 65TH STREET  
RESTAURANT LLC, 76TH STREET RESTAURANT,  
LLC, and DANIEL BOULUD,

Defendants.

-----X  
HON. EILEEN A. RAKOWER, J.S.C.

Plaintiffs, Edison Lopez, Carlos Cruz Cacildo, and Justin Wands (collectively, “Plaintiffs”), individually and on behalf of themselves and all others similarly situated, bring this action for unpaid wages against defendants, the Dinex Group, LLC, 44th Street Restaurant, LLC, Bowery Restaurant, LLC, 64 West Restaurant, LLC, 65th Street Restaurant, LLC, 76th Street Restaurant, LLC, and Daniel Boulud (collectively, “Defendants”). This action is based on Defendants’ alleged failure to pay Plaintiffs and a putative class of similarly situated servers, bussers, runners, bartenders, baristas, captains, assistant captains, hosts, sommeliers, and other similarly situated “Tipped Workers” who work or have worked for Defendants in New York at db Bistro Moderne, DBGB Kitchen and Bar, Bar Boulud, Daniel, Café Boulud, and Boulud Sud (collectively, the “Boulud Restaurants”), the appropriate minimum wage, overtime compensation, spread-of-hours pay, tips, and other wages between June 10, 2008 and the present (the “Relevant Time Period”).

Plaintiffs now move for an Order: (a) granting preliminary approval of the Settlement Agreement and Release (“Settlement Agreement”); (b) approving Plaintiffs’ proposed schedule for final settlement approval; (c) conditionally

certifying the following settlement class under Article 9 of the CPLR for purposes of effectuating the settlement:

Named Plaintiffs and the 1,050 current and former employees of Defendants who performed work as servers, bussers, runners, bartenders, baristas, captains, assistant captains, hosts, sommeliers, and in any other similarly situated tipped position who work or have worked for Defendants for more than 6 weeks in New York at db Bistro Moderne, DBGB Kitchen and Bar, Bar Boulud, Daniel, Café Boulud, or Boulud Sud at any time from June 10, 2008 through the date the Court issues the Preliminary Approval Order.;

(d) appointing Plaintiffs' counsel as class counsel; and, (e) approving Plaintiffs' proposed Notice of proposed settlement of class action lawsuit and Claim Form, and directing their distribution.

In support, Plaintiffs submit: the attorney affidavit of Brian S. Schaffer ("Schaffer"); the proposed Settlement Agreement and Release ("Settlement Agreement"); the proposed Notice of proposed settlement of class action lawsuit and Claim Form; a copy of Plaintiffs' amended complaint; and, a proposed Order granting Plaintiffs' motion for preliminary approval of settlement, conditional certification of the settlement class, appointment of Plaintiffs' counsel as class counsel, and approval of the proposed notice of settlement and class action settlement procedure.

No opposition is submitted.

Pursuant to CPLR §. 908, "[a] class action shall not be dismissed, discontinued, or compromised without the approval of the court. Notice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs." (CPLR § 908). Although CPLR § 908 does not define the criteria for approval, New York's courts have recognized that New York's class action statute is similar to the federal statute. (*Fiala v. Metro. Life Ins. Co.*, 27 Misc. 3d 599, 606 [Sup. Ct. NY Cnty. 2010]; *Matter of Colt Indus. Shareholder Litig.*, 77 N.Y.2d 185, 194 [1991]; *Avena v Ford Motor Co.*, 85 A.D.2d 149, 152 [1st Dept 1982]). Thus, in determining whether approval is appropriate, the court looks to whether the proposed settlement is fair, adequate, reasonable, and in the best interests of the class members. (*Rosenfeld v. Bear Stearns & Co.*, 237

A.D.2d 199, 199 [1st Dep't 1997]; *Klein v. Robert's Am. Gourmet Food, Inc.*, 28 A.D.3d 63, 73 [2d Dep't 2006]). The following factors are considered:

(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

(*In re Initial Pub. Offering Sec. Litig.*, 226 F.R.D. 186, 190 [2005]).

An action that purports to be a class action, but has not yet been certified as such, is treated as "a class action" for purposes of this rule. (*Avena v. Ford Motor Co.*, 85 A.D.2d 149, 152 [1st Dep't 1982]). The approval of the proposed settlement of a class action is a matter of discretion for the trial court, and "it is axiomatic that the law encourages settlement of disputes." (*Id.*).

As far as class certification is concerned, under CPLR § 901(a), a lawsuit may qualify as a class action if the following criteria are met:

- (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 adjudication of the controversy.

(CPLR § 901[a][1]-[5]). The party moving for class action certification bears the burden of demonstrating that these criteria are met. (*In re Colt Indus. Shareholder Litigation*, 155 A.D.2d 154, 159 [1st Dep't 1990]).

Additionally, a class action asserting Labor Law violations is permissible, so long as any party who elects to seek liquidated damages may opt out of the class. (*Cohen v. Gerson Lehrman Group, Inc.*, 686 F. Supp. 2d 317, 322 [S.D.N.Y. 2010] citing *Pesantez v. Boyle Environmental Services, Inc.*, 251 A.D.2d 11, 12 [1st Dep't 1998] ["To the extent certain individuals may wish to pursue punitive claims pursuant to Labor Law § 198(1-a), which cannot be maintained in a class action (CPLR § 901[b]), they may opt out of the class action."]; *Downing v. First Lenox Terrace Assoc.*, 107 A.D.3d 86, 89 [1st Dep't 2013]). Whether a particular lawsuit qualifies as a class action rests within the sound discretion of the trial court, and the class certification statute "should be liberally construed." (*Kudinov v. Kel-Tech Constr. Inc.*, 65 A.D.3d 481, 481 [1st Dep't 2009]).

Review of a proposed class action settlement generally involves a two-step process: First, the court reviews the proposed terms of settlement and makes a preliminary determination on the fairness, reasonableness and adequacy of the settlement terms. (*In re Initial Pub. Offering Sec. Litig.*, 226 F.R.D. at 191 [S.D.N.Y. 2005]). If the proposed settlement "appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted." (*Id.*).

Second, where preliminary approval is granted, the court must direct the preparation of notice of the certification of the settlement class, the proposed settlement and the date of the final fairness hearing. (*Id.*). Class members (and non-settling defendants whose rights may be affected by the proposed settlement) then have an opportunity to present their views of the proposed settlement, and the parties may present arguments and evidence for and against the terms, before the court makes a final determination as to whether the proposed settlement is fair, reasonable and adequate. (*Id.*).

Here, the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls

within the range of possible approval. Accordingly, in light of the foregoing and upon review of the moving papers and exhibits attached thereto, Plaintiffs' motion is granted without opposition in accordance with the proposed order annexed hereto.


Wherefore, it is hereby

ORDERED that Plaintiff's motion is granted without opposition in accordance with the proposed order annexed hereto.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: June 23, 2015

**JUN 23 2015**



EILEEN A. RAKOWER, J.S.C.