

Toribio v Feldor Billiards, Inc.
2020 NY Slip Op 33534(U)
October 27, 2020
Supreme Court, New York County
Docket Number: 153384/2014
Judge: Jennifer G. Schechter
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JENNIFER G. SCHECTER

PART

IAS MOTION 54EFM

Justice

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VICENTE TORIBIO, JENNIFER ARRIGO, JENNIFER BECHEM, BRENDAN BURKE, LIAM BUSH, RIGDZIN COLLINS, JENNY CRUZ, PENELOPE CRUZ, RENEE CRUZ, VANESSA CRUZ, ALEXIS DAVID, QUERLIM FRANCO, MIEKO GAVIA, ALBERT GOOLD, CHARLES GOOLD, STEPHANIE HENRIQUEZ, KERRI KENDER, KAMILA NAREWSKA, LILY NUNEZ, JOSE PEREZ, ANGEL PIMENTEL, STEPHANIE PON, ALEXIS RUBIN, ALLAN RUBENSTEIN, ANTHONY THAMBYNAYAGAM, HUI-SHURN YONG,

Plaintiffs,

- v -

FELDOR BILLIARDS, INC. D/B/A FAT CAT BILLIARDS, NOAH SAPIR, CHARLES BERG,

Defendants.

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MOTION SEQ. NO.	013
DECISION + ORDER ON MOTION	

The following e-filed documents, listed by NYSCEF document number (Motion 013) 372-412, 443, 456, 460, 464-515, 539, 586

were read on this motion for PARTIAL SUMMARY JUDGMENT.

Plaintiffs Vincente Toribio, Jennifer Bechem, Brendan Burke, Liam Bush, Rigdzin Collins, Jenny Cruz, Penelope Cruz, Renee Cruz, Vanessa Cruz, Alexis David, Querlim Franco, Mieko Gavia, Stephanie Henriquez, Kerri Kender, Kamila Narewska, Lily Nuñez, Jose Perez, Angel Pimentel, Stephanie Pon, Alexis Rubin, and Anthony Thambynayagam (collectively, Plaintiffs) move for partial summary judgment pursuant to CPLR 3212 against defendants Feldor Billiards, Inc. d/b/a Fat Cat Billiards (Fat Cat) and Noah Sapir (with Fat Cat, Defendants).¹ Defendants oppose.

Plaintiffs' motion is granted in part.

¹ Ben Gee, previously a defendant, was also the subject of Plaintiffs' motion. Gee passed away in late 2019, and the case was automatically stayed pursuant to CPLR 1015. The remaining parties agreed to dismissal of the claims against him without prejudice.

Background

This is a consolidated wage and hour action for various violations of the New York Labor Law (NYLL). Plaintiffs, who were employed by Fat Cat, seek to recover damages for unlawful retention of gratuities and failure to provide accurate wage statements in violation of the Labor Law. Between July 2008 through July 2014 (Relevant Period), defendant Fat Cat, a New York corporation, employed Plaintiffs (at various times) at its music club in Manhattan featuring live entertainment, recreational games such as pool and ping pong and alcoholic beverages (JS ¶¶ 1-3). Defendant Sapir owns 50% of the shares in Fat Cat (JS ¶ 4). As Fat Cat’s “creative director,” Sapir was, at times, responsible for aspects of its day-to-day personnel management (JS ¶ 6). Charles Berg, a defendant who is a subject of Plaintiffs’ claims, but not their summary judgment motion, owns the other 50% of Fat Cat (JS ¶ 4). Berg handled the lease, licenses, insurance and financial aspects of Fat Cat’s business (JS ¶ 7). In 2009, Ben Gee became Fat Cat’s general manager, reporting directly to Berg and Sapir (JS ¶ 5; Dkt. 315 at 12 [Gee Dep. 11:12–18]).

At Fat Cat, tip-eligible employees were paid \$8 to \$10 per hour, plus their share of customer tips received and pooled during their shifts (Dkt. 515 [Berg Aff.] ¶ 5; Dkt. 315 at 60-61 [Gee Dep. 59:5–60:6]). Beginning around July 2008, Fat Cat changed its compensation structure (JS ¶ 8). Pursuant to the new scheme, each tip-eligible employee’s hourly rate varied between \$25 to \$40 depending on their position and shift (JS ¶ 9; Gee Dep. 59:20–23; Dkt. 466 at 24-25, 29-31 [Berg Dep. 23:11–24:5, 28:12–30:2]; Dkt. 515 [Berg Aff.] ¶¶ 4, 6-7). The hourly rate for a given shift hinged on how busy that specific shift was expected to be, with busier shifts assigned a higher hourly rate (Dkt. 468 at 114-

115 [Sapir AM Dep. 113:16–114:8]; Dkt. 466 at 24-25 [Berg Dep. 23:21–24:5]; Dkt. 515 [Berg Aff.] ¶ 7). Sapir, Berg and Gee testified that they intended to include both a minimum hourly wage rate of \$10 and customer tips in the new scheme (Gee Dep. 59:20–23; Dkt. 466 at 24-25, 29-31 [Berg Dep. 23:11-24:5, 28:12-30:2]; Dkt. 515 [Berg Aff.] ¶ 6; Dkt. 469 at 60-61 [Sapir PM Dep. 59:23-60:3]). In accordance with the scheme, Fat Cat continued to collect cash tips from customers in jars and to include a tip line on credit card receipts (JS ¶¶ 10-11). Ben Gee testified that the cash tips were placed into the cash registers (Dkt. 315 at 62 [Gee Dep. 61:6-9]).

Significantly, the amount that Fat Cat paid tipped employees was not based on the amount of tips--high or low--that were actually collected on any particular night. In fact, defendants have no records of how much Fat Cat received in customer tips nightly. Plaintiffs do not dispute that they knew that the higher hourly rate included tip compensation and overall earned them more money.

In 2014, after this action was commenced, Fat Cat again modified its pay structure to pay tip-eligible employees a \$9 hourly base rate (JS ¶ 12; Dkt. 466 at 43-45 [Berg Dep. 42:22-44:5]; Pimentel Dep. 83:15– 23; Dkt. 515 [Berg Aff.] ¶ 4). Thereafter, tip-eligible employees began to receive tips directly from customers, dividing them up amongst themselves (JS ¶¶ 12-13). This change was made at the request of employees (Dkt. 466 at 43-45 [Berg Dep. 42:22-44:5]; Pimentel Dep. 83:15– 23; Dkt. 515 [Berg Aff.] ¶ 4).

Plaintiffs move for an order establishing that (1) Defendants are liable as to the first cause of action for violations of NYLL § 196-d for unlawfully retaining gratuities from customers and intended for Plaintiffs; (2) Defendants are liable as to the third cause of

action for failing to provide accurate wage statements to Plaintiffs on each payday as required under NYLL § 195(3); (3) Defendants' third, fourth and fifth affirmative defenses of purported good faith compliance with the NYLL fail as a matter of law; and (4) Sapir was an "employer" of Plaintiffs under the NYLL.

Legal Standards

Article 6 of the New York Labor Law, § 196-d, provides:

No employer or his agent or an officer or agent of any corporation, or any other person *shall demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity ... for an employee.* ... Nothing in this subdivision shall be construed as affecting the allowances from the minimum wage for gratuities in the amount determined in accordance with the provisions of article nineteen of this chapter ... nor to the sharing of tips by a waiter with a busboy or similar employee.

"The drafters of Labor Law § 196-d sought to end the 'unfair and deceptive practice' of an employer retaining money paid by a patron 'under the impression that he is giving it to the employee, not to the employer'" (*Samiento v World Yacht Inc.*, 10 NY3d 70, 79 [2008], quoting Mem. of Indus. Commr., June 6, 1968, Bill Jacket, L. 1968, ch. 1007, at 4).

12 NYCRR § 146-2.14 (e) states as follows:

Eligibility of employees to receive shared tips, or to receive distributions from a tip pool, shall be based upon duties and not titles. Eligible employees must perform, or assist in performing, personal service to patrons at a level that is a principal and regular part of their duties and is not merely occasional or incidental.

(see also *Gomez v MLB Enterprises, Corp.*, No. 15-CV-3326, 2018 WL 3019102, at *7 [SDNY June 5, 2018] ["The operative inquiry remains whether an employee's duties

consist of performing or assisting in performing extensive and regular personal service to patrons”]).

12 NYCRR § 146-2.17, titled “Records of tip sharing or tip pooling,” states as follows:

(a) Employers who operate a tip sharing or tip pooling system must establish, maintain, and preserve for at least six years records which include:

(1) A daily log of the tips collected by each employee on each shift, whether in cash or by credit card;

(2) A list of occupations that the employer deems eligible to receive tips through a tip sharing or tip pool system;

(3) The shares of tips that each occupation is scheduled to receive from tip sharing or tip pooling; and

(4) The amount in tips that each employee receives from the tip share or tip pool, by date.

(b) Such records must be regularly made available for participants in the tip sharing or tip pooling systems to review. Nothing in this section shall be interpreted as granting any employee the right to review the payroll records of any other employee.

NYLL § 195(3) requires every employer to “furnish each employee with a statement with every payment of wages” that lists, among other things, the “*rate or rates of pay and basis thereof*, whether paid by the hour, shift, day, week, salary, piece, commission, or other; gross wages; deductions; allowances, if any, claimed as part of the minimum wage; and net wages.” Wages are defined as “earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis” (NYLL § 190[1]).

Pursuant to NYLL § 198 (1-d), if an employee is not given the required pay statements, they may sue for statutory damages of \$250 per work day (maximum \$5,000), plus costs and reasonable attorney's fees. The provision sets forth an affirmative defense if "the employer made complete and timely payment of all wages due" pursuant to Articles 6 and 19 of the Labor Law (NYLL § 198 (1-d); see *Ahmed v Morgan's Hotel Group Mgt., LLC*, 160 AD3d 555, 556 [1st Dept 2018]).

Discussion

Plaintiffs contend that between July 2008 and July 2014—the six-year period immediately before this action was brought—Defendants implemented and maintained a compensation scheme for Fat Cat's employees in which Plaintiffs collected and retained all customer gratuities left by Fat Cat's customers. They seek partial summary judgment on liability for violation of NYLL § 196-d on this basis. Defendants maintain that Plaintiffs are pursuing tips in this litigation that were already paid to them. Defendants point to testimony that tip-eligible employees received an hourly rate of \$25 to \$40 that included a minimum hourly rate of \$10 and customer tips (Dkt. 315 at 60-61 [Gee Dep. 59:20–60:6]; Dkt. 466 at 24-25, 29-31 [Berg Dep. 23:11–24:5, 28:12–30:2]; Dkt. 515 [Berg Aff.] ¶ 6). Defendants contend that there is a factual issue over whether any individual plaintiff was ever shorted customer tips. They maintain that Plaintiffs have not shown that Fat Cat actually received more in tips than what it ultimately remitted to the tip-eligible employees in compensation and that there are factual issues related to the shifts Plaintiffs worked,

their hourly rates, customers' actual tips per shift, the number of tip-eligible employees per shift and hours worked in non-tip-eligible roles per shift.

Of course, Plaintiffs, who are not moving for summary judgment on damages and are only seeking findings on certain issues to narrow the case, have not made a showing related to the tip amounts themselves. The implementing regulations of the NYLL require an employer, not employees (who would not have access to all of the necessary information in the first instance), to keep *six years* of records consisting of “(1) A daily log of the tips collected by each employee on each shift, whether in cash or by credit card; (2) A list of occupations that the employer deems eligible to receive tips through a tip sharing or tip pool system; (3) The shares of tips that each occupation is scheduled to receive from tip sharing or tip pooling; and (4) The amount in tips that each employee receives from the tip share or tip pool, by date” (12 NYCRR § 146-2.17[a]).

There is no triable issue of fact that Defendants, or anyone on their behalf, ever actually tracked the tips received in the tip jars and on credit-card slips (*see* Dkt. 405 at 2-11 [daily tracking sheets]; Dkt. 315 at 184-185 [Gee Dep. 183:22-184:3]; Dkt. 469 at 24-25 [Sapir PM Dep. 23:11-24:11]). While money is fungible, Defendants bear the burden of demonstrating that tips collected from customers were paid to their employees and not retained (*see* NYLL § 196-a [where employer fails “to keep adequate records . . . the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements”]; *Doo Nam Yang v ACBL Corp.*, 427 F Supp 2d 327, 337 [SDNY 2005] [employer who has not satisfied recordkeeping requirements must show employee was “properly paid” for hours worked]; *see also Canelas v World*

Pizza Inc., 2017 WL 1233998, at *9 [SDNY Mar. 31, 2017]). Accordingly, Defendants fail to raise an issue of fact regarding their acceptance and improper retention of all the gratuities intended for its employees between July 2008 and July 2014. Their payments to Plaintiffs were based on projections and not on actual tip receipts.

Crucially, Defendants do not argue—and the evidence submitted does not create a genuine issue of triable fact—that any of Plaintiffs waived their share of pooled tips by contract or by operation of any other doctrine (*see Tamburino v Madison Sq. Garden, L.P.*, 115 AD3d 217, 220 [1st Dept 2014] [“rights pursuant to section 196-d may be contracted away” but must be done so “clearly and unmistakably”]; *but see* <https://www.labor.ny.gov/legal/counsel/pdf/tips-frequently-asked-questions.pdf> [“no agreement between the employer and employee(s) can change or waive the legal protections about the handling and payment of tips”] *and Samiento*, 10 NY3d at 79 [agency interpretation of NYLL § 196–d is entitled to deference, so long as it is neither irrational nor unreasonable]). Contrary to defendants’ arguments, Plaintiffs demonstrated, as a matter of law, that Defendants violated § 196-d. The questions that Defendants raise all go to the proper award of damages.

Next, Plaintiffs contend that they are entitled to partial summary judgment on Sapir’s individual liability for damages, as their employer, under the NYLL. Defendants contend that there is an issue of fact over whether Sapir, individually, had the requisite operational control over Fat Cat and whether he had sufficient control over Plaintiffs’ employment. Defendants point to Berg’s “total control” over the payroll system with sole

authority to issue paychecks or to implement changes (Dkt. 468 at 128 [Sapir AM Dep. 127:3-13]; Dkt. 469 at 45 [Sapir PM Dep. 44:19-25]).

Labor Law § 190 defines “Employer” to include “any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service.” Whether an entity or individual is an “employer” within the meaning of the NYLL, turns on the “economic reality” test: “whether the alleged employer (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” (*Matter of Carver v State*, 26 NY3d 272, 291 [2015] [quotation marks omitted] [applying economic reality test to Federal Labor and Standards Act case]; *see Ponce v Lajaunie*, 2015 WL 4273108, at *2 [Sup Ct, NY County 2015] [applying test to NYLL claim]; *Membrives v HHC TRS FP Portfolio LLC*, 2017 NY Slip Op 32922[U], 3 [Sup Ct, Nassau County 2017] [same]).

Plaintiffs established that Sapir was their NYLL employer, presenting un rebutted evidence that Sapir had the power to hire and fire (Dkt. 468 at 58-59 [Sapir AM Dep. 57:5-58:20]; Dkt. 469 at 79 [Sapir PM Dep. 78:6-8]), had personnel management responsibilities (JS ¶ 6; Dkt. 315 at 31 [Gee Dep. 30:5-13]), determined Plaintiffs’ payment rates and methods (Dkt. 468 at 110, 128-129 [Sapir AM Dep. 109:6-22, 127:4-128:2]; Dkt. 315 at 31 [Gee Dep. 30:5-13]), and had a direct report (Gee) who tracked payroll hours and cash (including tip) deposits (Dkt. 315 at 13 [Gee Dep. 12:7-16]). Plaintiffs also present un rebutted evidence that Sapir bore responsibility for the unlawful compensation scheme itself (Dkt. 469 at 42 [Sapir PM Dep. 41:7-13]). In response, Sapir does not raise a triable

issue as to whether he lacked independent decision-making authority in carrying out his role in setting out these employment details. Berg's responsibility for arranging payroll does not alter the analysis as to whether Sapir was a statutory employer. Partial summary judgment is granted on the issue of Sapir's status as Plaintiffs' employer under the NYLL.

Plaintiffs contend that Defendants failed to provide accurate wage statements each payday, as the wage statements excluded the rates of pay and falsely recorded customer tips in violation of NYLL § 195(3). Defendants contend that Plaintiffs failed to prove that the wage statements did not satisfy the requirements under NYLL § 195(3) or to establish that Defendants cannot prove that they did not make "complete and timely payment of all wages due." Defendants contend that the paystubs submitted by Plaintiffs are not representative of all of them for all pay periods.

Plaintiffs demonstrated that the submitted paystubs all failed to indicate hours worked and hourly rates of pay in violation of NYLL § 195(3) (*see* Dkt. 404 [paystubs] at 2-18). Defendants having failed to track actual tips from customers, the paystubs also fail to accurately state tips² (*see id.*; Dkt. 466 at 43-45, 75-76 [Berg Dep. 42:22-44:5, 74:14-75:14]). Plaintiffs also provided prima facie evidence that the paystubs issued to all employees for the relevant time period had the same deficiencies (*see* Dkt. 402

² Defendants do not dispute that NYLL § 195(3) required them to record Plaintiffs' share of tips. The New York Department of Labor website requires tips disbursed by employers to be recorded on wage statements (*see* Payment of Tips Received By Credit Card & Cash, *available at* <https://labor.ny.gov/workerprotection/laborstandards/workprot/payofwag.shtm> [accessed Aug. 28, 2020] ["When customers pay tips in cash, employers may, as a service to their employees, allow employees to leave cash tips earned over the course of a pay period with the employer. The employer must issue a tip payment for the total amount of those cash tips along with any wage payment for the same pay period. ... The wage statement provided with the tip payment must contain a breakdown of tips and wages, and meet all other requirements for wage statements"]).

[Memorandum by Samantha Merley dated Aug. 18, 2010] [gross totals, not hours, reported for payroll]; Dkt. 466 at 43-45 [Berg Dep. 42:22-44:5]). Defendants, in rebuttal, failed to present any evidence to the contrary. Because Defendants failed to disburse each employee's share of pooled tips, the affirmative defense for "complete and timely payment of all wages due" fails as a matter of law for each pay period in which any of Plaintiffs worked in a tip-eligible role.

Defendants also contend that Plaintiffs David and Rubin worked for Fat Cat exclusively in non-tip-eligible roles: David as sound engineer technician and stage manager, and Rubin as a sound technician and music manager. While it is undisputed that David and Rubin cleared tables in and around the stage area, at least on occasion, there is an issue of fact over whether this service was "a principal and regular part of their duties and [was] not merely occasional or incidental" (12 NYCRR § 146-2.14 [e]). Evidence that other Plaintiffs worked in non-tip-eligible roles at various times during the relevant time period speaks only to damages and will be addressed.

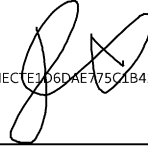
Finally, in seeking partial summary judgment dismissal of Defendants' third, fourth, and fifth affirmative defenses, Plaintiffs contend that Defendants failed to attempt to comply with the NYLL in good faith beginning in 2009. The evidence of Defendants' willful violation of the NYLL, which was the governing standard before November 25, 2009 (*see Ryan v Kellogg Partners Institutional Servs.*, 19 NY3d 1, 10 n 8 [2012]), is insufficient to carry Plaintiffs' prima facie burden (*see* Dkt. 469 at 71 [Sapir PM Dep. 70:5-71:24; Dkt. 516 [Berg Oct. 29, 2018 Aff.] ¶¶ 16-17). But Sapir admitted that he and Berg knew the scheme was contrary to the Labor Law beginning in 2009 (Dkt. 469 at 72-73

[Sapir Dep. 71:25-72:9], and produced no evidence of their good faith attempts to comply (see *Rivera v Harvest Bakery, Inc.*, 2018 WL 4214337, at *10 [EDNY Aug. 17, 2018], adopted by 2018 WL 4211301 [EDNY Sep. 4, 2018]). Because there is *no* evidence for the court to view “in the light most favorable to the defense” (see *Calderon v Mullarkey Realty, LLC*, 2018 US Dist LEXIS 97224, at *50 [EDNY June 10, 2018]), partial summary judgment is granted to Plaintiffs dismissing Defendants’ third, fourth, and fifth affirmative defenses, except that Defendants retain the ability to argue that their breach was not willful on and before November 24, 2009. Accordingly, it is

ORDERED that Plaintiffs’ motion is granted to the extent of dismissing Defendants’ third, fourth, and fifth affirmative defenses as to the time period beginning on November 25, 2009, and finding, as a matter of law, that

- 1) that defendant Sapir was an employer of the Plaintiffs for purposes of the NYLL;
- 2) that between July 2008 and July 2014, Sapir and Fat Cat collected customer gratuities and failed to disburse them to Plaintiffs; and
- 3) that between July 2008 and July 2014, each of Plaintiffs were tip-eligible, excluding Alexis David and Alexis Rubin, as to whom there remains a triable issue of material fact over their tip-eligibility during this timeframe; and
- 4) that between July 2008 and July 2014, defendants failed to submit paystubs in violation of NYLL § 195(3) and have failed to prove the affirmative defense of “complete and timely payment of all wages due” for any pay periods in which Plaintiffs were eligible to receive tips; and it is further

ORDERED that a telephone conference will be held on January 21, 2021 at 2:00 p.m. to discuss the scheduling of pre-trial deadlines and a pre-trial conference, and the parties shall email Michael Rand (mrاند@nycourts.gov) a dial-in number 30 minutes before the call.

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10/27/2020
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART

OTHER