Short Form Order

Index No. 601155/2017

SUPREME COURT – STATE OF NEW YORK
PART 55 – SUFFOLK COUNTY

PRESENT:
Hon. George Nolan
Justice Supreme Court

----------x

PAUL BUONAGURA, on behalf of himself and others similarly situated,

Plaintiff,

-against-

GIORGIO'S CATERING LLC, FOX HILL COUNTRY CLUB CATERERS INC., GEORGE REGINI, and/or GEORGE REGINI, JR.,

Defendants.

----------x

Mot. Seq. No. 004 – MG
Orig. Return Date: 7/12/2022
Mot. Submit Date: 9/15/2022

PLAINTIFF'S ATTORNEY
LEEDS BROWN LAW, P.C.
1 Old Country Road, Suite 347
Carle Place, NY 11514

DEFENDANTS' ATTORNEY
ZABELL & COLLOTTA, P.C.
1 Corporate Drive, Suite 103
Bohemia, NY 11716

Upon the e-filed documents numbered 53 through 90, and upon due deliberation and consideration by the Court of the foregoing papers, it is hereby

ORDERED that the plaintiff's motion for an order pursuant to CPLR 901 and 902 for an order certifying this action as a class action, designating Leeds Brown Law, P.C. as Class Counsel and approving the proposed Notice of Wage & Hour Class Action Lawsuit, is granted.

Plaintiff Paul Buonagura, individually and on behalf of those similarly situated, commenced this class action suit by filing a summons and complaint on January 19, 2017. Plaintiff claims that he and the putative class are owed unlawfully retained gratuities pursuant to Labor Law § 190 et seq, Labor Law § 196-d, and 12 NYCRR § 146 et seq. According to the submissions, plaintiff worked as a bartender at Giorgio's Catering LLC ("Giorgio's") in 2011 and alleges that Giorgio's assessed a "mandatory charge" which plaintiff asserts was in fact a gratuity that should have been passed along to its employees in violation of Labor Law § 190.

Plaintiff now moves individually and on behalf of all other persons similarly situated for class action certification. Defendants have opposed the motion.

Plaintiff Paul Buonagura alleges that he was employed by the defendants in 2011 as a bartender and part of defendants' catering staff. Plaintiff further alleges, in sum, that the defendants regularly added a 20% mandatory "service charge" or "operational charge" to the prices they charged for various catered events. The plaintiff contends that the service charges

collected were actually gratuities never remitted to Giorgio's employees but instead, were unlawfully retained by defendants in violation of Labor Law § 196-b which provides that it is a violation of the law to "retain any part of a gratuity or any charge purported to be a gratuity for an employee" (***Samiento v. World Yacht***, 10 NY3d 70, 854 NYS2d 83 [2008]). Plaintiff alleges that the defendants' customers believed that the service charges would be distributed to the defendants' workers. In opposition, the defendants argue that their catering contracts contained a disclaimer stating that the operational charge imposed is "to offset operation and administrative expenses" and was therefore not a gratuity that would be distributed to its employees.

In January of 2017, the plaintiff commenced the within, putative class action. The complaint contains one cause of action predicated upon the illegal retention of gratuities pursuant to New York Labor Law §196-d. The plaintiff's proposed class is comprised of, *inter alia*, individuals who performed service work at defendants' catered events which presumably includes wait staff personnel, bus boys, bartenders hosts, food runners, Maitre D's and other employees who serve in customarily tipped trades and occupations.

This case was previously assigned to the Honorable Denise F. Molia. By prior Orders dated May 18, 2017 (MOLIA, J.) and October 2, 2019 (MOLIA, J.) , this court extended plaintiff's time to move for class certification until pre-class certification disclosure was completed. The plaintiff now moves for class certification. The defendants have opposed the application. "Upon a balanced consideration of all relevant circumstances" (***Emilio v. Robison Oil Corp.***, 63 AD3d 667, 880 NYS2d 177 [2d Dept 2009]), the Court agrees that the plaintiff's motion should be granted.

"In order to certify a lawsuit as a class action, the court must be satisfied that questions of law or fact common to the class predominate over any question affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy" (***Osarczuk v. Associated Universities, Inc.***, 82 AD3d 853, 918 NYS3d 538 [2d Dept 2011], CPLR 901(a), 902). "The primary issue on a motion for class certification is whether the claims as set forth in the complaint can be efficiently and economically managed by the court on a classwide basis" (***Globe Surgical Supply v. GEICO Ins. Co.***, 59 AD3d 129, 971 NYS2d 263 [2d Dept 2008]).

"In determining whether an action should proceed as a class action, it is appropriate to consider whether the claims have merit although this 'inquiry is limited"' and "not intended to be a substitute for summary judgment or trial" (***Pludeman v. Northern Leasing Sys., Inc.***, 74 AD3d 420, 904 NYS2d 372 1st Dept 2010]). Rather, "[c]lass action certification is thus appropriate if on the surface there appears to be a cause of action which is not a sham" (***Pludeman v. Northern Leasing Sys., Inc.***, *supra*). Although the plaintiff bears the burden of establishing that the class exists (***Osarczuk v. Associated Universities, Inc.***, 82 AD3d 853, 918 NYS2d 538 [2d Dept 2011], CPLR Article 9 is to be liberally construed (***City of New York v. Maul***, 14 NY3d 499, 903 NYS2d 304 [2010]), and "where the case is doubtful, the benefit of any doubt should be given to allowing the class action" (***Krebs v. Canyon Club, Inc.*** 22 Misc3d 1125(A), 890 NYS2d 873 [Sup. Ct. Westchester Cty. Jan 2, 2009]). "Whether the facts presented on a motion for class certification satisfy the statutory criteria is within the sound discretion of the trial court" (***Pludeman v. Northern Leasing Sys., Inc.***, 74 AD3d 420, 904 NYS2d 372 [1st Dept 2010]).

Applying the foregoing principals to this matter, the Court agrees upon the exercise of its discretion, that the motion for class certification should be granted. The record indicates, *inter alia*, that: (1) common questions exist "as to whether defendants have unlawfully withheld gratuities from its employees" and (2) that "a class action appears to be the superior method for fair and efficient adjudication" (***Krebs v. Canyon Club, Inc***. 22 Misc3d 1125(A), 890 NYS2d 873 [Sup. Ct. Westchester Cty. Jan 2, 2009]). Further, and resolving any doubt in favor of class, the Court finds that the numerosity, commonality and typicality requirements are satisfied upon the record presented, since the proposed class is of a sufficiently significant size and common questions predominate over individual issues with respect to the putative plaintiffs and the named plaintiff who avers that he and others were impermissibly deprived of gratuities (***Kudinov v. Kel-Tech Const. Inc.***, 65 AD3d 481, 884 NYS2d 413 [1st Dept 2009]). The Court notes that the commonality prong of the inquiry contemplates "predominance not identity or unanimity among class members" and may be satisfied even where "each of the plaintiffs and proposed class members possesses his or her own unique factual circumstances" (***City of New York v. Maul***, 14 NY3d 499, 903 NYS2d 304 [2010]). Further, the Court agrees that the plaintiff has adequately established that he is typical of those of the class and that he can fairly and adequately protect its interests.

Lastly, the Court's function on the plaintiff's motion for class certification is not to weigh facts or render a summary judgment-type conclusion with respect to the substance of the plaintiff's claims. Rather, the Court's inquiry is limited to whether, "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, 904 NYS2d 372 [1st Dept 2010]). Here, the record does not support the conclusion that the plaintiff's claims are sham-type in nature so as to otherwise warrant the denial of class certification (*see* ***Krebs v. Canyon Club, Inc***. 22 Misc3d 1125(A), 890 NYS2d 873 [Sup. Ct. Westchester Cty. Jan 2, 2009]).

The Court has considered the defendants' remaining contentions and concludes that they are insufficient to defeat the plaintiff's application for class certification.

Accordingly, it is hereby,

ORDERED that the motion pursuant to CPLR Article 9 by the plaintiff Paul Buonagura, on behalf of himself and others similarly situated, for class action certification, is granted; and it is further

ORDERED that notice to all potential class members be provided pursuant to the Publication Order, dated November 21, 2023, and Notice of Class Action annexed hereto.

The parties are reminded that this matter is scheduled for a further compliance conference before the undersigned on December 7, 2023, at 9:30 a.m.

The foregoing constitutes the decision and Order of the Court.

ENTER

DATE: November 27, 2023
Riverhead, NY

HON. GEORGE NOLAN, J.S.C.

___ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION