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SHORT FORM ORDER

INDEX NO. 5198/2011

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

KIMON STATHAKOS, Individually and as a Representative of all others similarly situated,

Plaintiff,

-against-

METROPOLITAN TRANSIT AUTHORITY LONG ISLAND RAILROAD,

Defendant.

ORIG. RETURN DATE: JUNE 1, 2011
FINAL SUBMISSION DATE: SEPTEMBER 29, 2011
MTN. SEQ. #: 002 (001)
MOTION: MG

PLTF'S/PET'S ATTORNEY:
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Upon the following papers numbered 1 to 8 read on this motion TO DISMISS.
Notice of Motion and supporting papers 1-3; Memorandum of Law 4; Affirmation in Opposition and supporting papers 5, 6; Reply Affirmation and Affidavit 7, 8; it is,

ORDERED that this motion by defendant, THE LONG ISLAND RAILROAD COMPANY s/h/a METROPOLITAN TRANSIT AUTHORITY LONG ISLAND RAILROAD ("LIRR"), for an Order, pursuant to CPLR 3211 (a) (1) and (7), dismissing the complaint and any cross-claims on the grounds that: (1) the LIRR is entitled to governmental immunity; (2) the LIRR is not in breach of contract, is hereby **GRANTED** for the reasons set forth hereinafter. The Court has received opposition hereto from plaintiff.

This action was commenced by the filing of a summons and complaint with the Clerk of the Court on March 9, 2011. Plaintiff, a purported class representative, alleges that he commutes on the LIRR from Stony Brook station to Pennsylvania Station "almost every weekday" via the Port Jefferson

KAK

line. Plaintiff further alleges that he purchased monthly commutation tickets for the months of December 2010, January 2011, and February 2011. Plaintiff argues that a monthly commutation ticket creates a contractual obligation for the LIRR to provide train service. Plaintiff claims herein that the LIRR's suspension of service on the Port Jefferson line on December 27, 2010, January 12, 2011, January 27, 2011, and February 2, 2011, "made commuting into New York City via the use of Plaintiff's monthly commutation tickets impossible." Plaintiff contends that the LIRR's suspension of service on those days due to emergency weather conditions constituted a breach of contract. As such, plaintiff seeks "some sort of refund or credit on the purchase of his commutation ticket for those days that the Defendant did not provide train service."

The LIRR has now filed the instant application to dismiss plaintiff's complaint pursuant to CPLR 3211 (a) (1) and (7). On a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true (*see Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]). On such a motion, the court may consider affidavits for the limited purpose of remedying any defects in the complaint (*see Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]). The criterion is whether the plaintiff has a cause of action and not whether he may ultimately be successful on the merits (*see Stukuls v State of New York*, 42 NY2d 272 [1977]; *One Acre, Inc. v Town of Hempstead*, 215 AD2d 359 [1995]; *Detmer v Acampora*, 207 AD2d 477 [1994]).

Where a defendant moves to dismiss an action asserting the existence of a defense founded upon documentary evidence pursuant to CPLR 3211 (a) (1), the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Trade Source, Inc. v Westchester Wood Works, Inc.*, 290 AD2d 437 [2002]; *see Del Pozo v Impressive Homes, Inc.*, 29 AD3d 621 [2006]; *Montes Corp. v Charles Freihofer Baking Co.*, 17 AD3d 330 [2005]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346 [2003]).

The LIRR initially argues that it is entitled to governmental immunity, as it is a public benefit corporation that is a wholly owned subsidiary of the Metropolitan Transit Authority ("MTA"), and performs an essential governmental function for the benefit of the people of the State of New York, i.e, providing commuter transportation. Therefore, the LIRR contends that it is entitled to the same privileges, immunities, and exemptions as the MTA. Further, the LIRR

indicates that during the dates in question, the LIRR, in its discretion, decided to suspend or limit service pursuant to its Winter Storm Operation policy, which is intended to prevent passengers and crew from being stranded on trains that become stuck between stations during inclement weather and to enable the LIRR to clear the tracks and third rail of snow and ice. Moreover, the LIRR argues that it complied with Section 10-2 of the tariffs in effect on the subject dates, which provided, among other things, that there would be no refunds when trains are delayed or cancelled. Finally, the LIRR alleges that even if suspension of service could be considered a breach of contract, plaintiff is not entitled to a refund because refunds are not issued on a *pro rata* basis given the deep discount in the price of monthly tickets.

In opposition hereto, plaintiff argues that the theory of governmental immunity does not apply to this action, as this is not a tort action but "purely a breach of contract, declaratory judgment action." Similarly, plaintiff argues that the "professional judgment rule" is inapplicable herein, as that rule does not apply to breach of contract actions where the specific terms agreed to by the parties govern. Plaintiff claims that this is a "very simple case where Plaintiff paid for train service and the Defendant did not provide train service." Furthermore, plaintiff contends that the LIRR failed to comply with its own tariff which "clearly contemplates a refund under the circumstances at issue in this action."

The Court of Appeals has held that the LIRR is not itself the State or one of its political subdivisions, but rather is, pursuant to Public Authorities Law § 1266 (5), a public benefit subsidiary corporation of the MTA (*Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382 [1987]). Although "public benefit corporations . . . created by the State for the general purpose of performing functions essentially governmental in nature, are not identical to the State or any of its agencies, but rather enjoy, for some purposes, an existence separate and apart from the State, its agencies and political subdivisions" (*John Grace & Co. v State University Constr. Fund*, 44 NY2d 84, 88 [1978]), the Court has held that a particularized inquiry is necessary to determine whether – for the specific purpose at issue – the public benefit corporation should be treated like the State (*id.*). Pursuant to Public Authority Law § 1264, the purposes of the MTA are in all respects for the benefit of the people of the state of New York and the MTA shall be regarded as performing an essential governmental function in carrying out its purposes (*see* Public Authority Law § 1264 [1] and [2]).

Governmental immunity attaches when official action involves the exercise of discretion or expert judgment in policy matters, and is not exclusively ministerial, and a municipal defendant generally is not answerable in damages for

the injurious consequences of that action (*see Haddock v New York*, 75 NY2d 478 [1990]). The rationale for this immunity is that despite injury to a member of the public, the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury (*id.*; *see also McCormack v City of New York*, 80 NY2d 808 [1992]). In addition, the "professional judgment rule" insulates a municipality from liability for its employees' performance of their duties where the conduct involves the exercise of professional judgment such as electing one among many acceptable methods of carrying out tasks, or making tactical decisions (*Johnson v City of New York*, 15 NY3d 676 [2010]).

In the instant action, while plaintiff argues that governmental immunity and the professional judgment rule should not attach as this is a breach of contract action, the Court finds that the acts complained of herein that allegedly caused damage to plaintiff were discretionary in nature, to wit: the decisions by the LIRR's Winter Storm Operating Meeting Committee to suspend and limit service pursuant to its Winter Storms Operation Policy, and its subsequent decision to not issue refunds as a result of the suspension and cancellations. The Court notes parenthetically that the tariffs in effect provide that "no refunds are given for . . . delayed or cancelled trains." Accordingly, the Court finds that the LIRR is entitled to governmental immunity for the acts complained of herein by plaintiff.

In view of the foregoing, and affording plaintiff "the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 [2005]), the Court finds that plaintiff has failed to plead a cause of action for breach of contract against the LIRR.

As such, this motion by the LIRR to dismiss plaintiff's complaint is **GRANTED**, and this action is dismissed.

The foregoing constitutes the decision and Order of the Court.

Dated: April 13, 2012

HON. JOSEPH FARNETI
Acting Justice Supreme Court

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION