G-Bowley v Downtown LLC
2017 NY Slip Op 31774(U)
August 15, 2017
Supreme Court, New York County
Docket Number: 655513/2016
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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WHITNEY G-BOWLEY,
on behalf of herself and all other employees similarly situated,

Plaintiffs, Index No. 655513/2016

- against -

THE DOWNTOWN LLC and RIVINGTON HOSPITALITY GROUP LLC, d/b/a HOTEL ON RIVINGTON, PAUL STALLINGS, COREY KUMPULAINIEN, ROBERTO BUCHELLI, and MARCANTHONY CRIMI,

Defendants.

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Hon. C. E. Ramos, J.S.C.:

Plaintiff Whitney G-Bowley ("G-Bowley"), on behalf of herself and all other hourly banquet service workers similarly situated, moves for class certification seeking unpaid gratuities from defendants The Downtown LLC ("Downtown"), Rivington Hospitality Group LLC, d/b/a Hotel on Rivington ("Rivington Group"), Paul Stallings ("Stallings"), Corey Kumpulainien ("Kumpulainien"), Roberto Buchelli ("Buchelli"), and MarcAnthony Crimi ("Crimi") (collectively "Defendants"), pursuant to CPLR 901(a).

For the reasons set forth below, this Court grants the motion for class certification as to those potential plaintiffs

that are similarly situated hourly banquet service workers currently or previously employed by the Hotel on Rivington (the "Hotel") any time during the six years prior to the filing of this action.

The Parties

The Hotel is an event center located in New York City that routinely hosts weddings, banquets, and other special events (Verified Complaint, ¶ 39).

Downtown is the owns and operates the Hotel (Verified Complaint, ¶ 9). Rivington Group manages and plans events at the Hotel (*Id.*, at ¶ 10).

Stallings is an owner of the Hotel and managed its construction and operation (Verified Complaint, ¶ 12).

Kumpulainien and Buchelli are the founders of Rivington Group and are responsible for the event operations at the Hotel including managing the banquet staff (Verified Complaint, ¶¶ 19, 22).

Since January 2012, Crimi has been the General Manager of the Hotel and is responsible for managing operations and employees (Verified Complaint, ¶¶ 24, 25).

Background

The proposed class is comprised of persons employed by Defendants as hourly banquet service workers, including, but not limited to servers and bartenders, at the Hotel during the six years prior to the commencement of this action through the entry of final judgment in this matter (the "Class") (Verified Complaint, ¶ 28).

A typical event held at the Hotel is staffed with about 5-6 banquet servers and 1-2 bartenders, although the number varies according to the size of the event (G-Bowley Aff., ¶ 7). The size of the Class is allegedly more than 40 members (Verified Complaint, ¶ 29).

Since January 2012, G-Bowley has worked as an hourly banquet server at the Hotel (Verified Complaint, ¶¶ 5, 6). She alleges that Defendants retained the mandatory service charges added to customer bills at banquet events, but have allegedly failed to distribute such mandatory service charges to members of the Class (Verified Complaint, ¶ 51). The banquet event order forms, which fail to specify whether the mandatory service charges are purported to be gratuities provide that:

> "Food, Beverage, Audio/Visual and Rental Prices are subject to a 20% Service Charge, and 8.875% Sales Tax will be added to charges outlined above"
>
> (Verified Complaint, Ex. A, pp. 1-4).

In addition, G-Bowley alleges that the Hotel failed to ensure that its customers understood that the services charges were not gratuities.

On October 18, 2016, G-Bowley commenced this action against Defendants, on behalf of the Class, seeking the unpaid gratuities.

Discussion

G-Bowley, on behalf of herself and all other employees similarly situated, moves for class certification pursuant to CPLR 901(a). Under CPLR 901(a), one or more members of a proposed class may sue on behalf of such class when five prerequisites are met (CPLR 901[a]). The party seeking class certification bears the burden of establishing these criteria (*Kudinov v Kel-Tech Constr. Inc.*, 65 AD3d 481, 481 [1st Dept 2009]). The class action statute should be liberally construed in favor of the members seeking class certification (*Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 21 [1st Dept 1991]).

G-Bowley alleges that the action is maintainable as a class action under CPLR Article 9 (Verified Complaint, ¶ 27). G-Bowley brings this action on behalf of all persons who worked for Defendants as hourly banquet service workers at the Hotel at any time during the six years prior to the commencement of this

action through the entry of final judgment in this matter (*Id.*, at ¶ 28).

Defendants argue that customers of the Hotel were expressly notified in writing that the mandatory service charges were not gratuities paid to its employees. As a result, the Hotel's employees would not qualify for inclusion in the Class.

Defendants have submitted event agreements that support their contentions, but that does not render class certification inappropriate in this instance (*Bloom v Cunard Line*, 76 AD2d 237, 240 [1st Dept 1980]). Courts would consider class action certification appropriate if the prima facie case is neither spurious nor sham (*Pludeman v N. Leasing Sys., Inc.*, 74 AD3d 420, 422 [1st Dept 2010]). The merits of claims will be taken into consideration only to the extent of determining the genuineness of such claims (*Brandon v Chefetz*, 106 AD2d 162, 168 [1st Dept 1985]). Defendants fail to demonstrate that the cause of action is spurious or a sham. The merits of claims including the customer's interpretation of the event agreements and event order forms and their enforceability, should not be resolved at this present stage.

A. Numerosity

The first prerequisite to certification is that "the class is so numerous that joinder of all members, whether otherwise

required or permitted, is impracticable" (CPLR 901[a][1]). The Courts have not set a threshold number of potential class members or developed a "mechanical test" to determine numerosity (*Friar v Vanguard Holding Corp.*, 78 AD2d 83, 96 [2d Dept 1980]). Instead, courts look to the totality of the circumstances and draw inferences from the particular facts before it (*Id.*; *Kudinov v. Kel-Tech Const. Inc.*, 65 AD3d at 481).

Here, the Class satisfies the numerosity requirement for class certification under CPLR 901(a)(1). The Class consists of similarly situated hourly banquet service workers who have worked at the Hotel at any time during the six years prior to the commencement of this action (Verified Complaint, ¶ 28). G-Bowley has established that there were at least 40 employees sustained damages at pertinent times and therefore, the Class satisfies the numerosity requirement (*Id.*, at ¶ 29, Ex. C; *See Consolidated Rail Corp. v Town of Hyde Park*, 47 F3d 473, 483 [2d Cir 1995] ["numerosity is presumed at a level of 40 members"]).

B. Commonality and Predominance

The second prerequisite for class certification requires "questions of law or fact common to the class which predominate over any questions affecting only individual members" (CPLR 901[a][2]). Plaintiffs must establish both the commonality of the issues among class members and the predominance of common issues over any individualized issues of the class (*Pludeman v N.*

Leasing Sys., Inc., 74 AD3d at 423). The existence of subsidiary questions of law or fact not common to a proposed class does not negate the certification of a class action (*Weinberg v Hertz Corp.*, 116 AD2d 1, 6 [1st Dept 1986]).

Here, G-Bowley alleges there are at least four common issues among the class members in relation to service charges without the need for individualized inquiry, including: (1) whether Defendants failed to remit the mandatory charge to members of the Class as gratuities; (2) whether a reasonable customer believed the mandatory service charges were being paid as gratuities; (3) whether the Class was fully paid for their work; and (4) whether Defendants are liable for all damages claimed (Verified Complaint, ¶ 32).

In opposition, Defendants submit the Hotel's event agreements, which provide that the mandatory service charges are not gratuities. However, Defendants do not dispute that the banquet event order forms fail to provide that the mandatory service charges are not gratuities and raises the possibility that a reasonable customer may come to the conclusion that the mandatory service charge was a gratuity. At this stage, the defendants have not provided any explanation that would establish that as a matter of law the "service charge" serves any purpose other than to create the impression that the charge is the collection of a fee over and above the normal cost of an event as

to constitute the collection of a gratuity for the service employees.

C. Typicality

The third prerequisite to certification is that "the claims or defenses of the representative parties are typical of the claims or defenses of the class" (CPLR 901[a][3]). Courts interpret the typicality requirement of broadly, reasoning that it is not necessary "that the claims of the named plaintiff be identical to those of the class" and "even if the class representative cannot personally assert all the claims made on behalf of the class" (*Pruitt v Rockefeller Ctr. Properties, Inc.*, 167 AD2d at 22).

Since January 2012, G-Bowley has worked as an hourly banquet server at the Hotel (Verified Complaint, ¶¶ 5, 6). She alleges that she is subject to the same mandatory service charge policy instituted by Defendants which results in the unlawful retention of the gratuities belonging to the Class (*Id.*, at ¶ 31). Additionally, G-Bowley has sustained similar damages as a result of Defendants' mandatory service charge policy and seeks monetary compensation and injunctive relief similar to the entire Class (*Id.*). Thus, G-Bowley satisfies the typicality requirement.

D. Adequacy

The fourth prerequisite to certification is that "the representative parties will fairly and adequately protect the

interests of the class" (CPLR 901[a][4]). G-Bowley satisfies the adequacy requirement because she possesses an "adequate understanding of the case to enable her to serve as class representative" and that "her attorneys possess the requisite 'competence, experience and vigor' to serve as class counsel" (*Fiala v Metropolitan Life Ins. Co.*, 52 AD3d 251, 251 [1st Dept 2008]; *Borden v 400 E. 55th St. Assoc., L.P.*, 105 AD3d 630, 631 [1st Dept 2013]).

Here, G-Bowley asserts that her interests are aligned with the Class (Verified Complaint, ¶ 34). The class counsel, Thomas & Solomon LLP, asserts that its attorneys are experienced in wage and hour class action litigation and are qualified to litigate the present case (*Id.*, at ¶¶ 34-36). Therefore, the adequacy element has been established.

E. Superiority

The fifth prerequisite to certification is that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy" (CPLR 901[a][5]). A class action is the superior method of adjudication where the damages claimed to be sustained by any individual member will "be insufficient to justify the expenses inherent in any individual action" (*Weinberg v Hertz Corp.*, 116 AD2d at 5).

Here, a class action will "achieve economies of time, effort, and expense, and promote uniformity of decision as to

persons similarly situated", as numerous class members have suffered relatively small damages and given the small scale of damages, class members may be less inclined to bring lawsuits on an individual basis (*Pludeman v N. Leasing Sys., Inc.*, 74 AD3d at 423). G-Bowley and all other members of the Class lack the resources to procure separate claims. Furthermore, the individual damages make it impractical to pursue each claim separately (Verified Complaint, ¶ 37). Therefore, a class action is not only the superior but the only practical method for the Class to assert its claims against Defendants.

Accordingly, it is

ORDERED that the plaintiffs' motion for class certification is granted, and it is further

ORDERED that the parties are directed to settle an order in conformity with this decision, and it is further

ORDERED that the parties contact the Clerk of Part 53 to schedule a discovery conference within thirty (30) days of notice of entry of this order.

Dated: August 15, 2017

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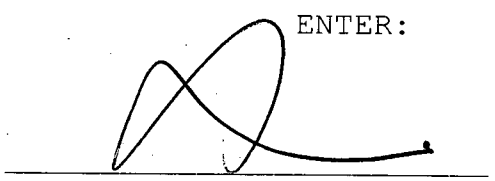

J.S.C.

CHARLES E. RAMOS