SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

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DANILO MERA, AMIDOU ABOUDOU, CARLOS COCOLOTL, ERICK MARQUEZ, FIKRET USLU, HECTOR LOPEZ, MARIO SACRAMENTO, DAVID MELENDEZ, WILSON HERAS, MARIJA NIKCEVIC

Plaintiff,

- v -

MILOS HY, INC., MILOS, INC., CONSTANTINOS SPILIADIS, GEORGE SPILIADIS, COSTAS SPILIADIS, EVRIDIKI SPILIADIS, DAVID DANGOOR, IOANNA SOURIAS,

Defendant.

INDEX NO. 150880/2022

MOTION DATE 04/29/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. LORI SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for DISMISS.

Plaintiffs commenced this action on behalf of themselves and all non-exempt employees of two restaurants pursuant to Civil Practice Law and Rules ("CPLR") Article 9, seeking, *inter alia*, unpaid wages, damages, and reasonable counsel fees due to alleged violations of the New York Labor Law. Seven of the ten Plaintiffs also allege a hostile work environment in violation of the New York State Human Rights Law, Executive Law § 296, *et seq.* ("NYSHRL") and the New York City Human Rights Law, New York City Administrative Code § 8-107, *et seq.* ("NYCHRL"), and seek injunctive relief, back pay, damages, and counsel fees. After filing, Plaintiffs agreed to discontinue against the individually named defendants. The remaining defendants, Milos HY, Inc. and Milos, Inc. ("Defendants"), now move, pre-answer, to dismiss the complaint in its entirety. Plaintiffs oppose the motion.

BACKGROUND

Defendants operate two Greek restaurants in New York County under the name Estiatorio Milos. According to the Complaint, Defendant Milos HY, Inc. operates a location in Hudson Yards, while Defendant Milos, Inc. runs a restaurant at 125 West 55th Street. Plaintiffs are former servers, bussers, bartenders, or runners who worked at the two restaurants at varying times between February 2019 and March 2020 (Complaint, ¶¶ 34-43). According to the Complaint, all Plaintiffs worked at the Hudson Yards location, except that Plaintiff Aboudou worked at the 55th Street location (*id.*) and Plaintiff Lopez trained at the 55th Street location (*id.* at ¶ 39[b]).

Labor Law Claims

Plaintiffs bring their Labor Law claims on behalf of themselves and all non-exempt employees, "including but not limited to bartenders, barbacks, servers, bussers, runners, cooks, line cooks, porters, and dishwashers" employed by Defendants within six years of the filing of the Complaint (*id.* ¶ 24). They further assert that the proposed class must include a subclass of tipped employees, of which all named Plaintiffs are a part (*id.* ¶ 26, 28).

Plaintiffs allege that throughout their employment, Defendants engaged in "time shaving," resulting in Plaintiffs and all prospective class members not being paid for time worked. Specifically, Plaintiffs claim that Defendants required employees to work through their thirty-minute unpaid meal breaks (*id.* ¶ 44).

Plaintiffs further allege on behalf of the proposed subclass of tipped employees that Defendants claimed a tip credit for all hours these employees worked even where they engaged in non-tipped duties that exceeded twenty percent of their total hours worked in violation of the Labor Law (*id* ¶ 28, 45). Plaintiffs further allege Defendants mandated participation in a tip pool

which improperly included managers and non-tipped employees (*id.* ¶ 28, 45). Plaintiffs claim that managers working at Defendants' restaurants included employees that were ineligible to participate in tip pooling (*id.* ¶ 46), and that Defendants also illegally retained tips (*id.* ¶ 28, 45).

Finally, Plaintiffs allege that because of these practices, Defendants failed to comply with certain notice requirements. They claim on behalf of all putative class members that, as a result of Defendants requiring employees to work through unpaid meal breaks, Defendants failed to provide accurate wage statements accompanying their paychecks (*id.* ¶ 28, 45, 48). They allege Defendants failed to provide an accurate tip credit notice and maintain accurate records of daily tips earned due to the purportedly invalid tip pooling arrangement (*id.* ¶ 28, 45).

Hostile Work Environment Claims

Seven of the ten Plaintiffs allege, as the Complaint's Second and Third Causes of Action, that Defendants created a hostile work environment due to race, national origin, and, in the case of one Plaintiff, sexual orientation, in violation of NYSHRL and NYCHRL.[1]

The Complaint alleges that these Plaintiffs experienced an environment where the managers and employees of Greek national origin referred to the non-Greek employees by country of origin rather than their names and regularly denigrated them for their race and ethnicities (Complaint ¶ 49[b], 50[b], 51[b], 52[b], 53[b], 54[b], 55[b]). The Complaint specifies that Greek employees "regularly" called employees from Latin American countries phrases including "'Pinche Ecuatoriano' which translates to 'Fucking Ecuadorian,'" "Fucking Mexican" and "Speak English Only," and said similar comments including "Do this now, you Mexican"

[1] To the extent the Complaint could be read as alleging discrimination claims pursuant to the NYSHRL and NYCHRL, Plaintiffs concede in their opposition papers that their claims allege a hostile work environment only (NYSCEF Doc. No. 23, Plaintiffs' Memorandum of Law in Opposition, 19).

(*id.*). Plaintiff Aboudou, who is from Benin, claims a sous chef called him "Zamunda," a fictional African country from the movie "Coming to America" (*id.* ¶ 50[b]). Additionally, Plaintiff Mera, who is gay, states he was also called "Señiorita;" "Pumitero," which he states is a slur; and was told to "come here young lady" (*id.* ¶ 49[d]).

The Complaint alleges that one Plaintiff was told by a Greek employee: "We are more developed than you. We are the first people who adapted architecture and sculptures," (*id.* ¶ 52[c]) and that a Greek manager told another Plaintiff "Greeks are more intelligent than Hispanics" (*id.* ¶ 55[b]). The Complaint alleges that the same employees would speak to Greek employees "professionally and with respect, with no offensive slurs or remarks" (*id.* ¶ 51[b]).

These Plaintiffs further contend that Greek employees were given less work overall and more favorable assignments than non-Greek employees (*id.* ¶ 49[c], 50[d], 51[c], 52[d], 53[c], 54[c], 55[d]). The Complaint alleges they were required to move chairs from storage, take out the garbage, clean bathrooms, polish silverware and glassware, and other such tasks and that Greek employees were never required to perform these functions (*id.*).

Plaintiffs alleging these causes of action claim they could not complain about the hostile work environment because managers took part in and contributed to the environment (*id.* ¶ 49[e]). Plaintiff Marquez claims his employment was terminated for participating in an earlier federal action involving similar claims, which has since been discontinued (*id.* ¶ 52[e]). Plaintiffs specifically name the general manager Stefan, and managers CK, Zaki, Anastacios Tzimas and Slavo Ljub, as actively participating in the behavior creating a hostile work environment (*id.* ¶ 53[d], 56).

DISCUSSION

Defendants move, pre-answer, to dismiss the Complaint in its entirety pursuant to CPLR 3211(a)(1) and (7). They argue that the Complaint's Labor Law claim contains "boilerplate," "kitchen sink" allegations that are "nothing more than legal conclusions," and to the extent they plead specific facts, those can be rebutted by documentary evidence. They further assert that in the event Plaintiffs' Labor Law claims are not dismissed for failure to state a cause of action, the Court should find that Plaintiffs are unable to pursue those claims on a class basis in accordance with CPLR § 901(b). With respect to the NYSHRL and NYCHRL causes of action, they contend the Complaint fails to include any facts suggesting the comments pled were repeated and continuous, and "offers nothing more than stray remarks" insufficient to support a claim.

"In considering a motion to dismiss for failure to state a claim [pursuant to CPLR 3211(a)(7)], the court is required to accept as true the facts as alleged in the complaint, afford the plaintiff the benefit of every favorable inference and strive to determine only whether the facts alleged fit within any cognizable legal theory" (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 144-145 [1st Dept 2009], *citing Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). Nevertheless, "conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss" (*Godfrey v Spano*, 13 NY3d 358, 374 [2009], citing *Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233-234 [1st Dept 1994]).

Dismissal sought pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]; *see also Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]. "Factual affidavits . . . do not constitute documentary

evidence within the meaning" of CPLR 3211(a)(1) (*Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014]).

Labor Law Claims

The Complaint's first cause of action for violation of the Labor Law is threefold. First, Plaintiffs allege Defendants adopted what the Complaint refers to as a policy of "time shaving" by requiring them to work through unpaid meal breaks. Second, Plaintiffs allege Defendants violated tipping regulations by requiring tipped employees to perform non-tipped work for more than twenty percent of their shifts, adopted a violative tip-pooling scheme, and illegally retained tips. Third, Plaintiffs allege that because Defendants failed to properly compensate them, the tip credit notices, wage statements, and tip record-keeping required by the Labor Law were inaccurate.

Time Shaving

Defendants seek to dismiss Plaintiffs' time shaving claim, arguing that the Complaint's "conclusory reference to 'time shaving'" without identifying the mechanics and specifics of the purported conduct does not state a cause of action under the Labor Law.

Labor Law § 193 prohibits employers from making any deduction from an employee's wages other than those permitted by statute or expressly authorized by the employee. Courts have found that complaints that sufficiently pled time shaving have stated a cause of action under Labor Law § 193 (*see, e.g., Ackerman v New York Hosp. Med. Ctr. of Queens*, 127 AD3d 794 [2d Dept 2015] [Plaintiff stated a claim under § 193 where employer's timekeeping system rounded down to the nearest quarter-hour when employees worked past their scheduled shift]; *Brown v S. Nassau Communities Hosp.*, 2019 NY Slip Op 32239(U) [Sup Ct, New York County 2019] [Bannon, J.] [Plaintiff stated a § 193 claim against an employer deducting "lunch hour"

wages when the employee worked through lunch]; *see also Ryan v Kellogg Partners Institutional Servs.*, 19 NY3d 1, 16 [2012] [withholding of non-discretionary bonuses "expressly linked" to labor and services rendered violates the Labor Law]).

As to the sufficiency of the pleadings, CPLR 3013 requires: "Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense" (*see also Cuervo v Opera Solutions LLC*, 87 AD3d 426, 428 [1st Dept 2011] [Moscowitz, J. concurring in part] ["To state a claim under Labor Law § 193, plaintiff must allege a specific deduction from wages."]). Here, the Complaint states: "Throughout their employment with Defendants, Plaintiffs had thirty (30) minutes automatically deducted for a meal break. However, Plaintiffs were required to work through their meal breaks so they were unable to take any free and clear breaks. Class Members similarly had thirty (30) minutes automatically deducted from their wages for a meal break" (Complaint ¶ 44). The Court finds that the Complaint is sufficiently pled so as to give Defendants and the court notice of the transactions and occurrences intended to be proved (*see Ackerman*, 127 AD3d at 795-796) and does state a claim under Labor Law § 193.

Defendants also seek to dismiss on the grounds that they have documentary evidence to rebut Plaintiffs' time shaving claims. In support of their motion, Defendants annex an affidavit of Marios Zeniou, a restaurant manager at the Hudson Yards Milos, who states:

> From its opening, Milos required staff to record their hours worked, including meal breaks, and paid staff based on those records. A sample time record for Plaintiff Mera is attached as Exhibit 2 to this declaration. The restaurant can provide the complete set of time records; this example is submitted to rebut the allegation that time shaving occurred or that time records were in any way modified.

(NYSCEF Doc. No. 16, Defendants' Exhibit D, ¶ 5). The "sample" time record indicates that Mera worked six days during the period of March 25, 2019 to April 1, 2019, and in that time clocked out for an approximately thirty-minute period during the middle of each shift. Defendants assert that this time record demonstrates that employees were paid for all hours worked.

Defendants fail to present documentary evidence conclusively establishing a defense to Plaintiffs' claims. The Court finds that records from one employee for one week are insufficient to conclusively establish a defense to the claims alleged by all Plaintiffs and on behalf of all putative class members. Moreover, accepting the allegations set forth in the Complaint as true, the practice Plaintiffs claim to have experienced would not be reflected on employee timecards.

Tip-Related Claims

On behalf of themselves and a putative subclass of tipped workers, Plaintiffs allege that Defendants claimed a tip credit for all hours worked despite having caused tipped employees to engage in non-tipped duties exceeding twenty percent of the total hours worked each workweek; implemented an invalid tip pooling scheme in which managers and non-tipped employees received tips from the pool; and illegally retained tips.

As set forth in the New York State Department of Labor's Hospitality Industry Wage Order, codified at 12 NYCRR § 146, *et seq.*, every employer in the hospitality industry must pay to each employee at least the minimum wage rates provided for by law (§ 146-1.1[a]). Large employers in New York City are entitled to deduct a specified amount constituting a tip credit from the hourly wages of food service workers, provided that the total of tips received plus the wages equals or exceeds the minimum wage rate (§ 146-1.3[b][1][i]). Employers are not entitled

to deduct a tip credit for any day in which an employee spends more than twenty percent of that day's shift in a "non-tipped" capacity (§ 146-2.9).

Defendants argue that Plaintiffs have not pled a cause of action that Defendants violated what they refer to as "the twenty percent rule" because "while [Plaintiffs] claim that they performed certain 'non-tipped' duties, none of them assert *any* specific instance in which they actually did so for a specific period. Further, this generalized allegation fails to state how or why such work fell outside the tipped occupation in question" (NYSCEF Doc. No. 21, Defendants' Memorandum of Law in Support, at 11 [Emphasis in original]). In opposition, Plaintiffs argue their allegation is a specific factual claim based on their first-hand experiences, and that they are not required to plead with more specificity than they have or, for example, keep logs of their tipped and non-tipped work. The Complaint alleges that Plaintiffs and the proposed subclass of tipped workers were "required to perform substantial non-tipped activities including, but not limited to, sweeping the floor, throwing out garbage, polishing dishes, silverware, and glassware, cutting bread, filling up oil batters, bringing water, filling up ice, preparing napkins and setting up tables. Plaintiffs and the Tipped Subclass would spend well in excess of twenty (20) percent of their workday performing non-tipped activities" (Complaint ¶ 47).

Neither Plaintiffs nor Defendants cite any state court decisions discussing sufficiency of pleadings when alleging a violation of New York's "twenty percent rule." In the federal context, courts have held that a complaint states a Fair Labor Standards Act minimum wage claim where it "plausibly allege[s]" that an employee in a tipped occupation performed related non-tipped duties more than twenty percent of a work week, and the employer claimed the tip credit for all hours worked (*Flood v Carlson Rests., Inc.*, 94 F Supp 3d 572, 584-585 [SD NY 2015] [internal

citations omitted]). The Court finds that Plaintiffs here have plausibly alleged a violation of the twenty percent rule sufficient to survive a motion to dismiss.

Turning to Plaintiffs' tip pooling allegations, Defendants argue that the Complaint fails to plead facts suggesting the tip pool was improper. They contend that the Complaint fails to assert the identities of those they contend improperly participated in the pool and why they were ineligible, therefore Plaintiffs' claims regarding the tip pool should be dismissed. The Complaint alleges that "Plaintiffs observed managers and supervisors improperly taking tips from the tip pool. Furthermore, managers included non-eligible employees, such as sommeliers and baristas into the tip pool" (¶ 46).

Employers are permitted to require tip pooling among food service workers (12 NYCRR §§ 146-2.14, 146-2.16). Section 146-2.14(e) provides: "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." Pursuant to Labor Law § 196-d, other than proper deduction of a tip credit, employers are prohibited from directly or indirectly demanding, accepting, or retaining any employee gratuities (*see also* 12 NYCRR § 146-2.16[b]["An employer may require food service workers to participate in a tip pool and may set the percentage to be distributed to each occupation from the tip pool. *Only food service workers may receive distributions from the tip pool*." (Emphasis added)]).

In support of their motion to dismiss, Defendants contend that all tip pool participants at their restaurants during the period in question were permitted by law to participate. Defendants focus on the requirement that tip pool eligibility be "based upon duties and not titles" (§ 146-

2.14[e]) They further rely on *Barenboim v Starbucks Corp.*, 21 NY3d 460, 471-472 (2013), in which the Court of Appeals held that "employer-mandated tip splitting should be limited to employees who, like waiters and busboys, are ordinarily engaged in personal customer service, a rule that comports with the 'expectation[s] of the reasonable customer'" (quoting *Samiento v World Yacht Inc.*, 10 NY3d 70, 79 [2008]). It concluded that "the line should be drawn at meaningful or significant authority or control over subordinates" (*Barenboim*, 27 NY3d at 473).

Accepting the allegations in the Complaint as true and affording Plaintiffs every possible inference, their allegations that they "observed managers and supervisors improperly taking tips from the tip pool" and including non-eligible tip employees in the tip pool fits within a cognizable legal theory that violates the Labor Law. At this pre-answer, pre-discovery stage, a determination that all employees who received tips from Defendants' tip pool were eligible to do so would be premature. Likewise, Plaintiffs' allegation that managers improperly retained tips, based on their claim that they "consistently received a similar number of tips every week, regardless of how slow or busy the restaurants were" (Complaint ¶ 46) states a cause of action.

Tip Credit Notice, Wage Statement, and Record-Keeping Requirements

Defendants also seek to dismiss Plaintiffs' claim that Defendants' tip credit notices, wage statements, and tip records were inaccurate and therefore violate Labor Law § 195(1), $195(3), and 12 NYCRR § 146-2.17 respectively.

Labor Law § 195(1) requires employers to provide employees with a written statement of, *inter alia*, their rate of pay, including notice of deduction of a tip credit, at the time of hire (*see also* 12 NYCRR § 146-2.2). Labor Law § 195(3) requires employers to furnish each employee with a wage statement along with every payment of wages, which must include, *inter alia*, the date of work covered by that payment of wages; the rates of pay and basis thereof; gross

wages; deductions; and allowances, if any, claimed as part of the minimum wage (*see also* 12 NYCRR § 146-2.3). Employers operating tip pools are required to maintain tip pooling records, which must be preserved for at least six years and be made available for participants to review (12 NYCRR § 146-2.17).

An actionable claim under § 195(3) must allege that a defendant failed to provide a statement that included the information enumerated in those sections (*see Tezoco v GE & LO Corp.*, 199 AD3d 541 [1st Dept 2021]; *Davis v Carlo's Bakery 42nd & 8th LLC*, 2022 NY Slip Op 31876[U], *5-*6 [Sup Ct, New York County 2022] [Billings, J.]). Further, Labor Law §§ 198(1-b) and 198(1-d) specifically provide for remedies in the event an employee "is not provided with" the required notice and statements.

The Complaint alleges: "At all relevant times, Defendants failed to provide Plaintiffs and Class Members with proper wage statements with each paycheck, as required under the NYLL, as they did not provide for their proper compensation due to Defendants' policy of time-shaving and utilization of an invalid tip pool" (¶ 48). In their papers, they elaborate: "the time-shaving plausibly alleged by Plaintiffs plainly invalidates the wage statements, because these, therefore, do not accurately reflect the actual hours that Plaintiffs worked" (NYSCEF Doc. No. 23, Plaintiffs' Memorandum of Law in Opposition, at 14).

Based on the foregoing, Plaintiffs appear to concede they received tip credit notices and wage statements, even if they were, according to them, inaccurate. Accordingly, they cannot maintain a cause of action based on § 195(3) (*see Davis*, 2022 NY Slip Op 31876[U], at *6 ["The statute provides a remedy only for enumerated omissions from defendants' wage statements, not for potentially inaccurate information."]). Plaintiffs' claims that Defendants

failed to provide tip credit notices pursuant to § 195(1) and maintain tip records in accordance with 12 NYCRR § 146-2.17 fail for the same reasons.

Accordingly, Defendants' motion to dismiss Plaintiffs' Labor Law claims is denied, except as to Plaintiffs' claims pursuant to Labor Law §§ 195(1) and 195(3) and 12 NYCRR § 146-2.17, which is granted.

Class Claims

Defendants contend that in the event Plaintiffs' Labor Law claims are not dismissed for failure to state a cause of action, the Court should find Plaintiffs are precluded by CPLR § 901(b) from pursuing these claims on behalf of a class because the Complaint seeks liquidated damages. It is generally "premature to dismiss class action allegations before an answer is served or precertification discovery has been taken" (*Griffin v Gregory's Coffee Mgt. LLC*, 191 AD3d 600 [1st Dept 2021], quoting *Downing v First Lennox Terrace Assoc.*, 107 AD3d 86, 91 [1st Dept 2013], *affd* 24 NY3d 382 [2014]). To succeed on a pre-certification motion to dismiss, a defendant must conclusively show that there is no basis for class action relief as a matter of law (*Griffin*, 191 AD3d at 601).

CPLR § 901(b) provides: "[u]nless a statute creating or imposing a penalty . . . specifically authorizes the recovery thereof in a class action, an action to recover a penalty . . . created or imposed by statute may not be maintained as a class action." Labor Law § 198 allows for statutory and liquidated damages where an employee prevails in an action instituted upon a wage claim, but the statute does not expressly authorize the recovery of liquidated damages in a class action. Courts have held that liquidated damages in this context constitute a penalty and therefore cannot be sought on behalf of a class (*Carter v Frito-Lay, Inc.*, 74 AD2d 550, 551 [1st Dept 1980], *affd* 52 NY2d 994 [1981]; *Ballard v Community Home Care Referral Serv.*, 264

AD2d 747 [2d Dept 1999]; *Griffin v Gregory's Coffee Mgt. LLC*, 2019 NY Slip Op 31125[U], *4-*5 [Sup Ct, New York County 2019] [Freed, J.]). Nevertheless, a plaintiff can avoid application of CPLR § 901(b) by waiving the right to seek penalties (*see, e.g., Cox v Microsoft Corp.*, 8 AD3d 39, 40 [1st Dept 2004], citing *Ridge Meadows Homeowners' Assn., Inc. v Tara Dev. Co., Inc.*, 242 AD2d 947 [4th Dept 1997]; *Super Glue Corp. v Avis Rent A Car Sys., Inc.*, 132 AD2d 604, 606 [2d Dept 1987]). Such waiver may occur either in the complaint itself or in the motion for class certification (*Chaney v Hermes of Paris, Inc.*, 2018 NY Slip Op 33255(U), *6 [Sup Ct, New York County 2018] [Bransten, J.], citing *Borden v 400 E. 55th St. Assoc., L.P.*, 34 Misc3d 1202[A] [Sup Ct, New York County 2013] [Gische, J.]).

The Complaint alleges that Plaintiffs, both as individuals and on behalf of all putative class members, are entitled to recover unpaid wages, damages for unreasonably delayed payments, statutory penalties, liquidated damages, and reasonable counsel fees and costs and disbursements (Complaint ¶ 1, 24, 63). While Defendants contend the inclusion of liquidated damages precludes Plaintiffs' class action claims, that finding is premature. "Once Plaintiffs have had an opportunity to conduct discovery and develop a factual record, they may then decide whether to pursue class certification and waive certain remedies or to pursue those remedies" (*Chaney*, 2018 NY Slip Op 33255[U], *6). Defendants therefore fail to conclusively show that there is no basis for class action relief as a matter of law.

Hostile Work Environment Claims

Defendants additionally move to dismiss the Complaint's second and third causes of action alleging a hostile work environment on behalf of seven of the ten Plaintiffs. Defendants argue the Complaint fails to plead facts suggesting that the conduct alleged in the Complaint were repeated and continuous, or that any group was treated better than Plaintiffs because of

their race, ethnicity or national origin. Defendants contend that, "at best, the Complaint offers nothing more than stray remarks which are not sufficiently sever or pervasive to support a claim at law" (NYSCEF Doc. No. 21, Defendants' Memorandum of Law in Support, at 19).

A hostile work environment within the meaning of the NYSHRL exists when "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 310 [2004], quoting *Harris v Forklift Sys., Inc.*, 510 US 17, 21 [1993]; *see also Chin v New York City Hous. Auth.*, 106 AD3d 443, 445 [1st Dept 2013]). "Isolated remarks or occasional episodes of harassment will not support a finding of a hostile or abusive work environment" (*Ferrer v New York State Div. of Human Rights*, 82 AD3d 431 [1st Dept 2011], quoting *Matter of Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d 44 [4th Dept 1996], *lv denied* 89 NY2d 809 [1997]).

Plaintiffs asserting a hostile work environment pursuant to the broader NYCHRL need not show that the conduct was "severe or pervasive," only that they were treated less well than other employees because of their protected status (*Franco v Hyatt Corp.*, 189 AD3d 569 [1st Dept 2020]; *Hernandez v Kaisman*, 103 AD3d 106, 113-114 [1st Dept 2012]). They will not succeed, however, if the conduct complained of consists of nothing more than "petty slights and trivial inconveniences" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 80 [1st Dept 2009]). Furthermore, the lack of discriminatory animus is fatal to a cause of action for hostile work environment (*Pelepelin v City of New York*, 189 AD3d 450, 451-452 [1st Dept 2020]; *Llanos v City of New York*, 129 AD3d 620 [1st Dept 2015]).

Plaintiffs succeed in stating a claim of hostile work environment under both the NYSHRL and the NYCHRL. Plaintiffs have sufficiently pled facts that, accepted as true as the Court must when deciding a motion to dismiss, show they did not merely experience isolated remarks or occasional episodes of harassment but that the conduct complained of was severe and pervasive enough to alter their working conditions. The Complaint also pleads facts indicating that Plaintiffs were treated less well than employees of Greek national origin, and the conduct alleged cannot be said to be "nothing more than petty slights or trivial inconveniences."

Contrary to Defendants' contention, Plaintiffs' allegations are not conclusory or unparticularized. All seven of the Plaintiffs asserting a hostile work environment claim detailed specific comments made in the workplace during a fourteen-month period, sometimes naming supervisors who made the remarks, and specifically state how they were treated less well than employees who were of a different country of national origin, i.e., that they were required to performing the less favorable tasks of moving chairs from a different floor, taking out the garbage, cleaning bathrooms, and cleaning silverware and glassware, while the Greek employees were not. Accordingly, Defendants' motion to dismiss Plaintiffs' second and third causes of action is denied.

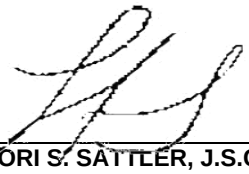
Accordingly, for the reasons set forth herein it is hereby:

ORDERED that Defendants' motion to dismiss the First Cause of Action is denied except as to Plaintiff's claims regarding improper tip credit notices, wage statements, and tip record keeping which is granted as set forth herein; and it is further

ORDERED that Defendants' motion to dismiss the Second and Third Causes of Action is denied; and it is further

ORDERED that Defendants shall file and serve via NYSCEF an Answer to the Complaint within 20 days of service of a copy of this Decision and Order with Notice of Entry.

This constitutes the Decision and Order of the Court.



10/12/2022
DATE

LORI S. SATTLER, J.S.C.

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