SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: [redacted] CAROL EDMEAD Justice

PART 35

Marshall Maor, et al

-v-

Hornblower New York, LLC, et al

INDEX NO. 160993/14

MOTION DATE _____

MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

In accordance with the accompanying memorandum decision, motion sequence 001 is resolved as follows: it is hereby

ORDERED that defendants' motion to dismiss plaintiffs' complaint pursuant to CPLR 3211(a)(1), (7) and (8) is granted solely as to defendant Hornblower Yachts, LLC (s/h/a Hornblower Yachts, Inc.) pursuant to CPLR 3211(a)(8), and the complaint as to said defendant is hereby severed and dismissed with prejudice; it is further

ORDERED that the remainder of defendants' motion is denied; it is further

ORDERED that the remaining defendants' shall serve their Answer within 20 days of entry of this order; and it is further

ORDERED that the parties shall appear for a preliminary conference on June 9, 2015, at 2:15 p.m; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon defendants within 20 days of entry.

This constitutes the decision and order of the Court.

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

Dated: 5.5.2015

[redacted] CAROL EDMEAD, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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MARSHALL MAOR and STAR JADA RIVERA, Individually and on behalf of a class of similarly situated employees,

Index No. 160993/2014

Motion Seq. 001

Plaintiffs,

-against-

HORNBLOWER NEW YORK, LLC, HORNBLOWER YACHTS, INC., HORNBLOWER CRUISES & EVENTS, TERRY MACRAE, and any other related entities,

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendants Hornblower New York, LLC and Hornblower Cruises & Events (a d/b/a name for Hornblower New York, LLC) (collectively, "Hornblower") and Hornblower Yachts, LLC (s/h/a Hornblower Yachts, Inc.) ("Yachts"), and Terry MacRae ("MacRae") move pursuant to CPLR 3211(a)(1), (7) and (8) for dismissal of plaintiffs Marshall Maor ("Maor") and Star Jada Rivera's ("Rivera"), and the putative class's amended class action complaint.

Factual Background[1]

Defendants are in the business of dining cruises and yacht tours. For such events, and allegedly since November 2008, defendants contracted with customers using standard forms (*e.g.*, contracts, bills, invoices and menus) to provide food and services at a pre-selected location, venue and time, or on an individual price-per-person basis. In furtherance of such events, defendants employed a staff of workers to perform food and service related tasks.

Many of the service workers performed under the same contracts that governed

[1] The factual background is derived from the allegations of plaintiffs' amended class action complaint.

defendants' events. Defendants allegedly included a service charge in the amount of approximately 20-22% on the contracts or regarding the price-per-person events. However, this charge was not actually dispersed to staff as a gratuity. And, although defendants often provided customers with other documents that conveyed a "service charge" or "administrative charge," defendants failed to disclaim that the charge was not actually a gratuity. As such, a reasonable customer would believe that these charges functioned as a gratuity for the service staff.

The putative class consists of similarly situated employees who performed work for defendants as service employees, including wait staff, waiters, servers, captains, bussers, bartenders, food runners, maître d's, and in various other customarily-tipped trades.

Maor allegedly worked for defendants in food and service capacities during October 2014. Rivera allegedly worked in the same vein during July 2013. During their employment, Maor and Rivera were paid $12 and $15 per hour, respectively, as their only compensation.

Plaintiffs allege that defendants violated New York Labor Law Article 6 § 196-d and supporting New York State Department of Labor Regulations, including 12 NYCRR §§ 146-2.18(b) and 146-2.19(b), by unlawfully withholding gratuities.

Arguments[2]

Defendants contend that since April 2012 -- and not since November 2008, as plaintiffs allege -- Hornblower has operated event and dining cruises in and around various waterways surrounding New York City. Thus, the purported statutory period alleged by plaintiffs should be disregarded.

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[2] Defendants supply additional factual background by affidavits from Cameron Clark ("Clark"), the Vice President and General Manager of Hornblower, and Richard Jacobs ("Jacobs"), the Vice President and General Counsel of Yachts. Such purported facts are discussed in the context of defendants' legal arguments below.

As to the named plaintiffs, the complaint must be dismissed because the documentary evidence demonstrates that plaintiffs are not and have never been employees of Hornblower or Yachts. Labor Law § 196-d applies only to employers in relation to their employees. Caselaw provides that temporary workers (who were not employed by the main entity), whose services were provided pursuant to catering contracts with a third-party staffing company, are not entitled to payments of mandatory gratuities paid by customers of the main entity as part of the contracts between the main entity and the customers as such workers are independent contractors and not employees of the main entity.

Here, Maor and Rivera were employed, and directly paid, by third-parties. Maor was employed by Preferred Wait Staffers, Inc. ("PWS"), which is evidenced by his application for employment. Hornblower contracted with PWS to supply it with various food service workers on an as-needed, event-by-event basis. When Hornblower needs staffing for a particular event, Hornblower notifies PWS that it needs a certain number of food service workers for a certain date and time on a certain vessel. Hornblower notes the time of arrival and departure of the workers and provides the time records to PWS, which sends Hornblower an invoice for the workers' services.

Maor has worked on only one event on a Hornblower vessel: a one hour and 45 minute shift on a cruise that departed from Pier 15 on the Hudson River on October 31, 2014.[3] Maor subsequently received a check from PWS for his services performed. In a November 2, 2014 email from Maor to Hornblower's Vice President, Maor stated that he worked for PWS (on two

[3] Maor was scheduled to work a second cruise that evening departing at 9:00 p.m., but voluntarily left the vessel at 8:00 p.m., not to return.

Hornblower cruises on October 31), and demanded his share of a service charge for his event.[4] Rivera was employed by Walsh Associates, Inc. ("Walsh"), another staffing company with which Hornblower contracted for service workers on an as-needed basis.[5] Thus, plaintiffs' complaint must be dismissed since neither named plaintiff was employed by Hornblower or Yacht.

Moreover, even assuming plaintiffs were Hornblower employees, the complaint must be dismissed, since Hornblower cruises did not charge a fee purported to be a gratuity.

As to the sole event at which Maor worked, the "boarding manifest" for this event shows that customers were charged a flat fee of either $25 for a sightseeing cruise only, or $40 for a cruise and food package. The administrative fee (totaling $0.90) was charged to one customer who reserved tickets *via* a website called Ticketmob, which charges a 15 cent administrative fee to process the reservation, plus a 3% credit card fee pursuant to an agreement between Ticketmob and Hornblower (the "Ticketmob Agreement"). Neither of these fees was a gratuity. As to the August 11, 2013 event at which Rivera worked, same was a cruise for which the customer paid a flat fee of $6,000 for the vessel, and $12,768.37 for beverage services. Hornblower charged an administrative fee of $918.75. However, the "charter summary" related to this event states that it is subject to Hornblower's "Charter Agreement" (which is attached to the event's charter summary). The Charter Agreement provides under the heading "Administrative Charge and Gratuities," that an administrative charge is charged to the customer based on food, beverage and all other services, but that the charge is "not a gratuity" and would "not be distributed" as such to

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[4] However, Maor never responded to an invitation to meet with the Vice President and a PWS representative.

[5] Rivera worked only two events on Hornblower vessels: one on August 11, 2013, and one on September 28, 2013.

service employees. Also, the Charter Agreement provides that customers on this event may leave a "discretionary" gratuity based on the level of their satisfaction with the services. As to the other September 28, 2013 event Rivera worked, Hornblower charged the customers a 20% administrative fee. The charter summary for this event was also made subject to the same Charter Agreement.

The language of Labor Law § 196-d can include mandatory service charges as a charge "purported to be a gratuity" when it is shown that employers represented or allowed their customers to believe that the charges were in fact gratuities for their employees. However, Hornblower either did not charge any administrative or service charge, or, when it did, it properly notified the customer in clear language that the fee was not a gratuity. Thus, plaintiffs fail to state a claim under this section.

As to MacRae, MacRae is Hornblower's President and CEO. Thus, the claim against MacRae must be dismissed, since there is no basis for asserting claims against a corporate officer or director for a corporation's alleged violations under the Labor Law.

As to Yachts, the court lacks personal jurisdiction over Yachts, since it is a foreign corporation with no ties to New York. Yachts is not a New York corporation, but a California corporation that operates similar cruises exclusively in California. Yachts, which has never operated any cruises in New York, has no employees, property, bank accounts or revenue-generating activities in New York, and has not entered into any contract either in New York, or to supply goods or services in New York.

In opposition, plaintiffs contend that the complaint adequately pleads an employment relationship with Hornblower under the Labor Law. The analysis of whether plaintiffs were

employees pertains to the degree of control exercised by the putative employer, which is premature at the similar caselaw). Moreover, plaintiffs not only seek to recover unlawfully retained gratuities on behalf of themselves, but other similarly situated persons employed by Hornblower.

The invoices from the pertinent staffing agencies and Maor's cherry-picked email communications do not conclusively establish whether plaintiffs furnished labor to Hornblower in the legal capacity of employees. Further, the veracity of the assertions proffered by defendants in Clark's affidavit requires examination through deposition testimony. Likewise, the length of Maor's employments and the circumstances surrounding the events he worked (plaintiffs purport to have worked other events besides those discussed by defendants) should be addressed during discovery. Defendants do not cite any case supporting dismissal in this context on a pre-answer motion to dismiss.

Further, caselaw provides that employers may be liable where they allowed their customers to believe that charges were in fact gratuities for their employees. Here, plaintiffs have alleged that defendants assessed a charge to customers, and the charge was not remitted to plaintiffs. Plaintiffs also allege that defendants provided customers with other documents that conveyed a service or administrative charge, and that defendants used the same standard forms for numerous events that contained a mandatory service charge on it without a disclaimer. As a result, reasonable patrons would have understood the service charge to be a gratuity.

Plaintiffs argue that the two unexecuted contracts from events that Rivera worked do not conclusively resolve the issue of whether service charges were improperly retained throughout the class period dating back to November 2008. The applicable legal standard is whether a

reasonable customer would believe charges imposed by defendants were charges purported to be a gratuity, based on the totality of circumstances, including all of the statements made or not made by the employer. This analysis includes representations made on all of the various documents and forms used by defendants.

Defendants' purported evidence does not address such representations, and therefore does not shed light on what the reasonable patron actually believed. Discovery will permit plaintiffs to examine the complete catering files, executed contracts, relevant correspondence with patrons, depose the witnesses responsible for relaying the service charge information to patrons, and assess whether patrons were actually misled or formed a belief as to the nature of the charges/fees. And, since the action is a class action lawsuit, the relevant evidence, which spans six years, will cover thousands of catered events. Defendants' arguments go to the merits and are premature.

With respect to MacRae, an individual acting as an employer can be held liable for wage violations under Labor Law § 190(3). Here, plaintiffs alleged sufficient allegations indicating that MacRae was an "employer" under the statute.

Plaintiffs also contend that Yachts should remain in the action. Yachts enforces uniform policies and procedures with the other corporate entities, and operate as joint employers. Plaintiffs allege that the corporate entities utilized standardized forms to effectuate the unlawful payroll scheme. Moreover, all of the entities are owned and operated by MacRae. Thus, the entities are inextricably linked.

At this pre-discovery phase, the complaint raises an issue as to whether the entities were in fact a single employer subject to joint liability for employment-related acts. Further, plaintiffs are not now in a position to know the complex relationship between the entities, and thus require

investigation through discovery. And, given the unrelated action in New York involving Yachts, plaintiffs have reason to believe that this entity does in fact conduct business in New York.

In the alternative, should the court determine the pleadings are deficient in some respect as to their claim for unpaid gratuities pursuant to Labor Law § 196(d), plaintiffs request leave to amend the complaint.

In reply, defendants note that plaintiffs did not allege in the complaint that they were employed by any entities other than the Hornblower entities, or that their employment relationship with defendants (notwithstanding their employment by other entities) was based on any of the factors set forth in the caselaw cited in the moving papers. Instead, plaintiffs now raise, for the first time, that they require discovery that may establish that they had an employment relationship of some sort with defendants.

Despite claiming that this is a purported class action with a statute of limitations period spanning six years and thousands of events, plaintiffs are dismissive of the fact that they worked at only one or two Hornblower events. Before bringing the action, plaintiffs did not perform sufficient due diligence to discover that Hornblower's New York operations did not commence until April 2012.

Although defendants' caselaw in the moving papers concerned summary judgment, plaintiffs therein expressly alleged that the subject staffing agency and its principal were the disclosed agents of the main entity. In contrast, there is no mention in this action of any other employing entity. There is also no allegation that would provide any *indicia* of an employment relationship with Hornblower based on a theory of "joint" employment.

The documentary evidence irrefutably establishes that both named plaintiffs were

employed by other entities. In response to this clear documentation, neither plaintiff has denied that he/she was employed by these entities; nor has either one submitted any documentation, or even an affidavit, contradicting defendants' showing.

Moreover, plaintiffs make no allegations (either in the complaint or in opposition) that would support a claim of an employment relationship other than the bald, conclusory statement that they were "employed" by Hornblower. Instead, plaintiffs simply assert in opposition that, despite the lack of any allegations in their pleadings that would support a claim of a joint employment relationship (or an allegation that they were employed by other entities while performing work for Hornblower), they should be given the opportunity at this belated date to gather information through discovery that would support a claim they had not previously made.

Plaintiffs' caselaw as to employment status is inapposite, since those cases concerned motor vehicle accidents in which the individual driver who caused the incident was an employee or independent contractor of the main entity so as to impose vicarious liability. Since the main entities were named as defendants, the issue of vicarious liability must necessarily have been raised in the complaint, thus satisfying any pleading requirements. Here, however, plaintiffs did not allege or hint at vicarious liability. Plaintiffs have not provided any facts which would create an issue for a jury to decide as to whether they can be deemed "employed" by Hornblower in the face of the documentary evidence.

With further regard to Maor, Maor provides no evidentiary response to counter defendants' showing that Hornblower did not charge any administrative fee or service charge (except as to one customer) for the one event at which he worked.

As to the two events at which Rivera worked, the customer was informed in writing (by

the Charter Agreement) that the administrative fee is not a gratuity, and that customers can leave voluntary gratuities for servers if the service is to their satisfaction.

Plaintiffs' statement that they "have worked other events," is unsupported, and their alleged need for extensive discovery of the possible other events, which they still cannot identify, is a fishing expedition.

Additionally, as established in the moving papers, Hornblower did not begin doing business until April 2012, not 2008. And, in any event, at this juncture, no class has been certified: thus, Maor and Rivera are currently the only plaintiffs. Since they are unable to state a claim, the complaint must be dismissed, as no purported class representative remains. This renders plaintiffs' claim -- that the two contracts do not resolve the issue of whether improper charges occurred through the purported class period going back to 2008 -- unavailing.

As to Yachts, the documentary evidence confirms that Yachts is a California entity, which was converted from a corporate entity named "Hornblower Yachts, Inc.," another California corporation to its present status. The case cited by plaintiffs as to this issue is factually distinguishable. Here, as stated in Jacobs's affidavit, Yachts is a California limited liability company that operates cruises only in California and has no ties to New York. The lone, erroneous allegation in the complaint that Yachts is a New York corporation is hardly the type of "sufficient start" toward proving ties with New York required by the caselaw. And, the unrelated action concerning Yachts provides no reason to believe that Yachts conducts business in New York. In that matter, which involved Yachts considering making a bid for a New York State license to operate cruises from Niagara Falls, the First Department ruled that New York was not required to open the process for bidding. Thus, Yachts was actually precluded from conducting

that particular business in New York. Plaintiffs present no further reason indicating that Yachts ever engaged in any business in New York.

Discussion

Pursuant to CPLR 3211(a)(l), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." A motion to dismiss on the basis of a defense founded upon documentary evidence may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" *(DKR Soundshore Oasis Holding Fund Ltd. v Merrill Lynch Intern.*, 80 AD3d 448 [1st Dept 2011], *citing Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Such evidence must be unambiguous, authentic and undeniable (*see NRAM PLC v Societe Generale Corp. and Inv. Banking*, 2014 WL 3924619 [Sup Ct New York Cty 2014]). Notably, affidavits do not constitute documentary evidence within the meaning of 3211(a)(1) (*see Art and Fashion Group Corp. v Cyclops Production, Inc.*, 120 AD3d 436 [1st Dept 2014]; *Tsimerman v Janoff*, 40 AD3d 242 [1st Dept 2007]). At the same time, however, documents such as business records attached to an affidavit may be accepted as documentary evidence (*see Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383 [1st Dept 2002]).

In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401 [1st

Dept 2013]). On a motion to dismiss, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, *supra; Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Nevertheless, the court may consider evidentiary material in evaluating a motion made under CPLR 3211(a)(7); when such material is considered, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate" (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]). In other words, "dismissal results only if the movant demonstrates conclusively that the plaintiff has no cause of action, or that 'a material fact as claimed by the pleader to be one is not a fact at all'" (*Laquila Group, Inc. v Hunt Const. Group, Inc.*, 44 Misc 3d 1203(A), 2014 WL 2919334 [Sup Ct New York Cty 2014], *citing Sokol v Leader*, 74 AD3d 1180, 1181-1182 [2d Dept 2010]).

With further regard to a CPLR 3211(a)(7) motion, "affidavits submitted by the defendant will seldom if ever warrant the relief he seeks unless . . . the affidavits establish conclusively that plaintiff has no cause of action" (*Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 635 [1976]; *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128 [1st Dept 2014]).

As to defendants' contention that dismissal is warranted on the ground that there is no employment relationship between plaintiffs and defendants, Labor Law § 196-d 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."

The critical inquiry in determining whether an employment relationship exists in a Labor Law § 196-d action pertains to the "degree of control exercised by the purported employer over the results produced or the means used to achieve the results" (*Bynog v Cipriani Group*, 1 NY3d 193, 198 [2003]). Factors relevant to assessing control include "whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule" (*id.*).

Paragraph 50 of the complaint alleges that "plaintiffs and all members of the putative class constituted 'employees' as that term is defined under New York Labor Law § 190 *et seq.* and case law interpreting the same." The other reference to plaintiffs' employment relationship with defendants is found in paragraph 37, which alleges that "While employed by Defendants," plaintiffs "were paid $12.00 and $15.00 per hour, respectively . . . ." At this juncture, and for purposes of this motion, the court must assume the allegations that Maor and Rivera were "employees" of defendants as true (*see Connor v Pier Sixty, LLC*, 870 NYS2d 899 [Sup Ct New York Cty 2009] ("contrary to the defendants' assertion, the complaint does allege that the plaintiffs were employed by the defendants in that the first paragraph thereof specifically alleges that the defendants were the plaintiffs' employer")).

.Defendants have produced Maor's employment application, timesheet and check from PWS, as well as an email from Maor in which he states that he was employed by PWS. Defendants have also produced the timesheets from Walsh showing that Rivera worked for Walsh at two Hornblower events, with Hornblower listed as the "client." Such submissions, however,

purporting to show that Maor and Rivera were technically employed by PWS and Walsh, respectively, do not conclusively demonstrate that Maor and Rivera were not "employees" of defendants under the *Bynog* standard. And, defendants cite no decision wherein a pre-answer motion to dismiss on this issue was granted; moreover, plaintiffs are not obligated to submit evidence in support of the complaint's allegations in opposition to such a motion (*see Connor v Pier Sixty, LLC*, *supra* (pre-answer motion to dismiss as to plaintiffs' employment status denied, and court found that plaintiffs were not obligated to submit evidence in opposition in support of their pleadings)).

Therefore, dismissal pursuant to CPLR 3211 (a)(7) and (a)(1) on the ground that plaintiffs have not, and, based on the documents submitted, cannot state an employee relationship with defendants, is unwarranted.

Further, defendants' documentary evidence fails to defeat the claim that defendants unlawfully withheld gratuities. 12 NYCRR 146-2.18(b) provides that "there shall be a rebuttable presumption that any charge in addition to charges for food, beverage, lodging, and other specified materials or services, including but not limited to any charge for 'service' or 'food service,' is a charge purported to be a gratuity." Further, 12 NYCRR 146-2.19(b) provides that "the employer has the burden of demonstrating, by clear and convincing evidence, that the notification was sufficient to ensure that a reasonable customer would understand that such charge was not purported to be a gratuity." And, Labor Law § 196-d has been held to apply to "mandatory" gratuity 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, 80 [2008]). The standard under which a mandatory charge or fee is purported to be

a gratuity should be weighed against the expectation of the reasonable customer (*id.*).

As to Maor, defendants established that Maor worked only one event involving a Hornblower vessel, and that in that event, aside from a single administrative charge (regarding a customer's credit card), defendants did not charge any service or administrative fee that could provide grounds for an unpaid gratuity.

However, as plaintiffs note in opposition, defendants' boarding manifest and Ticketmob Agreement fail to address the complaint's allegations that defendants provided customers with other documents (such as menus, bills and invoices) "that contained a mandatory Service Charge on it— without a disclaimer." (Complaint ¶ 33). Plaintiffs further alleged that as a result, "reasonable patrons would have understood the Service Charge to be in the nature of a gratuity." Although the evidence submitted indicates that the sole administrative charge was not a gratuity, and that defendants properly disclosed that such fees were not gratuities, such evidence does not utterly refute the allegations that *other documents* described above existed and that defendants improperly withheld gratuities in violation of Labor Law § 196-d and failed to make the proper disclosures under 12 NYCRR 146-2.19(b). And, Clark's affidavit indicating that the aforementioned charge was the only potential administrative or service charge pertaining to the event that Maor worked does not constitute "documentary evidence" under CPLR 3211(a)(1). Further, pursuant to the Court of Appeals' directive in *Rovello*, *supra*, an affidavit should "seldom" warrant relief under CPLR 3211(a)(7). Thus, the court cannot conclude as a matter of law at this juncture, that plaintiff has no cause of action premised upon Maor's alleged

employment with defendants.[6]

As to Rivera, the Charter Agreements cannot be considered by the court in ruling on the motion. The purported charter summaries for the events Rivera worked, which allegedly attached the Charter Agreements detailing a 20% administrative fee at issue, required a $5,000 deposit and signatures for both sets of documents to become effective. However, both the purported charter summaries and Charter Agreements submitted by defendants are unsigned. Thus, as plaintiffs point out in opposition, the documents' authenticity is not established. Accordingly, such documentation cannot be considered as "documentary evidence" under CPLR 3211(a)(1). In any event, and as indicated above, the Charter Agreements do not utterly defeat the allegations that defendants provided customers with other documents (such as menus, bills and invoices) "that contained a mandatory Service Charge on it— without a disclaimer."

As such, dismissal of the claims pursuant to CPLR 3211(a)(1) on the ground that defendants did not violate Labor Law § 196-d is denied.[7]

As to MacRae, dismissal of the action as against her is unwarranted at this juncture. Although there is no private right of action against corporate officers for violations of article 6 of the Labor Law (§§ 190 *et seq.*), a cause of action may be maintained against an individual as an employer, and not as a corporate officer (*see Bonito v Avalon Partners, Inc.*, 106 AD3d 625 [1st Dept 2013]). Contrary to defendants' contention that the complaint was brought against MacRae

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[6] The same reasoning applies to defendants' claim that Hornblower has only been in business since 2012 as opposed to 2008.

[7] Defendants' contention that the Complaint should be dismissed since no class has been certified, and Maor and Rivera, the only plaintiffs, cannot state a claim is unavailing; the Court finds that these plaintiffs have adequately stated claims which are not subject to dismissal based on the purported documentary evidence submitted.

as a corporate officer, as pointed out in opposition, the complaint alleges that MacRae was an "employer" under Labor Law § 190(3) and supporting New York State Department of Labor Regulations. Plaintiffs allege that MacRae had the power to hire and fire employees, supervised and controlled employees work schedules or conditions of employment, determined the rate and method of payment for defendants' employees, and maintained employment records for defendants *(see Karic v. Major Automotive Companies Inc.*, 992 F.Supp.2d 196 [EDNY 2014] (finding officers which "possessed hiring and firing power, set work schedules, determined salaries, issued checks and drafted and signed employment agreements" jointly and severally liable under New York Labor Law)). Thus, at this stage of the litigation, the complaint as to MacRae survives the motion.

Notwithstanding, the complaint must be dismissed as to Yachts.

CPLR 3211(a)(8) provides for dismissal in the event that the court lacks personal jurisdiction of the defendant. When presented with a motion under this section, the plaintiff bears the ultimate burden of proof on the issue (*see Davis v Scottish Re Group Ltd.*, 2014 WL 7475035 [Sup Ct New York Cty 2014]). However, "the party opposing a motion to dismiss need not state all the facts necessary to establish jurisdiction. If evidence of the facts establishing jurisdiction are in the exclusive control of the moving party, CPLR 3211(d) requires only a 'sufficient start,' demonstrating that such facts 'may exist' to warrant further discovery" (*see HBK Master Fund LP v Troika Dialog USA, Inc.*, 85 AD3d 665 [1st Dept 2011], *citing Peterson v Spartan Industries, Inc.*, 33 NY2d 463, 467 [1974]).

Defendants establish by Jacobs's affidavit and by a California Articles of Organization document that Yachts is a California corporation, which does business exclusively in California,

and has, at all times, has no presence whatsoever in New York.

As to plaintiffs' claim that Yachts is alleged to have been jointly liable (with the other defendants) as an employer, it has been held that the "insulating corporate veil may be pierced and New York jurisdiction [pursuant to CPLR § 302(a) may be] asserted over" a foreign corporation if the foreign corporation and American corporation "were actually operated as one integrated enterprise" (*Donetto v S.A.R.L. De Gestion Pierre Cardin* (3 Misc 3d 1106, 787 NYS2d 677 [Sup Ct New York Cty 2004]). To determine whether such long-arm jurisdiction exists under such circumstances, courts are to look at factors of common ownership, financial dependency, and the extent to which officers/directors of the parent corporation control the activities of the subsidiary (*Donetto, supra* citing *Volkswagenwerk Aktiengesellschaft v Beech Aircraft Corp.* (751 F2d 117 [2d Cir 1984]).

Here, the complaint is devoid of any allegations as to the purported intertwined nature of Yachts and Hornblower. As noted by defendants, the only specific allegation about Yachts in the complaint is that it is a New York corporation, an allegation which defendants have utterly refuted.

Plaintiffs' reliance on the case, *Matter of Hornblower Yachts, LLC v Harvey* (121 AD3d 1513 [4th Dept 2014]), as an indication that Yachts conducted business in New York is misplaced. In *Harvey*, Yachts brought a proceeding in 2014 to compel the New York State Office of Parks Recreation and Historic Preservation to conduct competitive, public bidding with respect to a public concession license to operate scenic boat tours and to conduct related serves on the Niagara River. However, the court dismissed the petition for such relief. At most, *Harvey* indicates that Yachts desired to conduct business in New York in 2014. Such case does not provide any basis to

indicate that Yachts actually conducted business in New York.

As such, defendants' motion as to Yachts is granted pursuant to CPLR 3211(a)(8).

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendants' motion to dismiss plaintiffs' complaint pursuant to CPLR 3211(a)(1), (7) and (8) is granted solely as to defendant Hornblower Yachts, LLC (s/h/a Hornblower Yachts, Inc.) pursuant to CPLR 3211(a)(8), and the complaint as to said defendant is hereby severed and dismissed with prejudice; it is further

ORDERED that the remainder of defendants' motion is denied; it is further

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ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon defendants within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: May 5, 2015

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD