Caitlin Toll O'Flanagan Trust v Autzu Drivesharing, LLC
2020 NY Slip Op 30800(U)
March 11, 2020
Supreme Court, New York County
Docket Number: 656326/2019
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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THE CAITLIN TOLL O'FLANAGAN TRUST DATED DECEMBER 2, 2015,

Plaintiff,

-against-

AUTZU DRIVESHARING, LLC,

Defendant.

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THE SPENCER TOLL O'FLANAGAN TRUST DATED DECEMBER 2, 2015,

Plaintiff,

-against-

AUTZU DRIVESHARING, LLC,

Defendant.

---X

DECISION AND ORDER
Index No.: 656326/2019

Mot. Seq. No.: 001

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O. PETER SHERWOOD, J.:

I. FACTS

These are motions for summary judgment in lieu of complaint. The facts are taken from the parties' memoranda of law. By order dated February 11, 2020, the two cases were combined but separate index numbers have been retained.

A. The Caitlin Toll O'Flanigan Trust (Caitlin Trust Case)

Defendant Autzu Drivesharing, LLC (Drivesharing) provides vehicles to rideshare drivers. Plaintiff Caitlin Trust Dated December 2, 2015 (Caitlin Trust) owned an interest in Stork Driver PA, LLC (Stork), which provides vehicles to rideshare drivers under rental or rent-to own service packages.

On May 18, 2019, Caitlin Trust and Drivesharing entered into a Unit Purchase Agreement (the Agreement) which transferred plaintiff's ownership interest in Stork to Drivesharing. As part of the purchase price, Drivesharing executed a promissory note in favor of Caitlin Trust for just over $1.2M. Drivesharing was to make payments in twelve equal monthly installments, starting on August 29, 2019. After Drivesharing failed to make the first payment, Caitlin Trust sent a

default letter on August 30, 2019. When Drivesharing failed to make the second payment Caitlin Trust sent a second default letter on September 26, 2019. Drivesharing has not made any payments.

B. The Spencer Toll O'Flanigan Trust (Spencer Trust Case)

The facts related to the Spencer Trust Case are the same as those above.

II. ARGUMENTS

A. Defendant's Arguments in Opposition to the Motions in Lieu

Defendant Driveshare explains that the Notes have an offset provision which reduces the amount due to the plaintiffs for Driveshare's damages for plaintiffs' breaches of the Agreement (Notes § 4, Doc. No. 15). Driveshare did not include the Agreement in its papers. Driveshare states that plaintiffs represented that Stork had no undisclosed liabilities, but Driveshare discovered many liabilities after closing, including money owed to New York State for improper licensing and because many of the vehicles were not maintained to New York City Taxi and Limousine Commission standards. Defendant has not yet been able to ascertain the total liability to resolve these issues but plaintiff have to indemnify Driveshare. Driveshare also argues plaintiffs fraudulently induced Driveshare to enter into the Agreement by misrepresenting Stork's liabilities. While Driveshare admits it owes plaintiffs money, the amount has yet to be determined, and is less than stated in the Notes.

Driveshare argues that because it has the right of offset, CPLR 3213 does not apply. Outside evidence will be needed to determine the extent of the offset, which could be as much as half of the amount of the Notes. Accordingly, the Notes do not show a fixed sum due to the plaintiffs. Further, there are issues of fact regarding the amount due to plaintiffs.

B. Plaintiffs' Replies in Support of Summary Judgment

Plaintiffs argue the offset provision in the Notes has not been triggered. The Notes allow an offset "[i]n the event it is determined pursuant to Article 8 of the [Agreement] that Sellers are obligated to indemnify any Purchaser Indemnity . . . for Damages" (Exhibit A to Lipschutz aff, NYSCEF Doc. No. 15 in each case, at § 5). Section 8.04(c) of the Agreement is quoted in the Lipschutz Reply affidavit (NYSCEF Doc. No. 25 in the Spencer Trust Case). The Agreement was not submitted by any party. According to the affidavit, section 8.04 (c) states:

> "Any claim by [Driveshare] on account of Damages which do not result from a Third-Party Claim (a "Direct Claim") shall be asserted by [Driveshare] giving [plaintiffs] prompt written notice thereof (the "Claim Notice"). ... Such Claim Notice shall describe the Direct Claim in reasonable detail, shall include copies of all material written evidence thereof and shall indicate the estimated amount, if reasonably practicable, of the Damages that have been or may be sustained by the Indemnitee.
>
> [Plaintiffs] shall have 30 days **after [their] receipt** of the Claim Notice to respond in writing to such Direct Claim. During such 30 day period, [Driveshare] shall allow [plaintiffs] and its professional advisors to investigate the matter or circumstances alleged to give rise to the Direct Claim, and whether and to what extent any amount is payable in respect of the Direct Claim, and [Driveshare] shall assist [plaintiffs'] investigation by giving such information and assistance ... as [plaintiffs] or any of [their] professional advisors may reasonably request.
>
> If [plaintiffs] object[] to any claim made by the Indemnified Party in any Claim Notice, then [plaintiffs] shall deliver a written notice (a "Claim Dispute Notice") to [Driveshare] during the 30 day period commencing upon receipt by [plaintiffs] of the Claim Notice. The Claim Dispute Notice shall set forth in reasonable detail the principal basis for the dispute of any claim in the Claim Notice.
>
> If [plaintiffs] deliver[] a Claim Dispute Notice, then [plaintiffs] and [Driveshare] shall attempt in good faith to resolve any such objections raised in the Claim Dispute Notice.
>
> If [plaintiffs] and [Driveshare] agree to a resolution of such objection, then a memorandum setting forth the matters conclusively determined by [plaintiffs] and [Driveshare] shall be prepared and signed by both parties.
>
> If no such resolution can be reached during the 30 day period following [Driveshare]'s receipt of a given Claim Dispute Notice. or if [plaintiffs] do[] deliver a Claim Dispute Notice within the aforementioned 30 day period. [plaintiffs] shall be deemed to have rejected such claim, in which case [Driveshare] shall be free to pursue such remedies as may be available to [Driveshare] on the terms and subjects to the provisions of this Agreement."

This process was not followed. There has been no determination. Without a determination, or at least going through this process[1], Driveshare does not have a right of offset.

[1] In its brief Driveshare does not dispute that it has not invoked the procedure. At oral argument in March 2020, however, Driveshare's counsel represented that the indemnification procedure was commenced recently.

As far as Driveshare argues that the possibility of offset makes the amount due plaintiffs uncertain and therefore the motion not for the payment of money only, the Notes are for the payment of money only, for a clear sum, and for payment at fixed intervals.

As far as Driveshare alleges fraudulent inducement, that is just a way to re-word the breach of contract claim to one for breach of the representations and warranties, for which indemnification is the remedy. Further, the allegations of fraud are not substantiated, so are insufficient to withstand a motion for summary judgment in lieu of complaint (Reply at 10).

Plaintiffs also seek their attorneys' fees pursuant to section 7(b) of the Notes.

III. DISCUSSION

CPLR § 3213 provides for accelerated judgment where the instrument sued upon is for the payment of money only and where the right to payment can be ascertained from the face of the document without regard to extrinsic evidence, "other than simple proof of nonpayment or a similar *de minimis* deviation from the face of the document" (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]; *Interman Indus. Products Ltd. v R.S.M. Electron Power*, 37 NY2d; 151, 155 [1975]). An action on a promissory note is an action for payment of money only (*see Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136, 137 [1st Dept 1968], *affd* 29 NY2d 617 [1971]; *see also Davis v Lanteri*, 307 AD2d 947 [2d Dept 2003]). The usual standards for summary judgment apply to CPLR § 3213 motions. The instrument and evidence of failure to make payments in accordance with its terms constitute a *prima facie* case for summary judgment (*Weissman*, 88 NY2d at 444; *Matas v Alpargatas S.A.I.C., 21A* AD2d 327 [1st Dept 2000]).

Plaintiffs have presented an instrument for the payment of money only. It is undisputed that defendant failed to make any payments. However, defendant asserts it is entitled to some offset pursuant to section 5 of the Notes. Defendant now alleges that although there has been no determination under Article 8 of the Agreement which could create the right of offset pursuant to the Notes, the contractual process for making that determination is underway. Accordingly, there is a question of material fact as to entitlement to offset which precludes granting summary judgment (*see Lavelle v Urbach Kahn & Werlin PC*, 198 AD2d 451 [3d Dept 1993]).

As far as defendant argues plaintiffs fraudulently misrepresented Stork's liabilities, "[t]he cause of action for [or defense of] fraudulent inducement is duplicative of the claim for [or defense of] breach of representations and warranties" in the Agreement (*31 Cornelia Properties Corp. v Lemma*, 136 AD3d 584, 585 [1st Dept 2016]). As far as defendant argues plaintiffs breached the

Agreement, their remedy for that breach is offset, pursuant to the process outlined at section 8.04(c) of the Agreement. There has been no "determination" of entitlement to setoff but plaintiffs have provided sufficient facts to raise material issues of fact requiring denial of the motion for summary judgment at least as to the amount owed (*see Jones v Madison Plaza Commercial Owners LLC*, 173 AD3d 599 [1st Dept 2019]).

Accordingly, it is hereby

ORDERED that the motion for summary judgment in lieu of complaint is DENIED; and it is further

ORDERED that defendant shall answer the complaint within twenty (20) days of the date of service of this Decision and Order with notice of entry; and it is further

ORDERED that counsel shall appear for a preliminary conference in Part 49, Courtroom 252, 60 Centre Street, New York, New York on Tuesday, May 5, 2020 at 9:30 AM.

This constitutes the decision and order of the court.

DATED: March 11, 2020

E N T E R,

O. P. Sherwood

O. PETER SHERWOOD J.S.C.