SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. WILLIAM PERRY** **PART** **23**

Justice

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VINCENT SETTECASI, PAMELA GRAHAM, COREE SPENCER, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Plaintiff,

- v -

GOTHAM HALL, LLC, GOTHAM HALL OPERATING ENTITY, LLC, CORE ZIEGFELD, LLC D/B/A ZIEGFELD BALROOM, SIMON AUERBACHER, BRUCE KURTZ

Defendant.

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INDEX NO. 152791/2018

MOTION DATE 06/30/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81

were read on this motion to/for ORDER MAINTAIN CLASS ACTION.

Plaintiffs Vincent Settecasi (Settecasi), Pamela Graham (Graham) and Coree Spencer (Spencer) (collectively, plaintiffs) bring this putative class action to recover damages for alleged wage and overtime violations under Labor Law articles 6 and 9. Plaintiffs move, pursuant to CPLR article 9, for class certification and for an order appointing Leeds Brown Law, P.C. as class counsel, approving a proposed Notice of Wage & Hour Class Action Lawsuit and approving a proposed publication order. Defendants Gotham Hall, LLC (Gotham LLC), Gotham Hall Operating Entity, LLC (Gotham Operating) (together, Gotham), Core Ziegfeld, LLC d/b/a Ziegfeld Ballroom (Ziegfeld), Simon Auerbacher (Auerbacher) and Bruce A. Kurtz (Kurtz) (collectively, defendants) oppose the motion and cross-move, pursuant to CPLR 3212, for partial summary judgment dismissing the first cause of action alleging they unlawfully withheld gratuities under Labor Law § 196-d and the Department of Labor's Hospitality Wage Order (12 NYCRR) §§ 146-2.18 and 146-2.19.

BACKGROUND

Gotham and Ziegfeld operate two event spaces in Manhattan known as Gotham Hall and Ziegfeld Ballroom (together, the Venues) (NYSCEF Doc No. 58, Ilan Weiser [Weiser] affirmation, Ex D, ¶¶ 3 and 27). Auerbacher is a partner and Kurtz is a director in Gotham LLC and Ziegfeld (*id.*, ¶¶ 15-16). Defendants facilitate the production of private events their clients hold at the Venues by coordinating with outside vendors, such as caterers and service staff (NYSCEF Doc No. 45, Kurtz aff, ¶ 7). Thomas Preti Caterers Inc. d/b/a Thomas Preti Events to Savor (TPC) and Neuman's Kitchen, Inc. (Neuman's) were two of the caterers the Venues recommended to clients, and Hospitality Staffing, LLC and Top Shelf Staffing, LLC (Top Shelf) provided bartenders and cleaners for events (*id.*, ¶¶ 26 and 35).

Plaintiffs allege they and members of the putative class worked for defendants in food and service capacities, such as wait staff, waiters, servers, captains, bussers, bartenders, food runners, maître d's, bridal attendants and other related, customarily tipped positions at events held at the Venues from 2012 to the present (NYSCEF Doc No. 57, Weiser affirmation, Ex C, ¶¶ 9-11 and 18). Plaintiffs allege defendants charged clients a mandatory 23% service charge for the administration of catered events at the Venues (*id.*, ¶¶ 31-32). The service charge appeared on contracts, menus, bills and invoices for catered events, but the documents failed to disclose that the charge was not a gratuity for staff (*id.*, ¶¶ 32-34). It is alleged that a reasonable patron would have construed the service charge as a gratuity and that defendants' sales or event staff represented or allowed clients to believe the charge was a gratuity (*id.*, ¶¶ 35-36). Defendants allegedly failed to distribute the service charge to the putative class and retained it for themselves (*id.*, ¶¶ 41-42). The putative class members also worked more than 40 hours each week, but defendants willfully or purposefully failed to pay them overtime compensation (*id.*, ¶ 43).

Plaintiffs, on behalf of themselves and the putative class, commenced this action in March 2018. The first amended class action complaint (the FAC) alleges as a first cause of action violations of Labor Law § 196-d and 12 NYCRR 146-2.18 and 146-2.19 predicated on the unlawful withholding of gratuities. As alternatives to the first cause of action, the FAC alleges breach of contract and unjust enrichment as second and third causes of action. As a fourth cause of action, the FAC alleges violations of Labor Law §§ 650 and 663 and 12 NYCRR 146-1.4 based on a failure to pay overtime compensation. As a fifth cause of action, the FAC alleges violations of Labor Law §§ 191, 193 and 198 for unlawful deductions from plaintiffs' pay. Defendants have interposed an answer.

In moving for class certification, plaintiffs rely on sample event contracts and invoices and the deposition transcripts for plaintiffs and Kurtz. Defendants oppose and cross-move for summary judgment dismissing the first cause of action. The cross motion is supported by an affidavit from Kurtz; an affidavit from Michael Bonizio (Bonizio), TPC's president, owner and co-founder; sample event contracts and invoices from 2012 to the present; plaintiffs' responses to requests for admissions and interrogatory responses; and documentary discovery from Spencer and Graham. Defendants also rely on the deposition transcripts submitted by plaintiffs on the motion for class certification.

DISCUSSION

I. The Cross Motion for Summary Judgment

A party moving for summary judgment under CPLR 3212 "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "facts must be viewed in the light most favorable to the non-moving party"

(*Vega v Restani Constr. Corp.*, 18 NY3d 499, 203 [2012] [internal quotation marks and citation omitted]). Once the moving party has met this prima facie burden, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient to raise a material issue of fact (*Alvarez*, 68 NY2d at 324). The moving party's "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*).

Labor Law § 196-d provides, in relevant part:

> "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 or of any charge purported to be a gratuity for an employee ...."

The statute is meant 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 n 4 [2008] [citation omitted]). To that end, the Department of Labor adopted the Hospitality Wage Order to "clarify what constitutes a gratuity and details notice requirements that employers must follow when informing customers about gratuities" (*Lyell Party House, Inc. v New York State Dept. of Labor, Commr.*, 190 AD3d 1046, 1046 [3d Dept 2021]). Relevant herein are 12 NYCRR 146-2.18 and 146-2.19.

12 NYCRR § 146-2.18 (Charge purported to be a gratuity or tip) partially states:

> "(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 (Administrative charge not purported to be a gratuity or tip), reads, in part:

> "(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.
> (b) The employer has the burden of demonstrating, by clear and convincing evidence, that the notification was sufficient to ensure that a reasonable customer would understand that such charge was not purported to be a gratuity.
> (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."

A. The Mandatory or Administrative Service Charge

Defendants contend that no reasonable customer would have understood the service charge was a gratuity because each client contract contained plain, clear language stating that the charge was not a gratuity. The Venues' form contract consists of two sections (NYSCEF Doc No. 45, ¶¶ 11-12). The first contains information on pricing and the number of attendees (the Offer Letter) and the second contains the terms and conditions (the Terms and Conditions) (together, the Contract) (*id.*, ¶ 12). Kurtz avers the Venues typically charge a mandatory additional charge labeled a "service charge" or "administrative charge" (*id.*, ¶ 14). From 2012 to 2013, Gotham Hall's standard Offer Letter stated, "All prices subject to a 22% service charge," and section 7 of the standard Terms and Conditions stated:

> "SERVICE CHARGE: An amount equal to twenty-two (22%) of the charge to Client hereunder for food and beverages will be added to the account as a service charge and shall be payable in accordance with the terms hereof. The service charge is not a gratuity paid directly to the wait staff, captains, or bartenders. Any gratuities shall be at Client's sole discretion"

(NYSCEF Doc No. 46, Kurtz aff, Ex A at 1-2). From 2014 onward, the Venues' standard Offer Letter states that "[a]ll charges are subject to an additional 23% administrative charge," and section 7 in the Venues' standard Terms and Conditions reads:

> "**ADMINISTRATIVE CHARGE: An amount equal to twenty-three (23%) of the charge to Client hereunder for food and beverages will be added to the account as an administrative charge and shall be payable in accordance with the terms hereof. The administrative charge is not a gratuity; it is not paid to any supervisory or event staff. Any gratuities shall be at Client's sole discretion**"

(NYSCEF Doc No. 47, Kurtz aff, Ex B at 1 and 3; NYSCEF Doc No. 49, Kurtz aff, Ex D at 1-2) (emphasis in original). Each Contract required the client to return signed copies of the Offer Letter and the Terms and Conditions or else the agreement would "automatically terminate" (NYSCEF Doc No. 47 at 1; NYSCEF Doc No. 49 at 1). The additional charge was subject to New York City sales tax unless the client was tax-exempt (NYSCEF Doc No. 45, ¶ 24). Kurtz avers that not every contract included the additional charge, and if the contract did not include it, the Terms and Conditions did not contain a disclaimer (*id.*, ¶ 25). Invoices from the relevant period reveal separate entries for the additional charge (NYSCEF Doc No. 48, Kurtz aff, Ex C; NYSCEF Doc No. 50, Kurtz aff, Ex E).

Plaintiffs argue the notification that an administrative charge is not a gratuity must appear on each contract or agreement and any menu and bill listing prices. Here, the notification does not appear on the Offer Letters or invoices. Plaintiffs also contend that discovery is necessary on what a reasonable customer would have perceived the Terms and Conditions.

As discussed above, under 12 NYCRR 146-2.19 (c), a disclaimer explaining that an administrative charge is not a gratuity must appear as "a statement in the contract or agreement with the customer, and on any menu and bill listing prices." The documentary evidence

establishes that the disclaimer appears in the Terms and Conditions section in the Venues' standard Contract, and, contrary to plaintiffs' contention, the Terms and Conditions form part of the Contract (*see Castillo v Big Apple Hyundai*, 177 AD3d 473 [1st Dept 2019] [concluding that an indemnification provision in a standard AIA contract was incorporated by reference into the parties' contract]). That said, defendants have not shown they have satisfied 12 NYCRR 146-2.19 (c) (*see Button v Metropolitan Club, Inc.*, 187 AD3d 630, 630 [1st Dept 2020] [denying summary judgment where the defendant's failure to satisfy 12 NYCRR 146-2.19 (c) "precludes it from taking advantage of the regulatory safe harbor provision"]). An invoice is a detailed bill listing prices, and 12 NYCRR 146-2.19 (c) specifies that the disclaimer explaining that an administrative charge is not a gratuity must appear on any contract and bill listing prices (*see Settecasi v Ark Restaurants Corp.*, 2019 WL 2894562, *1, 2019 NY Misc LEXIS 13137, *2 [Sup Ct, NY County, June 27, 2019, index No. 154038/2018, James, J.] [denying dismissal, in part, because "invoices constitute 'bill[s] listing prices' to which 12 NYCRR§ 146-2.19 explicitly refers in the conjunctive"]). The invoices submitted on the cross motion lack statements notifying clients that the administrative charge was not a gratuity (*see Atkins v Metronome Events, Inc.*, 2019 NY Slip Op 32027[U], *19 [Sup Ct, NY County 2019], *affd* 187 AD3d 429 [1st Dept 2020] [denying a motion to set aside a verdict where the jury reasonably concluded the "defendants did not meet their burden of proving by clear and convincing evidence that they notified the patrons that the service charge listed on the contract or post-party invoice was not a gratuity"]; *cf. Flores v Mamma Lombardi's of Holbrook, Inc.*, 104 F Supp 3d 290, 302 [ED NY 2015] [reasoning "[t]hat the corresponding invoice – which by its nature is less detailed than the contract – does not include this language is of no moment" because the parties' relationship was governed by the catering contract which unambiguously stated the service charge was not a

gratuity]). Gotham Hall's invoices state only that "Special Gratuities for Supervisory Staff at Host's Discretion" (NYSCEF Doc No. 48 at 1). Ziegfeld Ballroom's invoices omit this language in its entirety (NYSCEF Doc No. 50 at 1).

Defendants cite *Ahmed v Morgan's Hotel Group Mgt., LLC* (160 AD3d 555 [1st Dept 2018], *lv denied* 32 NY3d 901 [2018]) for the proposition that strict compliance with 12 NYCRR § 146-2.19 (c) is not required. The Court in *Ahmed* concluded that a banquet event order, or BEO, served as the detailed contract and bill for defendant's catered events and contained clear language explaining the service charge was not a gratuity (*id.* at 555). The Court also found "[t]hat other documents generated in connection with the event, such as proposals, did not include the explanatory language does render the BEO language ineffective" (160 AD3d at 556). However, the Court in *Ahmed* referred to proposals, not invoices. Here, while defendants' form Contract describes the price for each service, the invoice or "bill listing prices" omits the obligatory disclaimer language. Furthermore, defendants' contention that they need not satisfy every element of 12 NYCRR 146-2.19 (c) is not supported (*see Button*, 187 AD3d at 630 [denying summary judgment where the disclaimer was not printed in the font size specified in the regulation]). Thus, the cross motion to dismiss so much of the first cause of action alleging violations of 12 NYCRR 146-2.18 and 146-2.19 is denied.

B. Whether Plaintiffs are Employees

Defendants posit that plaintiffs are not employees for purposes of Labor Law § 196-d liability. In *Bynog v Cipriani Group, Inc.* (1 NY3d 193 [2003], *rearg denied* 2 NY3d 794 [2004]), the Court of Appeals identified five factors to consider in determining whether an employment relationship exists. Defendants submit the evidence demonstrates they lacked the requisite degree of control over plaintiffs to establish an employment relationship under *Bynog*.

In support, Kurtz avers that the Venues outsourced all catering and service staff to a catering company or staffing agency (NYSCEF Doc No. 45, ¶¶ 9 and 27). He states that the catering company or staffing agency determines the number of staff needed for each event, and each company employs captains to supervise staff before, during and after an event (*id.*, ¶ 36). Bonizio avers that TPC is solely responsible for hiring and assigning wait staff to an event, determines their hourly rate of pay and maintains time and pay records for its wait staff, who are on its payroll (NYSCEF Doc No. 53, Bonizio aff, ¶¶ 9-11 and 16). Defendants also point to plaintiffs' testimony confirming that they were supervised by catering company captains.

Plaintiffs argue the cross motion is premature because discovery has been limited to the issue of class certification, and they have yet to depose Kurtz in his individual capacity and other key witnesses. They argue that triable issues of fact exist whether they are employees under Labor Law § 196-d as their testimony establishes that defendants exercised significant and meaningful control over them. In addition, plaintiffs argue that *Bynog* does not preclude temporary servers from receiving gratuities given the expansive definition for an "employee" in 12 NYCRR 146-3.2 (a), which defines an "employee" as "any individual suffered or permitted to work in the hospitality industry by the operator of the establishment or by any other employer."

To recover for a Labor Law § 196-d violation, the plaintiff must establish that he or she is the defendant's employee (*Colon v Compass Group USA, Inc.*, 188 AD3d 800, 801 [2d Dept 2020], *lv denied* 36 NY3d 910 [2021]; *Robinson v Great Performances Artists As Waitresses, Inc.*, 2021 NY Slip Op 31680[U], *13 [Sup Ct, NY County 2020], *affd* 195 AD3d 140, 147 [1st Dept 2021] [stating that "[t]he employer/employee relationship is key to a Section 196-d claim"]). Labor Law § 190 (2) defines an "employee" as "any person employed for hire by an employer in any employment."

Critical to determining whether an employment relationship exists is the "degree of control exercised by the purported employer over the results produced or the means used to achieve the results" (*Bynog*, 1 NY3d at 198 [concluding that temporary waiters hired through an employment agency were independent contractors as the defendants' involvement with plaintiffs was limited to "meet[ing] with them on the day of the banquet to discuss the particular customer menu and the timing of the various courses being served"] [*id.* at 199]). In assessing control, the court looks at five factors: "whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule" (*id.* at 198). "[C]ontrol over the means is the more important factor to consider" (*Matter of Ted Is Back Corp. (Roberts)*, 64 NY2d 725, 726 [1984]). "[I]ncidental control over the results produced without further indicia of control over the means employed to achieve the results will not constitute substantial evidence of an employer-employee relationship" (*id.*). The *Bynog* factors, though, are not exhaustive (*see Hart v Rick's Cabaret Intl.*, 967 F Supp 2d 901, 923 [SD NY, 2013] [collecting cases]). Additional factors to consider "include whether the worker was required to wear a uniform, follow company procedures, attend meetings, sign in and out of work, and coordinate vacation with a supervisor, and whether the employer decided when each task should be started and on which task the worker should focus at any particular time" (*Padovano v FedEx Ground Package Sys.*, 2016 WL 7056574, *5, 2016 US Dist LEXIS 167577, *13 [WD NY, Dec. 5, 2016, No. 16-CV-17-FPG]) and whether the employer trained staff (*Connor v Pier Sixty, LLC*, 29 Misc 3d 1220[A], 2010 NY Slip Op 51911[U], *2 [Sup Ct, NY County 2010] [denying summary judgment, in part, where the defendant "required its temporary workers to attend a four-week training session, had supervisors present during events to offer instruction and correction to the temporary employees

and required the temporary employees to wear a jacket which Pier Sixty provided"]). These factors typically implicate the employer's "'direct supervision or input over the means used to complete the work'" (*Athenas v Simon Prop. Group, LP*, 185 AD3d 884, 885 [2d Dept 2020], *lv denied* 36 NY3d 901 [2020] [citation omitted]). "Where the proof on the issue of control presents no conflict in evidence or is undisputed, the matter may properly be determined as a matter of law" (*Bhanti v Brookhaven Mem. Hosp. Med. Ctr.*, 260 AD2d 334, 335 [2d Dept 1999]).

As applied here, these factors do not favor finding the existence of an employment relationship. Plaintiffs chose when to work as they had the discretion to accept or reject an assignment, especially if, in Settacasi's case, they were already working elsewhere (NYSCEF Doc No. 34, Brett R. Cohen [Cohen] affirmation, Ex H [Settecasi tr] at 182-183; NYSCEF Doc No. 35, Cohen affirmation, Ex I [Graham tr] at 27-28 and 114-116; NYSCEF Doc No. 36, Cohen affirmation, Ex J [Spencer tr] at 35-36 and 154). Plaintiffs did not work a fixed schedule. TPC's email communications to its pool of wait staff required them to confirm their availability (NYSCEF Doc No. 53, ¶ 19; NYSCEF Doc No. 62, Weiser affirmation, Ex H; NYSCEF Doc No. 63, Weiser affirmation, Ex I). Plaintiffs were free to engage and did engage in employment at other venues and for other companies (NYSCEF Doc No. 34 at 103-104 and 165-166; NYSCEF No. 36 at 28-29 and 72; NYSCEF Doc No. 59, Weiser affirmation, Ex E, ¶¶ 27 and 30-31; NYSCEF Doc No. 60, Weiser affirmation, Ex F, ¶ 14; NYSCEF Doc No. 61, Weiser affirmation, Ex G, ¶¶ 27-28). Plaintiffs did not receive fringe benefits (NYSCEF Doc No. 34 at 278; NYSCEF Doc No. 35 at 143; NYSCEF Doc No. 36 at 186; NYSCEF Doc No. 59, ¶ 36; NYSCEF Doc No. 60, ¶ 37; NYSCEF Doc No. 61, ¶ 33). None of the plaintiffs received a paycheck from Gotham or Ziegfield (NYSCEF Doc No. 59, ¶¶ 1-3; NYSCEF Doc No. 60, ¶¶ 1-3; NYSCEF Doc No. 61, ¶¶ 1-3). Plaintiffs did not receive an employee handbook or written

company policy from defendants (NYSCEF Doc No. 35 at 58; NYSCEF Doc No. 36 at 158-159; NYSCEF Doc No. 59, ¶ 9; NYSCEF Doc No. 60, ¶ 36; NYSCEF Doc No. 61, ¶ 10). Defendants did not supply wait staff with uniforms. The catering company or the client set the uniform for an event, and the uniform requirements were communicated to plaintiffs by the catering company or staffing agency (NYSCEF Doc No. 33, Cohen affirmation, Ex G [Kurtz tr] at 69-70 and 100-101; NYSCEF Doc No. 53, ¶ 20; NYSCEF Doc No. 34 at 271; NYSCEF Doc No. 35 at 133; NYSCEF Doc No. 36 at 34).

The evidence also shows that captains employed by the catering company or staffing agency supervised event staff. Captains held pre-event meetings during which they informed staff of the timeline for an event, announced table assignments, discussed the menu and the timeline for food service, and advised staff of special guest requests (NYSCEF Doc No. 45, ¶ 36; NYSCEF Doc No. 53, ¶¶ 12, 26-27; NYSCEF Doc No. 34 at 77-78; NYSCEF Doc No. 35 at 35-36, 39-41 and 46; NYSCEF Doc No. 36 at 49-52 and 56). Captains supervised and instructed wait staff during and after an event as to when and how to set up and break down tables and other equipment and when staff may take breaks (NYSCEF Doc No. 53, ¶ 27; NYSCEF Doc No. 35 at 123-124). Captains also recorded each staff member's time in and out at an event (NYSCEF Doc No. 53, ¶¶ 19-20 and 22; NYSCEF Doc No. 34 at 87; NYSCEF Doc No. 35 at 30; NYSCEF Doc No. 36 at 39).

Nevertheless, defendants have not dispelled all triable issues of fact as to the degree of control they exercised and whether such control was minimal or incidental (*see Membrives v HHC TRS FP Portfolio*, 196 AD3d 560, 562-563 [2d Dept 2021] [denying summary judgment because of the conflicting evidence on the issue of control]; *Maor v One Fifty Fifty Seven Corp.*, 2018 NY Slip Op 30655[U], *7 [Sup Ct, NY County 2018], *affd as mod* 169 AD3d 497 [1st

Dept 2019] [denying summary judgment where questions of fact exist as to defendants' degree of control over temporary wait staff]; *Cornejo v Eden Palace Inc.*, 2020 NY Slip Op 31618[U], *10 [Sup Ct, Kings County 2020] [denying summary judgment where the testimony showed that temporary wait staff received direct instructions from their employer and from catering hall employees]; *Maor v Hornblower N.Y., LLC*, 51 Misc 3d 1231[A], 2016 NY Slip Op 50891[U], *5 [Sup Ct, NY County 2016] [denying summary judgment where the plaintiffs testified defendant's employees were "in charge" of them for an entire event]; *Connor*, 29 Misc 3d 1220[A], 2010 NY Slip Op 51911[U], *2 [denying summary judgment where the deposition testimony showed defendants "continuously instructed and corrected the temporary employees throughout the course of an event"]). Unlike *Bynog*, defendants' involvement at each event extended beyond a pre-event discussion on the menu and the timing for service (1 NY3d at 199). Significantly, Kurtz testified that he attended 90% of the events at Gotham Hall until Ziegfeld Ballroom opened, when he began to split his time between the Venues (NYSCEF Doc No. 33 at 72-73). Kurtz explained that his job entailed "[making] sure everybody is doing what they are supposed to be doing … as directed by the different leads who are running that particular aspect of the event that evening" (*id.* at 75), and that his "job is to point out what is wrong, not what is right" (*id.* at 76). He admitted that he would direct or instruct people during an event (*id.*). If a task was not performed properly, he would not "necessarily" instruct that person directly but would alert the captain or cleaning supervisor (*id.* at 76-77). However, if he "saw a server with a tray standing empty and a high top table full of dirty glasses, I might direct that server right there with the empty tray to say please go over to that high top table and clear it" (*id.* at 78). Kurtz also testified that he had the authority to have a worker sent home from an event and had the

authority to speak to the caterer to determine whether a worker should return for future events (*id.* at 80).

Spencer testified that Kurtz "ran the events at Gotham Hall" (NYSCEF Doc No. 36 at 77). She expressed that Kurtz:

> "would, um, have us do the event to his liking. We would be given information from the catering company. We would set the event up, and then he would change things up. He would have us open the buffet when he wanted it opened and he would supervise. He would run the event as he wanted to his expectations. So sometimes we were told one thing by the catering company, but we were also told that if Allen Kurtz wants you to do something, you are to do it, because he is in charge"

(*id.* at 167-168). Spencer testified that "many times Kurtz would come over and have us change what we had done more to his liking" and that this was done "fairly frequently" (*id.* at 172-173). She specified that she "worked on the early setup crew, so he did instruct me a fair amount in how he wanted the floor plan done. I was one of the few employees that would set up, and he would instruct us how he wanted things done. And this was fairly frequently" (*id.* at 173). She stated that Kurtz would tell wait staff to move the coat check area, move a table or bring the food out at an earlier time (*id.*).

Graham testified that "[w]e were also told by, um, you know, if Allan Kurtz told you to do something, you did it. If Maureen told you to do something, you, you know, did it unless it conflicted with something your captain told you"[1] (NYSCEF Doc No. 35 at 135). Graham also testified that "we learned how [defendants] wanted things done by being told by them" and that "Kurtz would tell people what to do" (*id.* at 138-139). Settecasi testified that "[e]very part of the job we perform is dictated by them" (NYSCEF Doc No. 34 at 152). Given this conflicting evidence on the degree of defendants' control over the results produced or the means used to

[1] Maureen Acapora is the beverage director for the Venues (NYSCEF Doc No. 33 at 51).

achieve the results, the cross motion to dismiss so much of the first cause of action alleging a Labor Law § 196-d violation is denied.

II. Plaintiffs' Motion for Class Certification

Plaintiffs move to certify a class comprised of "[a]ll individuals who performed work as servers, bartenders, or in related service positions during catered events held at Gotham Hall and/or Ziegfeld Ballroom between March 2012 and the present ('the Relevant Period')" (NYSCEF Doc No. 37, Cohen affirmation, Ex K).

Defendants argue that plaintiffs seek certification on the first cause of action, but the first cause of action lacks merit as discussed on the cross motion. They also contend that plaintiffs cannot satisfy CPLR 901 and 902 and urge the court to deny the motion because the class members cannot be identified.

In reply, plaintiffs clarify that they seek class certification on all causes of action (NYSCEF Doc No. 73, plaintiffs' reply mem at 29 n 9).

CPLR 901 (a) sets forth five prerequisites for a class action as follows:

> "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."

These prerequisites are commonly referred to as "numerosity, commonality, typicality, adequacy of representation and superiority" (*City of New York v Maul*, 14 NY3d 499, 508 [2010]). CPLR 902 sets forth additional factors for the consider before allowing an action to proceed as a class action. They include:

> "1. the interest of members of the class in individually controlling the prosecution or defense of separate actions;
> 2. the impracticability or inefficiency of prosecuting or defending separate actions;
> 3. the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
> 4. the desirability or undesirability of concentrating the litigation of the claim in the particular forum;
> 5. the difficulties likely to be encountered in the management of a class action."

A plaintiff moving for class certification bears the burden of satisfying the prerequisites in CPLR 901 and 902 (*Cupka v Remik Holdings, LLC*, 202 AD3d 473, 474 [1st Dept 2022]), through the submission of evidentiary facts sufficient to support certification (*Kudinov v Kel-Tech Constr., Inc.*, 65 AD3d 481, 481 [1st Dept 2009] [stating there must be an "evidentiary basis" for certification]; *Feder v Staten Is. Hosp.*, 304 AD2d 470, 471 [1st Dept 2003] [stating that the plaintiff must submit "competent evidence in admissible form"]). Because CPLR article 9 must be liberally construed (*Andryeyeva v New York Health Care, Inc.*, 33 NY3d 152, 183 [2019]), "'any error, if there is to be one, should be in favor of allowing the class action" (*Pruitt v Rockefeller Center Properties, Inc.*, 167 AD2d 14, 21 [1st Dept 1991] [internal quotation marks and citation omitted]). It is within the court's discretion to grant certification (*City of New York*, 14 NY3d at 509).

To begin, "[c]lass action certification is … appropriate if on the surface there appears to be a cause of action which is not a sham" (*Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 422 [1st Dept 2010]). This is a limited inquiry "and such threshold determination is not intended to be a substitute for summary judgment or trial" (*id.* at 422, citing *Kudinov*, 65 AD3d at 452). It has been held that "'[c]laims of uniform systemwide wage violations are particularly appropriate for class certification'" (*Kurovskaya v Project O.H.R. (Office for Homecare*

Referral), 194 AD3d 612, 613 [1st Dept 2021], quoting *Andryeyeva*, 33 NY3d at 184). Given the denial of defendants' cross motion, the plaintiff's claims are neither spurious nor a sham.

1. CPLR 901

CPLR 901 (a) (1) requires the plaintiff to show "the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable." A class of 40 members meets the numerosity threshold (*Agolli v Zoria Hous., LLC*, 188 AD3d 514, 514 [1st Dept 2020]). Plaintiffs have satisfied this element as Kurtz testified there were at least 50 servers for a room of 500 guests for a sit-down dinner at the Venues (NYSCEF Doc No. 33 at 63-64).

CPLR 901 (a) (2) requires that there be "questions of law or fact common to the class which predominate over any questions affecting only individual members." "Commonality cannot be determined by any 'mechanical test'" (*City of New York v Maul*, 14 NY3d 499, 514 [2010], quoting *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 97 [2d Dept 1980]). "[I]t is 'predominance, not identity or unanimity,' that is the linchpin of commonality" (*id.*, quoting *Friar*, 78 AD2d at 98). Plaintiffs have shown that common questions of law and fact regarding alleged violations of the Labor Law and the Hospitality Wage Order predominate over any questions affecting the individual class members (*see Button*, 187 AD3d at 630-631; *Maor v One Fifty Fifty Seven Corp.*, 169 AD3d 497, 497-498 [1st Dept 2019]). Defendants' argument that certification would require individualized analysis into whether each class member is an employee and whether each client contract included a mandatory administrative charge is unpersuasive (*see Maor*, 169 AD3d at 497-498 [granting class certification even though triable issues of fact exist whether plaintiffs were employees under Labor Law § 196-d]).

CPLR 901 (a) (3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Typicality is satisfied "[i]f it is shown that a

plaintiff's claims derive 'from the same practice or course of conduct that gave rise to the remaining claims of other class members and is based upon the same legal theory'" (*Pludeman*, 74 AD3d at 423]). Minor differences in each individual plaintiff's claims will not defeat typicality (*Williams v Air Serv Corp.*, 121 AD3d 441, 442 [1st Dept 2014]). The court finds that plaintiffs' claims are typical of the class.[2]

Under CPLR 901 (a) (4), a class representative must "fairly and adequately protect the interests of the class." The court must consider the "potential conflicts of interest between the representative and the class members, personal characteristics of the proposed class representative (e.g. familiarity with the lawsuit and his or her financial resources), and the quality of the class counsel" (*Cooper v Sleepy's, LLC*, 120 AD3d 742, 743-744 [2d Dept 2014] [internal quotation marks and citation omitted]; *Ackerman v Price Waterhouse*, 252 AD2d 179 [1st Dept 1998]). Plaintiffs have demonstrated they adequately represent the class based on their familiarity with the claims at issue (NYSCEF Doc No. 34 at 243; NYSCEF Doc No. 35 at 73; NYSCEF Doc No. 36 at 179). Furthermore, class counsel is intimately familiar with litigating similar class actions involving alleged Labor Law and Hospitality Wage Order violations.

CPLR 901 (a) (5) provides that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Plaintiffs have demonstrated that a class action is a superior method for fairly and efficiently adjudicating their disputes (*see Jim & Phil's Family Pharm. v Aetna U.S. Healthcare, Inc.*, 271 AD2d 281, 282 [1st Dept 2000] [granting certification because of the large class, the similarity of claims, and the potentially small recovery by each plaintiff]). It would be impractical to require each class member to commence a separate action or to join or consolidate those separate actions.

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[2] The court observes that neither Graham nor Spencer seek overtime compensation (NYSCEF Doc No. 35 at 126; NYSCEF Doc No. 36 at 153).

2. CPLR 902

The CPLR 902 factors also weigh in favor of class certification (*see Maor*, 169 AD3d at 497-498). It would be impracticable, not to mention inefficient, for the class and defendants to prosecute or defend individual actions in different venues arising from the same facts and causes of action. It would also conserve judicial resources to resolve the claims in a class action in the same venue. Moreover, it does not appear that this action would be difficult to manage as plaintiffs' counsel is intimately familiar with managing other class actions seeking damages for similar violations.

3. Publication

CPLR 904 (b) provide that "reasonable notice of the commencement of a class action shall be given to the class in such manner as the court directs." Here, plaintiffs propose mailing a copy of the Notice of Wage & Hour Class Action Lawsuit by first class mail to each class member and may "in their discretion" email same to each class member every Monday for eight consecutive weeks (NYSCEF Doc No. 38, Cohen affirmation, Ex J). Class counsel proposes publishing a copy of the Notice of Wage & Hour Class Action Lawsuit on its website, Facebook and social media pages. The proposed publication order directs defendants to produce to plaintiffs within 30 days the names of all individuals who performed work at the Venues from March 2012, along with their last known mailing and email addresses and telephone numbers and social security numbers. However, it does not appear that defendants are in possession of this information (NYSCEF Doc No. 45, ¶¶ 31-34). Thus, it would be futile to direct them to produce information that is not within their possession or control (*see Cornejo*, 2020 NY Slip Op 31618[U], *21). Indeed, plaintiffs concede that the class members may be identified through records maintained by third parties (NYSCEF Doc No. 73 at 32). Accordingly, the parties are

directed to meet and confer with each other on how best to proceed in collecting the names, last known mailing and email addresses, telephone numbers and social security numbers for the class members, and they shall discuss same with the court at the next conference, to be scheduled below.

Accordingly, it is

ORDERED that the part of the motion brought by plaintiffs Vincent Settecasi, Pamela Graham and Coree Spencer for class certification (motion sequence no. 001) is granted; and it is further

ORDERED that the certified class shall consist of "[a]ll individuals who performed work as servers, bartenders, or in related service positions during catered events held at Gotham Hall and/or Ziegfeld Ballroom between March 2012 and the present. The putative class does not include maintenance workers, corporate officers, salespersons, cooks, food preparers, chefs, dishwashers, directors, clerical, office workers or any other person whose trade, classification or profession does not customarily receive gratuities"; and it is further

ORDERED that the part of plaintiffs' motion seeking to appoint Leeds Brown Law, P.C. as class counsel is granted, and the Court hereby appoints Leeds Brown Law, P.C. as class counsel; and it is further

ORDERED that within 30 days after the date of this order with written notice of entry, the parties are directed to meet and confer and agree on how best to proceed in collecting the names, last known mailing and email addresses, telephone numbers and social security numbers for the class members; and it is further

ORDERED that the part of the motion seeking approval of a proposed Notice of Wage & Hour Class Action Lawsuit and a proposed publication order is denied with leave to renew, pending a further conference with the court; and it is further

ORDERED that the cross motion of defendants Gotham Hall, LLC, Gotham Hall Operating Entity, LLC, Core Ziegfeld, LLC d/b/a Ziegfeld Ballroom, Simon Auerbacher and Bruce A. Kurtz for summary judgment dismissing the first cause of action is denied; and it is further

ORDERED that the parties shall appear for a virtual status conference via Microsoft Teams on June 2, 2022 at 11:00 a.m.

4/13/2022
DATE

WILLIAM PERRY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE