Luxury Travelers Brokers Inc. v Tauber
2021 NY Slip Op 30819(U)
March 15, 2021
Supreme Court, Kings County
Docket Number: 507562/20
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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LUXURY TRAVELERS BROKERS INC., and ENGINE HOUSE MARKETING LLC,

Plaintiffs Decision and order

- against - Index No. 507562/20

DAVID TAUBER and AVIGDOR KAHAN, March 15, 2021

Respondent,

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §2221 seeking to reargue a decision and order dated December 20, 2020 which dismissed the lawsuit. The defendants have opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in the prior order between 2013 and 2014 the defendants sold airline miles to the plaintiffs for payments exceeding $500,000. The complaint alleged the defendant sold these miles to plaintiff knowing the miles were fraudulently obtained. United Airlines refused to honor a portion of the miles used and cancelled airline tickets purchased with those miles. The plaintiffs business suffered as a result and instituted this lawsuit and alleged causes of action for breach of contract, breach of implied contract, unjust enrichment, fraud, loss of value and prima facie tort. In the prior order the court dismissed the entire complaint and now the plaintiff

seeks to reargue that determination.

Conclusions of Law

A motion to reargue must be based upon the fact the court overlooked or misapprehended fact or law or for some other reason mistakenly arrived at in its earlier decision (Deutsche Bank National Trust Co., v. Russo, 170 AD3d 952, 96 NYS2d 617 [2d Dept., 2019]).

In the previous decision the court concluded there could be no breach of contract because the defendants delivered miles to the plaintiff and the plaintiff paid for such miles, thus satisfying all contractual obligations. Upon reargument the plaintiff asserts the defendants were obligated to reimburse the plaintiff in the event the miles were dishonored. Consequently, the defendants owe the plaintiffs such refunds and therefore the breach of contract claim is valid. The Amended Complaint does assert the plaintiff requested a refund which the defendant's refused (see, Amended Complaint, §15) however, the plaintiff has not pointed to any contractual provision that requires such refund. The terms and conditions contained within plaintiff's website states that the plaintiff "IS PURCHASING YOUR MILES AND POINTS FOR THE PURPOSE OF USING THE MILES AND POINTS AS CONSIDERATION FOR PURCHASING TRAVEL. MONEY PAID TO YOU NOW IS A DEPOSIT THAT WILL BE EARNED AND BECOME NON-REFUNDABLE AT THE TIME

A TICKET IS PURCHASED USING THE MILES OR POINTS. IF THE MILES AND POINTS ARE CANCELLED FOR ANY REASON BY YOU, AN AIRLINE OR THE CREDIT CARD ISSUER, THEN YOU WILL REFUND THE DEPOSIT TO FLYER-MILES" (see, website of plaintiff submitted as Exhibit 'N' to motion for reargument). Thus, the only instance where a refund is necessary is where the miles or points are cancelled for any reason. In this case the tickets that were purchased with those miles were cancelled. There is nothing in the website which governs that eventuality and surely nothing that states if the ticket is cancelled by the airline then the seller of the miles, the defendants in this case, must refund the money received from the transaction. Thus, there is no requirement any such refund was due and consequently there is no basis to conclude there are any questions about a breach of contract claim. Since there are no breach of contract likewise there can be no independent claims of unjust enrichment.

Concerning the fraud claim the court held the complaint failed to state any cause of action since the defendants could not control whether the airline would dishonor any tickets purchased with such miles. The plaintiff asserts that since the defendants improperly pooled miles into one account they knew the airline would dishonor them and thus committed fraud. Further, even if, as the court held in the prior order, the plaintiff was not permitted to sell secondary miles, still the defendant's

fraud contributed to this loss.

Essentially, the plaintiff argues that since the defendants sold pooled miles accounts which are inherently tainted then such sales constituted fraud. However, there is no basis upon which to assert the miles were inherently tainted. Indeed, the airline approved many of the tickets purchased with those miles without objection. Thus, as already held in the prior decision, no misrepresentation was made by the defendants because they could not control whether or not the tickets would be honored. Further, contrary to the plaintiff's arguments, the defendants did not and could not know with certainty the actions a third party would take, particularly where the third party, the airline, acted inconsistently, approving some tickets and dishonoring others. By those very terms the defendants could not have provided any basis upon which any misrepresentation was in their control and thus could not have committed any fraud. The plaintiff has not presented any argument not already presented compelling the court to reconsider its prior determination.

Lastly, even if the Amended Complaint alleged special damages surely the complaint does not allege the defendants acted with the specific intent to harm the plaintiff, a necessary element of prima facie tort (Freihofer v. Hearst Corp., 65 NY2d 135, 490 NYS2d 735 [1985]).

Therefore, based on the foregoing the motion seeking to

reargue the earlier decision is consequently denied.

So ordered.

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DATED: March 15, 2021
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC