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Ex-Waiter Gets Partial Class Cert. Over Stiffed Steakhouse Pay

By **Joyce Hanson**

Law360 (April 23, 2019, 6:23 PM EDT) -- A New York federal court on Monday conditionally certified a class of tipped workers at one location of a ritzy steakhouse chain's Manhattan restaurants in litigation claiming the business stiffed them on minimum wages, overtime and tips, but denied certification to workers at four others.

U.S. Magistrate Judge Katharine H. Parker partly granted conditional certification of lead plaintiff Elvir Delijanin and add-on plaintiff Omer Boci's proposed collective action claiming Fair Labor Standards Act violations by Wolfgang's Steakhouse Inc. and related entities, ruling that a class of tipped workers employed since August 2015 at the chain's Midtown East location can move forward with their claims.

However, the judge denied without prejudice claims related to Wolfgang's Gotham Hotel, Times Square, Park Avenue and Tribeca eateries, saying Delijanin and Boci's "hearsay statements" didn't meet their burden of showing that potential opt-in plaintiffs at all locations were similarly situated victims of a common policy that violated the FLSA.

"All they have provided is a list of unsupported assertions and conclusory allegations that are insufficient to conditionally certify a class that includes other locations," Judge Parker wrote.

Judge Parker also found that the Wolfgang locations all appear to be separate corporate entities, each with different management. Delijanin didn't identify a common manager at all locations who told him and others to work off the clock, and he gave no information about cash wages paid to other tipped employees, their weekly schedules or their tips, according to the judge.

Gerald C. Waters Jr. of Meltzer Lippe Goldstein & Breitstone LLP, representing Wolfgang's, told Law360 Tuesday that the favorable decision confirms that the Second Circuit "does have a standard for certification of a conditional collective action, albeit low."

"Among other things, we were able to successfully limit this case to facts relating to plaintiff's singular work location as opposed to the broader collective action sought to be certified," Waters said. "We are pleased with the decision of the court which will enable us, on behalf of our client, to continue to expose the legal and factual flaws of plaintiff's claims."

Counsel for Delijanin and Boci did not immediately respond Tuesday to a request for comment.

From January 2013 to April 2018, according to his Aug. 28 complaint, Delijanin worked as a waiter at Wolfgang's in Midtown East. After the suit was filed, Boci joined the action, saying he had also worked as a waiter there from May 2010 to January 2017.

They claimed that all five steakhouses violated the FLSA and New York Labor Law by failing to pay them and other non-exempt tipped employees the statutory minimum wage under both statutes due to invalid tip credit deductions. In addition, they claimed the steakhouse chain failed to pay them and other tipped employees for all regular and overtime hours worked due to "off-the-clock" work.

Both Delijanin and Boci claim they were scheduled to work 38 hours a week and required to arrive 30

minutes to an hour before their shifts' official start time so they could do side work such as setting up the dining room, making deliveries and preparing sauces, according to Judge Parker. In declarations to the court, Delijanin said he actually worked 42 hours per week, while Boci said he put in two to six hours of extra time every week, but their off-the-clock hours were never reflected on their pay stubs, the judge said.

Both said they received wages of \$5 per hour from May 2012 through January 2017, but Boci then stopped working at Wolfgang's, while Delijanin said he earned a wage of \$7.50 in 2017 and \$8.65 in 2018, according to Judge Parker.

The judge noted that Delijanin and Boci may not be similarly situated regarding all of the alleged FLSA violations for all years in the statute of limitations period.

"For example," she wrote, "Boci appears to have received notice about tips and tip credit via [a] tip allowance acknowledgment form, whereas the only evidence that plaintiff received such notice is his paystubs from 2017 and 2018, after Boci left Midtown East's employ. Thus, it is possible that Boci, but not plaintiff, may have properly been treated as a tipped worker in 2015 and 2016, and that plaintiff may have been properly treated as a tipped worker in 2017 and 2018."

Delijanin is represented by C.K. Lee of Lee Litigation Group PLLC.

Wolfgang's is represented by Gerald C. Waters Jr., Jonathan D. Farrell, Nicholas P. Melito and Dong Phuong V. Nguyen of Meltzer Lippe Goldstein & Breitstone LLP.

The case is Delijanin v. Wolfgang's Steakhouse Inc. et al., case number 1:18-cv-07854, in the U.S. District Court for the Southern District of New York.

--Editing by Adam LoBelia.

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