SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DORIS LING-COHAN **PART** IAS MOTION 36

Justice

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INDEX NO. 650203/2014

ROBERT ATKINS,

Plaintiff,

MOTION DATE 01/17/2019, 01/17/2019, 01/17/2019

- V -

MOTION SEQ. NO. 003 004 005

METRONOME EVENTS, INC.,226 EAST 54TH STREET RESTAURANT, INC.

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 92, 93, 94, 95, 96, 97, 104, 105, 106, 107, 111, 112, 113, 114, 115, 117, 119, 124, 126, 150, 155

were read on this motion to/for ATTORNEY - FEES.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 98, 99, 100, 101, 102, 103, 108, 109, 110, 116, 118, 120, 125, 127

were read on this motion to/for SET ASIDE VERDICT.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 151, 152, 153, 154

were read on this motion to/for SET ASIDE VERDICT.

Upon the foregoing documents, it is

ORDERED that the within motions are decided in accordance with the attached memorandum decision.

7/3/2019
DATE

DORIS LING-COHAN, J.S.C.

CHECK ONE:	[ ]	**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[ ] **DENIED**	[X]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[X]	**REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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ROBERT ATKINS,

Plaintiff,

-against-

METRONOME EVENTS, INC., d/b/a PROVIDENCE NYC, CLUB CRIMSON NYC, ROSSCOMMON, 226 EAST 54TH STREET RESTAURANT, INC., d/b/a LEXICON, and ROBERT PEREIRA,

Defendants.

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Index No.: 650203/2014

Motion Seq. No.: 003/ 004/005

DORIS LING-COHAN, J.:

Plaintiff Robert Atkins commenced this action against his former employer, defendants Metronome Events, Inc., d/b/a Providence NYC, Club Crimson NYC, Rosscommon, 226 East 54th Street Restaurant, Inc., d/b/a Lexicon (Lexicon), and Robert Pereira (Pereira), alleging that defendants unlawfully retained service charges/automatic gratuities that were intended for plaintiff. After trial, a jury awarded plaintiff $66,140.97 in damages. In motion sequence number 003, plaintiff moves for an order, pursuant to Labor Law § 198, awarding plaintiff his underpayment, liquidated damages, pre-and post-judgment interest, attorney's fees, costs and disbursements, and all fees and costs. In motion sequence numbers 004 and 005, defendants move, pursuant to CPLR 4402 granting a mistrial.[1] Alternatively, defendants move, pursuant to CPLR 4401 and 4404(a) setting aside the March 26, 2018 verdict as being against the weight of evidence. Motion sequence numbers

[1] Motion sequence number 005 is an updated and enhanced version of motion sequence number 004. Evidently, after the parties received a copy of the trial transcript, the court advised them to submit an updated version of the motion papers and include annotations.

003, 004 and 005 are hereby consolidated for disposition. For the reasons set forth below, plaintiff's motion is granted, and defendants' motions are denied.

BACKGROUND AND FACTUAL ALLEGATIONS

Defendants own and operate various event spaces in New York City. Plaintiff was employed by defendants as a bartender from 2009 to 2013. According to plaintiff, although defendants routinely added a 20% service charge/automatic gratuity to the banquet events, he did not receive his portion of the service charge from each contract. As the patrons assumed that the 20% service charge would be paid to the waitstaff and bartenders, they did not pay additional and separate gratuities. Plaintiff also claimed that defendants unlawfully withheld other credit card and cash tips.

Plaintiff was terminated in April 2013. In January 2014, plaintiff filed a complaint, alleging that defendants unlawfully withheld gratuities from his pay checks. In the first cause of action, alleging a violation of the New York Labor Law, plaintiff claims that he was entitled to his share of the 20% service charge/automatic gratuities collected for the events that he worked. The second cause of action alleges that defendants violated General Business Law (GBL) § 349 when they intended to mislead their patrons into thinking that the service charge was a gratuity. In the third cause of action, grounded in unjust enrichment, plaintiff alleges that defendants knowingly received and retained funds that patrons intended to be paid to plaintiff and other waitstaff.

The case was scheduled for a jury trial to begin on March 14, 2018. On March 13, 2018, this court noted for the record that the second and third causes of action in the complaint had been withdrawn. The pertinent facts of the jury trial are as follows:

Plaintiff was employed as a bartender, serving drinks at private, or banquet, events, and events open to the public, or night club events. When plaintiff worked at the night club events, he was given a flat shift pay rate of $50 dollars, in addition to whatever tips he made. During the night

club events, the bartenders would charge customers' credit cards for drinks and oversee their own cash registers. At the end of the evening, the bartenders would add up the tips from the credit cards and take the equivalent amount of cash out of the register. They would then split the cash and credit card tips between the bartenders and the bar-backs.

Plaintiff believed that he received all the tips he was entitled to during his nightclub shifts. However, in comparison, plaintiff claimed that he did not receive the tips or gratuities he was entitled to while working during the banquet events. Over the course of four years, plaintiff worked at approximately 143 banquet events. A banquet typically lasted five hours. Plaintiff received a shift pay of $150 per banquet event, regardless of the hours worked or the amount of people at the banquet. He was primarily assigned to Lexicon, one of the smaller venues, located on East 54th Street, New York, New York. Plaintiff testified that a full banquet would hold 350-500 people, and there would be three bartenders, one bar-back, two busboys and three wait staff. On most occasions, patrons asked the bartenders for drinks but did not have to pay extra for them, as the client had entered into pre-paid contracts with defendants for their food and drinks. During plaintiff's testimony, counsel read the portion of the complaint where plaintiff alleges that he is entitled to damages for violation of Labor Law § 196-d, in the amount of $375,000. Trial tr at 234.

As explained by plaintiff, he was deprived of his tips and gratuities in three ways. In the first scenario, plaintiff claimed that he did not received his pro-rata share of the gratuities from each banquet he worked at. According to plaintiff, defendants entered into contracts with clients for large amounts of money to provide banquet events. Defendants charged clients an additional 20% of the food and beverage charge, which was listed as a service charge. There was no explanation on the contract for the term "service charge." As a result, according to plaintiff, clients did not leave many gratuities as they had assumed that they were pre-paying for gratuities to be given to the bartenders. Plaintiff testified, "they stole all of our tips from all of the banquets. They didn't pay us." *Id.* at

239.[2] Plaintiff states that neither he, nor the other bartenders, received their share of the service charge. Another former bartender testified on plaintiff's behalf, also claiming that patrons did not tip well because they assumed that she had been taken care of. *Id.* at 311.

In the second scenario, plaintiff testified that, if there were drinks ordered that were not covered by the client's contract, i.e. premium liquor, the patron would provide plaintiff with his credit card for those drinks. Plaintiff would add a 20% tip to the credit card. Plaintiff testified that part of his job responsibilities included closing out the tabs at the end of the night. At the end of the evening, plaintiff did not take the 20% out of the cash register. Instead, he gave the credit card charges to Emily Gould (Gould), a manager, or another manager on duty. Plaintiff testified that, unlike at the nightclub, there were no cash registers at the banquet events and he did not receive any of the 20% tips that he had manually added onto the customers' credit card bills for additional drinks. He testified that he recalled only two banquet events where there were cash registers.

In the third scenario, plaintiff testified that, during some of the banquets, either he or Gould would receive large envelopes of cash from clients at the end of the evening. Plaintiff stated that if he received one of these envelopes, he would give it to Gould. Plaintiff assumed that these large envelopes were meant as gratuities that were to be divided up between the bartenders or wait staff. However, he did not receive any of the money from these envelopes. Jeffrey Sheppard (Sheppard), another employee, testified that he had "seen people hand envelopes to [Gould]." *Id.* at 347.

Pereira, the owner, testified that the legal capacity for Lexicon is under 300 people. He testified that a bartender at a banquet would make $100 - $300 in cash tips, in addition to the $150 shift pay. Further, Pereira testified that plaintiff was not instructed to add a 20% gratuity to the credit

[2] Plaintiff testified that he would receive five to fifty dollars per event in cash tips left in a bucket on the bar and then he would split that between the other bartenders and bar-back. These cash tips were unreported.

card charges. "It would be your prerogative what you leave him as a tip on that credit card." *Id.* at 407. In addition, Pereira stated that plaintiff absolutely had a cash register and would go to the cash register and take the credit card tips out as cash from the register.

When presented with a template of a contract between defendants and a client, Pereira testified that the contract said service charge, and that there are no tips or gratuities referenced in the contract.[3] A 20 percent service charge was also listed on each post-party invoice, without any explanation. The post-party invoices and the staffing sheets were matched up for the dates that plaintiff had worked for defendants and they were entered into evidence. According to Pereira, if the client asked what the service charge is, defendants would explain "if they wish to leave a gratuity or tip, they're more than welcome to do that and they would do that directly with the employees or they would do it directly with the maître d' and give them instruction on what to do." *Id.* at 412.

During the trial, the post-party invoice dated December 14, 2011 was provided to Humberto Campoverde (Campoverde), a manager, who was one of defendants' witnesses. Campoverde testified that this post-party invoice listed a credit card charge for additional liquor. *Id.* at 568.

Current and former bartenders and managers testified that plaintiff's testimony was inaccurate regarding the amount of tips he made per banquet. They also explained that they would ring up the credit cards and take the cash tips from the registers. For example, Edith Rocha (Rocha) testified that defendants never kept the tips on the credit cards and that they cashed out their own tips. She testified that she made at least $75 to $150, and sometimes $300, per banquet, in tips, including her shift pay of $150. *Id.* at 639.

[3] The templates were not the actual contracts, as, among other things, they were not fully signed and executed by the parties. After conferring with the court, counsel stipulated to mark all templates of contracts into evidence.

Gould was unable to testify and her EBT was read into the record in front of the jury. In pertinent part, Gould testified that the contracts would not include a gratuity and that the service charge is for staffing fees. The service charge actually would pay "[b]artenders, bar-backs, servers, bussers, cocktail servers, back of the house, so kitchen staff." *Id.* at 615. However, it would go towards their "shift pay." *Id.* She had discussions with clients regarding gratuities and advised them that, "everything is paid for. If you want to, you know, tip, you can at your own will, it's not requested, it's not required." *Id.* at 618. If the client voluntarily left a tip, Gould would give it to the staff directly. Gould testified that she never ran the credit cards for tips. She testified, "[t]hey received a shift pay, so they're being paid for their services already and to then ask an individual for money is inappropriate." *Id.* at 621.

Alicia Simms (Simms), another manager, testified that she would communicate to the client that the service charge "is a charge that we put in place that covers basically the services to set up a room for an event . . . ." *Id.* at 705-706. Simms confirmed that there was no definition of the term service charge, but that she would explain to the customers that gratuities were optional and were not included in the contract.

Jury Charge

The record reflects that counsel discussed the proposed charges and verdict sheet, including the burden of proof. This court summarized plaintiff's allegations that defendants collected and retained tips that were intended for plaintiff. It stated that plaintiff has the burden of proof to establish by a fair preponderance of the credible evidence, each of the dates that he worked for defendants from June 1, 2009 and February 11, 2013. It reiterated that plaintiff may only prevail on the dates that he proved he worked. The court reviewed the elements of Labor Law § 196-d with the jury, stating in relevant part:

> "No employer or his agent . . . 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.
>
> "Nothing in this subdivision shall be construed as ... affecting practice 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."

Id. at 829.

The court continued that, prior to January 1, 2011, the plaintiff "has the burden of proof to show by a fair preponderance of the credible evidence that the defendants' customers understood that any service charge contained in any contract between the defendants and its customers was a tip or gratuity intended to be for the service staff." *Id.* at 830.

The court continued that the law was amended January 1, 2011, as follows:

> "[A]ny charge for the administration of a banquet, special function or package deal shall be clearly identified as such and customers shall be notified that the charge is not a gratuity or a tip. Defendants have the burden of demonstrating by clear and convincing evidence that the notification was sufficient to ensure that a reasonable customer would understand that such charge was not purported to be a gratuity. Adequate notification shall include a statement in the contract or agreement with the customer. . . ."

Id. at 831-832.

The court summarized that defendants deny all plaintiff's claims and contend that he was paid all the money that he was entitled to and that they acted in accordance with Labor Law § 196-d. The court reiterated that the jury should decide what tips or gratuities plaintiff is entitled to and instructed the jury that plaintiff's "damages are limited to the amount of money that he is owed from defendants and nothing more." *Id.* at 832.

After the jury was sent to deliberate, defendants made an oral application, pursuant to CPLR 4401, to dismiss the complaint as a matter of law, for failure to prove a prima face case that plaintiff worked on particular dates and that he failed to receive his gratuities. Defendants argued that there was no connection from the dates he worked to the contracts presented and that there is no proof that

he did not receive tips. In addition, defendants sought to dismiss the pre-January 1, 2011 service charges, on the basis that plaintiff did not submit evidence to indicate what a reasonable customer believed the service charge to be. For instance, plaintiff did not provide customers who could testify with knowledge of what they were told or saw, or how the contract was negotiated. The court denied defendants' motion. Trial tr at 849.

Jury Verdict

On March 26, 2018, the jury delivered their verdict. In the first question, the jurors were asked to determine whether plaintiff proved by a preponderance of the credible evidence that he worked for defendants on specific dates from June 1, 2009 through February 11, 2013, and that defendants collected credit card tips or envelopes of cash from banquet patrons that were intended as tips for the bartenders but failed to give them to plaintiff. Five out of six jurors answered "yes" to this question.

In relevant part, the second question asked, for the time period prior to January 1, 2011, whether plaintiff proved by a preponderance of the evidence that a reasonable customer would understand that any "service charge" contained in any contract as reflected in post-party invoices between defendants and its customers, was being collected as a gratuity for plaintiff. Six out of six jurors answered yes to this question.

In the third question, the jurors were asked to determine, for the time period from January 1, 2011 through February 11, 2013, whether defendants proved by clear and convincing evidence that a reasonable customer would understand or expect that a "service charge" contained in any contract as reflected in post-party invoices was not purported to be a gratuity. The jurors answered "no" to this question.

In the fourth question, assessing damages, six out of six jurors found that plaintiff did not receive all the money he was entitled to. In response to the fifth question, five out of six jurors

determined that plaintiff was owed $370.91 throughout the course of his employment for credit card tips and/or envelopes of cash. In response to the sixth question, five out of six jurors found that defendants owed plaintiff $52,056.75 in service charges prior to January 1, 2011. For the final question, five out of six jurors found that defendants owed plaintiff $90,921.06 in service charges from January 1, 2011 to February 11, 2013.

After the court thanked the jurors for their service, it was brought to the court's attention that, despite not being placed into evidence, the jury had access to the complaint during deliberation. In the complaint, plaintiff had asked for statutory damages and attorney's fees, and the damages initially calculated by the jurors had accounted for these.

Defendants then made an oral application for a mistrial, arguing that the jury was "tainted too far and too hard by the fact that they saw the complaint and that they have calculated in their verdict, interest and penalties and attorney's fees . . . ." Trial tr at 864. The court reserved its decision and indicated that any post-trial motions shall be made on paper.

The court provided the jury with a curative instruction, asking the jurors to recalculate the damages. The court stated, "[j]ust so it's clear, you cannot consider in your deliberations any statutory penalties or attorney's fees." *Id.* at 865.

After deliberating again, the jury revised the amount of damages assessed for questions five through seven. They found that plaintiff was entitled to $370.91 for credit cards tips and/or envelopes of cash. For service charges, the jury determined that plaintiff was entitled to $23,946.11 prior to January 1, 2011 and $41,823.95 after that date.

The Instant Action

Motion for a mistrial/to set aside the verdict (motion sequence numbers 004 and 005)[4]

[4] As the issues presented in motion sequence number 003 are dependent on whether the jury verdict stands, motion sequence numbers 004 and 005 will be addressed first.

Defendants argue that a mistrial is warranted, as defendants were prejudiced by the jury's consideration of the complaint, which had not been placed into evidence. The complaint contained the causes of action for GBL § 349 and unjust enrichment, which had been withdrawn prior to the action. It also contained other allegations that defendants were unable to respond to during the hearing, such as quotes from defendants' website or inadmissible statements regarding the industry practice regarding gratuities.

As indicated above, the amount of damages in the initial verdict included attorney's fees and statutory penalties, as this is what plaintiff had requested in his complaint. Defendants summarized "[t]here is nothing to suggest and no way to know whether this jury did not consider these claims when they 'shoehorned' the award of attorney's fees, costs and disbursements into their initial verdict and there is no way of knowing whether they continued to consider these claims when they rendered their second verdict since the court did **not** instruct the jury to disregard these claims when it issued its curative instruction." Mamo Affirmation, at 4.

Defendants continue that, under plaintiff's own theory of recovery, the award is excessive and should be aside as unfair. Defendants maintain that the jury verdict should be adjusted to reflect the shift pay plaintiff received. According to defendants, if plaintiff collects both the tips and the wages, his wages should be minimum wage, plus the calculated service charges. As plaintiff's shift pay far surpassed the applicable minimum wage, the jury's damages should be recalculated with this offset.

As indicated in the facts, at the close of evidence, the court denied defendants' motion to dismiss the complaint as a matter of law for failure to prove a prima facie case that plaintiff worked on particular dates and that he failed to receive his gratuities. Defendants now provide similar arguments that the verdict should be set aside as against the weight of evidence. For example, defendants contend that there was no evidence in admissible form introduced at trial to support the

jury's conclusion that, for the pre-2011 events, a reasonable customer would have understood that service charge was collected as a gratuity. Defendants argue that, as the pre-and-post party invoices are unsigned and redacted, they cannot be considered as binding contracts. Defendants continue that, there was no admissible evidence to demonstrate that defendants collected credit card or cash tips but failed to give them to plaintiff. According to defendants, plaintiff's testimony on this issue was "miniscule" and neither of plaintiff's two witnesses saw any credit card or cash tips collected, but not given to plaintiff. On the contrary, defendants allege that their six witnesses testified, among other things, that plaintiff was generously tipped.

Plaintiff argues that defendants' motion for a mistrial should be denied because defendants were not prejudiced when the jury viewed the complaint. Plaintiff notes that the complaint was handed to plaintiff during the trial and plaintiff testified that he requested the amount of $375,000 in damages. Even viewing this amount in the complaint, the jury awarded far less, even including attorney's fees. Moreover, the court instructed the jury to recalculate the damages based only on the underpayment of tips/gratuities. Further, although the additional causes of action were alleged in the complaint, the verdict sheet only addressed plaintiff's potential recovery for credit card tips, cash tips and service charges, and did not allocate any damages for the other causes of action.

Plaintiff argues that the verdict should not be set aside. According to plaintiff, the quality of the evidence is relevant, not the number of witnesses. In this situation, the jury weighed the evidence and decided to believe plaintiff's witnesses. After listening to testimony, the jury found it credible that plaintiff charged 20% gratuities to credit cards but did not receive those gratuities and that he did not receive some of the cash tips that were intended for him. Plaintiff also alleges that it was reasonable for the jury to find that patrons would infer that the 20% service charge on the contract and post-party invoice was a gratuity, for the time period prior to January 1, 2011.

In addition, with respect to post-2011, although defendants testified that there was a 20% service charge on every contract, they did not provide any of the required notification to the customers that service charges were not gratuities. Regarding the templates, defendants testified that the terms on the templates, or post-party invoices, were identical to the actual contracts, and did not contain the required notification about service charges. As a result, plaintiff claims that, for the time period after January 1, 2011, defendants did not meet their burden to demonstrate that customers were notified that a service charge was not a gratuity.

Finally, plaintiff argues that the jury deliberated on the issue of damages and that his damages should not be reduced to reflect his shift pay.

After plaintiff filed its opposition papers to motion sequence 005, defendants filed reply papers, labeled "Affirmation in Support of Mistrial". This affirmation contained the argument that defendants were prejudiced when the jury viewed the complaint and when certain documents were submitted to the jury, over defendants' objections. For example, defendants allege that there was no admitted evidence to establish the dates plaintiff worked. In such affirmation, defendants assert, for the first time, that the court allowed hearsay statements and certain documents to be admissible, despite defendants' objections.

Motion for additional damages and attorney's fees (motion sequence 003)

Plaintiff moves for an order, pursuant to Labor Law §198, awarding him his underpayment, liquidated damages, pre-and post-judgment interests, attorney's fees and other costs and disbursements. Plaintiff calculated his prejudgment interest as follows: He took the jury's award of $66,140.97 and divided it by 143, the total number of events worked. Plaintiff explained that his average amount of damages per banquet would be calculated at $462.52 per banquet. Plaintiff then multiplied that amount by the number of banquets worked each year, and then added 9% interest per year until 2018. For example, for the year 2009, plaintiff worked 24 events, so he calculated his

underpayment as $462.52 x 24 = $11,100.48. After applying a 9% interest rate for 2009 through 2018, he calculated $13,008.58 in interest. According to plaintiff, his total underpayment for 2009 would be $11,100.48 + $13,008.58 = $24,109.06. Applying this formula for each year, with plaintiff working 64 banquets in 2010, 17 banquets in 2011, 34 banquets in 2012 and 4 banquets in 2013, his total underpayment is allegedly $126,685.16. Plaintiff derived at this number by adding the prejudgment interest for each year ($13,008.52 + $29,381.12 + $6,510.74 + $10,647.86 + $996.50 = $60,544.74) to the jury award.

According to plaintiff, he is entitled to liquidated damages, in accordance with Labor Law § 198 (1-a), in the amount of 100% of his calculated underpayment; namely an additional $126,685.16 in liquidated damages. Plaintiff argues that he is entitled to this amount because defendants cannot prove a good faith basis to believe that its underpayment was in compliance with the law.

Defendants do not oppose plaintiff's methods of calculating prejudgment interest, nor do they offer any alternative methods of calculating prejudgment interest or liquidated damages. In response to the claim for liquidated damages, defendants broadly propose that liquidated damages should be denied, as plaintiff "made no showing and offered no proofs of a willful violation against any of the defendants." Defendants' memo of law at 4. They continue that the employee bears the burden of establishing willfulness. According to defendants, plaintiff waived any claim for liquidated damages as he did not introduce any evidence to the jury regarding liquidated damages and the jury did not include liquidated damages in its award.

Pursuant to Labor Law § 198 (1-a), where an employee prevails in a wage claim, the employee is entitled to recover all reasonable attorney's fees. Counsel states that he worked 809.95 hours on this case, resulting in attorney's fees in the amount of $271,315.00 and an additional $14,098.64 in expenses, costs and disbursements. Counsel articulated the six criteria traditionally used to determine reasonable attorney's fees and submitted his time records for this litigation. In the

event that counsel is required to enforce any court judgment, he seeks to reserve his rights under Labor Law § 198 (4) to collect additional attorney's fees and costs. Further, plaintiff requests post-judgment interest, and also an order automatically increasing the judgment by 15 percent if, among other things, any amount of the judgment remains unpaid after 90 days.

In opposition, defendants argue that the requested amount of attorney's fees and costs is unreasonable and should be reduced. According to defendants, counsel's fee demands should not be more than $22,046.00 and the expenses should be limited to $4,216.64.

DISCUSSION

Mistrial/Vacate Verdict (motion sequence numbers 004 and 005)

Pursuant to CPLR 4402, "[a]t any time during the trial, the court, on motion of any party, may order a continuance or a new trial in the interest of justice on such terms as may be just."

Following the initial jury verdict, defendants moved for a mistrial. Despite not being placed into evidence, the jury viewed the complaint. In the complaint, plaintiff had requested attorney's fees, statutory damages and pre-and post-judgment interest. The jurors informed the court that they had accounted for this requested relief in their calculation of gratuities owed to plaintiff. Defendants allege that the jury was prejudiced by viewing the allegations in the complaint, including the two causes of action that had been previously withdrawn.

"The decision to grant or deny a mistrial is within the sound discretion of the trial court and is to be made on a case-by-case basis. [T]he facts in each case must be examined to determine the nature of the material placed before the jury and the likelihood that prejudice would be engendered." *Chung v Shakur*, 273 AD2d 340, 340-341 (2d Dept 2000) (internal quotation marks and citations omitted). Here, the court finds that the jury's viewing of the complaint was not sufficiently prejudicial to defendants so as to warrant a new trial. Portions of the complaint, including the

requested amount of $375,000 in damages, were read during the trial. The questions on the verdict sheet only addressed gratuities and service charges, and the jurors were not asked to determine damages for the two other causes of action.

Further, the record reflects that, after the initial jury verdict, the jury had advised the court that its award consisted of the underpayment, in addition to the costs and fees requested in the complaint. The court issued a curative instruction, advising the jury to only answer the questions presented on the verdict sheet. The court advised them to only provide the amounts for the underpayments, and not to include any additional damages or attorney's fees. The jury was then able to recalculate the gratuities owed to plaintiff, subtracting the extraneous statutory penalties or attorney's fees. *See e.g. Rodriguez v Polakowski*, 175 AD2d 726, 726-727 (1st Dept 1991) ("plaintiff was not prejudiced by defense counsel's summation remarks . . . , and in any event, any possible prejudice was corrected by the court's curative instructions during its charge").

After plaintiff replied to defendants' motion sequence 005, defendants submitted an affirmation with additional arguments in favor of a mistrial. The court "will not consider [these arguments], as [they were] improperly raised for the first time in their reply brief." *Stang LLC v Hudson Sq. Hotel, LLC,* 158 AD3d 446, 447 (1st Dept 2018). In any event, defendants' arguments regarding the inadmissibility of certain evidence and testimony at trial, is without merit. The parties stipulated that plaintiff worked specific events and also stipulated to enter the templates of the contracts and other exhibits into evidence. In addition, although defendants argue that Sheppard's testimony regarding envelopes of cash handed to Gould constituted inadmissible hearsay, "[t]his issue is, in part, unpreserved for review. In any event, any error in the admission of hearsay testimony was harmless as we are satisfied that the result would have been the same if the evidence

had not been improperly admitted." *Barracato v Camp Bauman Buses, Inc.*, 217 AD2d 677, 678 (2d Dept 1995).

Vacating or Adjusting the Verdict

Pursuant to CPLR 4401, "[a]ny party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party . . .. Grounds for the motion shall be specified." As set forth above, after the close of evidence, the court denied defendants' motion made pursuant to CPLR 4401.

Defendants now move, pursuant to 4404 (a), to set aside the jury verdict as against the weight of evidence. CPLR 4404 (a) provides, in relevant part, that after a jury trial, "upon the motion of any party . . . , the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence."

In determining whether a jury verdict should be set aside as against the weight of evidence pursuant to CPLR 4404 (a), the court must find that "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial." *Curiale v Peat, Marwick, Mitchell & Co.*, 214 AD2d 16, 24 (1st Dept 1995) (internal quotation marks and citations omitted). The question involves a "discretionary balancing of many factors," and the court may not "employ its discretion simply because it disagrees with a verdict . . .." *McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 205-206

(1st Dept 2004). Every favorable inference must be given to "the party in whose favor the verdict was rendered." *Editex, Ltd. v Centennial Ins. Co.*, 272 AD2d 150, 152 (1st Dept 2000).

Pursuant to Labor Law § 196-d, "[n]o 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." It is well settled that, "[t]he plain language of section 196-d prohibits any retention or withholding of gratuities by the employer." *Tamburino v Madison Sq. Garden, LP*, 115 AD3d 217, 220 (1st Dept 2014).

Plaintiff testified that, at the end of an event, he closed the tabs on the credit cards and added an additional 20% gratuity to those cards. During the trial, a manager testified that a post-party invoice contained an additional credit card charge for premium liquor. However, according to plaintiff, he did not receive any of these gratuities. In addition, plaintiff testified that there were occasions where customers left large sums of money, intended for him as a gratuity. However, he did not receive any of this money.

The jury found that plaintiff proved, by a preponderance of the evidence, that defendants collected tips intended for plaintiff, yet failed to give them to him. In light of the above, the jury's "determination was based on upon a fair interpretation of the evidence." *Augustine v New York City Tr. Auth.*, 118 AD3d 475, 476 (1st Dept 2014). It is well settled that the "[c]redibility of witnesses and resolution of conflicting proofs are matters properly for determination by a jury. *Mazariegos v New York City Transit Auth.*, 230 AD2d 608, 609-610 (1st Dept 1996). Furthermore, "any inconsistencies in the witnesses' testimony were placed before the jury, whose resolution of such conflicts is entitled to deference." *Bykowsky v Eskenazi*, 72 AD3d 590, 590 (1st Dept 2010). As a result, contrary to defendants' arguments, the number of witnesses or amount of testimony is irrelevant.

The Court of Appeals has stated that "the statutory language of Labor Law §196-d can include mandatory charges when it is shown that employers represented or allowed their customers to believe that the charges were in fact gratuities for their employees. An employer cannot be allowed to retain these monies." *Samiento v World Yacht Inc.*, 10 NY3d 70, 81 (2008). Furthermore, "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." *Id.* at 79.

Plaintiff claimed that he did not receive gratuities owed to him for 143 events between 2009 and 2013. To determine and verify the dates allegedly worked and to assess the damages, the jury was presented with plaintiff's pay stubs, templates from the contracts and the post-party invoices that correlated to each of plaintiff's pay stubs, and the number of employees who also worked on those dates. These exhibits had been accepted into evidence and plaintiff testified to their contents.

Plaintiff testified that patrons did not provide him with gratuities, as they assumed his gratuities were being taken care of by the terms of the contract. Defendants testified that 20% of the food and beverage cost for the banquet was added to each contract and correlating post-party invoice and listed as a service charge. There was not an additional space in either document for a gratuity. Defendants testified that they advised clients that the service charges were not gratuities. They further testified that the service charge actually did go to pay the wait staff, like plaintiff, but that the money went towards plaintiff's fixed shift-pay. Gould testified that patrons were advised that everything was taken care of by the terms of the contract.

As noted in the facts, prior to rendering its verdict, the court provided the jury with the language from Labor Law § 196-d. Given the evidence, statutory language and jury charge, there was a valid line of reasoning and permissible inferences which could have led the jury to conclude that the patrons would interpret the service charge as a gratuity. *See e.g. Iovino v Kaplan*, 145 AD3d

974, 977 (2d Dept 2016) ("There was also a valid line of reasoning and permissible inferences which could have led the jury to conclude that the loss of range of motion in the plaintiff's left shoulder was insignificant within the meaning of the statute").

Post January 2011, additional regulations were incorporated into Labor Law § 196-d, creating a "rebuttable presumption that any charge in addition to charges for food, beverage, lodging, and other specified materials or services, including but not limited to any charge for 'service' or 'food service,' is a charge purported to be a gratuity." 12 New York Code of Rules and Regulations (NYCRR) § 146-2.18 (b). In addition, in relevant part, banquet administrative charges "shall be clearly identified as such and customers shall be notified that the charge is not a gratuity or tip." 12 NYCRR § 146-2.19 (a). Among other notification requirements, "[a]dequate notification shall include a statement in the contract or agreement with the customer." 12 NYCRR § 146-2.19 (c). Finally, "[t]he employer has the burden of demonstrating, by clear and convincing evidence, that the notification was sufficient to ensure that a reasonable customer would understand that such charge was not purported to be a gratuity. 12 NYCRR § 146-2.19 (b).

As noted, the court explained the new requirements for service charges occurring after January 1, 2011. In relevant part, the jury was informed of the rebuttable presumption that a service charge is a charge purported to be a gratuity. Defendants did not submit any evidence that they provided clients with written notification regarding the nature of the 20% service charge. Accordingly, the "jury's conclusion" that defendants did not meet their burden of proving by clear and convincing evidence that they notified the patrons that the service charge listed on the contract or post-party invoice was not a gratuity, "is supported by a reasonable interpretation of the evidence." *Solomon v City of New York*, 145 AD3d 643, 643 (1st Dept 2016).

Defendants argue that the jury verdict should be adjusted to "account for an offset"; namely, that damages should be re-calculated by applying the minimum wage, instead of plaintiff's shift-pay.

However, this argument is without merit. The jury was asked to assess the amount owed to plaintiff on these dates. Plaintiff alleged that he was entitled to the shift pay he received, in addition to his pro-rata share of the gratuities. He never testified or asserted that he was entitled to minimum wage plus his gratuities. "The jury's verdict, awarding . . . damages . . . was not against the weight of the evidence." *Bykowsky v Eskenazi*, 72 AD3d at 590.

For the reasons set forth above, defendants' motions, as set forth in motion sequence numbers 004 and 005, to set aside the verdict pursuant to CPLR 4404 (a) are denied.

Pre-interest Judgment, Liquidated damages and Attorney's Fees (motion sequence 003)

Article 6 of the Labor Law governs the payment of wages and is comprised of Labor Law §§ 190-199 (a). Labor Law § 198 provides the remedies available for successful wage claims made pursuant to Article 6, including the availability of attorney's fees and liquidated damages. *See e.g. Slotnick v RBL Agency Agency Ltd.*, 271 AD2d 365, 365 (1st Dept 2000) (Labor Law 198 (1-a) "provides only a damage remedy for substantive violations of article 6 of the Labor Law and depends upon pleading and proof of such substantive violation"); *see also Salahuddin v Craver*, 163 AD3d 1508, 1510 (4th Dept 2018) (internal quotation marks and citations omitted) (Labor Law § 198 "is not a substantive provision, but [rather] provides for remedies available to a prevailing employee").

Labor Law §198 (1-a) states the following, in relevant part:

> "In any action instituted in the courts upon a wage claim by an employee or the commissioner in which the employee prevails, the court shall allow such employee to recover the full amount of any underpayment, all reasonable attorney's fees, prejudgment interest as required under the civil practice law and rules, and, unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law, an additional amount as liquidated damages equal to one hundred percent of the total amount of the wages found to be due."

Prejudgment Interest:

Pursuant to Labor Law § 198 (1-a), plaintiff, a prevailing employee, may recover prejudgment interest on his underpayment of wages. Although prejudgment interest may be awarded

in addition to liquidated damages, a plaintiff may only recover prejudgment interest on his "actual damages ... under the NYLL, ... not [his] liquidated damages." *Gamero v Koodo Sushi Corp.*, 272 F Supp 3d 481, 515 (SD NY 2017), *affd* 2018 WL 5098817, 2018 US App LEXIS 29594, (2d Cir 2018) (internal quotation marks and citations omitted). The rate of interest in New York is 9 percent a year. CPLR 5004.

As indicated in the facts, plaintiff calculated his prejudgment interest by assigning the same amount of damages per event and then multiplying that amount by the events worked at for each year. He then took the total and added 9% interest for each year until 2018. However, the court does not agree with the method plaintiff used to calculate his prejudgment interest. Although the jury did not assign an amount of damages per event, it is undisputed that plaintiff's damages would vary per event, based on the event's service charge and the number of other employees who also worked. Plaintiff states that he worked at 24 banquets in 2009, 64 banquets in 2010, 17 banquets in 2011, 34 banquets in 2012 and 4 banquets in 2013. The jury determined that plaintiff was entitled to $23,946.11 in service charges prior to January 1, 2011 and $41,823.95 in service charges after that date. While plaintiff may have worked 84 banquets in 2009-2010, versus 55 for 2011-2013, the service charges awarded for pre-2011 were much lower than after that date, meaning that his amount of damages per event would have been lower as well. By using the same amount of damages per event, the prejudgment interest is skewed and inflated, resulting in a higher amount of prejudgment interest for a longer amount of time.

"To determine when prejudgment interest begins to accrue, courts applying [the] NYLL in wage-and-hour cases often choose the midpoint of the plaintiff's employment within the limitations period." *Gamero v Koodo Sushi Corp.*, 272 F Supp 3d at 515 (internal quotation marks and citations omitted). Using the mid-point of plaintiff's employment for the calculations of prejudgment interest, the court holds the following: The jury found that plaintiff was entitled to $370.91 for credit cards

tips and/or envelopes of cash for 2009 to 2013. Using a reasonable intermediate date of 2011, plaintiff is entitled to receive nine percent interest on $370.91 ($33.38) for seven years = $233.67. Using a midpoint of 2010 for the service charges pre-2011, plaintiff is entitled to receive nine percent interest on $23,946.11 ($2,155.14) for eight years = $17,241.19. Finally, using a midpoint of 2012 for the service charges post-2011, plaintiff is entitled to receive nine percent interest on $41,823.95 ($3,764.15) for six years = $22,584.93. Therefore, plaintiff is entitled to the amount of $40,059.79, as prejudgment interest on his actual damages.

Liquidated Damages

The Labor Law was amended twice during the course of plaintiff's employment, effecting both burden of proof and the amount of liquidated damages available. "Neither amendment applies retroactively." *Gamero v Koodo Sushi Corp.*, 272 F Supp 3d at 503. Prior to November 24, 2009, an employee seeking to recover liquidated damages "bore the burden to demonstrate the employer's willful failure to pay wages." *Rana v Islam*, 887 F3d 118, 122 (2d Cir 2018). An employer "willfully" violates the Labor Law when it "knowingly, deliberately, or voluntarily disregards its obligation to pay wages. The plaintiff need not prove that the defendants acted maliciously or in bad faith." *Keun-Jae Moon v Joon Gab Kwon*, 248 F Supp 2d 201, 235 (SD NY 2002) (internal quotation marks and citations omitted). Courts have found that the Labor Law's standard for willfulness "does not appreciably differ" from the willfulness standard under the Fair Labor Standards Act (FLSA). *Id.*

However, effective November 24, 2009, the Labor Law was amended, to shift the burden, requiring employers to "'prove [ ] a good faith basis to believe that its underpayment of wages was in compliance with the law' in order to avoid liquidated damages." *Rana v Islam*, 887 F 3d at 122 (citation omitted).

The majority of plaintiff's employment took place after the November 24, 2009 amendment requiring the employer to demonstrate good faith. Nonetheless, in response to this motion, defendants did not make any attempt to meet their burden to prove a good faith basis to believe their underpayment was in compliance with the law. Accordingly, plaintiff may recover liquidated damages for his unpaid gratuities after November 24, 2009.

Plaintiff is also entitled to recover liquidated damages for unpaid gratuities prior to November 24, 2009. Defendants did not offer any evidence of a good faith attempt to comply with Labor Law § 196-d. Furthermore, during trial, defendants argued that they acted in accordance with the Labor Law. Nonetheless, the jury found that defendants kept cash and credit card tips that were intended for plaintiff and that plaintiff met his burden to prove that customers would understand that any service charge was intended as a gratuity.

Regarding amounts allowable, prior to April 9, 2011, an employee could recover 25% of his unpaid wages as liquidated damages. However, effective on that date, an employee could recover 100% of his unpaid wages as liquidated damages. Plaintiff claims that he is entitled to $126,685.16 in liquidated damages. However, this calculation is incorrect for two reasons. First, plaintiff incorrectly calculated his liquidated damages at a rate of 100% for the entire employment period, instead of at 25% from June 1, 2009 to April 8, 2011. *See e.g. Trinin v Victoria Classics, Ltd.*, 145 AD3d 582, 582 (1st Dept 2016) ("The amendment to Labor Law § 198 (1-a), which took effect on April 9, 2011, was not intended by the legislature to apply retroactively and, therefore, plaintiff is only entitled to recover liquidated damages equal to 25% of the total amount of the wages found to be due").

In addition, depending on the date, the amount of liquidated damages recoverable should correlate to 25 or 100 percent of $66,140.97, plaintiff's actual damages.[5] Here, plaintiff incorrectly calculated his liquidated damages based on his actual damages plus prejudgment interest. While defendants have opposed plaintiff's motion, notably, they have not offered a method for the court to assess the liquidated damages for any of the specific underpayments, including the January 1, 2011 to April 9, 2011 time frame.

The jury determined that plaintiff was entitled to $23,946.11 for service charges prior to January 1, 2011. Accordingly, plaintiff is entitled to 25% of this amount, or $5,986.52, in liquidated damages for this time. The jury awarded plaintiff $41,823.85 in damages for post January 1, 2011. This includes approximately 26 months ($1,608.60 per month). There are approximately three months remaining where the liquidated damages would be assessed at 25% ($402.15 x 3 = $1206.45), and the remaining 23 months of plaintiff's employment would be assessed at 100% ($1608.60 x 23 = $36,997.80). The jury found that plaintiff was entitled to $307.91 for credit cards tips and/or envelopes of cash for 2009 to 2013. Given that the jury did not differentiate by year, the court will divide the cash/credit card tips by half ($153.95) and apply 25% ($38.48) and 100% ($153.95) on each figure, totaling $192.43. Accordingly, plaintiff is entitled to $44,383.20 in liquidated damages.

Attorney's Fees

Labor Law § 198 (1-a) states, in pertinent part, "[i]n any action instituted in the courts upon a wage claim by an employee . . . in which the employee prevails, the court shall allow such employee to recover . . . all reasonable attorney's fees." *See e.g. Fornuto v Nisi,* 84 AD3d 617, 617-618 (1st

[5] *See e.g. Salustio v 106 Columbia Deli Corp.*, 264 F Supp 3d 540, 557-559 (SD NY 2017) (Plaintiff was awarded unpaid wages of $5,714.33 and was entitled to an additional amount of liquidated damages equaling 100% of the unpaid wage award of $5,714.33. Plaintiff was also awarded prejudgment interest of nine percent on his unpaid wages of $5,714.33).

Dept 2011) ("attorneys' fees in connection with plaintiffs' wage claims, . . . are mandatory under . . . Labor Law § 198 (1-a)").

In addition, Labor Law § 198 (4) indicates, in relevant part, "[i]n any civil action by an employee . . . the employee . . . shall have the right to collect attorney's fees and costs incurred in enforcing any court judgment." As plaintiff, an employee of defendants, has prevailed on his unpaid wage/gratuities claim against defendants, he is entitled to recover reasonable attorney's fees. However, the portion of the motion seeking attorney's fees, costs and disbursements will be referred to a Special Referee to hear and determine, in accordance with CPLR § 4317 (b), on the reasonableness of the attorney's fees.

Labor Law § 198 (4)

Labor Law § 198 (4) states the following, in relevant part:

> "Any judgment or court order awarding remedies under this section shall provide that if any amounts remain unpaid upon the expiration of ninety days following issuance of judgment, or ninety days after expiration of the time to appeal and no appeal is then pending, whichever is later, the total amount of judgment shall automatically increase by fifteen percent."

Plaintiff requested an order, pursuant to Labor Law § 198 (4), automatically increasing the judgment by 15 percent if any amounts of the judgment remain unpaid. As set forth above, if the conditions of Labor Law § 198 (4) are met, the 15 percent increase is automatic.

Accordingly, the portion of plaintiff's motion made pursuant to Labor Law § 198 (4) is granted.

CONCLUSION

Accordingly, it is

ORDERED that the motions of defendants Metronome Events, Inc., d/b/a Providence NYC, Club Crimson NYC, Rosscommon, 226 East 54th Street Restaurant, Inc., d/b/a Lexicon, and Robert

Pereira to vacate the jury verdict (motion sequence numbers 004 and 005) are denied in their entirety; and it is further

ORDERED that motion of plaintiff Robert Atkins for an order pursuant to Labor Law § 198 (motion sequence number 003) is granted; and it is further

ORDERED, that plaintiff shall have the judgment against defendants, pursuant to the jury verdict as follows: $66,140.97 with interest at 9 percent from March 26, 2018, until the date of this decision and, thereafter, at the statutory rate, as calculated by the Clerk; and it is further

ORDERED, that plaintiff shall have the judgment against defendants in the amount of $40,059.79, as prejudgment interest on his actual damages; and it is further

ORDERED, that plaintiff shall have judgment against defendants in the amount of $44,383.20 as liquidated damages; and it is further

ORDERED that if the above amount awarded under Labor Law § 198 remains unpaid, upon the expiration of 90 days following issuance of judgment, or 90 days after expiration of the time to appeal and no appeal is then pending, whichever is later, the total amount of the judgment shall automatically increase by 15 percent, and it is further,

ORDERED that the portion of plaintiff's action that seeks the recovery of attorney's fees against defendants is severed and the issue of the amount of reasonable attorney's fees plaintiff may recover against defendants is referred to a Special Referee to hear and determine, in accordance with CPLR § 4317 (b). Within 90 days from the date of this order, counsel for plaintiff shall serve a copy of this order with notice of entry, together with a completed Information Sheet, upon defendants and the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar or the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that the parties shall attempt to resolve the fee dispute as follows: (1) within 21 days of entry of this order, plaintiff shall serve upon defendants an affirmation and documentary

proof, to support plaintiff's attorney's fees claim; within 21 days of receipt, defendants shall serve upon plaintiffs any objections to such claimed fees, which shall be detailed as to specific amounts sought; (3) within 12 days thereof, counsel shall confer with each other and attempt to resolve the fee dispute, in a telephone call to be initiated by plaintiff; (4) if unable to resolve, all such submissions shall be supplied to the assigned Special Referee, who may also attempt to settle the case and fee dispute, prior to the attorneys' fees hearing; and it is further

ORDERED that the parties shall settle judgment, in accordance with this decision/order, **returnable to the Judgment Clerk**.

This constitutes the Decision and Order of the court.

Dated: 7/3/19

Doris Ling-Cohan, J.S.C.

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