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GERALD DUCHENE, et al., on behalf of themselves and all others similarly situated, Plaintiffs, -against- MICHAEL L. CETTA, INC. d/b/a SPARKS STEAK HOUSE, Defendant.

06 Civ. 4576(PAC)

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
NEW YORK**

244 F.R.D. 202; 2007 U.S. Dist. LEXIS 44984

June 18, 2007, Decided

COUNSEL: [**1] For Gerald Duchene, on behalf of himself and all others similarly situated, Scot Berenson, Marian Bocris, Husein Bracic, Gaby Cucu, Jose Dafraga, Pjetrovic Damir, Daniel Durdek, Omar Ebied, Nari Ferreira, Salah Helal, Sead Hot, Ali Kasmi, Ladislav Kulisek, Fadil Kurmemovic, Marin Mesic, Jose Monge, Edelmiro Moreno, Sammy Musovic, Laurence O'Neill, Ivan Pavicic, Sucko Pjetrovic, Fikret Radoncic, Fahrudin Redzepagic, Alaettin Sangu, Victor Simoes, Daniel Suarez, Blaise Yaksick, on behalf of themselves and all others similarly situated, Sani Hadzibrahimovic, Carlos Prado, Ian COLLINS, Leo Blokar, Diego Suarez, Ahmed T. Ibrahim, Ibrahim Wakim, Constantin Arama, Carlos Anibal Ponce, Kevin Mason, Gerry Finnegan, Armindo Barata, Carlos A. Zufriategui, Alaettin Sungu, Mirzet Purisic, Bogdan Stanciu, Ioan Mircica, Jorge Horacio Alvarez, Georgian Cibu, Gerardo Alarcon, Saied G. Salem, Kelmend Vutmi, Elsayed Ali, Christopher Rourke, Akbal Makhoul, Stanley Zuk, Marek Krakowiak, Kamal Brahimi, Mohamed Elbeyali, Rachid Lamniji, Giuseppe Vetro, Eduard Bulku, Suleyman Kucur, Sadik Preljvukaj, Almir Selimovic, Jeton Gjidiija, Plaintiffs: Louis Pechman, LEAD ATTORNEY, Laurie Berke-Weiss, Berke-Weiss & [**2] Pechman, LLP, New York, NY.

For Fadil Kurmemovic, Jeton Gjidiija, Plaintiffs: Louis Pechman, LEAD ATTORNEY, Berke-Weiss & Pechman, LLP, New York, NY.

For Michael L. Cetta, Inc., doing business as Sparks Steak House, Defendant: Philip K Davidoff, LEAD ATTORNEY, Jeffrey Alan Goldstein, Ford & Harrison LLP, New York, NY.

For Costel Dumitra, ADR Provider: Louis Pechman, LEAD ATTORNEY, Berke-Weiss & Pechman, LLP, New York, NY.

JUDGES: PAUL A. CROTTY, United States District Judge.

OPINION BY: PAUL A. CROTTY

OPINION

HONORABLE PAUL A. CROTTY, United States District Judge:

[*202] Plaintiffs, current and former waiters at Defendant Sparks Steak House ("Sparks"), initiated this litigation under the Fair Labor Standards Act ("FLSA") and the New York Labor Law, alleging that Sparks unlawfully diverted a portion of their tips to other restaurant workers. On August 24, 2006, the Court ordered that the FLSA claim proceed [*203] as a collective action pursuant to *Section 216(b) of the FLSA*. Plaintiffs now move, pursuant to *Fed.R.Civ.P. 23(b)(3)*, for certification of a class action, consisting of all persons who have worked as waiters at Sparks between June 14, 2000 and [**3] the date of final judgment in this proceeding. Sparks argues both that the Court should not exercise supplemental jurisdiction over the state law claims; and that the requirements for class action certification have not been met. The Court disagrees, and grants Plaintiffs' motion for class certification.

SUPPLEMENTAL JURISDICTION

Under 28 U.S.C. β 1367(a), the Court may exercise supplemental jurisdiction over Plaintiffs' state law claims if the state and federal claims and the FLSA claims "derive from a common nucleus of operative fact," such that the parties "would ordinarily be expected to try them all in one judicial proceeding." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966). Here, the state and federal claims arise out of precisely the same conduct by Defendant, and there is no indication that the state claim would predominate over the federal claim. Moreover, similar claims have regularly been tried together by courts in this district. See, e.g., *Heng Chan v. Triple 8 Palace, Inc.*, No. 03 Civ. 6048, 2006 U.S. Dist. LEXIS 15780, 2006 WL 851749 (S.D.N.Y. March 30, 2006); *Chung v. New Silver Palace Restaurants, Inc.*, 272 F. Supp. 2d 314 (S.D.N.Y. 2003). [**4] The Court therefore exercises supplemental jurisdiction over Plaintiffs state law claims.

CLASS CERTIFICATION

To certify a class action, the court must first find that the class meets the strict requirements of numerosity, commonality, typicality, and adequacy of representation. *Fed.R.Civ.P. 23(a)(1)-(4)*. If so, the Court must then determine (1) whether common questions of law and fact predominate over questions affecting only individual class members, and (2) whether the class action is superior to all other methods for adjudicating the controversy. *Fed.R.Civ.P. 23(b)(3)*. Sparks does not dispute that the proposed class satisfies the requirements of commonality, typicality, and adequacy of representation under *Rule 23(a)(2)-(4)*, or that common questions of law and fact predominate under *Rule 23(b)(3)*, and the court finds these requirements to be satisfied. The remaining issues before the Court are therefore whether the numerosity requirement is satisfied, and whether a class action is the superior adjudicatory method.

A. Numerosity

Sparks concedes that at present it employs 66 waiters [**5] and that more than 60 current and former employees have already joined the FLSA collective action. Sparks also does not dispute that there are more than 180 members of the proposed class. This number easily satisfies the numerosity requirement in this Circuit. See *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) ("numerosity is presumed at a level of 40 members"); *Hirschfeld v. Stone*, 193 F.R.D. 175, 182 (S.D.N.Y. 2000) (certifying a class with 150 to 170 members); *Adames v. Mitsubishi Bank, Ltd.*, 133 F.R.D. 82, 89 (S.D.N.Y. 1989) (142 class members "clearly sufficient" to satisfy requirement of numerosity).

Sparks argues that since the identities of the potential class members are known, a substantial number have

already opted in to the FLSA collective action, and most are residents of the New York metropolitan area, joinder is practicable. But a number of the proposed class members now live outside the New York metropolitan area, and it is far from clear that all or most are financially capable of pursuing individual suits. Notwithstanding Sparks's contentions, the Court finds joinder impracticable [**6] and the numerosity requirement satisfied. See *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993) *In re Independent Energy*, 210 F.R.D. 476, 479 (S.D.N.Y. 2002).

B. Superiority

Sparks urges that there is an emerging trend in federal courts to decline to certify state wage and hour class actions pursuant to *Rule 23(b)(3)*. Sparks cites as the leading case, *Leuthold v. Destination America, Inc.*, 224 F.R.D. 462 (N.D. Cal., 2004). In *Leuthold*, the Court rejected plaintiffs' *Rule 23* [*204] motion, and cited the difference between a collective action with its opt-in requirements and a class action with its opt-out requirements. Allowing a class action is said to eviscerate Congress's carefully calibrated selection of an opt-in mechanism for FLSA collective actions.

Leuthold is not applicable here. First, the court's decision seems to be based on a finding of hostility between those very few potential class members who had opted in to the FLSA collective action and the remainder who would be forced into the litigation if a class certification were permitted. That is certainly not the case here, where there is already broad [**7] participation in the collective action, which also eliminates the *Leuthold* court's concern that the state law class action would ultimately predominate over the FLSA collective action. Furthermore, there is no risk of confusing the potential class members, because the opt-in date for the collective action expired late in December, more than six months ago. Finally, there appears to be no sound policy reason why a New York State action should not be permitted to proceed as a class action along with the FLSA proceeding. In the last analysis, the clearly available alternative of a separate action in New York State Supreme Court would be neither efficient, nor effective.

Whatever trend Sparks may have discerned in other circuits, courts in the Second Circuit routinely certify class action in FLSA matters so that New York State and federal wage and hour claims are considered together. See, e.g., *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81 (S.D.N.Y. 2001); *Realite v. Ark Restaurants Corp.*, 7 F. Supp. 2d 303 (S.D.N.Y. 1998). There is no good reason to depart from these precedents, especially where so many of the facts are common to both federal [**8] and state claims.

CONCLUSION

Plaintiffs' motion to certify this case as a class action under *Fed.R.Civ.P. 23(b)(3)* is GRANTED. Plaintiffs are to submit their proposed order concerning notice to the class members for prompt endorsement by the Court. The Clerk is directed to close out this motion.

Dated: New York, New York

June 18, 2007

SO ORDERED

PAUL A. CROTTY

United States District Judge