

Maor v Serenuse, Inc.
2018 NY Slip Op 32535(U)
June 13, 2018
Supreme Court, Bronx County
Docket Number: 20056/2016E
Judge: Lizbeth Gonzalez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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Marshall Maor, individually and on behalf of others
similarly situated,

Plaintiff,

DECISION AND ORDER
Index No. 20056/2016E

-against-

Serenuse, Inc. d/b/a Casa Mia Manor House; Anthony
Cuomo, Raffaele Cuomo; and any other related entities,
Defendants.

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Plaintiff Marshall Maor, defendants' former banquet server and employee, alleges that defendants Serenuse, Inc. d/b/a Casa Mia Manor House ("Casa Mia"), Anthony Cuomo and Raffaele Cuomo unlawfully retained gratuities in violation of Labor Law §§190, 196-d and 12 NYCRR § 146. Plaintiff maintains that defendants' mandatory 18-20% "service charge" is a gratuity owed to plaintiff and defendants' present and past similarly situated employees. Plaintiff seeks an order 1) certifying the underlying action as a class action pursuant to CPLR §§ 901-902; 2) designating Leeds Brown Law, P.C. as class counsel; 3) approving for publication the proposed Notice of Wage & Hour Class Action Lawsuit; and 4) endorsing the proposed Publication Order.

Defendants oppose the motion and cross-move pursuant to CPLR 3212 for summary judgment dismissal of the action against defendant Anthony Cuomo.

In support of his motion, plaintiff proffers his affidavit wherein he states that he worked for defendants at approximately 28 catered events as a banquet server and worker from July 2015 – January 2016. Wages were paid by envelope in cash: plaintiff proffers a sample pre-printed envelope bearing Casa Mia's name, address, email address and his handwritten first name. Defendants allegedly paid plaintiff a flat rate of \$70 for buffet events lasting seven hours or less and \$80 for dinner service and buffet events lasting more than seven hours.

Raffaele Cuomo, who self-describes as the current owner of Casa Mia, acknowledged at deposition that the plaintiff had "worked for his company."

Plaintiff avers that like other members of the putative class, he received no tips or portion of the service charge. When customers asked whether they needed to tip, they were informed by defendants' sales and/or events staff that tip was included in the service charge.

GRATUITIES

NYS Labor Law § 196-d prohibits employers from demanding, accepting or retaining, directly or indirectly, any part of an employee's gratuity or any charge purported to be a gratuity (*Matter of Altour Serv., Inc. v Industrial Bd of Appeals*, 127 AD2d 609 [1st Dept 2015]).

Before 2011, a mandatory charge or fee purported to be a gratuity was weighed against the expectation of the reasonable customer (*see Samiento v World Yacht Inc.*, 10 NY3d 70 [2008]). The NYS Hospitality Wage Order, as codified at 12 NYCRR § 146 and amended, now includes a rebuttable presumption that a “service charge” is a gratuity absent written language to the contrary.

12 NYCRR § 146-2.18

- (a) A charge purported to be a gratuity must be distributed in full as gratuities to the service employees or food service workers who provided the service.
- (b) 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.

12 NYCRR § 146-2.19

- (a) A charge for the administration of a banquet, special function, or package deal shall be clearly identified as such and customers shall be notified that the charge is not a gratuity or tip that a reasonable customer would understand that such charge was not purported to be a gratuity.
- (b) The employer has the burden of demonstrating, by clear and convincing evidence, that the notification was sufficient to ensure
- (c) Adequate notification shall include a statement in the contract or agreement with the customer, and on any menu and bill listing prices, that the administrative charge is for administration of the banquet, special function, or package deal, is not purported to be a gratuity, and will not be distributed as gratuities to the employees who provided service to the guests. The statements shall use ordinary language readily understood and shall appear in a font size similar to surrounding text, but no smaller than a 12-point font.

12 NYCRR § 146-2.2

- (a) Prior to the start of employment, an employer shall give each employee written notice of the employee's regular hourly pay rate, overtime hourly pay rate, the amount of tip credit, if any, to be taken from the basic minimum hourly rate, and the regular payday. The notice shall also state that extra pay is required if tips are insufficient to bring the employee up to the basic minimum hourly rate.

Plaintiff proffers defendants’ invoices, contracts and off-premises catering menu to establish their noncompliance with the NYS Hospitality Wage Order. The contracts and invoices are respectively dated 1/13/13 (baby shower), 1/19/13 (GOP breakfast), 1/11/14 (Michael’s bar mitzvah), 3/7/15 (baby shower), 3/7/15 (90th birthday), 12/10/15 (event), 12/11/15 (Christmas party) and 12/19/15 (event).

At deposition, defendant-owner Raffaele Cuomo acknowledged that Casa Mia’s contracts have always included a service charge. Plaintiff proffers defendants’ invoices and contracts; they include an 18% service charge but no disclaimer informing customers that the service charge was not a gratuity. Defendants’ off-premises catering menu adds a 20% service charge for its Basic Buffet, Basic Cocktail and Basic BBQ packages; the menu similarly contains no disclaimer informing customers that the service charge was not a gratuity.

CLASS CERTIFICATION

Plaintiff seeks certification of a class of individuals who performed work as servers, attendants, bussers, bartenders, food runners, captains and related service positions at defendants' catered events from 1/5/10 to the present. The putative class does not include maintenance workers, corporate officers, salespersons, cooks, food preparers, chefs, dishwashers, directors, clerical or officer workers, or any other employee whose trade, classification or profession does not customarily receive gratuities.

CPLR § 901 states that one or more members of a class may sue or be sued as representative parties on behalf of all where:

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.

Defendants proffer the affidavit of defendant Raffaele Cuomo in opposition to plaintiff's motion for class certification and in support of defendants' cross-motion to dismiss all claims against defendant Anthony Cuomo, Raffaele's father.

Casa Mia Manor House, located at 577 Route 303, Blauvelt, New York, is a restaurant and catering business. Mr. Cuomo by affidavit avers that he is Casa Mia's owner and general manager, a catering hall that currently has six employees including four servers and one bartender. At deposition, Mr. Cuomo testified that Casa Mia can host two events simultaneously; a typical month might include 22 catered events. A large event might include 180-200 people, for whom four servers and one bartender would be insufficient. Most customers left tips.

According to Raffaele Cuomo, defendants' Response to Plaintiff's First Set of Interrogatories incorrectly stated that the number of employees is 46, which number represents the total number of service workers employed by Casa Mia since its opening in 2000. Mr. Cuomo avers that since 2010, Casa Mia has employed only 28 persons who would be potential class members.

The NYS Hospitality Wage Order requires employers to establish, maintain and preserve weekly payroll records for at least six years (12 NYCRR § 146-2.1[a]). The employee earnings records produced by defendants are deficient to the extent that they omit each employee's name, position and title. Some pages do not indicate the year. The ten pages are numbered 2, 23, 30, 36, 37, 43, 52, 53, 80 and 81 without explanation. Ten pages clearly do not constitute the records of the 28 persons whom Mr. Cuomo acknowledges as potential members of the putative class; the court is moreover unable to discern which records pertain to plaintiff Maor. The payroll records also do not indicate, as defendants' counsel argues, that plaintiff worked with no more than five persons per shift.

Here, the proffered evidence establishes that the number of aggrieved persons may be 28, 46 or some higher number. Plaintiff's documentary evidence establishes that he and similarly situated workers may have been subject to defendants' nonpayment of gratuities. The commonality of the putative class's wage benefits and their typicality predominate over any alleged individualized claims (see *Dabrowski v Abax*, 84 AD3d 633 [1st Dept 2011]). To the extent that the determination as to whether a particular lawsuit qualifies as a class action rests within the sound discretion of the court (*Kudino v Kel-Tech Constr. Inc.*, 65 AD3d 481 [1st Dept 2009]), this court finds that plaintiff has met its burden relative to the five prongs of a class action analysis: numerosity, common questions of law and fact, typicality of claims or defenses, adequacy and the superiority of a class action relative to individually litigated claims.

DESIGNATION OF CLASS COUNSEL

Plaintiff is represented by Laura R. Reznick, Esq., an associate with Leeds Brown Law, P.C. Counsel submits her affirmation and copies of decisions from multiple jurisdictions to establish Leeds Brown's experience in litigating and settling employment-related lawsuits. Ms. Reznick affirms that her firm will advance all costs of the underlying litigation. Defendants submit no opposition to this prong of plaintiff's motion. Leeds Brown Law, P.C. is accordingly authorized to serve as class counsel.

DISMISSAL AS TO DEFENDANT ANTHONY CUOMO

Defendants cross-move for the dismissal of the action against defendant Anthony Cuomo. The younger Mr. Cuomo avers that his father "does not have, and has never had, involvement in any aspect of the business of Casa Mia."

By way of rebuttal, plaintiff submits his affidavit in opposition wherein he avers that the elder Mr. Cuomo directly supervised him on at least one occasion. Plaintiff proffers entity information from the NYS Department of State Division of Corporations database that identifies the elder Mr. Cuomo as the chief executive officer of Sereneuse, Inc. A print-out from the NYS Liquor Authority website identifies the elder Mr. Cuomo as the person who applied for a liquor license in his capacity as the principal of Sereneuse, Inc./trade name Casa Mia Manor House. The effective date of the license is 4/1/17. Mr. Anthony Cuomo submits no affidavit. The court accordingly finds that plaintiff met his shifting burden of proof.


CONCLUSION

After careful review and deliberation, this court finds that plaintiff met his burden of proof and grants plaintiff's motion for class certification in its entirety. Plaintiff's proposed class action notice and proposed publication order are hereby approved. Plaintiff shall provide the court with a copy of the publication order within 15 days for signing. Defendants' cross-motion is denied.

A copy of this Decision and Order with Notice of Entry shall be served within 30 days.

Dated: June 13, 2018

So ordered,



Hon. Lizbeth González, J.S.C.