Chen v Vallo Transp. Ltd.

2020 NY Slip Op 34317(U)

November 23, 2020

Supreme Court, Queens County

Docket Number: 705994/2020

Judge: Denis J. Butler

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FILED
11/23/2020
COUNTY CLERK
QUEENS COUNTY

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER IAS Part 12
Justice

STEVE CHEN, PETER KWONG, JAMIE LAM, JASON PHILIPS, and EJ ZGODNY, on their own behalf, and on behalf of those similarly situated,

Plaintiff,

-against-

VALLO TRANSPORTATION LTD.,

Defendants.

Index No.: 705994/2020

Motion Date: November 10, 2020

Motion Seq. No.: 001

The following papers were read on this motion by defendant Vallo Transportation Ltd. (Vallo) for an order, pursuant to CPLR 3211, dismissing the first cause of action as duplicative with the second cause of action, both for breach of contract; dismissing the fifth cause of action for money had and received; dismissing the class action allegations; and disqualifying plaintiffs' law firm.

	Papers Numbered
Notice of Motion, Affirmation, Exhibits	E4-13
Affirmation In Opposition, Exhibits	E15-25
Reply Affirmation	E26

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

Plaintiffs, separately, contracted with Vallo to provide their children with private transportation to and from school for the 2019 to 2020 school year. In March 2020, due to the COVID-19 pandemic, Vallo ceased providing transportation services for the remainder of the school year.

Plaintiffs claim that they are entitled to a refund of their monies, pro rata, for the period of time Vallo did not render transportation services under the contracts.

This motion seeks the dismissal of duplicative contract causes of action for breach of contract, the claim for money had and received, and the claims seeking certification as proposed class action suit. In addition, this motion seeks disqualification of plaintiffs' counsel, Marc Held, Esq., and his law firm, Held & Hines, LLP. Mr. Held is also one of Vallo's clients and would purportedly be a member of the alleged putative class.

Plaintiff's first and second causes of action, both for breach of contract, are duplicative inasmuch as they do not allege independent conduct constituting two separate causes of action (*see Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382 [1987]). Both causes of action allege that Vallo breached their contracts with plaintiffs by failing to provide transportation services in March 2020, and seek damages based upon Vallo's failure to issue a refund. Plaintiff's second cause of action is therefore dismissed as duplicative.

"On a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must afford the complaint a liberal construction, accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. The plaintiff's ultimate ability to prove those allegations is not relevant" (*Nouveau El. Indus., Inc. v Glendale Condominium Town & Tower Corp.*, 107 AD3d 965, 966 [2d Dept 2013] [citations and internal quotation marks omitted]). Indeed, "[w]hether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss" (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34 [2d Dept 2006]; *see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11 [2005]).

A cause of action for money had and received sounds in quasi contract and "arises when, in the absence of an agreement, one party possesses money that in equity and good conscience it ought not retain" (*Rocks & Jeans v Lakeview Auto Sales & Serv.*, 184 AD2d 502, 502 [2d Dept 1992]; *see Goldman v Simon Prop. Grp., Inc.*, 58 AD3d 208 [2d Dept 2008]). "Although an action for money had and received 'is recognized as an action in implied contract, the name is something of a misnomer because it is not an action founded on contract at all; it is an obligation which the law creates in the

absence of agreement when one party possesses money that in equity and good conscience he [or she] ought not to retain and that belongs to another'" *Matter of Witbeck*, 245 AD2d 848, 850 [3d Dept 1997], quoting *Parsa v State of New York*, 64 NY2d 143, 148 [1984]). Here, plaintiffs' fifth cause of action for money had and received cannot lie, as it is undisputed that the parties entered into express agreements which govern the transactions at issue (*see Lum v New Century Mtge. Corp.*, 19 AD3d 558 [2d Dept 2005]; *Eagle Comtronics, Inc. v Pico Prods., Inc.*, 256 AD2d 1202 [4th Dept 1998]; *Fesseha v TD Waterhouse Inv. Servs., Inc.*, 193 Misc 2d 253 [Sup Ct, NY County 2002]).

Generally, where pre-certification discovery has not been taken, it is premature to dismiss class action allegations as legally insufficient (*see Bernstein v Kelso & Co., Inc.*, 231 AD2d 314 [1st Dept 1997] [holding that the trial court prematurely dismissed class action allegations in the complaint before answer was served]; *Mountz v Global Vision Products, Inc.*, 3 Misc 3d 171 [Sup Ct, NY County 2003] [holding that where a plaintiff has not yet requested class certification, a defendant's request for denial of class certification should only be granted if the substantive claim is dismissed]). Only in limited instances, where it appears conclusively from the complaint and affidavits that there was as a matter of law no basis for class action relief, have courts dismissed class action allegations (*see Wojciechowski v Republic Steel Corp.*, 67 AD2d 830 [4th Dept 1979]). In this case, it would be inappropriate to dismiss the class action allegations since the allegations in the verified class action complaint provide a potential basis for a class action.

Nor does the court find that Mr. Held and his law firm must be disqualified. The disqualification of an attorney is a matter that rests within the sound discretion of the court (*see Matter of Town of Oyster Bay v 55 Motor Ave. Co., LLC*, 109 AD3d 549 [2d Dept 2013]; *Albert Jacobs, LLP v Parker*, 94 AD3d 919 [2d Dept 2012]; *Columbus Constr. Co., Inc. v Petrillo Bldrs. Supply Corp.*, 20 AD3d 383 [2d Dept 2005]). A party's right to be represented by counsel of his or her own choosing is a valued right which will not be superseded absent a clear showing that disqualification is warranted (*see Halberstam v Halberstam*, 122 AD3d 679 [2d Dept 2014]). Although Mr. Held is a partner of the law firm that represents plaintiffs, he is not a class representative (*cf. Tanzer v Turbodyne Corp.*, 68 AD2d 614 [1st Dept 1979]). Mr. Held is merely a potential class member of a class that has not even been certified. These circumstances serve to minimize the potential for impropriety, conflict, or undue influence arising out of Mr. Held's dual relationship. Further, to the extent Mr. Held might be motivated to take some action or decision based on the potential

for financial benefit to his law firm, it is noted that courts in New York maintain discretion to approve settlements and attorney's fees in class actions, ensuring that any financial benefits sought by counsel would not come at the expense of individual benefits to class members.

Accordingly, the motion is granted solely to the extent that the second cause of action for breach of contract is dismissed, as duplicative of the first cause of action for breach of contract, and the fifth cause of action for money had and received is dismissed for failure to state a claim (*see* CPLR 3211 [a] [7]).

This constitutes the decision and order of the court.

Dated: November 23, 2020

Denis J. Butler, J.S.C.

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