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29 Ex-Workers Ask To Testify Against Pizza Pro Mario Sbarro

By **Joyce Hanson**

Law360 (March 29, 2019, 5:50 PM EDT) -- Twenty-nine former steakhouse workers in a wage-and-hour suit against Mario Sbarro, of the global pizzeria chain, and his son have urged a New York federal court to toss the Sbarros' bid to stop them from testifying over working conditions at the now-shuttered eatery.

Lead plaintiff Ashraf Hussain told the court Thursday that Sbarro and his son, Gennaro, want to deprive him and other ex-employees of their right to testify at a trial scheduled to begin May 6 in the collective action alleging Fair Labor Standards Act violations at the Sbarro-owned Burton & Doyle Steakhouse. The Sbarros argue — wrongly — that the Rules of Civil Procedure require parties to disclose ahead of time who will testify, Hussain said.

But the 29 plaintiffs cannot be precluded from testifying, Hussain said, despite the Sbarros' argument that they weren't told who would be the best individuals to depose besides Hussain and another former employee, Donald Bartunek. Further, Hussain said, the defendants already knew the identities of the FLSA collective's members because they had their payroll and time records and could have reviewed them to decide which of the opt-ins to depose.

"Defendants had every opportunity to notice plaintiffs' depositions and move to compel those depositions or any other discovery regarding those individuals," Hussain said. "Rather, they raise [their concerns] on the eve of trial as a blatant attempt to deny plaintiffs the opportunity to testify and address the character and magnitude of their respective Burton & Doyle employment histories at trial."

Hussain also asked the court to deny Sbarro's motion to preclude testimony

concerning his wealth, saying his financial position and background as an experienced restaurateur will help decide whether the plaintiffs are entitled to liquidated damages under the FLSA and the New York State Labor Law. Sbarro has owned and operated 630 pizzerias in 28 countries, Hussain said.

On March 14, the Sbarros moved the court to exclude from trial the testimony of the opt-in plaintiffs, evidence of damages for plaintiffs, testimony about Mario Sbarro's wealth, Hussain's proposed damages calculation chart, proposed newspaper article exhibits and a protective order stipulation.

"Plaintiffs have no good faith explanation for their failure to produce the aforementioned plaintiffs for depositions prior to or anytime in the nearly three years since the close of discovery, which was extended on three separate occasions," the Sbarros said. "Defendants repeatedly requested, in writing, that plaintiffs' counsel identify a list of those opt-in plaintiffs who should be deposed as representative witnesses of the collective action, but plaintiffs still never identified those plaintiffs requested by defendants or produced them for depositions."

Last year at this time, a New York federal magistrate judge **refused to let the Sbarros escape** the wage-and-hour lawsuit brought by Hussain, a former server at the now-shuttered Great Neck, Long Island, steakhouse after finding enough evidence that Mario Sbarro was the restaurant's sole owner.

Burton & Doyle Steakhouse was owned by Burton and Doyle LLC, which in turn was wholly owned by Mario Sbarro LLC, whose sole member is Mario Sbarro, according to U.S. Magistrate Judge Steven I. Locke.

Judge Locke didn't buy Sbarro's contention that summary judgment in his favor was warranted because he was retired and thus could not be classified as an employer under the FLSA and the NYSL. Despite the restaurateur's claims, the evidence suggests that Sbarro actively held the positions of managing director, manager and administrative officer of Mario Sbarro LLC throughout Hussain's employment, the judge wrote.

Over the next 10 years, ownership changed hands several times among family members and other associates, but by June 2008 all shares of Burton and Doyle LLC had transferred to Mario Sbarro LLC, according to Judge Locke.

In 2009, Sbarro asked his son Gennaro to serve as general manager at the steakhouse "in an effort to improve its operations," and thereafter the father would occasionally visit the restaurant every month or two as a guest and to tell his son whether he was satisfied with Burton & Doyle's

food quality, sanitation and cleanliness, the judge said.

In August 2017, Gennaro Sbarro filed a voluntary petition for Chapter 7 bankruptcy in the Eastern District of New York.

Hussain's November 2015 complaint alleges that Burton & Doyle failed to pay minimum and overtime wages and "spread of hours" pay for split shifts exceeding 10 hours. In addition, the steakhouse allegedly misappropriated gratuity charges that customers believed went to servers but were actually retained by the restaurant.

When Hussain worked as a server from January 2013 through July 2014, Burton & Doyle paid him an hourly rate of only \$5, compared with the federal minimum wage of \$7.25 per hour, but the steakhouse was ineligible to take a tip credit under the FLSA and NYSSL because the restaurant did not allow employees to keep all the tips they received, the suit claims.

Pechman Law Group PLLC's Lou Pechman, a lawyer for Hussain, said Friday, "This case is the one in a hundred which is going to trial rather than settling. Apparently, Mario Sbarro thinks he can slip out of the case and evade liability, but we intend to hold him accountable."

The Sbarros' lawyer, Donald Derrico of Gordon Rees Scully Mansulhani LLP, told Law360 in an email Friday that the law firm does not comment on pending litigation.

Ashraf Hussain is represented by Louis Pechman, Vivianna Morales, Lillian Marquez and Gregory Slotnick of Pechman Law Group PLLC.

Mario Sbarro and Burton & Doyle are represented by Donald Derrico and Francis J. Giambalvo of Gordon Rees Scully Mansulhani LLP.

The case is Hussain et al. v. Burton and Doyle of Great Neck LLC et al., case number 2:14-cv-05924, in the U.S. District Court for the Eastern District of New York.

--Editing by Jay Jackson Jr.