Kloska v Suffolk County
2015 NY Slip Op 31675(U)
August 20, 2015
Supreme Court, Suffolk County
Docket Number: 14-14238
Judge: Jr., Andrew G. Tarantino

[* 1]

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SHORT FORM ORDER

INDEX No. 14-14238

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 11/26/14
ADJ. DATE 3/10/15
Mot. Seq. #002 - MotD

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RICHARD KLOSKA and AMERICAN GENERAL CONTRACTING LLC,

Plaintiffs,

- against -

SUFFOLK COUNTY, SUFFOLK COUNTY DEPARTMENT OF CONSUMER AFFAIRS and SAMUEL CHU, as Commissioner,

Defendants.

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Bay Shore, New York 11706

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Upon the following papers numbered 1 to 12 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1-5; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 6-7; Replying Affidavits and supporting papers 8-12; Other defendants' memorandum of law; (and ~~after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants for an order dismissing the complaint pursuant to CPLR 3211 (a) (7), is granted to the extent of dismissing COUNT (which is what Plaintiff referred to as Causes of Action) I, II, V, VI, and VII of the complaint, with leave to timely replead as to cause of action I only, dismissing count III of the complaint to the extent set forth below, and dismissing the plaintiffs' claim for monetary damages, and is otherwise denied.

This is an action for declaratory and injunctive relief, as well as monetary damages, arising from the defendants' efforts to prosecute consumer complaints filed with the Suffolk County Department of Labor, Licensing and Consumer Affairs ("the department") relating to home improvement work performed by American General Contracting LLC ("AGC") in Suffolk County.

As can best be divined from the complaint, it appears that this lawsuit is based on claims of misrepresentation and bias in the course of the negotiations and attempted settlement of the subject consumer complaints and of the related violations issued by the department. The plaintiffs allege, in part, that in November 2013, they met with the complainants and with Robert Meguin, deputy commissioner

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of the Suffolk County Department of Consumer Affairs, to discuss a resolution of the complaints and violations; that they were advised that AGC's home improvement contractor's license would not be renewed unless AGC resolved the violations; that in December 2013, the plaintiffs entered into a settlement pursuant to which AGC paid the maximum fine for the violations, the complaints were resolved, and AGC's license was renewed without condition; that at or about the same time, AGC, as plaintiff, was engaged in litigation with two of the complainants; that sometime thereafter, Samuel Chu, who was already the commissioner of the Suffolk County Department of Labor, was appointed commissioner of the Suffolk County Department of Consumer Affairs, and the offices were merged; that in April 2014, Chu met with the complainants to discuss how the department could "help" them; that it was later learned from attorneys who had attended the meeting that the department's representatives were "out to get" the plaintiffs; that the litigation involving the complainants is now "on hold," as "all of the complainants are now waiting for [the department] to 'wack' AGC"; that the department has since issued violations to AGC arising from the same complaints that had previously been resolved by the payment of fines; and that the department now claims that the renewal of AGC's license was conditional.

The plaintiffs plead seven self-styled "counts" in their complaint. They are as follows:

- Count I is for judgment declaring that the defendants are in violation of the New York State General Municipal Law, Public Officers Law, and Election Law, as well as the Suffolk County Charter, Ethics Law, and Code. (The plaintiffs also plead, as part of count I, requests for declaratory relief which are essentially duplicated in other counts and which, therefore, will not be considered in connection with Count I.)

- Count II is for a "finding" that the defendants have interfered with the plaintiffs' right of access to the courts and, as a result, that the plaintiffs have been injured.

- Count III is for a "finding" that the holding of two public offices, the merger of two public offices, and the interference with the plaintiffs' access to the courts violates the New York State Constitution.

- Count IV is for a "finding" that Samuel Chu is unlawfully and improperly holding two incompatible public offices and, as a result, that the plaintiffs have been injured.

- Count V is for a "finding" that the defendants changed longstanding policies and procedures–including the policy of closing consumer complaints and yielding to the courts "where a matter is a civil dispute and litigation and/or attorneys are involved on both sides"–and, in so doing, violated the plaintiffs' constitutional rights.

- Count VI is for a "finding" that the defendants violated the Suffolk County Charter by merging two public offices without a public referendum and, in so doing, violated the plaintiffs' constitutional rights.

- Count VII is for a "finding" that the defendants conspired to violate the plaintiffs' procedural and substantive due process rights.

The plaintiffs also seek to recover monetary damages in connection with one or more of the requested declarations and "findings," as well as to permanently enjoin the defendants from pursuing any violations for which the plaintiffs have already paid the relevant fine. The defendants now move, pre-answer, to dismiss the complaint for failure to state a cause of action.

In considering a motion to dismiss under CPLR 3211 (a) (7), a court must determine whether, accepting the facts as alleged in the complaint as true and according the plaintiff the benefit of every favorable inference, those facts fit within any cognizable legal theory (***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]). However, bare legal conclusions and factual claims flatly contradicted by the record are not entitled to any such consideration (***Doria v Masucci***, 230 AD2d 764, 646 NYS2d 363 [1996], *lv denied* 89 NY2d 811, 657 NYS2d 404 [1997]).

As to count I, it is evident that the plaintiffs failed to plead what provisions of the New York State General Municipal Law, Public Officers Law, and Election Law, and the Suffolk County Charter, Ethics Law, and Code the defendants are claimed to have violated. The plaintiffs, in opposition, do not dispute the deficiency, but claim that due reference to the specific provisions was made in the affirmation and memorandum of law on their prior motion for a preliminary injunction, and seek to "incorporate" those papers and restate their allegations. "In opposition to [a motion to dismiss pursuant to CPLR 3211 (a) (7)], a plaintiff may submit affidavits to remedy defects in the complaint and preserve inartfully pleaded, but potentially meritorious claims" (***Mills v Gardner***, 106 AD3d 885, 886, 965 NYS2d 580, 582 [2013] [internal quotation marks omitted]). The plaintiffs, however, in a stated effort to be "green conscious," have not furnished the court with copies of those papers. Since those papers are not before the court, they cannot serve to rectify the omissions. Rather than dismiss Count I outright, the court, on its own motion, hereby grants the plaintiffs leave to replead it, with requisite specificity, no later than 30 days after the date of this decision and order.

Count II fails to state a legally cognizable claim. Simply put, it does not appear from the statements in the complaint how the defendants may be said to have interfered with the plaintiffs' right of access to the courts. The plaintiffs allege, in relevant part, that AGC remains "engaged in litigation with two of the Complainants" and that "AGC is the plaintiff in both actions"; according to the court's computer records, both actions are to recover in contract, presumably for work performed at the complainants' homes, and both are marked "active." While the plaintiffs imply that the complainants may now be delaying or prolonging litigation in order to gain some perceived advantage, the most that may be concluded from the relevant allegations is that the defendants' "tactics" have caused AGC to lose some leverage in possible settlement negotiations with the complainants, which is hardly actionable.

The defendants' motion is granted with respect to count III only to the extent it is based on the plaintiffs' claim of interference with their right of access to the courts (as discussed in the preceding paragraph); otherwise, the court finds it to be adequately pleaded. Whether, as the defendants contend, there may be no requirement in state or local law obligating Suffolk County to utilize the referendum process to establish the department, is beyond the scope of a motion to dismiss for failure to state a cause of action. "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19, 799 NYS2d 170, 175 [2005]; *see also* ***Staver Co. v Skrobisch***, 144 AD2d 449, 533 NYS2d 967 [1988], *lv dismissed*

74 NY2d 791, 545 NYS2d 106 [1989]). While the defendants also mention, in passing, that the plaintiffs "have no injury in fact, and thus lack standing" to object to the establishment of the department, they offer no legal or factual support for that proposition.

Count IV is likewise sufficiently pleaded to withstand dismissal. The court rejects the defendants' argument that the plaintiffs have failed to identify in their complaint what two offices Samuel Chu is alleged to hold; it seems clear that what is alleged is that the Suffolk County Department of Labor and the Suffolk County Department of Consumer Affairs were improperly merged and that Chu is now the commissioner of two improperly merged departments. If, in fact, the court has misconstrued the plaintiffs' intention in this regard, they are free to seek leave to amend the complaint (or to amend as of right, if timely done) to clarify the basis for their claim.

As to counts V and VI, even assuming that they otherwise state legally sufficient claims, they are wholly unsupported by any allegations of fact to suggest that the plaintiffs were deprived of a constitutional right, particularly as it is not pleaded that AGC's license has been revoked or that additional, improper fines have been imposed. Nor, as the defendants correctly note, do the doctrines of double jeopardy or res judicata have any bearing on or applicability to this matter.

Count VII, which is based on a claimed deprivation of the plaintiffs' property rights in their home improvement contractor's license (by failure to unconditionally renew) and in money (by the threatened repeated imposition of fines), is barred by the doctrine of ripeness. Significantly, the plaintiffs do not allege that they have been deprived of their license, nor that new fines have been imposed.

> The ripeness doctrine and the related rule that there must be "an actual controversy between genuine disputants with a stake in the outcome" (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C3001:3, p 356) serve the same purpose: "to conserve judicial machinery for problems which are real and present or imminent, not to squander it on abstract or hypothetical or remote problems" (4 Davis, Administrative Law § 25:1, at 350 [2d ed]).

(***Church of St. Paul & St. Andrew v Barwick***, 67 NY2d 510, 518, 505 NYS2d 24, 29, *cert denied* 479 US 985, 107 S Ct 574 [1986]). Accordingly, their due process claims are not ripe for review, and there is no justiciable controversy upon which the court may properly render a judgment.

Also dismissed is the plaintiffs' claim for monetary damages, as it is undisputed that they failed to serve a notice of claim and, hence, to comply with a condition precedent to bringing suit against a county. County Law § 52 (1), which governs in this matter, broadly provides that

> Any claim or notice of claim against a county for damage, injury or death, or for invasion of personal or property rights, of every name and nature, and whether casual or continuing trespass or nuisance and any other claim for damages arising at law or in equity, alleged to have been caused or sustained in whole or in part by or because of any misfeasance, omission of duty, negligence or wrongful act on the part of the county, its officers, agents, servants or employees, must be made and served in compliance with section fifty-e of the

> general municipal law. Every action upon such claim shall be commenced pursuant to the provisions of section fifty-i of the general municipal law. The place of trial shall be in the county against which the action is brought.

As such, the failure to serve a notice of claim in any action against a county to recover damages is fatal, unless the action has been brought to vindicate a public interest or leave to serve a late notice of claim has been granted (***Picciano v Nassau County Civ. Serv. Commn.***, 290 AD2d 164, 736 NYS2d 55 [2001]). The plaintiffs, in opposition, do not argue the applicability of the exception for actions brought to vindicate a public interest, nor do they seek leave to serve a late notice of claim. Instead, they argue that the notice of claim requirement does not apply where the demand for monetary damages is merely incidental to the equitable relief sought. While that argument may serve to excuse noncompliance under other notice of claim statutes, it does not apply to cases, as here, governed by County Law § 52 (*see id.*).

As a final matter, it is noted that the defendants do not address in their moving papers the legal sufficiency of the plaintiffs' claim for permanent injunctive relief.

The defendants shall serve their answer to the complaint within 30 days after service upon it by Plaintiff of the amended complaint as directed above by the Court.

Dated: 8.20.2015

A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION