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9/26/11

BRISTOL, SS.

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT

CIVIL ACTION NO. BRCV2010-1042

BRISTOL, SS SUPERIOR COURT  
FILED

SEP 26 2011

MARC J. SANTOS, ESQ.  
CLERK/MAGISTRATE

RAMONA CRUZ and NELITA MONTEIRO,<sup>1</sup>

Plaintiffs

vs.

DARTMOUTH CLUBS, INC., d/b/a KINGS INN,

Defendant

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION  
FOR SUMMARY JUDGMENT**

**INTRODUCTION**

The two named plaintiffs allege in their complaint that they have worked as exotic dancers at the defendant's place of business, known as Kings Inn in Dartmouth, Massachusetts. Pursuant to Mass.R.Civ.P. 23, the plaintiffs have moved for certification of a class they define as "all individuals who have been exotic dancers at Kings Inn at any time since September 7, 2007 (three years before the filing of the complaint)." The plaintiffs by way of motion for summary judgment seek to have this court rule as a matter of law that the defendant misclassified the dancers as independent contractors and consequently violated G.L. c. 149, § 148B (the Massachusetts Independent Contractor Law); G.L. c. 151, §§ 1 and 1A (the Massachusetts Minimum Wage and Overtime Laws); G.L. c. 149, § 148 (the Massachusetts Wage Law); and G.L. c. 149, § 152A (the Massachusetts Tips Law). For the reasons herein stated, the plaintiffs' motion is

**DENIED.**

<sup>1</sup> On behalf of themselves and all others similarly situated

## BACKGROUND

According to her affidavit, filed in support of this motion, of the plaintiff Cruz worked as an exotic dancer at the Kings Inn from January, 2003 to January, 2010. Not receiving an hourly wage, she worked for tips from customers. In order to so work, the plaintiff Cruz as well as "the other exotic dancers" had to pay a series of fees to the defendant and tips to certain other workers. These fees included a "door fee" of \$35 for a day shift and or \$65 for a night shift. Also, a \$5 "stage fee" had to be paid by a dancer each time she took to the stage to perform. A "late fee" of approximately \$100 was imposed by the defendant when a dancer arrived late. If a dancer wished to perform a private so-called "VIP dance" for a customer, she had to pay the defendant \$65 on each occasion. Additionally, she had to "tip out" the disc jockey \$10 for a shift, plus \$1 for each song played. These representations are substantially corroborated by the separate affidavit of the plaintiff Monteiro.

Further in her affidavit, the plaintiff Cruz estimates that during "an average shift" she would pay out approximately \$200 in tips and fees and would work with "approximately 7 other exotic dancers." However, on particularly busy evenings, she might work with "as many as 20 other exotic dancers." The day shifts, according to the affidavit, ran from 11 AM to 7 PM, and the night shifts ran from 7 PM to 2 AM.

Dancers apparently were free to work at other locations and to perform at private functions during the period they also danced at Kings Inn. Also, although a shift schedule was maintained by the defendant, it was based upon the availability of the dancers themselves. Seniority played a role in scheduling, with certain shifts (i.e. Friday and Saturday nights) being among the more coveted.

## DISCUSSION

The court will allow summary judgment where there are no genuine issues of material fact and where the record entitles the moving party to judgment as a matter of law. See Mass. R. Civ. P. 56(c); Cassesso v. Commissioner of Correction, 390 Mass. 419, 422 (1983); Community Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976). The moving party bears the burden of establishing that there is no issue of material fact on every relevant issue. See Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989). A party moving for summary judgment who or which does not bear the burden of proof at trial may demonstrate the absence of a genuine dispute of material fact for trial either by submitting affirmative evidence negating an essential element of the non-moving party's case, or by showing that the non-moving party has no reasonable expectation of proving an essential element of its case at trial. See Flesner v. Technical Communications Corp., 410 Mass. 805, 809 (1991); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). It is necessary, however, for the summary judgment movant "to show by credible evidence from . . . affidavits and other supporting materials that there is no genuine issue of material fact and that [the party is] entitled, as matter of law, to a judgment." Smith v. Massimiano, 414 Mass. 81, 85 (1993) (citations omitted).

The pivotal question presented in this case is whether the plaintiffs are employees or independent contractors. The determination is typically fact-dependent, Dias v. Brigham Medical Associates, Inc., 438 Mass. 317, 322 (2002), often involving consideration of many factors. See Restatement (Second) of Agency § 220 comment c (1958). Under the Massachusetts Independent Contractor Law, G.L. c. 149, § 148B(a), an individual performing a service is to be considered an employee, unless:

- (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of services and in fact; and
- (2) the service is performed outside the usual course of the business of the employer; and
- (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

"The failure of an employer to prove all three criteria set forth above suffices to establish that the individual in question is an employee." Somers v. Converged Access, Inc., 454 Mass. 582, 589 (2009) (citations omitted).

Based upon the materials submitted by both sides, there is a fair quantum of evidence suggesting that the named plaintiffs as well as members of the putative class had considerable freedom with respect to important aspects of their services. Scheduling appears to have been principally a function of the individual dancer's availability and seniority. The plaintiffs make no claim of being constrained by a minimum or maximum number of hours or shifts per week. Also, while the plaintiffs have tendered a published statement of rules from the Kings Inn, the plaintiffs do not complain of any restriction or interference by the defendant upon their dance performance. And, although the plaintiff Cruz in her affidavit cites a practice by the defendant of charging a fee for the use of certain auxiliary rooms for private dances with customers, the decision of whether and how often to use these rooms appears to have been left to the discretion of the individual dancer.

The second element of the statutory test highlights an issue of blunt contest between these plaintiffs and this defendant: "the usual course of business" of Kings Inn. The defendant argues that it is in "the bar and restaurant business" and that it independently contracts with exotic dancers to provide entertainment in the same way

another establishment might hire a live band. The plaintiffs, relying in part upon the characterization of a manager for the defendant that Kings Inn is a "strip club," argue that exotic dancers certainly thereby perform their services in the usual course of the Kings Inn's business.

The issue seems not as easily settled as either party suggests. Though the plaintiffs' references to other cases, particularly Chaves v. King Arthur's Lounge, Inc., Suffolk Civ. A No. 07-2505 (Mass.Super. Jul. 31, 2009) and Cruz v. Manlo Enterprises, Inc., Worcester Civ. No. 10-01931 (Mass.Super. June 10, 2011) are helpful, those cases are grounded in greater factual development than is presented in the instant matters. To the view of this court, a comedy club doesn't necessarily employ its comedians, nor a dinner theater its actors. However, both very likely employ the people who serve customers their drinks. Are the dancers of the Kings Inn class likened more to "booked" acts or to waitstaff? On this record, the question cannot be answered beyond dispute.

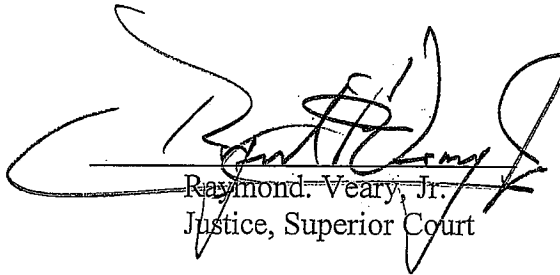
The defendant makes a reasonable claim to having satisfied the third statutory element, that of the plaintiffs being customarily and independently engaged in the same service. By affidavit, the defendant asserts that dancers, while performing at Kings Inn, were at liberty to perform elsewhere. The plaintiffs do not contradict this assertion but only add that a geographical limitation was placed upon these off-site performances. Also, according to materials tendered by the plaintiffs, the two named plaintiffs in the present case appear to be the same Ramona Cruz and Nelita Monteiro who were plaintiffs in Cruz v. Manlo Enterprises, Inc., Worcester Civ. No. 10-01931 (Mass.Super. June 10, 2011). In the Worcester case, the plaintiffs claimed to have been exotic dancers at an establishment know as Mario's Showcase for a period including "September 7, 2007 to

September 7, 2010," coinciding considerably with the period they claim to have been dancing at the Kings Inn. It appears then that the plaintiffs during the relevant time period the enjoyed and, in fact, exercised meaningful independence to perform their services as exotic dancers at locations and for parties having no connection to the defendant.

This court therefore concludes that genuine issues of material fact remain as to each of the three elements set forth in G.L. c. 149, § 148B(a) and that these issues are central to the plaintiffs' claims.

**ORDER**

For the foregoing reasons, it is hereby **ORDERED** that the plaintiffs' motion for summary judgment be **DENIED**.

  
Raymond Veary, Jr.  
Justice, Superior Court

Dated: September 26, 2011