SAMIENTO v. WORLD YACHT INC.
Cite as 854 N.Y.S.2d 83 (Ct.App. 2008)

883 N.E.2d 990
10 N.Y.3d 70

Arnel SAMIENTO et al., Appellants,
v.
WORLD YACHT INC. et al., Respondants

Court of Appeals of New York

Feb 14, 2008

Background: Current and former restaurant servers sued employers, alleging the employers unlawfully had retained service charges and automatic gratuities added to meal and banquet bills in place of patrons' direct tip payment to servers. The Supreme Court, New York County, Marylin G. Diamond, J., granted employers' motion to dismiss. The Supreme Court, Appellate Division, 38 A.D.3d 328, 833 N.Y.S.2d 2, affirmed as modified, and certified question.

Holdings: The Court of Appeals, Ciparick, J., held that:

(1) service charges and automatic gratuities could be charges "purported to be a gratuity for an employee" within meaning of governing statute;
(2) "banquet exception" to gratuity statute did not exempt banquet industry; and
(3) employers' retention of charges did not amount to deceptive act or practice in conduct of business, trade or commerce

Affirmed as modified; question answered.

Law Office of Steven M. Sack, New York City (Scott A. Lucas of counsel), for appellants.

Kauff McClain & McGuire LLP, New York City (Denis Lalli and J. Patrick Butler of counsel), for respondents.

Andrew M. Cuomo, Attorney General, New York City (Barbara Underwood, Micjelle Aronowitz, Jennifer S. Brand, Sasha Samberg-Champion, Seth Kupferberg and Donya Fernandez of counsel), and Maria Colavito for the Attorney General of the State of New York and another, amici curiae.

McNamee, Lochner, Titus & Williams, PC, Albany (David J. Wukitsch of counsel), for New York State Restaurant Association, amicus curiae.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York City (Marc Falcone of counsel), and David A. Colodny for Urban Justice Center and others, amici curiae.

OPINION OF THE COURT

CIPARICK, J.:

In Bynog v Cipriani Group (1 NY3d 193 [2003]), we left open the question as to whether Labor Law § 196-d, which forbids an employer from retaining any part of a gratuity or "any charge purported to be a gratuity" for an employee applies only to a voluntary gratuity or tip presented by a customer or whether it may also apply to a service charge that is held out to the customer as a substitute for a tip. We conclude that a charge that is not a voluntary payment may be a "charge purported to be a gratuity" within the meaning of the statute.

As alleged in the complaint, plaintiffs are former and present restaurant servers who claim their employers violated Labor Law section 196-d by failing to properly remit the money collected as either service charges, gratuities included within the ticket price or automatic gratuities added at the time of purchase of a ticket for three types of dining cruises provided by defendants, banquet cruises; general public dining and special events cruises. All of the dining cruises take place in New York harbor on boats either owned and/or operated by defendants. Banquet cruises are private events which involve either individual or corporate patrons that have contracted with defendants to charter an entire vessel for celebratory, ceremonial, charitable or

corporate purposes. General public dining cruises are attended by members of the general public who purchase individual tickets either from defendants directly or from designated travel and tour operators; as to these cruises, plaintiffs' complaint is limited to charges paid by customers in the latter category. Special event dining cruises are held on major holidays, such as July 4th and New Year's Eve, and are similar to the general public dining cruises in that tickets are available to the general public, however, tickets for special event cruises are sold at a significantly higher price. Meals and drinks are served at all three types of cruises. Plaintiffs characterize the meals and drinks provided on these cruises as luxury dining in which customers would expect to pay a gratuity of between 15 to 20 percent. Defendants pay their employee wait staff an hourly wage which varies according to the type of cruise. Tips are allowed although are seldom collected, allegedly because patrons believe the tip is included in the price of the cruise.

Plaintiffs' complaint asserts seven causes of action. The first cause of action alleges World Yacht[1] violated Labor Law § 196-d by withholding gratuities from its wait staff with respect to all three types of cruises. In relation to defendants' banquet cruises, plaintiffs assert that defendants told inquiring customers that the 20 percent service charge is remitted to defendants' wait staff as the gratuity, but then failed to distribute any amount of the service charge to its wait staff. Plaintiffs further argue that defendants should be precluded from treating the 20 percent banquet service charge as anything other than a gratuity because defendants presented banquet patrons with bills which segregated and excluded the banquet service charge from other banquet charges thereby treating the banquet service charge like a gratuity for sales tax purposes, and presumably for income tax purposes as well. As to the general public dining cruises (to the extent customers come through travel and tour operators) and special event cruises, plaintiffs assert that World Yacht manipulated the custom of tipping by representing to the customer that the gratuity was included in the ticket price but then only remitting to its employees a gratuity of between 4 to 7 percent.

[1] "World Yacht" refers to all of the defendants collectively, including New York Cruise Lines Inc., World Yacht Inc., World Yacht LLC and World Yacht Limited Partnership.

Plaintiffs' second cause of action alleges that World Yacht violated General Business Law § 349 by (1) misrepresenting to its banquet customers that the 20 percent service charge would be remitted to the waiters, (2) misrepresenting to its general public dining cruise patrons that the ticket price included the gratuity and (3) misrepresenting to its special event patrons that upon purchasing a ticket for a special event cruise, an automatic gratuity is added to the price of the ticket at the time of purchase. Plaintiffs' third cause of action alleges defendants were unjustly enriched by wrongfully retaining gratuities meant for its wait staff. Plaintiffs' remaining causes of action alleging violations of federal and state wage and labor laws are not relevant to this appeal. Defendants moved for an order pursuant to CPLR 3211(a)(7) to dismiss plaintiffs' first three causes of action for failure to state a claim. Supreme Court granted, in part, defendants' motion by dismissing plaintiffs' General Business Law § 349 action in its entirety, and relying on the Appellate Division's decision in Bynog v Cipriani Group (298 AD2d 164 [1st Dept 2002], affd on other grounds, 1 NY3d 193 [2003]), dismissed that portion of plaintiffs' Labor Law § 196-d cause of action which alleged defendants failed to remit the 20 percent service charge collected at banquet cruises. The Appellate Division unanimously modified, on the law, dismissing plaintiffs' unjust enrichment claim and the remainder of the first cause of action holding that special event and public dining patrons, "paid a mandatory service charge that was not in the nature of a voluntary gratuity, and thus the failure to remit any of this charge to the waitstaff did not constitute a violation of § 196-d, notwithstanding defendants' treatment of the charge for sales or income tax purposes, and the fact that certain patrons believed the charge to be in the nature of a gratuity," (38 AD3d 328, 328- 329 [2007]) and otherwise affirmed. The Appellate Division certified the following question: "Was the order of the Supreme Court, as modified by the decision and order of this Court, properly made?" We answer the certified question in the negative and hold that plaintiffs sufficiently pleaded a cause of action for violation of Labor Law § 196-d.

In relation to gratuities, Labor Law § 196-d requires that:

> "No employer or his agent or an officer or agent of any corporation, or any other person shall demand or accept, directly or indirectly, any part of the

> gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee."

Labor Law § 196-d further states in its last sentence that:

> "Nothing in this subdivision shall be construed as affecting. . . practices in connection with banquets and other special functions where a fixed percentage of the patron's bill is added for gratuities which are distributed to employees, nor to the sharing of tips by a waiter with a busboy or similar employee."

In Bynog v Cipriani Group (1 NY3d 193, 196 [2003]), we held "that because plaintiffs were independent contractors and not employees of the defendants, they were not entitled to recover. . . [service charge] payments." However, we "reserve[d] judgment as to whether those waiters would be entitled to a share of [the] service charge under Labor Law section 196-d if [the wait staff] were employees" (id. at 199 n 4). On this appeal plaintiffs, supported by the New York State Attorney General and the New York State Department of Labor (NYSDOL), assert defendants violated Labor Law § 196-d by informing its banquet patrons that the 20 percent service charge was wait staff's tip. Plaintiffs further assert that World Yacht violated Labor Law section 196-d by telling its travel and tour patrons as well as its special events patrons that a gratuity was included within the ticket price for the cruise.

Defendants assert that in order to constitute a gratuity, within the purposes of Labor Law § 196-d, a payment must be voluntary and not mandatory and that the payments here were mandatory. In Weinberg v D-M Rest. Corp. (53 NY2d 499, 507[1981]), we cited with approval the Arizona Supreme Court's determination in Beaman v Westward Ho Hotel Co. (89 Ariz 1, 4-5 [1960]) that "[a] tip is in law, if not always in fact, a voluntary payment." We also cited, with approval, Peoria Hotel Co. v Dept. of Revenue (87 IllApp3d 176, 178-179 [1980]) which held that a fixed percent gratuity charge added to banquet customers' bills was really a mandatory charge.

We have stated that "[w]hen presented with a question of statutory interpretation, our primary consideration is to ascertain and give effect to the intention of the

Legislature" (Matter of DaimlerChrysler Corp. v Spitzer, 7 NY3d 653, 660 [2006] [internal quotation marks and citations omitted]). "The language of a statute is generally construed according to its natural and most obvious sense. . . in accordance with its ordinary and accepted meaning, unless the Legislature by definition or from the rest of the context of the statute provides a special meaning" (McKinney's Cons Laws of NY, Book 1, Statutes § 94, at 191-194 [1971 ed]). Labor Law § 196-d clearly forbids an employer demanding or accepting, "any part of the gratuities, received by an employee, or retain[ing] any part of a gratuity or any charge purported to be a gratuity for an employee." Plaintiffs' complaint alleges that World Yacht told inquiring patrons that the service charge is the gratuity, or that it is paid to the wait staff as additional compensation in place of a gratuity," thus discouraging patrons from leaving anadditional tip. Defendants characterize the enactment of Labor Law § 196-d as having no manifestation of legislative intent for the term 'gratuity' to encompass charges such as the mandatory banquet service charges at issue. We disagree. The language of the statute states that it is a violation of Labor Law § 196-d to "retain any part of a gratuity or . . . any charge purported to be a gratuity for an employee." We have repeatedly stated that "where the language of a statute is clear and unambiguous, courts must give effect to its plain meaning" (Matter of Charter Dev. Co., L.L.C. v City of Buffalo, 6 NY3d 578, 581 [2006] [alternation in original deleted], quoting Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington, 97 NY2d 86, 91 [2001]). Given the language, "any charge[2] purported[3] to be a gratuity" and the [2]remedial nature of Labor Law § 196-d, such language should be liberally construed in favor of the employees. Both the plain meaning of Labor Law § 196-d and its legislative history establish that the service charges at issue in this appeal are contemplated

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[2] Black's Law Dictionary 248 [8th ed 2004] [hereinafter Black's] defines "charge," in pertinent part, as [t]o demand a fee [or] to bill." Merriam Webster's Collegiate Dictionary 192 [10th ed 1993] [hereinafter Webster's] defines "charge," in pertinent part, as: "expense [or] cost [and] the price demanded for something."

[3] "Purport" or "purported" have been variously defined as: "reputed [or] rumored,"; "the idea or meaning that is conveyed or expressed;" and "to profess or claim falsely[,] to seem to be" (see Black's at 1271; see also Webster's at 949 [defining "purported" as: "reputed [or] alleged" and "purport" as: "meaning conveyed, professed, or implied" and "to have the often specious appearance of being, intending, or claiming (something implied or inferred)])."

within Labor Law § 196-d.[4] Even if the charge is mandatory, and not subject to negotiation, when a complaint asserts, as plaintiffs' complaint asserts here, that a service charge has been represented to the consumer as compensation to defendants' wait staff in lieu of the gratuity, such allegation is covered within the statutory language of Labor Law § 196-d. It is well settled that a court, when deciding whether to grant a motion to dismiss pursuant to CPRL 3211, must take the allegations asserted within a plaintiff's complaint as true, accord plaintiffs the benefit of every possible inference, determining only whether the facts as alleged fit within any cognizable legal theory (see Arnav Indus., Inc. Retirement Trust v Brown Raysman, Millstein, Felder & Steiner, 96 NY2d 300, 303 [2001]).

We agree with the Attorney General of the State of New York and the NYSDOL, charged with enforcing Labor Law § 196-d, that the standard under which a mandatory charge or fee is purported to be a gratuity should be weighed against the expectation of the reasonable customer as this standard is consistent with the purpose of Labor Law § 196-d. The Labor Department's interpretation of a statute it is charged with enforcing is entitled to deference. The construction given statutes and regulations by the agency responsible for their administration, "if not irrational or unreasonable," should be upheld (see Chesterfield Assoc. v N.Y. State Dept. of Labor, 4 NY3d 597, 604 [2005], quoting Howard v Wyman, 28 NY2d 434, 438 [1971]).

The NYSDOL's opinion letters support our holding that a banquet charge, like any charge can "purport to be a gratuity" and that the reasonable patron standard should govern when determining whether a banquet patron would understand a service charge was being collected in lieu of a gratuity. The NYSDOL in an opinion letter dated March 26, 1999, stated that "[i]f the employer's agents lead the patron who purchases a banquet or other special function to believe that the contract price includes a fixed percentage as a gratuity, then that percentage of the contract price must be paid in its entirety to the waiter, busboys and 'similar employees' who work at that function, even if the contract makes no reference to such a gratuity."

World Yacht asserts that the last sentence of Labor Law § 196-d exempts the

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[4] The drafters of Labor Law § 196-d, sought to end the "unfair and deceptive practice" of an employer retaining money paid by a patron "under the impression that he is giving it to the employee, not the employer" (see Mem of Indus. Commr., June 6, 1968, at 4, Bill Jacket L 1968, ch 1007).

banquet industry from the roscription of Labor Law § 196-d and allows an employer to retain service charges. We disagree. The legislative history of the last sentence makes what has been referred to as the banquet exception quite clear. The New York State Hotel & Motel Association, Inc., requested the inclusion of this language upon the drafting of Labor Law § 196-d in order to ensure the industry could continue its common practice of applying a fixed percentage, or lump sum payment, to a banquet patron's bill as a gratuity which then was distributed to all personnel engaged in the function, wait staff, bartenders, busboys and all other similar employees. It was feared that without this language the practice of pooling for later distribution of tips to all involved employees would be prohibited because upon receiving payment, a person could believe they were entitled to retain the entire amount and not share with the rest of the personnel who worked the banquet (see Letter from the N.Y. State Hotel & Motel Assoc., Inc., May 21, 1968, at 12, Bill Jacket, L 1968, ch 1007). Therefore World Yacht's contention that banquet service charges are not contemplated within "any charge purported to be a gratuity" is incorrect.

As further indication that defendants held out the mandatory service charges as gratuities, plaintiffs point to World Yacht's tax treatment of these monies. Supreme Court declined to examine defendants' treatment of the service charge at issue for tax purposes, while the Appellate Division found no violation of section 196-d, "notwithstanding defendants' treatment of the charge for sales or income tax purposes" (38 AD3d 328, 329 [2007]). We cannot accept this proposition. Plaintiffs should be entitled to show defendants' tax treatment of the charges since charges that are treated as gratuities for tax purposes could also be represented to patrons as being gratuities as well.

We likewise disagree with the Appellate Division that no Labor Law § 196-d violation existed with respect to special event cruises and public dining cruises booked through travel and tour operators. That court held that "[a]ll of these patrons paid a mandatory service charge that was not in the nature of a voluntary gratuity, and thus the failure to remit any of this charge to the waitstaff did not constitute a violation of § 196-d" (38 AD3d 328, 328-329). We hold that the statutory language of Labor Law § 196-d can include mandatory charges when it is shown that employers represented or allowed its customers to believe that the charges were in fact gratuities for its

employees. An employer can not be allowed to retain these monies. Thus plaintiffs' first cause of action should be reinstated in its entirety and plaintiffs should be allowed to go forward on this cause of action as it relates to all three types of cruises.

Turning to plaintiffs' second cause of action alleging that World Yacht engaged in deceptive consumer practices under General Business Law § 349, we conclude that it was properly dismissed. In order to assert a prima facie cause of action under General Business Law § 349, a plaintiff must be able to establish that a defendant intended to deceive its customers to the customer's detriment and was successful in doing so. "[P]roof that a material deceptive act or practice caused actual, although not necessarily pecuniary, harm is required to impose compensatory damages" (Small v Lorillard Tobacco Co., 94 NY2d 43, 55-56 [1999][internal quotation marks and citations omitted]). Since plaintiffs here cannot show how World Yacht's customers suffered a detriment by agreeing to pay the service charges, the automatic gratuities, or the added gratuities, plaintiffs failed to establish a prima facie claim under General Business Law § 349 and therefore plaintiffs' second cause of action was properly dismissed.

As to plaintiffs' third cause of action for unjust enrichment, this action does not lie as plaintiffs have an adequate remedy at law and therefore this claim was likewise properly dismissed. We have reviewed all other arguments and find them without merit.

Accordingly, the Appellate Division's order should be modified, without costs, by reinstating plaintiffs' first cause of action and, as so modified affirmed. The certified question should be answered in the negative.

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Order modified, without costs, by reinstating plaintiffs' first cause of action and, as so modified, affirmed. Certified question answered in the negative. Opinion by Judge Ciparick. Judges Graffeo, Read, Smith, Pigott and Jones concur. Chief Judge Kaye took no part.

Decided February 14, 2008