

RYAN BLAY, on behalf of himself and others similarly situated, Plaintiff, v. ZIPCAR, INC., Defendant.

Civil Action No. 09-11683-NMG

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

716 F. Supp. 2d 115; June 7, 2010, Decided

EXCERPT OF OPINION

MEMORANDUM & ORDER

GORTON, J.

Plaintiff Ryan Blay ("Blay") brings a putative class action against defendant Zipcar, Inc. ("Zipcar") for 1) unjust enrichment, 2) money had received and 3) declaratory judgment based upon allegations that certain fees charged to "members" of a rental car company are unlawful. Before the Court are Zipcar's motion to dismiss and Blay's motion to strike.

I. Background

A. Factual Background

This dispute arises out of plaintiff's dissatisfaction with miscellaneous customer charges that it believes are unlawfully high. Zipcar provides a car-sharing service to members who, upon approval of their application, sign a membership agreement and pay an annual membership fee. For predetermined hourly rates, members may reserve cars, which are parked throughout various metropolitan areas, in half-hour increments for periods of one hour or more. If the reservation proceeds without incident, the hourly rate plus taxes are automatically charged to customers.

According to Zipcar's membership contract, however, the company may also impose various additional charges under certain circumstances. Five such charges are at issue in this case:

1) a \$ 3.50 charge for reservations, extensions or cancellations made by phone with a live Zipcar representative (instead of online or through an automated phone system);

2) an automatic fee charged whenever a customer receives a parking or traffic ticket that Zipcar processes (regardless of error or fault and allegedly without a mechanism for lodging such complaints);

3) escalating late fees starting at \$ 50 which are imposed when a car is late and regardless of whether the vehicle has been reserved in the following time slot;

4) a policy pursuant to which a customer who forgets something in a vehicle must 1) recover the item within three hours

after he returns the car, 2) make a new reservation (for at least one hour) in order to retrieve it or 3) attempt recovery through an online lost and found; and

5) when a customer's account is inactive, she is charged \$ 20 per month if she has monies deposited with Zipcar and, if no money is on deposit, Zipcar may terminate her membership.

Plaintiff alleges that these charges are attempts to induce customers to do business with Zipcar as Zipcar intends (e.g., not returning cars late or maintaining inactive accounts). Plaintiff claims, moreover, that the fees are unrelated to Zipcar's associated costs or expenses and are therefore unenforceable penalties that generate windfalls to Zipcar.

Blay was a Zipcar member from April, 2007 through May, 2009. He claims that he has incurred customer charges at issue and seeks monetary and injunctive relief on behalf of a putative class of Zipcar members.

B. Procedural History

Blay filed his complaint on October 17, 2009 and, in December, 2009, Zipcar responded with a motion to dismiss. Blay submitted a timely opposition and Zipcar replied. In February, 2010, plaintiff filed a motion to strike certain documents submitted by Zipcar in connection with its motion to dismiss which Zipcar opposed the same month. The Court heard oral argument on the pending motions at a scheduling conference on May 19, 2010.

II. Analysis

B. Zipcar's Motion to Dismiss

2. Application

Zipcar moves to dismiss Blay's complaint because 1) agreed-upon fees represent alternative performances under the contract 2) the existence of an agreement renders quasi-contract remedies unavailable, 3) Blay cannot seek the return of payments voluntarily made or turn an affirmative defense into a cause of action, 4) Blay lacks standing to assert claims regarding fees he was never charged and claims for declaratory or injunctive relief and 5) the complaint fails to meet the requisite pleading standards in claiming that the fees are illegal penalties. Because Zipcar's fifth argument pervades plaintiff's claims, it will be considered in connection with the first.

a. Alternative Performance, Liquidated Damages or Penalties

The parties dispute how to classify (and thus how to analyze) the fees at issue. On one end are so-called alternative contracts. The concept of an alternative performance contract has been largely absent from Massachusetts case law over the past century and Zipcar's memorandum contains numerous citations to other jurisdictions and to Massachusetts cases from

the 1920s or earlier. Assuming that the doctrine is still valid, it provides that:

A contract may give an option to one or both parties to either perform a specified act or make a payment. Although this form of contract cannot be used as a cover for the enforcement of a penalty, if on a true interpretation, it appears that it was intended to give a real option, that is, that it was conceived possible that at the time fixed for performance, either alternative might prove the more desirable, the contract will be enforced according to its terms.

14 Williston on Contracts § 42:10 (4th ed. 2010).

On the other hand, a contract may also purport to present an alternative but in fact contemplate a single performance with a penalty or a liquidated damages sum stated as an alternative. *Id.* What renders a provision as an unenforceable penalty, however, is not subject to bright-line analysis. *TAL Fin. Corp. v. CSC Consulting, Inc.*, 446 Mass. 422, 844 N.E.2d 1085, 1093 (Mass. 2006). In general,

a liquidated damages provision will be enforced when, at the time the agreement was made, potential damages were difficult to determine and the clause was a reasonable forecast of damages expected to occur in the event of a breach. Conversely, [such] damages will not be enforced if the sum is grossly disproportionate to a reasonable estimate of actual damages made at the time of contract formation.

Id. (citation omitted). A party challenging a payment term as an unenforceable penalty bears the burden of proof. *Id.* at 1091-92.

Here, Zipcar contends that, with respect to each of the disputed charges, its membership contract allows for alternative performance and is thus an alternative contract. Moreover, Zipcar asserts that the payment provisions contemplate a continuation of the contractual relationship and, therefore, cannot be analyzed under the rules of liquidated damages because no breach occurs (and thus damages are not at issue) when payment provisions are invoked.

Blay, by contrast, characterizes the subject fees as unenforceable penalties. First, he contends that the charges at issue are not reflective of a permissible alternative contract because 1) the contract does not present any true options to drivers, 2) the charges are hidden and do not represent the product of contractual bargaining between equally-situated parties and 3) the fees are intended to compel compliance with terms as dictated by Zipcar, which is unlawful. Instead, Blay argues, the provisions are properly analyzed according to the rules for liquidated damages provisions. Then, because the charges are disproportionate to Zipcar's reasonably anticipated damages and bear no reasonable relation to its

costs, Blay contends that they represent unlawful penalties rather than enforceable liquidated damages terms.

Plaintiff's complaint and his memorandum are replete with allegations that, for instance, the charges are excessive, arbitrary and disproportionate to Zipcar's costs. Plaintiff does not, however, offer any basis for such a claim other than the threadbare assertions themselves. In his opposition, Blay responds to Zipcar's argument that his complaint is inadequately pled by circularly restating his legal conclusion:

The inequitable nature of the fees and charges is apparent because they are unreasonably and grossly disproportionate to the real damages from the breach and unconscionably excessive.

(quotation marks omitted). Furthermore, at oral argument, plaintiff's only justification of his complaint was based upon "intuition" and a "smell test". More is required to survive a motion to dismiss and Blay's claims based upon four of the five fees will therefore be dismissed without prejudice. Each is considered in turn.

1) *\$ 3.50 live representative fee*: Zipcar charges a \$ 3.50 charge for reservations, extensions or cancellations made over the phone with a live representative. According to Zipcar, it represents a clear alternative performance term. The customer may make reservations, cancellations or extensions online or through an automated phone system or may elect, for a small fee, the comfort of speaking with a representative. Attempting to sidestep that characterization, Blay counters that the fee is assessed regardless of the reason a member calls. That includes situations when a driver has no choice but to seek out a live representative such as arriving for a reservation only to find that the car is unusable because, perhaps, the garage door does not open. Pointing to the member agreement and standard operating procedures, Zipcar retorts that in such a situation, the fee is not charged because the call is not placed to make, extend or cancel a reservation. Indeed, Zipcar's operating procedures explicitly state that an agent

should waive the \$ 3.50 assistance fee if they need to make a change to a member's reservation due to issues with the Zipcar or other member behavior impacting the calling member's reservation.

Zipcar is correct. The \$ 3.50 fee offers a real choice and, when it doesn't, the fee is waived. Moreover, Blay makes no allegation concerning why or how the fee is "grossly disproportionate" or unrelated to Zipcar's costs. Quite logically, Zipcar reports that it charges for such calls because it needs to pay staff to be available. Without greater substantiation, therefore, Blay's claims asserting that the \$ 3.50 fee is an unenforceable penalty will be dismissed without prejudice.

2) *Late fees*: Zipcar's late fees can be severe. They start at \$ 50 and, after an hour, escalate to \$ 100. Again, however, Zipcar contends that its customers are given several choices: 1) reserve a car for another half-hour or hour if they might risk running late, 2) extend an ongoing reservation at no extra charge if the car is not reserved in the following time slot or 3) take the risk that a fee will be assessed if the car is late.

Blay responds that the fees are grossly disproportionate to any damages from a customer's breach. In support of that proposition, he notes that fees increase significantly at hour intervals, that late fees do not change depending on whether another customer has reserved the car immediately after the subject rental and that customers do not "choose" to return a car one-minute late. Blay sums up as follows:

Quite simply, Defendant's charges serve unfairly to punish one party rather than compensate the other who suffered no loss from the first party's breach.

Not only is that statement unsupported by any concrete allegations, it is flatly refutable. Zipcar is in the car-sharing business and, in order for it to operate effectively, the company is entitled to deter customers from returning cars late. The obvious reason, as Zipcar states, is that quite often members reserve vehicles back-to-back. In such situations, as noted in the complaint, if a vehicle is returned late, Zipcar's policy is to direct the customer whose car is not available on-time to another vehicle nearby. Of course that causes Zipcar to suffer a loss, contrary to Blay's cursory contention. At the very least, Zipcar must, for example, pay an agent to deal with the two customers and must incapacitate a second vehicle. More abstractly, the service would not be as attractive to members if they risked repeatedly arriving for a reservation only to find that the car was missing. When a vehicle is not subject to back-to-back reservations, moreover, Zipcar presents customers with an alternative to paying the late fee: they may extend their reservation for one half-hour (or however long is necessary) at the normal hourly rate which is substantially less than the late fee.

Apart from conclusory statements that are unsubstantiated, Blay has not, therefore, demonstrated why the late fee is an unenforceable penalty or grossly disproportionate to Zipcar's costs. Accordingly, the allegations based upon those charges will be dismissed without prejudice.

3) *Ticket processing*: If a customer incurs a parking or traffic ticket and Zipcar processes it, the company charges a \$ 20 processing fee. Zipcar contends that customers have choices to avoid that fee: they may pay the ticket promptly, in which case Zipcar is not even notified or they may wait, have Zipcar handle it and pay \$ 20. Blay responds that this "blanket" fee is unrelated to any expense undertaken. To support his contention that the fee is irrational, Blay speculates that a customer may, for instance, pay the ticket promptly but nonetheless be charged after Zipcar is erroneously notified that the ticket is unpaid. Blay also believes that a mechanism should exist to contest the fee if a ticket was

erroneously issued. In short, Blay states that he "can find no nexus between the fee and costs" and the penalty is disproportionate.

Blay conflates the burden of proof. He is required to make more than threadbare allegations and must provide some indication that the fee is grossly disproportionate to Zipcar's cost. His conclusory assertions are, however, unsupported and Zipcar's explanation that it is obliged to pay staff and bear other costs associated with the processing is compelling. Accordingly, the claims based upon the processing fees will also be dismissed without prejudice as inadequately pled.

4) *Lost items*: For customers who accidentally leave belongings behind after a rental, Zipcar allows them to retrieve such items free of charge within three hours. After that time, the customer must either try to recover the items through an online lost-and-found message board or reserve the vehicle again for at least one hour (the minimum time for any reservation). Blay contends that customers are not given a true choice because they often do not realize within three hours that they have forgotten something and therefore must pay the excessive fee.

Blay again fails to demonstrate how this charge is "unfair and disproportionate". If a customer needs to return to the vehicle to retrieve a lost item, Zipcar must make the vehicle available and another customer cannot rent it. To be sure, one hour is longer than necessary to accomplish a retrieval but that is the minimum reservation time and there is a legitimate risk of customer abuse of the privilege. In any case, the Court need not speculate because it is plaintiff's burden to plead a colorable claim and his conclusory argument does not do so. The claims based upon the lost item fees will, therefore, also be dismissed without prejudice.

5) *Inactivity fee*: According to the complaint, inactive members face several possible consequences. First, if they maintain money on deposit with Zipcar, the company will charge them \$ 20 per month until the funds are depleted or the member uses the service again. Second, if an inactive member has no money deposited, Zipcar reserves the unilateral right to close the account without notice, in which case the customer must re-apply and pay an application fee to resume membership. Third, a customer may simply terminate his membership in which case he must also re-apply to resume membership. Such fees are assessed on top of an annual membership charge.

Zipcar sees these options as viable alternatives. Blay characterizes them as powerful inducements that are not alternatives but are all designed, improperly, to compel customers to maintain an active account from which Zipcar benefits.

With respect to these fees, Blay's argument is colorable. In particular, the Court is unpersuaded that an inactive member costs Zipcar anything at all, let alone \$ 20 per month, and Blay is correct that the clear motive seems to be to induce customers to maintain active memberships. Although it is still unclear whether the charges might prove to be unenforceable penalties and plaintiff's pleading is again cursory, the

Court finds that the allegations related to inactivity fees are sufficient to state a cause of action and survive a motion to dismiss.

With respect to the summary nature of all of his general allegations, Blay reiterates that, at this stage, he cannot plead with any greater detail and must rely on the "smell test" or "intuition" without the benefit of discovery. His expressed plight is lamentable but ultimately unpersuasive. First, *Twombly* and *Iqbal* make clear what is required of a plaintiff in pleading his claim and substantiating his allegations. Neither "labels and conclusions" nor "naked assertions devoid of further factual enhancement" will do. *Iqbal*, 129 S. Ct. at 1949 (citation and quotation marks omitted). Plaintiff's complaint simply identifies the fees and then summarily jumps to the legal conclusion that they are unenforceable penalties. That is insufficient. *Id.* at 1949-50.

Second, for the reasons described above, the Court disagrees with the plaintiff's conclusory allegation that four of the five subject fees "smell" unlawful and grossly disproportionate to what is permissible. None of the charges is excessive on its face which is, of course, difficult to assess in the abstract. Where plaintiff's alleged "intuition" is, however, either unidentifiable or easily refuted, the Court will not look past clear deficiencies of the pleadings to allow such claims to move forward.

Finally, and perhaps most importantly, the Court is not persuaded that Blay is foreclosed or that he cannot state a claim if any of the deficient sub-claims has merit. If, for instance, Blay can allege facts in support of his contention that "[f]ees similar to [Zipcar's] imposed by similar vehicle rental businesses are not nearly as exorbitant as Zipcar's", he may be able to state a cause of action. Moreover, requiring greater substantiation is especially appropriate in the context of a putative class action where many potential plaintiffs presumably exist.

ORDER

In accordance with the foregoing,

1) plaintiff's motion to strike (Docket No. 16) is **DENIED**;
and 2) defendant's motion to dismiss (Docket No. 6) is **ALLOWED**
without prejudice.

So ordered.

/s/ Nathaniel M. Gorton

Nathaniel M. Gorton

United States District Judge

Dated June 7, 2010