

Membrives v HHC TRS FP Portfolio LLC
2017 NY Slip Op 32922(U)
March 10, 2017
Supreme Court, Nassau County
Docket Number: 607828/15
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

PEDRO MEMBRIVES and MICHELE
SPERO, individually and on behalf of others
Similarly situated,

TRIAL/IAS, PART 1
NASSAU COUNTY

Plaintiff,

INDEX No. 607828/15

MOTION DATE: 2/22/17
Motion Sequence 001, 002

-against-

HHC TRS FP PORTFOLIO LLC; REMINGTON
LODGING & HOSPITALITY, LLC REMINGTON
HOLDINGS LLC; REMINGTON LONG ISLAND
EMPLOYERS, LLC; MARK A. SHARKEY; ARCHIE
BENNETT JR.; MONTY J. BENNETT; CHRISTOPHER
PECKHAM; and any other related entities,

Defendant.

The following papers read on this motion:

Notice of Motion.....XX
Affirmation in Support.....XX
Memorandum of Law.....X

Motion by defendants to dismiss the complaint is **denied**. Cross-motion by plaintiff for class certification is **granted**.

This is an action by catering employees to recover gratuities allegedly misappropriated by defendants. Defendant Remington Long Island Employers, LLC operates the Hyatt Regency hotel in Hauppauge. The hotel is owned either by Remington Long Island Employers, or one of its affiliates; defendants HHC TRS FP Portfolio LLC FP, Remington Lodging & Hospitality,

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LLC, or Remington Holdings LLC (see deft's memo at 1).

On October 9, 2008, Hyatt Corporation, as agent for HHC TRS FP Portfolio, doing business as Hyatt Regency Long Island, entered into a staffing services agreement with non-party Hospitality Staffing Solutions. The agreement granted Hospitality Staffing the non-exclusive right to provide banquet, housekeeping, stewarding, and room service staff to Hyatt.

The agreement provides that Hospitality Staffing shall provide "a contact person with Hyatt who shall supervise and coordinate all contract employees' work." The agreement provides that Hospitality Staffing shall be responsible for all aspects of contract employees' work performance, including...hiring, scheduling...wage determination..., provided that said supervision and direction is consistent with the standards maintained by Hyatt." The agreement provides that Hospitality Staffing was to pay its employees in accordance federal and state wage and hour laws, including minimum wage and overtime. The agreement provides that Hospitality Staffing "shall provide labor on a schedule as agreed to by Hyatt."

Hospitality Staffing was required to submit a weekly invoice, showing name of employee, hours worked, rate per hour, and area worked for all personnel. Hospitality Staffing was responsible for payroll. The contract provided that labor would be provided at a rate of \$12.60 per hour, including insurance and benefits. Hospitality Staffing was required to provide workers compensation insurance. The contract contains an indemnity provision that Hospitality Staffing was to indemnify Hyatt for all claims arising from the services performed by Hospitality Staffing, including claims by employees.

On August 21, 2012, HHC TRS entered into a temporary labor services agreement with Hospitality Staffing. The temporary labor agreement provided that labor would be provided at the rate of \$14.84 per hour and contained a similar indemnification provision.

Plaintiff Pedro Membrives worked at the Hyatt in various food and service capacities during 2013-2014. The Hyatt's catering agreement provides that all prices are subject to an "administrative charge" or "administrative fee" of 23%. Membrives alleges that the administrative fee was understood as a fund to provide gratuities for the catering employees but was misappropriated by defendants.

This action was commenced on December 4, 2015. Plaintiff asserts a single claim for unlawful retaining of gratuities in violation of Labor Law § 196-d. Plaintiff purports to bring the action as a class action on behalf of all service employees, including waiters, servers, captains, bussers, bartenders, food runners, bridal attendants, and maître d's who were employed at the Hyatt since December 4, 2009.

By notice of motion dated October 7, 2016, defendants move to dismiss the complaint for failure to join a necessary party, Hospitality Staffing. Defendants argue that Hospital Staffing will be adversely effected by the judgment by virtue of the indemnity provision. Alternatively,

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defendants move to dismiss the complaint for a defense founded upon documentary evidence. Defendants argue that the staffing agreements establish that they had no control over plaintiff's employment are thus are not employers.

In opposition, plaintiff argues that defendants have sufficient control over the work to be employers. Plaintiff argues that Hospitality Staffing is not a necessary party because Hospital Staffing and defendants are joint tortfeasors and a party who undertakes to provide indemnity is not necessary or indispensable.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. The court must accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference. Further, any deficiencies in the complaint may be amplified by supplemental pleadings and other evidence. Whether plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss but must await a summary judgment motion (**AG Capital Funding Partners v. State Street Bank and Trust Co.**, 5 NY3d 582, 591 [2005]).

Labor Law § 196-d provides that, "No employer or his agent...or any other person shall demand or accept...any part of the gratuities, received by an employee....or any charge purported to be a gratuity...." The statute provides that, "Nothing in this subdivision shall be construed 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...." Service charges which are not voluntary payments may be gratuities within the meaning of the statute (**Samiento v World Yacht, Inc.**, 10 NY3d 70 [2008]). The "banquet exception" does not exempt service charges intended as gratuities for banquet employees, but rather confirms the legitimacy of existing practices concerning the pooling and distribution of such gratuities (Id).

The question of whether an entity or individual is an "employer" within the meaning of the statute is to be determined by whether they possess the power to control the workers in question, in light of the "economic reality" presented by the facts of each case (**Carver v New York**, 26 NY3d 272, 279 [2015]). The relevant factors include whether the person 1) had the power to hire and fire the employees, 2) supervised and controlled employee work schedules or conditions of employment, 3) determined the rate and method of payment, and 4) maintained employment records (Id).

Clearly, Hospitality Staffing hires the employees and maintains the employment records. However, the staffing agreements suggest that Hyatt retained the power to fire and set the work schedule. Supervision of employees is subject to Hyatt's standards. It appears that Hospitality Staffing was to pay its workers' salaries from the \$14.84 hourly rate. Thus, the maximum compensation was set by Hyatt, regardless of whether employees were paid more than the minimum wage by Hospitality Staffing. Based upon the economic reality of the case, the documentary evidence does not establish that defendants were

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not employers within the meaning of Labor Law § 196-d. Defendants' motion to dismiss the complaint for a defense founded upon documentary evidence is **denied**.

Where an indemnitor is vouched in to an action or proceeding, a judgment against the party indemnified in such action or proceeding is binding upon the indemnitor (**Culver Contracting Corp v Humphrey**, 268 NY 26 [1935]). Thus, defendants need simply notify Hospitality Staffing of the present action in order to bind Hospital Staffing by the judgment. It follows that Hospitality Staffing is neither a necessary nor an indispensable party. Defendants' motion to dismiss for failure to join a necessary party is **denied**.

The court concludes that the class of catering workers is so numerous that joinder of all members is impracticable. There are common questions of law or fact which predominate over questions affecting only individual members, namely whether defendants are "employers" within the meaning of Labor Law § 196-d. The claim of plaintiff Membrives for his share of misappropriated gratuities is typical of the claims of the class. Plaintiff Membrives will fairly and adequately represent the interests of the class. A class action is superior to other available methods for the fair and efficient adjudication of the controversy (CPLR § 901).

Accordingly, plaintiff's cross-motion for class certification is **granted**. Plaintiff may maintain the action on behalf of all service employees, including waiters, servers, captains, bussers, bartenders, food runners, bridal attendants, and maître d's who were employed at the Hyatt Regency in Hauppauge since December 4, 2009. The notice of wage and hour class action lawsuit is approved in the form annexed as exhibit N to plaintiff's motion. Publication order signed herewith. Any arguments not addressed herein are deemed to be without merit.

So ordered.

Date: MAR 10 2017

Stephen A. Bucaria
J.S.C.

ENTERED

MAR 13 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE