

Curanaj v Tao Group Operating LLC

2024 NY Slip Op 34638(U)

July 25, 2024

Supreme Court, Westchester County

Docket Number: Index No. 56152/2024

Judge: Linda S. Jamieson

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Disp x Dec _____ Seq. No. 1 Type dismiss

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

-----X
ELIZABETH CURANAJ, individually and
on behalf of all others similarly
situated,

Index No. 56152/2024

Plaintiff,

DECISION AND ORDER

-against-

TAO GROUP OPERATING LLC,

Defendant.

-----X

The following papers numbered 1 to 5 were read on this motion:

<u>Paper</u>	<u>Number</u>
Notice of Motion	1
Memorandum of Law	2
Affirmation and Exhibits in Opposition	3
Memorandum of Law in Opposition	4
Reply Memorandum of Law	5

Defendant brings its motion to dismiss this case in its entirety. The facts are as follows. Defendant is an entertainment group that owns and runs various nightclubs, restaurants and similar venues in New York and elsewhere. According to the complaint, in either September 2022 or October

2023,¹ plaintiff bought two tickets on defendant's website for a nightclub in New York. She alleges that after she selected two tickets, at \$50 each, the price increased from \$50 per ticket to \$62.50 per ticket, because of "an eye-popping \$12.50 per ticket 'Ticketing Fee.'" It is clear from the complaint that at the time that plaintiff learned of the ticketing fee and the increased price, she had not yet completed the purchase. It appears that plaintiff continued with the purchase, despite learning of the ticketing fee. There is no indication in the complaint as to whether plaintiff actually used the tickets that she purchased.

Plaintiff alleges that "Defendant has been nickel and diming visitors of its nightclubs on its website in violation of the New York Arts and Cultural Affairs Law § 25.07(4). Whenever a consumer selects an admission ticket to a concert event for a nightclub in New York City on the <https://taogroup.com>, she is quoted a fee-less price, only to be ambushed by a variable rate 'Ticketing Fee'—after selecting a ticket or several tickets for purchase and after being prompted to answer various questions and input various pieces of registration and billing information. This cheap trick has enabled Defendant to swindle

¹The complaint contains two different dates of purchase. It is unclear which is the correct one, as plaintiff fails to set forth the date in her opposition papers.

substantial sums of money from its customers." A review of the complaint shows that plaintiff does not actually allege any damages; all she says is that "Plaintiff was harmed by paying this Ticketing Fee, even though that total cost was not disclosed to Plaintiff at the beginning of the purchase process, and therefore, is unlawful pursuant to New York Arts & Cultural Affairs Law § 25.07(4)." As stated, it is clear from the complaint that plaintiff was not unwittingly obligated to pay the ticketing fee; she certainly could have decided to abandon the transaction and not pay any fees, but chose not to do so.

Plaintiff accurately cites to the current Arts & Cultural Affairs Law section 25.07(4).² This section states, in relevant part, that

Every operator . . . of a place of entertainment . . . shall disclose the total cost of the ticket, inclusive of all ancillary fees that must be paid in order to purchase the ticket, and disclose in a clear and conspicuous manner the portion of the ticket price stated in dollars that represents a service charge, or any other fee or surcharge to the purchaser. Such disclosure of the total cost and fees shall be displayed in the ticket listing prior to the ticket being selected for purchase. Disclosures of subtotals, fees, charges, and any other component of the total price shall not be false or misleading, and may not be presented more prominently or in the same or larger size as the total price. The price of the ticket shall not increase during

² It appears that this statute was repealed, effective July 2025, and a new Article 25 will go into effect at that time. ("**§ 25.07. Ticket prices**" "Currentness <[Repealed July 1, 2025, pursuant to L.1991, c. 704, § 4. See, also, § 25.13 in art. 25, Theatre Tickets.]>") N.Y. Arts & Cult. Aff. Law § 25.07 (McKinney).

the purchase process, excluding reasonable fees for the delivery of non-electronic tickets based on the delivery method selected by the purchaser, which shall be disclosed prior to accepting payment therefor.

It is clear that at the time that plaintiff bought her tickets on defendant's website, the total cost and fees were not displayed in the ticket listing prior to the ticket being selected for purchase. It is also clear, however, that prior to making the purchase, the fees were disclosed, and plaintiff could have changed her mind about buying these now more expensive tickets.

Since this statute went into effect in August 2022, it seems that there have been no New York State reported cases applying this provision. It appears that the only case in any Court applying it is a case in the Southern District of New York which denied the defendant's motion to dismiss, *Charles v. Color Factory, LLC*, 2024 WL 1693236, at *3 (SDNY Apr. 19, 2024), which plaintiff relies on heavily. In that case, the Court found that the plaintiff had standing because "plaintiff paid an unlawful fee," which was "a sufficiently concrete economic injury to confer standing." The Court found that the fee was unlawful because not only did defendant fail to disclose the total cost at the beginning of the purchase process, but in that case, defendant failed to "clearly and conspicuously disclose the fee on the final checkout page. . . ." The Court also held that

"defendant failed to disclose 'how much of the \$8.99 is allocated to taxes versus fees,' which may violate the statutory requirement that defendant 'disclose in a clear and conspicuous manner the portion of the ticket price stated in dollars that represents a service charge, or any other fee or surcharge to the purchaser.'" *Charles*, 2024 WL 1693236 at *4.

In this case, in contrast, defendant did clearly and conspicuously disclose the fee on or before the final checkout page, and there is no question that none of the fee is allocated to taxes. The Court thus finds that the facts here are sufficiently different from those in *Charles* that the Court disregards this federal decision - which is not binding, in any event. *Conergics Corp. v. Dearborn Mid-W. Conveyor Co.*, 144 A.D.3d 516, 527, 43 N.Y.S.3d 6, 15 (1st Dept. 2016) ("This Court is not bound, of course, by precedents of federal courts on pure issues of state law.").

With respect to the issue of standing, plaintiff argues that "Paying Defendant an "illegally appropriated surplus is a classic pocketbook injury sufficient to give her standing." But there is no allegation here that the fee was "an illegally appropriated surplus." Indeed, in her opposition papers, plaintiff contests defendant's statement that "Plaintiff does not allege that the Ticketing Fee was unreasonable or unlawful," stating that "Plaintiff alleges exactly that: Tao's 'Ticketing

Fee ... was not disclosed to Plaintiff at the beginning of the purchase process, and therefore, is unlawful pursuant to New York Arts & Cultural Affairs Law § 25.07(4).'" A close reading of the complaint, however, demonstrates that plaintiff does not contend that the **fee** itself is unlawful, but only that the **timing** of when it was disclosed was unlawful. Specifically, plaintiff alleges in the complaint that "Plaintiff was harmed by paying this Ticketing Fee, even though that total cost was not disclosed to Plaintiff at the beginning of the purchase process, and therefore, is unlawful pursuant to New York Arts & Cultural Affairs Law § 25.07(4)." In effect, plaintiff is arguing that because the fee was unlawful, she was harmed by paying an unlawful fee (even though she could have chosen to terminate the transaction and not pay the fee). Indeed, if the same fee had been disclosed at the outset, it would not have been unlawful, and thus she would have no damages. A review of the complaint shows that plaintiff alleges no damages aside from the fact that she paid this fee. This is inadequate to confer standing on plaintiff.

Even if plaintiff had standing because of the unlawful fee, however, the Court finds that plaintiff knowingly paid the fees; she does not allege that the fee was concealed prior to the conclusion of the transaction, or that the fee was unclear in any way. Defendant contends that the "voluntary payment

doctrine" bars plaintiff's claim, because she knowingly paid the fee. As the Court of Appeals has explained, this "common-law doctrine bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law." *Dillon v. U-A Columbia Cablevision of Westchester, Inc.*, 100 N.Y.2d 525, 526 (2003) (granting motion to dismiss). See also *Morales v. Copy Right, Inc.*, 28 A.D.3d 440, 441, 813 N.Y.S.2d 731, 732-33 (2d Dept. 2006) ("The Supreme Court properly granted the defendants' motions to dismiss the complaint, as the plaintiffs' voluntary payment of the photocopying charges, without any alleged fraud or mistake of material fact or law, bars recovery of the payments under the 'voluntary payment doctrine.'"); *DRMAK Realty LLC v. Progressive Credit Union*, 133 A.D.3d 401, 403, 18 N.Y.S.3d 618, 621 (1st Dept. 2015) (dismissal proper because "the voluntary payment doctrine bars recovery of payments voluntarily made with full knowledge of the facts, in the absence of fraud or mistake of material fact or law. The onus is on a party that receives what it perceives as an improper demand for money to 'take its position at the time of the demand, and litigate the issue before, rather than after, payment is made.'"); *Hedley's, Inc. v. Airwaves Glob. Logistics, LLC*, 130 A.D.3d 872, 873, 15 N.Y.S.3d 84, 86 (2d Dept. 2015) ("The voluntary payment doctrine bars recovery of payments voluntarily made with full knowledge

of the facts, and in the absence of fraud or mistake of material fact or law."); *Utica Mut. Ins. Co. v. Am. Re-Ins. Co.*, 218 A.D.3d 1283, 193 N.Y.S.3d 594, 597, *rearg. den.*, 221 A.D.3d 1604, 198 N.Y.S.3d 487 (4th Dept. 2023) ("Although a 'mistake of material fact or law' is an exception to the voluntary payment doctrine, if a payment is made based upon a party's own lack of diligence, the voluntary payment doctrine will bar recovery.").

In response, plaintiff sets forth four reasons why the voluntary payment doctrine does not bar her claim. First, she argues that the voluntary payment doctrine is "an affirmative defense, the application of which 'may be inappropriate at the motion to dismiss stage.'" In support of this assertion, plaintiff cites only federal cases. A review of the cases cited above shows that many of them, including the seminal case in the Court of Appeals, do apply the voluntary payment doctrine on motions to dismiss.

Plaintiff next asserts that "even if the Court were to consider the voluntary payment doctrine at this juncture, it should conclude that it does not apply for violations of ACAL § 25.07(4)," because courts have refused to apply it "in cases alleging the imposition of statutorily unlawful fees under Real Property Law § 274-a(2)(a)" or in "cases of statutorily unlawful rent payments." In this case, however, the fees are not

"statutorily unlawful" per se, but are otherwise-allowable fees that were not disclosed timely.

Plaintiff's next argument against the application of the voluntary payment doctrine is that it "does not apply in cases like this one, where a Plaintiff is charged an unlawful fee, but did not know such fee was unlawful." Plaintiff further alleges that "because this inquiry turns on Plaintiff's knowledge, it is inappropriate to determine at the pleading stage." A review of the complaint shows that plaintiff does not allege a mistake of fact or law.

Even if she had made such an allegation, however, according to the complaint, plaintiff was well aware of the fee **before** she completed her purchase. As the Second Department has explained in granting another motion to dismiss, "the voluntary payment doctrine bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law. Here, no fraud or mistake is alleged." *Wells Fargo Bank, N.A. v. Burke*, 155 A.D.3d 668, 671, 64 N.Y.S.3d 228 (2d Dept. 2017). So too here, no fraud or mistake is alleged. Plaintiff chose to continue with her transaction, even after seeing the allegedly "eye-popping" \$12.50 per ticket fee. The Court thus dismisses the action in its entirety, based on the voluntary payment doctrine. *Beltway 7 & Properties, Ltd. v. Blackrock Realty Advisers, Inc.*, 167 A.D.3d 100, 104, 90

N.Y.S.3d 3, 6 (1st Dept. 2018) (motion to dismiss properly granted based on voluntary payment doctrine, noting that “the party that made the payment must give some indication that it “took steps to indicate that it was reserving its rights.”).

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
July 25, 2024



HON. LINDA S. JAMIESON
Justice of the Supreme Court

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