

Cortes v Pacific Langham N.Y. Corp.

2020 NY Slip Op 30735(U)

March 9, 2020

Supreme Court, New York County

Docket Number: 154853/2018

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

-----X

LESLIE CORTES, individually and on behalf of others
similarly situated,

Plaintiff,

INDEX NO. 154853/2018

MOTION DATE 02/21/2020

MOTION SEQ. NO. 001

- v -

PACIFIC LANGHAM NEW YORK CORPORATION, doing
business as LANGHAM PLACE FIFTH AVENUE, and any
other related entities,

Defendants.

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18,
19, 20, 21, 22, 23

were read on this motion to/for MISCELLANEOUS

I. INTRODUCTION

In this putative class action to recover unlawfully retained tips and gratuities, the plaintiff moves for the certification of the settlement class, approval of a settlement of the class action, approval of the forms of notices and claims, and the appointment of the plaintiff's counsel as class counsel. The defendants do not oppose the motion. The motion is granted, and the matter is set down for a fairness hearing on June 9, 2020, at 9:30 a.m.

II. BACKGROUND

The plaintiff, Leslie Cortes, individually and on behalf of others similarly situated, commenced this action against Pacific Langham New York Corporation, doing business as Langham Place Fifth Avenue. She alleged that, beginning in May 2012, the defendant violated Labor Law §§ 190 *et seq.*, Labor Law § 196-d, and 12 NYCRR part 146, by unlawfully retaining tips and gratuities that rightfully belonged to her and other service employees at the defendant's

hotel and catering venues. She asserted that the defendant unlawfully assessed "service charges" upon customers as part of the bills and invoices for catered affairs, without informing the customers that those amounts were not going to be distributed to service employees and without distributing those amounts to service employees. The class sought to be certified consists of more than 40 service employees, and is defined as

"[a]ll individuals who, according to Defendant's reasonably accessible records and those of its third-party service provider, performed service work at catered events held at Langham Place Fifth Avenue from July 2013 through May 23, 2018, in such trades, classifications, and professions that customarily receive gratuities, including but not limited to servers, waiters, banquet servers, bussers, bartenders, captains and runners, and whose names appear on the Class List."

The proposed class settlement will require the defendants to pay the gross sum of \$675,000 into a settlement fund, inclusive of attorneys' fees. Class counsel anticipates that, upon its request for final approval of the settlement, it will ask the court to award it an attorney's fee in the sum of \$225,000, plus disbursements in the sum of up to \$7,500, both sums to be paid from the gross sum of \$675,000 that will be deposited into the settlement fund. The defendants agree to withhold and pay all appropriate payroll taxes.

III. DISCUSSION

A. Class Certification

CPLR 908 provides that "[a] class action shall not be dismissed, discontinued, or compromised without the approval of the court. Notice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs" (see *Desrosiers v Perry Ellis Menswear, LLC*, 139 AD3d 473, 474 [1st Dept 2016]). An action that has yet to be certified as a class action is nonetheless deemed to be a class action for the purpose of the notification provisions of CPLR 908, since the risk that a plaintiff's decision to seek certification may be influenced by whether the settlement is satisfactory or not gives that plaintiff an opportunity to employ the class action claim for unfair

personal aggrandizement in the settlement (see *Vasquez v National Sec. Corp.*, 139 AD3d 503 [1st Dept 2016]; *Avena v Ford Motor Co.*, 85 AD2d 149 [1st Dept 1982]).

In any event, the plaintiff satisfied her burden of showing that certification of a class consisting of “[a]ll individuals who, according to Defendant’s reasonably accessible records and those of its third-party service provider, performed service work at catered events held at Langham Place Fifth Avenue from July 2013 through May 23, 2018, in such trades, classifications, and professions that customarily receive gratuities” is warranted here.

Article 9 of the CPLR is to be “liberally construed” (*Beller v William Penn Life Ins. Co. of N.Y.*, 37 AD3d 747, 748 [2d Dept 2007]; *Jacobs v Macy’s E, Inc.*, 17 AD3d 318, 319 [2d Dept 2005]) in favor of the granting of class certification if all of the prerequisites of CPLR 901(a)(1) through (5) and CPLR 902(1) through (5) are met (see *Matter of Colt Indus. Shareholder Litig.*, 77 NY2d 185 [1991]; *Klein v Robert’s Am. Gourmet Food, Inc.*, 28 AD3d 63 [2d Dept 2006]; *Ackerman v Price Waterhouse*, 252 AD2d 179 [1st Dept 1998]).

“The prerequisites articulated in CPLR 901(a) include proof that the proposed class is so numerous that joinder of all members is impracticable, that common questions of law and fact applicable to the class predominate over questions affecting only individual members, that claims or defenses of the representative parties are typical of the claims or defenses of the class, and that the class action is superior to other available methods for the fair and efficient adjudication of the controversy”

(*Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 135-136 [2d Dept 2008]; see *Ackerman v Price Waterhouse*, 252 AD2d 179 [1st Dept 1998]). Here, the existence of dozens of service employees who had gratuities unlawfully withheld from them satisfies the numerosity prong of the statute (see *Emilio v Robison Oil Corp.*, 63 AD3d 667 [2d Dept 2009]). The putative class members share common questions of fact or law regarding the defendant’s failure to distribute tips and gratuities to which they were entitled (see *Lomeli v Falkirk Mgt. Co.*, _____AD3d_____, 2020 NY Slip Op 00115 [2d Dept, Jan. 8, 2020]; *Maor v One Fifth Fifty Seven Corp.*, 169 AD3d 497, 497-498 [1st Dept 2019]; *Kudinov v Kel-Tech Constr. Inc.*, 65 AD3d 481 [1st Dept 2009]). The claims of the class representative are typical of those of the

class. The class representative has demonstrated that she can fairly and adequately protect the interests of the class, as she has no claims potentially adverse to other class members. The class action procedure appears to be superior to other available methods of adjudicating the controversy, since the amount that might be recovered by an individual class member in a separate lawsuit might be quite modest.

The relevant factors articulated in CPLR 902(1) (“[t]he interest of members of the class in individually controlling the prosecution or defense of separate actions”), CPLR 902(2) (“[t]he impracticability or inefficiency of prosecuting or defending separate actions”) and CPLR 902(3) (“[t]he extent and nature of any litigation concerning the controversy already commenced by or against members of the class”) may, under the circumstances of this case, be subsumed under the prerequisite of superiority (see CPLR 901[a][5]; *Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d at 136). CPLR 902(4), which requires consideration of “[t]he desirability or undesirability of concentrating the litigation of the claim in the particular forum” is satisfied here, since the concentration of the claims in New York County, where the defendant has its principal offices and facilities, and where its service employees worked, is desirable (see *Galdamez v Biordi Constr. Corp.*, 13 Misc 3d 1224[A], 2006 NY Slip Op 51969(U), *5 [Sup Ct, N.Y. County 2006], *affd* 50 AD3d 357 [1st Dept 2008]). CPLR 902(5) requires consideration of “[t]he difficulties likely to be encountered in the management of a class action.” The plaintiff has demonstrated that, in light of the fact that the membership in the class is not overwhelmingly large, the employees’ tasks were reasonably similar to each other, and the claims cover only a limited period of time, “the claims as set forth in the complaint can be efficiently and economically managed by the court on a classwide basis” (*Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d at 136).

B. Preliminary Approval of Settlement Agreement

This court must make an initial evaluation of whether the proposed settlement "is fair, adequate, reasonable, and in the best interest of class members" (*Klein v Robert's Am. Gourmet Food, Inc.*, 28 AD3d at 73; see *Matter of Traffic Exec. Assoc.-Eastern R.R.*, 627 F2d 631, 634 [2d Cir 1980]).

"Where, as here, the action is primarily one for the recovery of money damages, determining the adequacy of a proposed settlement generally involves balancing the value of that settlement against the present value of the anticipated recovery following a trial on the merits, discounted for the inherent risks of litigation"

(*Klein v Robert's Am. Gourmet Food, Inc.*, 28 AD3d at 73). In light of the limited period of time covered by the proposed settlement agreement, the lump sum fund set forth in the settlement agreement fairly and adequately compensates the class members for their unpaid tips and gratuities, and is in their best interest.

The settlement here provides for sufficient notice to all class members, as it directs that each member be provided with a copy of the settlement agreement and all forms by first class mail (see *Vasquez v National Sec. Corp.*, 48 Misc 3d 597 (Sup Ct, N.Y. County 2015), *affd* 139 AD3d 503 [1st Dept 2016]). It also provides for opt-out rights for those who wish to pursue their remedies on an individual basis, and thus comports with the requirements of due process (see *Jiannaras v Alfant*, 27 NY3d 349 [2016]; *Hibbs v Marvel Enters.*, 19 AD3d 232 [1st Dept 2005]). The proposed notice and claim forms conform to generally accepted class action forms (see *Hibbs v Marvel Enters.*, 19 AD3d at 233; *Matter of Colt Indus. Shareholder Litig.*, 155 AD2d 154 [1st Dept 1990]). The affidavit of the plaintiff's counsel describes dozens of class actions that his firm has litigated successfully, which "amply demonstrated its experience and skill in class action litigation, and that it will adequately represent the interest of all class members" (*Ackerman v Price Waterhouse*, 252 AD2d at 195).

C. Fairness Hearing

The court concludes that the circumstances of this action warrant the scheduling of a "fairness hearing" within the meaning of Fed. R. Civ. P. 23(a)(2), a procedure which has been adopted in CPLR article 9 class actions in New York (see *Jiannaras v Alfant*, 27 NY3d at 351-352 [2016]). The hearing shall be scheduled for a date shortly after class members' deadline for opting out of the settlement. Hence, all parties shall appear on June 9, 2020, at 9:30 a.m. for a fairness hearing, after which the court will entertain an application or motion for final approval of the settlement agreement.

IV. CONCLUSION

Accordingly, it is

ORDERED that the plaintiff's motion to certify a settlement class, to preliminarily approve the proposed Settlement Agreement dated February 21, 2020, to approve the forms for notices and claims, and to appoint the plaintiff's counsel as class counsel is granted, without opposition; and it is further,

ORDERED that a class comprising all individuals who, according to the defendant's reasonably accessible records and those of its third-party service provider, performed service work at catered events held at Langham Place Fifth Avenue from July 2013 through May 23, 2018, in such trades, classifications, and professions that customarily receive gratuities, including but not limited to servers, waiters, banquet servers, bussers, bartenders, captains and runners, and whose names appear on the class list, as set forth in the Settlement Agreement, be, and hereby is, certified; and it is further,

ORDERED that the class is certified for the purposes of the settlement of this action only; and it is further,

ORDERED that the proposed Settlement Agreement dated February 21, 2020 is preliminarily approved; and it is further,

ORDERED that the plaintiff's counsel, Leeds Brown, P.C., is appointed as class counsel for the purposes of effectuating the Settlement Agreement; and it is further,

ORDERED that the Notice of Settlement of Class Action Lawsuit, Claim Form and Release, and related materials annexed to the Settlement Agreement be, and hereby are, approved; and it is further,

ORDERED that the Notice of Settlement of Class Action Lawsuit, Claim Form and Release, and related materials annexed to the Settlement Agreement shall be distributed by class counsel in accordance with the terms of the Settlement Agreement dated February 21, 2020; and it is further,

ORDERED that the Settlement Agreement shall not be construed to be a concession or admission, and shall not be employed against the defendant as an admission or indication with respect to any claim of any fault or omission by the defendant; and it is further,

ORDERED that, regardless of whether the settlement is finally approved, neither the Settlement Agreement, nor any document, statement, proceeding, or conduct related to the settlement, nor any reports or accounts thereof, shall in any event be construed as, offered, or admitted in evidence as, received as, or be deemed to be evidence for any purpose adverse to the defendant, including, but not limited to, evidence of a presumption, concession, indication, or admission by the defendant of any liability, fault, wrongdoing, omission, concession, or damages; and it is further,

ORDERED that, regardless of whether the settlement is finally approved, neither the Settlement Agreement, nor any document, statement, proceeding, or conduct related to the settlement, nor any reports or accounts thereof, shall in any event be disclosed, referred to, or offered or received in evidence against the defendant in any further proceeding in the action, or in any other civil, criminal, or administrative action or proceeding, except for the purposes of

settling the action or enforcing the settlement pursuant to the Settlement Agreement; and it is further,

ORDERED that the parties shall appear for fairness hearing on June 9, 2020, at 9:30 a.m., in Room 311 of the courthouse located at 71 Thomas Street, New York, NY; class counsel shall instruct the Settlement Administrator to publish a notice to all authorized claimants advising them of the date, time, and location of the hearing, at which time any member of the class as herein certified may make objections to the proposed Settlement Agreement; and the Settlement Agreement shall not become effective, as that term is defined in Section 1.20 of the Settlement Agreement, until such time as the hearing is held, and the court has issued an order authorizing the parties to complete the settlement process; and it is further,

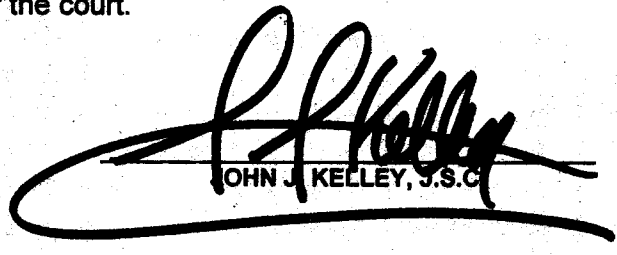
ORDERED that, except as to any individual claim of those persons who validly and timely opt out of and be excluded from the settlement, on the final effective date, as that term is defined in the Settlement Agreement, all of the released class claim shall be dismissed with prejudice as to the authorized claimants, as that term is defined in the Settlement Agreement, and all applicable settlement class members, as that term is defined in the Settlement Agreement; and it is further,

ORDERED that, on the final effective date, as that term is defined in the Settlement Agreement, the authorized claimants and all settlement class members, as those terms are defined in the Settlement Agreement, shall be deemed to have, and by operation by the judgment to be entered shall have, fully, finally, and forever released, relinquished, and discharged all released class claims, as that term is defined in the Settlement Agreement, and any other claims as set forth in the Settlement Agreement; and it is further,

ORDERED that, in the event that the settlement does not become effective in accordance with the terms of the Settlement Agreement, or is terminated, canceled, or fails to become effective for any reason, the court, upon application of any party, may nullify or vacate all or any portion of this order, as may be warranted.

This constitutes the Decision and Order of the court.

3/9/2020
DATE


JOHN J. KELLEY, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART		
	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: