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

----------x

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

Plaintiffs Decision and order

- against - Index No. 507562/20

DAVID TAUBER and AVIGDOR KAHAN, December 21, 2020

Respondent,

----------x

PRESENT: HON. LEON RUCHELSMAN

The defendants have both moved seeking to dismiss the complaint on the grounds it fails to state any cause of action. The plaintiffs oppose the motion and have cross-moved seeking a default. That motion is opposed as well. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

According to the Amended Verified Complaint between 2013 and 2014 the defendants sold airline miles to the plaintiffs for payments exceeding $500,000. The Amended Verified Complaint alleges that the defendants possessed so many miles by obtaining promotional miles paid by community members who switched to Star Energy an energy billing services company. Specifically, the complaint alleges that "Defendants fraudulently applied for the airline miles offer from Star Energy by using the same United Airlines MileagePlus reward account number for many different names and accounts, misrepresenting the true name of the owner of the accounts, so as to have them deposit multiple times the

25,000 incentive miles into the same United account" (see, Amended Verified Complaint, ¶9). The Amended Verified Complaint asserts that one account with many miles is more advantageous than numerous accounts with fewer miles and that the defendants then sold these miles to plaintiff knowing the miles were fraudulently obtained. Indeed, 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 has alleged causes of action for breach of contract, breach of implied contract, unjust enrichment, fraud, loss of value and prima facie tort.

The defendants have now moved seeking to dismiss the lawsuit on the grounds the plaintiffs assumed the risk the miles could be rejected by the airline and no causes of action can accrue against the defendants. The plaintiffs argue there are questions of fact that must be explored that foreclosure dismissal at this stage of the litigation.

Conclusions of Law

It is well settled that a "motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, AG Capital Funding

Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]). Whether the third party complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

It is well settled that to succeed upon a claim of breach of contract the plaintiff must establish the existence of a contract, the plaintiff's performance, the defendant's breach and resulting damages (Harris v. Seward Park Housing Corp., 79 AD3d 425, 913 NYS2d 161 [1st Dept., 2010]). In this case the plaintiffs concede the defendants sold their miles and that the plaintiffs were paid accordingly. Rather, the plaintiffs argue the defendants committed wrongdoing because they "fraudulently applied for the airline miles offer from Star Energy by using the same United Airlines MileagePlus reward account number for many different names and accounts, with the intention to pool the miles into one account. Furthermore, Defendants misrepresented the true name of the owners of the accounts, so as to have Star Energy deposit multiple times the 25,000 miles into the same United Airlines account" (see, Affirmation in Opposition, ¶11). However, these allegations do not establish a claim for breach of contract. The agreement between the plaintiffs and defendants

mandated the defendants deliver miles to the plaintiffs and the plaintiffs pay for such miles. The mere fact the miles were subsequently dishonored by United Airlines does not establish any breach of contract committed by the defendants. The plaintiffs assert the defendants breached the contract "by failing to deliver and/or make available such airline miles, in that the miles were cancelled by United Airlines and its affiliates, as such Plaintiffs did not received what they paid for" (see, Affirmation in Opposition, ¶40). However, it cannot seriously be asserted that plaintiffs did not receive the miles they paid for, indeed they surely did. Rather, the plaintiffs contend the miles were dishonored. That dishonoring by the airline itself cannot establish a breach of contract on the part of the defendants.

Moreover, it is well settled that a plaintiff may file an action for quantum meruit as an alternative to a breach of contract claim (see, Thompson v. Horowitz, 141 AD3d 642, 37 NYS3d 266 [2d Dept., 2016]). "To be entitled to recover damages under the theory of quantum meruit, a plaintiff must establish: "(1) the performance of services in good faith, (2) the acceptance of services by the person or persons to whom they are rendered, (3) the expectation of compensation therefor, and (4) the reasonable value of the services rendered" (F and M General Contracting v. Oncel, 132 AD3d 946, 18 NYS3d 678 [2d Dept., 2015]). In this case the defendants did not perform any services at all. The

contract required the defendants to deliver miles in exchange for payment. Since the defendants did not perform any service on behalf of the plaintiffs the cause of action for implied contract is inapplicable in this case. Therefore, the motion seeking to dismiss the causes of action for breach of contract and breach of implied contract is granted.

Turning to the motion seeking to dismiss the cause of action for unjust enrichment, it is well settled that a claim of unjust enrichment is not available when it duplicates or replaces a conventional contract or tort claim (see, Corsello v. Verizon New York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]). As the court noted "unjust enrichment is not a catchall cause of action to be used when others fail" (id). The court has already concluded there was a viable contract between the parties. Consequently, the motion seeking to dismiss the claim for unjust enrichment is granted.

Turning to the claim of fraud, it is well settled that to succeed upon a claim of fraud it must be demonstrated there was a material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages (Cruciata v. O'Donnell & Mclaughlin, Esqs,149 AD3d 1034, 53 NYS3d 328 [2d Dept., 2017]). These elements must each be supported by factual allegations containing details constituting the wrong alleged (see, JPMorgan

Chase Bank, N.A. v. Hall, 122 AD3d 576, 996 NYS2d 309 [2d Dept., 2014]). Moreover, it is well settled that to successfully plead fraud, the fraud must be pled with specificity from which intent or reasonable reliance might be inferred (see, CPLR §3016(b), Goldstein v. CIBC World Markets Corp., 6 AD3d 295, 776 NYS2d 12 [1st Dept., 2004]).

The crux of plaintiffs fraud claim is that the plaintiffs fraudulently obtained the miles they sold thus they should have known such miles would be dishonored by the airline. The plaintiffs assert the "defendants represented the miles were good and usable when in fact they knew the miles were not, because they had been unlawfully pooled into one account, by fraudulently applying for the airline miles offer from Star Energy by using the same United Airlines MileagePlus reward account number for many different names and accounts, with the intention to pool the miles into one account" (see, Affirmation in Opposition, ¶91).

However, for the plaintiffs to allege they justifiably relied upon any misrepresentation of the defendants they must demonstrate the defendants controlled the outcome of such misrepresentation and the misrepresentation concerned a fact or event the defendants knew would not occur (F.A.S.A. Construction Corp., v. Degenshein, 47 AD3d 877, 850 NYS2d 612 [2d Dept., 2008]). Thus, for example in F.A.S.A., the plaintiff purchased property from the defendant and the contract of sale contained a

rider that stated the seller represented that subdivision maps had been filed with the county clerk's office containing at least 20 approved lots for building single family residences. Upon the purchase of the property the plaintiff was informed by the county that the zoning ordinances has been amended and that the property could not include 20 such residences. The court dismissed fraud claims filed against the seller. The court noted that even if the seller misrepresented 20 residences could be built on the property such a representation "was neither an affirmation of an event which, when made, the defendants knew would not occur, nor an assertion of facts exclusively within the defendants' knowledge" (id). Further, the court explained that the "decision of the Planning Board to invalidate the subdivision map, made after the closing on the sale of the property, was a matter completely beyond the defendants' control" (id).

Likewise, in this case, the decision to accept or reject the miles was solely within the discretion of the airline. Indeed, Rule 10 of the United Airlines MileagePlus Program specifically prohibits purchasing frequent flyer miles on the secondary market that were in fact purchased in this case. Moreover, the MileagePlus Program rules specifically permit the airline, in its "discretion" to dishonor any tickets purchased with such miles (see, Mileageplus Rules for the MileagePlus Program, Rule 2). In fact, according to the Verified Amended Complaint the airline

dishonored "some or all" of the miles sold to the plaintiffs. Thus, clearly, whether the miles would be honored by the airline had nothing whatsoever to do with the nature of the acquisition of the miles by the defendants, but rather, by the sole discretion of the airline. The Verified Amended Complaint (¶11) does assert that "upon information and belief" United Airlines dishonored the miles because the miles were fraudulently obtained. However, as noted, the airline, and no other party, prohibited the use of secondary miles altogether. Thus, the fraudulent nature of the procurement of the miles, even if true, is not the cause of the airline's decision to dishonor the miles. The reason, as stated in the MileagePlus Rules is because the use of such miles is prohibited. The airline's apparent arbitrary decision wether to accept or dishonor secondary miles is their decision alone based upon factors not presented in this motion. The fact the Verified Amended Complaint asserts that some miles were accepted by the airline further undermines plaintiff's argument that the defendants committed fraud by selling such tainted miles. Rather, the risk the miles would be dishonored by the airline was solely the risk of the plaintiff. Therefore, the motion seeking to dismiss the fraud claim is granted.

There is no independent cause of action entitled 'loss of value' thus the fifth cause of action is dismissed.

Concerning the sixth cause of action, to establish a cause

of action for prima facie tort it must be demonstrated the defendant acted with the intent to inflict harm, resulting in special damages, without excuse or justification, by acts which are otherwise legal (Diorio v. Ossining Union Free School District, 96 AD3d 710, 946 NYS2d 195 [2d Dept., 2012]). Further, the complaint must allege the defendant acted with malice or 'disinterested malevolence' (Simaee v. Levi, 22 AD3d 559, 802 NYS2d 493 [2d Dept., 2005]). In addition, the special damages must be pled with particularity, wherein actual losses must be identified and casually related to the alleged tortious act (Epifani v. Johnson, 65 AD3d 224, 882 NYS2d 234 [2d Dept., 2009]). In this case, the complaint does not adequately allege any special damages. Indeed, the damages sought in the prima facie tort cause of action is the same amount sought as compensatory damages in the 'Wherefore' clause of the complaint. Therefore, the plaintiff has failed to allege a prima facie tort and consequently the motion seeking to dismiss this cause of action is granted.

Therefore, based on the foregoing the entire complaint is dismissed. The cross-motion seeking a default is now moot and is denied.

So ordered.

ENTER:

DATED: December 21, 2020
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC