

EDISON LOPEZ, CARLOS CRUZ CACILDO, and JUSTIN WANDS, on behalf of themselves and all others similarly situated, Plaintiffs, - v - THE DINEX GROUP, LLC, 44TH STREET RESTAURANT, LLC, BOWERY RESTAURANT, LLC, 64 WEST RESTAURANT, LLC, 65TH STREET RESTAURANT LLC, 76TH STREET RESTAURANT, LLC, and DANIEL BOULUD, Defendants.

Supreme Court of New York, New York County

June 23, 2015, Decided; June 23, 2015, Filed

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Reporter

2015 N.Y. Misc. LEXIS 2192

EDISON LOPEZ, CARLOS CRUZ CACILDO, and JUSTIN WANDS, on behalf of themselves and all others similarly situated, Plaintiffs, - v - THE DINEX GROUP, LLC, 44TH STREET RESTAURANT, LLC, BOWERY RESTAURANT, LLC, 64 WEST RESTAURANT, LLC, 65TH STREET RESTAURANT LLC, 76TH STREET RESTAURANT, LLC, and DANIEL BOULUD, Defendants.

Notice: NOT APPROVED BY REPORTER OF DECISIONS FOR REPORTING IN STATE REPORTS.

Core Terms

settlement, class action, Notice, proposed settlement, preliminary approval, certification, days, class member, APPOINTMENT, captains, settlement procedure, similarly situated, final approval, CONDITIONAL

Judges: [*1] HON. EILEEN A. RAKOWER, J.S.C.

Opinion by: EILEEN A. RAKOWER

Opinion

DECISION and ORDER

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiffs, Edison Lopez, Carlos Cruz Cacildo, and Justin Wands (collectively, "Plaintiffs"), individually and on behalf of themselves and all others similarly situated, bring this action for unpaid wages against defendants,

the Dinex Group, LLC, 44th Street Restaurant, LLC, Bowery Restaurant, LLC, 64 West Restaurant, LLC, 65th Street Restaurant, LLC, 76th Street Restaurant, LLC, and Daniel Boulud (collectively, "Defendants"). This action is based on Defendants' alleged failure to pay Plaintiffs and a putative class of similarly situated servers, bussers, runners, bartenders, baristas, captains, assistant captains, hosts, sommeliers, and other similarly situated "Tipped Workers" who work or have worked for Defendants in New York at db Bistro Moderne, DBGB Kitchen and Bar, Bar Boulud, Daniel, Café Boulud, and Boulud Sud (collectively, the "Boulud Restaurants"), the appropriate minimum wage, overtime compensation, spread-of-hours pay, tips, and other wages between June 10, 2008 and the present (the "Relevant Time Period").

Plaintiffs now move for an Order: (a) granting preliminary approval of [*2] the Settlement Agreement and Release ("Settlement Agreement"); (b) approving Plaintiffs' proposed schedule for final settlement approval; (c) conditionally certifying the following settlement class under Article 9 of the CPLR for purposes of effectuating the settlement:

Named Plaintiffs and the 1,050 current and former employees of Defendants who performed work as servers, bussers, runners, bartenders, baristas, captains, assistant captains, hosts, sommeliers, and in any other similarly situated tipped position who work or have worked for Defendants for more than 6 weeks in New York at db Bistro Moderne, DBGB Kitchen and Bar, Bar Boulud, Daniel, Café Boulud, or Boulud Sud at any time from June 10,

2008 through the date the Court issues the Preliminary Approval Order.;

(d) appointing Plaintiffs' counsel as class counsel; and, (e) approving Plaintiffs' proposed Notice of proposed settlement of class action lawsuit and Claim Form, and directing their distribution.

In support, Plaintiffs submit: the attorney affidavit of Brian S. Schaffer ("Schaffer"); the proposed Settlement Agreement and Release ("Settlement Agreement"); the proposed Notice of proposed settlement of class action lawsuit and Claim Form; a copy [*3] of Plaintiffs' amended complaint; and, a proposed Order granting Plaintiffs' motion for preliminary approval of settlement, conditional certification of the settlement class, appointment of Plaintiffs' counsel as class counsel, and approval of the proposed notice of settlement and class action settlement procedure.

No opposition is submitted.

Pursuant to [CPLR §. 908](#), "[a] class action shall not be dismissed, discontinued, or compromised without the approval of the court. Notice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs." ([CPLR § 908](#)). Although [CPLR § 908](#) does not define the criteria for approval, New York's courts have recognized that New York's class action statute is similar to the federal statute. (([Fiala v. Metro. Life Ins. Co.](#), 27 Misc. 3d 599, 606 [Sup. Ct. NY Cnty. 2010]; [Matter of Colt Indus. Shareholder Litig.](#), 77 N.Y.2d 185, 194 [1991]; [Avena v Ford Motor Co.](#), 85 A.D.2d 149, 152 [1st Dep't 1982])). Thus, in determining whether approval is appropriate, the court looks to whether the proposed settlement is fair, adequate, reasonable, and in the best interests of the class members. ([Rosenfeld v. Bear Stearns & Co.](#), 237 A.D.2d 199, 199 [1st Dep't 1997]; [Klein v. Robert's Am. Gourmet Food, Inc.](#), 28 A.D.3d 63, 73 [2d Dep't 2006])). The following factors are considered:

(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the [*4] risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the

best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

([In re Initial Pub. Offering Sec. Litig.](#), 226 F.R.D. 186, 190 [2005]).

An action that purports to be a class action, but has not yet been certified as such, is treated as "a class action" for purposes of this rule. ([Avena v. Ford Motor Co.](#), 85 A.D.2d 149, 152 [1st Dep't 1982]). The approval of the proposed settlement of a class action is a matter of discretion for the trial court, and "it is axiomatic that the law encourages settlement of disputes." (*Id.*).

As far as class certification is concerned, under [CPLR § 901 \(a\)](#), a lawsuit may qualify as a class action if the following criteria are met:

- (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 [*5] 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.

([CPLR § 901 \[a\]\[1\]-\[5\]](#)). The party moving for class action certification bears the burden of demonstrating that these criteria are met. ([In re Colt Indus. Shareholder Litigation](#), 155 A.D.2d 154, 159 [1st Dep't 1990]).

Additionally, a class action asserting Labor Law violations is permissible, so long as any party who elects to seek liquidated damages may opt out of the class. ([Cohen v. Gerson Lehrman Group, Inc.](#), 686 F. Supp. 2d 317, 322 [S.D.N.Y. 2010] citing [Pesantez v. Boyle Environmental Services, Inc.](#), 251 A.D.2d 11, 12 [1st Dep't 1998] ["To the extent certain individuals may wish to pursue punitive claims pursuant to [Labor Law § 198\(1-a\)](#), which cannot be maintained in a class action ([CPLR § 901\[b\]](#)), they may opt out of the class action."]); [Downing v. First Lenox Terrace Assoc.](#), 107 A.D.3d 86,

[89 \[1st Dep't 2013\]](#)). Whether a particular lawsuit qualifies as a class action rests within the sound discretion of the trial court, and the class certification statute "should be liberally construed." ([Kudinov v. Ket-Tech Constr. Inc.](#), [65 A.D.3d 481, 481 \[1st Dep't 2009\]](#)).

Review of a proposed class action settlement generally involves a two-step process: First, the court reviews the proposed terms of settlement and makes a preliminary determination on the fairness, reasonableness and adequacy of the settlement terms. (*In re Initial Pub. Offering Sec. litig.*, [226 F.R.D. at 191 \[S.D.N.Y. 2005\]](#)). If the proposed [*6] settlement "appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted." (*Id.*).

Second, where preliminary approval is granted, the court must direct the preparation of notice of the certification of the settlement class, the proposed settlement and the date of the final fairness hearing. (*Id.*). Class members (and non-settling defendants whose rights may be affected by the proposed settlement) then have an opportunity to present their views of the proposed settlement, and the parties may present arguments and evidence for and against the terms, before the court makes a final determination as to whether the proposed settlement is fair, reasonable and adequate. (*Id.*).

Here, the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval. Accordingly, in light [*7] of the foregoing and upon review of the moving papers and exhibits attached thereto, Plaintiffs' motion is granted without opposition in accordance with the proposed order annexed hereto.

Wherefore, it is hereby

ORDERED that Plaintiff's motion is granted without opposition in accordance with the proposed order annexed hereto.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: June 23, 2015

/s/ Eileen A. Rakower

EILEEN A. RAKOWER, J.S.C.

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT, CONDITIONAL CERTIFICATION OF THE SETTLEMENT CLASS, APPOINTMENT OF PLAINTIFFS' COUNSEL AS CLASS COUNSEL, AND APPROVAL OF THE PROPOSED NOTICE OF SETTLEMENT AND CLASS ACTION SETTLEMENT PROCEDURE

The above-entitled matter came before the Court on Plaintiffs' Motion for Preliminary Approval of Settlement, Conditional Certification of the Settlement Class, Appointment of Plaintiffs' Counsel as Class Counsel, and Approval of the Proposed Notice of Settlement and Class Action Settlement Procedure ("Motion for Preliminary Approval").

I. PRELIMINARY APPROVAL OF SETTLEMENT

1. Based upon the Court's review of the Memorandum of Law in Support [*8] of Plaintiffs' Motion for Preliminary Approval, the supporting Affidavit of Brian Schaffer ("Schaffer Aff."), and the exhibits attached thereto, the Court grants preliminary approval of the settlement memorialized in the Settlement Agreement and Release ("Settlement Agreement"), attached to the Schaffer Aff. as Exhibit A.
2. The Court concludes that the proposed Settlement Agreement is within the range of possible settlement approval, such that notice to the Class is appropriate.
3. The Court finds that the Settlement Agreement is the result of extensive, arm's-length negotiations between counsel well-versed in the prosecution of wage and hour class and collective actions, and that the proposed settlement has no obvious deficiencies.

II. CONDITIONAL CERTIFICATION OF THE PROPOSED SETTLEMENT CLASS

4. The Court finds that this action satisfies all of the prerequisites of New York Civil Practice Law and Rules ("CPLR") [§ 901](#), and that consideration of the [CPLR § 902](#) factors supports conditional certification.
5. The Court provisionally certifies the following class under Article 9 of the CPLR, for settlement purposes only ("Settlement Class"):

Named Plaintiffs and the 1050 current and former employees of Defendants who performed [*9] work as servers, bussers, runners, bartenders, baristas, captains, assistant captains, hosts, sommeliers, and in any other similarly situated tipped position who work or have worked for Defendants for more than 6 weeks in New York at db Bistro Moderne, DBGB Kitchen and Bar, Bar Boulud, Daniel, Café Boulud, or Boulud Sud at any time from June 10, 2008 through the date the Court issues the Preliminary Approval Order.

III. APPOINTMENT OF PLAINTIFFS' COUNSEL AS CLASS COUNSEL

6. The Court appoints Fitapelli & Schaffer, LLP ("F&S") as Class Counsel because they did substantial work identifying, investigating, litigating, and settling Plaintiffs' and the Class Members' claims, have years of experience prosecuting and settling wage and hour class actions, and are well-versed in wage and hour law and in class action law.

7. The work that F&S has performed both in litigating and settling this case demonstrates their commitment to the class and to representing the class's interests.

IV. CLASS NOTICE

8. The Court approves the proposed Notice and Claim Form, attached as Exhibit B to the Schaffer Aff., and directs their distribution to the Class.

9. [CPLR § 908](#) requires that "[n]otice of the proposed . . . compromise [of [*10] a class action] shall be given to members of the class in such manner as the court directs."

10. The content of the Notice and Claim Form fully complies with due process. The Notice and Claim Form describe the terms of the settlement, inform the class about the allocation of attorneys' fees and costs, and provide specific information regarding the date, time, and place of the final approval hearing.

V. CLASS ACTION SETTLEMENT PROCEDURE

11. The Court hereby adopts the following settlement procedure:

a. Within ten (10) days of the date of this Order, Defendants' counsel shall provide: (i) the Claims

Administrator with a list, including each Class Member's name, address, locations worked, dates of employment and social security number (the "Class List"); and (ii) Class Counsel with a copy of the Class List excluding social security numbers.

b. Within forty (40) days of the date of this Order, the claims administrator will mail the Notice and Claim Form to Class Members in English and Spanish.

c. In order to become an "Authorized Claimant" and receive their Individual Settlement Amount, Class Members must submit a valid Claim Form by the "Bar Date" The Bar Date shall be forty five (45) days [*11] after the initial mailing of the Notice and Claim Form, except that Class Members who did not receive the Notice and Claim Form, or were unable to submit the Claim Form within forty five (45) days, due to such factors as change of address, military service, hospitalization, or other extraordinary circumstances, will receive an additional fifteen (15) days to submit a valid Claim Form. Additionally, Class Members who wish to object to or opt out of the settlement must do so on or before the Bar Date.

d. Plaintiffs will file a Motion for Final Approval of Class Action Settlement no later than eight (8) days in advance of the fairness hearing.

e. The Court will hold a final fairness hearing on SEPT 1, 2015 at 11 A.m., at 15 Part, Room 205 at the Supreme Court of the State of New York, located at 71 THOMAS STREET, New York, New York.

f. If the Court grants Plaintiff's Motion for Final Approval of the Settlement, the Court will issue an Order granting final approval. If no party seeks a rehearing, reconsideration, or appeal of the Court's Final Order and Judgment, the "Final Effective Date" of the settlement will be thirty (30) days after the Court has entered its Order granting final approval. If rehearing, [*12] reconsideration or appellate review is sought, the "Final Effective Date" shall be after any and all avenues of rehearing, reconsideration or appellate review have been exhausted and no further rehearing, reconsideration or appellate review is permitted, and the time for seeking such review has expired.

g. Defendants shall fund the "Qualified Settlement Fund" no less than five (5) days after the Final Effective Date in an amount equal to the "Net Settlement Amount" (the portion of the Gross

Settlement Fund to be paid to Authorized Claimants as their Individual Settlement Amounts, Plaintiffs as Court-approved service awards, Class Counsel as Court-approved attorneys' fees and costs, and the Claims Administrator).

h. The Claims Administrator will mail all settlement checks within fifteen (15) days of the Final Effective Date.

i. The parties shall abide by all other terms of the Settlement Agreement.

It is so ORDERED this 23 day of JUNE, 2015.

/s/ Eileen A. Rakower

Hon. Eileen A. Rakower