SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 46

----------x

JDG INVESTIGATIONS, INC., and JOHN GIVENS,

Index No. 161609/2015

Plaintiffs

- against -

DECISION AND ORDER

CITY OF NEW YORK, NEW YORK CITY COUNCIL, and JULIE MENIN, in her capacity as Commissioner of the New York City Department of Consumer Affairs,

Defendants

----------x

LUCY BILLINGS, J.S.C.:

Plaintiffs JDG Investigations, Inc., a process serving business, and its owner John Givens challenge the authority of defendant Commissioner of the New York City Department of Consumer Affairs (DCA) to adjudicate violations of the New York City Administrative Code and the Rules of the City of New York (R.C.N.Y.) regulating process servers in New York City. Plaintiffs also challenge the DCA Commissioner's authority to impose fines and civil penalties on plaintiffs for violations of those provisions. Plaintiffs claim that the adjudication of violations and imposition of fines and penalties violated plaintiffs' rights to due process and to protection against excessive punishment under the 8th and 14th Amendments to the United States Constitution and Article I, §§ 5 and 6 of the New York Constitution. Plaintiffs further claim that DCA published false statements on its website about JDG Investigations.

I. FACTUAL AND PROCEDURAL BACKGROUND

On November 2, 2011, DCA issued to JDG Investigations a Notice of Hearing on charges that JDG Investigation violated 6 R.C.N.Y. § 2-234a(b) and (c) by failing to submit an affirmation that JDG Investigations had adopted a written Compliance Plan. The notice informed JDG Investigations that it might settle these charges by paying a fine of $1,000 rather than attending a hearing. On December 22, 2011, JDG Investigations signed a Consent Order requiring JDG Investigations to submit (1) a written Compliance Plan, (2) an affirmation that JDG Investigations had adopted that Compliance Plan, and (3) monthly reports regarding JDG Investigations' compliance with the Consent Order and the laws governing process servers. The Consent Order also provided that JDG Investigations' failure to submit the required documents would be grounds for revocation of its process server license and fines of up to $1,000 for each violation of the Consent Order or applicable laws. The Consent Order did not, however, impose any fine on JDG Investigations.

On February 19, 2014, DCA issued another Notice of Hearing to JDG Investigations, alleging over 200 violations of the process server statutes and regulations and the 2011 Consent Order. Plaintiffs commenced a proceeding pursuant to C.P.L.R. Article 78 challenging these violations, but the New York Supreme Court dismissed the proceeding as moot after DCA withdrew the notice.

Defendants now move to dismiss this action based on the

complaint's failure to state a claim. C.P.L.R. § 3211(a)(7). Plaintiffs cross-move to join a defendant and amend their amended complaint, to convert defendants' motion to a motion for summary judgment, and to grant summary judgment in favor of plaintiffs on their claims. C.P.L.R. §§ 1002(b), 3025(b) and (c), 3211(c), 3212(b).

II. VALIDITY OF THE STATUTES AND REGULATIONS REGULATING PROCESS SERVERS

Plaintiffs claim that the Administrative Code and R.C.N.Y. provisions regulating process servers usurp the New York Legislature's exclusive jurisdiction in violation of New York Constitution Article VI, § 30, and Municipal Home Rule Law § 11(1)(e). In related proceedings by plaintiffs against defendants, this court previously determined that the Administrative Code and R.C.N.Y. provisions regulating process servers do not usurp the New York Legislature's authority. Therefore the court grants defendants' motion to dismiss plaintiffs' same claims here for the same reasons as the court dismissed those claims there. Givens v. City of New York, Index No. 100016/2016, slip op. at 4-6 (Feb. 2, 2018); JDG Investigations v. City of New York, Index No. 100224/2016, slip op. at 4-6 (Feb. 2, 2018).

Plaintiffs also claim that the Administrative Code and R.C.N.Y. provisions regulating process servers are void because DCA and the City of New York failed to comply New York City Charter § 1043(d) by not reviewing the provisions and reporting specific findings to the New York City Council. This court

previously determined these claims as well in the two proceedings cited above, finding that DCA and the City did prepare the required report and submitted it to the City Council September 13, 2013. Givens v. City of New York, Index No. 100016/2016, slip op. at 6-7 (Feb. 2, 2018); JDG Investigations v. City of New York, Index No. 100224/2016, slip op. at 6-7 (Feb. 2, 2018). Res judicata thus bars all plaintiffs' claims challenging the validity of Administrative Code and R.C.N.Y. provisions regulating process servers. Matter of Hunter, 4 N.Y.3d 260, 269 (2005); Bevilacqua v. CPR/Extell Parcel I, L.P., 126 A.D.3d 429, 429 (1st Dep't 2015); Andrade v. New York City Police Dept., 106 A.D.3d 520, 521 (1st Dep't 2013); Pitcock v. Kasowitz, Benson, Torres & Friedman, LLP, 80 A.D.3d 453, 454 (1st Dep't 2011). See Landau, P.C. v. LaRossa, Mitchell & Ross, 11 N.Y.3d 8, 13 (2008).

III. THE REGULATORY FRAMEWORK UNDERLYING DCA'S AUTHORITY

New York City Charter § 2203 sets forth the DCA Commissioner's powers to enforce violations of the Administrative Code and R.C.N.Y. provisions regulating process servers:

> (f) The commissioner, in the performance of said functions, including those functions pursuant to subdivision e of this section, shall be authorized to hold public and private hearings, administer oaths, take testimony, serve subpoenas, receive evidence, and to receive, administer, pay over and distribute monies collected in and as a result of actions brought for violations of laws relating to deceptive or unconscionable trade practices, or of related laws, and to promulgate, amend and modify rules and regulations necessary to carry out the powers and duties of the department.
>
> . . . .
>
> (h)(1) Notwithstanding any inconsistent provision of law, the department shall be authorized, upon due notice and

> hearing, to impose civil penalties for the violation of any laws or rules the enforcement of which is within the jurisdiction of the department pursuant to this charter, the administrative code or any other general, special or local law. The department shall have the power to render decisions and orders and to impose civil penalties for all such violations . . . .

Administrative Code § 20-104 includes parallel provisions:

> d. The commissioner or the commissioner's designee shall be authorized to conduct investigations, to issue subpoenas, to receive evidence, to hear complaints regarding activities for which a license is or may be required, to take depositions on due notice, to serve interrogatories, to hold public and private hearings upon due notice, to take testimony and to promulgate, amend and modify procedures and practices governing such proceedings.
>
> e.(1) The commissioner shall be authorized, upon due notice and hearing, to suspend, revoke or cancel any license issued by him or her in accordance with the provisions of chapter two and to impose or institute fines or civil penalties for the violation of (i) any of the provisions of chapter two of this title and regulations and rules promulgated under chapter two of this title and (ii) any of the provisions of any other law, rule or regulation, the enforcement of which is within the jurisdiction of the department . . . . Except to the extent that dollar limits are otherwise specifically provided such fines or civil penalties shall not exceed five hundred dollars for each violation.

Administrative Code § 20-106(a), in Chapter 1 of Title 20, sets forth the fines to be imposed upon conviction of violations of the Administrative Code and R.C.N.Y. provisions governing licensing and regulating of process servers:

> Except as otherwise specifically provided in chapter two of this title, or in subdivision b of this section, any person, whether or not he or she holds a license issued under chapter two, who violates any provision of chapter two or any regulation or rule promulgated under it shall, upon conviction thereof, be punished for each violation by a fine of not less than twenty-five dollars nor more than five hundred dollars, or by imprisonment not exceeding fifteen days, or both; and any such person shall be subject also to a civil penalty in the sum of one hundred dollars for each violation, to be recovered in a civil action.

Administrative Code § 20-409.1, in Chapter 2 of Title 20, sets forth civil penalties for violations of the Administrative Code's provisions governing process servers:

> Any person who, after notice and hearing shall be found guilty of violating any provision of this subchapter, shall be punished in accordance with the provisions of chapter one of this title and shall be subject to a penalty of not less than seven hundred dollars nor more than one thousand dollars for each violation.

IV. DCA'S AUTHORITY TO ENFORCE VIOLATIONS OF THE STATUTES AND REGULATIONS GOVERNING PROCESS SERVERS

Plaintiffs claim that DCA lacks the authority to initiate administrative proceedings against plaintiffs for their alleged violations of the Administrative Code and R.C.N.Y because New York criminal courts maintain exclusive jurisdiction over adjudication of these violations. New York City Charter § 2203(f) and (h)(1) and Administrative Code § 20-104(e)(1), however, expressly empower the DCA Commissioner to enforce the statutes and regulations governing process servers through hearings and imposition of fines or civil penalties for violations of those provisions. Nor does the New York Constitution, Penal Law, or Criminal Procedure Law limit DCA in administratively adjudicating violations of the process server statutes and regulations. N.Y. Penal Law § 5.10(3); Miller v. Schwartz, 72 N.Y.2d 869, 870 (1988); Rosenthal v. Hartnett, 36 N.Y.2d 269, 272 (1975).

Administrative Code § 20-106(a) imposes fines and penalties on persons convicted of violating the process server statutes or regulations and therefore does not limit DCA's power to impose

fines on plaintiffs, even though they have not been convicted of any criminal offense. The introductory phrase, "Except as otherwise specifically provided in chapter two of this title," also explicitly sets forth that § 20-106(a) does not provide the exclusive fines and penalties for violations of the process server statutes and regulations and does not override the penalties under Administrative Code § 20-409.1.

Plaintiffs also claim that New York City Charter § 1048 requires the New York City Office of Administrative Tribunals (OATH) to conduct any adjudicatory hearings regarding violations of the Administrative Code and the R.C.N.Y. New York City Charter § 1048(1) provides that OATH "shall conduct all adjudicatory hearings for agencies of the city unless otherwise provided for by executive order, rule, law . . . ." N.Y.C. Charter § 1048(1) (emphasis added). New York City Charter § 2203(f) otherwise provides for the DCA Commissioner to hold hearings and § 2203(h)(1) otherwise provides for DCA to "render decisions and orders and to impose civil penalties for all such violations" of the process server statutes and regulations. DCA thus was authorized to adjudicate the violations alleged against plaintiffs and was not required to refer those adjudications to OATH. In fact plaintiffs do not even allege that defendants held any hearing or that OATH did not conduct any hearing on those alleged violations.

For these reasons, the court also grants defendants' motion to dismiss plaintiffs' claims that DCA lacked authority or

jurisdiction under the New York City Charter or Administrative Code to adjudicate violations of the process server statutes and regulations and thus violated plaintiffs' rights to procedural and substantive due process. U.S. Const. amend. XIV; N.Y. Const. art. I, § 6. Consequently, plaintiffs' claim that DCA falsely represented to plaintiffs that it maintained jurisdiction to adjudicate plaintiffs' alleged violations also fails.

V. DCA'S AUTHORITY TO IMPOSE FINES AND OTHER PENALTIES

Plaintiffs claim further that DCA further exceeded its authority and violated the Eighth Amendment to the United States Constitution and Article I, § 5, of the New York Constitution by charging plaintiffs with multiple violations of the same statute or regulation and threatening to impose cumulative and consecutive penalties in further violation of Penal Law § 80.15. Penal Law § 80.15, however, does not limit DCA's authority to impose multiple penalties for the same offense, as Penal Law § 5.10(3) expressly provides that nothing in the Penal Law bars or otherwise affects any penalty authorized by law to be recovered in a civil proceeding.

6 R.C.N.Y. § 6-30, which sets forth the schedule of penalties for violations of the process server statutes and regulations, also allows DCA to charge each violation of a statute or regulation or its "subdivision, paragraph, subparagraph, clause, item, or other provision" as a separate violation. Section 6-30 prohibits DCA neither from charging violations of multiple statutory or regulatory provisions for the

same conduct, nor from charging multiple violations of the same statutory or regulatory provision for different conduct or multiple instances of the same conduct. Therefore the court grants defendants' motion to dismiss plaintiffs' claims that DCA lacked authority under the New York City Charter or Administrative Code to charge each violation of each provision of the Administrative Code or R.C.N.Y. separately and to impose multiple punishments and thus violated plaintiffs' rights to protection against excessive punishment. U.S. Const. amend. VIII; N.Y. Const art. I, § 5. See V & A Towing v. City of New York, 197 A.D.2d 386, 387 (1st Dep't 1993); Meyers Bros. Parking Sys. v. Sherman, 87 A.D.2d 562, 563 (1st Dept 1982), aff'd, 57 N.Y.2d 653 (1982).

Plaintiffs again point to Administrative Code § 20-106(a) as allowing DCA to impose a fine or penalty for violations of the process server statutes and regulations only after a conviction for a criminal offense and limiting all civil penalties to $100 per violation. Plaintiffs misinterpret the statute's plain terms, which provide that "any person . . . who violates any provision of chapter two [of Title 20] or any regulation or rule promulgated under it shall, upon conviction thereof, be punished for each violation . . . ; and any such person shall be subject also to a civil penalty in the sum of one hundred dollars for each violation." N.Y.C. Admin. Code § 20-106(a) (emphasis added). Thus Administrative Code § 20-106(a) applies to adjudications and convictions of violations of provisions in the

Administrative Code and R.C.N.Y., not necessarily adjudications and convictions of a criminal offense.

As explained above, neither do Administrative Code § 20-106(a)'s qualifying terms, "Except as otherwise specifically provided in chapter two of this title," limit the penalties DCA may impose for violations of the provisions governing process servers. As "otherwise specifically provided in chapter two of this title," Administrative Code § 20-409.1 authorizes DCA to impose a $700 to $1,000 fine for each violation of the process server statutes.

Consequently, DCA was authorized to impose fines on plaintiffs without conviction of a criminal offense, but only upon conviction of their violation of the process server statutes and regulations. Upon conviction of their violation of the process server statutes, DCA was authorized to impose an initial fine of up to $500, a civil penalty of $100, and an additional fine, albeit not a civil penalty, of $700 to $1,000 per violation. Moreover, plaintiffs expressly agreed to the Consent Order, which independently authorized DCA's imposition of fines of up to $1,000 for each violation of the Consent Order or 6 R.C.N.Y. § 2-234a(b) or (c).

For these reasons, the court grants defendants' motion to dismiss plaintiffs' claims that DCA exceeded its authority to impose fines and penalties and fines and thus violated plaintiffs' rights to procedural and substantive due process. U.S. Const. amend. XIV; N.Y. Const. art. I, § 6. The court also

grants defendants' motion to dismiss plaintiffs' claims that defendants violated 18 U.S.C. §§ 241 and 242, as those federal criminal statutes do not provide a private right of action. Storm-Eggink v. Gottfried, 409 Fed. Appx. 426, 427 (2d Cir. 2011); Hill v. Didio, 191 Fed. Appx. 13, 14 (2d Cir. 2006); Keady v. Nike, Inc., 23 Fed. Appx. 29, 31 (2d Cir. 2001).

Finally, insofar as plaintiffs claim that the maximum fine DCA may impose is excessive and violates the Eighth Amendment to the United States Constitution or Article I, § 5, of the New York Constitution, plaintiffs fail to plead facts to support such a claim. Neither the amended complaint nor the proposed second amended complaint alleges what fines DCA imposed for what offenses, that any such fines were excessive, or even that DCA actually fined plaintiffs, as the pleadings allege only that DCA threatened to or sought to impose fines of $1,000.

VI. PLAINTIFFS' RIGHT TO SERVE PROCESS WITHOUT A PROCESS SERVER LICENSE

Plaintiffs claim that DCA violated the Administrative Code and R.C.N.Y. when DCA notified plaintiffs that they were not permitted to serve process without a license while their license applications were pending and threatened to penalize plaintiffs if they did serve process without a license. Administrative Code § 20-403(a) requires process servers and process serving businesses to hold a process server license, without any exceptions for individuals or businesses with pending applications. No other statute or regulation authorizes plaintiffs to serve process without a license while their license

applications were pending.

Administrative Code § 20-105(d) stays the enforcement of the DCA Commissioner's orders while an applicant's renewal application is pending, but does not allow service of process without a license. Plaintiffs were not permitted to serve process pending the determination of their license applications because their licenses had expired, not because of any DCA order, so that Administrative Code § 20-105(d) was inapplicable.

VII. PLAINTIFFS' DEFAMATION CLAIM

Plaintiffs claim that DCA's Notice of Hearing dated November 2, 2011, and the parties' Consent Order dated December 22, 2011, included false statements that constitute defamation per se. Statements during a judicial or quasi-judicial proceeding, however, are absolutely privileged as long as they are material and pertinent to the subject of the proceedings. Rosenberg v. MetLife, Inc., 8 N.Y.3d 359, 365 (2007); Park Knoll Assoc. v. Schmidt, 59 N.Y.2d 205, 209-10 (1983); Stega v. New York Downtown Hosp., 148 A.D.3d 21, 25 (1st Dep't 2017); Cicconi v. McGinn, Smith & Co., Inc., 27 A.D.3d 59, 61 (1st Dep't 2005). The judicial and quasi-judicial privilege encompasses statements during the preliminary or investigative stages of a quasi-judicial administrative proceeding, especially where a public interest is at stake. Rosenberg v. MetLife, Inc., 8 N.Y.3d at 365; Stega v. New York Downtown Hosp., 148 A.D.3d at 26-27; Cicconi v. McGinn, Smith & Co., Inc., 27 A.D.3d at 61.

This privilege protects DCA's statements in its Notice of

Hearing to JDG Investigations and the statements in the Consent Order, even if considered DCA's statements and not the parties' jointly endorsed statements. The statements were part of the preliminary stages of an administrative proceeding concerning the operation of a process serving business that performs a service critical to members of the public who are parties and witnesses in judicial proceedings. Rosenberg v. MetLife, Inc., 8 N.Y.3d at 365; Stega v. New York Downtown Hosp., 148 A.D.3d at 26-27; Cicconi v. McGinn, Smith & Co., Inc., 27 A.D.3d at 61.

VIII. PLAINTIFFS' CROSS-MOTION TO AMEND THEIR COMPLAINT

Plaintiffs seek to join the DCA attorney who signed the 2011 Notice of Hearing, the Consent Order, and the 2014 Notice of Hearing and to amend their complaint with allegations regarding DCA's history of administratively prosecuting violations of the process server regulations. C.P.L.R. §§ 1002(b), 3025(b). As this proposed joinder of a defendant and proposed amendments would not defeat defendants' motion to dismiss any of the amended complaint's claims, the court denies plaintiffs' cross-motion as futile. Aleksandrova v. City of New York, 151 A.D.3d 427, 428 (1st Dep't 2017); Desarrolladora Farallon S. de R.L. de C.V. v. Mexvalo, S. de R.L. de C.V., 146 A.D.3d 442, 442 (1st Dep't 2017); South Bronx Unite! v. New York City Indus. Dev. Agency, 138 A.D.3d 462, 462 (1st Dep't 2016).

IX. CONCLUSION

For all the reasons explained above, the court grants defendants' motion to dismiss the amended complaint in its

entirety and denies plaintiffs' cross-motion to join a defendant, to amend the amended complaint, and for summary judgment. C.P.L.R. §§ 1002(b), 3025(b) and (c), 3211(a)(7) and (c), 3212(b). This decision constitutes the court's order and judgment of dismissal.

DATED: February 20, 2018

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.