To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF WESTCHESTER

----------X

MARIANELLA VELASQUEZ, individually and on behalf of those similarly situated,

Plaintiff,

-against -

SUNSTONE RED OAK, LLC d/b/a RENAISSANCE WESTCHESTER HOTEL, SUNSTONE RED OAK LESSEE, INC., SUNSTONE HOTEL TRS LESSEE, INC., HIGHGATE HOTELS, L.P., JOHN V. ARABIA; PAUL R. WOMBLE; RICKEY WHITWORTH; BRYAN A. GIGLIA; ROBERT SPRINGER; and any other related entities,

Defendants.

----------X

DECISION & ORDER

Index No. 51015/16

Sequence No. 2

LUBELL, J.

The following papers were considered in connection with this motion by plaintiff for an Order: (i) certifying this action as a class action; (ii) designating Leeds Brown Law, P.C. as class counsel; (iii) approving for publication the proposed Notice of Wage & Hour Class Action Lawsuit; and (iv) endorsing the proposed Publication Order:

PAPERS	**NYSCEF**
NOTICE OF MOTION/AFFIRMATION/EXHIBITS A-K/ MEMORANDUM OF LAW	53-67
MEMORANDUM OF LAW IN OPPOSITION/AFFIRMATION/ EXHIBITS 1-6/AFFIDAVIT/ EXHIBITS 1-9	132-150
REPLY AFFIRMATION/EXHIBITS L-X/ MEMO OF LAW	153-167

Plaintiff Marianella Velasquez, on behalf of herself and others similarly situated ("Plaintiffs") move for class certification pursuant to CPLR §§901, 902. Plaintiffs allege that the Defendants maintained a uniform policy of charging a "service charge" and retaining that charge exclusively for themselves -

without complying with the Hospitality Wage Order. Plaintiffs also contend that this policy applied to all catered events and affected all catering workers, namely because Class Members did not receive any portion of the service charge in their compensation.

1. Plaintiffs Satisfy the Article 9 Standard

The Court of Appeals has made clear that Article 9 is intended to be a liberal procedural requirement to promote, rather than limit, class actions. (*See e.g., City of New York v. Maul*, 14 N.Y.3d 499, 508-509 [2010]). This liberal construction has been repeatedly implemented by New York courts in deciding whether to certify a class. (*See e.g., Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 90-92 [2nd Dept. 1980]). Courts have instructed that "any error, if there is to be one, should be . . . in favor of allowing the class action." (*Friar*, 78 A.D.2d at 90-92).

Section 901(a)(1) requires that the class be so numerous that joinder of all class members is impracticable. Defendants contend that Plaintiffs have failed to satisfy the numerosity requirement of Section 901(a)(1) and claim that "[p]laintiffs submit no evidence to establish numerosity". (Def. Br. at 14-15).

Here, the record demonstrates that the Plaintiffs have offered evidence that the class is so numerous that joinder of all class members is impracticable. Further, the Defendants have failed to deny that as many as 40 servers could work at a single event, or that the class is in excess of 40 employees. (*See also Medrano v. Mastro Concrete, Inc.*, 2018 N.Y. Misc. LEXIS 1512, at *7-8 [Sup. Ct. New York Cty. 2018]; *Ramirez v. Mansions Catering, Inc.*, 2009 N.Y. Misc. LEXIS 5661, at *11 [Sup. Ct. New York Cty. 2009] ("While defendants argue that Ramirez relies upon unfounded presumptions to satisy the numerosity criteria, that he worked with other wait staff during the catered events indicates that his assertions are of probative value, and his so-called 'presumption' carries more weight than defense counsel's surmise.")

Here, the record establishes that at least 120 service workers worked catered events during the relevant period. Therefore, numerosity is satisfied.

2. Class-wide Resolution is Proper as There are Common Issues of Liability

Defendants' primary argument in opposition to class certification addresses the merits of Plaintiffs' claims instead of the prerequisites to class certification – and only serves to highlight the underlying common questions of law and fact.

The inquiry on a motion for class certification is limited to "whether there appears to be a cause of action that is neither spurious nor a sham." (*Cardona v. Maramont Corp.*, 2009 N.Y. Misc. LEXIS 5010, *8 [Sup. Ct. New York Cty. Nov. 12, 2009] (citation omitted)). "While it is appropriate in determining whether an action should proceed as a class action to consider whether a claim has merit, this 'inquiry is limited,' and such threshold determination is not intended to be a substitute for summary judgment or trial." (*Kudinov v. Kel-Tech Constr. Inc.*, 65 A.D.3d 481, 482 [1st Dep't. 2009]).

The questions of law and fact specific to particular class members working at Renaissance Westchester Hotel's catered events are not only common, but identical. The two common issues concern Defendants' standard form documents (*i.e.*, contracts, invoices, and other materials that customers saw), namely whether those records complied with the Hospitality Wage Order requirements under 12 NYCRR §§146-2.18, 2.19, and what the understanding of a reasonable patron was, if Defendants did comply.

The Hospitality Wage Order states that "[t]here 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." (See 12 N.Y.C.R.R. §146-2.18(b)). Similarly, 12 N.Y.C.R.R. §146-2.19(a) states 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," and 12 N.Y.C.R.R. §146-2.19(b) states that "[t]he 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."

By assessing a service charge for the administration of a banquet event, Defendants were obligated to comply with these provisions and provide adequate notification under §146-2.19(c). These legal and factual questions are not unique to one service worker because they concern the interpretations of the customer and Defendants' documents for catered events - which they concede were standardized.

The issues presented here can only be decided on a class-wide basis since the central issue is whether Defendants' policy with respect to withholding gratuities was lawful. Thus, if the Defendants are liable to one putative class member for a particular event, Defendants will be liable to all putative class members who

also worked the event, and all will be entitled to share in an equal distribution of the unpaid gratuity. Here, the Named Plaintiff's claims and those of the class members all arise from a common allegation - that Renaissance imposed and retained a Service Charge from its customers and that by doing so it "created the prospect that a reasonable customer could form a belief that the service charge was in lieu of a gratuity." (*Martin v. Rest. Assoc. Events Corp.*, 35 Misc.3d 215; *aff'd* 106 A.D.3d 785 [2nd Dept. 2013]). As Judge Scheinkman held in *Martin*, class certification was proper under a similar set of facts that are presented here.

3. The Named Plaintiff's Claims are Typical of the Class

The "touchstone of typicality is whether the Named plaintiffs' claims derive from the same practice or conduct that gave rise to the remaining claims of the class members and is based on the same legal theory. (*See Pajaczek v CEMA Constr. Corp.*, 18 Misc 3d 1140 (A),*4 [Sup Ct, NY Cty. 2008]. The Named Plaintiff and members of the putative class worked for Defendants as servers, bartenders and other service roles at catered events held by Defendants from 2010 to the present. Named Plaintiff, like all members of the putative class, alleges that Renaissance imposed a service charge at numerous events where a reasonable customer believed the charge was a gratuity, yet Defendants failed to remit the gratuities as required under the Labor Law and its implementing regulations. (See 12 NYCRR Part 146). Notably, Renaissance admits that it has utilized standardized contracts and forms that apply to all of Renaissance's catered events throughout the entire class period. As such, all service workers were subjected to Renaissance's alleged policy of withholding gratuities.

Typicality is present because the (i) claims of the Named Plaintiff and all other members of the putative class arise from the same conduct; (ii) putative class members allegedly suffered from the same wrong committed by Defendants for which they are liable (i.e., the withholding of gratuities and the 23% service charge); and (iii) Plaintiff's case is based on the same legal theory.

Defendants contend that typicality is not met because an individualized determination is required to assess whether Renaissance exercised the requisite amount of control to constitute an employee relationship. Here, typicality still exists because the class members were all supervised directly and exclusively by the same Renaissance personnel. As such, the ultimate determination of employer-employee status will hinge on the same set of facts for all workers, who worked the same events for the same guests at the same physical location.

Further, typicality has been found in similar Section 196-d class actions where employee status was at issue. In *Maor v. Hornblower N.Y., LLC*, 2016 N.Y. Misc. LEXIS 2111, *10-13 (N.Y. Sup. Ct. June 13, 2016), the court held that typicality was met despite the fact that a portion of the class were temporary servers and others were the permanent servers. The court reasoned that "since the named plaintiffs' claims are typical of those of the putative class - namely that Hornblower improperly withheld tips - plaintiffs have satisfied the typicality requirement." (Id. at *17).

4. The Named Plaintiff is an Adequate Class Representative

Section 901(a)(4) requires that the Named Plaintiff be in a position to adequately protect the interests of the members of the class in the litigation and have no substantiated conflicts. Defendants challenge the adequacy of the Named Plaintiff arguing that (1) she is subject to "individualized defenses"; and (2) she lacks "personal characteristics" of an adequate class representative. Defendants' challenges are meritless.

Here, the Named Plaintiff seeks the same relief as the class members - to receive the gratuities allegedly owed to all service workers. The bar to meet the "adequacy of representation" prong of class certification is not a high one, and is easily met here. The Court of Appeals has stated, "[h]aving found no substantiated conflicts between the tenants and a representative with 'adequate understanding of the case,' and competent attorneys, we conclude that allowing tenants to opt out of the class avoids any question of the adequacy of the class representation pursuant to CPLR 901(a)." (*Borden v. 400 E. 55th St. Assoc.*, L.P., 24 N.Y.3d 382, 400 [2014]).

In short, the Named Plaintiff has knowledge of the nature of the wage claims at issue, and has no alleged conflicts with the members of the putative class. That is all that is required to meet the "adequacy of representation" prong of CPLR §901.

Based upon the foregoing, it is hereby

ORDERED that plaintiff's motion for an Order: (i) certifying this action as a class action; (ii) designating Leeds Brown Law, P.C. as class counsel; (iii) approving for publication the proposed Notice of Wage & Hour Class Action Lawsuit; and (iv) endorsing the revised proposed Publication Order is GRANTED (see separate Order

signed this date.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York
August 21, 2018

HON. LEWIS J. LUBELL, J.S.C.

Leeds Brown Law, P.C.
By: Michael A. Tompkins, Esq.
Attorney for Plaintiff
One Old Country Road, Suite 347
Carle Place, NY 11514

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Attorneys for Defendants
1745 Broadway, 22nd Fl
New York, New York 10019