

M E M O R A N D U M

SUPREME COURT : QUEENS COUNTY
IA PART 2

PETER H. ENGEL, etc., et al.	X	INDEX NO. 19868/99
- against -		BY: WEISS, J.
FOREST HILLS GARDENS CORPORATION, et al.		DATED: May 6, 2004

X

Defendant Forest Hills Gardens Corporation ("FHGC") has moved for summary judgment dismissing the complaint against it.

The plaintiffs seek to maintain this action as a class action on behalf of all persons whose vehicles were immobilized by a device attached to a wheel ("booted") while parked on the streets owned by defendant FHGC for the period from February 5, 1992 through July 9, 1995. The plaintiffs do not seek damages for booting after July 9, 1995, which is the effective date of Local Law 24/95 of the City of New York regulating booting on private parking lots and private streets. The plaintiffs began the instant action on September 8, 1999.

Defendant FHGC, a private residential community, owns the streets in Forest Hills Gardens, New York. The community encompasses approximately 900 homes on 175 acres and includes approximately seven miles of private streets. Beginning in 1989, FHGC stopped having illegally parked vehicles towed and began having them immobilized by attaching a device to a wheel. The

owners of the vehicles paid a fee to a contractor to have the vehicles unbooted.

FHGC and a company which once operated the booting program brought a previous action in the New York State Supreme Court, County of Queens, Forest Hills Gardens Corporation and A-Z Parking Services, Inc. v Baroth (147 Misc2d 404), for a declaratory judgment against owners of vehicles that had been booted and who had brought small claims actions against FHGC and/or A-Z Parking claiming that the booting program was illegal and that the redemption fee was unreasonable. Mr. Justice Kassoff held that FHGC and A-Z had the right to boot illegally parked vehicles on the private streets of Forest Hills Gardens, and the parties subsequently settled the action. Mr. Justice Kassoff also signed a judgment dated June 15, 1990 which provided in relevant part: "9. \$100 is the reasonable, just and currently valid reimbursement fee for A-Z and FHGC to exact from the owners of all vehicles immobilized after April 1, 1999. 10. Inflationary factors and increases in the Consumer Price Index may require subsequent adjustments to the amounts of the reimbursement fee, provided that such adjustments are not in excess of the actual increased costs incurred from time to time by A-Z and FHGC. *** 21. The settlement of the Class Action is not an admission by A-Z and FHGC, nor is this judgment a finding of the validity of the claims in the class action. Furthermore, the settlement is not a concession by A-Z or

FHGC and shall not be used as an admission of fault or omission by any person."

A-Z decided to discontinue providing booting services to FHGC by the end of 1991. On or about February 5, 1992, defendant FHGC entered into a contract with defendant Cornell Boot Service, Inc., whereby the latter obligated itself to boot vehicles illegally parked on the private streets of Forest Hills Gardens for a fee of \$125 to be paid by the owner of the booted vehicle. Plaintiff Peter H. Engel owned a 1982 Audi, plaintiff Gordon Orlow owned a 1987 BMW, and plaintiff Laura Samodulski owned a 1989 Dodge Caravan. (Theodore Zelnick is no longer a party to this action [see order dated May 7, 2001].) The plaintiffs allege that they had their vehicles booted by defendant Cornell Boot Service, Inc. while parked on the streets owned by defendant FHGC during the period from February 5, 1992 through July 9, 1995. Plaintiff Engel, plaintiff Orlow, and plaintiff Samodulski allegedly had their vehicles booted on or about August 15, 1994, January 27, 1995, and April 26, 1995 respectively, and the plaintiffs had to pay \$148, \$150, and \$150 respectively for the release of their vehicles. The plaintiffs allege that they are aggrieved because "[t]he service fees of \$148 and \$150 exacted by the defendants were greater than the actual and reasonable expenses of Cornell plus a reasonable profit" and the service fees exacted were in violation of the judgment of Mr. Justice Kassoff entered in Baroth.

R. Andrew Parker, a former officer and board member of defendant FHGC, swears to the following: He was a member of a group which conducted a review of the booting operation in late 1991 to early 1992. The group determined, inter alia, that A-Z had inadequate hours of operation, that A-Z paid its personnel with "bounties" based on the number of cars booted rather than by salary, and that A-Z failed to provide a grace period before booting.

Irwin R. Karassik, formerly a member of defendant FHGC's Board of Directors, swears that he took part in the negotiations with defendant Cornell which resulted in the latter's receiving a contract in or about February, 1992 to perform booting services. Karassik alleges that "[d]uring the negotiations, I asked Cornell to prepare pro forma financial statements of their anticipated and projected income and expenses during their first and second years of operation in order to determine what booting fee they would reasonably require ***." (Emphasis in original.) Because of "almost universal dissatisfaction with the level of service provided by A-Z," Karrassik continues, "[t]he contract FHGC finally negotiated with Cornell provides for a substantial increase in the nature and extent of the services to be rendered by Cornell." Karrassik was of the opinion, shared by the Board, that the judgment in Baroth "permitted a change in the booting fee if justified by future circumstances, *** the [Baroth] decision was expressly

limited to the facts and circumstances surrounding the employment of A-Z by FHGC, [and] changes in the nature, scope, and extent of the services provided, whether by A-Z, Cornell, or any other provider, with concomitant inflated operating costs, may justify increases in the booting fee ***."

Linda Hoffman, another former member of the Board, alleges that at around the time A-Z terminated its contract, there were few, if any, companies in the area that performed booting services and that Cornell then only towed vehicles. At the request of FHGC, Cornell agreed to provide booting services, and, as a consequence, the company experienced start up costs such as those incurred in buying the boots, leasing or purchasing vehicles to drive around the community, renting space near the community to be used as an office where the redemption fee could be paid, and hiring personnel. Cornell allegedly agreed to eliminate some of A-Z's aggressive booting practices, thereby reducing its opportunities for income, and agreed to provide an increased level of services such as taking photographs of cars before and after booting. Moreover, FHGC limited the areas where Cornell could boot to a "Red Zone," where the illegal parking occurred most. Hoffman further alleges that FHGC itself incurred numerous expenses in administering the booting program for which it did not seek sufficient reimbursement through the booting fee and that "[a]t no time did FHGC make any profit on the parking fees collected by

Cornell." Hoffman swears that "eventually, FHGC waived collection of this [\$15] fee from Cornell" and that "FHGC paid its costs out of the annual fees charged the homeowners." Cornell allegedly "complained throughout the time of its contract with FHGC that it was not making a sufficient profit, or was actually losing money" and that "when FHGC's accountant reviewed Cornell's books, his report showed that Cornell did not appear to be making much of a profit, if any."

That branch of the motion by defendant FHGC which is for summary judgment dismissing the plaintiffs' first cause of action is granted. The plaintiffs' first cause of action alleges that they have been aggrieved because the defendants charged a service fee in excess of the amount authorized by the Baroth judgment. Summary judgment is warranted where, as in the case at bar, there is no issue of fact which must be tried. (See, Alvarez v Prospect Hospital, 68 NY2d 320.) Defendant FHGC demonstrated that changed circumstances required a departure from the formula set out in the Baroth judgment for computing the fee to be paid by owners of booted vehicles. Indeed, A-Z, the boot service company bound by the Baroth judgment, terminated its contract with defendant FHGC, and the Baroth formula was not intended to apply to a new contractor with start up costs and with an obligation to provide a greater level of service.

That branch of the motion by defendant FHGC which is for summary judgment dismissing the second cause of action is granted. The second cause of action seeks to recover from the defendants an alleged overcharge computed by subtracting from the redemption fee collected the sum of actual operating expenses plus a reasonable profit. "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact ***." (Alvarez v Prospect Hospital, supra, 324.) Defendant FHGC successfully carried this burden by submitting adequate evidence establishing that, under all of the circumstances of this case, there was no overcharge by Cornell. Contrary to the contention of the plaintiffs, this is not a case where the deficient showing by a proponent of a motion for summary judgment excuses an adequate rebuttal. (See, Winegrad v New York Univ. Med. Ctr., 64 NY2d 851; Doe v Orange-Ulster Bd. of Co-op. Educational Services, 4 AD3d 387.) The burden shifted to the plaintiffs herein to produce evidence sufficient to create a genuine issue of fact concerning an alleged overcharge. (See, Alvarez v Prospect Hospital, supra.) The perfunctory, seven page affirmation submitted by the plaintiffs' attorney in opposition did not carry this burden. Without taking all of the circumstances of the case into consideration, comparisons between increases in the Consumer Price Index and increases in the redemption fee do not

establish that there was an overcharge. The court notes that to the knowledge of defendant FHGC, "plaintiffs made no effort to obtain Cornell's records even though FHGC did provide information regarding the names of Cornell's principals."

That branch of the motion by defendant FHGC which is for summary judgment dismissing the third cause of action based on General Business Law § 70 is granted. The plaintiffs allege that "[t]he agreement between the defendants and the patrolling of the Gardens by Cornell on behalf of FHGC, constitutes a willful violation of General Business Law § 70." General Business Law § 70 provides in relevant part: " *** 2. No person, ***, company, *** or corporation shall engage in *** the business of watch, guard or patrol agency, *** without having first obtained from the department of state a license so to do ***." However, even assuming that the defendants violated the statute, General Business Law § 70(4) makes a violation a class B misdemeanor, and the plaintiffs made no showing that they have an available civil remedy based on the statute. The court notes further that even if the plaintiffs can base a civil cause of action on General Business Law § 70, CPLR 214(2), a three year statute of limitations, controls the plaintiffs' statutory claim (see, Gaidon v Guardian Life Ins. Co. of America, 96 NY2d 201), and the plaintiff's third cause of action is time-barred.

That branch of the motion by defendant FHGC which is for summary judgment dismissing the plaintiffs' fourth cause of action based on Vehicle and Traffic Law § 1640-a is granted. The plaintiffs allege that FHGC violated Vehicle and Traffic Law § 1640-a because it "failed to make application to the City of New York for the enactment of a local law or ordinance for the prohibition, regulation, restriction or limitation on the parking of vehicles within the Gardens ***." However, even assuming that Vehicle and Traffic Law § 1640-a applies to the case at bar, pursuant to Vehicle and Traffic Law § 1601, defendant FHGC could regulate parking on its private streets without the enactment of a City local law or ordinance. Vehicle and Traffic Law § 1601, "Rights of owners of real property," provides: "Nothing in this chapter shall be construed to prevent the owner of real property used by the public for purposes of vehicular travel by permission of the owner and not as matter of right from prohibiting such use, or from requiring conditions additional to those specified in this chapter, or from otherwise regulating such use as may seem best to such owner."

That branch of the motion by defendant FHGC which is for summary judgment dismissing the fifth cause of action based on General Business Law § 349 is granted. The plaintiffs allege, inter alia, that "the imposition of a fee of \$148 and \$150 by the defendants constitutes a deceptive act or practice in the conduct

of a business, trade, or commerce or in the furnishing of a service within the State of New York." The plaintiffs do not have a valid cause of action based on General Business Law § 349. In order to prove a cause of action under General Business Law § 349, the plaintiff must show that his claim is based on a deceptive act or practice that is "consumer oriented," and the plaintiff must also show that the defendant has engaged in an act or practice that is deceptive or misleading in a material way which caused injury. (See, Gaidon v Guardian Life Ins. Co. of Am., 94 NY2d 330; New York Univ. v Continental Ins. Co., 87 NY2d 308; Andre Strishak & Assocs., P.C. v Hewlett Packard Co., 300 AD2d 608.) A deceptive act or practice has been defined as a representation or omission likely to mislead a reasonable consumer acting reasonably under the circumstances. (See, Gaidon v Guardian Life Ins. Co. of Am., supra; New York Univ. v Continental Ins. Co., supra; Andre Strishak & Assocs., P.C. v Hewlett Packard Co., supra.) The booting of vehicles is not a deceptive act or practice, nor is it consumer oriented behavior. Moreover, CPLR 214(2), a three year statute of limitations, controls the plaintiffs' statutory claim. (See, Gaidon v Guardian Life Ins. Co. of America, supra.) Plaintiff Engel, plaintiff Orlow, and plaintiff Samodulski had their vehicles booted on or about August 15, 1994, January 27, 1995, and April 26, 1995 respectively, but this action was not commenced until more than three years later on September 8, 1999.

Upon searching the record on this motion (see, CPLR 3212[b]; Colbert v Metropolitan Property and Liability Ins. Co., 188 AD2d 842), the court also grants summary judgment to defendant Cornell Boot Service, Inc. dismissing the complaint against it.

Short form order signed herewith.

J.S.C.