

Katz v Flat Rate Long Distance, Inc.

2022 NY Slip Op 32084(U)

June 30, 2022

Supreme Court, New York County

Docket Number: Index No. 650145/2022

Judge: Sabrina Kraus

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

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ROCHELLE KATZ,

Plaintiff,

- v -

FLAT RATE LONG DISTANCE, INC. d/b/a
FLAT RATE MOVING, ADIL EL-KHAYARI,
ERIKA REYES, GILAD ZUKIN, ZARIYAH HARRIS,
And RICARDO MCKENZIE

Defendant.

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INDEX NO. 650145/2022
MOTION DATE 03/03/2022
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001), 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15

were read on this motion to/for PARTIAL MOTION TO DISMISS

BACKGROUND

Plaintiff commenced this action to recover damages for violation of the New York State Human Rights Law (NYSHRL) (Executive Law § 296[2][a]) claiming discrimination in public accommodation on the basis of religion, perceived creed, national origin; New York City Human Rights Law (NYCHRL) (Administrative Code of City of N.Y. § 8-107[4][a]) claiming discrimination in public accommodation on the basis of religion, perceived creed, national origin; Intentional Infliction of Emotional Distress(IIED); New York’s Unfair Trade Practices Act (General Business Law [GBL] § 349; Carmack Amendment, and 49 U.S.C. §14704(a) against defendants, Flat Rate Long Distance Inc. d/b/a Flat Rate Moving, Adil El-Khayari, Erika Reyes, Gilad Zukin, Zariyah Harris, and Ricardo McKenzie.

On August 10, 2021, plaintiff hired defendant Flat Rate Long Distance, Inc d/b/a Flat

Rate Moving (Flat Rate), to move her property from New York to Texas. A delivery window was originally set between August 18, 2021 - August 28, 2021, and then set between August 25, 2021 – September 9, 2021. Plaintiff informed the defendants that she observes the Jewish High Holy Days of Rosh Hashanah and informed Flat Rate that she would be unavailable to communicate via e-mail or telephone and would not be able to accept the delivery on September 7, 2021, or September 8, 2021. Flat Rate responded that the delivery window would end on September 6, 2021. On September 6, 2021, Flat Rate sent plaintiff an email stating another change to the delivery window that would be between September 8, 2021- September 9, 2021. On September 8, 2021, an employee from Flat Rate sent plaintiff an email attempting to deliver plaintiff's items. The email informed plaintiff that if they did not hear from her as soon as possible, her items would be sent to California, until another driver returned to Texas. It is not clear when plaintiff's items were actually delivered, but they were delivered damaged. On November 4, 2021, plaintiff submitted a claim to Flat Rate for damages in the amount of \$1,595.00.

The summons and complaint were filed on January 10, 2022.

PENDING MOTION

On March 24, 2022, defendants, by counsel, moved pursuant to CPLR § 3211(a)(2) and CPLR § 3211(a)(7) for dismissal of first four of the plaintiff's causes of action.

On June 2, 2022, the motion was fully briefed and submitted to this court for determination.

DISCUSSION

Defendants motion to dismiss pursuant to CPLR § 3211(a)(2) for lack of subject matter jurisdiction is denied.

Pursuant to NYSHRL (NY Executive Law § 297[9]) “[a]ny person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of

appropriate jurisdiction for damages ... and such other remedies as may be appropriate.” The NYCHRL (NYC Administrative Code 8-502) similarly provides “any person claiming to be a person aggrieved by an unlawful discriminatory practice ... an act of discriminatory harassment or violence ... shall have a cause of action in any court of competent jurisdiction for damages, including punitive damages, and for injunctive relief and such other remedies as may be appropriate.

Defendants assert that plaintiff’s characterization of claims under NYSHRL and NYCHRL are preempted by Federal Aviation Administration Authorization Act (FAAAA) because the claims arise from Flat Rate’s rates, routes, and services as a motor carrier. However, “[s]ubject matter jurisdiction has been defined as the ‘power to adjudge concerning the general question involved and is not dependent upon the state of facts which may appear in a particular case, arising, or which is claimed to have arisen, under the general question’” (*21st Century Pharmacy v. Am. Int’l Grp.*, 195 A.D.3d 776 [2nd Dept 2021] [internal citations omitted]). “A [c]ourt of general jurisdiction, such as the Supreme Court of the State of New York always has jurisdiction at least to determine whether it has jurisdiction” (*Jennings v. New York City Council*, 10 Misc. 3d 1073(A) [Sup. Ct. 2006]). This court has jurisdiction.

Defendants motion to dismiss pursuant to CPLR § 3211(a)(7) for failure to state a claim for plaintiff’s first four causes of actions is granted.

Pursuant to CPLR § 3211(a)(7), a motion to dismiss for failure to state a cause of action, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Bd. of Mgrs. of 285 Driggs Ave. Condominium v. 285 Driggs Ave., LLC*, 173 A.D.3d 821, 822 [2019]). The standard of review on such a motion is not whether the party has artfully drafted the pleading, “but whether deeming the pleading to allege whatever can be

reasonably implied from its statements, a cause of action can be sustained” (*Stendig, Inc. v. Thom Rock Realty Co.*, 163 A.D.2d 46, 558 N.Y.S.2d 917 [1st Dept. 1990]).

Executive Law § 296(2)(a) deems it unlawful discrimination if a place of public accommodation denies accommodation to any person on the basis of “race, creed, color, national origin, sex, or disability or marital status.” NYSHRL forbids all discrimination against a protected class in places of public accommodation regardless of the motivation (Executive Law § 290 et seq). Under the NYCHRL, a plaintiff must prove that unlawful discrimination was one of the motivating factors of the complained of conduct (NYC Administrative Code, § 8-107).

In this case, the plaintiffs claim against defendants must be dismissed because, even construing her allegations in the light most favorable to her, the plaintiff has failed to plead any facts that plausibly allege that she was treated less well than other customers of defendants or that the delay or damages to her property give rise to an inference of discrimination. Nor has plaintiff pleaded any facts suggesting that any relevant decision maker made religious criticisms or comments or those outside of a protected class were treated differently from her. The plaintiff’s religious status alone, is insufficient to give rise to a minimal plausible inference of religious discrimination. Specifically, plaintiff does not allege that delay in delivering her household items was a result of religious animus, or that defendants refused, withheld, or denied plaintiff a public accommodation under Executive Law § 296(2)(a). Although on a motion to dismiss plaintiffs’ allegations are presumed to be true, conclusory allegations are insufficient to survive a motion to dismiss (*Godfrey v. Spano*, 13 N.Y.3d 358 [2009]).

Additionally, plaintiff fails to state a claim for intention infliction of emotional distress. To prevail in an action for IIED, a plaintiff must allege: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii)

a causal connection between the conduct and injury; and (iv) severe emotional distress. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society (*Chanko v. American Broadcast Companies, Inc.*, 27 N.Y.3d 46, 56 [2016]). “[A] cause of action for intentional infliction of emotional distress should not be entertained where the conduct complained of falls well within the ambit of other traditional tort liability” (*Fisher v. Maloney*, 43 N.Y.2d 553, 558 [1978]). Here, plaintiff has not alleged any actions on the part of defendants that rise to the level of “extreme and outrageous conduct.”

Under GBL § 349, to state a cause of action under that statute, a plaintiff “must, at the threshold, charge conduct that is consumer oriented. The conduct need not be repetitive or recurring, but defendant's acts or practices must have a broad impact on consumers at large; as opposed to “[p]rivate contract disputes unique to the parties [that] would not fall within the ambit of [GBL §349]” (*New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308 [1995], quoting *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20 [1995]).

The factual allegations set forth in the complaint fail to set forth a viable claim to recover damages for a violation of GBL §349. Here, the plaintiff does not allege that the defendants engaged in deceptive business practices directed at members of the public at large that generally enter contracts for moving services. Rather, the plaintiffs' claim is based upon allegations that Flat Rate made misleading oral representations regarding the nature of insurance coverage available for plaintiff's property. These allegations against Flat Rate are unique to plaintiff, and do not have an impact on the public at large. Accordingly, the factual allegations set forth in the complaint are insufficient to show that the defendants engaged in consumer-oriented conduct,

and do not state a cause of action for violation of GBL §349 (*Flax v. Lincoln National Life Insurance Co.*, 54 A.D. 3d 992 [2nd Dept.2008]).

CONCLUSION

WHEREFORE, it is hereby

ORDERED that the partial motion to dismiss is granted for the first, second, third, and fourth cause of action of the complaint against all defendants; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

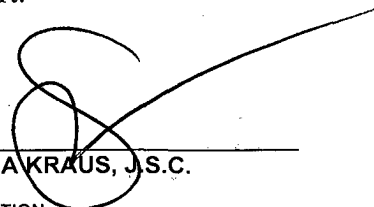
ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that counsel are directed to appear for a virtual preliminary conference on September 20, 2022, at 2 PM.

ORDERED that this constitutes the decision and order of this court.

6/30/22
DATE



SABRINA KRAUS, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- APPLICATION: SETTLE ORDER
- CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE