Green Apple Mgt. Corp. v Pyram
2012 NY Slip Op 33647(U)
August 2, 2012
Sup Ct, Queens County
Docket Number: 20237/2011
Judge: Sidney F. Strauss

[* 1]

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIDNEY F. STRAUSS IA PART 11

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GREEN APPLE MANAGEMENT CORPORATION and CHECKER MANAGEMENT CORPORATION,

Plaintiffs,

-against-

JOSEPH PYRAM, CLEOMENE PYRAM, and WHITE AND BLUE GROUP CORPORATION,

Defendants.

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Index No.: 20237/2011

Motion Date: July 11, 2012

Cal. No.: 14

Seq. No.: 1

The following papers numbered 1 to 11 were read on the motion by the plaintiffs seeking an order, pursuant to CPLR 3212, granting them partial summary judgement against the defendants Joseph Pyram and Cleomene Pyram on their claims for an account stated, and, as to liability, on their claims for breach of contract. Also read was the cross-motion of said defendants seeking an order, pursuant to CPLR 3212(a) and/or 3211(a)(7), dismissing plaintiffs' first and fourth causes of action for an account stated; dismissing plaintiffs' claim for punitive damages; dismissing plaintiffs' claims based upon a "termination fee" clause in the agreements as an unenforceable penalty; compelling plaintiffs to comply with defendants' discovery demands related to actual damages; and denying plaintiffs' motion for partial summary judgment.

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Notice of Motion - Affirmation - Exhibits.....	1 - 3
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The plaintiffs are in the business of contracting with taxicab medallion owners to manage their medallions. They allege that defendant Joseph Pyram ("J.Pyram") breached his agreement with Green Apple Management Corporation ("Green Apple") and that defendant Cleomene Pyram ("C.Pyram") breached her agreement with Checker Management Corporation

("Checker"). Pursuant to their respective agreements, said defendants were obligated, in pertinent part, to provide the plaintiffs with the medallion and associated rate card for the duration of the agreement; if terminating the agreement without cause, to provide 90 days prior written notice and pay a $12,500.00 termination fee; and to reimburse expenses prepaid on their behalf to manage the medallions. Plaintiffs further allege that the defendants terminated their agreements without cause, and without the requisite notice. Defendants assert, in effect, that the terminations of these agreements occurred near the end of each term; twenty-nine days early as to defendant C.Pyram and three and a half months early as to defendant J.Pyram; that there are questions of fact as to whether plaintiffs' damages incurred are anything more than de minimus at best, and furthermore, the termination fee set forth in each agreement should be stricken because it is clearly disproportionate to the actual loss.

Undisputed in the underlying action is that the defendants terminated their agreements, without cause, and without satisfying the agreed upon ninety days' notice. Furthermore, both defendants confirm in their supplemental response to plaintiffs' request for production of documents, that they entered into other agreements, for the same and/or similar services, prior to the termination date of the underlying contracts.

The first and fourth causes of action assert claims for an account stated, in the sum of $12,566.28 as against J.Pyram and $13,570.84 as against C. Pyram, respectively. "An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due" (*Jim-Mar Corp. v Aquatic Constr.*, 195 A.D.2d 868, 869 [1993], lv denied 82 N.Y.2d 660 [1993]; see *Sisters of Charity Hosp. of Buffalo v Riley*, 231 A.D.2d 272, 282 [1997]; *Chisholm-Ryder Co. v Sommer & Sommer*, 70 A.D.2d 429, 431 [1979]). An essential element of an account stated is an agreement with respect to the amount of the balance due (see *Interman Indus. Prods. v R.S.M. Electron Power*, 37 N.Y.2d 151, 153-154 [1975]; *Sisters of Charity Hosp. of Buffalo*, supra at 282, 661 N.Y.S.2d 352). "An account stated assumes the existence of some indebtedness between the parties, or an express agreement to treat the statement as an account stated. It cannot be used to create liability where none otherwise exists" *(M. Paladino, Inc. v Lucchese & Son Contr. Corp.*, supra at 516 [1998]; see *Gurney, Becker & Bourne v. Benderson Dev. Co.*, 47 N.Y.2d 995, 996 [1979]; *Erdman Anthony & Assocs. v. Barkstrom*, 298 A.D.2d 981, 981-982 [2002]; *Bauman Assoc. v. H & M Intl. Transp.*, 171 A.D.2d 479, 485 [1991]). Here, plaintiffs have failed to state a claim for an account stated, in light of the fact that the underlying actions both rely on written agreements between the parties, notably absent from both being express language in said contracts that statements shall be treated as an account stated. Therefore, that branch of defendants' motion which seeks to dismiss the first and fourth causes of action, is granted.

The plaintiffs established their prima facie entitlement to judgment as a matter of law on the second and fifth causes of action alleging breach of contract insofar as asserted against the defendants by submitting the executed written agreement between them and the plaintiffs and evidence that the defendants failed to pay for services rendered according to the terms of the subject agreement (see, *Maser Consulting, P.A. v Viola Park Realty, LLC*, 91 AD3d 836 [2d Dept. 2012]; *McFadyen Consulting Group, Inc. v Puritan's Pride, Inc.*, supra; *Yellow Book Sales*

& Distrib. Co., Inc. v Mantini, 85 AD3d 1019 [2d Dept. 2011]; *Castle Oil Corp. v Bokhari*, 52 AD3d 762 [2d Dept. 2008].) In opposition, defendants do not deny the validity of the contract, (See, *Taxifleet Management, LLC v Tin*, 2012 NY Slip Op 51323[U]), rather, they assert that the liquidated damages provision is in effect, a penalty, and as such, unenforceable.

"Whether the early termination fee represents an enforceable liquidation of damages or an unenforceable penalty is a question of law, giving due consideration to the nature of the contract and the circumstances (*Mosler Safe Co. v Maiden Lane Safe Deposit Co.*, 199 NY 479, 485[1910]; *Leasing Serv. Corp. v Justice*, 673 F2d 70, 74 [2d Cir 1982]). The burden is on the party seeking to avoid liquidated damages [the defendants] to show that the stated liquidated damages are, in fact, a penalty. (*P.J. Carlin Constr. Co. v City of New York*, 59 AD2d 847 [1st Dept 1977]; *Wechsler v Hunt Health Sys*., 330 F Supp 2d 383, 413 [SD NY 2004])." (*JMD Holding Corp. v Congress Fin. Corp*., 4 N.Y.3d 373 [2005].)

The defendants in this instance have failed to prove "either that damages flowing from a prospective early termination were readily ascertainable at the time [the parties] entered into their . . . agreement, or that the early termination fee is conspicuously disproportionate to these foreseeable losses." This is particularly relevant in light of the fact that the defendants admit that by agreeing to the liquidated damages provision at the outset, they limited their risk of liability in the event they breached the agreements early on. The assumption of risk as to the value of the contracts to the plaintiff in the event that the defendants breached the contracts or, terminated without cause, early on, was something that absent a liquidated damages provision, could not readily be ascertained at the commencement of the agreements. Further, the defendants failed to establish how the fact that the contracts were near the end of their terms anyway should be sufficient to explain why they did not have to comply with the previously negotiated and consented to provisions in their agreements. As the Court of Appeals in *JMD Holding Corp. v Congress Fin. Corp*., *supra*, succinctly stated its leanings on this issue, "we have cautioned generally against interfering with parties' agreements (see *Fifty States Mgt. Corp. v Pioneer Auto Parks*, 46 NY2d 573, 577 [1979] ["Absent some element of fraud, exploitive overreaching or unconscionable conduct . . . to exploit a technical breach, there is no warrant, either in law or equity, for a court to refuse enforcement of the agreement of the parties"]; cf. 3 Farnsworth, Contracts § 12.18, at 303-304 [3d ed] ["(I)t has become increasingly difficult to justify the peculiar historical distinction between liquidated damages and penalties. Today the trend favors freedom of contract through the enforcement of stipulated damage provisions as long as they do not clearly disregard the principle of compensation"]; see also *XCO Intl. Inc. v Pacific Scientific Co.*, 369 F3d 998, 1002-1003 [7th Cir 2004] ["The rule (against penalty clauses) hangs on, but is chastened by an emerging presumption against interpreting liquidated damages clauses as penalty clauses"].)" (*JMD Holding Corp.*, supra.)

As to that branch of plaintiffs' motion seeking summary judgment as to liability with regard to their causes of action for breach of contract, same is hereby granted. Inasmuch as plaintiffs sufficiently establish that the balance of their claims, in addition to the termination fee, represents reimbursement for pre-paid items, and not actual damages, plaintiffs shall also be entitled to same. Accordingly, that branch of defendants' cross-motion seeking to dismiss

plaintiffs' claims based upon the termination fee provision in the agreements as an unenforceable penalty, same is denied as moot.

Inasmuch as defendants have failed to show that facts essential to justify opposition may exist upon further discovery, the court rejects their argument that plaintiffs' motion seeking partial summary judgment is premature (See, *McFadyen Consulting Group, Inc. v Puritan's Pride*, 87 AD3d 620 [2d Dept. 2011]; *Vidal v Tsitsiashvili*, 297 AD2d 638 [2d Dept. 2002]; *Mazzaferro v. Barterama Corp*., 218 AD2d 643 [2d Dept. 1995].) Therefore, as to that branch of defendants' cross-motion seeking to compel plaintiffs to comply with defendants' discovery demands, same is denied.

With respect to breach of contract cases, "punitive damages are not recoverable in an ordinary breach of contract case, as their purpose is not to remedy private wrongs but to vindicate public rights. Punitive damages are only recoverable where the breach of contract also involves a fraud evincing a high degree of moral turpitude, and demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations, and where the conduct was aimed at the public generally" (*Tartaro v Allstate Indem. Co.*, 56 AD3d 758, 758 [2d Dept. 2008]).Further, "[p]unitive damages are available where the conduct associated with the breach of contract is first actionable as an independent tort for which compensatory damages are ordinarily available, and is sufficiently egregious to warrant the additional imposition of exemplary damages. A party must demonstrate not only egregious tortious conduct, but also that such conduct was part of a pattern of similar conduct directed at the public generally" (*id*.).

Here, the defendants have met their burden entitling them to summary judgment on plaintiffs' causes of action alleging punitive damages (*Chance v Felder*, 33 AD3d 645, [2d Dept 2006]; *Zuckerman v City of New York*, 49 N.Y.2d 557 [1980]; *Tartaro v Allstate Indem. Co.*, 56 AD3d 758 [2d Dept., 2008]). Specifically, defendants assert that the alleged behavior was not intentional nor a complete wanton disregard for the plaintiffs' well being to warrant punitive damages. In addition, the defendants argue that their alleged conduct was not egregious or of high moral turpitude especially considering that they were repossessing their own property, namely, the medallions, and therefore, such conduct was not actionable as an independent tort. Furthermore, there is no evidence of a pattern of egregious conduct directed toward the public at large. (See, *Ural v Encompass Ins. Co. of America*, 2012 WL 2579996 [2d Dept. 2012].) As the Court of Appeals aptly stated, "a private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally." (*Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 N.Y.2d 603 [1994].) In opposition, the plaintiffs have failed to sufficiently raise triable issues of fact (*Tartaro v Allstate Indem. Co.*, 56 AD3d 758[2d Dept., 2008]). As such, defendants' motion for summary judgment on the those branches of plaintiffs' causes of action seeking punitive damages is granted and as such, are dismissed.

Dated: August 2, 2012

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SIDNEY F. STRAUSS, J.S.C.