| **El-Nathal v FA Mgt., Inc.** |
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| 2013 NY Slip Op 33885(U) |
| March 11, 2013 |
| Supreme Court, Queens County |
| Docket Number: 701569/12 |
| Judge: Orin R. Kitzes |
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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES,
Justice

Part 17

HASSAN EL-NATHAL, individually and on behalf of all others similarly situated,

Plaintiff,

- against -

FA MANAGEMENT, INC.,

Defendant.

Index No. 701569/12
Motion Date: 11/21/12
Motion Seq. No. 1



The following papers numbered 1 to 9 read on this motion by defendant FA Management, Inc. for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against it

| | Papers Numbered |
|---|---|
| Order to Show Cause - Affidavits - Exhibits | |
| Notice of Motion - Affidavits - Exhibits | 1-2 |
| Answering Affidavits - Exhibits | 3-4 |
| Reply Affidavits | 5 |
| Memoranda of Law | 6-9 |

Upon the foregoing papers it is ordered that the motion is granted.

I. Background

Plaintiff Hassan El-Nahal alleges the following: He has been a licensed New York City taxi driver since 1994. From 2009 to 2011, he leased a taxicab and a medallion from defendant FA Management, which "controls" 75 medallions and which operates out of a garage in Astoria, Queens. The rules of the New York City Taxi and Limousine Commission (TLC) impose a cap on the amount a taxi medallion owner, broker, or agent can charge a driver for the lease of a taxi medallion for daily leases and weekly leases. At the relevant time, the rules of the TLC fixed the lease cap at (1) $105 for all twelve hour day

shifts, (2) $115 for the twelve hour night shift on Sunday, Monday, and Tuesday, (3) $120 for the twelve hour night shift on Wednesday, (4) $129 for the twelve hour night shift on Thursday, Friday, and Saturday, and (5) $666 for any weekly shift of one week or longer. The TLC rules also prohibited the lessor from charging the lessee additional sums with certain exceptions, one of those being for "[a] credit card pass-along no greater than five percent (5%)" of the total amount paid by credit card."

The plaintiff further alleges : He began to drive for defendant FA in 2007, and, until May, 2009, the defendant charged him a weekly rate of $690 ( $666 plus a "shift fee" of $34). In May, 2009, the company owner informed him that he would have to pay $852 to lease the taxi and medallion, and the plaintiff contacted the TLC which told him that there had been no change in its rules. The plaintiff spoke to the owner and "informed him that $852 was more than he was allowed to charge." The owner replied that he would continue to charge $852 per week, and he did so until he ended his relationship with the plaintiff in 2011. Defendant FA systematically over-charged him for the weekly lease of a vehicle and for deductions it made for credit card charges. He drove a taxi leased from defendant FA seven days a week, keeping the same vehicle for months at a time. He always paid his lease fee on a weekly basis. Nevertheless, defendant FA charged him $852 per week instead of the $666 authorized by TLC rules. Defendant FA also deducted 5% from sums paid by passengers with credit cards before applying the sums to the plaintiff's lease payments or remitting the sums to the plaintiff instead of deducting only 2%, defendant FA's actual cost to process credit card transactions.

The plaintiff filed a complaint with the TLC, and when the plaintiff refused a demand by the defendant to withdraw it, his relationship with the company ended. Moreover, the administrative agency "never prosecuted the matter."

On or about August 10, 2012, the plaintiff began this action, which he seeks to maintain as a class action, to recover the alleged over-charges.

II. The Legal Standards on a CPLR 3211(a)(7) Motion

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference***." ( *Jacobs v. Macy's East, Inc.*, 262 AD2d 607, 608; *Leon v. Martinez*, 84 NY2d 83.) The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (*see, Stukuls v. State of New York*, 42 NY2d 272; *Jacobs v. Macy's East Inc., supra*) , and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary

support for the pleading. ( *See*, *Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633.) The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint. (*See*, *Rovello v. Orofino Realty Co., Inc. supra;* *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 AD2d 159.) As a general rule, where a CPLR 3211(a)(7) motion is not converted into one for summary judgment, the court may only "consider affidavits for the limited purpose of remedying any defects in the complaint ***." (*One Acre, Inc. v. Town of Hempstead* 215 AD2d 359; *see*, *Nonnon v. City of New York*, 9 NY3d 825.) Nevertheless, "[w]hile typically the pleaded facts will be presumed to be true and accorded a favorable inference, 'allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence [will] not [be] entitled to such consideration' ***." (*Marraccini v. Bertelsmann Music Group Inc.*, 221 AD2d 95, 98, quoting *Roberts v. Pollack*, 92 AD2d 440, 44; *see*, *Ullmann v. Norma Kamali, Inc.*, 207 AD2d 691; *Fisher v. Maxwell Communications Corp.*, 205 AD2d 356.)

III. The First Cause of Action

The plaintiff alleges that defendant FA breached an oral contract he had with it to lease taxis " by extracting from plaintiff payments in excess of the contract amount of $666 for a weekly lease." The plaintiff fails to state a cause of action. First, the plaintiff alleges that defendant FA leased him a taxi and medallion on a weekly basis instead of on a daily basis, but this allegation is contradicted by his admission that he received an $852 payment for a seven day period. Applying the rates then in effect, he received (1) $115 for the twelve hour night shift on Sunday, Monday, and Tuesday ($345), (2) $120 for the twelve hour night shift on Wednesday, and (3) $129 for the twelve hour night shift on Thursday, Friday, and Saturday ($387). The sum of $345, $120, and $387 is $852. Simple mathematics deprives the plaintiff's allegation about a weekly lease of the presumption of truth on a CPLR 3211(a)(7) motion. (*See*, *Marraccini v. Bertelsmann Music Group Inc.*, *supra*.) The mathematics shows that the parties entered into a series of daily leases. The receipts submitted by the plaintiff on this motion also show that he paid the rates on daily leases. " If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action ***." ( *Peter F. Gaito Architecture, LLC v. Simone Development Corp.* 46 AD3d 530, 530.) Second, even assuming that the parties entered into weekly leases, the cap amount of $666 is found in the TLC's rules, not in the parties' contract pursuant which the defendant demanded – and the plaintiff accepted– a higher rate. It is true that " *unless a contract provides otherwise*, the law in force at the time the agreement is entered into becomes as much a part of the agreement as though it were expressed or referred to therein, for it is presumed that the parties had such law in contemplation when the contract was made and the contract will be

construed in the light of such law." ( *Dolman v. United States Trust Co.*, 2 NY2d 110, 116 [italics added]; *Ronnen v. Ajax Elec. Motor Corp.*, 88 NY2d 582; *Mayo v. Royal Ins. Co. of America,* 242 AD2d 944; *Bridge Capital Investors, II v. Susquehanna Radio Corp.*, 458 F3d 1212.) In the case at bar, the contract between the parties provided for a rate different than that fixed by TLC regulation, thereby precluding the plaintiff from relying on the presumption that the parties had the TLC rate in contemplation. Instead, as the defendant argues, the parties' contract is unambiguous, and extrinsic matters may not be considered to vary its meaning. ( *See, OFSI Fund II, LLC v. Canadian Imperial Bank of Commerce,* 82 AD3d 537[ affidavit concerning industry custom disregarded].) Third, even if the TLC rules were somehow incorporated into the parties' contract, at the relevant time the TLC rules did not limit the number of sequential daily leases, and the plaintiff was free to charge for seven sequential daily leases even if the sum arrived at exceeded the weekly cap of $666. In this connection, the court notes that although the plaintiff filed an overcharge complaint with the TLC, the administrative agency took no action. The TLC amended its rules in 2012, after the plaintiff ended his relationship with the defendant, to change the one week rate of $666 to rent a taxi by creating a one-week day shift rate ($690) and a one-week night shift rate ($797). Importantly, the TLC for the first time promulgated a new rule which prohibits lessors from charging more than the weekly rate for seven consecutive day shifts or seven consecutive night shifts. In sum, although the defendant deplorably may have evaded the rules of the TLC, its conduct did not amount to breach of contract.

IV. The Second Cause of Action

The second cause of action alleges that the defendant committed breach of contract by charging the plaintiff 5% on credit card transactions. Assuming the rules of the TLC on credit card charges applied to the parties' contract, section 58-21(c)(5)(i) allowed the defendant to charge "[a] credit card pass-along no greater than five percent (5%), as allowed under subdivision (f) below." The plaintiff argues that the rule only allows the lessor to charge back its actual expenses on each credit card transaction up to the limit of 5%. The court disagrees. The rule is not expressly phrased in terms of actual expenses, and the term "pass-along" seems to have been used, not in connection with a limitation to actual expenses, but as a shorthand way of referring to a recovery of expenses. Moreover, section 58-21(f)(3) provides: "An Owner (or Owner's Agent) can withhold from the cash payments, a credit card pass along of no more than five percent (5%) of the total amount." The lessor need not add up the actual cost of all the individual credit card transactions, but may charge a flat 5% on the "total amount." A flat rate seems to have been fixed for the administrative convenience of all. Finally, the TLC rules elsewhere refer to the 5% charge as a simple "mark up" rather than as a "pass- along" ( *see,* TLC Rule 63-14[f]), indicating that no special, restrictive meaning was attached to the latter term.

The parties did not submit any "legislative history" to aid in the interpretation of section 58-21(c)(5)(i), but the plaintiff submitted a copy of a New York Times article by Michael M. Grynbaum, "New York Taxi Drivers Unsure They Will See Benefits of a Fare Increase" dated May 22, 2012, which, ironically enough, weakens the plaintiff's position. The article reads in relevant part: " The city is also looking at ways to eliminate part or all of a fee on credit card transactions widely despised by drivers that allows taxi fleets to collect 5 percent of any fare paid on a card. *Some* of that money is used to pay credit card companies and vendors; the rest tends to be pocketed by the garage. ¶ "The fee has become a profit center for the fleets," said David S. Yassky, the taxi commissioner, in an interview on Tuesday. He described the current fee as 'generous.'" (Italics added.) The inferences may be drawn that fleet owners were commonly passing along more than their actual costs, that this fact was widely known in the industry, that the taxi commissioner knew about it, and that the taxi commissioner did not find any illegality in the practice.

V. The Third Cause of Action

The third cause of action, which is for unjust enrichment, is barred by the rule that a party cannot sue for unjust enrichment where he also alleges the existence of an express contract covering the transaction. (*See, One Step Up, Ltd. v. Webster Business* Credit *Corp.*, 87 AD3d 1; *Universal/MMEC, Ltd. v. Dormitory Authority of State of New York,* 50 AD3d 352.)

VI. The Fourth and Fifth Causes of Action

The fourth cause of action alleges that the defendant violated TLC Rule 58-21(c)(4) by charging him an excessive weekly rate for leasing a taxi and medallion and violated TLC Rule 58-21(f)(3) by charging him more than its actual costs to process credit card fares. The plaintiff fails to state causes of action. In regard to the fourth cause of action, at the relevant time, the TLC rules did not limit the number of sequential daily leases, and the plaintiff was free to charge for seven sequential daily leases even if the sum arrived at exceeded the weekly cap of $666. In regard to the fifth cause of action, as discussed above, the court rejects the plaintiff's argument that the relevant rule only allows the lessor to charge back its actual expenses up to the limit of 5%. The court need not reach the issue of whether the plaintiff can base a private cause of action upon the TLC Rules, but notes that several cases decide the issue in the negative. (*See, e.g., Rashid v. B. Taxi Management* , Index No. 653426, Sup.Ct. New York County; *Desmangles v. Woodside Management Company*, Index No. 653423, Sup. Ct. New York County.)

Dated: March 11, 2013

J.S.C.