

**RBG Mgt. Corp. v Transit Worker's Union of Am.**

2008 NY Slip Op 33697(U)

March 31, 2008

Sup Ct, New York County

Docket Number: 111757/06

Judge: Louis B. York

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This opinion is uncorrected and not selected for official publication.

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 2

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RBG MANAGEMENT CORP.,

Plaintiff,

Index No. 111757/06

-against-

DECISION/ORDER

TRANSIT WORKER'S UNION OF AMERICA,  
AFL-CIO TRANSIT WORKER'S UNION LOCAL 100,  
ROGER TOUSSAINT, METROPOLITAN TRANSIT  
AUTHORITY,

Defendants.

**FILED**  
APR 09 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

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Louis B. York, J.S.C.:

Plaintiff moves to renew/reargue the Court's decision of July 17, 2007. Upon the December 15, 2005 expiration of the employment contract between NYCTA and Local 100, the Transit Worker's Union's ("TWU") local chapter, the parties had been in continuous negotiation of a new contract. On December 17, Local 100 filed an Improper Practice Charge with the Public Employment Relations Board ("PERB") as required by New York State statutory guidelines. The union sought to enjoin Defendant NYCTA from bringing up pension benefits during contract negotiations. This injunctive relief was denied in a December 20 decision. The same day, the union ordered a full strike by employees of Defendant NYCTA. This strike concluded on December 22, 2005.

In this action for money damages, Plaintiff RBG Management Corp. ("RBG"), a management company for a chain of supermarkets in Manhattan and the Bronx, demands at least \$39,856.86 plus interest for lost revenue and expenses arising out of the December 2005 New York City Transit Strike. Plaintiff alleges that its Manhattan and Bronx locations "experienced a large decrease in the

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number of patrons shopping at their supermarkets” and as a result, “[Plaintiff] lost a substantial amount of revenue due to a loss of customers.” (Pl.’s Compl. ¶¶ 34-35). Defendant New York City Transit Authority (“NYCTA”) moved to dismiss the complaint for failure to state a cause of action and improper pleading pursuant to New York Public Authorities Law § 1212(1). Plaintiff then submitted a Cross-Motion to amend its Complaint and an Opposition to Defendant’s Motion to Dismiss. The proposed amendment to the Complaint asserts an additional cause of action against Defendant NYCTA sounding in prima facie/intentional tort. Plaintiff argues in opposition to Defendant’s Motion to Dismiss in that, assuming the Court grants leave to amend the Complaint, the Amended Complaint will effectively state a valid cause of action. Defendant asserted no opposition to Plaintiff’s Cross-Motion to amend the Complaint and requested that this Motion to Dismiss be considered a Motion to Dismiss the Amended Complaint. For the reasoning that follows, Plaintiff’s Cross-Motion to Amend the Complaint is granted; and Defendant’s Motion to Dismiss the Amended Complaint is granted.

#### Discussion

Initially, the Court turns to Plaintiff’s Motion to Amend the Complaint. According to CPLR § 3025(b), “leave shall be freely given” to amend pleadings. Since there is no opposition from Defendant, and the Court is not aware of any reason to deny Plaintiff’s request to amend the Complaint, the Court grants the Cross-Motion.

Upon application, the Court may dismiss a plaintiff’s Complaint for failure to state a cause of action. CPLR § 3211(a)(7). In its prior decision, the Court dismissed the action because of the failure of the plaintiff to allege in its complaint that 30 days had elapsed since the filing of the Notice of Claim and that the Authority has failed to respond to the claims (Public Auth Law §1212(1). The

plaintiff now argues that despite this omission in the complaint, the plaintiff did, in fact, file a Notice of Claim and such a technical omission should not result in dismissal. The Court is persuaded by the plaintiff's reasoning to address the issues on the merits, particularly since the defendant never raised this issue. In addressing this issue, the Court is to afford Plaintiff every possible favorable inference and determine whether the facts alleged demonstrate entitlement to relief under any legal theory. If so, dismissal is improper. Arnav Indus. v. Brown Raysman, Millstein, Felder & Steiner, LLP, 96 N.Y.2d 300, 303, 727 N.Y.S.2d 688, 690 (2001). In the present action, Plaintiff asserts two alternative causes of action against Defendant. The first bases liability upon Defendant's alleged violation of New York Civil Service Law § 210, commonly referred to as the "Taylor Law," which prohibits strikes by public employees. Civ. Serv. Law § 210. The second cause of action sounds in prima facie/intentional tort. Plaintiff asserts that Defendant bargained in bad faith by making pension modifications a mandatory element of contract negotiations.

A violation of the Taylor Law does not give rise to a private cause of action. Burns Jackson Miller Summit & Spitzer v. Lindner, 59 N.Y.2d 314, 322, 464 N.Y.S.2d 712, 714 (1983). In a similar and recent case, this Court found that a group of New York City businesses suing for lost revenue as a result of the 2005 Transit Strike had no claim against the NYCTA. The Court found that, in accordance with Burns, the plaintiffs' cause of action steeped in the Taylor Law justifies a motion to dismiss. Russian Samovar, Inc. v. Transit Worker's Union of America, 2006 N.Y. Misc. LEXIS 3893, 7 (N.Y. Sup. Ct., N.Y. County 2006). For the same reasons, Plaintiff's first cause of action in the present case is inherently baseless.

The Taylor Law's restriction on private causes of action does not, however, prevent an independent common law cause of action. Burns, 59 N.Y.2d at 322, 464 N.Y.S.2d at 714. Plaintiff

argues it has asserted a valid cause of action for prima facie/intentional tort against Defendant for “intentionally caus[ing] the strike by bargaining in bad faith . . . resulting in special damages.” (Pl.’s Am. Compl. ¶¶ 52, 54). The elements of a prima facie tort are “1) intentional infliction of harm 2) resulting in special damages 3) without excuse or justification and 4) by an act or series of acts that would otherwise be lawful.” Burns, 59 N.Y.2d at 332.

With reference to the first element, Plaintiff must allege an intentional infliction of harm. To do so, Plaintiff’s proposed Amended Complaint asserts that “NYCTA had actual knowledge and intentionally caused the strike by bargaining in bad faith [and] that NYCTA was aware of the likely impact the strike would have on plaintiff.” (Pl.’s Am. Comp. ¶¶ 52, 53). An intentional tort may be actionable if Defendant commits an intentional harm without justification. American Guild of Musical Artists v. Petrillo, 286 N.Y. 226, 231, 36 N.E.2d 123, 125 (1941). Further, when the act is lawful, as is assumed in this case, it may only be actionable when entirely malicious and directed exclusively toward the complaining party. Burns 59 N.Y.2d at 333, 464 N.Y.S.2d at 721. Plaintiff does not allege that Defendant included pension issues in its negotiations solely with malicious intent to harm it. The naked allegations of intentional, malicious acts set forth in Plaintiff’s Amended Complaint are insufficient to withstand a motion to dismiss.

Turning to the second element, Plaintiff has also failed to demonstrate special damages. In Plaintiff’s proposed Amended Complaint, it asserts “damages [inflicted] upon the plaintiff resulting in special damages in the sum of \$39,856.86,” caused by a decrease in customer traffic because of the strike. Plaintiff essentially demands revenue lost from those customers who did not shop at its locations during the strike. However, the Court has held that “general allegations of lost sales from unidentified lost customers” is insufficient to support a prima facie tort. Vigoda v. DCA Prods. Plus

Inc., 293 A.D.2d 265, 266, 741 N.Y.S.2d 20, 22-23 (1<sup>st</sup> Dept. 2002). Vigoda further states that if "all plaintiffs have alleged is lost future income, conjectural in identity and speculative in amount," the special damages element has not been met. Id. Here, because Plaintiff merely demands lost revenue from an unidentifiable pool of customers, special damages have not been sufficiently alleged.

With respect to the third element, Plaintiff's complaint must demonstrate the absence of excuse or justification by Defendant. Plaintiff's proposed Amended Complaint, however, fails to address this issue at all.

It is unclear whether the fourth element, a lawful act or acts, is met. Plaintiff argues that Defendant's tortious act consists of bargaining in bad faith. However, the union went on strike before PERB rendered a decision on the Improper Practice Charge. Since PERB has not weighed in on this issue, it is not necessary for this Court to delve into the merits of that proceeding since facial insufficiency of this cause of action is readily apparent by the reasoning above.

For the reasons given forth, it is therefore

**ORDERED** that Plaintiff's motion to amend the complaint is granted; and it is further

**ORDERED** that Defendant's motion to dismiss the amended complaint is granted with costs and disbursements to Defendant as taxed by the Clerk of the Court; and it is further

**ORDERED** that the Clerk is directed to enter judgment accordingly.

Dated: 3/31/08

**FILED**

APR 09 2008

COUNTY CLERK'S OFFICE  
NEW YORK

ENTER:

*[Signature]*

Louis B. York, J.S.C.