

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
Civil Action No.:

CHARLES MORAN and
ANTHONY MARCASCIANO,
On behalf of themselves and
all others similarly
situated,

Plaintiffs,

v.

BAY TOWER, INC.,

Defendant.

COMPLAINT

Introduction

The Plaintiffs, former banquet waiters at the Defendant restaurant, Bay Tower, Inc. ("Bay Tower"), bring this suit on behalf of themselves and all other waitstaff currently employed or formerly employed by the banquet department of the Defendant, to recover gratuities and service charges which the Defendant has illegally failed to pay the banquet waitstaff. In spite of a law requiring that an employer turn over the entire amount of tips to the persons "engaged in the serving of food or beverage," the Defendant has a long-standing policy of retaining for itself 1.5% percent of the gratuity paid by banquet patrons. In addition, the

Defendant has permitted management-level employees to take a cut out of the pool of gratuities that are turned over to the banquet waitstaff. Furthermore, the Defendant has charged banquet patrons a separate "service" charge of at least 3%, and charged patrons other, separate and additional "service" fees and charges, but has not paid any portion of these fees to the banquet waitstaff who serve the food and beverages. The Plaintiffs seek a declaration of rights, restitution, treble damages, costs of suit and attorney's fees. The Plaintiffs further seek certification to pursue this action on behalf of the Class consisting of all waitstaff now or formerly employed by Bay Tower in the banquet department, since the date of the inception of the practices set forth in this Complaint.

Parties

1. The Plaintiff Charles Moran ("Moran") is a natural person residing in Somerville, Middlesex County, Massachusetts.

2. The Plaintiff Anthony Marcasciano ("Marcasciano") is a natural person residing in Malden, Middlesex County, Massachusetts.

3. The Defendant Bay Tower, Inc. ("Bay Tower") is a Massachusetts corporation with a principal place of business at 60 State Street, Boston, Suffolk County, Massachusetts.

Factual Allegations

4. The Defendant Bay Tower operates a restaurant and function rooms located at 60 State Street, Boston. Patrons reserve the function rooms for private parties of varying sizes, from dinners-for-two to weddings.

5. The Defendant maintains a staff, known as the banquet department, consisting of management personnel, waitstaff (including bartenders), and other employees, dedicated to booking, scheduling and servicing these private functions. Some waitstaff in the Defendant's restaurant also wait functions in the banquet department on a part time or as-needed basis.

6. The Defendant established the banquet department as a separate department in or about the year 1994. Prior to that date, the defendant handled functions, but on a smaller scale than it does today.

7. The Plaintiff Charles Moran commenced employment with the Defendant in approximately the Summer, 1994, as a banquet waiter in the Bay Tower. At all times material to this Complaint, Mr. Moran has worked either full-time or part-time as a waiter in the Defendant's banquet department, engaged in the serving of food or beverage, until September 11, 1997, the date he ceased being employed by Bay Tower.

8. The Plaintiff Anthony Marcasciano commenced employment with the Defendant approximately 11 years ago as a waiter in the Bay Tower restaurant, then joined the banquet department. At all times material to this Complaint, Mr. Marcasciano has worked either full-time or part-time as a waiter in the Defendant's banquet department, engaged in the serving of food or beverage, until November, 1996, the date he ceased being employed by Bay Tower.

9. The waitstaff of the banquet department have at all times material to this Complaint been managed by supervisors. The waitstaff and supervisors work in day and night shifts.

10. At all times material to this Complaint, Bay Tower has charged banquet patrons a fee consisting of at least 18% of the patron's food and beverage charges.

11. At all times material to this Complaint, banquet patrons have received an invoice or receipt from Bay Tower, itemizing the food and beverage charges, the gratuity, and any other fees charged. In addition, patrons paying by credit card have received a separate itemized credit card receipt.

12. The receipt (and credit card receipt) given to banquet patrons lists at least two itemized charges in addition to the charges for food and beverages: One is a charge for "service," equal to 3% of the amount charged for

food and beverages; the other is a separate charge called "15% serv," equal to 15% of the amount charged for food and beverages.

13. For certain functions, the patron is also charged a separate "service fee," apart from the 3% service fee referred to in Paragraph 12 above.

14. Certain banquet patrons have been charged other, additional fees depending on the function involved, such as, by way of example only, "attendant fees," "cake cutting gratuities," and "bartender" fees.

15. At all times material to this Complaint, the Defendant has printed receipts and invoices for banquet patrons similar in style and content to the receipts described in the Paragraphs above, using the words "gratuity" and "service" to describe the charges added on to the food and beverage bill.

16. The Defendant requires that banquet waitstaff inform each patron, at the time the patron is presented with the receipt and/or credit card slip, that the "gratuity is included."

17. The entire amount of the bill paid by banquet patrons is given directly to the Defendant. Any tips for the banquet waitstaff are then turned over to the banquet waitstaff by the Defendant.

18. At all times material to this Complaint, banquet waitstaff, including bartenders, have split the "tips pool," (meaning, the amount turned over to the waitstaff and not withheld by the Defendant), in equal shares (pro rata) among the waitstaff working the shift in which the tips were produced.

19. At the time the banquet department was created, the Defendant remitted a 15% gratuity to the waitstaff.

20. At one time, the separate "bartending" fees were also included in the pooled tips remitted to each shift of banquet waitstaff.

21. When patrons leave a cash tip on top of the tip included in the bill, the full amount of the cash tip is also placed into the tips pool to be divided among the waitstaff on that shift.

22. At some point, after expanding the banquet department, the Defendant ceased to remit 1% of the gratuity to the waitstaff, thereby reducing the amount of the pooled gratuities turned over to the waitstaff.

23. Thereafter, the Defendant ceased to remit an additional .5% of the gratuity to the waitstaff, thereby further reducing the amount of the pooled gratuities.

24. On information and belief, the 1.5% retained by the Defendant has been used to pay salaries of management level employees.

25. However, at all times material to this Complaint, management-level supervisors on each shift have also been permitted or authorized by the Defendant to take a cut from the pool of tips otherwise available to the banquet waitstaff working the shift.

26. The share of the tips pool taken by management level supervisors is equal to the pro rata share paid each banquet waiter or waitress, thereby further reducing the amount of the pooled gratuities actually available to the banquet waitstaff.

27. On those shifts where there is more than one supervisor, each supervisor takes a share from the tips pool equal to the amount paid each waiter and waitress.

28. In addition, the Defendant has subtracted from the pooled gratuities an amount equal to \$2.00 per function, further reducing the tips pool available to banquet waitstaff to a figure well below 13.5%.

29. In addition, the Defendant has also ceased turning over the "bartending" fee to the banquet waitstaff and bartenders.

30. On information and belief, the "bartending fee" is used to pay the wages of employees not engaged in the service of food or beverages.

31. The Defendant never gave the waitstaff notice that it would take the deductions described above, has not explained the nature of the deductions to waitstaff, and does not identify or explain the deductions on the pay-stubs of banquet waitstaff.

32. Indeed, the Defendant has affirmatively misrepresented to certain banquet waitstaff the amount of the deductions from tips.

33. In addition, banquet waitstaff have not been paid any portion of the 3% charge added for "service," referred to in Paragraph 12 of this Complaint.

34. In addition, banquet waitstaff have not been paid any portion of the separate "service fees," referred to in Paragraph 13 of this Complaint.

35. Employees and waitstaff have complained to the Defendant about the practice of failing to pay the entire amount of tips to the waitstaff.

36. On information and belief, the Defendant fired a banquet waiter for complaining at the time the Defendant took the additional .5% out of the tips paid over to the banquet waitstaff.

37. On information and belief, banquet patrons intend and expect that gratuities, service charges and other fees, such as bartending charges, will be paid to banquet waitstaff.

38. The Defendant has specifically instructed banquet waitstaff not to inform banquet patrons of the actual amount of the gratuity remitted to the banquet waitstaff.

39. Pursuant to General Laws, Chapter 149, Section 150, as amended by Chapter 110 of the Acts of 1993, the Plaintiffs have filed a complaint with the Fair Labor and Business Practices Division of the Office of the Attorney General, on behalf of themselves and all others similarly situated, complaining of the practices alleged in this Complaint, and have received the written assent of the Attorney General to proceed with a private civil action seeking, inter alia, treble damages, costs of litigation, and attorney's fees.

Class Allegations

40. This action is brought by the Plaintiffs as a class action, pursuant to Rule 23 of the Massachusetts Rules of Civil Procedure, on behalf of all past and present banquet waitstaff employed by the Defendant, from the date of the inception of the practices set forth in this Complaint ("Class").

41. The proposed Class would consist of past and present banquet department waitstaff engaged in the service of food and beverages, including bartenders who have served at functions, and all other waitstaff who have worked

shifts, on-call or part-time for the defendant's banquet department. The Class would exclude supervisors.

42. On information and belief, the members of the Class are so numerous that joinder of all Class members is impracticable. The exact number or identity of Class members is unknown, but can be determined from the Defendant's records.

43. There are numerous and substantial questions of fact and law common to all members of the Class, which will control this litigation and predominate over any individual issues. Included within the common questions of law and fact are such questions as whether the Defendant violated the wage and hour laws, including the "tips" statute, General Laws Chapter 149, Section 152A, or otherwise violated the legal rights of the Plaintiffs and the members of the Class, by:

(a) Deducting 1.5% from the pool of tips turned over to the Plaintiffs and the other members of the Class;

(b) Authorizing or permitting management-level supervisors to take a pro rata share out of the tips pool divided up by the waitstaff;

(c) Taking other deductions from the waitstaff tips;

(d) Taking deductions from waitstaff without written or even oral notice, and failing to explain the nature of the deductions;

(e) Failing to pay the Plaintiffs and Class members any portion of the 3 % "service" fees charged patrons;

(f) Failing to pay the Plaintiffs and Class members any portion of the other "service" fees and bartending fees charged patrons;

(g) Instituting a uniform policy designed to mislead banquet patrons as to the amount of the gratuity actually paid to waitstaff.

44. The claims of the Plaintiffs are typical of the claims of the members of the Class.

45. The named Plaintiffs will fairly and adequately protect the interests of the Class. The Plaintiffs have no interests adverse to the interests of other members of the Class.

46. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

47. Many claims of Class members are relatively small, leaving individual Class members with little incentive to prosecute individual actions, rendering individual suits impractical and not cost effective.

48. Certification of this action as a class action will allow an orderly and expeditious administration of Class claims, and economies of time, effort and expense will be fostered, in addition to which uniformity of decisions will be ensured.

COUNT I

(G.L. c. 149, § 150 and G.L. c. 149 § 152A: tips and gratuities)

49. The Plaintiffs repeat and reallege the allegations of paragraphs 1 through 48 set forth above, and incorporate those allegations as if set forth more fully herein.

50. The Plaintiffs and other members of the Class were at all times employees of the Defendant, engaged in the serving of food or beverage.

51. The Defendant employer has demanded and retained for itself tips and gratuities paid or given directly to the Defendant employer for the benefit of the Plaintiff employees, or authorized or permitted management level employees to retain for themselves said gratuities, all in violation of G.L. c. 149, §152A.

52. Wherefore, pursuant to G.L. c. 149, §150 and §152A, the Plaintiffs demand restitution, statutory fines and penalties, treble actual damages, interest, attorneys fees and costs of litigation.

COUNT II

(G.L. c. 149, § 150 and G.L. c. 149 § 152A: service fees)

53. The Plaintiffs repeat and reallege the allegations of paragraphs 1 through 52 set forth above, and incorporate those allegations as if set forth more fully herein.

54. The defendant has submitted bills or invoices to banquet patrons indicating service charges, for food and beverages served by the Plaintiffs and other members of the Class, and has remitted no portion of said service fees or charges to the Plaintiffs, all in violation of G.L. c. 149, §152A.

55. Wherefore, pursuant to G.L. c. 149, §150 and §152A, the Plaintiffs demand restitution, statutory fines and penalties, treble actual damages, interest, attorneys fees and costs of litigation.

COUNT III

(G.L. c. 149, § 150 and G.L. c. 149 § 152A: other fees/charges)

56. The Plaintiffs repeat and reallege the allegations of paragraphs 1 through 55 set forth above, and incorporate those allegations as if set forth more fully herein.

57. The defendant has submitted bills or invoices to banquet patrons indicating fees and charges to be paid to waitstaff, for food and beverages served by the Plaintiffs and other members of the Class, and has remitted no portion of said fees and charges to the Plaintiffs, all in violation of G.L. c. 149, §152A.

58. Wherefore, pursuant to G.L. c. 149, §150 and §152A, the Plaintiffs demand restitution, statutory fines and

penalties, treble actual damages, interest, attorneys fees and costs of litigation.

COUNT IV

(G.L. c. 149, §148)

(Pleaded in the alternative)

59. The Plaintiffs repeat and reallege the allegations of paragraphs 1 through 58 set forth above, and incorporate those allegations as if set forth more fully herein.

60. The sums the Defendant has withheld from the Plaintiffs and other members of the Class constitute "wages" as that term is used in Chapter 149, Section 148, (governing the timely payment of "wages"), and Chapter 149, Section 150A (deductions from "wages").

61. The Defendant has failed to make timely payments of wages as required by Chapter 149, Section 148, and has failed to inform the Plaintiffs and other members of the Class in writing of the nature of deductions from wages, as required under Chapter 149, Section 148 and Section 150A.

62. Wherefore, pursuant to G.L. c. 149, §148, §150 and §150A, the Plaintiffs demand restitution, statutory fines and penalties, treble actual damages, interest, attorneys fees and costs of litigation.

COUNT V

(Conversion)

63. The Plaintiffs repeat and reallege the allegations of paragraphs 1 through 62 set forth above, and incorporate those allegations as if set forth more fully herein.

64. Banquet patrons paid moneys directly to the Defendant with the expectation and intention that said funds would be remitted to the Plaintiffs and other Class members.

65. The Defendant knowingly retained said funds, and failed to remit the moneys to the Plaintiffs and other Class members.

66. As a proximate result of the Defendant's conduct, the Plaintiffs and Class members have suffered economic losses and damages.

67. Wherefore, the Plaintiffs demand damages in tort, including but not limited to restitution of the retained funds, with interest.

COUNT VI

(Unjust Enrichment)

68. The Plaintiffs repeat and reallege the allegations of paragraphs 1 through 67 set forth above, and incorporate those allegations as if set forth more fully herein.

69. The Defendant has knowingly received and retained funds that patrons intended be paid to the Plaintiffs and other Class members.

70. In equity and good conscience, said funds belong to Plaintiffs and members of the Class.

71. Wherefore, the Plaintiffs demand restitution and disgorgement of said funds, in a sum to be determined by the Court, with interest.

COUNT VII

(Fraud)

72. The Plaintiffs repeat and reallege the allegations of paragraphs 1 through 71 set forth above, and incorporate those allegations as if set forth more fully herein.

73. The Defendant intentionally and deceptively represented or caused others to represent to patrons that certain amounts included in the bill would be paid to the Plaintiffs and other Class members.

74. The Defendant has misrepresented the extent of deductions from tips to certain waitstaff.

75. The Defendant has intentionally retained and diverted to its own use funds which were supposed to be paid to Plaintiffs and other members of the Class.

76. As a proximate result of the Defendant's conduct, the Plaintiffs and Class members have suffered economic losses and damages.

77. Wherefore, the Plaintiffs demand damages equivalent to the difference between the amount patrons were

led to believe would be paid to the Plaintiffs and the Class, and the amount actually paid, with interest.

COUNT VIII

(Breach of Contract)

78. The Plaintiffs repeat and reallege the allegations of paragraphs 1 through 77 set forth above, and incorporate those allegations as if set forth more fully herein.

79. The Defendant had an express or implied contract with Plaintiffs and Class members to pay Plaintiffs and other Class members gratuities, service fees and other charges, for services the Plaintiffs and Class member performed, which moneys the Defendant has failed and refused to pay.

80. As a proximate result of the defendant's conduct, the Plaintiffs and Class members have suffered economic losses and damages.

81. Wherefore, the Plaintiffs demand damages in contract, in a sum to be determined by the Court, with interest.

COUNT IX

(Quantum Meruit)

82. The Plaintiffs repeat and reallege the allegations of paragraphs 1 through 81 set forth above, and incorporate those allegations as if set forth more fully herein.

83. The Plaintiffs and other members of the Class provided services expecting fair and reasonable compensation in the form of gratuities.

84. Banquet patrons expected, intended and believed that the Plaintiffs and other members of the Class would receive fair compensation in the form of gratuities.

85. The gratuities turned over to the Plaintiffs and other members of the Class by the defendant were not fair and reasonable compensation for the services provided.

86. Wherefore, the Plaintiffs demand payment in quantum meruit in payment for the value of the services provided, with interest.

COUNT X

(Intentional interference with contract/advantageous relations)

87. The Plaintiffs repeat and reallege the allegations of paragraphs 1 through 86 set forth above, and incorporate those allegations as if set forth more fully herein.

88. The Plaintiffs and other Class members have or had an express or implied contract or advantageous business relationship with banquet patrons, under which the Plaintiffs and Class members are or were to receive tips, gratuities and other service related fees/charges.

89. The Defendant has without justification and acting with wrongful motive or by wrongful means interfered with

said contractual relationship or advantageous business relationship.

90. As a proximate result of the Defendant's conduct, Plaintiffs and Class members have suffered economic losses and damages.

91. Wherefore, Plaintiffs demand damages equivalent to the value of the contracted-for payments, together with consequential damages.

COUNT XI

(Declaratory Judgment, Chapter 231A, §1, et seq.)

92. The Plaintiffs repeat and reallege the allegations of paragraphs 1 through 91 set forth above, and incorporate those allegations as if set forth more fully herein.

93. There exists an actual controversy between the Plaintiffs and Defendant, namely, that the Plaintiffs and other members of the proposed Class claim an entitlement to tips, gratuities and service fees and charges, which the Defendant has withheld and has refused to pay.

94. A determination of the respective rights of the parties would terminate the uncertainty or controversy giving rise to these proceedings, leaving only the issue of damages to be determined pursuant to G.L. c. 231A, §5 and §6.

95. The Plaintiffs seek said declaration on behalf of themselves and the Class.

96. Wherefore, the Plaintiffs seek a declaration pursuant to G.L. c. 231A, §1, et seq., declaring that with respect to the time period covered by this complaint, and with respect to every banquet function within the time period covered by this Complaint: (i) the Plaintiffs and members of the Class were and are entitled to receive the entire gratuity paid by each patron, without any deductions; (ii) supervisors and management level employees are not (and were not) entitled to any portion of any gratuity paid; (iii) the Plaintiffs and members of the Class were and are entitled to the proceeds of any "service" charges paid, in proportion to the service provided by the Plaintiffs and Class members; and, (iv) the Plaintiffs and Class members were and are entitled to the proceeds of any "bartending" fees paid by patrons, and any other fees of a similar nature intended for the Plaintiffs and Class members.

Wherefore, the Plaintiffs pray:

a.) That the Court certify a Class to pursue this action consisting of all present and former banquet waitstaff, including bartenders and excluding supervisors, employed by the Defendant since the inception of the practices complained of in this Complaint;

b.) That the Court declare the rights of the parties;

c.) That the court award the Plaintiffs and Class members judgment in the form of restitution and actual money damages;

d.) That the Court award the Plaintiffs and Class members prejudgment interest;

e.) That the Court award the Plaintiffs and Class members treble actual damages under Counts I through IV of the Complaint;

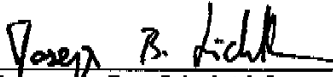
f.) That the Court award the Plaintiffs and Class members attorney's fees and costs of suit under Counts I through IV of the Complaint;

g.) That the Court award the Plaintiffs and Class members such other damages or order such other remedies and relief, at law or in equity, as the Court deems just, equitable and proper.

The Plaintiffs,

CHARLES MORAN and
ANTHONY MARCASCIANO,

By their attorney,


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Dated: November 6, 1997

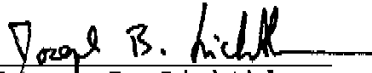
JURY DEMAND

PLAINTIFFS DEMAND A TRIAL BY JURY AS TO ALL COUNTS OF
THE COMPLAINT SO TRIABLE.

The Plaintiffs,

CHARLES MORAN and
ANTHONY MARCASCIANO,

By their attorney,


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Dated: November 6, 1997