Grewal Limousines, Inc. v First Data Merchant Servs. Corp.
2014 NY Slip Op 31464(U)
May 21, 2014
Supreme Court, Suffolk County
Docket Number: 30247-13
Judge: Thomas F. Whelan

[* 1]

SHORT FORM ORD ER

INDEX No. 30247-13

SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 4/2/14
SUBMIT DATE: 4/25/24
Mot. Seq. # 001 - MG
Mot. Seq. # 002 - MG
CDISP: **YES**

GREWAL LIMOUSINES, INC. d/b/a BLACKBIRD LIMOUSINES, Plaintiff, -against- FIRST DATA MERCHANT SERVICES CORP., AUTHORIZENET, LLC and NATIONAL E PAYMENT NY, LLC, Defendants.	PIKE & PIKE, PC Attys. For Plaintiff 1921 Bellmore Ave. B ell ore, NY 11710 MARKOTIS & LIEBERMAN, PC Attys. For Defs. First Data & National 115B Broadway - Ste. 2 Hicksville, NY 11801 HOLWELL SCHUSTER GOLDBERG Attys. For Def. AuthorizeNet 125 Broad St. New York, NY 10004

Upon the following papers numbered 1 to ___ read on these motions to dismiss ___ Order To Show Cause/Notice of Motion and supporting papers: 1 - 5; 6-9 ; Notice of Cross Motion and supporting papers ___; Answering papers 10-12 ; Reply papers 13 (memorandum); 14-18 (affirmations) ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by defendants, First Data Merchants Services Corp. and National E Payment, LLC, to dismiss the amended complaint served by the plaintiff is considered under CPLR 3211(a) and is granted; and it is further

ORDERED that the separate motion (#002) by defendant. AuthorizeNet, LLC, for dismissal of the complaint pursuant to CPLR 3211(a) is considered thereunder and is granted.

The plaintiff is in the business of providing limousine services to its customers. In the summer of 2011, the plaintiff was allegedly solicited by defendant, National E Payment, LLC [hereinafter National], to open a credit card processing account with defendant, First Data Merchants Services

Corp. [hereinafter FDMS], so as to provide the plaintiff with the processing of and accounting for the credit and debit card purchases made by its customers. In July of 2011, the plaintiff entered into a written agreement with FDMS under which an account of the plaintiff's credit and debit card transactions was established. The plaintiff alleges that FDMS subcontracted some of its work under the written agreement it executed with FDMS defendant, AuthorizeNet.

The credit and debit account services provided by FDMS disqualified the processing of any "duplicate" transactions, that is, a transaction that occurs on the same day, by use of the same credit card, for the same dollar amount in the same batch as another transaction. The failure to process results in the card holder not being charged for the ride provided to him or her by the plaintiff. In September of 2012, the plaintiff advised National that its credit and debit card revenues were low and of its belief that some charges were lost. Defendant National reported this to FDMS which indicated that these circumstances were likely attributable to the non-processing of duplicate transactions which could be remedied by the simple expedient of a request to change the program employed by FDMS to include processes of duplicate transactions. Upon receipt of the plaintiff's issuance of such request, FDMS changed the program of the plaintiff's accounts so as to allow for the processing of duplicate transactions. National and/or FDMS allegedly advised the plaintiff that recovery of the previously unprocessed duplicate transactions from the customers of the plaintiff was dependent upon the plaintiff's identification of the uncharged rides, an option which the plaintiff purportedly rejected as bad for its business.

The plaintiff then commenced this action in which it seeks recovery of the value of those uncharged limousine rides from the defendants. In the amended complaint served, the defendants are each charged with tortious conduct denominated as follows: negligence; breach of the covenant of good faith and fair dealings; and detrimental reliance. In a separate fourth cause of action, the plaintiff asserts a separate negligence claim against defendant FDMS for allegedly reporting inflated amounts on the plaintiff's credit and debit card accounts to the IRS. The first three causes of action are premised upon an alleged duty owing to the plaintiff to reveal that duplicate transactions would not be processed by the credit/debit card services accounted provided by FDMS unless the plaintiff specifically requested such processing, while the last is premised upon allegedly FDMS' conduct in negligently reporting the plaintiff's credit/debit card transactions to the IRS.

For the reasons stated below, the separate motions by the defendants to dismiss the amended complaint served by the plaintiff are granted.

Liability for negligence may result only from the breach of a duty running between a tortfeasor and the injured party (*see* ***Kimmell v Schaefer,*** 89 NY2d 257, 652 NYS2d 715 [1996]). "A tort obligation is a duty imposed by law to avoid causing injury to others. It is 'apart from and independent of promises made' and therefore apart from the manifested intention of the parties to a contract" (***New York Univ. v Continental Ins. Co.***, 87 NY2d 308, 316, 639 NYS2d 283 [1995] *quoting* Prosser and Keeton, Torts § 92, at 655 [5th ed.]). A defendant may thus be liable in tort when it has breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations (*id.*).

A simple breach of contract does not give rise to liability in tort unless it appears that there has been a breach of a duty independent of those imposed upon the defendant under the terms of his contract (*see* ***Clark–Fitzpatrick, Inc. v Long Is. R.R. Co.***, 70 NY2d 382, 389, 521 NYS2d 653 [1987]; ***OP Solutions, Inc. v Crowell & Moring, LLP,*** 72 AD3d 622, 622, 900 NYS2d 48 [2010]; ***Yenrab, Inc. v 794 Linden Realty, LLC***, 68 AD3d 755, 892 NYS2d 105 [2d Dept, 2009]; ***Wiernik v Kurth***, 59 AD3d 535, 873 NYS2d 673 [2d Dept 2009]). In determining whether a conduct may be actionable under the law of torts, the court's focus is on whether a non-contractual duty was violated, *i.e.*, a duty imposed on individuals as a matter of social policy, as opposed to a duty imposed consensually as a matter of contractual agreement (*see* ***Apple Records, Inc. v Capitol Records, Inc.***, 137 AD2d 50, 529 NYS2d 279 [1st Dept1988]; ***Rich v New York Cent. & Hudson River R.R. Co.***, 87 NY at 382 [1882]).

Even in those cases wherein there is an alleged breach of duties owing from the defendant to the plaintiff that is sufficiently separate and distinct from those owing under the contract, such breaches may be actionable in tort only if the measure of damages sought is likewise separate and distinct (*see* ***Sommer v Federal Signal Corp.***, 79 NY2d 540, 583 NYS2d 957 [1992]; ***North Shore Bottling Co. v Schmidt & Sons***, 22 NY2d 171, 179, 292 NYS2d 86 [1968]). Where the claimant alleges only economic loss, the usual means of redress is an action for breach of contract and the claim will not give rise to a tort action for the recovery of economic losses (*see* ***Clark–Fitzpatrick, Inc. v Long Is. R.R. Co.***, 70 NY2d 382, *supra*; ***Chiarello v Rio,*** 101 AD3d 793, 957 NYS2d 133 [2d Dept 2012]; ***Heffez v L & G Gen. Constr., Inc.***, 56 AD3d 526, 867 NYS2d 198 [2d Dept. 2008]; ***Lee v Matarrese***, 17 AD3d 539, 793 NYS2d 457 [2d Dept 2005]).

A review of the plaintiff's amended complaint reveals that the same is devoid of allegations of a breach of any duty owing from the defendants to the plaintiff that is independent from those arising from their contractual relations and the obligations imposed upon them thereunder if any. Nor are the losses for which damages demanded non-economic in nature and thus recoverable under theories of negligence. The First cause of action which sound in negligence is thus legally insufficient and is, therefore, dismissed pursuant to CPLR 3211(a)(1).

Also insufficient is the plaintiff's Second cause of action which sounds in breach of the implied covenant of good faith and fair dealings. To state a cognizable claim sounding in a breach of the duty of good faith and fair dealings that is implied in every contract, the existence of a valid contract between the parties must be alleged (*see* ***Kurlanski v Kim,*** 111 AD3d 676, 975 NYS2d 98 [2d Dept 2013]). Here, the plaintiff has not alleged the existence of an enforceable contract between it and defendants, National and AuthorizeNet, and its Second cause of action sounding in breach of this implied covenant is thus subject to dismissal to the extent asserted against these defendants.

In any event, the Second cause of action is additionally insufficient for the following reasons. A covenant of good faith and fair dealings implied by law is imposed upon all contracting parties and it mandates that none of such parties "shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (***511 W. 232nd Owners Corp.***, 98 NY2d 153, 154, 746 NYS2d 131 [2d Dept 2002]). The 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 the benefits under their agreement" (***Aventine Inv. Mgt. v Canadian Imperial Bank of Commerce***, 265 AD2d 513, 514, 697 NYS2d 128 [2nd Dept 1999]). As in all cases wherein a tort is asserted by and against contracting parties, a claim for breach of the implied covenant of good faith and fair dealings is actionable only where independent wrongs are asserted and demands for the recovery of separate damages not intertwined with the damages resulting from a breach of contractual provisions are advanced (*see* ***Elmhurst Dairy, Inc. v Bartlett Dairy, Inc.***, 97 AD3d 781, 949 NYS2d 115 [2d Dept 2012]; ***Refreshment Mgt. Serv., Corp. v Complete Office Supply***, 89 AD3d 913, 933 NYS2d 312 [2d Dept 2011]; ***MBIA Ins. Corp. v Merrill Lynch***, 81 AD3d 419, 420, 916 NYS2d 54 [1st Dept 2011]). Where a contractual party is merely seeking to reap the benefits of its contractual bargain, the tort claim will not lie (*see* ***New York Univ. v Continental Ins. Co.***, 87 NY2d 308, *supra*, *citing* ***Sommer v Federal Signal Corp.***, 79 NY2d, at 552, *supra*; ***Bellevue S. Assocs. v HRH Constr. Corp.***, 78 NY2d 282, 293–295, 574 NYS2d 165 [1991]), as it is not cognizable (*see* ***Refreshment Mgt. Serv., Corp. v Complete Office Supply***, 89 AD3d 913, *supra*; ***Baer v Complete Office Supply Warehouse Corp.***, 89 AD3d 877, 934 NYS2d 179 [2d Dept 2011]).

As indicated above, the amended complaint is devoid of allegations of any breaches of obligations imposed by law rather than by the parties themselves during their course of business dealings and no economic damages different from that the plaintiff would had received under the terms of any contracts with the defendants are alleged. The plaintiff's Second cause of action is thus legally insufficient as to all defendants and is dismissed pursuant to CPLR 3211(a)(7).

The plaintiff's Third cause of action, entitled "detrimental reliance" appears to sound in fraudulent concealment. Such a claim rests upon an omission or concealment by a party who had a duty to disclose material facts that are alleged to be omitted or concealed (*see* ***Sutton v Hafner Valuation Group, Inc.***, 115 AD3d 1039, 982 NYS2d 185 [3d Dept 2014]; ***Manti's Transp., Inc. v C.T. Lines, Inc.***, 68 AD3d 937, 892 NYS2d 432 [2d Dept 2009]). Allegations regarding the concealment and the duty to disclose must be advanced and such duty must arise from the existence of a fiduciary or confidential relationship between the plaintiff and the defendant (*see* ***Mandarin Trading Ltd. v Wildenstein***, 16 NY3d 173, 919 NYS2d 465 [2011]; ***Sutton v Hafner Valuation Group, Inc.***, 115 AD3d 1039, *supra*).

"A fiduciary relationship whether formal or informal, is founded upon trust or confidence reposed by one person in the integrity and fidelity of another ... [and] might be found to exist, in appropriate circumstances, between close friends ... or even where confidence is based upon prior business dealings" (***AHA Sales, Inc. v Creative Bath Prods., Inc.***, 58 AD3d 6, 867 NYS2d 169 [2d Dept 2008] internal citations and quotations omitted). "A conventional business relationship, without more, is insufficient to create a fiduciary relationship. Rather, a plaintiff must show special circumstances that transformed the parties' business relationship to a fiduciary one" (***Legend Autorama, Ltd. and Audi of Smithtown, Inc. v Audi of America, Inc.***, 100 AD3d 714, 717, 954 NYS2d 141 [2d Dept 2012]). Plaintiff must support its assertion of a fiduciary relationship with some objective facts in order to overcome a CPLR 3211(a)(7) motion to dismiss a complaint alleging breach of fiduciary relationship (*see* ***L. Margarian & Co., Inc. v Timberland Co.***, 245 AD2d 69, 665 NYS2d 413 [1st Dept 1997]).

Here, the amended complaint is devoid of allegations as to the existence of a special or fiduciary relationship between the plaintiff and any of the defendants. The Third cause of action advanced in the complaint to the extent it sounds in fraudulent concealment is thus dismissed pursuant to CPLR 3211(a)(7).

To the extent that the Third cause of action may be viewed as one sounding in a claim for equitable estoppel based upon the FDMS's issuance of approval in the form of authorizations for the duplicate transactions it failed to process thereby inducing the plaintiff into believing that such transactions were properly credited to its account, this claim is also legally insufficient. It is well established that a cognizable cause of action sounding in equitable estoppel, rests upon a lack of knowledge of the true facts; reliance upon the conduct of the party estopped; and a prejudicial change in position of the reliant party (*see* ***PHH Mtge. Corp. v Davis***, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; ***River Seafoods, Inc. v JPMorgan Chase Bank***, 19 AD3d 120, 796 NYS2d 71 [1st Dept 2005]; ***Prudential Home Mtge. Co., Inc. v Cermele***, 226 AD2d 357, 640 NYS2d 254 [2d Dept 1996]).

Here, the record reveals that the "knowledge of true facts" element is missing inasmuch as the plaintiff received monthly statements of its accounts since its inception from the FDMS. The record further reveals the absence of any prejudicial change in the position on the part of the plaintiff as a result of any reasonable reliance on the authorizations issued by FDMS with respect to the duplicate transactions that were not processed and thus not credited to the plaintiff's account.

Finally, the court agrees with defendant FDMS that the plaintiff's Fourth cause of action in which it is charged with negligence for its inaccurate reporting of the plaintiff's credit/debit card receipts lack the factual allegations necessary to state a claim for negligence against such defendant. "The elements of a cause of action alleging common-law negligence are a duty owed by the defendant to the plaintiff, a breach of that duty, and a showing that the breach of that duty proximately caused injury to the plaintiff" (***Merchants Mut. Ins. Co. v. Quality Signs of Middletown***, 110 AD3d 1042, 973 NYS2d 787 [2d Dept 2013]; *see* ***Turcotte v Fell***, 68 NY2d 432, 437, 510 NYS2d 49 [1986]). Here, there are insufficient factual allegations of any injury to the plaintiff and with respect to the other two elements of a cognizable claim sounding in negligence. The Fourth cause of action asserted against FDMS is thus dismissed for legal insufficiency pursuant to CPLR 3211(a)(7).

In view of the foregoing, the instant motion (#001) and separate motion (#002) interposed by the two defendant groups are granted and the amended complaint is dismissed.

DATED: 5/26/14

THOMAS F. WHELAN, J.S.C.