

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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YONG XIONG HE,

Plaintiff,

-against-

CHINA NEW STAR RESTAURANT, INC.,
et al.,

Defendants.

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POLLAK, United States Magistrate Judge:

MEMORANDUM & ORDER
19 CV 5907 (PKC) (CLP)

On October 18, 2019, plaintiff commenced this action against defendants China New Star Restaurant, Inc. (“China New Star, Inc.”), Wai Shun Chan a/k/a Vincent Chan (“Vincent Chan”), Wai Leung Chan, and Wai Wen Chan a/k/a Daniel Chan (“Daniel Chan”). Plaintiff seeks monetary and declaratory relief under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§ 201 et seq., and Articles 6 and 19 of the New York Labor Law (“NYLL”). Plaintiff alleges that defendants failed to pay him minimum wage, failed to pay him overtime wages, failed to provide him with a written notice of pay, and failed to furnish an accurate statement of wages. (Compl.¹ ¶ 1).

On November 18, 2021, the parties indicated that they had reached a settlement in the case. This Court Ordered the parties to file a motion for settlement approval and set a hearing for December 21, 2021 to consider the fairness of the agreement, pursuant to Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199 (2d Cir. 2015). (See ECF No. 188; Electronic Scheduling Order, dated Nov. 18, 2021). On December 21, 2021, the parties filed a consent to the undersigned for all purposes, which the Honorable Pamela K. Chen endorsed on January 6, 2022.

¹ Citations to “Compl.” refer to the Complaint, filed October 18, 2019, ECF No. 1.

(See ECF Nos. 191; Electronic Order, dated Jan. 6, 2022).

For the reasons set forth in this Order, the Court approves the parties' settlement as fair and reasonable and approves plaintiff's attorney's fees and costs.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff was employed as a waiter at China New Star, Inc. from approximately December 2012 to August 29, 2019, when his employment was terminated. (Compl. ¶ 5). Defendant China New Star, Inc. is a for-profit corporation incorporated in the state of New York and located at 2212 Flatbush Avenue in Brooklyn, New York. (*Id.* ¶ 6). At all times during his employment, defendants Vincent Chan, Wai Leung Chan, and Daniel Chan were plaintiff's employers and had the power to hire and fire him. (*Id.* ¶¶ 8-10, 12). During his time as a waiter at China New Star, Inc., plaintiff worked fifty-five hours per week: five ten-hour days and one five-hour day. (*Id.* ¶ 15). Plaintiff was paid \$110 in cash per week for his work; he was paid \$20 for each day of ten hours of work and \$10 for each day he worked for 5 hours. (*Id.* ¶¶ 15, 17). As a result, plaintiff alleges that defendants paid him less than the federal hourly minimum wage of \$7.25, and less than the New York state minimum wage, which was raised to \$15.00 per hour over the course of plaintiff's employment. (See *id.* ¶¶ 19, 22). Additionally, plaintiff alleges that defendants failed to compensate him for overtime work (*id.* ¶¶ 26, 30), and that defendants failed to provide him with written notices of his rate of pay and regular payday, as well as wage statements. (*Id.* ¶¶ 38, 41).

After plaintiff filed a supplemental Complaint, adding additional defendants and alleging that those defendants, in conjunction with the original defendants, had transferred property that may have been used to satisfy a judgment against them, Judge Chen issued an Order to Show Cause, and after a hearing, issued an Order attaching three of the defendants' properties. (See

Electronic Minute Entry, dated Aug. 10, 2020; ECF No. 98). On July 21, 2021, Judge Chen held an evidentiary hearing as to whether defendants had violated the prior attachment Order and whether the Court could Order defendants to collect mortgage proceeds on one of the attached properties. She later issued Orders regarding the disbursement of the mortgage payments. (See Electronic Minute Entries, dated July 21, 2021, Aug. 13, 2021).

While Judge Chen dealt with the attachment and related issues, this Court also dealt with defendants' alleged delays in producing documents (see ECF No. 93), and held several settlement conferences. (See Electronic Minute Entries, dated Mar. 2, 2021, May 26, 2021, June 7, 2021, July 12, 2021, July 14-15, 2021). The parties initially came to a partial settlement on April 29, 2021, in which the defendants agreed to pay plaintiff \$135,000. However, the parties disagreed as to whether the issue of attorney's fees had been resolved.² (See ECF No. 159). According to plaintiff, defendant reneged on the agreement, and plaintiff moved to enforce the settlement. (See id.). However, plaintiff later withdrew from this position, claiming that because he had later incurred "substantial" attorney's fees in connection with the hearings before Judge Chen as well as the additional discovery motions, he wished to pursue his full attorney's fees. (See ECF Nos. 182, 186). Defendants, after initially taking the position that the original agreement was not enforceable (see ECF Nos. 157, 161), then sought to enforce the settlement. (See ECF Nos. 177, 185). As a result of these changes in positions, this Court set a conference for October 15, 2021. (See Order of this Court, dated Oct. 7, 2021).

Before this Court could hold the October 15, 2021 conference, the parties notified the undersigned that they were close to reaching a settlement, and on November 18, 2021, they

² Plaintiff also filed several discovery motions that this Court later denied without prejudice to refile in light of the motions to enforce the settlement. (See ECF Nos. 94, 95, 96, 97, 103, 105, 108, 109, 110; Electronic Order, dated Sept. 9, 2021).

reported that they had reached a settlement. (See ECF Nos. 187, 188). On November 23, 2021, the parties filed a motion for settlement approval, accompanied by an Affidavit from Jessica Harris, Esq., an executed Settlement Agreement (the “Agreement”), and plaintiff’s counsels’ billing and costs records. (See Mot.;³ Harris Decl.;⁴ Sett. Agr.;⁵ Billing Recs.⁶).

DISCUSSION

I. Legal Standards

In considering whether to approve a FLSA settlement, courts consider whether the agreement “reflects a reasonable compromise of disputed issues rather than a mere waiver of statutory rights brought about by an employer’s overreaching.” Le v. Sita Info. Networking Computing USA, Inc., No. 07 CV 86, 2008 WL 9398950, at *1 (E.D.N.Y. June 12, 2008) (quoting Lynn’s Food Stores, Inc. v. United States, 679 F.2d 1350, 1354 (11th Cir. 1982) (holding that where an FLSA settlement is a reasonable compromise, the settlement should be approved to “promote the policy of encouraging settlement of litigation”)). Courts have identified several factors to consider when determining whether a proposed settlement is fair and reasonable, including:

(1) the plaintiff’s range of possible recovery; (2) the extent to which the settlement will enable the parties to avoid anticipated burdens and expenses in establishing their respective claims and defenses; (3) the seriousness of the litigation risks faced by the parties; (4) whether the settlement agreement is the product of arm’s-length bargaining between experienced counsel; and (5) the possibility of fraud or collusion.

³ Citations to “Mot.” refer to the motion for settlement on consent, filed Nov. 23, 2021, ECF No. 189.

⁴ Citations to “Harris Decl.” refer to the Declaration of Jessica Harris, filed Nov. 23, 2021, ECF No. 190.

⁵ Citations to “Sett. Agr.” refer to the executed Settlement Agreement, filed Nov. 23, 2021, ECF No. 190-1.

⁶ Citations to “Billing Recs.” refer to the Gladstein Reif & Meginniss LLP Contemporaneous Billing Records, filed Nov. 23, 2021, ECF No. 190-2.

Wolinsky v. Scholastic, Inc., 900 F. Supp. 2d 332, 335 (S.D.N.Y. 2012) (internal quotations and citations omitted); see also Cohetero v. Stone & Tile, Inc., No. 16 CV 4420, 2018 WL 565717, at *6 (E.D.N.Y. Jan. 25, 2018) (endorsing the factors from Wolinsky).

“When presented with a settlement for approval, a district court’s options are to (1) accept the proposed settlement; (2) reject the proposed settlement and delay proceedings to see if a different settlement can be achieved; or (3) proceed with litigation.” Fisher v. SD Prot. Inc., 948 F.3d 593, 606 (2d Cir. 2020) (citing Evans v. Jeff D., 475 U.S. 717, 727 (1986)). “[E]ven though a district court has a duty to review an FLSA settlement for reasonableness to prevent any potential abuse, this does not grant the court authority to rewrite contract provisions it finds objectionable.” Id. Rather, if a court finds one or more provisions of a FLSA settlement agreement to be unreasonable, the court must reject the proposed settlement. See id. at 605.

II. Settlement Terms

The Court notes that the Agreement does not contain any confidentiality clauses, non-employment clauses, non-disparagement clauses that do not contain a carve-out for truthful statements, or general releases, all of which have previously been rejected by courts in this Circuit. See Ortiz v. My Belly’s Playlist LLC, 283 F. Supp. 3d 125, 126 (S.D.N.Y. 2017) (holding that a settlement clause in which plaintiffs agree to never seek re-employment with defendant contravenes the FLSA); Lopez v. Bell Blvd Bakery LLC, No. 15 CV 6953, 2016 WL 6156199, at *2 (E.D.N.Y. Oct. 3, 2016), report and recommendation adopted, 2016 WL 6208481 (E.D.N.Y. Oct. 21, 2016) (holding confidentiality clause is impermissible); Martinez v. Gulluoglu LLC, No. 15 CV 2727, 2016 WL 206474, at *1 (S.D.N.Y. Jan. 15, 2016) (holding that for a non-disparagement clause to be permissible in a FLSA settlement agreement “it must

include a carve-out for truthful statements about plaintiffs' experience litigating their case"); Gonzales v. Lovin Oven Catering of Suffolk, Inc., No. 14 CV 2824, 2015 WL 6550560, at *3 (E.D.N.Y. Oct. 28, 2015) (holding that a settlement agreement containing a general release violated the FLSA). As such, the Court finds that the Agreement does not contain any impermissible clauses and comports fully with Cheeks.

III. Settlement Amount

The settlement amount was "reached through arms-length negotiations by experienced counsel, and reflects a careful balancing of the respective litigation risks and anticipated litigation burdens faced by all parties." (Mot. at 7). Plaintiff will receive a total of \$416,000. (Sett. Agr. ¶ 2.1). Of that, \$135,000 will go directly to plaintiff, to be paid in the form of four checks over two payment dates. (Id.) Two days after the "Execution Date,"⁷ plaintiff will receive two checks for \$30,000 each, one of which will be less all applicable deductions and thus will represent plaintiff's claims for back pay. (Id. ¶¶ 2.1, 2.3). The other will be in the amount of \$30,000 with no withholdings, thus covering plaintiff's claims for federal and state liquidated damages. (Id. ¶¶ 2.1, 2.3). The second payment date, ninety days after the Execution Date, will proceed similarly, with two checks of \$37,500 each made out to plaintiff, one of which will be subject to withholding. (Id. ¶¶ 2.1, 2.3).

Plaintiff argues that, had he prevailed on all of his claims, he would be entitled to \$345,000. (See Mot. at 5). However, plaintiff acknowledges that he faces a risk that he would not prevail on all of his claims if he proceeded to trial. He states that there are "factual disputes" as to the dates of employment and number of hours worked. (Id.) Additionally, defendants filed

⁷ The "Execution Date" is termed "the date that all Parties have signed this Agreement." (Sett. Agr. ¶ 2.1(i)). However, the settlement may only be executed upon Court approval pursuant to Cheeks. As such, the Execution Date will be the date that this Order is entered.

a counterclaim against plaintiff, stating that he “repeatedly engaged in illegal conduct by converting [tips] and fraudulently charging customer credit cards for larger tips.” (Id. at 5-6). Plaintiff acknowledges that this counterclaim could both reduce his potential damages and affect his credibility were this action to proceed to trial. Plaintiff also notes that the Agreement avoids additional costly litigation, including discovery motions that were denied without prejudice pending resolution of the motions to enforce the purported April 29, 2021 settlement agreement as well as the depositions which have yet to occur in this case. (Id. at 7). He further expresses concerns regarding defendants’ ability to withstand a greater judgment. (Id.) The Agreement therefore prevents “more extensive and likely costly litigation,” a factor that weighs in favor of finding that the settlement was reasonable. Calle v. Elite Specialty Coatings Plus, Inc., No. 13 CV 6126, 2014 WL 6621081, at *3 (E.D.N.Y. Nov. 21, 2014). Weighing the settlement amount agreed to here against the inherent risks and burdens that plaintiff would face in pursuing the litigation and seeing no issues regarding potential fraud or collusion in this case, the Court finds that the settlement reached is fair and reasonable. See Wolinsky v. Scholastic Inc., 900 F. Supp. 2d at 335.

IV. Attorney’s Fees and Costs

The Second Circuit has set forth six factors to determine whether attorney’s fees in FLSA settlements are reasonable: “(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.” Goldberger v. Integrated Res., Inc., 209 F.3d 43, 50 (2d Cir. 2000).

Courts often employ the “lodestar” method in determining whether attorney’s fees are reasonable, multiplying the number of hours reasonably spent by counsel on the matter by a

reasonable hourly rate. See Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 546, 551-52 (2010); Millea v. Metro-North R.R. Co., 658 F.3d 154, 166 (2d Cir. 2011); Arbor Hill Concerned Citizens Neighborhood Ass’n v. County of Albany, 522 F.3d 182, 183 (2d Cir. 2008); Cowan v. Ernest Codelia, P.C., No. 98 CV 5548, 2001 WL 30501, at *7 (S.D.N.Y. Jan. 12, 2001), aff’d, 50 F. App’x 36 (2d Cir. 2002). Although there is a “strong presumption that this amount represents a reasonable fee,” the resulting lodestar figure may be adjusted based on certain other factors. Cowan v. Ernest Codelia, P.C., 2001 WL 30501, at *7; see Quaratino v. Tiffany & Co., 166 F.3d 422, 425 (2d Cir. 1999).

Courts in this Circuit have addressed the issue of applying a multiplier to the lodestar calculation. In one case, the Honorable William H. Pauley III concluded that “a multiplier near 2 should, in most cases, be sufficient compensation for the risk associated with contingent fees in FLSA cases.” Fujiwara v. Sushi Yasuda Ltd., 58 F. Supp. 3d 424, 439 (S.D.N.Y. 2014). In reaching this decision, Judge Pauley examined the case law of this Circuit and noted that courts “have generally refused multipliers as high as 2.03.” Id. at 438 (quoting In re Currency Conversion, 263 F.R.D. 110, 129 (S.D.N.Y. 2009)); see also Velandia v. Serendipity 3, Inc., No. 16 CV 1799, 2018 WL 3418776, at *5 (S.D.N.Y. July 12, 2018) (finding a multiplier of 1.2 to be a “reasonable lodestar modifier”).

Instead of using the lodestar method, courts may employ the “percentage of the fund” method. See McDaniel v. County of Schenectady, 595 F.3d 411, 417 (2d Cir. 2010). With this method, courts in this Circuit have routinely found an award representing one-third of the settlement amount to be reasonable. Romero v. Westbury Jeep Chrysler Dodge, Inc., No. 15 CV 4145, 2016 WL 1369389, at *2 (E.D.N.Y. Apr. 6, 2016) (citing cases). However, a one-third percentage may be “simply too great” in relation to the work performed. Larrea v. FPC Coffees

Realty Co., No. 15 CV 1515, 2017 WL 1857246, at *6 (S.D.N.Y. May 5, 2017) (declining to approve a one-third fee that would result in an 11.4 multiplier of the lodestar calculation).

In FLSA cases, regardless of the method used, “[t]he Court must . . . separately assess the reasonableness of plaintiffs’ attorney’s fees, even when the fee is negotiated as part of a settlement rather than judicially determined.” Beckert v. Rubinov, No. 15 CV 1951, 2015 WL 6503832, at *2 (S.D.N.Y. Oct. 27, 2015) (quoting Lliguichuzcha v. Cinema 60, LLC, 948 F. Supp. 2d 362, 366 (S.D.N.Y. 2013)).

Here, plaintiff’s counsel has used the lodestar method, noting that “the agreed amount of fees represents just 65% of the amount of fees actually incurred” by counsel. (Mot. at 9; see also Billing Recs.). The billing records state that counsel at the firm Gladstein, Reif & Meginniss, LLP (the “Firm”) billed 1,299.40 hours, for a total of \$387,328. (Billing Recs. at 43). This includes hours billed by Jessica Harris, Esq, a 2015 law school graduate, and Michael Winston, Esq, a partner at the Firm who worked on the case until July 2021, and a paralegal and law student. (Harris Decl. ¶¶ 3-4; see Billing Recs.). Ms. Harris bills at an hourly rate of \$240 per hour; Mr. Winston bills at an hourly rate of \$400 per hour, and the paralegal and law student each bill at a rate of \$100 per hour. (See Billing Recs.). The costs cited are the filing fee, service on the defendants, and various research services, mailings, and photocopies, which total \$29,323.96. (Billing Recs. at 53; Sett. Agr. ¶ 2.1).

Counsel acknowledges that the attorney’s fees requested in this case are comparatively high, but notes that “a fee agreement may not be rejected as unreasonable ‘merely because the fee would be disproportionate to the financial interest at stake in the litigation.’” (Mot. at 8 (citing Fisher v. SD Prot. Inc., 948 F.3d at 602)). Counsel also represents, and this Court agrees, that they have “expended significant time and expense investigating, litigating, and successfully

settling this matter,” including drafting the complaint, responding to defendants’ counterclaims, filing several discovery motions, obtaining prejudgment attachment of defendants’ properties, as well as the associated motions to enforce, participating in numerous settlement conferences, and litigating the enforceability of the earlier settlement agreement. (See supra at 2-3; Mot. at 8-9).

Accordingly, the Court finds that the attorney’s fee is reasonable relative to the settlement amount. The other Goldberger factors also weigh in favor of finding the award fair and reasonable: the risks of litigation are high, “FLSA claims [such as this case] typically involve complex mixed questions of fact and law,” Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 743 (1981), and the public policy goal of encouraging attorneys to take on FLSA and NYLL actions that protect the wages of workers is served here. See Beckman v. KeyBank, N.A., 293 F.R.D. 467, 481 (S.D.N.Y. 2013). Lastly, courts often award costs that are “incidental and necessary to [plaintiff’s] representation” and the filing fee, cost of service, mailings, and various research services certainly qualify as necessary aspects of this litigation, particularly in light of the numerous legal issues presented throughout this litigation. See, e.g., In re Indep. Energy Holdings PLC Sec. Litig., 302 F. Supp. 2d 180, 183 n.3 (S.D.N.Y. 2003).

In summary, this Court finds that the attorney’s fee award, in addition to the amount requested for costs, is fair and reasonable.

CONCLUSION

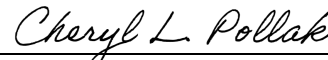
In this case, after holding a fairness hearing and reviewing the parties’ submission, the Court finds that the settlement reached is a fair and reasonable compromise of plaintiff’s claims, considering the amount received, the factual disputes that might have limited recovery, defendant’s counterclaims, and the fact that the parties engaged in arms’ length negotiations, all of which were sufficient to gain an understanding of the risks and benefits of proceeding with

the litigation. Cf. Wolinsky v. Scholastic, Inc., 900 F. Supp. 2d at 335 (examining the factors courts consider when approving FLSA settlement agreements). The Court also finds that counsel's request for fees and costs is reasonable.

As the parties have already filed a signed stipulation of dismissal (see Sett Agr. at 26), this Court So Orders the stipulation, filed separately on ECF. The Clerk is directed to send copies of this Order to the parties either electronically through the Electronic Case Filing (ECF) system or by mail.

SO ORDERED.

Dated: January 10, 2022
Brooklyn, New York



CHERYL L. POLLAK
Chief United States Magistrate Judge
Eastern District of New York