

Sapoznik v Progressive Credit Union

2019 NY Slip Op 35088(U)

September 26, 2019

Supreme Court, Queens County

Docket Number: Index No. 707734/2019

Judge: Kevin J. Kerrigan

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Kevin J. Kerrigan
Justice

IA Part 10

Alan T. Sapoznik, Clara Sapoznik and x
ACGSA Transit, Inc.,
Plaintiffs,

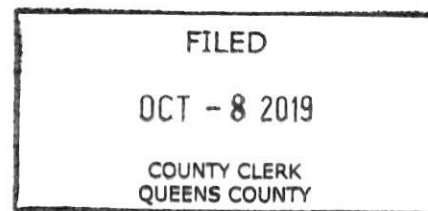
Index
Number 707734 2019

- against -

Motion
Date July 15, 2019

Progressive Credit Union a/k/a Pen Fed Credit
Union, City of New York, New York City Taxi
and Limousine Commission, Port Authority of
New York and New Jersey and The Metropolitan
Transportation Authority,
Defendants.

Motion Seq. No. 2



The following papers EF numbered below read on this motion by defendant Port Authority of New York and New Jersey for an order pursuant to CPLR 3211(a)(2) and (7) dismissing the complaint against it and on this cross motion by defendant Progressive Credit Union a/k/a Pen Fed Credit Union (hereinafter referred to as Pentagon Federal Credit Union) for an order pursuant to CPLR 3211(a)(5) and (7) dismissing the complaint against it.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits	12-17
Notice of Cross- Affidavits - Exhibits	27-32, 34
Answering Affidavits - Exhibits	37-40, 41-44
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Upon the foregoing papers it is ordered that the motion and the cross motion are granted.

I. The Allegations of the Complaint

Plaintiff Alan T. Sapoznik and plaintiff Clara Sapoznik own plaintiff ACGSA Transit, Inc. (ACGSA) which purchased New York City yellow taxi medallions numbered

3K70 and 3K73. Defendant Progressive Credit Union is a corporation licensed to operate a credit union by the New York State Department of Financial Services and/or the National Credit Union Administration (NCUA). The NCUA has taken over the management of Progressive and has assigned its assets and liabilities to defendant Pen Fed Credit Union. Pentagon Federal Credit Union is the successor by merger to defendant Progressive. The caption of this action, however, was never amended by plaintiff to reflect the merger. This Court, therefore, shall refer to said defendant interchangeably as either Progressive/Pen Fed or Pentagon. Defendant New York City Taxi and Limousine Commission (TLC) is an agency of defendant City of New York. Defendant Metropolitan Transit Authority (MTA), a public benefit corporation, operates subways, buses, and commuter trains.

In previous years, the TLC restricted the number of yellow taxi medallions so that their market value rose to approximately \$1,300,000 each by 2014. Subsequently, the City of New York, through the TLC, authorized the creation of a new class of taxi medallions, the green New York City taxi medallions, which flooded the market with additional taxicabs. At the same time, New York City, through the TLC, allowed the operation of computerized taxi services, such as Uber and Lyft, which enabled passengers to summon a vehicle through app-based devices.

Despite its knowledge of these circumstances and of the decreasing value of yellow taxi medallions, defendant Progressive/Pen Fed continued to finance the purchases of taxi medallions. The plaintiffs borrowed \$1,146,621.88 from defendant Progressive/Pen Fed in or about 2016. The defendant credit unions have demanded that the plaintiffs make monthly payments, and the loan has a five year balloon due on November 9, 2021. The defendant credit unions have caused the plaintiffs, who were not represented by an attorney, to sign confessions of judgment.

The value of the plaintiffs' taxi medallions was diminished because of (1) a fifty-cent surcharge imposed by the MTA on a yellow medallion taxicab ride but not on a ride in an app-based vehicle, (2) the MTA's refusal to allow yellow taxicabs to pick up passengers at suburban rail road stations, and (3) the MTA's wrongful and negligent refusal to coordinate its activities with the other defendants. The value of the plaintiffs' taxi medallions was also diminished because the Port Authority "forbids the New York City Medallion Taxicabs to pick up passengers at Newark Airport and to return said passengers to New York City," and "[t]his causes New York City Yellow Taxicabs to lose money on every required trip to Newark Airport as they must return to New York City with no passengers."

II. Discussion

A. The Motion by the Port Authority

The Port Authority, created in 1921, when pursuant to the United States Constitution, Congress approved the compact between the states of New York and New Jersey providing for its creation, operates various airports, ports, terminals, transportation facilities, and other facilities in the region. The Port Authority's Rules and Regulations state: "Ground transportation services may be provided at an Air Terminal without specific pre-arrangement by the operator of a vehicle licensed to carry passengers for hire in response to hails from prospective passengers on public streets of the municipality whose boundaries include the location within an Air Terminal at which the vehicle is located."

By concurrent legislation, the states of New York and New Jersey consented to suits against the Port Authority upon compliance with certain jurisdictional conditions precedent. The consent was made conditional upon compliance with New York Unconsolidated Laws § 7107, "Limitation of actions; service of notice of claim required," which provides in relevant part: "The foregoing consent is granted upon the condition that any suit, action or proceeding prosecuted or maintained under this act shall be commenced within one year after the cause of action therefor shall have accrued, and upon the further condition that in the case of any suit, action or proceeding for the recovery or payment of money, prosecuted or maintained under this act, a notice of claim shall have been served upon the port authority by or on behalf of the plaintiff or plaintiffs at least sixty days before such suit, action or proceeding is commenced. ***." (See, *Conn v. Tutor Perini Corp.*, 174 AD3d 680 [2nd Dept 2019].)

"Compliance with the condition precedent in the statute [Uncons.Laws of NY § 7107] of giving sixty days notice is mandatory and jurisdictional. The failure to satisfy this condition will result in withdrawal of defendant's consent to suit and compels the dismissal of the action for lack of subject matter jurisdiction." (*Lyons v. Port Auth. of New York & New Jersey*, 228 AD2d 250, 251, [1st Dept 1996]; *Belpasso v. Port Auth. of New York & New Jersey*, 103 AD3d 562 [1st Dept 2013].)

There is no merit in the argument made by the plaintiffs' attorney that the notice of claim statutes do not apply to ongoing negligence. (See, *Stone v. Town of Clarkstown*, 82 AD3d 746 [2nd Dept. 2011] ["the plaintiffs' third cause of action alleging negligence should have been dismissed as against the Town to the extent it alleged conduct which occurred prior to the 90-day period preceding the filing of the plaintiffs' notice of claim"].) The plaintiffs in this case do not allege that they filed a notice of claim at any time, and, thus, the statutes read together require the dismissal of the entire complaint. The additional argument made by the plaintiffs' attorney that notice of claim statutes do not apply when the municipal entity is a third party defendant also has no merit. The municipal

defendants in this case are not third party defendants or similar to third party defendants, and, moreover, this is not a case concerning a statutory duty to indemnify. (*See, Montalto v. Westchester St. Transp. Co.*, 102 AD2d 816 [2nd Dept 1984].)

The failure to comply with statutory notice of claim requirements can result in the dismissal of a complaint pursuant to CPLR 3211(a (5) and)(7). (*See, e.g., Mosheyev v. New York City Dept. of Educ.*, 144 AD3d 645 [2nd Dept 2016]; *Bertolotti v. Town of Islip*, 140 AD3d 907 [2nd Dept 2016]; *Belpasso v. Port Auth. of New York & New Jersey*, 103 AD3d 562[2013].) “The law is clear that when a notice of claim requirement is statutorily imposed it is usually deemed an element of the substantive cause of action and as such its satisfaction must be pleaded in the complaint ***.” (*Fratto v. W. Reg'l Off-Track Betting Corp.*, 147 Misc.2d 577 [Sup. Ct. 1990].)

The plaintiffs’ complaint against the Port Authority is dismissable for failure to comply with statutory notice of claim requirements.

The plaintiffs’ complaint against the Port Authority is also dismissable because of another failure to state a cause of action. The plaintiffs’ tort claims are barred because the State is immune from liability for the discretionary acts of its officials. (*Donald v. State*, 17 NY3d 389 [2011].) “The Port Authority is and of necessity has to be a State agency.” (*Whalen v. Wagner*, 4 NY2d 575, 584 [1958]; *In re World Trade Ctr. Bombing Litig.*, 17 NY3d 428[2011].) The act of the Port Authority in forbidding yellow taxis to return from Newark Airport to New York City with passengers is considered “discretionary” because it took “the exercise of reasoned judgment.” (*See, Donald v. State, supra*, 395.)

B. The Cross Motion by Defendant Pentagon Federal Credit Union

Defendant Pentagon is the successor by merger to defendant Progressive Credit Union. The plaintiffs’ first cause of action asserted against defendant Pentagon is for breach of contract. The plaintiffs’ allege that they are aggrieved because (1) “the loan was irresponsible, improper, and void under the laws governing Federal Credit Unions, 12 USC Section 1766,” (2) “Defendant Progressive/Pen Fed acted recklessly and in an arbitrary and capricious manner in improperly loaning money against a rapidly deflating asset,” and (3) “Defendant Progressive/Pen Fed continued to lend large sums of money against rapidly deflating New York City Yellow Taxicab Medallion[s] in violation of its fiduciary duty to its owners, shareholders, members, borrowers and the general public.” “The essential elements of a cause of action to recover damages for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance pursuant to the contract, (3) the defendant's breach of its contractual obligations, and (4) damages resulting from the breach ***.” (*Starker v. Trump Vill. Section 4, Inc.*, 162 AD3d 946 [2nd Dept 2018]; *All Seasons Fuels, Inc.*

v. Morgan Fuel & Heating Co., 156 AD3d 591 [2nd Dept 2017].) The contractual obligation of the defendant credit unions was to lend money to the plaintiff borrowers, and the complaint contains no allegation that the loan was not made. In regard to plaintiffs' allegation (1) above, 12 USC § 1766, "Powers of Board," a lengthy statute, concerns the powers of the Board of the National Credit Union Administration (NCUA), and the complaint contains no specific allegations showing that the statute has relevance to the making of the loan to the plaintiffs. In regard to plaintiffs' allegation (2) above, the complaint's "arbitrary and capricious" language is irrelevant to a cause of action for breach of contract against the defendant credit unions and more appropriate to an Article 78 proceeding brought against a governmental entity. In regard to the complaint's allegation of a violation of a fiduciary duty, a cause of action for breach of fiduciary duty differs from a cause of action for breach of contract, and, in any event, there is ordinarily no fiduciary duty between a bank and its customers. (See, *Curtis-Shanley v. Bank of Am.*, 109 AD.d 634 [2nd Dept 2013].)

The plaintiffs failed to state a valid cause of action for violation of New York General Business Law §349 against defendant Pentagon . General Business Law § 349 "Deceptive acts and practices unlawful," a broad consumer protection statute, declares unlawful "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." (General Business Law § 349[a]; see, *North State Autobahn, Inc. v. Progressive Ins. Group Co.*, 102 AD3d 5 [2nd Dept 2012].) "The elements of a cause of action to recover damages for deceptive business practices under General Business Law § 349 are that the defendant engaged in a deceptive act or practice, that the challenged act or practice was consumer-oriented, and that the plaintiff suffered an injury as a result of the deceptive act or practice." (*Valentine v. Quincy Mut. Fire Ins. Co.*, 123 AD3d 1011, 1015 [2nd Dept 2014]; *Nafash v. Allstate Ins. Co.*, 137 AD3d 1088 [2nd Dept. 2016].) "A party claiming the benefit of General Business Law § 349 must, as a threshold matter, charge conduct that is consumer oriented," i.e., conduct that has a broad impact on consumers at large." (*JP Morgan Chase Bank, N.A. v. Hall*, 122 AD3d 576, 581 [2nd Dept 2014][internal quotation marks and citation omitted]). In the case at bar, the dispute between the parties does not involve consumer-oriented conduct.

The plaintiffs failed to state a valid cause of action for violation of the federal Truth in Lending Act (TILA) 15 USC §1601 against defendant Progressive. TILA was enacted "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.***." (15 USC § 1601 [a].) TILA provides that: "(i) The adjective 'consumer', used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money,

property, or services which are the subject of the transaction are primarily for personal, family, or household purposes.” (15 USC § 1602 [I].) Taxi medallions are not used primarily for personal, family, or household purposes, but rather are used for the commercial purpose of operating a taxi business. The plaintiffs failed to state a valid cause of action for violation of TILA, and the court notes that a defense based on TILA has been rejected in similar cases involving taxi medallions. (See, e.g., *Melrose Credit Union v. Galarza*, Index No. 707947/17 [Sup Ct. Queens County, December 5, 2017] [“TILA does not apply to commercial transactions”]; *Melrose Credit Union v. Guerrier*, Index No. 707962/17 [Sup Ct. Queens County, March 5, 2018] [TILA “only applies to consumer credit transactions and does not apply to extensions of credit for commercial purposes”]).

Accordingly, the complaint is dismissed as against The Port Authority of New York and New Jersey and Progressive/Penn Fed/Pentagon.

Dated: September 26, 2019



Kevin J. Kerrigan, J.S.C.

FILED
OCT - 8 2019
COUNTY CLERK
QUEENS COUNTY