Geller v RailEurope
2010 NY Slip Op 34064(U)
November 15, 2010
Supreme Court, New York County
Docket Number: 651139/2010
Judge: Melvin L. Schweitzer

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

PRESENT: MELVIN L. SCHWEITZER J.S.C. **PART** 45

Index Number : 651139/2010

GELLER, MARK A.

vs

RAILEUROPE

Sequence Number : 001

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ **Yes** ☐ **No**

Upon the foregoing papers, it is ordered that this motion by defendant to dismiss GRANTED per the attached Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: November 10, 2010

MELVIN L. SCHWEITZER J.S.C.

Check one: ☑ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

☐ **SUBMIT ORDER/JUDG.** ☐ **SETTLE ORDER /JUDG.**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

MARK A. GELLER, on behalf of himself and all individuals similarly situated,	:	
Plaintiff,	:	Index No. 651139/2010
-against-	:	DECISION AND ORDER
RAIL EUROPE, INC.,	:	Sequence No. 001
Defendant.	:	

MELVIN L. SCHWEITZER, J.:

In May 2010, plaintiff Mark A. Geller, a resident of Los Angeles, California, purchased two round trip tickets on France's highspeed TGV train from Paris to Cannes. He bought the tickets from defendant, RailEurope, via the internet. The tickets included vouchers for lunch on the train. While traveling to Cannes, however, he was told TGV no longer recognized the lunch vouchers. Mr. Geller now seeks to turn his personal travel aggravation into a broad consumer class action lawsuit against RailEurope. Defendant moves pursuant to CPLR 3211 (a) (1) and (7) to dismiss the complaint contending the claims for negligence, fraud and unjust enrichment do not state a cause of action and the claims under California Consumer Legal Remedies Act and California Business and Professional Code are barred by the parties' choice of New York law; and the complaint does not plead a valid class action.

The court grants defendant's motion.

The following facts are taken from the complaint in this case and two documents contained on RailEurope's website. RailEurope, located in White Plains, N.Y., is the largest North American distributor of European rail products. ¶ 3. It offers for sale and sells products

and services in connection with European train travel on approximately 35 European railroads to residents of the United States on-line via www.raileurope.com. RailEurope is a privately-held corporation. The majority of its shareholders are French National Railway Corporation Société Nationale des Chemins de fer Français (SNCF) and Swiss Federal Railways. ¶ 3. The complaint alleges that RailEurope earns its income by charging fees for booking, shipping and other services and that it generates revenue unlawfully by charging Americans additional monies for products and services which do not exist. ¶¶ 6-7. The complaint alleges as follows:

> In or around May 2010 , Mr. Geller purchased from RailEurope two first class refundable tickets for round trip travel from Paris to Cannes on the high speed TGV train operated by SNCF for $536 per ticket. The purchase price included four "non-refundable" meal vouchers (two per ticketed person, each way), at approximately $28 each, or $56 per person. RailEurope does not offer to sell these tickets without the meal vouchers, but instead sells them only as a bundled product (train ticket plus meal voucher).
>
> When Mr. Geller presented the meal vouchers on the TGV, he was told that the vouchers are not valid, and have not been accepted for well over a year, on the TGV. Rather, meals could be purchased on the train for approximately half the amount Mr. Geller was charged by RailEurope for each worthless meal voucher. Although Mr. Geller requested a refund from RailEurope for the worthless meal vouchers, RailEurope has not provided a refund to Mr. Geller.

¶¶ 8-9. The complaint also alleges that numerous other customers have complained that RailEurope sells for an additional cost products and services of no value and that "numerous other customers" have complained about the following deceptive sales practices:

- selling "first class" tickets on trains which do not have first class seating;
- selling children's tickets on trains which do not require tickets for children; and
- charging approximately $35 for "reserved seating" on trains where reserved seating is provided to all ticket holders at no extra cost.

¶ 10. As a result of these deceptive practices, unsuspecting Americans have paid more for European rail travel than they otherwise would have paid had they known that RailEurope's representations were false and misleading and omitted material information concerning the European rail travel products and services sold by RailEurope. ¶ 13.

Plaintiff brings this action as a class action pursuant to CPLR Article 9 on behalf of himself and all others similarly situated. The complaint defines the class as:

> All persons who during the period July 30 2004 through the present (the "Class Period"), have overpaid RailEurope in connection with European train travel because of the following: (a) the products or services sold by RailEurope do not exist or have no value on the European railways; (b) the products or services sold by RailEurope are provided free of charge by the European railways; or (c) RailEurope has made false representations concerning ticket availability at lower prices.

The complaint alleges that "[p]laintiff believes" there are hundreds of members of the Class as described above dispersed throughout the country, they are so numerous that joinder of all class members is impracticable, and there are common questions of law and fact as to all members of the Class and predominate over any questions affecting solely individual members of the Class. The complaint alleges that the questions of law and fact common to the class are:

a. Whether RailEurope made material misrepresentations and omissions to plaintiff and the other members of the Class concerning products and services available for purchase through RailEurope in connection with train travel in Europe.

b. Whether RailEurope sells products and services which do not exist and/or have no value;

c. Whether RailEurope engages in deceptive up-selling of train tickets;

d. Whether RailEurope committed negligence;

e. Whether RailEurope committed fraud;

f. Whether, with respect to plaintiff and the other members of the California Subclass, RailEurope violated the California consumer protection statutes by committing the deceptive business practices alleged herein;

g. Whether RailEurope has been unjustly enriched; and

h. Whether the members of the Class have sustained damages, and if so, what is the proper measure of such damages.

The complaint alleges that since the damages suffered by individual members of the Class may be relatively small, the expense and burden of individual litigation make it impossible for the members of the class individually to redress the wrongs done to them, and that the class is readily definable and prosecution of this action as a class action will eliminate the possibility of repetitious litigation. ¶¶ 14-23.

In support of its motion to dismiss, defendant refers the court to two provisions contained on RailEurope's website (collectively referred to as Terms and Conditions) which, by their terms, anyone purchasing any products and services must acknowledge and accept as a condition to such purchase. *See* Exs. 1 and 2 to Affirmation of John Ansbro in Support of Defendant RailEurope Inc.'s Motion to Dismiss Pursuant to Rule 3211, dated October 1, 2010 (Supporting Affirmation). Of particular relevance is the following provision of the Terms and Conditions in Ex. 1:

> Welcome to the RailEurope.com Site. The following are terms of a legal agreement between you and Rail Europe, Inc. ("Rail Europe", "we", "us", or "our"). By accessing, browsing, using and/or submitting to the RailEurope.com site ("RailEurope.com Site"), you acknowledge that you have read, understood, and agree, to be bound by these terms and any amendments thereto (the "Terms

> and Conditions"), the terms of our Privacy Policy, and the terms and conditions of the travel products and services sold on the RailEurope.com Site, which are incorporated by reference into these Terms and Conditions, and to comply with all applicable laws and regulations. If you do not agree to these Terms and Conditions, do not use the RailEurope.com Site.

Supporting Affirmation, Ex. 1, p 1. Defendant argues that plaintiff's acceptance of the Terms and Conditions constitutes a contract between plaintiff and defendant, and that, at most, the complaint describes what would be a basic breach of contract claim arising from plaintiff's allegedly dishonored meal vouchers. Defendant RailEurope, Inc.'s Memorandum of Law in Support of its Motion to Dismiss the Complaint Pursuant to Rule 3211 (Moving Memorandum), p 4; Defendant's Reply Memorandum of Law in Further Support of its Motion to Dismiss (Reply Memorandum), p 3. Plaintiff does not, however, purport to bring a breach of contract action among the five Counts of his complaint.

Discussion

On a motion to dismiss pursuant to CPLR 3211, the court should liberally construe the complaint. *See 511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002). This court must "accept the facts as alleged in the complaint as true [and] accord Plaintiffs the benefit of every possible favorable inference." *Leon v Martinez*, 84 NY2d 83, 87 (1994). Plaintiff's motion must be denied if from the pleadings' "four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 (2001). Dismissal under CPLR 3211 (a) is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon*, 84 NY2d at 88.

Negligence Claim

The complaint pleads negligence as the first cause of action asserting that defendant "was duty bound to provide the products and services it represented to plaintiff and the other members of the class." Complaint, ¶ 26. As noted, defendant contends that the Terms and Conditions govern the transaction about which plaintiff complains. Defendant asserts that the dispute is one involving a breach of contract and plaintiff has merely attempted to disguise a contract claim as a tort claim for negligence. Moving Memorandum, p 17. Plaintiff counters that the Terms and Conditions are unenforceable as a contract between the parties for lack of consideration. Plaintiff's Memorandum of Law in Opposition to Defendant RailEurope, Inc.'s Motion to Dismiss the Complaint Pursuant to Rule 3211 (Opposition Memorandum), p 9. Plaintiff argues that the extensive disclaimer in the Terms and Conditions expressly disclaims any responsibility on defendant's part, denies liability for mistakes and does not warrant the accuracy of any information about the products and services it sells via its website. *Id.* at 9-11 (quoting from the Terms and Conditions). As plaintiff sees it, this extensive disclaimer results in *no* obligations on the part of defendant so that it has given no consideration in exchange for the money it makes as a booking agent. *See e.g. Baker's Aid v Hussman Foodservice Co.*, 730 F Supp 1209, 1219 (EDNY 1990) ("It is hornbook law that a contract which does not require performance by each party is unenforceable for lack of consideration.") (*citing Joneil Fifth Ave. Ltd. v Ebeling & Reuss Co.*, 458 F Supp 1197, 1200 (SDNY 1978)). The court does not agree. The complaint alleges that plaintiff paid $536 to obtain train tickets and meal vouchers from RailEurope and that RailEurope, in turn, was obligated to deliver those tickets and vouchers which, in fact, it did. The Terms and Conditions also obligate defendant to refund the cost of the purchased products

and services under the conditions set forth therein. Accordingly, the Terms and Conditions do not fail for want of consideration. The relationship between plaintiff and defendant is one arising out of a contract in accordance with the Terms and Conditions, and plaintiff's claim is based on defendant's alleged failures to perform under the parties' agreement by allegedly failing to deliver valid meal vouchers for which plaintiff paid defendant. *See Megaris Furs, Inc. v Gimbel Bros., Inc.*, 172 AD2d 209, 211 (1st Dept 1991) ("negligent performance of [a] contract [is] a cause of action which simply does not exist."). As the Court of Appeals has explained, "[i]t is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." *Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 389 (1987). Such a duty must spring from circumstances extraneous to, and not constituting elements of, the contract. *Id.* at 389. "Merely charging a breach of a 'duty of due care,' employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim." *Id.* at 390; *Megaris*, 172 AD2d at 211. Accordingly, the court dismisses the negligence claim.

Fraud

> The complaint attempts to plead a fraud cause of action as follows:
>
> RailEurope intended to and did make material misrepresentations and omissions to Plaintiff and the other members of the Class via www.raileurope.com that by paying additional monies to RailEurope in connection with their purchase of tickets for European rail travel, they would be entitled to additional products and services that they otherwise would not be entitled to receive, including, but not limited to, meal vouchers for meals, first class cabins, seat reservations, and train tickets for child travel. At all relevant times, RailEurope knew or should have known that these additional products and services either did not exist and/or were worthless or were otherwise provided free of charge by the European railways.

> At all relevant times from July 30, 2004 to the present, RailEurope also intended to and did make material misrepresentations and omissions to Plaintiff and the other members of the Class via www.raileurope.com that certain classes of lower priced train tickets were not refundable or were not available for sale, thus forcing consumers to purchase higher priced tickets.

Complaint, ¶¶ 31-32.

The fraud claim lacks the detail required by CPLR 3016 (b). *See Orix Credit Alliance, Inc. v R.E. Hable Co.*, 256 AD2d 114, 116 (1st Dept 1998); *Megaris*, 172 AD2d at 210. The complaint contains no specificity as to which of the 35 railroads is at issue with respect to any product, or any detail concerning any alleged misrepresentation (with the sole exception of plaintiff's one trip aboard the TGV). Rather, it states in conclusory fashion that "customers have complained" about various practices not experienced firsthand by plaintiff. This unsubstantiated innuendo, devoid of factual substance demonstrating an actual fraudulent statement and reliance thereon, is insufficient to state a claim. *See Orix*, 256 AD2d at 116 (rejecting fraud claim when plaintiff "offered nothing but general second-hand or third-hand rumors of [defendant's] misconduct" leaving defendant unable to determine details).

In the Terms and Conditions defendant disclaimed responsibility and liability arising out of the "representations" that plaintiff relies upon as essential to his fraud claim. When a contracting party expressly disclaims the existence of, or reliance upon, specific representations, "that party will not be allowed to claim that he was defrauded into entering the contract in reliance on those representations." *Mfrs. Hanover Trust Co. v Yanakas*, 7 F3d 310, 315 (2d Cir. 1993) (*citing Citibank, N.A. v Plapinger*, 66 NY2d 90, 94-95 (1985)); *see also Bd. of Mgrs. of Chelsea 19 Condominium v Chelsea 19 Assocs.*, 73 AD3d 581 (1st Dept 2010).

The fraud count alleges that RailEurope "knew or should have known" that "products and services" offered on its website, "including, but not limited to meal vouchers for meals, first class cabins, seat reservations, and train tickets for child travel . . . did not exist or were worthless. . . ." It further alleges that RailEurope knew or should have known, and failed to disclose, that lower-class seats were available. But, like all customers who purchase tickets on the RailEurope website, plaintiff had to and did acknowledge and agree that: (i) RailEurope is solely a reseller of the products of others, and (ii) RailEurope is not responsible for errors and omissions with respect to these goods, the price information provided for those goods, or the failure of any railroad operators to honor the ticket purchased. This disclaimer bars plaintiff's fraud claim because it specifically discloses the third-party reseller relationship, disclaims responsibility for inaccuracies in pricing on the site, and refutes claims to liability based upon any railroad provider's failure to honor products purchased on the RailEurope site. Because the Terms and Conditions expressly and specifically communicates the disclaimer, plaintiff cannot now ignore his contractual agreement without being "guilty of deliberately misrepresenting [his own] true intention." *Plapinger*, 66 NY2d at 94. The fraud claim thus fails and is dismissed.

Unjust Enrichment

Plaintiff's unjust enrichment claim is premised on his contention that he cannot assert a breach of contract claim due to the failure of consideration. The court has rejected that contention finding that plaintiff's purchase of the tickets and vouchers on the RailEurope website pursuant to the Terms and Conditions was in furtherance of and governed by a contract between the parties. "[T]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same

subject matter." *Clark-Fitzpatrick*, 70 NY2d at 388; *Singer Asset Fin. Co. v Melvin*, 33 AD3d 355, 358 (1st Dept 2006) ("Plaintiff's recovery for unjust enrichment is barred by the existence of a valid and enforceable written contract."). Here, RailEurope and plaintiff (and any other potential plaintiffs) have a binding contractual relationship. Plaintiff's action, if any, lies in breach of contract, and not in the quasi-contractual remedy of unjust enrichment. Accordingly, the court dismisses the unjust enrichment claim.

California Law Claims

Pursuant to the Terms and Conditions, plaintiff agreed that New York law governs his relationship with RailEurope. New York courts enforce such choice of law agreements. *See Scientific Holding Co., Ltd. v Plessey Inc.*, 510 F2d 15, 22 (2d Cir. 1974) (applying New York law) ("When a contract contains a choice of law provision, the law of the state chosen by the parties will be applied to any issue which the parties could have resolved by an explicit provision in their contract.") (*citing* Restatement (Second) of Conflict of Laws § 187 (1971)). These principles are applicable here where plaintiff attempts to assert California state-law consumer protection claims when the contract specifies New York law. *See DeJohn v The .TV Corp. Intern.*, 245 F Supp 2d 913, 922 (ND Ill 2003), where the court dismissed claims under the Illinois consumer protection statutes brought by an Illinois plaintiff, despite an explicit choice of New York law in the parties' contract. The court held:

> Here, the parties agreed that New York law would govern any dispute arising under the . . . Agreement. Although the contract does not explicitly say that New York law will apply to a fraud or deceptive practices act claim, such a provision could have been included. Accordingly, the court will respect the parties' choice of New York law. This means that DeJohn cannot pursue claims based on non-New York law, so the portions of Counts II and III directed at [defendant] must be dismissed.

Id. Accordingly, counts III and IV of the complaint are dismissed.

Class Action Allegation

Under CPLR § 901 (a), a class action may lie where the complaint satisfies all of the following prerequisites:

> (1) the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
>
> (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (4) the representative parties will fairly and adequately protect the interests of the class; and
>
> (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Where a complaint, on its face, fails to satisfy the class action requirements of CPLR § 901 (a), it may be dismissed pursuant to CPLR 3211 (a)(7). *Wojciechowski v Republic Steel Corp.*, 67 AD2d 830, 830-31 (4th Dept 1979). Specifically, putative class action complaints may be dismissed where the claims alleged would require individual investigation and proof, where they must be decided separately with respect to each individual, and where questions of law and fact affecting particular class members would not be common to the class proposed. *Id.*; *see also Williams v Blum*, 93 AD2d 755, 755 (1st Dept 1983) (class action complaint dismissed under CPLR § 3211 for failure to meet the class action requirements of CPLR § 901 (a)); *Baytree Capital Assoc. v AT&T Corp.*, 10 Misc 3d 1053 (A), 2005 WL 3163921 (NY Sup Ct May 31, 2005) (same, *citing Wojciechowski*).

Here, common questions of fact among the allegations of the complaint do not predominate over individual questions affecting individual class members. The proposed class would include customers from across the United States who purchased a variety of rail tickets and services, in any number of combinations and packages, over a period of six years, for use on 35 different railroad companies throughout Europe. There is no allegation in the complaint that RailEurope made any uniform representation upon which the class members commonly relied to their detriment. That is because the complaint pleads facts which involve potentially thousands of different representations made with respect to thousands of different products, sold by 35 different companies, and which were purchased by thousands of different customers, each for their own individual reasons. Indeed, the class action allegations of the complaint do not even purport to rely on a breach of contract for failure to recognize lunch vouchers such as those plaintiff purchased with his tickets. Thus, the complaint does not, and cannot, meet the requirement of CPLR § 901 (a)(2). Even assuming the complaint could be said to plead a valid fraud claim (which, as noted, the court has found not to be the case), individual trials would be required to determine (i) whether each putative plaintiff was exposed to an alleged misrepresentation at all, and (ii) whether that plaintiff relied on the alleged misrepresentation. *Id.*; *see also Hazelhurst v Brita Products Co.*, 295 AD2d 240, 241-242 (1st Dept 2002) ("[T]he need for particularized proof of reliance and resulting injury upon Brita's alleged misrepresentations about its products precludes certification since individual issues, not common issues of the class, predominate. . . . [R]eliance may not be presumed where, as here, a host of individual factors could have influenced a class member's decision to purchase. . . .") (internal citations omitted); *Cornell Univ. v Dickerson*, 100 Misc 2d 198, 203-04 (Sup Ct Tompkins Cty

June 29, 1979) (dismissing class action allegations under CPLR 3211 where "there is no allegation or proof that the services afforded [potential plaintiffs] were identical," and plaintiff failed to show "any one misrepresentation, or group of misrepresentations, or common thread that may be applicable to substantially the entire group."); *Kleinberg v Frankel*, 89 AD2d 556, 557 (2d Dept 1982). The complaint here does not allege that RailEurope engaged in a single course of fraudulent or misleading conduct upon which the alleged class members commonly relied. Instead, it contemplates multiple, different representations to different class members that allegedly harmed each in different ways. *See id.*; *see also Baytree*, 809 NYS2d at 480 (the "broadly defined" class "lack[ed] commonality with respect to the specific fraudulent conduct with which each individual putative class member's service was changed improperly or illegally.").

> The defined class includes all persons who, during the past six years:
>
> have overpaid RailEurope in connection with European train travel because of the following: (a) the products or services sold by RailEurope do not exist or have no value on the European railways; (b) the products and services sold by RailEurope are provided free of charge by the European railways; or (c) RailEurope has made false representations concerning ticket availability at lower prices.

Compl. ¶ 14. These generalities contemplate innumerable representations and/or "courses of conduct" by RailEurope, as well as innumerable sales transactions each with its own set of facts and circumstances.

Further, section 901 (a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." CPLR § 901 (a)(3). *See Small v Lorillard Tobacco Co., Inc.*, 94 NY2d 43, 54 (1999); *Hazelhurst*, 295 AD2d at 242 (class certification reversed by First Department where named plaintiffs' claims differed from those of

other class members). The complaint does not allege plaintiff to be typical of the purported class. *See Alix v Wal-Mart Stores, Inc.*, 16 Misc 3d 844, 858, 838 (Sup Ct Albany Cty June 11, 2007). In that case, the putative class action plaintiffs alleged that they were forced to work "off the clock," but the complaint also asserted claims on behalf of the class arising from four other work practices that did not affect the proposed representative plaintiffs. *Id.* The court denied class certification, holding that "[a]s plaintiffs' individual claims do not encompass many of those which plaintiffs seek to advance on behalf of the class, it cannot be said that the claims of the representative parties are typical of those of the class." *Id.* at 859. This rule requires dismissal of plaintiff's class allegations here.[1]

To summarize, there is a single reason why the complaint is dismissed: plaintiff's attempt to turn a sows ear into a half dozen silk purses. Plaintiff's attempt to convert what, at most, could be a breach of contract action into three common law tort and two California statutory law claims, as well as a class action, does not withstand analysis. RailEurope communicated on its website an offer in the form of the Terms and Conditions. See Supporting Affirmation, Ex. 1, p 1, *supra*. Plaintiff accepted defendant's offer by moving his computer's cursor to the "I agree" icon and clicking on it. At that point a contract was formed and then plaintiff purchased the TGV tickets and vouchers. *See e.g. Hines v Overstock.com, Inc.*, 380 Fed Appx 22, 2010 WL 2203030 at *24 (2d Cir 2010) (contract formed when the plaintiff entered website since the site's terms and conditions stated that "[e]ntering the Site will constitute your acceptance of these Terms and Conditions" provided defendant proves plaintiff had "an opportunity to see the terms

[1] In light of the foregoing, the court need not address defendant's contention that plaintiff waived his right to assert a class action suit under the Terms and Conditions.

and conditions prior to 'accepting' them by accessing the website"); *see also Moore v Microsoft Corp.*, 293 AD2d 587 (2d Dept 2002) (held that a contract was formed since the terms and conditions of the program were "prominently displayed" on the user's computer screen before the program could be installed and since the user had an opportunity to read them and was required to indicate assent to the terms and conditions by clicking on the "I agree" icon).

Plaintiff does not have a cause of action for negligence, fraud, unjust enrichment or for violation of California law. He has not purported to bring a claim for breach of contract. Nor can plaintiff convert a breach of contract claim such as he might have into the wide-ranging consumer fraud class action he purports to bring here.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss the complaint is granted.

Dated: November 15, 2010

ENTER:

J.S.C.