Scarola v Verizon Communications, Inc.
2016 NY Slip Op 30969(U)
May 26, 2016
Supreme Court, New York County
Docket Number: 652705/2015
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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RICHARD J.J. SCAROLA,

Plaintiff,

Index No.
652705/2015

Decision and
Order

- against -

Mot. Seq. 001

VERIZON COMMUNICATIONS, INC.,

Defendant.

----------X

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Richard J.J. Scarola ("Scarola" or "plaintiff") brings this action against defendant Verizon Communications, Inc. ("Verizon" or "defendant")[1] seeking a declaratory judgment and alleging breach of contract and violation of N.Y. General Business Law section 349 ("GBL § 349").

Defendant now moves for an order, pursuant to CPLR § 3211, dismissing plaintiff's complaint with prejudice. Defendant submits the affirmation of William D. Christ, Esq., dated September 14, 2015, annexing (a) the summons and complaint, dated August 3, 2015; (b) a complaint filed by Scarola, Malone, & Zubatov, LLP (the "Scarola Firm") in the Civil Court of the City of New York, County of New York, bearing Index No. 9119 NCV 2013 (the "2013 Action"); (c) a copy of the Settlement Agreement in the 2013 Action, dated July 25, 2013; (d) a complaint filed by the Scarola Firm against Verizon and McCarthy, Burgess & Wolff (the "2014 Action"); (e) the amended complaint in the 2014 Action; (f) the District Court's pre-trial conference order in the 2014 Action; (g) the further amended complaint in the 2014 Action; and (h) the District Court's Memorandum and Order in the 2014 Action.

[1] Defendant maintains that plaintiff has incorrectly sued "Verizon Communications, Inc." instead of "Verizon New York Inc." and notes that the prior settlement agreement was entered into by Verizon New York Inc. Plaintiff alleges in his complaint that plaintiff never dealt with Verizon New York, Inc. and that the debt collection firm that contacted plaintiff identified another entity "Verizon – West" as its client or customer.

In opposition, plaintiff submits the affidavit of Richard J.J. Scarola, annexing *inter alia*, a copy of plaintiff's e-mail correspondence with counsel for Verizon, dated October 13, 2015 and October 15, 2015; and a copy of a letter plaintiff sent to the District Court dated September 14, 2014.

In reply, defendant submits the reply affirmation of William D. Christ, Esq., annexing *inter alia*, Verizon's proposed stipulation, dated August 28, 2014, stating that Scarola and SMZ owe no amounts to Verizon with regard to Verizon's account number 6892005406; an October 15, 2015 e-mail from defendant's counsel to Scarola attaching a second proposed stipulation and order; and a copy of a check from Verizon to "Scarola Ellis" in the amount of $9,232.00, dated August 26, 2013.

The following facts are alleged in the complaint and assumed to be true for purposes of this motion. Plaintiff is a member of the Scarola Firm. The Scarola Firm and its predecessors maintained a business account (Account No. 6892005406) with Verizon for certain telecommunications services until late May 2012, when the Scarola Firm vacated its offices and moved to new offices. The Scarola Firm took all necessary steps to give effective notice to cancel all such services and no amounts were due from the Scarola Firm to Verizon. Nevertheless, Verizon began sending plaintiff monthly invoices in increasing amounts and other communications demanding payments. The Scarola Firm protested the continuation of billing on the account, made efforts to reach Verizon and obtain a response in writing or by telephone, and ultimately commenced a lawsuit against Verizon in April 2013 (the "2013 Action"). The 2013 Action settled by agreement in July 2013.

After settlement of the 2013 Action, Verizon, on its own and through the collection agency McCarthy Burgess & Wolff ("McCarthy"), began to "harass" plaintiff, personally and individually, at home and at work, making new demands for payment in continually increasing amounts. The demands were addressed to plaintiff, and did not identify the Scarola Firm or suggest that collection was being sought from the Scarola Firm or any party other than plaintiff individually. Plaintiff received multiple calls on the same day at his home, and repeated communications were directed to plaintiff's office.

Based on the foregoing allegations, plaintiff seeks a declaratory judgment that plaintiff owes no amounts to Verizon, damages arising from Verizon's breach of the 2013 settlement agreement, and damages due to Verizon's deceptive and misleading practices in violation of GBL § 349. Plaintiff also seeks to recover attorneys' fees, costs and disbursements incurred by plaintiff in connection with this action, including the related 2014 Action.

CPLR § 3211 provides, in relevant part: "(a) Motion to dismiss a cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded on documentary evidence; or . . . 7. the pleading fails to state a cause of action[.]"

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true . . . and determine simply whether the facts alleged fit within any cognizable legal theory." *People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 A.D.2d 91 (1st Dept. 2003) (internal citations omitted). The challenged pleading is "afforded a liberal construction" and the plaintiff is accorded "the benefit of every possible favorable inference." *Leon v. Martinez*, 84 N.Y.2d 83, 87, 638 N.E.2d 511, 513 (1994). However, allegations that consist of "bare legal conclusions and factual claims that are either inherently incredible or flatly contradicted by documentary evidence" are not entitled to such consideration. *Summit Solomon & Feldesman v. Lacher*, 212 A.D.2d 487, 487, 623 N.Y.S.2d 210, 210 (1st Dept. 1995).

I

Defendant argues that dismissal of plaintiff's first cause of action for declaratory judgment is warranted because there is no justiciable dispute, and plaintiff's request for declaratory relief is moot in light of the District Court's order in the 2014 Action. Defendant points out that plaintiff did not raise the issue of declaratory relief on appeal, and offers to enter a proposed stipulated order confirming that neither Scarola nor the Scarola Firm owe any amounts to Verizon with regard to account number 6892005406.

Plaintiff asserts that he is entitled to declaratory relief because, notwithstanding Verizon's consent to a declaratory judgment in the pre-trial conference order for the 2014 Action, the declaratory judgment was never entered, and Verizon refuses to agree to the steps necessary for the entry of declaratory relief.

Under CPLR 3001, this court "may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." A declaratory judgment action thus "requires an actual controversy between genuine disputants with a stake in the outcome[.]" *Long Island Lighting Co. v. Allianz Underwriters Ins. Co.*, 35 A.D.3d 253, 253 (1st Dept. 2006) (internal citation omitted); *Winkler v. Spinnato*, 134 A.D.2d 66, 81 (2d Dept. 1987) *aff'd* 72 N.Y.2d 402, 530 N.E.2d 835 (1988) ("Where there is no genuine dispute between the parties, the courts are precluded, as a matter of law, from issuing a declaratory judgment.").

In the present action, defendant does not contend that either Scarola or the Scarola Firm owe any amounts in connection with the closed Verizon account. Moreover, defendant agreed that no amounts were owed on the account in the Settlement Agreement resolving the 2013 Action, consented to the entry of declaratory relief in the 2014 Action, and has proposed to enter a stipulation order confirming that no amounts are owed. Because there is no genuine dispute with respect to the specific declaratory relief plaintiff seeks, this court is precluded from issuing a declaratory judgment. *See Walker v. Pataki*, 266 A.D.2d 40, 41, 698 N.Y.S.2d 624, 625 (1999) (declaratory relief unavailable where respondent officials did not dispute that foreign nationals were entitled to notification of foreign national's consulate upon arrest, and thus no justiciable controversy existed).

II

As for plaintiff's second cause of action, the elements of a breach of contract claim include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages. *See, e.g.*, *Morris v. 702 E. Fifth St. HDFC,* 46 A.D.3d 478, 850 N.Y.S.2d 6 (1st Dept. 2007).

Defendant argues that plaintiff lacks standing to assert a claim under the Settlement Agreement because Scarola was not a party to the Settlement Agreement, and that plaintiff has failed to allege damages arising from the alleged breach of the Settlement Agreement.

Plaintiff contends that he has adequately plead damages and alleged his status as a signatory and party to the Settlement Agreement, or, at minimum, his status as a third-party beneficiary of the Settlement Agreement.

The Settlement Agreement is a letter dated July 25, 2013 addressed to "Richard J.J. Scarola, Esq., Scarola Malone & Zubatov LLP, 1700 Broadway – 41st Floor, New York, New York 10019" and regarding "Scarola Malone & Zubatov LLP v. Verizon Communications, Inc. NY Civil Index No. 9119 NCV 2013." The letter opens:

> Dear Sir:
>
> On behalf of Verizon New York Inc. ("Verizon") sued herein as "Verizon Communications, Inc." and its affiliates, we hereby amicably resolve the dispute regarding your internet service under account # 6892005406 at issue in the case captioned above. ("the Dispute"). This Settlement Agreement sets forth the terms and conditions of the

> settlement and resolution of the Dispute. *The signatories to this Agreement are referred to jointly as the "Parties."*
>
> In consideration of the mutual promises set forth in this Settlement Agreement, Verizon agrees to pay you a total settlement amount of $9,232.00 within thirty (30) days of your signature and return of this letter agreement. Verizon has also agreed to zero-out any remaining balance left on that account and close it out.

The Agreement further states: "*This Agreement is binding on the Parties*, their predecessors, successors, parents, subsidiaries, affiliates, assigns, transferees, agents, directors, officers, employees, attorneys and shareholders." While the Settlement Agreement also provides that "[e]ach of the signatories of this Agreement represents and warrants that he is authorized to execute this Agreement and *to bind his respective Party to it*[,]" the Agreement is clear that "the signatories are referred to jointly as the 'Parties'" and "[the] Agreement is binding on the Parties" and their "attorneys."

Plaintiff contends that he is a signatory and party to the Agreement, his signature appearing above the signature block "Richard J.J. Scarola, Scarola Malone & Zubatov LLP, Plaintiff *Pro Se*." In light of the express terms of the Settlement Agreement referenced above, the plaintiff has adequately alleged that he is a signatory and party to the Settlement Agreement, and therefore has standing to assert a claim for breach of the Settlement Agreement.

With respect to the element of damages, the pleadings must "set forth facts showing the damage upon which the action is based." *Gordon v. Dino De Laurentiis Corp.*, 141 A.D.2d 435, 436, 529 N.Y.S.2d 777, 779 (1st Dept. 1988). Absent allegations of fact showing damage, "mere allegations of breach of contract are not sufficient to sustain a complaint[.]" *Id.* Furthermore, "vague and conclusory allegations" are insufficient to sustain a breach of contract cause of action. *Fowler v. Am. Lawyer Media, Inc.*, 306 A.D.2d 113 (1st Dept. 2003).

Plaintiff does not allege that either Scarola or the Scarola Firm ever paid any amounts demanded, but not owed, to either the defendant or McCarthy. Rather, plaintiff asserts in vague and conclusory fashion that "[he] has been damaged by such breach" and "the events . . . flowing from such breach," including "the cost in time and money to plaintiff in addressing the breach." Such allegations fail to state damages beyond attorneys' fees and costs, which are generally not recoverable as damages for breach of contract. *See Equitable Lumber Corp. v. IPA Land Dev. Corp.*, 38 N.Y.2d 516, 519, 344 N.E.2d 391, 394 (1976) ("Generally, attorney's fees

are not recoverable as damages in an action for breach of contract under the Uniform Commercial Code or otherwise, unless expressly agreed to by the parties."). Under New York law, the intent to provide for counsel fees as damages for breach of contract must be "unmistakably clear" in the language of the contract. *Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 20–21 (2d Cir. 1996). Here, the Settlement Agreement expressly states that "each party will bear its own costs and fees" and does not provide for the recovery of attorneys' fees as damages in the event of its breach. Thus, even assuming that defendant breached the Settlement Agreement by failing to "zero-out any remaining balance left on [the] account" and "close it out," plaintiff's complaint is fatally deficient because it does not demonstrate how the defendant's purported breach of the Settlement Agreement caused plaintiff any injury.

The Settlement Agreement is notably silent on Verizon's obligations with respect to McCarthy or any debt collection agency receiving plaintiff's account from Verizon. Moreover, plaintiff cannot recover damages for the alleged harassment under a breach of contract theory because "there is no right of recovery for mental distress resulting from the breach of a contract-related duty." *See Rakylar v. Washington Mut. Bank*, 51 A.D.3d 995, 996, 858 N.Y.S.2d 759, 760 (2d Dept. 2008) (where bank made errors in plaintiff's refinancing transaction, plaintiff could not prevail on a breach of contract theory because plaintiff's alleged damages were too speculative and not a natural and probable consequence of such breach). Plaintiff's breach of contract claim must therefore be dismissed.

III

Section 349 of the GBL is a consumer protection statute that prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service" in New York State. GBL § 349(a). The statute is intended to "empower consumers; to even the playing field in their disputes with better funded and superiorly situated fraudulent businesses." *Teller v. Bill Hayes, Ltd.*, 213 A.D.2d 141, 148 (2d Dept. 1995). "[S]ection 349 is directed at wrongs against the consuming public," *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 24, 647 N.E.2d 741, 744 (1995), and applies to "virtually all economic activity" *see Karlin v. IVF Am., Inc.*, 93 N.Y.2d 282, 290, 712 N.E.2d 662, 665 (1999). The broad reach of GBL §§ 349 and 350 "provide[s] needed authority to cope with the numerous, ever-changing types of false and deceptive business practices which plague consumers in our State." *Id.* (quoting N.Y. Dept. of Law, Mem. to Governor, 1963 N.Y. Legis. Ann., at 105).

To state a claim under GBL § 349, a plaintiff must allege that (1) the deceptive act or practice was consumer-oriented; (2) the deceptive act or practice was misleading in a material respect; and (3) the plaintiff was injured as a result. *Spagnola v. Chubb Corp.*, 574 F.3d 64, 74 (2d Cir. 2009); *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 3 N.Y.3d 200, 205–6 (2004) ("[A] plaintiff must allege both a deceptive act or practice directed toward consumers and that such act or practice resulted in actual injury to a plaintiff.").

The threshold requirement of consumer-oriented conduct is met by proof that "the acts or practices have a broader impact on the consumer at large" in that they are "directed to consumers" or "potentially affect similarly situated consumers." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25–27 (1995). "Private contract disputes, unique to the parties," do not fall within the ambit of the statute. *Id.* at 25. Nor do "single shot transaction[s] involving complex arrangements, knowledgeable and experienced parties and large sums of money." *Genesco Entm't, a Div. of Lymutt Indus., Inc. v. Koch*, 593 F. Supp. 743, 752 (S.D.N.Y. 1984) (rental of Shea Stadium was a "single shot transaction," not a typical consumer transaction, and therefore not covered by section 349).

Defendant contends that plaintiff has failed to allege consumer-oriented conduct because the Settlement Agreement is a contractual transaction unique to the Scarola Firm and Verizon, the Firm's account was not for personal, family or household purposes, and Verizon's conduct in connection with the Settlement Agreement could not affect consumers at large.

While defendant is correct in noting that the term "consumer" is associated with an individual "who purchases goods and services for personal, family or household use," *Cruz v. NYNEX Info. Res.*, 263 A.D.2d 285, 290, 703 N.Y.S.2d 103 (2000), section 349's consumer orientation does not preclude its application to disputes between businesses. *Id.* In *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20 (1995), the Court of Appeals held that plaintiffs satisfied the threshold requirement of "consumer-oriented" conduct because the acts of the defendant "potentially affect[ed] similarly situated consumers" because the defendant Bank dealt with the two union funds' representative as "any customer entering the bank to open a savings account," "furnish[ed] the Funds with standard documents presented to customers upon the opening of accounts[,]" and the account openings were not "unique" to the parties, "private in nature," or a "single shot transaction." *Id.* at 26–27.

Although the Settlement Agreement may be viewed as a private contractual transaction, plaintiff has alleged conduct apart from the purported breach of the

Settlement Agreement that is "consumer-oriented" in nature. Specifically, plaintiff alleges that Verizon "has a system which continues billing on canceled accounts and services and does not afford a reliable or commercially reasonable means for cancellation by consumers of its services[,]" such that "materially misleading and false debt information is widely disseminated to consumers, collection agents and, apparently, others, such as credit reporting agencies[.]"

Similar allegations have been deemed sufficient, at the pleading stage, to meet the threshold requirement that the alleged conduct is "consumer-oriented." *See, e.g., Kapsis v. Am. Home Mortgage Servicing Inc.*, 923 F. Supp. 2d 430, 450 (E.D.N.Y. 2013) (allegations that defendant mortgage loan servicer "fail[ed] to properly credit accounts after payments were made, fail[ed] to timely respond to communications sent by debtors, issu[ed] false or misleading monthly statements" and "refus[ed] to provide detailed accountings to debtors for sums allegedly owed" adequately alleged a "consumer-oriented" practice sufficient to state a claim under GBL § 349); *Midland Funding, LLC v. Giraldo*, 39 Misc. 3d 936, 961 N.Y.S.2d 743 (Dist. Ct. 2013) (allegation that defendant debt buyer engaged in deceptive litigation practices by routinely filing assigned-debt lawsuits without any valid factual basis was sufficient to allege "consumer-oriented" conduct).

Therefore, assuming the truth of the allegations in the complaint, plaintiff has adequately alleged that defendant engaged in "consumer-oriented" conduct insofar as the faulty billing, account closure, and debt collection practices alleged in the complaint potentially affect a large number of similarly situated consumers whose accounts are administered by defendant.

Defendant argues that Verizon's actions were neither deceptive nor materially misleading, as required to state a claim under GBL § 349.

Deceptive practices" are "acts which are dishonest or misleading in a material respect." *Kramer v. Pollock–Krasner Found.,* 890 F.Supp. 250, 258 (S.D.N.Y. 1995); *see Goldberg v. Manhattan Ford Lincoln-Mercury, Inc.*, 129 Misc. 2d 123, 125–26 (Sup. Ct. 1985) (listing false advertising, pyramid schemes, deceptive preticketing, misrepresentation of the origin, nature or quality of the product, false testimonial, deceptive collection efforts against debtors, deceptive practices of insurance companies, and "bait and switch" operations as trade practices that have been considered "deceptive" under GBL§ 349).

Here, Plaintiff alleges that, although all necessary steps to give effective notice to cancel the Scarola Firm's telecommunications services with Verizon were taken, no amounts were due from Plaintiff to Verizon, and efforts were made to

communicate with Verizon in order to cease the continuation of Verizon's billing on the account thereafter, Plaintiff was compelled to resort to the courts and commence litigation in order to have Verizon address the ongoing issue and cancel the account. Accordingly, accepting Plaintiff's allegations as true and viewing Plaintiff's complaint in the light most favorable to the non-moving party, Plaintiff has sufficiently stated a claim under GBL § 349, for purposes of surviving a motion to dismiss at this early stage of litigation. *See generally Midland Funding*, 961 N.Y.S.2d 743 (allegation that debt buyer commenced lawsuit without any valid factual basis was sufficient to allege a materially deceptive practice); *In re Scrimpsher*, 17 B.R. 999, 1016 (Bankr. N.D.N.Y. 1982) (where Wegmans hired a collection agency to collect its customers' dishonored checks, Wegmans' deceptive collection techniques, which sought "to enforce nonexistent payment rights against a consumer," violated GBL § 349).

Wherefore it is hereby,

ORDERED that defendant's motion to dismiss is granted only to the extent that the first and second causes of action are dismissed; and it is further

ORDERED that the claim under GBL § 349 shall proceed.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: May 24, 2016

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Eileen A. Rakower, J.S.C.