

Hosue v Calypso St. Barth, Inc.
2017 NY Slip Op 31928(U)
September 11, 2017
Supreme Court, New York County
Docket Number: 160400/2015
Judge: Robert D. Kalish
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29**

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**ALECIA HOSUE, on behalf of herself
and all other similarly situated employees,**

Plaintiff,

Index No. 160400/2015

-against-

Seq. 004

CALYPSO ST. BARTH, INC.,

Decision and Order

Defendant.

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HON. ROBERT D. KALISH, J.:

The above-entitled matter came before the Court on Plaintiff's Motion for Final Approval of Class Action Settlement, Service Awards to Plaintiff and two other Participating Class Members, and Class Counsel's Attorney's Fees and Costs ("Motion for Final Approval").

JUDGMENT AND ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT, SERVICE AWARDS TO PLAINTIFF AND TWO OTHER PARTICIPATING CLASS MEMBERS, AND CLASS COUNSEL'S ATTORNEY'S FEES AND COSTS

Plaintiff filed the present Class Action Complaint in New York County Supreme Court on October 9, 2015. The Complaint alleged that Defendant violated the New York Labor Law ("NYLL") and its supporting New York State Department Of Labor Regulations ("NYCRR") during the Class Period because Defendant required its Sales Employees to work off-the-clock after

the end of their scheduled shift and during meal breaks without compensation and failed to include commissions in the regular rate of pay when calculating the overtime rate of pay for Sales Employees, thereby depriving these Sales Employees of straight and overtime wages. A Joint Settlement Agreement and Release ("Settlement Agreement") was fully executed, as of June 5, 2017, by all parties to effectuate the parties' agreement to resolve this matter for \$145,000.00. On June 6, 2017, Plaintiff filed a Motion for Preliminary Approval Of The Settlement Agreement, Conditional Certification Of The Class For Settlement Purposes, Appointment Of The Plaintiff As Class Representative, Appointment Of The Law Firm Of Louis Ginsberg, P.C. As Class Counsel and Approval Of The Class Notice. On June 28, 2017, the Court granted preliminary approval of the Settlement Agreement, provisionally certified the Settlement Class, appointed Plaintiff as Class Representative, appointed the Law Firm of Louis Ginsberg, P.C. as Class Counsel, and approved the Class Notice.

Subsequently, after notice to the Class, on August 22, 2017, Plaintiff filed a Motion for Final Approval of Class Action Settlement, Service Awards to Plaintiff and two other Participating Class Members, and Class

Counsel's Attorney's Fees and Costs. Defendant did not oppose this Motion.

The Court held a Fairness Hearing on September 6, 2017. No Settlement Class Member objected to the settlement and only one Class Member requested exclusion (opted out).

Having considered the Motion for Final Approval of Class Action Settlement, Service Awards to Plaintiff and two other Participating Class Members, and Class Counsel's Attorney's Fees and Costs, and the supporting Declaration of Louis Ginsberg, Esq., the oral argument presented at the September 6, 2017 Fairness Hearing, and the complete record in this matter, for the reasons set forth at the September 6, 2017 Fairness Hearing, and for good cause shown,

Accordingly, it is hereby

ORDERED that

Certification Of The Settlement Class

1. The Court certifies the following class under Article 9 of the New York Civil Practice Law and Rules ("CPLR") for settlement purposes ("Settlement Class"):

All non-exempt hourly paid employees who worked as Sales Employees for Defendant in the State of New York, who are or were employed at any time from October 9, 2009 through the date of Preliminary Approval and who,

during the class period, allegedly did not have their commissions included in their regular rate of pay when calculating their overtime rate of pay, were allegedly not paid all of their straight time pay and overtime pay for work performed during meal breaks and for work performed post-shift off the clock, and allegedly were not provided with accurate wage statements.

Approval Of The Settlement Agreement

2. The Court hereby grants the Motion for Final Approval of Class Action Settlement, Service Awards to Plaintiff and two other Participating Class Members Dario Rodriguez and Paola Francisquini, and Class Counsel's Attorney's Fees and Costs, and finally approves the settlement, as set forth in the Settlement Agreement, of \$145,000.00.

3. CPLR § 908 requires judicial approval for any compromise of claims brought on a class basis. In determining whether to approve a class action settlement, courts examine "the fairness of the settlement, its adequacy, its reasonableness, and the best interests of the class members." Fiala v Met Life Insurance Co., Inc., 899 N.Y.S.2d 531, 537 (NY Sup. Ct. 2010) (citation omitted). Relevant factors in determining whether a settlement is fair, reasonable, and adequate include "the likelihood of success, the extent of support from the parties, the judgment of counsel, the

presence of bargaining in good faith, and the nature of the issues of law and fact.” In re Colt Indus. Shareholder Litig., 155 A.d.2d 154, 160 (1st Dep’t 1990) (citations omitted). A court should also “balanc[e] the value of [a proposed] settlement against the present value of the anticipated recovery following a trial on the merits, discounted for the inherent risks of litigation.” Fiala at 538 (citation omitted). All of these factors weigh in favor of approving the settlement.

4. In reaching the settlement, Class Counsel took into account the risks of establishing liability, and also considered the time, delay, and financial repercussions in the event of trial and appeal by Defendant. The settlement negotiations were at all times hard fought and at arm’s length, were between parties represented by counsel experienced in wage-and-hour law, and have produced a result that Class Counsel believes to be in the best interests of the Class in light of the costs and risks of continued litigation. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 116 (2d Cir. 2005) (internal quotation omitted). Additionally, Defendant has and will continue to vigorously contest Plaintiff’s claims if the action does not settle. In light of the strengths and weaknesses of the case, the

settlement easily falls within the range of reasonableness because it achieves a significant benefit for Plaintiff and the Settlement Class members in the face of significant obstacles. While there is a possibility that the Class could recover more money, including interest, after trial, the Settlement provides the significant benefit of a guaranteed payout to Settlement Class members, rather than “speculative payment of [a] hypothetically larger amount years down the road.” Gilliam v. Addicts Rehab. Ctr. Fund, 2008 WL 782596, at *5 (S.D.N.Y. 2008) (quoting Teachers’ Ret. Sys. Of Louisiana v. A.C.L.N. Ltd., 2004 WL 1087261, at *5 (S.D.N.Y. 2004)). In this case, there was also a collection risk due to Defendant’s financial condition.

Service Awards To The Class Representative And Two Other Participating Class Members

5. The Court finds reasonable the service award of \$5,000.00 for the class representative, Alecia Hosue, given the significant contributions she made to advance the prosecution and resolution of the lawsuit. This award shall be paid from the settlement fund.

6. The Court also finds reasonable the service awards of \$2,500.00 for participating class members Dario Rodriguez and Paola Francisquini given the contributions they made to advance the prosecution and resolution of the lawsuit. These awards shall be paid from the settlement fund.

7. A Court may grant service awards in a class action. Such awards “rewar[d] the named plaintiffs for the effort and inconvenience of consulting with counsel over the many years [a] case was active and for participating in discovery. . . .” Cox v. Microsoft Corp., 26 Misc.3d 1220(A), 4 (N.Y. Sup. 2007). Service awards “are particularly appropriate in the employment context...[where] the plaintiff is often a former or current employee of the defendant, and thus...he has, for the benefit of the class as a whole, undertaken the risks of adverse actions by the employer or co-workers.” Frank v. Eastman Kodak Co., 228 F.R.D. 174, 187 (W.D.N.Y. 2005).

8. Plaintiff and the two other Participating Class Members expended considerable time and effort to assist Class Counsel with the case. As such, their actions exemplify the very reason service fees are awarded. See Frank at 187 (recognizing the important role that plaintiffs play as the “primary source of information concerning

the claim[,]" including by responding to counsel's questions and reviewing documents).

9. Plaintiff also assumed significant risks in prosecuting this action. Even where there is not a record of actual retaliation, service fees are appropriate in recognition of the risk of retaliation assumed by lead plaintiffs for the benefit of absent class members. Frank at 187-188 ("Although this Court has no reason to believe that Kodak has or will take retaliatory action towards either Frank or any of the plaintiffs in this case, the fear of adverse consequences or lost opportunities cannot be dismissed as insincere or unfounded.").

10. The service awards totaling \$5,000.00 for Plaintiff and \$2,500.00 each for the other two Participating Class Members are reasonable and well within the range awarded by courts in similar matters. See Capsolas v. Pasta Resources Inc., 2012 WL 4760910, at *9 (S.D.N.Y. 2012) (approving service awards of \$20,000.00 and \$10,000.00 for class representatives in wage-and-hour action); Lovaglio v. W & E Hospitality Inc., 2012 WL 2775019, at *4 (S.D.N.Y. 2012) (approving service awards of \$10,000.00 each to three class representatives in wage-and-hour action); Sewell v. Bovis Lend Lease, Inc., 2012 WL 1320124, at *13 (S.D.N.Y. 2012) (approving

service awards of \$15,000.00 and \$10,000.00 for the class representatives); Matheson v. T-Bone Restaurant, LLC, 2011 WL 6268216, at *9 (S.D.N.Y. 2011) (approving service awards of \$45,000.00 and \$5,000.00 for the class representatives in a wage-and-hour class action); Willix v. Healthfirst, Inc., 2011 WL 754862, at *7 (E.D.N.Y. 2011) (approving service awards of \$30,000.00, \$15,000.00, and \$7,500.00 in a wage-and-hour class action.).

Award Of Fees And Costs To Class Counsel

11. On June 28, 2017, as per the Court's order granting Plaintiff's June 8, 2017 Motion for Preliminary Approval, the Court appointed the Law Firm of Louis Ginsberg, P.C. ("Louis Ginsberg, P.C.") as Class Counsel because they did substantial work identifying, investigating, litigating, and settling Plaintiff's and the Settlement Class members' claims, have years of experience prosecuting and settling wage-and-hour class actions, and are well-versed in wage-and-hour law and in class action law.

12. Louis Ginsberg, P.C. are experienced attorneys with an excellent reputation among the employment law bar, who have obtained millions of dollars for employees. See Deborah Clemons, on behalf of herself and all others similarly situated v. A.C.I.

Foundation, Ltd and Areba Casriel, Inc., Case No. 154573/2015

(Hon. Manuel Mendez) (Louis Ginsberg, P.C. appointed Lead Class Counsel in wage-and-hour class action for a class of approximately 75 and received approval of a \$297,000.00 class-wide settlement);

Siewharack v. Queens Long Island Medical Group, P.C., (11 cv

03603 (WFK)(ARL)(E.D.N.Y.)) (Louis Ginsberg, P.C. appointed Co-

Lead Class Counsel in wage-and-hour class action for a class of approximately 2,500 and received approval of a \$2.45 million class-wide settlement); Ludwig v. Pret A Manger, (11 cv 5677

(BSJ)(AJP)(S.D.N.Y.)) (Louis Ginsberg, P.C. appointed Co-Lead

Class Counsel in wage-and-hour class action for a class of

approximately 165, received approval of a \$299,000.00 class-wide

settlement, and the Court stated that "Each of the firms before me do

have experience, substantial experience in prosecuting wage-and-

hour actions such as this."); Ramirez v. Riverbay, 2014 WL 3800886,

at *7 (S.D.N.Y. 2014) (Louis Ginsberg, P.C. appointed Co-Lead Class

Counsel in wage-and-hour class action, received Class Certification

for three subclasses of about 1,700 employees, received approval of

a \$6.25 million class-wide settlement, and the Court found that

"Plaintiffs' counsel has pursued a number of similar actions and has

vigorously litigated the action before this Court.”); Kaye v. Orange Regional Medical Center (Index No.: 2012/003968, Orange County Sup. Ct., J. Colangelo) (Louis Ginsberg, P.C. appointed Lead Class Counsel in a wage-and-hour class action and obtained Final Approval of a \$371,739.79 class action settlement.); and Pierre v. Grandell Rehabilitation and Nursing Center, Inc. (15 Civ. 967 (ADS)(GRB)) (Louis Ginsberg, P.C. appointed Lead Class Counsel in a wage-and-hour class action and obtained a settlement of \$562,500.00 for a class of approximately 154 members.). Class Counsel’s experience prosecuting large-scale class and collective employment law actions on behalf of workers was directly responsible for bringing about the positive settlement in this case.

13. The work that Class Counsel has performed in litigating and settling this case demonstrates their commitment to the class and to representing the best interests of the class. Class Counsel has committed substantial resources to prosecuting this case.

14. The Court hereby grants Class Counsel’s request for attorney’s fees and awards Class Counsel \$48,328.50 which is 33.33% of the settlement fund.

15. The CPLR authorizes a court to grant attorneys' fees to class counsel who obtain a judgment on behalf of a class: "If a judgment in an action maintained as a class action is rendered in favor of the class, the court in its discretion may award attorneys' fees to the representatives of the class based on the reasonable value of legal services rendered..." CPLR § 909.

16. A Court may calculate reasonable attorney's fees by either the lodestar method (multiplying the hours reasonably billed by a reasonable hourly rate) or based on a percentage of the recovery. Fiala v Met Life Insurance Co., Inc., 899 N.Y.S.2d 531, 540. Where a settlement establishes a common fund, the percentage method is often preferable because "[t]he lodestar method has the potential to lead to inefficiency and resistance to expeditious settlement because it gives attorneys an incentive to raise their fees by billing more hours." Cox v. Microsoft Corp., 26 Misc.3d 1220(A), 4 (N.Y. Sup. 2007). Here, using the lodestar method, based upon billing entries through August 17, 2017, would result in a total of \$66,836.00.

17. Public policy favors a common fund attorneys' fee award in wage-and-hour class actions. See Johnson v. Brennan, 2011 WL 4357376, at *19 (S.D.N.Y. 2011) ("If not, wage-and-hour abuses

would go without remedy because attorneys would be unwilling to take on the risk.”); See also Sand v. Greenberg, 2010 WL 69359, at *3 (S.D.N.Y. 2010) (“But for the separate provision of legal fees, many violations of the Fair Labor Standards Act would continue unabated and uncorrected.”).

18. “Common fund recoveries are contingent on a successful litigation outcome.” Guaman v. Anja-Bar NYC, 2013 WL 445896, at *7 (S.D.N.Y. 2013). Such “contingency fees provide access to counsel for individuals who would otherwise have difficulty obtaining representation...and transfer a significant portion of the risk of loss to the attorneys taking a case. Access to the courts would be difficult to achieve without compensating attorneys for that risk. deMunecas v. Bold Food LLC, 2010 WL 3322580, at *8 (S.D.N.Y. 2010) (internal quotation marks and citation omitted). Many individual litigants “cannot afford to retain counsel at fixed hourly rates...yet they are willing to pay a portion of any recovery they may receive in return for successful representation.” Id. (citation omitted).

19. Regardless of the method used to determine reasonable attorney’s fees, a court should consider the following factors:

“the risks of the litigation, whether counsel had the benefit of a prior judgment, standing at bar of counsel for the plaintiffs and defendants, the magnitude and complexity of the litigation, responsibility undertaken, the amount recovered, the knowledge the court has of the case’s history and the work done by counsel prior to trial, and what it would be reasonable for counsel to charge a victorious plaintiff.”

Fiala v Met Life Insurance Co., Inc., 899 N.Y.S.2d 531, 540 (N.Y. Sup. 2010). All of these factors weigh in favor of approving the requested fee.

20. Applying the lodestar method as a comparison, which results in a total of \$66,836.00, the Court finds that the fee Class Counsel seeks is reasonable, as Class Counsel’s request for 33.33% of the settlement fund is consistent with that awarded in these types of cases. The fee requested is also reasonable based on the fact Class Counsel did substantial work on a fully contingent basis. See e.g. In-re Lloyd’s Am. Trust Fund Litig., 2002 WL 31663577, at *27 (S.D.N.Y. 2002) (a “multiple of 2.09 is at the lower end of the range of multipliers awarded by courts”); In re NASDAQ Market-Makers

Antitrust Litig., 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (awarding multiplier of 3.97 times lodestar); Rabin v. Concord Assets Group, Inc., 1991 WL 275757, at *2 (S.D.N.Y. 1991) (awarding multiplier of 4.4); In re RJR Nabisco, Inc. Sec. Litig., 1992 WL 210138, at *5–*8 (S.D.N.Y. 1992) (awarding multiplier of 6). Here, Class Counsel seeks no multiplier. The fee award requested by Class Counsel is less than the total amount of time spent by them based on the lodestar method.

21. The fact that Class Counsel's fee award will not only compensate them for time and effort already expended, but also for time that they will be required to spend administering the settlement going forward, also supports their fee request.

22. The Court also awards Class Counsel reimbursement of their litigation expenses in the amount of \$656.13.

23. The attorney's fees and the amount in reimbursement of litigation costs and expenses shall be paid from the settlement fund.

The Claims Administrator's Fees Should be Approved

24. The Court confirms Rust as the Claims Administrator. The Court approves Class Counsel's request for the Claims Administrator to be paid out of the settlement fund. The estimated administration

costs are \$15,000. Claims Administrator fees in this amount are routinely found reasonable. Therefore, this Court will approve all reasonable Claims Administrator fees in an amount not to exceed \$15,000.00, provided that a) the Claims Administrator submits appropriate invoices to Class Counsel for Class Counsel's review and approval and b) Class Counsel approves the fees.

Settlement Procedure

25. Within fourteen (14) calendar days of this Order, the Claims Administrator shall pay Class Counsel attorneys' fees of \$48,328.50 from the settlement fund.

26. Within fourteen (14) calendar days of this Order, the Claims Administrator shall reimburse Class Counsel for litigation expenses totaling \$656.13 from the settlement fund.

27. The "Effective Date" of the settlement shall be thirty (30) days following this Order if no appeal is taken from the Order. If a party appeals this Order, the "Effective Date" of the settlement shall be the day after all appeals are finally resolved in favor of final approval.

28. Within twenty (20) calendar days of the later of the Effective Date or the final installment being paid by Defendant, the

Claims Administrator will pay the service awards of \$5,000.00 to Plaintiff Alecia Hosue and \$2,500.00 each to Class Members Dario Rodriguez and Paola Francisquini.

29. Within twenty (20) calendar days of the later of the Effective Date or the final installment being paid by Defendant, the Claims Administrator shall pay the remainder of the settlement fund (after subtracting for the attorney's fees, expenses, the Plaintiff's service award, the service awards to the two participating class members, and the Claims Administrator's fees of no more than \$15,000 subject to Class Counsel's review and approval of the Claims Administrator's appropriate invoices), to Qualified Class Members in accordance with the allocation plan described in the Settlement Agreement.

30. The Court retains jurisdiction over this action for the purpose of enforcing the Settlement Agreement and overseeing the distribution of settlement funds. The parties shall abide by all terms of the Settlement Agreement, which are incorporated herein, and this Order.

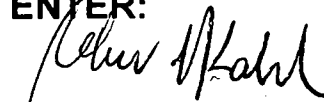
31. All members of the Settlement Class who have not excluded themselves from the settlement shall be permanently

enjoined from pursuing and/or seeking to reopen claims that have been released pursuant to the settlement.

32. This litigation shall be dismissed with prejudice after Defendant pays all settlement payment installments totaling \$145,000.00 to the Claims Administrator. At that time, Class Counsel shall notify the Court and submit a stipulation signed by counsel for the parties and to be signed by this Court dismissing this class action with prejudice.

Dated: 9/11/17
New York, New York

ENTER:



~~HON. ROBERT D. KALISH~~