Little v Hartz Hotel Servs., Inc.
2023 NY Slip Op 33649(U)
October 16, 2023
Supreme Court, New York County
Docket Number: Index No. 155998/2022
Judge: Dakota D. Ramseur
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR **PART** 34M

Justice

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ADRIAN LITTLE,

Plaintiff,

- v -

HARTZ HOTEL SERVICES, INC.,TRIBECA GRAND HOTEL, INC.,SOHO GRAND HOTEL, INC.,CONSTANTINO MILANO, 320 WEST BROADWAY DINER CORP. D/B/A SOHO DINER

Defendant.

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INDEX NO. 155998/2022

MOTION DATE 07/12/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 33, 34, 35, 36, 37, 38

were read on this motion to/for DISMISSAL.

In July 2022, plaintiff Adrian Little commenced this class action against defendants Hartz Hotel Service, Tribeca Grand Hotel, Inc., d/b/a the Roxy Hotel, Soho Grand Hotel, Constantino Milano, and 320 West Broadway Diner Corp, d/b/a Soho Diner. Plaintiff, a former employee at the Roxy Hotel and Soho Grand Hotel, alleges that the defendants operate as part of a single integrated enterprise and that their tip and wage policies violate several the New York Labor Law provisions. In this motion sequence, defendants move pre-answer to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (a) (7). Plaintiff opposes. For the following reasons, defendants' motion is granted in part.

BACKGROUND

The Roxy Hotel employed plaintiff as a server in its restaurant on 6th Avenue from September 2017 through October 2017; thereafter, from November 2019 through January 2020, plaintiff was employed as a server at the Soho Grand Hotel's restaurant on West Broadway. Plaintiff alleges that, during his employment, defendants' tip and wage policies violated provisions of Title 12 of the New York Code, Rules, and Regulations Law, which governs compensation for service work, and Article 6 of the New York Labor Law. Under §146-1.3 of the code, an employer may pay service workers at a rate that is lower than the basic minimum hourly rate (a practice known as taking a "tip credit") so long as its workers receive a tip-inclusive wage that is equal to or greater than the minimum hourly rate and only after providing notice of the amount of credit taken prior to the start of employment. (*See* 12 NYCRR §146.1.3 [a], §146-2.2 [a].) Meanwhile, where an employee does both tipped and non-tipped work on a given shift, §146-2.9 prohibits their employer from claiming a tip credit where the non-tipped work is either (a) for two or more hours or (b) for more than twenty percent of their shift

(whichever is less). (12 NYCRR § 146-2.9.) Here, plaintiff alleges that the tip-inclusive wage he received at the Roxy Hotel and Soho Grand Hotel did not meet or exceed the minimum wage (NYSCEF doc. no. 20 at ¶ 30, 44, amended complaint) and that he was required to work more than twenty percent of his shift performing non-tipped activities, including setting up the restaurant's tables and furniture, cleaning the tables before opening, polishing silver and glassware, rolling up napkins, preparing bowls of fruit for guests, and, at the end of a shift, closing the restaurant. (*Id.* at ¶ 35.)

Under New York Labor Law § 195 [1], employers are required to provide their employees (at the time of their hiring) notice of, among other things, the rate of pay, whether paid per hour, a salary, or commission, etc., and any allowances claimed as part of the minimum wage, including any tip allowances; similarly, under § 195 [3], employers are required to furnish employees with a wage statement with every payment of wages, listing the rate of pay and any allowances taken. (NYLL § 195 [1], [3].) Plaintiff avers that defendants failed to provide him with a notice of their claimed tip credits before he started work in September 2017 and November 2019 and that they never provided wage statements. (NYSCEF doc. no. 20 at ¶33, 34, 46, and 47.) Lastly, plaintiff alleges that, in violation of New York Labor Law § 196-d, which defendants allowed its managers, including one named Arten [LNU], to pocket tips belonging to tipped employees. (*Id.* at ¶31.)

Plaintiff commenced this action on behalf of "all non-exempt employees (including but not limited to cooks, food preparers, dishwashers, porters, waiters, bussers, food runners, dishwashers, bartenders, barbacks, and room-service attendants) employed by Defendants on or after the date that is six (6) years before the filing of the Complaint in this case."

In this motion sequence, defendants have moved to dismiss, pre-answer, pursuant to CPLR 3211 (a) (1) and (a) (7).

DISCUSSION

On a motion to dismiss under CPLR 3211 (a) (1), courts may grant such relief only where the "documentary evidence" is of such nature and quality—"unambiguous, authentic, and undeniable"—that it utterly refutes plaintiff's factual allegation, thereby conclusively establishing a defense as a matter of law. (*See Phillips v Taco Bell Corp.*, 152 AD3d 806, 806-807 [2d Dept 2017]; *VXI Lux Holdco S.A.R.L v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019 ["A paper will qualify as 'documentary evidence' if…(1) it is 'unambiguous,' (2) it is of 'undisputed authenticity,' and (3) its contents are 'essentially undeniable'"].) The First Department explained that the documentary evidence must "definitely dispose of the plaintiff's claim." (*Art & Fashion Group Corp. v CyclopsProd., Inc.* 120 AD3d 436, 438 [1st Dept 2014].)

On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), courts afford the pleadings a liberal construction, accept the facts as alleged in the complaint as true, and give the plaintiff the benefit of every possible favorable inference. (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015].) A court's inquiry is limited to assessing the legal sufficiency of the plaintiff's pleadings—that is, whether or not the facts set forth by the plaintiff sufficiently apprise the court

and the defendants of the transactions and/or occurrences that make up the material elements of a cause of action. (*See* CPLR 3013.) Accordingly, the Court's only function is to determine whether the facts as alleged fit within a cognizable legal theory. (*JF Capital Advisors*, 25 NY3d at 764.)

CPLR 901 (b)—Statutory Penalties

CPLR 901 (b) provides, "Unless a statute creating or imposing a penalty…specifically authorizes the recovery thereof in a class action, an action to recover a penalty…may not be maintained as a class action." Defendants contend that plaintiff's class action must be dismissed because he seeks to recover statutory penalties for defendants' alleged violation of Labor Law §195 (1) and (3) even though the statute does not specifically authorize their recovery through a class action suit. Defendants' argument has no merit. Where a statute imposes nonmandatory penalties, courts permit plaintiffs to waive any right to the penalty so that they may bring the claim as a class action. (*Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 394 [2014]; *Gudz v Jemrock Realty Co., LLC*, 105 AD3d 625, 625 [1st Dept 2013] ["Plaintiff's rent overcharge claim did not seek a "penalty" within the meaning of CPLR 901 [b] because she waived her right to treble damages."]) Here, plaintiff's amended complaint explicitly seeks statutory penalties and liquidated damages on an individual basis and only if the Court denies class certification. (NYSCEF doc. no. 20 at 11.) Should the Court grant class certification, plaintiff acknowledges that he expressly waives the right to seek either a penalty or liquidated damages. (*Id.*) Accordingly, defendants are not entitled to dismissal on this ground.

Dismissal of Complaint Against Non-Tipped Employees

Defendants argue that all of plaintiff's allegations—the failure to pay a tip-inclusive minimum wage, the failure to provide notice of a tip credit and related wage statements, and the policy allowing managers to retain employee tips—relate to workers who receive a tip-inclusive wage and not to defendants' non-tipped workers. Accordingly, defendants seek to exclude from the potential class all non-tipped employees. (NYSCEF doc. no. 29 at 12, def. memo of law.) Plaintiff does not oppose this branch of the motion, conceding that his amended complaint does not allege violations against non-tipped workers. Accordingly, this branch of the motion is granted. Further, although plaintiff recommends that the Court dismiss without prejudice class claims for "back of the house employees (e.g., line cooks, cooks, preparers, etc.)," the Court instead (and as argued by defendants) dismisses without prejudice class claims for all "non-tipped employees."

Dismissal of Plaintiff's Minimum Wage and Tip-Retention Claims

Defendants next contend that plaintiff has not sufficiently pled facts demonstrating it committed tip violations. More specifically, it argues that (1) "documentary evidence (plaintiff's wage notice and paystubs) conclusively shows that throughout his employment… [plaintiff's] tipped hourly rate met, or exceeded, the requirements of the NYLL and 12 NYCRR § 146-1.3" (*id.* at 14), (2) the complaint does not plead facts from which the Court can infer in which

specific weeks plaintiff's compensation fell below the minimum wage[1] (*id.* at 12; NYSCEF doc. no. 35 at 8, reply memo of law), and (3) "other than claiming that Plaintiff performed activities he characterizes as 'non-tipped,' the [complaint's] generalized allegations fail to state how or why such work fell outside the scope of the tipped occupation" (*id.* at 17). None are persuasive.

First, defendants do not provide the court with any of plaintiff's paystubs that attest to whether his tip-inclusive wage met or exceeded the minimum wage throughout his employment. As such, defendants are not entitled to dismissal pursuant to CPLR 3211 (a) (1) on his 12 NYCRR § 146-1.3 claim. Second, as to whether plaintiff adequately pled that he did not receive the minimum wage, New York uses a liberal, notice pleading standard (*see Leon v Martinez*, 84 NY2d at 87; CPLR 3013), which plaintiff met by simply alleging from September-October 2017 and from November 2019-January 2020 that he did not, at all times, receive a tip-inclusive minimum wage. Since the Court must accept this allegation as true, and since there is no requirement that plaintiff provide specific dates or specific weeks. Accordingly, the Court finds his minimum-wage cause of action adequately pled. Third, again, New York only requires a plaintiff to plead facts that put the defendants on notice of the transactions and occurrences that make up the material elements of a cause of action. Under this standard, plaintiff's 12 NYCRR §146-2.9 claim is adequately pled since he describes, in detail, the various tasks that comprised non-tipped work. Requiring plaintiff "to state how and or why such work fell outside the scope of the tipped occupation," as defendants argue, would place an additional pleading burden not required under the CPLR 3211 or 3013.

As to plaintiff's Labor Law § 196-d claim that defendants permitted its managers to retain its employees' tips, defendants contend that a violation of this section does not invalidate the tip credit it took from plaintiff's wages. Accordingly, from this perspective, since the tip credit was at all times properly taken, plaintiff is not entitled to seek them as part of his demand for compensatory damages.

Courts confronted with this issue have reached opposite conclusions. On one hand, courts have found that an employer forfeits its right to claim a tip credit when it violates § 196-d (*see Lu v Jing Fong Rest., Inc.*, 503 F Supp 2d 706, 711 [SDNY 2007] ["This separate violation of § 196-d would render [defendant] ineligible to receive a tip credit under New York law"]; *Copantitla v Fiskardo Estiatorio, Inc.*, 788 F Supp 253, 291 [SDNY 2011]; *Chowdhury v GK Grill LLC*, 2015 NY Slip Op 301169 [U] at *6 [Sup. Ct. NY County 2015] ["Plaintiffs have provided legal support for the proposition that, under appropriate circumstances, employers can be ordered to repay a tip credit to its employees, as part of compensatory relief"]; *Gomez v MLB Enters., Corp.*, 2018 US Dist. LEXIS 96145 at *19 [SDNY 2018] ["Defendants also forfeited their right to take a tip credit under the NYLL. As with the Fair Labor Standards Act, an employer loses its entitlement to the NYLL's tip credit if it improperly retains an employee's tips"]); on the other hand, courts have found that an employer's tip credit remains unaffected by a § 196 violation (*see Murphy v Lajaunie*, 2016 US Dist LEXIS 37137 at *20-21 [SDNY 2016] [finding that § 196-d's plain language and a New York Department of Labor's guidance letter support the conclusion "that an employer's violation of Section 196-d does not entitle employees

[1] In both their moving and reply papers, defendants also contend that plaintiff did not allege that his wage failed to meet the minimum wage. However, as mentioned *supra* at 2, this is directly refuted in paragraphs 30, 37, and 44 of plaintiff's first amended complaint. (NYSCEF doc. no. 20.)

to recover tip credits as damages"], citing *Schear v Food Scope Am., Inc.*, 2014 US Dist 3454 at *50-51 [SDNY 2014].) Neither the Court of Appeals nor any Appellate Division has addressed this issue.

The Court finds the Southern District of New York's rationale in *Murphy v Lajaunie* persuasive. There, the Court held that § 196-d's language—that "nothing in [§ 196-d] 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"—unambiguously precluded plaintiff's recovery of the claimed tip credit. (2016 US Dist. LEXIS 37137 at *17.) The court contrasted the "nothing shall be construed as affecting allowances from the minimum wage"-language in § 196-d with the Fair Labor Standards Act section governing tip credits. In § 203 (m), the FLSA explicitly conditions an employer's right to claim a tip credit on whether the employer provides notice and whether "all tips received by such employing have been retained by the employee." (29 USC §203 [m] [2] [A].) There is no equivalent in § 196-d. [2] The Court then noted that a 2009 guidance letter issued by New York's Department of Labor accorded with the Court's interpretation of the statute's plain meaning. (*See* Dept of Labor Request for Opinion, RO-0900063, Labor Law § 196-d violation.)[3] Therein, the Department explained that, where an employer retains an employee's tips in violation of this section but pays a tip-inclusive wage that is above the minimum, the employer is not required to pay, in compensatory damages, the tip credit it retained. (*Id.* at 1.) Accordingly, defendants motion to preclude tip credits in an award of unpaid wages under the New York Labor Law is granted.

Dismissal of Plaintiff's Tip Notice Claim

In support of its motion to dismiss plaintiff's Labor Law § 195 (1) claim (for not providing a tip notice)[4], defendants submit an affidavit from Lori DeBlois, their Director of Human Resources, and attach plaintiff's signed "NYS Pay/Tip Notice," dated December 2, 2019. (NYSCEF doc. no. 28, DeBlois affidavit and Exhibit 1.) The document provides for plaintiff's rate of pay and informs him of the tip credit that defendants would take: "Rate (s) of Pay: Your regular hourly pay is $15.000 per for the first 40 hours worked in a week. A $5.00 tip credit will be taken, as set for below, so your hourly wage as a tipped employee … will be $10.00 per hour." (*Id.*) It also explains that "[y]our hourly cash wage plus this credit must be at least equal to the minimum wage. If you do not receive enough tips over the course of a week so that your tips plus the cash do not meet the minimum wage … you will be paid additional wages that week to make up for the difference." (*Id.*) As defendants' Human Resource Director, DeBlois avers that the Pay/Tip Notice plaintiff signed was made in the regular course of defendants' business. (*Id.* at ¶ 4-5.)

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[2] 12 NYCRR 146-1.3 is New York's tip-credit governing statute. There is a similar dearth of language in this section that conditions a tip credit on the employee retaining all tips received.

[3] While this Court recognizes that the guidance letter does not have the same force and effect of law that a rule promulgated by the Department does, and thus is not entitled to the same level of deference (*see Barenboim v Starbucks Corp.*, 21 NY3d 460, 471 [2013]), the Court nonetheless finds it to be persuasive authority. (*See also Chowdhury v GK Grill LLC*, 2015 NY Slip Op. 30169 at * 6 [acknowledging that the Department's guidance letter is not the equivalent of law].)

[4] It should be noted that defendants do not move for dismissal of plaintiff's Labor Law § 195 (3) claim for failure to provide wage statements.

Defendants contend that dismissal of this claim is warranted under CPLR 3211 (a) (1) because the notice is of such quality as to be unambiguous, authentic, and undeniable and "definitively disposes" of plaintiff's claim. In opposition, plaintiff maintains that the Tip/Pay Notice is patently deficient since § 195 (1) requires notice to be provided "at the time of [the employee's] hiring" and the Pay/Tip Notice is dated December 2019, approximately two years the Roxy Hotel hired him. The Court grants this branch of the motion in part. Although it is clear that the Pay/Tip Notice is insufficient to dismiss plaintiff's § 195 (1) claim against the Roxy Hotel, plaintiff admits that he was employed as a tipped worker at Soho Grand Hotel "at the end of 2019 for approximately a month," meaning the Pay/Tip Notice signed in early December 2019 was at the time of his hiring at the Soho Grand Hotel. Accordingly, the motion to dismiss plaintiff's § 195 (1) claim is granted against the Soho Grand Hotel. [5]

Citing *Ahmed v Morgan's Hotel Group Mgt., LLC* (160 AD3d 155 [1st Dept 2018), defendants argue that the failure to provide notice of a tip credit does not invalidate the credit so long as the employee's tip-inclusive wage meets or exceeds the minimum wage, and since plaintiff "never alleges that he received less than the minimum wage," "plaintiff's claim for wages owed based on the improper taking of a tip credit must be dismissed" (NYSCEF doc. no. 29 at 11.) Yet, as noted in footnote 1, plaintiff does allege that he received less than the minimum wage, and, as noted *supra* at 4, defendants have produced no wage stubs demonstrating it paid a minimum wage throughout plaintiff's employment. Thus, *Ahmed* provides no support for dismissing plaintiff's Labor Law § 195 (1) claim.[6]

Accordingly, for the foregoing reasons, it is hereby

ORDERED that defendants Hartz Hotel Service, Tribeca Grand Hotel, Inc. (d/b/a the Roxy Hotel), Soho Grand Hotel, Constantino Milano, and 320 West Broadway Diner Corp (d/b/a Soho Diner)'s motion to dismiss pursuant to CPLR 3211 is granted as to all class claims brought on behalf of "non-tipped employees," granted to the extent that plaintiff Adrian Little seeks to include defendants' claimed tip credit in an award of damages, and granted as to plaintiff's Labor Law § 195 (1) claim against the Soho Grand hotel; and it is further

ORDERED that defendants' motion to dismiss is otherwise denied; and it is further

ORDERED that counsel for the parties shall appear at 60 Centre Street, Courtroom 341, New York, New York at 9:30 a.m. on December 12, 2023, for a status conference with the Court; and it is further;

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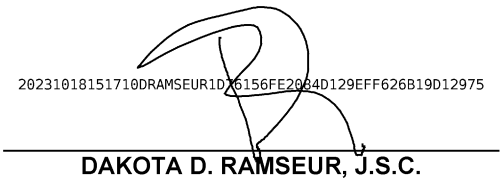
[5] The Court recognizes that defendants have moved pre-answer and that no discovery has taken place yet. Should evidence become available to plaintiff that casts doubt on the authenticity of the Pay/Tip Notice, plaintiff may seek leave to renew this branch of the motion.

[6] Additionally, the holding in *Ahmed*—that an employer has demonstrated an affirmative defense under Labor Law § 198 (1-d) where it has paid a minimum wage—applies only to § 195 (3) claims—not to § 195 (1). (160 AD3d at 556; *see also* New York Labor Law § 198 [1-d] ["In any action or administrative proceeding to recover damages for violation of subdivision *three* of section one hundred ninety-five of this article, it shall be an affirmative defense that (i) the employer made complete and timely payments of all wages due."]) Accordingly, even were defendants to prove it paid a minimum wage, plaintiff's § 195 (1) claim would be unaffected.

ORDERED that counsel for defendants shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days of entry.

This constitutes the Decision and Order of the Court.



10/16/2023
DATE

DAKOTA D. RAMSEUR, 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