

Liberty Taxi Mgt., Inc. v Gincherman

2007 NY Slip Op 32742(U)

August 20, 2007

Supreme Court, New York County

Docket Number: 0602658/2003

Judge: Richard B. Lowe

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE, III

PART 56

Index Number : 602658/2003
LIBERTY TAXI MANAGEMENT
vs
GINCHERMAN, VLADIMIR
Sequence Number : 005
PSJ

INDEX NO. _____
MOTION DATE 8/16/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

_____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
SEP 04 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

RECEIVED
SEP 4 2007
MOTION SUPPORT
OFFICE

Dated: 8/20/07

HON. RICHARD B. LOWE, III

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

OS1590

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
LIBERTY TAXI MANAGEMENT, INC.,

Plaintiff,

Index. No. 602658/03

-against-

VLADIMIR GINCHERMAN,

Defendant.

FILED
SEP 04 2007
NEW YORK
COUNTY CLERK'S OFFICE

-----X
Plaintiff moves pursuant to CPLR 3212 for partial summary judgment finding defendant liable for liquidated damages in the amount of \$90,000.00 plus interest and attorneys fees. The defendant cross moves pursuant to CPLR 3212 seeking an order dismissing the complaint and finding the liquidated damages clause an unenforceable penalty. Defendant also cross moves pursuant to CPLR 3124 for an order compelling Alec Pereman for a deposition.

Background

Liberty is a New York corporation which owns and manages New York City taxicab medallions and vehicles. Defendant Vladimir Gincherman ("Gincherman") is the owner of six such medallions. On August 5, 2002, plaintiff Liberty Taxi Management Inc. ("Liberty") entered into a three year written Management Agreement (the "Agreement"). The Agreement granted Liberty the exclusive right to manage and operate the Medallions for a period of three years commencing September 1, 2002 and terminating on September 1, 2005. It also contained an automatic three-year extension provision unless one of the parties gave written notice that the term would end September 1, 2005. In consideration of the exclusive right to manage and

operate the medallions, Liberty agreed to pay Gincherman a monthly payment in the amount of \$1,350.00 a month per medallion. The Agreement had a total value of approximately \$300,000.00. Liberty also paid monthly rental payments to Gincherman.

On May 6, 2003, Gincherman unilaterally terminated the Agreement. The parties do not dispute that under the terms of the Agreement, Gincherman's termination prior to September 1, 2005 was a material breach of the Agreement. In this instant motion, plaintiff seeks summary judgment on a liquidated damages clause in the Agreement which allegedly entitles it to the amount of \$15,000 per medallion. Section 6.1 of the Agreement provides:

If Owner fails to fulfill any of the terms of this Agreement, a material breach may result. It is expressly agreed by and between the parties hereto that each of the following circumstances constitute a material breach of this Agreement by Owner, which entitle Agent to terminate this agreement.

* * *

(G) Termination of this agreement before 09.01.2005

* * *

In the event Agent elects to terminate this Agreement as a result of material breach and this Agreement is terminated before 09/01/2005, then Agent shall be entitled to receive from Owner, liquidated damages as set forth in paragraph 8.3 of this Agreement as well as any and all other amounts due and owing to Agent in accordance with the terms and conditions of this Agreement.

Section 8.3 of the Agreement provides the following liquidated damages clause:

It is hereby acknowledged and understood by and between the parties hereto that in the event Owner terminates this Agreement in advance of 09.01.05, or Agent terminates this Agreement as a result of a material breach by Owner it will

be impractical to determine all of the damages sustained by Agent. In the event Owner terminates this Agreement in advance of that date or Agent terminates this Agreement as a result of material breach by Owner, then Owner shall pay to Agent the sum of \$15,000 (Fifteen Thousand Dollars) per taxi medallion. The aforementioned sum shall not prevent or stop Agent from seeking to recover from Owner any and all other sums due and owing to Agent pursuant to the terms and conditions of this Agreement but shall be in addition thereto.

In addition, plaintiff moves under Seciton 7.1 of the Agreement which provides an indemnification provision, which states:

Owner hereby agrees to indemnify Agent and to hold Agent harmless from and against any and all liabilities, claims, fines, penalties, expenses, damages and/or other costs, including, but not limited to, all reasonable attorneys' fees and costs of investigations, asserted against or incurred by Agent as a result of the actions and/or inaction of Owner and/or Owner's failure to fulfill any of its obligations under this agreement.

Plaintiff further seeks attorney's fees under section 5.7 of the Agreement which also provides that, "Owner shall be solely responsible for . . . reasonable attorneys' fees . . . incurred by . . . Agent . . . as a result of . . . Owner's failure to fulfill any of its obligations under this Agreement"

There is no dispute that Gincherman breached the Agreement. At his deposition he testified he was offered more money for the medallions by another management company and therefore switched to the other company (*Exhibit E to the Boyle Affirmation*, at p 38).

Gincherman also acknowledged that he understood plaintiff would incur costs and expenses if he withdrew his medallions from Liberty (*Id* at p. 52-53). Plaintiff alleges that because Gincherman committed a material breach, it is entitled under sections 6.1 and 8.3 to pay Liberty liquidated damages in the amount \$90,000.00 (\$15,000 per medallion). Liberty also seeks indemnification

for its legal fees under sections 5.7 and 7.1 of the Agreement.

Discussion

Summary judgment is warranted where there are no triable issues of fact (*CPLR* 3212[b]). On a motion for summary judgment, the movant must come forward with competent, admissible evidence establishing a prima facie entitlement to judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this burden is met, the opposing party must come forward with competent, admissible evidence creating a genuine triable issue of fact or the motion will be granted (*Zuckerman*, 49 NY2d at 562). The interpretation of a contractual liquidated damages clause is a question of law (*J.R. Stevenson corp. v County of Westchester*, 113 AD2d 918, 920-21 [2 nd Dept 1985]).

Liquidated Damages

It is well settled that “a liquidated damages clause is enforceable if, at the time it is executed, it appears that the amount of actual loss stemming from a breach will be impossible or difficult to ascertain, and the amount called for in the contract is reasonably proportionate to the probable loss from the breach” (*Ames Linen Serv. v Katz*, 8 AD3d 945, 946 [3 rd Dept 2004])(*Truck Rent-A-Center, Inc. v Puritan Farms 2nd, Inc.*, 41 NY2d 420, 425 [1977]). Parties are free to agree to such an amount between themselves rather than leaving the calculation to a court or jury (*Truck Rent-A-Center*, 41 NY2d at 424). Liquidated damages may not serve as a penalty, and a liquidated damages clause will be held valid and enforceable only if the amount liquidated is reasonably proportionate to the probable loss upon a breach and if the amount of probable loss is difficult or impossible to estimate precisely in advance (*Id* at 425).

The plaintiff submits the affidavit of its President Floren Pereman in support of the

motion. He affirms that the Taxi and Limousine Commission (TLC) has regulations pertaining to when vehicles must be removed from service and when they can no longer be designated as appropriate vehicles for a medallion (*Perelman Aff* ¶ 2). If a medallion owner were to withdraw randomly a medallion from management, it can result in a vehicle which “would have tens of thousands of miles of eligibility remaining, being unacceptable for [use]” (*Id.*) Because of TLC regulations, a vehicle owner cannot simply put a different medallion on the same vehicle and again allow it to operate. Rather the vehicle must be removed from service (*Perlman Reply Aff* ¶ 5). “If the vehicles’s mileage is above a certain amount, the TLC will not allow it back into service without repairs and improvements that can cost Liberty thousands of dollars (*Id.*) It is for this reason that damages are incalculable when a person withdraws a medallion under contract.

The plaintiff argues it is impossible to calculate the amount of damages which may be incurred if a medallion is wrongfully withdrawn which results in the inability of a vehicle to operate. Because of this, Liberty includes a negotiated termination fee in its medallion management contracts (*Id.*) These damages are contemplated in addition to others incurred by the plaintiff on behalf of Gincherman. These other fees may more readily be calculated and include fees incurred from medallion renewal fees, liability insurance, workers compensation, and vehicle maintenance (*Id* at ¶ 2).

Under the Agreement, Liberty was to lease six of Gincherman’s medallions for a period of three years (September 1, 2002 through September 1, 2005). Liberty agreed to pay Gincherman a rental payment of \$1,350 a month per medallion. Therefore, each contract had a value of \$48,600.00. On or about May 6, 2003, Gincherman terminated the contract despite having received the appropriate rental payments each month for each medallion (*Id.*)

Plaintiffs has established a prima facie case that the liquidated damages clause is enforceable. The liquidated damages provision represents a reasonable estimate of the damages incurred by Liberty. Gincherman was to receive total payments of almost \$300,000 pursuant to the Agreement. The plaintiff has established that a liquidated damages clause is appropriate because in the event of a breach, it would be difficult to ascertain the condition of the vehicles at the time the medallions were removed, the amount of time the vehicles would be out of service and the cost of putting them back into service, the vehicles mileage at the time of the breach, and the amount of fees Liberty would receive from drivers who leased the vehicles.

The defendant fails to rebut this evidence in its opposition to the motion. Rather, the defendant argues summary judgment should be denied based on his counterclaim alleging that he is entitled to \$79,000 from the plaintiff pursuant to an agreement he had with an entity known as IMP Management Corp. ("IMP") from 1999 to 2002. IMP's assets were apparently acquired by Liberty, but it did not assume any undisclosed liabilities and was not aware of the purported agreement (*Pereman Aff* ¶ 4). However, regardless of its enforce ability against Liberty, the agreement is independent of and did not arise from the Agreement at issue in this matter in the present motion and therefore is not a basis for the denial of this motion (*P.S. Griswold Co. v Cortland Glass Co.*, 138 AD2d 869 [3rd Dept 1988])(mere assertion of a counterclaim with respect to an independent and separate contract cannot form the bases for denial of plaintiff's motion for summary judgment).

The defendant also argues that at his deposition Pereman only testified to calculable expenses and did not testify to the incalculable expenses which are incurred because of the TLC regulations. Defendant argues that Pereman's affidavit testifying to the liquidated damages now

contradicts his earlier testimony. The deposition transcript shows that Pereman was questioned on the amount of expenses he incurred on behalf of Gincherman. Specifically the only damages related questioning was posed by the following question: "Back in approximately September 2002, as a taxi medallion manager did Liberty Taxi incur any expenses *on behalf of the medallion owner [Gincherman]* as part and parcel of their obligations under an agreement such as this?" (*Torto Aff, Exhibit D*, p. 30)(emphasis added). Pereman thereafter testified to such expenses that Liberty acquired on behalf of Gincherman which included the tax stamps, medallion renewals, workers compensation, etc. (*Id.*). Pereman was not questioned on Liberty's own damages which include those which he affirms were incurred because of TLC regulations. Therefore, the testimony is not contradictory and not grounds for denial of the motion.

This court finds that the plaintiff has sufficiently established that the liquidated damages clause contained in the contract is not a penalty clause by sufficiently establishing the reasonableness of the damages. The contract was worth approximately \$300,000 to Gincherman if fully performed. Under the liquidated damages clause, plaintiff is to receive \$90,000.00. This amount is neither excessive nor unreasonable in light of the evidence submitted by plaintiff. Furthermore, the clause is sustainable because the defendant has failed to rebut in any way the plaintiff's assertions with respect to the incalculable damages it incurs because of the TLC regulations when a medallion is withdrawn.

Therefore, summary judgment for liquidated damages is granted in favor of the plaintiff.

Attorneys' Fees

Liberty also moves for attorney's fees under the indemnification provisions which are contained under the Agreement.

Indemnification provisions are enforceable where authorized by a valid contractual agreement between the parties (*See Hooper Associates v AGS Computers, Inc.* 74 NY2d 487, 491 [1989]); (*A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]) (“Under the general rule, attorneys’ fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule”). Where the language of a contract is clear and unambiguous, it must be enforced according to its plain meaning (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]).

The Agreement expressly provides for payment of attorneys’ fees in addition to the damages to be recovered under the liquidation clause. It is undisputed that defendant unilaterally terminated the Agreement. Therefore, under the Agreement, plaintiff is entitled to recover attorneys fees.

The defendant in his opposition does not dispute the enforce ability of the indemnification clause or that plaintiff is entitled to attorneys’ fees under it. Rather, defendant argues the amount sought by plaintiff is not supported by the record. The issue of the amount of the attorneys’ fees will be submitted to a Special Referee to hear and report, unless otherwise stipulated by the parties to allow for the referee to hear and determine.

Conclusion

Therefore, based on the foregoing, it is hereby

ORDERED that the motion for summary judgment is granted and it is further

ORDERED that the issue of the amount of attorneys’ fees is hereby referred to a Special Referee to hear and report or otherwise determine if stipulated to by the parties and it is further

ORDERED that the cross-motion is denied as moot.

Settle Order

Dated: August 20, 2007

ENTER:


HON. RICHARD B. LOWE, III

J.S.C.

FILED
SEP 04 2007
NEW YORK
COUNTY CLERK'S OFFICE