

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. CONRAD D. SINGER,
Justice

TRIAL PART: 20

COSTANZA ELLISON, on behalf of herself and all others
similar situated,

Index No.: 607508/2023
Motion Seq. No.: 001
Motion Submitted: 02/05/2023

Plaintiff,

-against-

DECISION AND ORDER
ON MOTION

ADAM REST CORP., CUBAN RESTAURANT OF
BAYSIDE INC., THE CUBAN II, LLC, MARGARITAS
CAFE ONE, INC., MARGARITAS CAFE TWO INC.,
MARGARITAS CAFE THREE, INC., MARGARITAS
CAFE VI INC., MARGARITAS CAFE VII INC.,
MARGARITAS CAFE VIII INC., MARGARITAS CAFE
XI, INC., PAMELA RESTAURANT CORP., and PUGLIAS
OF GARDEN CITY INC,

Defendants.

The following papers have been read on this motion:

Plaintiff's Notice of Motion and Supporting Papers [Seq. 001]...X
Affirmation in Opposition and Supporting Papers [Seq. 001]...X
Plaintiff's Reply Affirmation [Seq. 001]...X

Upon the foregoing papers, the motion by the Plaintiff, COSTANZA ELLISON, on behalf of herself and all others similar situated, for an Order pursuant to Article 9 of the CPLR: 1) certifying this action as a class action; and 2) defining the Class to include all individuals who worked for Defendants as bartenders and servers ("Tipped Employees") from June 1, 2017 (the "Class Members"); and 3) Appointing Kessler Matura P.C. ("Plaintiff's Counsel") as Class Counsel; and 4) Approving the form and content of Plaintiff's Proposed Class Notice, which is attached to the Affirmation of Troy L. Kessler as Exhibit N, and authorizing Plaintiff's Counsel to issue Plaintiff's Proposed Notice of Class Action Lawsuit (the "Class Notice") to the Class Members by First Class U.S. Mail; and 5) Permitting 60 days from the

date on which the Class Notice is circulated for Class Members to opt-out of the Class by returning a signed statement to Plaintiff's Counsel, or a third-party administrator hired by Plaintiff's Counsel, shall issue the Class Notice; and 6) Directing that within 14 days of the entry of the Order, Defendants shall provide Plaintiff's Counsel with a list, in electronic form, containing the following contact information for each Class Member: a. name; b. last known home address; c. last known email address; d. last known mobile phone number; e. last known home phone number; and f. start and end dates of employment; and 7) directing that Plaintiff's Counsel, or a third-party administrator hired by Plaintiff's Counsel, shall issue the Class Notice within 10 days after receiving the list of Class Members' contact information; and 8) directing Defendants to provide the social security numbers of any Class Member whose Class Notice is returned as undeliverable and without a forwarding address by the U.S. Postal Service, and further directing that such information shall be provided within (7) seven calendar days after Class Counsel notifies Defendants' Counsel, Karl J. Silverberg of Silverberg P.C., of such undeliverable notices. These social security numbers shall be used by Class Counsel to conduct a records search for such Class Member's current address, so that Class Counsel can reissue the Class Notice by First Class U.S. Mail; is determined as herein after follows:

The Plaintiff and Putative Class Representative Constanza Ellison ["Plaintiff"], commenced this action on behalf of all current and former bartenders and servers at the Defendants' restaurants. The Plaintiff seeks unpaid minimum wages, spread-of-hour wages, and other relief based upon the Defendants', Adam Rest Corp., Cuban Restaurant of Bayside Inc., The Cuban II, LLC, Margaritas Cafe One Inc., Margaritas Cafe Two Inc., Margaritas Cafe Three, Inc., Margaritas Cafe VI Inc., Margaritas Cafe VII, Inc., Margaritas Cafe VIII Inc., Margaritas Cafe XI Inc., Pamela Restaurant Corp., and Puglias of Garden City Inc. [collectively, "Defendants"], alleged violations of New York Labor Law, Article 19,

and Hospitality Industry Wage Order, 12 NYCRR §§ 146, *et seq.* The Plaintiff alleges that she and other similarly situated employees of Defendants were denied minimum-wage pay and spread-of-hours wages, in violation of the New York Labor Law (“NYLL”) and Hospitality Industry Wage Order, 12 N.Y.C.R.R. §§ 146, *et seq.* (“HIWO”), pursuant to Defendants’ company policy of not paying employees such wages.

The Plaintiff now seeks an Order which, *inter alia*, certifies a class of current and former bartenders and servers [collectively, “Tipped Employees”], who worked for Defendants since June 1, 2017, through entry of the judgment in this case [the “Class” or “Class Members”].

The Plaintiff’s motion includes a detailed affidavit from the Plaintiff which set forth facts underlying her allegations of the Defendants’ company-wide policy that allegedly violated the NYLL. The Plaintiff’s affidavit sets forth, *inter alia*, the Plaintiff’s dates of employment, her job duties, and describes how the Defendants did not pay her full minimum wage and spread-of-hours wages. Her affidavit also sets forth details of the Defendants’ business, which demonstrate that the Plaintiff and other Tipped Employees were subjected to the same policies across Defendants’ restaurants. The Plaintiff’s motion also includes other evidence, including documentary evidence and an affidavit from a former manager for the Defendants, Brandon Caro, which demonstrates that the Defendants apply their wage-and-hour policies uniformly across their restaurants.

“CPLR article 9, which sets out the criteria to be considered in granting class action certification, is to be liberally construed”. (*Krobath v S. Nassau Communities Hosp.*, 178 AD3d 805, 806 [2d Dept 2019]). “The proposed class representative bears the burden of establishing compliance with the requirements of both CPLR 901 and 902...”. (*Id.*; citations omitted). “The determination to grant class action certification rests in the sound discretion of the Supreme Court, ‘and any error should be resolved in favor of allowing the class action’”. (*Kidd v Delta Funding Corp.*, 289 AD2d 203 [2d Dept 2001])

[citations omitted]).

“CPLR 901(a) sets forth the five requirements for certification of a class action: ‘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] [quoting CPLR 901(a)]). “[T]he court may also consider the merits of the action to the extent necessary for the elimination, as early as possible, of spurious actions’”. (*Id.*; citations omitted)].

The Court finds that the Plaintiff submitted sufficient evidence in support of her motion to “satisfy the minimal threshold of establishing that her claim was not a sham”. (*Medina*, 177 AD3d at 729; citations omitted)].

Furthermore, the Plaintiff’s motion satisfies the requirements of CPLR 901[a]. As discussed above, CPLR 901[a] sets forth the five requirements for certification of a class action, i.e., 1) numerosity; 2) predominance; 3) typicality; 4) adequacy; and 5) superiority.

In this case, the Plaintiff has put forth sufficient evidence to satisfy the numerosity requirement, in that: 1) the class is so numerous that joinder is impracticable, based on the evidence that there are ten [10] restaurants at issue, that the claims date back six [6] years, and based on the testimony indicating that over a dozen Tipped Employees work at the Defendants’ restaurants at any given time. As discussed by the Plaintiff’s counsel in his affirmation in reply, such evidence indicates that there are likely to be over 150 putative class members in this action, which well exceeds the numerosity threshold that has been applied

in other cases. (*Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 399 [2014]).

Additionally, while the Defendants argue that the motion should not be granted due to lack of discovery establishing numerosity, the Plaintiff put forth evidence in its reply papers indicating that Defendants caused delays in exchange of discovery. In light of the liberality with which Article 9 is to be construed, and as errors are to be resolved in favor of certification, the Court finds that the numerosity requirement has been satisfied for the purposes of class certification.

The Plaintiff has also satisfied the “predominance” requirement, in that: 2) questions of law and fact common to the class predominate over questions affecting only individual putative class members. (*See Kudinov v Kel-Tech Const. Inc.*, 65 AD3d 481, 482 [1st Dept 2009]).

The Plaintiff’s evidence also satisfies the “typicality” requirement, in that: 3) the Plaintiff’s claims are typical of the class claims. The Plaintiff has submitted sufficient evidence to demonstrate that her “claim derives from the same practice or course of conduct that gave rise to the remaining claims of other class members and is based upon the same legal theory”. (*Friar v Vanguard Holding Corp.*, 78 AD2d 83, 99 [2d Dept 1980] [citations omitted]).

The Plaintiff has also satisfied the “adequacy” requirement, in that: 4) the Plaintiff and her attorneys will fairly and adequately represent the Class. The Plaintiff’s evidence, including the supporting affirmation of the Plaintiff’s counsel, demonstrates that there are no potential conflict of legal interests between the Plaintiff and the other members of the proposed class, that the Plaintiff is familiar with the lawsuit and committed to prosecuting it; and that class counsel holds sufficient qualifications. (*See, Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 144 [2d Dept 2008]).

The Plaintiff has also satisfied the “superiority” requirement, in that: 5) class adjudication is the superior method to remedy the wage violations alleged. (*See, e.g., Chua v Trim-Line Hitech Constr.*

*Corp.*, 156384/19, 2024 WL 1319672, at \*1 [1st Dept Mar. 28, 2024] citing to *Nawrocki v. Proto Constr. & Dev. Corp.*, 82 AD3d 534, 536 [1st Dept. 2011]).

Additionally, the Court finds that the factors contained in CPLR 902 weigh in favor of class certification, considering that the Class Members' damages are likely to be small when compared to the cost of litigation, and further considering that the Plaintiff has demonstrated that her claims are distinct from the claims asserted in other actions pending against the Defendants. Additionally, class certification is preferable "given that the burden on litigants and on the courts would likely be significantly increased if aggrieved employees were forced to pursue individual lawsuits". (*Chua*, 2024 WL 1319672, at \*2; citations omitted]). The Plaintiff has also demonstrated a lack of anticipated difficulties in managing this case as a class action venued in Nassau County.

As the Court finds that the Plaintiff has sufficiently demonstrated entitlement to class certification, the Plaintiff's motion shall be **GRANTED**, in its entirety.

Accordingly, it is hereby,

**ORDERED**, that the Plaintiff's motion for an Order which, *inter alia*, certifies this action as a class action pursuant to Article 9 of the CPLR is **GRANTED**, in its entirety; and it is further,

**ORDERED**, that this action is hereby certified as a class action pursuant to Article 9 of the CPLR; and it is further,

**ORDERED**, that the Class includes all individuals who worked for Defendants as Tipped Workers (i.e., bartenders and servers) at any time since June 1, 2017 (the "Class Members"); and it is further,

**ORDERED**, that the Plaintiff's counsel, Kessler Matura P.C., meets the requirements of Section 901(a)(4) and is appointed as Class Counsel; and it is further,

**ORDERED**, that Class Counsel is authorized to issue Plaintiff's Proposed Notice of Class Action

Lawsuit (the "Class Notice"), e-filed as NYSCEF Doc. No. 28, to the Class Members; and it is further,

**ORDERED**, that Class Counsel is authorized to issue the Class Notice to Class Members by First Class U.S. Mail; and it is further,

**ORDERED**, that the Court hereby approves the form and content of Plaintiff's Proposed Class Notice; and it is further,

**ORDERED**, that for 60 days after the Class Notice is mailed, Class Members may opt-out of the Class by returning a signed statement to Class Counsel, or a third-party administrator hired by Class Counsel; and it is further,

**ORDERED**, that within 14 days of the entry of this Order, Defendants shall provide Class Counsel with a list, in electronic form, containing the following contact information for each Class Member:

- a. name;
- b. last known home address;
- c. last known email address;
- d. last known mobile phone number;
- e. last known home phone number; and
- f. start and end dates of employment; and it is further

**ORDERED**, that Class Counsel, or a third-party administrator hired by Class Counsel, shall issue the Class Notice within 10 days after receiving the list of Class Members' contact information; and it is further,

**ORDERED**, that Defendants shall provide the social security numbers of any Class Member whose Class Notice is returned as undeliverable and without a forwarding address by the U.S. Postal Service; and it is further,

**ORDERED**, that such information as required in the preceding paragraph shall be provided within seven [7] calendar days after Class Counsel notifies Defendants' Counsel, Karl J. Silverberg of Silverberg P.C., of such undeliverable notices. These social security numbers shall be used by Class Counsel to conduct a records search for such Class Member's current address, so that Class Counsel can reissue the Class Notice by First Class U.S. Mail; and it is further,

**ORDERED**, that all other requests for relief not specifically addressed herein shall be deemed **DENIED**.

This constitutes the Decision and Order of the Court.

Dated: April 2, 2024  
Mineola, New York



HON. CONRAD D. SINGER, J.S.C.

**ENTERED**

**Apr 08 2024**

NASSAU COUNTY  
COUNTY CLERK'S OFFICE