

All Taxi Mgt. Corp. v Nijman

2014 NY Slip Op 33136(U)

October 30, 2014

Supreme Court, Queens County

Docket Number: 15065/2011

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

ALL TAXI MANAGEMENT CORP.,
Plaintiff(s),

Index
No. 15065 2011

- against -

Motion
Date October 3, 2014

JOHAN B.M. NIJMAN,
Defendant(s).

Motion
Cal. No. 2

Motion
Seq. No. 2

The following papers numbered 1 to 12 read on this motion by plaintiff for an order granting it summary judgment on the issue of liability; granting it liquidated damages in the amount of \$166,875.00; and granting plaintiff a hearing to determine additional damages for expenses and losses incurred.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Exhibits.....	1-5
Answering Affirmation - Exhibits.....	6-9
Reply.....	10-12

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff is a corporation which is licensed by the New York City Taxi and Limousine Commission (TLC) to act as a medallion manager for owners of New York City taxi medallions. Defendant is a taxicab medallion owner, who entered into a Medallion Management Agreement with plaintiff, dated December 30, 2010. The contract period was to begin on January 1, 2011 and terminate on January 1, 2015. Pursuant to the agreement, defendant granted plaintiff the exclusive right to manage his medallion, and the taxicab to

which it was affixed, for the purpose of, *inter alia*, entering into leasing agreements with taxi drivers, in exchange for a monthly sum of \$ 2,400.00. On March 28, 2011, defendant directed plaintiff to surrender his medallion to the TLC. Plaintiff returned the medallion on April 28, 2011. As a result, plaintiff commenced this action to recover damages resulting from defendant's breach of the agreement. The first cause of action seeks liquidated damages, pursuant to the agreement, in the amount of \$ 166,875.00. The second cause of action seeks unspecified damages as a result of defendant's breach.

In support of its motion for summary judgment, plaintiff submits, *inter alia*, a copy of the subject agreement, which provides, in relevant part, that defendant's termination of the agreement prior to the expiration of the contract period (absent certain exceptions) constitutes a breach, entitling plaintiff to liquidated damages amounting to \$125.00 per day for each day the medallion is not within plaintiff's control, until the expiration of the agreement. The agreement further provides for the payment of damages constituting costs and expenses necessary to remove the medallion and provide for a replacement.

Plaintiff also submits the affidavit of Eldar Guseneynov, plaintiff's general manager, who states that plaintiff abided by all the terms of the agreement, and that defendant breached same as of April 28, 2011, at which date there were 1,335 days remaining on the contract, totaling \$ 166,875.00 in liquidated damages.¹ Mr. Guseneynov also states the following, with respect to additional damages pursuant to the contract and in support of plaintiff's second cause of action: "We realize these additional damages would be subject to proof. Accordingly, we request that if summary judgment is granted on liability, that a hearing be held whereby these additional damages can be determined."

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR § 3212; *Winegrad v NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Only if it meets this burden will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action (*Zuckerman v City of New York, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v Gervasio*, 81 NY2d 1062 [1993]).

1. Though Mr. Guseneynov and his counsel calculate the amount of days between April 28, 2011 and December 31, 2011, to be 240 days, same is 248 days.

Moreover, “the essential elements for pleading a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff’s performance pursuant to the contract, the defendant’s breach of his or her contractual obligations, and damages resulting from the breach” (*Dee v Rakower*, 112 AD3d 204 [2013], citing *Elisa Dreier Reporting Corp. v Global Naps Networks, Inc.*, 84 AD3d 122 [2011]; *Brualdi v IBERIA Lineas Aeraes de España, S.A.*, 79 AD3d 959 [2010]; *JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802 [2010]; *Furia v Furia*, 116 AD2d 694 [1986]).

As an initial matter, to the extent defendant contends that the motion should not be considered as untimely (CPLR 3212 [a]), same is without merit inasmuch as this matter was stayed for a period of time following the filing of the note of issue, by order dated March 17, 2014, which necessarily stayed the proceedings and, thus, stayed the time limit for making summary judgment motions. As such, the motion is timely and will be considered on substantive grounds.

While plaintiff has met its prima facie burden of establishing its entitlement to judgment as a matter of law on the issue of liability for breach of the agreement by virtue of the foregoing submissions defendant has raised a triable issue of fact in opposition. Defendant argues, *inter alia*, that the agreement is unenforceable since it violated the “owner must drive” rule as promulgated by TLC, which allows the owner of a medallion to lease same so long as the owner personally drives a minimum of shifts each calendar year (*see* 35 RCNY § 58-20). The court in *Taxifleet Mgt. LLC v Tin* (36 Misc 3d 1214 [A] [Civ Ct Kings County 2012]), was presented with the very same issue, and discussed the rule in depth:

“The TLC was created by the New York City Charter (‘NYC Charter’) to serve a number of purposes, among them to adopt and establish an overall public transportation policy governing taxis. *Metropolitan Taxicab Bd. of Trade v. New York City Taxi & Limousine Commn.*, 18 NY3d 329, 331 (2011). Pursuant to Chapter 65 of the NYC Charter, the TLC has the power and responsibility to promulgate rules and implement broad public policy in furtherance of its stated authority to regulate taxicabs and medallions. Pursuant to the ‘owner must drive’ rule, an owner of an Independent Medallion is permitted to lease his medallion as long as he personally drives a minimum number of shifts in every calendar year. *See* 35 RCNY § 51-01. In July 2011, the TLC adopted rule changes to ‘owner must drive’ requirements. The amended rules state that owners of independent cab medallions who bought their medallions after January 6, 1990, must drive their cabs for 180 nine-hour shifts per year. *See* 35 RCNY § 58-05; *see also* 35 RCNY § 58-20. The purpose of the ‘owner must drive’ requirement is to promote safety and good customer service. *See* New York City Taxi and Limousine Commission,

http://www.nyc.gov/html/tlc/downloads/pdf/owner_must_drive_version_10.pdf (accessed July 9, 2012). Here, the Contract is not void as against public policy. Although illegal contracts are, as a general rule, unenforceable, parties should be free to chart their own contractual course unless public policy is offended. *See Benjamin v. Koepfel*, 85 NY2d 549 (NY 1995); *Lloyd Capital Corp. v. Pat Henchar, Inc.*, 80 NY2d 124 (NY 1992); *Jara v. Strong Steel Door, Inc.*, 58 AD3d 600 (2d Dep't 2009); *Galbreath-Ruffin Corp. v. 40th & 3rd Corp.*, 19 NY2d 354 (NY 1967). As stated in *Village Taxi Corp. v. Beltre*, 91 AD3d 92 (2d Dep't 2011), parties are not authorized to bypass TLC Codes and make private arrangements that are contrary to the regulatory scheme of the TLC. The TLC Code, together with the related regulations which are targeted at the taxicab industry, exist for the public's protection. *See Id.*"

Though it is noted that the contract requires that the owner not violate any TLC rules, performance by defendant as required by the terms of the agreement may, in certain cases, furnish the occasion for a violation. That, coupled with the fact that, unlike the parties in *Tin*, it would appear that the agreement – along with the parties – are silent on the issue of whether “the parties could contract while abiding by the TLC regulations” (*id.*), such as permitting defendant to drive to fulfil the requirement, warrant denial of the motion. It is noted, however, that defendant submits his affidavit in opposition in which he states that, after speaking with one of plaintiff's agents about the potential for future violations of the “owner must drive rule,” defendant was told that there was nothing he could do to avoid those penalties/fines. These factual ambiguities in the record preclude the award of summary judgment in plaintiff's favor.

Assuming, *arguendo*, that the contract was not unenforceable as against public policy, denial of summary judgment is, nevertheless, warranted, inasmuch as defendant raised an issue of fact as to whether plaintiff fully performed under the contract or whether it violated the agreement by refusing to pay any owner must drive fine.²

2. To the extent defendant avers that the breach is based upon plaintiff's refusal to pay the \$2,500.00 fine (reduced to \$300.00) for the violation occurring during the 2008-2009 years, same is without merit inasmuch as plaintiff – under the subject agreement – was only responsible for the payment of penalties for violations occurring during the contract period. To the extent defendant avers that plaintiff refused to pay for any of those fines which were issued during the period (if they were, in fact, issued and not just anticipated), it would appear that, based upon the terms of the agreement, that there are issues of fact as to whether plaintiff failed to perform. These are the issues which are to be resolved at trial.

Moreover, there is also an issue of fact as to whether plaintiff is entitled to enforce the liquidated damages clause of the agreement. Plaintiff relies upon the case of *Arthur Cab Leasing Corp. v Loup Hacking Corp.* (39 Misc 3d 1219 [A] [Sup Ct Kings County 2013]), which has similar facts to the one at bar. The court stated therein, though, that “a liquidated damages clause, such as an early termination fee, merits enforcement only if the fixed damages amount is reasonably proportionate to the foreseeable actual loss” (*id.*, see also *G3-Purves St., LLC v Thomson Purves, LLC*, 101 AD3d 37, 41-42 [2012]; *United Tit. Agency, LLC v Surfside-3 Mar., Inc.*, 65 AD3d 1134, 1135 [2009]; see also *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 379-80 [2005]). Since plaintiff did not set forth foreseeable actual loss (in fact, Mr. Guseneynov essentially indicated that plaintiff was not able, at this juncture, to ascertain actual damages), there is no way for the court to ascertain whether the liquidated damage amount proposed by plaintiff pursuant to the contract is reasonably proportionate to actual loss.

Accordingly, the motion is denied.

Dated: October 30, 2014

J.S.C.