

Fischer v Presidential Holidays, Inc
2020 NY Slip Op 34298(U)
December 22, 2020
Supreme Court, New York County
Docket Number: 653051/2020
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH **PART** **IAS MOTION 14**

Justice

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SETH FISCHER, NEALY FISCHER
Plaintiff,

- v -

PRESIDENTIAL HOLIDAYS, INC,
Defendant.

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INDEX NO. 653051/2020
MOTION DATE 12/21/2020
MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 39, 40, 41, 42

were read on this motion to/for DISMISSAL.

The motion to dismiss by defendant is denied.

Background

This case arises out of a contract entered into by plaintiffs and defendant on February 7, 2020. Plaintiffs signed up for a Passover vacation in Mexico that was supposed to take place from April 7, 2020 through April 16, 2020 and claim they paid \$46,375 to defendant for the trip. Defendant cancelled the tour on March 22, 2020 and offered 75% of the amount paid; plaintiffs refused and demanded a full refund.

The Court previously denied plaintiffs' motion for summary judgment in lieu of complaint on the ground that the relief sought was not based on an instrument for the payment of money only (NYSCEF Doc. No. 24). Plaintiff later filed a complaint and this motion by defendant followed.

Defendant argues that under the terms of the contract securing the vacation, there were no refunds for cancellations after February 3, 2020. It also claims that another clause in the contract

concerning a “full repayment” only applies to cancellations made prior to February 3, 2020.

Defendant points out that it was able to get refunds from the hotel and offered all guests a 75% refund but plaintiffs refused.

It asks the Court to take judicial notice of the fact that the cancellation of the trip was merely a reflection of the anticipated actions of both the U.S. and Mexican governments relating to travel in light of the Covid-19 pandemic. Defendant emphasizes that it did not cancel the tour.

In opposition, plaintiffs emphasize that they paid over \$46,000 for a trip and defendant cancelled it without offering to refund the money paid. They question how defendant can justify keeping 25% of the payments when nothing was offered to customers. Plaintiffs emphasize that defendant’s interpretation of the contract is illogical and note they were drafted by defendant. Plaintiffs also argue that defendant cannot raise a force majeure defense where one does not exist.

In reply, defendant insists it obtained refunds for its clients and plaintiffs’ claims do not reflect the risks associated with the tour.

Discussion

“On a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true. Further, on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff” (*Alden Global Value Recovery Master Fund L.P. v Key Bank Natl. Assoc.*, 159 AD3d 618, 621-622, 74 NYS3d 559 [1st Dept 2018] [internal quotations and citations omitted]).

As an initial matter, the fact that defendant failed to attach the complaint to the moving papers is of no moment because this is an e-filed case and the Court has easy access to all documents filed in this case.

“[I]t is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed” (*Jin Ming Chen v Ins. Co. of the State of Pennsylvania*, 2020 NY Slip Op 06938 [2020] [internal quotations and citation omitted]).

Here, the terms and conditions of the vacation state that “Cancellations must be submitted in writing to Presidential Holidays. All deposits and payments are fully refundable until October 31, 2019. All payments, less the deposit, are fully refundable from November 1, 2019 to December 16, 2019. For cancellations from December 17, 2019 to February 3, 2020, there is a 50% refund. For any cancellations after February 3, 2020 there are no refunds” (NYSCEF Doc. No. 31).

The only logical interpretation of this provision is that it applies to cancellations by plaintiffs, the tour participants. Otherwise, under defendant’s view, it could unilaterally cancel the trip after February 3 and plaintiffs would be out of luck. That makes no sense. The Court is unable to find that the intention of this provision was to impose a unilateral condition allowing defendant to cancel and keep all the money. Such a provision would raise questions about whether there was adequate consideration for the tour. Who would sign up for a vacation where the tour company could cancel the trip without a refund?

Moreover, the agreement also provides that “Presidential Holidays, Inc. reserves the right to withdraw the programs announced and/or make any alterations necessary for the proper operation of the program. This can be done at the discretion of Presidential Holidays, Inc. for any

reason, without penalty. If Presidential Holidays, Inc. cancels a tour, the company has no responsibility beyond the refund of all monies paid to the company by the tour participant for the land package” (id.). At the very least, there is an issue of fact about whether defendant was required to pay a refund because the trip was cancelled under this provision of the contract.

To be clear, the Court makes no specific finding about whether defendant cancelled the trip or whether the trip was cancelled by governmental entities. It merely finds that there is no basis to dismiss this case on the grounds cited by defendant – that customers are not entitled to a refund if the tour operator cancels after a deadline.

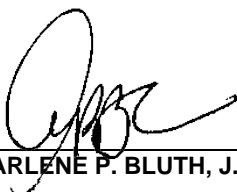
The Court also rejects defendant’s frequent reliance on the fact that it obtained refunds from the resort and offered tour participants a 75% refund. Nowhere in the contract does it say that a customer would be entitled to a 75% refund if the tour had to be cancelled due to unforeseen circumstances. It may be that 75% was the most it could recover for its customers without dipping into its own pockets but it does not justify dismissing this case.

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendant is denied and it is directed to answer pursuant to the CPLR.

Already-scheduled remote conference: January 27, 2021 at 10 a.m.

12/22/2020
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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					REFERENCE