SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

Plaintiffs,

- against -

SUNSTONE RED OAK, LLC d/b/a RENAISSANCE WESTCHESTER HOTEL, SUNSTONE RED OAK LESEE 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.

Defendant.

Index No.: 51015/2016

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the within is a true copy of a signed Decision and Order by the Hon. Sam D. Walker, Justice of the Supreme Court, State of New York, dated September 15, 2021 and entered on September 16, 2021, by the Clerk of the Court.

Dated: September 22, 2021
Carle Place, New York

Michael A. Tompkins, Esq.
LEEDS BROWN LAW, P.C.
One Old Country Road, Suite 347
Carle Place, New York 11514
mtompkins@leedsbrownlaw.com

Cc: All Counsel of Record (via NYSCEF)

To commence the statutory time 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
WESTCHESTER COUNTY
PRESENT: HON. SAM D. WALKER, J.S.C.

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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.

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DECISION AND ORDER
Index No: 51015/2016
Seq # 14

The following papers were reviewed on the order to show cause for an order pursuant to CPLR 902, decertifying the class previously certified in the action:

Order to Show Cause/Affirmation/Exhibits A-R
Memorandum of Law in Support
Affirmation in Opposition/Exhibits A-D
Memorandum of Law in Opposition
Memorandum of Law in Reply

Supplemental Memorandum of Law
Affirmation/Exhibits A-G/Affirmation/Exhibits A-NN
Supplemental Memorandum of Law
Affirmation/Exhibits A-T
Memorandum of Law

Based on the foregoing papers the motion is denied.

Factual and Procedural Background

The plaintiff, Marianella Velasquez, individually and on behalf of those similarly situated, filed a summons and complaint against the defendants, 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, and Robert Springer, alleging that the defendants unlawfully retained gratuities owed to the plaintiff and other similarly situated persons, who are presently or were formerly employed by the defendants at their hotel and catering venues.

By Decision & Order dated August 21, 2018, the Court (Hon. Lewis J. Lubell) granted the plaintiff's motion for an Order (i) certifying the action as a class action; designating Leeds Brown Law, P.C., as class counsel; approving for publication the proposed Notice of Wage & Hour Class Action Lawsuit; and endorsing the revised proposed Publication Order. By separate Order, the Court ordered that defendant furnish class counsel with a list containing the names and other pertinent information of all individuals who performed work in food service positions at catered and banquet events at the defendants' Renaissance Westchester Hotel from January 2010 through the present. The Order further states that on or before forty-five days after entry of the Order, the plaintiffs or their designated representatives shall cause a copy of the Notice of Class Action Lawsuit to be mailed to every class member (a) once by first class mail and (b) four times by electronic mail every other Monday during a consecutive eight-week span. The Order also required the class counsel to make the Notice of Class Action Lawsuit available on class counsel's website and/or its Facebook page and on or before forty-five days after entry of the Order, that Class Counsel may provide social media notice to class members.

By Decision and Order dated February 5, 2019, the Court (Hon. Helen M. Blackwood) denied both the plaintiffs' and the defendants' summary judgment motions, finding that there were material issues of fact as to whether or not the defendants were

employers of the plaintiffs, specifically whether they were under the control of the defendants while they were working at the hotel. The Court further found that there were triable issues of fact as to whether or not the defendants adequately advised their patrons as to the exact nature of the service charge at issue in the case. The Court also denied the plaintiffs' motion for sanctions based on the defendants' spoliation of evidence.

This action has been assigned to various judges prior to it being assigned to this IAS part and although, the attorneys have indicated that Justice Ecker intended to have a hearing on the issues raised in this motion, this Court intends to resolve the issues by Decision and will refer the matter for a trial on the overall liability and damages issues.

The defendants now file this order to show cause pursuant to CPLR 902, seeking to decertify the class, because despite the passage of one year and three months, the plaintiff has failed to take steps to ensure they have, and continue to establish, the adequacy of representation and typicality elements set forth in CPLR 901. Specifically, the defendants allege that the plaintiff and class counsel failed to notify class members of the pendency of this action, in accordance with the Court's Publication Order, dated August 21, 2018, thereby depriving class members of their due process rights and failing to adequately represent them, creating a situation in which no members of the Class will be bound by a final judgment rendered in this action.

The defendants argue that, despite the Court's Publication Order requiring the plaintiff and class counsel to mail to every class member, a copy of the Notice of Class Action Lawsuit, once by regular mail and four times by electronic mail, the plaintiff served only twelve people once by regular mail. The defendants further argue that the Notices the plaintiff did serve were defective under CPLR 901(b), because the plaintiff failed to waive

liquidated damages, as required by New York Labor Law ("NYLL") and failed to notify class members that they could preserve their right to pursue the damages by opting out of the suit. The defendants contend that the Class Members were deprived of their due process rights and therefore, rendered the litigation a legal nullity and the class must be decertified.

The defendants further argue that the plaintiff has also failed to establish that her claims are typical of the claims and defenses of the class, as required by CPLR 901(a)(3), because she worked only after the New York State Wage Order, relevant to this case became effective on January 1, 2011 and her claims are not typical of those who worked prior to that date. Additionally, the plaintiff was employed by an independent staffing agency and is therefore, subject to the unique defense of being an independent contractor, ineligible to recover under the NYLL.

In opposition, the plaintiffs argue that the defendants are effectively attempting to appeal Hon. Lewis Lubell's class certification decision. The attorney argues that, pursuant to the Publication Order, class counsel mailed out to any identified class member with a mailing address or information sufficient to identify them and published the Class Notice on its website for the last fourteen months, plus posted and boosted it on its Facebook page. The attorney argues that the Notice procedure undertaken was fully compliant with the Publication Order and is the best notice practicable, given the defendants' record keeping and discovery violations. The plaintiff's attorney asserts that throughout the Class Period, the defendants have failed to maintain time pay and employment records of their employees under Labor Law § 195(4), 12 NYCRR § 146-2.1 and 12 NYCRR § 146-2.18 and the defendants have failed to maintain all event records according to 12 NYCRR § 146-2.18©.), which requires the defendants to preserve six years worth of charges related

to the catered events in which they took place. The attorney asserts that the defendants engaged in a pattern of destroying documents which are highly relevant to both the employment and compensation of the defendants' employees, as well as the defendants' catering operations and promotion and sale of catered events. The attorney further argues that the defendants' challenge to the plaintiffs' ability to establish the typicality element of CPLR 901(a)(3) is completely merit-less and the issue has been fully litigated and resolved in favor of the class certification. The attorney alleges that the motion is procedurally defective because the defendants' options were to file an appeal or a motion to reargue/renew Justice Lubell's Decision and they did neither.

In reply, the defendants reiterate the arguments proffered in the motion and argue against the positions set forth in the opposition. The defendants re-assert that the plaintiff and class counsel are inadequate representatives because they failed to comply with the Court's Publication Order and failed to waive liquidated damages or notify the class. The defendants contend *inter alia* that the failure to effectuate notice was their own fault, the law of the case argument is irrelevant, and the procedural argument is baseless. The defendants also reiterate that the plaintiff's claims are not typical of class members who worked prior to January 1, 2011 and the plaintiff is subject to the unique defense of being an independent contractor.

As per Justice Ecker's directive, the attorneys submitted supplemental memorandi based upon conferences with him and his intention to hold a hearing to decide specific issues in the case. This Court does not intend to hold such a hearing, but has reviewed the supplemental documents nevertheless. Additionally, the Court (Hon. Helen M. Blackwood)

previously found that there were issues of fact as to whether or not the defendants were employers of the plaintiffs.

DISCUSSION

CPLR 904 states in pertinent part that:

> (a) In class actions brought primarily for injunctive declaratory relief, notice of the pendency of the action need not be given....
>
> (b) In all other class actions, reasonable notice of the commencement of a class action shall be given to the class in such manner as the court directs.
>
> (N.Y. Civ. Prac. L. & R. 904 [a] & [b]).

The plaintiff bears the burden of establishing compliance with the requirements of CPLR 901 and 902 and the five requirements for certification of a class action, which are: "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." (*Medina v Fairway Golf Mgt., LLC*, 177 AD3d 727, 728 [2d Dept, 2019]). However, prior to a decision on the merits, the class certification may be altered or amended and the class decertified if the prerequisites under CPLR 901 are not satisfied (*see* CPLR 902).

In this case, the defendants assert that the class must be decertified because the plaintiff cannot establish adequacy of representation or typicality.

"The three essential factors to consider in determining adequacy of representation

are 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" (*Globe Surgical Supply v Geico Ins. Co.*, 59 AD3d 129, 144 [2d Dept 2008]).

The defendants assert that preserving class members' due process rights requires adequate representation at all times throughout the litigation. The defendants claim that the plaintiff and Class Counsel failed to adequately represent the class members by depriving them of their right to notice and to opt out and failed to follow the Court's Publication Order, which found that the notice constituted the best notice practicable under the circumstances.

Upon review, the Court finds that the plaintiff and Class Counsel has complied with the Court's Publication Order in a substantive manner. The Class Counsel mailed notices to twelve people from information provided by the defendants, seventeen people provided by a third-party agency and sent emails to five people from information provided by the defendants. The Class Counsel also posted the notice on its website and Facebook. Further, Class Counsel has claimed an inability to contact any other class members, which may be directly related to defendants not maintaining comprehensive time pay and employment records.

With regard to the defendants' assertion that the plaintiff's claim is defective due to failure to opt out of punitive damages, the plaintiff's complaint does not seek the recovery of liquidated damages. Further, the Court will allow the plaintiff to provide additional notice, by which the plaintiff may opt out of punitive damages.

The defendants raise the issue of typicality, however, Justice Lubell has already ruled on that issue and nothing has changed in the plaintiff's status since that Decision and Order. The defendants had the opportunity to appeal or file a motion to reargue. Further, the Court does not agree that the plaintiff is subject to a different standard for determining liability than the staff who worked prior to 2011. The plaintiff is claiming the same wrong committed by the defendants and the plaintiff's claims need not be identical to those of all the class members (*Medina v Fairway Golf Management, LLC*, 177 AD3d 727, 728 [2d Dept 2019]).

Additionally, Judge Blackwood issued a Decision and Order, finding that there were issues of fact with regard to the plaintiff's status as an employee. That Decision was not appealed and the time to appeal has since expired. The defendants cannot now ask this Court to decide a motion with the same issue, seeking a different result. That issue has to be decided at trial.

Accordingly, based on the foregoing, it is

ORDERED that the motion to decertify the class is denied.

Dated: White Plains, New York
September 15, 2021

HON. SAM D. WALKER, J.S.C.