Talbi v Boulevard Taxi Leasing, Inc.

2012 NY Slip Op 30841(U)

April 3, 2012

Supreme Court, Queens County

Docket Number: 1577/11

Judge: Robert J. McDonald

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SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : **HON. ROBERT J. McDONALD** **IAS PART 34**
Justice

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SAMIR TALBI, individually and on behalf of all others similarly situated,

Plaintiff,

- against -

BOULEVARD TAXI LEASING, INC., MIKE MELLIS BROKERAGE, INC., MICHAEL MELLIS, STEVE GOUNARIS and JOHN DOES #1-10,

Defendants.

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Index No.: 1577/11

Motion Date: 1/5/12

Motion No.: 30

Motion Seq.: 1

The following papers numbered 1 to 8 read on this motion by defendants Boulevard Taxi Leasing Inc., Mike Mellis Brokerage, Inc., Michael Mellis, and Steve Gounaris for an order dismissing the complaint on the grounds of documentary evidence and the failure to state a cause of action, pursuant to CPLR 3211(a)(1) and (7).

	Papers Numbered
Notice of Motion-Affidavit -Exhibits(A-D)	1-4
Opposing Declaration	5-6
Reply Affirmation	7-8
Memorandum of Law	
Memorandum of Law	

Upon the foregoing papers this motion is determined as follows:

Plaintiff Samir Talbi commenced this purported class action for breach of contract, unjust enrichment and quantum meruit on January 11, 2011. The court's records reveal that plaintiff filed an amended complaint and a notice discontinuing the action against Sotirakis Coritsides on February 10, 2011. Defendants

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filed an answer on April 11, 2011, and served their amended answer on April 26, 2011. The amended answer, filed on April 28, 2011, interposed fifteen affirmative defenses and the first nine affirmative defenses pertain to the purported class action.

On April 6, 2011, defendants served plaintiff with a first notice for discovery and inspection. Plaintiff responded by serving objections and responses dated September 9, 2011. Plaintiff's counsel states that on October 6, 2011 defendants were served with plaintiff's first discovery demands, including interrogatories, a deposition notice, and document demand. Copies of these discovery demands have not been submitted. Defendants served the within motion on November 21, 2011.

Plaintiff Samir Talbi's first cause of action for breach of contract alleges that he entered into a "binding executory [sic] contractual agreement" with defendants for each shift he worked whereby he agreed to pay the lease fees in exchange for the use of a licensed taxi cab during a specified period. Plaintiff alleges that defendants breached the agreement by charging more than the Taxi and Limousine Commission maximum lease cap, charging for days on which drivers did not drive the taxi cab, overcharging for hybrid vehicles, allowing dispatchers to demand tips in order to obtain cabs, charging for damages and repair to vehicles, failing to provide a signed lease agreement to the drivers, and failing to provide a detailed receipt for the lease of the taxi cabs. Plaintiff seeks recession of the alleged unlawful portions of the executory agreement which was formed each time he drove a taxicab owned or controlled by the defendants, and seeks to recover the amounts retained in excess of the maximum lease cap.

The second cause of action for unjust enrichment incorporates the prior allegations and alleges defendants charged lease rates in excess of the rates permitted by the Taxi and Limousine Commission's Rules and Regulations, and seeks to recover unpaid compensation, interest, costs and reasonable attorney's fees.

The third cause of action for quantum meruit incorporates the prior allegations and alleges that defendants have failed to fully compensate the plaintiff for his labor, as he was overcharged for the lease of the taxicab, and seeks to recover unpaid compensation, interest, costs and reasonable attorney's fees.

Plaintiff, in his prayer for relief , seeks certification of the class; an award of monetary damages; interest; punitive

damages; injunctive relief; and costs, expenses and reasonable attorney's fees.

Defendants now seek an order dismissing the complaint. It is well established that on a motion to dismiss pursuant to CPLR 3211(a)(7), "the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *see Goshen v Mutual Life Ins. Co. Of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court's "sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail" (*Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see also *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d at 87-88; *High Tides, LLC v DeMichele*, 88 AD3d 954 [2011]; *Marist Coll. v Chazen Envtl. Servs., Inc.*, 84 AD3d 1181[2011]; *Sokol v Leader,* 74 AD3d 1180 [2010]; *Reiver v Burkhardt, Wexler & Hirschberg, LLP.*, 73 AD3d 1149 [2010]; *Tom Winter Assoc., Inc. v Sawyer,* 72 AD3d 803 [2010]; *Uzzle v Nunzie Court Homeowners Assn. Inc*. 70 AD3d 928 [2010]; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703 [2010]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (*see Morone v Morone*, 50 NY2d 481 [1980]; *Gertler v Goodgold*, 107 AD2d 481 [1985], affirmed, 66 NY2d 946 [1985]).

When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, *supra*). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (*see*, *id.*; *accord*, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:25, at 39)" (*Gershon v Goldberg*, 30 AD3d 372 [2006]; *Hispanic Aids Forum v Estate of Bruno*, 16 AD3d 294, 295 [2005]; *Sesti v N. Bellmore Union Free Sch. Dist.*, 304 AD2d 551, 551-552 [2003]; *Mohan v Hollander*, 303 AD2d 473, 474 [2003]; *Doria v Masucci*, 230 AD2d 764, 765 [1996], lv. to appeal denied, 89 NY2d 811 [1997]; *Rattenni v Cerreta*, 285 AD2d 636, 637 [2001]; *Kantrowitz & Goldhamer v Geller*, 265 AD2d 529 [1999]; *Mayer v Sanders*, 264 AD2d 827,

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828 [1999]; *Sotomayor v Kaufman, Malchman, Kirby & Squire*, 252 AD2d 554 [1998]).

"A motion to dismiss pursuant to CPLR 3211(a)(1) may be granted only where 'the documentary evidence that forms the basis of the defense [is] such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claims'" (*HSBC Bank USA, N.A. v Decaudin*, 49 AD3d 694, 695 [2008], quoting *Saxony Ice Co., Div. of Springfield Ice Co., Inc. v Ultimate Energy Rest. Corp.*, 27 AD3d 445, 446 [2006]; see *Leon v Martinez*, 84 NY2d at 88; *Uzzle v Nunzie Ct. Homeowners Assn., Inc.*, supra; *McMorrow v Dime Sav. Bank of Williamsburgh*, 48 AD3d 646 [2008]; *Sullivan v State of New York*, 34 AD3d 443, 445 [2006]; *Museum Trading Co. v Bantry*, 281 AD2d 524, 525 [2001]; *Nevin v Laclede Professional Prods.*, 273 AD2d 453, 453 [2000]). Affidavits submitted by a defendant in support of the motion, however, do not constitute documentary evidence (*Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2003]).

CPLR 3211 allows a plaintiff to submit affidavits but it does not oblige him or her to do so on penalty of dismissal (see *Rovello v Orofino Realty Co..*, 40 NY2d 633 [1976]). Such affidavits may be received for the limited purpose of remedying defects in the complaint but may not serve for purposes of determining whether there is evidentiary support for the pleadings (Id., at 40 N.Y.2d at 636; see also Leon v Martinez, 84 NY2d at 88; *Berman v Christ Apostolic Church Intern. Miracle*, 87 AD3d 1094 [2011]; *Kempf v Magida*, 37 AD3d 763 [2007]; *McGuire v Sterling Doubleday Enters., LP,* 19 AD3d 660, 661 [2005]).

CPLR § 902 provides that "[w]ithin sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained." This filing deadline is mandatory (*Shah v Wilco Systems, Inc.*, 27 AD3d 169, 173 [2005], lv. to app. dism. in part, den. in part, 7 NY3d 859, 857 [2006]). While class certification is an issue that should be determined promptly (see CPLR 902), a trial court has discretion to extend the deadline upon good cause shown (see CPLR 2004; *Rodriguez v Metropolitan Cable Communications*, 79 AD3d 841 [2010] *Argento v Wal-Mart Stores, Inc.*, 66 AD3d 930 [2009]), such as the plaintiff's need to conduct preclass certification discovery to determine whether the prerequisites of a class action set forth in CPLR 901 (a) may be satisfied (see *Fortune Limousine Serv., Inc. v Nextel Communications*, 35 AD3d 350, 352 [2006]; *Dunn v Consolidated Edison Co. of N.Y.*, 74 AD2d 816, 816-817 [1980]; *Galdamez v*

Biordi Constr. Corp.., 50 AD3d 357, 358 [2008]; see generally *Stern v Carter*, 82 AD2d 321 [1981]). "The purpose of preclass certification discovery is to ascertain the dimensions of the group of individuals who share plaintiff's grievance" (*Rodriguez v Metropolitan Cable Communications*, 79 AD3d at 842-843, quoting *Smith v Atlas Intl. Tours*, 80 AD2d 762, 764 [1981]; see *Gewanter v Quaker State Oil Ref. Corp.*, 87 AD2d 970 [1982]).

Plaintiff Talbi has neither moved to have the alleged class certified nor sought leave to extend the deadline for class certification. Plaintiff admittedly did not serve any discovery demands until October 6, 2011, and discovery is now stayed pending the determination of this motion (CPLR 3214[b]). Plaintiff has failed to establish that discovery is necessary in order to extend the deadline for class certification. Although the complaint's prayer for relief seeks certification of the class, in the absence of a motion by the plaintiff to either certify the class, or to extend the deadline for class certification, the court declines to extend a deadline. Therefore, that branch of defendants' motion which seeks to dismiss the class action is granted, and plaintiff's complaint will be treated as an individual action.

Defendant Michael Mellis, the President of Boulevard Taxi Leasing states in his affidavit that Boulevard leases medallions with taxicabs on a daily basis to independent drivers licensed by the Taxi and Limousine Commission. He states that all independent drivers are required to sign a daily lease agreement in order to be eligible to drive a taxicab owned by Boulevard, and if new leases are not signed on subsequent days the terms of the original lease apply. Mr. Mellis states that Mr. Talbi either signed a lease or worked under the terms of the lease he originally signed for each day that he drove a Boulevard owned taxicab. Mr. Mellis states that he never signed a lease in his individual capacity; that any lease signed by plaintiff was with Boulevard; and that he never required plaintiff or any other driver to pay him a tip. Mr. Mellis states that Boulevard's employee Steve Gounaris did not execute a lease with plaintiff in his individual capacity, nor did Gounaris require plaintiff to pay him a tip. Finally, Mr. Mellis states that Mike Mellis Brokerage Inc. is an entity handling the insurance coverage for the taxis and black cars and that it did not lease taxis to plaintiff or anyone else.

With respect to the first cause of action, defendants assert that any contract that existed was between plaintiff and Boulevard Taxi Leasing Inc. Defendants thus seek to dismiss the first cause of action as to Mike Mellis Brokerage, Inc, Michael

Mellis and Steve Gounaris on the grounds of lack of privity.

Plaintiff, in response to defendants discovery demands, produced copies of detailed receipts that he received from the defendants in connection with the leases of the taxicabs. Defendants thus assert that plaintiff's claim for breach of contract should be dismissed as to all defendants, as plaintiff cannot establish that he was not provided with detailed receipts. Defendants also assert that plaintiff's own documentary evidence fails to establish that he was required to work on holidays. Defendants further assert that plaintiff's allegations have no basis in fact, in that plaintiff's own documents establish that he was required to work seven days a week on only one occasion beginning October 10, 2010; that there are no records or documents reflecting that plaintiff was charged for days he did not work; that the Taxi and Limousine Commission does not require a written lease agreement, and that the defendants utilized a standard lease agreement that all drivers were required to sign in order to lease a taxicab. Defendants assert that plaintiff's claims are barred by documentary evidence.

Plaintiff's first cause of action clearly states a claim for breach of contract, and the documentary evidence submitted herein is insufficient to defeat plaintiff's claim. In view of the fact that plaintiff alleges that the defendants failed to provide him with a copy of the written lease agreement, it is not at all surprising that plaintiff in response to defendants' discovery demand has not produced the written agreement. Defendants, however, assert that plaintiff executed a written lease agreement. In the absence of the lease agreement the court is unable to determine whether the terms complied with the applicable regulations issued by the Taxi and Limousine Commission; whether the daily lease was extended for any period beyond the time period provided in the agreement; who were the parties to the lease and in what capacity the defendants may have executed the lease.

Although Boulevard Taxi Leasing provided plaintiff with detailed receipts for the leased vehicles, this does not defeat plaintiff's claim in its entirety, as plaintiff alleges that the amounts reflected in these receipts include improper charges and overcharges, in breach of the leasing agreement and the applicable regulations of the Taxi and Limousine Commission.

The statements made by Mr. Mellis in his affidavit with respect to Mr. Gounaris' alleged conduct lacks probative value, as Mellis lacks personal knowledge as to whether Mr. Gournaris ever solicited a tip from the plaintiff. In addition, as Mr.

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Mellis has failed to set forth his relationship to Mike Mellis Brokerage, Inc., the statements made in his affidavit on behalf of this entity lack probative value.

Defendants' second and third causes of action seek to recover damages for unjust enrichment and quantum meruit. "As a general rule, the existence of a valid and enforceable written contract governing a particular subject matter precludes recovery in quasi-contract on theories of quantum meruit and unjust enrichment for events arising out of the same subject matter" (*Marc Contr., Inc. v 39 Winfield Assoc., LLC*, 63 AD3d 693, 695 [2009]; see *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d, 382, 388 [1987]; *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]; *Grossman v New York Life Ins. Co.*, 90 AD3d 990 [2011]; *Yenrab, Inc. v 794 Linden Realty, LLC,* 68 AD3d 755, 758-759 [2009]). The theory of unjust enrichment lies as a quasi-contract claim. It is an obligation the law creates in the absence of any agreement (see *State of New York v Barclays Bank of N.Y.*, 76 NY2d 533, 540 [1990]).

Plaintiff, in his first cause of action alleges that between 2008 and 2010 defendants required plaintiff to lease a taxi cab on a daily, rather than a weekly basis. Defendants assert that plaintiff entered into a daily lease agreement with Boulevard Taxi Leasing, and that said lease, by its terms remained in effect after the daily time period ended. Defendants, however, have not submitted a copy of the lease agreements, and have not established the terms of any oral lease agreement. Defendants, therefore, have failed to establish that a valid and enforceable contract exists between the parties, which was in effect for the entire two year period. The court, therefore, is unable to determine at this time whether the third cause of action is repetitive of the first cause of action for breach of contract.

Accordingly, defendants' motion to dismiss the complaint is granted to the extent that plaintiff's claims based upon a class action are dismissed, and is denied in all other respects.

Dated: April 3, 2012
Long Island City, NY

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ROBERT J. McDONALD
J.S.C.