

Peitian Zhang v Mastercard Inc.

2023 NY Slip Op 30542(U)

February 22, 2023

Supreme Court, New York County

Docket Number: Index No. 159529/2022

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 14

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PEITIAN ZHANG,

Plaintiff,

- v -

MASTERCARD INC., INDUSTRIAL AND COMMERCIAL
BANK OF CHINA LTD.,

Defendants.

INDEX NO. 159529/2022

MOTION DATE 02/06/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13

were read on this motion to/for DISMISS.

Defendant Mastercard Inc.'s motion to dismiss is granted.

Background

This defamation case arises from an alleged fraudulent charge on plaintiff's debit card statement. In November 2016, plaintiff contacted Mastercard and Industrial and Commercial Bank of China (ICBC) to inform them that he would be returning to China and requested to stop his international debit card after November 29, 2016.

On December 7, 2016, plaintiff was informed that there was a charge for €460; however, plaintiff alleges this charge was fraudulent because he had stopped using his debit card. Plaintiff contends his debit card was stolen and filed a police report shortly after being notified of the charge. Plaintiff claims that beginning in December 2016, he received hostile phone calls and text messages from defendants threatening that they would inform his employer and family members of his debts and using inappropriate language. Plaintiff further alleges that defendants

called plaintiff's employer, Southwest University of Political Science and Law, and his wife,

informing each of them of plaintiff's debts. Plaintiff claims his reputation at work and his relationship with his wife were both damaged by these phone conversations. In June 2022, plaintiff claims defendants confiscated all funds in plaintiff's account, and in November 2022, defendants froze plaintiff's account used for his pension. Plaintiff filed a complaint alleging defamation, intentional infliction of emotional distress, breach of contract, negligence and an erroneous cause of action seeking an injunction.

Mastercard now moves to dismiss plaintiff's complaint. Mastercard contends that plaintiff's allegations are insufficient to state a defamation claim because it does not plead the particular words spoken, who said them, or when they were said. Moreover, plaintiff does not identify which of the two defendants made the statements. Next, Mastercard argues that plaintiff failed to allege the type of outrageous conduct necessary to state an intentional infliction of emotional distress claim. Mastercard further claims that there was no agreement between the parties, and plaintiff's contract claim should be dismissed. According to Mastercard, plaintiff had no contract with Mastercard, as Mastercard does not contract with consumers. Mastercard claims its agreeing to cancel plaintiff's debit card was an act of customer service, not a contractual obligation.

Additionally, Mastercard contends it had no duty toward the plaintiff and plaintiff's claim for negligence should likewise be dismissed. Mastercard argues because there was no contractual relationship and Mastercard did not have the power to prevent international use of plaintiff's card, Mastercard was not responsible for stopping the function of international use of the debit card. Moreover, Mastercard claims the statute of limitations has expired, as the applicable statute of limitations for negligence is three years and it has been at least six years since the alleged damage occurred. Finally, Mastercard argues there is no independent cause of action for

injunctive relief, but plaintiff's request for such relief should be denied because his injury can be redressed by money damages.

In response, plaintiff argues Mastercard does not meet the standard for dismissal of a complaint. Plaintiff contends it clearly alleged defamation and the court should determine the sufficiency of the defamation pleading by applying a liberal standard that considers if the statements are "reasonably defamatory," (NYSCEF Doc. No. 12 at 9). Plaintiff further alleges its claims for emotional distress rest on the allegation of Mastercard's harassing conduct and threats made to plaintiff of informing his employer and wife of his debts, resulting in plaintiff's distress and humiliation. Additionally, plaintiff asserts Mastercard entered into a contract with plaintiff when Mastercard accepted plaintiff's offer to stop the function of international use of plaintiff's debit card. Plaintiff alleges that Mastercard breached the contract by failing to stop the international use function. Next, plaintiff contends Mastercard owed a duty to stop the international function at the time it accepted plaintiff's request to do so. Plaintiff claims the only reason it is bringing a negligence claim so long after the alleged damage is because plaintiff could not come back to the United States from China due to COVID, and the "courts were closed for a long time," (NYSCEF Doc. No. 12 at 13). Finally, plaintiff alleges both defendants engaged in a pattern of demanding payment that inflicts harm upon plaintiff for which no remedy exists, entitling plaintiff to injunctive relief.

In reply, Mastercard claims that plaintiff's response papers are untimely and were filed 4 days after the deadline. Mastercard maintains that plaintiff fails to plead the particular words spoken, who said them, and when they were said, only repeating the elements of defamation. Additionally, Mastercard contends plaintiff "parrots" insufficient factual allegations for its intentional infliction of emotional distress claim, entitling Mastercard to dismissal of this claim.

Mastercard also argues the parties were not engaged in a contract and maintains its agreement to cancel international functions on plaintiff's debit card was a customer service call, not a contractual obligation. Furthermore, Mastercard highlights that plaintiff failed to plead any existence of consideration for the alleged contract. Mastercard maintains it did not owe a duty to plaintiff and plaintiff's assertion that the courts were closed does not convert plaintiff's negligence claim into a timely one. Finally, Mastercard contends plaintiff's arguments for injunctive relief are incoherent and moves for dismissal of all of plaintiff's claims.

Discussion

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the [pleading] as true, accord [the proponent of the pleading] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994] [citations omitted]). “At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration” (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141, 75 NE3d 1159 [2017] [citation and internal quotations omitted]).”

Defamation

A successful defamation claim includes: “(1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm.” (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34, 987 NYS2d 37 [1st Dept 2014]).

“In determining the sufficiency of a defamation pleading, [the court] considers whether the contested statements are reasonably susceptible of a defamatory connotation,” (*Davis v Boenheim*, 24 NY3d 262, 268, 998 NYS2d 131 [2014] [internal quotations and citation omitted]).

The Court grants Mastercard's motion. Plaintiff's factual allegations lay out a vague and broad overview of the events that plaintiff alleges occurred. Plaintiff states "the defendants" called him multiple times, but it is unclear *who* actually made these phone calls. Was it someone holding themselves out as a representative of Mastercard? ICBC? Or perhaps they did not state who they were, and plaintiff assumes it was one of the defendants as the entity in charge of his debit card. Moreover, despite these harassing phone calls continuing for over six years, plaintiff declined to quote the threatening messages, only alleging vague descriptions of what transpired. The Court cannot decipher defamatory language if no language or speaker is provided.

Intentional Infliction of Emotional Distress

The elements of intentional infliction of emotional distress are: "(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" (*Howell v New York Post Co.*, 81 NY2d 115, 121, 596 NYS2d 350 [1993]).

Plaintiff fails to demonstrate how the alleged conduct is extreme and outrageous enough to warrant a claim for intentional infliction of emotional distress (IIED). A bank or credit card company demanding payment on an overdue charge is not extreme or outrageous. Furthermore, without more detailed allegations of the language used, the Court is unable to find that plaintiff state a valid cause of action.

Breach of Contract

The elements of a breach of contract claim are "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." (*Markov v Katt*, 176 AD3d 401, 402-403, 109 NYS3d 295 [1st Dept 1995]).

Neither party alleges a written contract exists. Plaintiff's claim appears to mirror a quasi-contract; however, plaintiff's allegations are insufficient. First, there is no consideration. Plaintiff called his credit card company and requested that it cease the international usage function of his card. It is unclear whether this is in their power, but either way, there was no bargained-for exchange. Therefore, plaintiff's claim for breach of contract is dismissed.

Negligence

“[T]he statute of limitations for negligence that results in a loss of funds is three years.” (*NYAHS A Servs., Inc., Self-Ins. Tr. v. Recco Home Care Servs., Inc.*, 141 AD3d 792, 796, 36 NYS3d 270 [1st Dept. 2016]).

Plaintiff's negligence claim is untimely and barred by the statute of limitations. Although plaintiff's allegations are extremely broad, plaintiff claims the fraudulent payment was charged in December 2016, and the alleged harassment occurred shortly thereafter. The statute of limitations for plaintiff's claims expired in December 2019, three years after the damage accrued. Despite plaintiff's claims, courts in the United States were not closed in December 2019, or any time before that. The Court recognizes plaintiff was in China at the time, where the COVID pandemic spread months before it reached the United States in March 2020; however, at the time the statute of limitations expired, the pandemic was in its infancy and no lockdowns occurred until at least January 2020, even in China (*see A Timeline of China's Response in the First Days of COVID-19 | FRONTLINE* <https://www.pbs.org/wgbh/frontline/article/a-timeline-of-chinas-response-in-the-first-days-of-covid-19/> [PBS, Feb. 2 2021]). Furthermore, Executive Order No. 202.8 tolled the statute of limitations during COVID from March 2020 until November 3, 2020 (*see Murphy v Harris*, 210 AD3d 410, 177 NYS3d 559 [1st Dept 2022]). This

tolling period, lasting a total of 8 months, would still not create a circumstance allowing plaintiff to bring his claims in 2022.

Injunctive Relief

"A preliminary injunction substantially limits a defendant's rights and is thus an extraordinary provisional remedy requiring a special showing. Accordingly, a preliminary injunction will only be granted when the party seeking such relief demonstrates a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of equities tipping in favor of the moving party" (*1234 Broadway LLC v W. Side SRO Law Project*, 86 AD3d 18, 23, 924 NYS2d 35 [1st Dept 2011] [citations omitted]).

The Court grants Mastercard's motion dismissing plaintiff's claim and denying injunctive relief. As an initial matter, injunctive relief is not a separate cause of action under New York law. Besides, injunctive relief must be denied here as plaintiff has failed to demonstrate irreparable injury without a preliminary injunction. Plaintiff fails to demonstrate with sufficient detail how his injuries are irreparable and beyond the scope of money damages.

Accordingly, it is hereby

ORDERED that defendant Mastercard's motion to dismiss is granted and plaintiff's claims against Mastercard are severed and dismissed, and the Clerk is directed to enter judgment accordingly along with costs and disbursements upon presentation of proper papers therefor.

Next conference with remaining parties: April 4, 2023 at 10:30 a.m.

By March 28, 2023, the parties shall upload 1) a stipulation about discovery signed by all parties, 2) a stipulation of partial agreement that identifies the areas in dispute or 3) letters explaining why no agreement about discovery could be reached. The Court will then assess

whether a conference is necessary (i.e., if the parties agree, then an in-person conference may not be required).

If nothing is uploaded by March 28, 2023, the Court will adjourn the conference or may order a note of issue be filed.

2/22/2023

DATE



ARLENE BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE