

Cammayo v 1AND8, Inc.

2024 NY Slip Op 34334(U)

December 5, 2024

Supreme Court, Richmond County

Docket Number: Index No. 150173/2024

Judge: Lizette Colon

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At IAS Part 21M of the Supreme Court of the State of New York, held in and for the County of Richmond, at the Courthouse, located in Staten Island, City and State of New York on the 5th day of December 2024.

PRESENT: HON. LIZETTE COLON, JSC

-----X
Katherine Cammayo

Plaintiff(s),

-against-

**Motion Seq #2
DECISION/ORDER**

INDEX NO. 150173/2024

1AND8, Inc. d/b/a Museum of Ice Cream

Defendant(s).

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L, Colon;

Defendant made a motion (MS#2), with opposition, for an Order dismissing this action pursuant to CPLR § 3211(a)(3) and (7); and granting such other and further relief as the Court deems just and proper. Virtual oral arguments were held on 10/15/24 via Microsoft Teams. Defendant argues, in support of its motion, that Plaintiff lacks standing pursuant to CPLR 3211(a)(3) because “Plaintiff fails to meet her burden of pleading facts to show she suffered an injury sufficient to establish standing; [and] Plaintiff does not have standing to seek Injunctive Relief.” *See Defendant’s Memo in Support*, p. 2, NYSCEF #29.

Defendant further argues that Plaintiff fails to state a claim pursuant to CPLR 3211(a)(3) because “Plaintiff’s Claim is barred by the Voluntary Payment Doctrine; Plaintiff does not allege an injury as required under ACAL 25.33; [and] Plaintiff’s Claim for Damages

fails.” *Id.* The Court will address Defendant’s arguments in turn. For the forgoing reasons, Defendant’s motion is hereby denied in its entirety.

1. Standing

“[T]here is no requirement that a plaintiff allege standing in the complaint. Standing is instead in the nature of an affirmative defense to be pleaded and proved... Where a CPLR 3211(a)(3) motion is based upon an alleged lack of standing, the burden is on the moving defendant to establish, prima facie, the plaintiff’s lack of standing as a matter of law...The burden is not on the plaintiff to affirmatively establish its standing for the dismissal motion to be denied. To defeat a defendant’s motion to dismiss, the plaintiff has no burden of establishing its standing as a matter of law, but must merely raise a question of fact as to the issue.” *Wilmington Sav. Fund Soc’y, FSB v. Matamoro*, 200 A.D.3d 79, 156 N.Y.S.3d 333 (2021) [internal citations and quotations omitted].

A. **Standing to Bring Action**

Defendant argues that Plaintiff lacks standing to bring this Action. Specifically, Defendant argues that “Plaintiff lacks standing to pursue her claim under [the Arts and Cultural Affairs Law (“ACAL”)] because she has not alleged any concrete injury by the alleged technical violation of ACAL. Further, Plaintiff lacks standing to seek injunctive relief because she fails to allege facts showing that she will be harmed in the future.” *See Defendant’s Memo in Support*, p. 9, NYSCEF #29.

Defendant’s argument as to standing rests on the notion that the only harm alleged in the Complaint is a “technical violation of the ACAL.” *Id.*, p. 9. However, Defendant entirely overlooks that the Complaint alleges that Plaintiff suffered an economic injury that flowed from Defendant’s alleged violation of the statute. Specifically, Plaintiff is alleging that she was injured when “Defendant violated New York Arts & Cultural Affairs Law § 25.07(4) by failing to

disclose the total cost of a ticket, inclusive of all ancillary fees that must be paid in order to purchase the ticket after a ticket is selected...Defendant...violated New York Arts & Cultural Affairs Law § 25.07(4) by increasing the total cost of its tickets during the purchase process...[and] Defendant...violated New York Arts & Cultural Affairs Law § 25.07(4) by failing to disclose in a clear and conspicuous manner the portion of the ticket price stated in dollars that represents a service charge, or any other fee or surcharge to the purchaser.”

Plaintiff's Complaint., p.15, NYSCEF #1.

As explained above, the burden is on the Defendant to establish, prima faice, Plaintiff's lack of standing as a matter of law. The burden is not on the Plaintiff to affirmatively establish its standing for the dismissal motion to be denied. Plaintiff's allegation in her complaint that she paid an unlawful fee is a sufficiently concrete economic injury to confer standing. Whether or not the fee was unlawful is not a proper inquiry for the Court to undertake since this is a pre-discovery motion to dismiss. Defendant has failed to establish that Plaintiff lacks standing as a matter of law. Accordingly, the branch of Defendant's motion seeking to dismiss based on lack of standing is hereby denied.

B. CPLR 3211(a)(7) Failure to State a Cause of Action

“On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must determine whether, accepting as true the factual averments of the pleading and according the non-moving party the benefits of all favorable inferences which may be drawn therefrom, the proponent of the pleading can succeed upon any reasonable view of the facts stated.” *City Line Rent A Car, Inc. v. Alfess Realty, LLC*, 33 A.D.3d 835 N.Y.A.D. 2 Dept (2006) [internal citations and quotations omitted]. Additionally, the Voluntary Payment Common-Law Doctrine “bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of

material fact or law.” *Dillon v. U-A Columbia Cablevision of Westchester, Inc.*, 100 N.Y.2d 525, 790 N.E.2d 1155 (2003).

Defendant argues that Plaintiff has failed to state a cause of action pursuant to CPLR 3211(a)(7) because “Plaintiff’s Claim is barred by the Voluntary Payment Doctrine; Plaintiff does not allege an injury as required under ACAL 25.33; [and] Plaintiff’s Claim for Damages fails.” *See Defendant’s Memo of Law in Support.*, p. 9-12, NYSCEF #29. The Voluntary Payment Doctrine applies when a payment is voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law, however, it does not apply when a claim is predicated on a lack of full disclosure by a defendant, which is exactly what the Plaintiff in this case is claiming. *See Dillon v. U-A Columbia Cablevision of Westchester, Inc.*, 100 N.Y.2d 525 (2003). Additionally, it would be pre-mature for the Court to determine if the Voluntary Payment Doctrine applies at this pre-discovery stage of the case.

Defendant’s further arguments that Plaintiff does not allege an injury as required under ACAL 25.33, and that Plaintiff’s Claim for Damages fails, are also unpersuasive to this Court. Here, the Court only has to determine if, when accepting the facts in the Complaint as true and according the Plaintiff the benefits of all favorable inferences, Plaintiff can succeed upon any reasonable view of the facts stated. The Court has found that Plaintiff has plead facts sufficient to sustain a cause of action under the ACAL and for possible damages.

Accordingly, Defendant’s motion (MS#2) is denied in its entirety. In light of this Decision, the Parties shall submit a new proposed compliance conference order by December 13, 2024.

ENTER

HON. LIZETTE COLON, JSC