Chinun LLC v UNO A Brokerage Inc.
2020 NY Slip Op 32476(U)
June 24, 2020
Supreme Court, Queens County
Docket Number: 704783/2019
Judge: Joseph Risi

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JOSEPH RISI
A. J. S. C.

IA Part 3

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CHINUN LLC,

Plaintiff,

-against-

UNO A BROKERAGE INC., OPEN ROAD FLEET INC. and PHILLIP SOLIMAN,

Defendant

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Index Number 704783/2019

AMENDED DECISION/ORDER

Sequence Number 2

The following numbered papers read on this motion by plaintiff and third-party defendants to dismiss the counterclaims and the third-party complaint, pursuant to CPLR §3211(a)(7) and (2) dismissing the third-party complaint on the grounds that the third-party claims do not seek indemnification or contribution for the claims in the main complaint and instead assert entirely new claims; pursuant to CPLR §3211(a)(7) dismissing the complaint for an account stated; and pursuant to CPLR §3024(a) requiring defendant/third party plaintiff to amend its counterclaims to provide a more definite statement on the grounds that defendant/third party plaintiff fails to distinguish the counterclaims from the third-party claims and fails to indicate what portion of the alleged damages are attributable to plaintiff as opposed to third-party defendants.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	EF 45-51
Answering Affidavits - Exhibits	EF 56-57
Reply Affidavits	EF 58

Upon the foregoing papers, it is ordered that this motion is determined as follows:

The plaintiff commenced this action by filing a summons and complaint on March 19, 2019. The complaint alleges that the defendant Open Road manages for hire livery vehicles in New York City operating with ride sharing services including LYFT. Additionally, Open Road is the owner of multiple for-hire livery vehicles in New York City. The complaint alleges that the defendant

Soliman represented to plaintiff, that plaintiff could procure less expensive insurance if it registered its vehicles with Open Road, allowing its vehicles to be listed on Open Road's CAP insurance policy. Soliman further stated that the vehicles must be affiliated with the TLC base Take Me 2, Inc., which was also owned by Soliman. Between September 2015 and February 2017, plaintiff registered its vehicles with Open Road and affiliated them with Take Me 2. The plaintiff alleges that in September 2015 the plaintiff and defendant Open Road entered into an oral agreement whereby Open Road would pay plaintiff $450 per month per vehicle for the right to manage the vehicles and in exchange Open Road could keep the profits earned from managing the vehicles. The plaintiff alleges that in January 2016, Open Road stopped paying the fee and owes a balance of $114,371.68.

In February 2017, plaintiff's vehicles were insured by American Transit Insurance Company under Open Road's CAP insurance policy. The plaintiff alleges that this was arranged by defendant Uno A Brokerage, who was an insurance broker for these vehicles. That plaintiff was required to pay a deposit for this insurance and paid Open Road $41,180. The plaintiff alleges that in September 2017, American Transit cancelled this insurance policy and refunded the plaintiff's deposit. The plaintiff alleges that the defendants have failed to return this deposit. The plaintiff alleges that the defendants thereafter arranged for the vehicles to be insured by Park Insurance Company. The plaintiff alleges, that though Park Insurance charged substantially less than American Transit that the plaintiff was still charged and invoiced the same rates and the plaintiff was, thus, overcharged in the amount of $15,375.

Open Road filed an answer. It then filed an amended answer with counterclaims and third-party claims. It then filed a summons for the third-party complaint to go along with the amended answer and counter claims and third-party claims, which included a copy of the previously filed amended complaint. In its answer, counterclaims and third-party complaint Open Road alleges that it entered into a fee-for-service agreement in September 2015 with plaintiff whereby Open Road would provide certain management and compliance services to plaintiff with respect to certain vehicles owned and operated as for-hire motor vehicles by plaintiff. Open Road alleges that thereafter, the fee-for-service agreement was expanded to include and incorporate services by Open Road to plaintiff as well as third-party defendants Dryve, Chinun Two and Chinun Three, which collectively owned 171 vehicles for which Open Road provided services under the agreement. Open Road alleges that it did not known which entity owned each particular vehicle, but the plaintiff and third-party defendants agreed to be jointly and severally liable for all obligations under the fee-for-service agreement. Additionally, Open Road issued joint monthly and annual invoices to plaintiff and third-party defendant Dryve at their request for fees owed by and the obligations of all the entities. Open Road further alleges that the plaintiff and third-party defendants each made payments towards the balance due under the invoices but that a balance remains due of $227,854.80 and additional fees of $65,000, which includes E-Z Pass, traffic violations, parking violations and late fees $76,000.

The plaintiff has moved to dismiss the third-party complaint. First, the amended answer replaced the original answer filed by the Open Road. While, it was not originally filed with a summons, Open Road corrected this error by filing third-party summons. When Open Road filed

the summons it included the same amended answer, counterclaims and third-party complaint that was previously filed. Thus, any argument by the plaintiff that it does not know which answer to respond to is without merit.

The plaintiff argues that impleader is available only to bring in a potential indemnitor of the defendant. While the language of CPLR §1007 limits impleader to cases where a third party is or may be liable to the original defendant for part of the original claim, case law has allowed a more expansive use of the procedure. The Court of Appeals has recognized that the language of CPLR §1007 serves only to identify the persons against whom a third-party claim may be brought. It does not place a limit upon the amount which may be recovered or the theory of liability. One of the main purposes of third-party practice is the avoidance of multiplicity of actions and the determination of primary liability as well as ultimate liability in one proceeding whenever convenient. In such instances, it may be used to resolve interrelated lawsuits. *(George Cohen Agency v Donald S. Perlman Agency*, 51 NY2d 358 [1980]).

Thus, "CPLR 1007 should not be read as allowing recovery soley for claims sounding in strict indemnity. The statute places no limit...upon the legal theories which may be asserted as a basis for the claim and the third-party complaint may be based on a theory of liability different from and independent of the cause of action pleaded against the primary defendant" (*JP Morgan Chase Bank, N.A. v Strands Hair Studio, LLC*, 84 AD3d 1173, 1174 [2d Dept 2011] [citations omitted]). Here, the claims that defendant asserts in the third-party complaint arise from the same agreement as the main action. In order to avoid potentially conflicting results, it is necessary and proper to allow them to be tried together. In fact, if the defendant had commenced a separate action it would be proper to join that action for a joint trial as they arise from the same transaction. Therefore, dismissal or severance of the third-party complaint is not warranted.

The third-party defendants and plaintiff next argue that the claim for account stated must be dismissed. An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due (*see Episcopal Health Servs., Inc. v POM Recoveries, Inc.*, 138 AD3d 917 [2d Dept 2016]). An agreement maybe implied where a defendant retains bills without objecting to them within a reasonable period of time or makes a partial payment on the account (*see American Express Centurion Bank v Cutler*, 81 AD3d 761 [2d Dept 2011]). Here, in the counterclaim and third-party complaint, the defendant/third-party plaintiff Open Road alleges that it had a contract with the plaintiff and third-party defendants whereby the plaintiff and third-party defendants would pay monthly charges per car and that the defendant/third-party plaintiff sent invoices for payments to which the third-party defendants did not object or pay fully (*Titan Communications, Inc. v Diamond Phone Card, Inc.*, 94 AD3d 740 [2d Dept 2012]). Thus, the claim for account stated has been adequately pled.

Finally, the argument that the counterclaims should be amended to provide a more definite statement pursuant to CPLR §3024 is without merit. The plaintiff and third-party defendants argue that the third-party complaint and counterclaims do not adequately allege which amounts that are

allegedly due to Open Road are attributable to each party. The plaintiff and third-party defendants argue that such a lump sum claim against multiple parties is not allowed. While this is generally correct, the counterclaim and third-party complaint alleges the parties entered into an agreement where the plaintiff and third-party defendants agreed to be jointly and severally liable for all obligations under the fee-for-service agreement. Furthermore, Open Road alleges that it did not know the owner of each separate vehicle and billed and received payments for the vehicles collectively even though they may have been individually owned. Thus, the facts and circumstances of this case the allow for such a claim to be pled collectively.

Accordingly, the motion to dismiss is denied.

This is the decision and order of the Court.

Date: June 24, 2020

Hon. Joseph Risi, A.J.S.C.

FILED

6/26/2020
9:32 AM

COUNTY CLERK
QUEENS COUNTY