Kaufman v Sirius SM Radio, Inc.
2013 NY Slip Op 32217(U)
September 17, 2013
Supreme Court, New York County
Docket Number: 650420/2013
Judge: Shirley Werner Kornreich

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 650420/2013
KAUFMAN, ALVIN
vs.
SIRIUS XM RADIO, INC.
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE 8/22/13
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 2-22
Answering Affidavits — Exhibits _____ | No(s). 28-33
Replying Affidavits _____ | No(s). 34

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 9/17/13

SHIRLEY WERNER KORNREICH
J.S.C.
_____, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ALVIN KAUFMAN and RICHARD LALUNA,

Index No: 650420/2013

Plaintiffs,

DECISION & ORDER

-against-

SIRIUS XM RADIO, INC.,

Defendant.

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SHIRLEY WERNER KORNREICH, J.:

Defendant Sirius XM Radio, Inc. (Sirius) moves to dismiss the Complaint pursuant to CPLR 3211 (a)(1), (5), & (7). Defendant's motion is granted for the reasons that follow.

I. Factual Background & Procedural History

The court assumes familiarity with the allegations in this putative class action, which are set forth at length in the federal court decisions discussed below. In short, plaintiffs accuse Sirius, a satellite radio provider, of improperly charging customers a $2 Invoice Administration Fee (the Fee) for processing subscription payments made by credit card.

On November 18, 2009, plaintiff Alvin Kaufman filed a Class Action Complaint in the United States District Court for the Southern District of New York (the District Court). Kaufman asserted claims (1) under GBL § 349; (2) for unjust enrichment; and (3) for a declaratory judgment that the class members are not subject to arbitration. After Sirius moved to dismiss, an Amended Class Action Complaint was filed on February 22, 2010, which added plaintiff Richard LaLuna, who asserted a new breach of contract claim, and omitted plaintiff's original claim for unjust enrichment. LaLuna, a New York resident, was added to the case due

to the concern that Kaufman, a Nevada resident, might not be able to maintain a claim under GBL § 349. After Sirius moved to dismiss for a second time, plaintiffs filed a Second Amended Complaint on April 27, 2010. Before Sirius had an opportunity to file a motion to dismiss, plaintiffs were granted leave to file another amended pleading. On May 28, 2010, plaintiffs filed a Third Amended Complaint (the TAC), alleging GBL § 349, breach of contract, and declaratory judgment claims. Sirius then submitted a letter to the District Court, dated June 11, 2010, requesting leave to file a motion to dismiss the TAC. On August 20, 2010, the District Court held a pre-motion conference during which the parties were directed to submit letter-briefs on the two issues to be decided on Sirius' motion: "(1) whether non-New York resident Kaufman (and those similarly situated) adequately pled deception that occurred in New York sufficient to state a GBL § 349 claim and (2) whether Plaintiffs sufficiently pled facts to support a viable breach of contract claim.". The parties were explicitly directed to limit their letters to these two issues and not to "include arguments relating to the merits of the GBL § 349 claim." The parties each submitted letter-briefs.

In an order dated November 10, 2010, the District Court (1) dismissed the breach of contract claim; and (2) held that Kaufman and "any similarly-situated non-New York residents" cannot maintain a claim under GBL § 349. *See Kaufman v Sirius XM Radio, Inc.*, 751 FSupp2d 681 (SDNY 2010) (Marrero, J.). The District Court provided the following explanation for why it dismissed the breach of contract claim:

> The Court provided clear instructions to Plaintiffs at the Telephone Conference, directing them to set forth in their contemplated letter-brief the language in the contract that they assert has been breached, what their interpretation of that clause is, and how the facts pled in the [TAC] support a breach of that provision. However, Plaintiffs' brief focuses exclusively on the GBL § 349 claim (and mostly on the merits of that count which the Court stated repeatedly would not be

> susceptible to dismissal at the pleading stage) and does not even mention the contractual cause of action. Indeed, Plaintiffs' September 3 Letter-Brief and Plaintiffs' September 21 Letter-Brief fail to point the Court to any contractual obligation on the part of Sirius to refrain from charging [the Fee]. Accordingly, the Court rules that the Plaintiffs have abandoned their breach of contract cause of action.
>
> Even had Plaintiffs attempted to justify their contractual claim, the Court agrees with Sirius that there is no factual basis in the [TAC] upon which to plausibly ground that count. That Sirius charged [the Fee] to Plaintiffs without having language in the Payment Terms that unambiguously permitted it to do so does not mean that it breached its contract with Subscribers by sending them invoices with the [the Fee] and then collecting that $2.00 charge. Accordingly, the Court dismisses Plaintiffs breach of contract cause of action. Whether or not Sirius has deceived, as that term is defined under GBL § 349, certain of its Subscribers – despite language in its Payment Terms that unambiguously calls for at least those who receive an invoice and also pay by check or money order to pay a [the Fee] – is a question for another day.

Kaufman, 751 FSupp2d at 685-86 (footnotes omitted).

As for why the proposed non-New York class could not maintain a claim under GBL § 349, the District Court held that such claim was not viable because members of that class were not deceived in New York. *Id.* at 686-88, accord *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 324 (2002) ("the transactions where the consumer is deceived must occur in New York.").

On November 16, 2010, Sirius sought dismissal for lack of subject matter jurisdiction since the District Court's decision on the GBL § 349 claim eliminated diversity jurisdiction under the Class Action Fairness Act. On November 17, 2010, plaintiffs moved for reconsideration of the District Court's decision and for leave to file another amended complaint to add an unjust enrichment claim. In an order dated November 23, 2010, the District Court (1) adhered to its decision; (2) denied plaintiff's motion to amend the TAC; and (3) dismissed the

remaining claims in the TAC (the New York class' § 349 claim and the declaratory judgment claim) for lack of subject matter jurisdiction. *See Kaufman v Sirius XM Radio, Inc.*, 2010 WL 4968049 (SDNY 2010). Judgment was entered on December 13, 2010.

Plaintiffs appealed the District Court's decisions to the United States Court of Appeals for the Second Circuit. Plaintiffs argued "that the district court (1) erred in concluding that non-New York resident Kaufman (and those similarly situated) failed adequately to state a claim under GBL § 349, and (2) abused its discretion in denying plaintiffs leave to file a fourth amended complaint." Plaintiffs did not appeal the dismissal of their breach of contract claim. In an order dated April 4, 2012, the Second Circuit affirmed the District Court's decisions. *Kaufman v Sirius XM Radio, Inc.*, 474 Fed Appx 5 (2d Cir 2012).[1]

Approximately ten months later, on February 6, 2013, plaintiffs filed the Complaint in the instant action, which lists four claims: (1) a claim under GBL § 349; (2) breach of contract; (3) unjust enrichment; and (4) a declaratory judgment.[2] The Complaint's allegations are virtually identical to the allegations in the TAC. The Complaint is essentially the proposed fourth amended complaint (plaintiffs' fifth overall pleading). Though the District Court specifically allowed plaintiffs to file its surviving claims in state court, the Complaint includes the claims dismissed by the District Court. Sirius contends that the claims dismissed by the

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[1] It should be noted that courts have recently interpreted *Goshen* to allow out-of-state victims to sue under GBL § 349 so long as the deceptive transaction itself occurs in New York. *See Cruz v FXDirectDealer, LLC*, 720 F3d 115, 123 (2d Cir 2013). However, in this case, the Second Circuit stated that "[w]e rely not on the non-New York plaintiffs' residency but on the lack of any plausible claim that they engaged in a transaction with Sirius within New York." *Kaufman*, 474 Fed Appx at 8 n.1.

[2] Plaintiffs have withdrawn their declaratory judgment claim because Sirius waived its right to arbitration.

District Court must be dismissed under the doctrine of *res judicata*. Additionally, Sirius moves for dismissal on the merits and on the ground that the claims are time barred.

II. Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen*, 98 NY2d at 326 (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

A. GBL § 349

Pursuant to CPLR 214(2), a claim under GBL § 349 is subject to a three-year statute of

limitations. *Corsello v Verizon New York, Inc.*, 18 NY3d 777, 787 (2012). The claim accrues when a plaintiff has been injured by a deceptive act, not when plaintiff learns that he has been deceived. *Id.* at 788-90, citing *Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 210 (2001).

Sirius concedes that, had plaintiffs commenced this action within six months of the dismissal of the federal action, the surviving GBL § 349 claim would be timely under CPLR 205(a). *See 423 S. Salina St., Inc. v City of Syracuse*, 68 NY2d 474, 486 (1986) (state court claim "commenced within six months after the Second Circuit's affirmance of the dismissal of the prior Federal action, is timely if that action was timely brought"). However, since plaintiffs waited approximately ten months to commence this action, Sirius argues that plaintiffs missed out on the opportunity to toll the limitation period. Sirius, therefore, concludes LaLuna's[3] GBL claim is time barred because it accrued on November 25, 2008, the first time he was charged the Fee[4] – more than three years before this action was commenced.

Plaintiffs, on the other hand, argue that the dismissed federal class action, discussed in part I, tolled the statue of limitations. Their argument is predicated on *Am. Pipe & Const. Co. v Utah*, 414 US 538 (1974), in which the United States Supreme Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted

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[3] LaLuna, not Kaufman, is the only class representative whose payment of the Fee is relevant for determining when the GBL claim accrued because the non-New York class' GBL claim was dismissed by the District Court.

[4] LaLuna also paid the Fee in 2009 and 2010. The parties' dispute whether the 2010 payment is an inactionable "voluntary payment". However, these payments are irrelevent since the limitation period does not accrue on the dates they were made.

members of the class who would have been parties had the suit been permitted to continue as a class action." The Supreme Court explained:

> The *American Pipe* Court recognized that unless the statute of limitations was tolled by the filing of the class action, class members would not be able to rely on the existence of the suit to protect their rights. Only by intervening or taking other action prior to the running of the statute of limitations would they be able to ensure that their rights would not be lost in the event that class certification was denied .... A putative class member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations. The result would be a needless multiplicity of actions-precisely the situation that [Fed. R. Civ. P.] 23 and the tolling rule of *American Pipe* were designed to avoid.

Crown, Cork & Seal Co. v Parker, 462 US 345, 350-51 (1983).

It is well established that *American Pipe* did not affect state law. *See Matana v Merkin*, 2013 WL 3940825, at *8 (SDNY July 30, 2013) (Engelmayer, J.) ("*American Pipe* did not itself announce a tolling rule applicable to state law claims. Where the timeliness of state law claims is at issue, a federal court 'must look to the law of the relevant state to determine whether, and to what extent, the statute of limitations should be tolled by the filing of a putative class action in another jurisdiction.'"), quoting *Casey v Merck & Co.*, 653 F3d 95, 100 (2d Cir 2011); *see also Vincent v Money Store*, 915 FSupp2d 553, 560 (SDNY 2013) (Koetl, J.) ("*American Pipe* is a tolling rule that tolls the time for absent class members to bring a claim while a class action is pending of which they are members. The *American Pipe* case concerned the tolling of claims under a federal statute, the Sherman Act. It did not purport to announce a rule that would apple to state law claims.").

In *Vincent*, Judge Koetl explained why *American Pipe* has no relevance to the situation in this action – namely, that *American Pipe* only tolls the claims of non-parties to the class-action.

It does not obviate the requirement that named plaintiffs from the dismissed federal class action must make sure their new state court case is timely under state law:

> *American Pipe* tolling would not help the named plaintiffs. The policy behind *American Pipe* counsels against allowing named plaintiffs in a prior class action, as opposed to absent class members, to have their claims tolled. *American Pipe* tolling permits an absent class member to rely on a pending class action to toll the statute of limitations as to her individual claim, obviating the need for her to file a separate action to guard against the possibility that class certification will eventually be denied.

Vincent, 915 FSupp2d at 561 (quotation marks omitted). Indeed, as Judge Koetl pointed out, the Supreme Court has explicitly stated that *American Pipe* tolling only applies to non-parties. *Id.*, citing *Smith v Bayer Corp.*, 131 S Ct 2368, 2380 n.10 (2011) ("[*American Pipe*] demonstrate[s] only that a person *not a party* to a class suit may receive certain benefits (such as the tolling of a limitations period) related to that proceeding.") (emphasis added). Consequently, Judge Koetl concluded, the relevant inquiry under New York law is whether the parties to the prior class action commenced their new case in accordance with CPLR 205(a), which provides:

> If an action is timely commenced and is terminated in any other manner than by [a number of inapplicable exceptions], the plaintiff ... may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.

Vincent, 915 FSupp2d at 562, quoting CRLR 205(a) (brackets added by Judge Koetl).

Here, plaintiffs did not comply with CPLR 205(a). The federal action was dismissed in April 2012, but this action was not commenced until February 2013. Consequently, plaintiffs cannot avail themselves of CPLR 205(a). As discussed earlier, LaLuna's GBL claim is time barred because it accrued in 2008.

It should be noted that, in dicta, the Appellate Division has indicated a willingness to adopt *American Pipe*. *See Paru v Mut. of Am. Life Ins. Co.*, 52 AD3d 346, 348 (1st Dept 2008), citing *Yollin v Holland Am. Cruises, Inc.*, 97 AD2d 720 (1st Dept 1983); *see also Cambridge House Tenants' Ass'n v Cambridge Dev., L.L.C.*, 2012 WL 254979 (Sup Ct, NY County 2012) (Madden, J.) (allowing the claims of *new* plaintiffs under *American Pipe* tolling).[5] However, the court need not opine on this unsettled area of law because the applicability of *American Pipe* to this case, while interesting, is a red herring. Since this action only concerns the named plaintiffs in the dismissed federal action, the *only* question is whether this action was timely filed in compliance with CPLR 205(a). The answer is no. Therefore, the GBL § 349 claim is dismissed.

That being said, had the court assessed the merits of the claim, it would have concluded that dismissal was warranted in any event, because a disclosed fee that is permitted under a contract does not give rise to a GBL § 349 claim. *See Zuckerman v BMG Direct Marketing, Inc.*, 290 AD2d 330 (1st Dept 2002); *Sands v Ticketmaster-New York, Inc.*, 207 AD2d 687 (1st Dept 1994). As discussed in part II.B, the *res judicata* effect of the District Court's holding that the subject contracts were not breached precludes the court from revisiting this issue. Thus, since the court is bound by the finding that the Fee was contractually permitted, plaintiffs are precluded from asserting that the Fee violated GBL § 349.

B. Breach of Contract

Plaintiffs' breach of contract claim was dismissed on the merits by the District Court and

[5] It should be noted that many states, and most federal courts, have refused to allow cross-jurisdictional tolling. *See Soward v Deutsche Bank AG*, 814 FSupp2d 272, 281-82 (SDNY 2011) (Scheindlin, J.). It is unclear how the Court of Appeals would rule on this issue.

plaintiffs did not appeal the dismissal of this claim in their appeal to the Second Circuit. As a result, Sirius, argues, the dismissal of this claim is *res judicata*.[6]

"Under *res judicata*, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action. As a general rule, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 (1999) (citations and quotation marks omitted). It is well settled that "[t]he general doctrine of *res judicata* gives binding effect to the judgment of a court of competent jurisdiction and prevents the parties to an action, and those in privity with them, from subsequently re-litigating any questions that were necessarily decided therein." *Landau v LaRossa, Mitchell & Ross*, 11 NY3d 8, 13 (2008), quoting *In re Shea's Will*, 309 NY 605, 616 (1956).

Here, it is undisputed that the merits of plaintiffs' breach of contract claim was one of the two issues considered on the federal motion to dismiss. The District Court granted Sirius' motion, dismissing the claim on the merits. *See Kaufman*, 751 FSupp2d at 685-86. Plaintiffs did not appeal this ruling. Plaintiffs had ample opportunity to defend their claim in the federal

[6] Plaintiffs' argument that the District Court dismissed the breach of contract claim without prejudice is borderline frivolous. The November 10, 2010 order dismissed the claim on the merits. The November 23, 2010 order then dismissed the remaining claims (the claims surviving dismissal in the November 10, 2010 order – which did not include breach of contract) without prejudice for lack of subject matter jurisdiction. "Without prejudice" clearly only meant that the surviving claims could be re-filed in state court. The District Court obviously did not intend to take back its ruling on the merits since, in that same order, reargument of the dismissal of the breach of contract claim was denied.

action.[7] That plaintiffs chose not to set forth a more robust brief in the federal case is not a reason to allow them to relitigate their claim. Additionally, if plaintiffs disagreed with the District Court's basis for dismissing the claim, they should have raised the issue on appeal. They did not. Consequently, this court will not address the merits of the breach of contract claim because its dismissal by the District Court is *res judicata*. *See Kirschner v Agoglia*, 476 BR 75, 79 (SDNY 2012) ("If there is no appeal, the grant of the motion to dismiss for failure to state a claim is a final judgment dismissing the claim and is given *res judicata* and collateral estoppel effect."), citing *Teltronics Sers., Inc. v L M Ericsson Telecomms., Inc.*, 642 F2d 31, 34-35 (2d Cit 1981) (judgment under Fed. R. Civ. P. 12(b)(6) is entitled to *res judicata* effect).

C. Unjust Enrichment

Plaintiffs' unjust enrichment claim also is dismissed because the Fee arose from the subject contracts. *See IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 (2009), accord *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 (1987) ("existence of a valid and enforceable written contract governing a particular subject matter

[7] During oral arguments, plaintiffs set forth a disingenuous take on the circumstances surrounding the letter-briefing in the District Court. First, plaintiffs seem to suggest that there is some significance in the fact that the parties, as directed by the District Court, submitted letter-briefs instead of full length memoranda of law. This court will not impugn the briefing procedures used by other judges or other courts. Indeed, the letter-briefs were quite substantive. Second, plaintiffs seem to dispute the scope of what the letter-briefs were supposed to address to challenge the notion that they had a full and fair opportunity to litigate the claim in the District Court. This, again, is belied by the record in the federal action. As the District Court noted it its decision, plaintiffs repeatedly disregarded the District Court's instruction to brief the merits of the breach of contract claim. This warranted dismissal due to abandonment. Yet, the District Court was gracious enough to give plaintiffs a second (or fourth, if one counts each instance the District Court allowed plaintiffs to remedy the pleading defects repeatedly raised by Sirius; at the end, the District Court ran out of patience with the manner in which plaintiffs litigated the case, a sentiment echoed by the Second Circuit) bite at the apple by evaluating the merits of the claim. The District Court, however, found the claim to be without merit.

ordinarily precludes recovery in quasi contract for events arising out of the same subject matter"). Accordingly, it is

ORDERED that the motion to dismiss the Complaint by defendant Sirius XM Radio, Inc. is granted, and the Clerk is directed to enter judgment dismissing the Complaint with prejudice.

Dated: September 17, 2013

ENTER:

J.S.C.