New York Law Journal

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NEW YORK, FRIDAY, FEBRUARY 15, 2008

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• COURT OF APPEALS •

Waiters Held Entitled to Tips Included in 'Service Charges'

BY JOEL STASHENKO

ALBANY—The "service charge" that is typically tacked onto food service contracts for larger gatherings must be passed on in full to employees eligible for gratuities, like wait staff, if the charge is held out to customers as a substitute for tips, the Court of Appeals determined yesterday.

The Court also reversed the Appellate Division in another case, finding that New York lacks subject matter jurisdiction over an expired child support order issued by a Connecticut court even though the child involved had lived in New York for a decade.

The challenge to the disbursement of service charge money in *Samiento v. World Yacht Inc.*, 17, was brought on behalf of 14 food servers who were represented by attorneys retained through the New York City Bar Association's Legal Referral Service.

The plaintiffs alleged that servers saw little, or any, of the service charge money World Yacht collected from customers for its catered cruises in New York harbor with the explicit or implicit assurance that tips would be paid to the wait staff. The service charge is typically 15 percent to 20 percent of the bill for food services, according to the plaintiffs.

The servers argued that by passing through little, or none, of the service charge money, World Yacht was violating Labor Law §196-d, which prohibits employers from keeping any "gratuity" or "any charge purported to be a gratuity."

Judge Ciparick

Writing yesterday for a 6-0 court, Judge Carmen Beauchamp Ciparick stated that the plaintiffs should be allowed to bring a cause of action in Manhattan Supreme Court based on a possible Labor Law violation.

"We hold that the statutory language of Labor Law §196-d can include mandatory charges when it is shown that employers represented or allowed its customers to believe that the charges were in fact gratuities for its employees," Judge Ciparick wrote. "An employer cannot be allowed to retain these monies."

The president of the New York State Restaurant Association, which represents about 8,500 restaurants, called the ruling a "shocker" for the industry that would have a widespread impact on banquet and catering businesses. Rick Sampson called the service charge a "very, very important part of our industry," one he said helps pay for porters, catering sales people and other

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BY JOEL STASHENKO

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ALBANY—Derivative suits may be brought by members of limited liability corporations on behalf of their LLCs, even though state law provides no explicit authorization for such actions, a divided Court of Appeals ruled yesterday.

The four judges in the majority held that English and American precedents dating back to the 18th century demand that LLC members receive the same legal recourse as is available to corporate shareholders.

"To hold that there is no remedy when corporate fiduciaries use corporate assets to enrich themselves was unacceptable in 1742 and in 1832, and it is still unacceptable today," Judge Robert S. Smith wrote for the majority in *Tzolis v. Wolff*, 5. "Derivative suits are not the only possible remedy, but they are the one that has been recognized for most of two centuries, and to abolish them in the LLC context would be a radical step."

But the three dissenters held that "radical" is the word to describe what the majority was doing by recognizing standing for derivative suits when the Legislature intentionally deleted mention of such suits from the 1994 statute that became the Limited Liability Company Law. What was to be Article IX in that statute authorizing derivative suits was omitted, and the law has since

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Waiters Entitled to Tips in 'Service Charges'

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"back-of-the-house" workers, including wait staff.

"Those dollars are used to take care of all those people," Mr. Sampson said in an interview. "Removing something like that would have a devastating impact on the industry."

In what Mr. Sampson said is a widespread practice in the non-a la carte food service industry, World Yacht contended that it paid its wait staff from $12 to $15 an hour to compensate servers for tips they were not receiving.

World Yacht alternately argued that the last sentence of Labor Law §196-d, which says nothing in the statute should affect practices for "special functions" where a "fixed percentage of the patron's bill is added for gratuities," absolved them of responsibility for paying tips in full to employees.

Judge Ciparick wrote that sentence was added to the Labor Law in the 1960s to validate the right of food services workers to pool money so it could be distributed to them, not to exempt the industry from the prohibition against employers collecting charges, purportedly as tips, and not passing them on to servers.

Judge Ciparick noted in her ruling that the Court found persuasive opinion letters from the Department of Labor on charges collected as gratuities on banquet business and an amicus curiae decision from the Department of Labor and Attorney General Andrew M. Cuomo's office urging that the World Yacht servers be given a cause of action based on Labor Law §196-d.

Steven M. Sack and Scott A. Lucas represented the workers through the City Bar's Legal Referral Service.

Patrons' Expectations

Mr. Lucas said in an interview that the case was a matter of "right and wrong."

"It is simply wrong for a restaurant or banquet operator to add a 20 percent service charge if it has no intention of distributing it to the wait staff," Mr. Lucas said.

He added the decision would also apply to the gratuities that many restaurants typically add to a la carte bills for larger parties, if employers are characterizing them as tips to customers and then not passing them along to servers.

"It's the patrons' expectations that is the lynchpin of the inquiry," Mr. Lucas said.

Mr. Sampson said he wants to work with the Restaurant Association's counsel and the Labor Department to work out language for catering and other food service contracts that makes clear what service charges are for and which employees will get them.

World Yacht's attorney, Dennis A. Lalli of Kauff McClain & McGuire, did not immediately return a call yesterday seeking comment.

The ruling in part reversed the Appellate Division, First Department, which found in *Samiento v. World Yacht Inc.*, 28 AD3d 328 (2007), that the servers did not have a cause of action under Labor Law §196-d (NYLJ, March 16, 2007).

Chief Judge Judith S. Kaye took no part in the World Yacht ruling.

Child Support Jurisdiction

In another ruling by the Court, the judges unanimously ruled that New York lacks subject matter jurisdiction to change the terms of a child support petition issued by Superior Court in Connecticut.

The decision in *Spencer v. Spencer,* 10, concerned modifications made to an order by Albany County Family Court at the behest of a woman who moved to New York from Connecticut after divorcing from her physician husband in 1994.

When the oldest of her th
children turned 18, the legal
of majority in Connecticut, Su
Spencer petitioned Family Co
in Albany to have the child s
port terms extended until her s
reached New York's age of major
21. At the recommendation of a m
istrate judge, the Family Court
only increased the per weekly p
ment required of the former husba
from $250 to $350, but ordered th
he pay health insurance and colle
costs for the son and legal costs
Ms. Spencer.

The Family Court reasoned th
since the child support order h
expired in Connecticut upon t
son's 18th birthday, it was free
impose a new order in New York.

Chief Judge Kaye found that juri
diction in the case properly lies wi
Connecticut, where the husban
has continued to live after his wi
moved to New York.

Two federal laws, the Full Fait
and Credit for Child Suppo
Orders Act and the Uniform Inte
state Family Support Act, both re
ognize that a child support orde
properly issued by the controllin
jurisdiction should be adhered t
the chief judge wrote. It is "crit
cal" to the proper administratio
of the child support system tha
one order be honored, accordin
to the Court.

Comity with Connecticut law an
court rulings also dictates that th
child support order not be disturbed
Judge Kaye wrote.

Yesterday's ruling reversed *Spen
cer v. Spencer,* 35 AD3d 980 (2006),
by the Appellate Division, Third
Department.

Bruce J. Wagner of McNamee Loch-
ner Titus & Williams in Albany repre-
sented James Spencer and Michael T.
Snyder of Maynard O'Connor Smith
& Catalinotto was the attorney for
Ms. Spencer.

— Joel Stashenko can be reached at jstashenko@alm.com.

Disciplinary Proceedings

Appellate Division, First Department

**Matter of James P. Colliton
an attorney and counselor-at-law**

**Tom, J.P., Saxe, Friedman,
Gonzalez, and Williams, JJ.**

tained an office for the practice of law within the First Judicial Department.

On Oct. 2, 2007, respondent pleaded guilty in Supreme Court, New York

The Departmental Disciplinary Committee now seeks an order striking respondent's name from the roll of attorneys pursuant to Judiciary