Majority Opinion >

United States District Court for the Southern District of New York

Stephen Haberkorn, Plaintiff,

v.
Marquis Jet Partners, Inc., et ano., Defendants.

11 Civ. 2543 (LAK)

MEMORANDUM AND ORDER

LEWIS A. KAPLAN, *District Judge*.

Plaintiff, a citizen and resident of Nevada, purchased a "Marquis Jet Card" that allegedly entitled him to 25 hours of occupied flight time on private aircraft made available by the defendants. He brings this diversity action, purportedly on behalf of a class, claiming that the defendants sold the card through deceptive business practices and false advertising in violation of Sections 349 and 350 of the New York General Business Law ("GBL"). Defendants move to dismiss the complaint on various grounds, but it is necessary to address only one of them.

GBL § 349(a) makes it unlawful to engage in "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service *in this state*." (Emphasis added). Section 350 similarly makes it unlawful to engage in "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service *in this state*." (Emphasis added). Not surprisingly, a cause of action under either lies only if "the transaction in which the consumer is deceived . . . occur[s] in New York."1

The amended complaint does not allege that plaintiff purchased or was induced to purchase his "Marquis Jet Card" in the State of New York. Accordingly, it appears, as defendants argue, that it fails to state a claim upon which relief may be granted to plaintiff for want of any allegation of deceptive acts or false advertising in New York.

Plaintiff effectively acknowledges that the amended complaint does not plead that any deceptive act or practice or false advertising with respect to him took place in New York. Rather, he relies upon the governing law clause in an Agreement to Sublease and Consult between Marquis Jet Partners, Inc. and the plaintiff,2 which is one of several agreements that collectively establish the relationship between them. The provision in relevant part is as follows:

> "*16.6 Governing Law*. THIS AGREEMENT SHALL IN ALL RESPECTS, INCLUDING ALL MATTERS OF CONSTRUCTION, VALIDITY AND PERFORMANCE BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK APPLICABLE TO CONTRACTS ENTERED INTO IN THE STATE OF NEW YORK BY RESIDENTS OF SUCH STATE AND TO BE PERFORMED ENTIRELY WITHIN SUCH STATE."3

As is abundantly clear from the quoted language, this provision simply evidences the parties' agreement that the law

governing *the agreement* shall be that of New York. But what is at issue here is not the agreement, but the advertising and trade practices by which the defendants allegedly induced the plaintiff to enter into the relationship of which the sublease and consult agreement is a part. That is quite another matter. Nothing in the governing law clause reasonably could be read to subject the defendants' conduct in inducing the transaction to New York law, even assuming that the parties could have done that had they been of such a mind. And plaintiff's suggestion that the governing law clause somehow transformed him into a resident **[*2]** of New York is frivolous.

In view of this conclusion, it is unnecessary to address defendants' other arguments.

Accordingly, defendants' motion to dismiss the complaint is granted in all respects.

SO ORDERED.

Dated: November 17, 2011

Lewis A. Kaplan

United States District Judge

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fn 1 *Goshen v. Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314, 324 (2002).

fn 2 Pizzi Decl. Ex. A.

fn 3 *Id.* § 16.6.

General Information

Result(s)	Motion To Dismiss Granted
Related Docket(s)	1:11-cv-02543 (S.D.N.Y.)
Topic(s)	Consumer Law