

Green Apple Cleaners, LLC v EZ Pass New York

2013 NY Slip Op 32822(U)

November 6, 2013

Supreme Court, New York County

Docket Number: 651343/12

Judge: Cynthia S. Kern

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

PRESENT: CYNTHIA S. KERN
J.S.C.
Justice

PART 55

CAROL APPLE CLEANERS, LLC

INDEX NO. 651343/12

MOTION DATE _____

- v -
EZ PASS New York, ETAL.

MOTION SEQ. NO. 03

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the annexed decision.

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

Dated: 11/6/13

CK

CYNTHIA S. KERN *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
GREEN APPLE CLEANERS, LLC,

Plaintiff,

Index No. 651343/12

-against-

DECISION/ORDER

EZ PASS NEW YORK, EZ PASS NEW JERSEY,
THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY and AFFILIATED COMPUTER
SERVICES, INC.,

Defendants.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affirmation in Opposition.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff Green Apple Cleaners, LLC (“Green Apple”) commenced the instant action against defendants EZ Pass New York (“EZ Pass NY”), EZ Pass New Jersey (“EZ Pass NJ”), the Port Authority of New York and New Jersey (the “Port Authority”) and Affiliated Computer Services, Inc. (“Affiliated”) to recover damages for allegedly wrongfully attempting to recover unpaid tolls and administrative fees arising from plaintiff’s use of electronic E-ZPass toll lanes on Port Authority bridges and tunnels. Affiliated now moves pursuant to CPLR § 3211 to dismiss the complaint on the ground that it fails to state a cause of action. For the reasons set forth below, Affiliated’s motion is granted.

The relevant facts are as follows. Plaintiff is a large cleaning service which operates a fleet of pick-up-and-delivery trucks who use the Port Authority's E-Z Pass system. Affiliated, or more specifically, its subsidiary Local Solutions, Inc., was and is an independent contractor of the Port Authority which, inter alia, processes E-Z Pass in New York State pursuant to a contract with the Port Authority.

On or about April 24, 2012, plaintiff commenced the instant action with the filing of a Summons and Verified Complaint alleging that defendants are wrongfully attempting to recover unpaid tolls and administrative fees arising from plaintiff's use of electronic E-Z Pass toll lanes on Port Authority bridges and tunnels. Specifically, plaintiff has asserted eight causes of action against defendants sounding in: (1) bad faith; (2) fraud; (3) misrepresentation; (4) breach of good faith and fair dealing; (5) negligence and/or recklessness; (6) breach of contract; (7) unfair practices; and (8) defamation. Only the first seven causes of action are asserted against Affiliated directly. Affiliated now moves to dismiss the complaint in its entirety on the ground that it fails to state any cause of action.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). However, "allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration." *Tal v. Malekan*, 305 A.D.2d 281 (1st Dept 2003). Moreover, "[t]he statements contained in a pleading must be sufficiently particular to give the court and parties notice of the transactions or occurrences to be proved and must support the material elements for the cause of action." *Matter of Reden v. Nassau County Civ. Serv. Commn.*, 133 A.D.2d 694 (2nd Dept 1987).

In the instant action, Affiliated's motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's complaint is granted. As an initial matter, the portion of Affiliated's motion seeking to dismiss plaintiff's breach of contract claim is granted. A complaint adequately states a cause of action for breach of contract when it alleges: (1) the existence of a contract; (2) the plaintiff's performance under the contract; (3) the defendant's breach of the contract; and (4) damages as a result of the breach. *See JP Morgan Chase v. J.H. Electric of NY, Inc.*, 69 A.D.3d 802 (2d Dept 2010). Here, plaintiff alleges that "Defendants breached the E-Z Pass Terms of Service, when they misrepresented a debt owed, and then misrepresented to the Plaintiff on multiple occasions that the account was in good standing, inducing Plaintiff into taking no further action (such as for example, paying the debt off in a timely manner) and lulling Plaintiff into a false sense of security, resulting in significant damages and prejudice to Plaintiff." Additionally, plaintiff alleges that defendants "further violated the Terms of Service by failing to provide monthly accountings of the outstanding debt." These allegations are insufficient to state a claim for breach of contract against Affiliated as it is undisputed that Affiliated is not a named party to the E-Z Pass Terms of Service. To the extent that plaintiff argues in its opposition papers that Affiliate is an agent of E-Z Pass, and as such is bound by the terms of the contract entered into it by its principal, such contention is without merit as plaintiff fails to allege in its complaint any facts demonstrating that the Terms of Service applied to any agent of E-Z Pass and, in any event, such contention is refuted by the documentary evidence annexed to Affiliated's reply papers. The contract between Affiliated and the Port Authority explicitly states that Affiliated "is and shall be, in all respects, an independent contractor in performing Services pursuant to this Agreement."

Additionally, Affiliated's motion seeking to dismiss the first and fourth cause of action for bad faith and breach of good faith and fair dealing, respectively, is granted. As an initial matter, the court notes that while plaintiff attempts to assert two distinct causes of action for bad faith and breach of the covenant of good faith and fair dealing, these claims are in essence the same claim and not distinct under the law. Indeed, a party acts in bad faith by breaching the covenant of good faith and fair dealing. Accordingly, the court will discuss them under the same legal analysis. It is well settled that "[w]ithin every contract is an implied covenant of good faith and fair dealing." *Aventine Investment Management, Inc. v. Canadian Imperial Bank of Commerce*, 265 A.D.2d 513, 514 (2d Dept 1999). "This covenant is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive benefits under their agreement." *Id.* "For a complaint to state a cause of action alleging breach of an implied covenant of good faith and fair dealing, the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff." *Id.* Here, as stated above, there is no contract between plaintiff and Affiliated. Accordingly, there can be no breach of an implied covenant of good faith and fair dealing as there is no implied duty absent a contract.

Additionally, Affiliated's motion to dismiss plaintiff's second cause of action for fraud is granted. To plead a cause of action for fraud, a plaintiff must allege "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413 (1996); *see also Barclay v. Barclay Arms Associates*, 74 N.Y.2d 644 (1989).

Additionally, pursuant to CPLR § 3016(b), “[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.” Here, plaintiff bases its claim for fraud on the following allegations: (1) that it “through its agents would periodically contact New Jersey E-Z Pass;” (2) that “[w]henver the agent could contact the E-Z Pass Customer Service Center, they would be told that there was no problem and that the account was in good standing;” and (3) “defendants having misrepresented a debt owed, and then fraudulently represented to the Plaintiff on multiple occasions that the account was in good standing, induced Plaintiff into taking no further action.” These allegations are insufficient to state a claim for fraud as they are devoid of any particular facts that would establish the elements of fraud. Indeed, plaintiff’s allegations are nothing more than broad conclusory statements.

Additionally, Affiliated’s motion to dismiss plaintiff’s third and fifth causes of action for misrepresentation and negligence and/or recklessness is granted. In order to adequately state a cause of action for negligent misrepresentation, a plaintiff must plead facts which would “demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information.” *J.A.O. Acquisition Corp. v. Stavitsky*, 8 N.Y.3d 144 (2007). Here, plaintiff fails to state claim for negligent misrepresentation as plaintiff does not allege any facts demonstrating a special or privity-like relationship between it and Affiliated. Indeed, as noted above by the court, plaintiff’s claims center around the E-Z Pass Terms of Service, which Affiliated is not a party to. As plaintiff fails to allege any other facts demonstrating a relationship between it and Affiliated, it cannot maintain a claim for negligent

