Bolofsky v City of New York
2018 NY Slip Op 32813(U)
October 31, 2018
Supreme Court, New York County
Docket Number: 160227/2016
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 52

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GLEN BOLOFSKY, AS AN INDIVIDUAL AND GLEN BOLOFSKY, AS PRESIDENT OF ALTERNATE SIDE OF THE STREET SUSPENDED PARKING CALENDAR CORPORATION, d/b/a PARKING SURVIVAL EXPERTS, PARKINGTICKET.COM,

Plaintiff,

-against-

CITY OF NEW YORK; NEW YORK CITY DEPARTMENT OF FINANCE; JACQUES JIHA, COMISSIONER OF NEW YORK CITY DEPARTMENT OF FINANCE,

Defendants.

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DECISION & ORDER

Index No.: 160227/2016

Mot. Seq. No. 001

ALEAXNDER M. TISCH, J:

Defendants the City of New York (the City), the New York City Department of Finance (DOF), and Jacques Jiha, Commissioner of the DOF, move, pursuant to CPLR 3211 [a][2], [a][5], and [a][7], to dismiss plaintiff Glen Bolofsky's (Bolofsky) complaint for lack of subject matter jurisdiction, the statute of limitations, and failure to state a cause of action. For the reasons stated herein, the motion is granted.

Background

Bolofsky is the president of the Alternate Side of the Street Suspended Parking Calendar Corporation d/b/a Parking Survival Experts and Parkingticket.com (ASP) (amended complaint, ¶ 3). He provides information to members of the public about New York City parking regulations, and is an authorized ticket broker representing clients before the New York City Parking Violations Bureau (PVB) (*id.*, ¶ 4). The gravamen of Bolofsky's complaint is that defendants, in issuing tickets, enforcing parking regulations, and operating and maintaining the system for same, have damaged his business and reputation in various ways.

In January 2014, Bolofsky contacted DOF to discuss allegedly illegally imposed penalties at the PVB, which eventually led to a lawsuit challenging, among other things, PVB's practice of not placing immediate penalty holds on tickets when the offender pleaded not guilty (*id.*, ¶¶ 20, 25; Devine affirmation dated 6/28/17, exhibit A, petition in *Matter of Bolofsky v City of New York*, Sup Ct, NY County, Index no. 100049/2014 [*Bolofsky I*]). That action was resolved by order of the court (Chan, J.) dated October 29, 2014, which ordered the City to cease this practice (Devine affirmation, exhibit D, order dated 10/29/14 at 6-7). Bolofsky seeks to recover his legal fees in bringing that action (amended complaint, ¶ 20).

Bolofsky also alleges that on June 12, 2015, and July 29, 2015, his computers were blocked from accessing certain City websites necessary to conduct his ticket brokering business (*id.*, ¶¶ 26-28; Devine affirmation,. Exhibit G, notice of claim, ¶¶ 4, 14). At around the same time, Bolofsky states that defendants implemented electronic blocks on one of the websites it requires ASP to use in filing not guilty pleas (amended complaint, ¶¶ 29-33, 42-48; 8-26). These blocks purportedly slow down ASP's work, slowing its employees' abilities to process tickets in a timely manner, and increasing ASP's operations costs (amended complaint, ¶¶ 29-33, 42-48; 8-26). By order to show cause in *Matter of Sysco Metro NY, LLC v City of New York*, Sup Ct, NY County, Index no. 101637/2015, Bolofsky moved to force the City to remove the blocks (Devine affirmation, exhibit F, order to show cause dated 11/13/15). He claims that defendants ultimately created a website without the blocks, but that website is still under development, forcing ASP to continue using the old website with its electronic blocks (amended complaint, ¶ 46). Further, he states that defendants have applied barriers to ipay, a payment website (*id.*, ¶ 48), which increases the time required to make timely payments on tickets, leading to additional fines and penalties (*id.*).

Bolofsky further complains of being forced, since November 16, 2015, to attend ten full day hearings per week at the PVB, causing him unspecified damages and costs (*id.*, ¶ 34). DOF then ordered Bolofsky to appear in "two hearing rooms a day," further impeding his ability to prepare a case for his clients (*id.*, ¶¶ 36-38). He requested that ASP be allowed 60 days to prepare for hearings, and that dual hearing rooms not be used when more than a certain number of tickets are pending, but claims that defendants denied these requests, causing him further future damage as he has insufficient time to prepare for hearings (*id.*, ¶¶ 39-40).

Finally, Bolofsky alleges that the City is not collecting a $15 surcharge, required by the Vehicle and Traffic Law (VTL) § 241 (2) and 1809-a where the offender fails to plead to a ticket, when the offender is enrolled in its Stipulated Fine or other settlement programs (*id.*, ¶¶ 49-50). Bolofsky argues that the City's failure to collect the surcharge damages his business by obviating the need for his services, and that the program is illegal because the surcharge is required by statute (*id.*, ¶ 51). Bolofsky previously challenged the legality of the Stipulated Fine and other settlement programs in *Bolofsky I* (Devine affirmation, exhibit B, amended verified petition, ¶¶ 137-138). The court (Chan, J.), held that the settlement programs did not violate the VTL (Devine affirmation, exhibit D, order dated 10/29/14 at 10-11).

Procedural History

On April 11, 2016, Bolofsky filed a notice of claim with the City, alleging intentional economic harm, intentional and negligent infliction of emotional distress, breach of contract, tortious interference with contract, defamation, violations of 42 U.S.C. § 1983, and prima facie tort (Notice of claim at 1). On December 2, 2016, Bolofsky filed a complaint against defendants, alleging four causes of action: prima facie tort (first cause of action); tortious interference with contract (second cause of action);

intentional and negligent infliction of emotional distress (third cause of action); and fraud and fraudulent misrepresentation (fourth cause of action). On March 30, 2017, he filed an amended complaint, which omitted the fourth cause of action for fraud.

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88). "[W]here . . . the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

As an initial matter, defendants argue that Bolofsky's claims with respect to the Stipulated Fine and other settlement programs are barred by collateral estoppel based on the court's decision in *Bolofsky I* upholding the legality of those programs. "The doctrine of collateral estoppel precludes a party from relitigating an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point" (*Kaufman v Eli Lilly and Co.*, 65 NY2d 449, 455 [1985][internal quotation marks and citation omitted]). "First, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination" (*id.*). Bolofsky had a full and fair opportunity to litigate the legality of the City's settlement programs in *Bolofsky I*, and the court's decision therein is decisive of any repeated challenge on

the same issue (Devine affirmation, exhibit D, order dated 10/29/14 at 10-11). Accordingly, to the extent that any of Bolofsky's claims rest on a challenge to the settlement programs, they are dismissed.

Prima Facie Tort (First Cause of Action)

Bolofsky asserts that defendants, by shutting down his website access, installing electronic barriers on their websites, and imposing illegal penalties on his clients, intentionally harmed him in a manner rising to the level of a prima facie tort.

Defendants first argue that this claim is partially time-barred and subject to dismissal under CPLR 3211 (a) (5). A claim against a municipality, such as Bolofsky's herein, "shall be commenced within one year and ninety days after the happening of the event upon which the claim is based" (General Municipal Law § 50-I [1] [c]). Bolofsky commenced this action on December 2, 2016. Accordingly, any claims which accrued more than one year and ninety days prior to commencement, or before September 3, 2015, are time-barred. Bolofsky states in his notice of claim that the City blocked his web access on June 12, 2015 and July 29, 2015 (Devine affirmation,. Exhibit G, notice of claim, ¶¶ 4, 14). Additionally, any claim for illegal penalties must have accrued prior to the court's decision in *Bolofsky I*, dated October 29, 2014, which ordered the defendants to place penalty holds immediately rather than at a later date (Devine affirmation, exhibit D, order dated 10/29/14 at 6-7). Thus, Bolofsky's claim for prima facie tort is time-barred to the extent it is based on the web access shutdown or the penalties.

Moreover, Bolofsky fails to state a claim for prima facie tort. A prima facie tort claim requires proof of "(1) intentional infliction of harm, (2) causing special damages, (3) without excuse or justification, (4) by an act or series of acts that would otherwise be lawful" (*Curiano v Suozzi*, 63 NY2d 113, 117 [1984]). "Central to the cause of action for prima facie tort is that the

defendant's intent have been solely to injure plaintiff, i.e., that defendant have acted from 'disinterested malevolence'" (*WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 258 [1st Dept 1992]). The amended complaint does not allege that defendants acted solely with disinterested malevolence. Further, to the extent that Bolofsky is seeking expenses incurred in his previous litigations against defendants, such are not cognizable as special damages (*Howard v Block*, 90 AD2d 455, 455 [1st Dept 1982] ["That prior actions were meritless or vexatious does not, without more, spell out prima facie tort, and attorney's fees incurred therein do not spell out special damages"]).

Accordingly, that branch of defendants' motion to dismiss the first cause of action is granted.

Tortious Interference with Contract (Second Cause of Action)

Bolofsky asserts that "each and every defendant did damage to [his] business relationships by harming his relationships with his clients" (amended complaint, ¶59). Defendants argue that the court lacks subject matter jurisdiction over this cause of action, as Bolofsky failed to allege it sufficiently in the notice of claim. CPLR 3211 [a] [2] provides that the court may dismiss a claim where "the court has not jurisdiction of the subject matter of the cause of action. In order to adjudicate Bolofsky's' claims, his notice of claim must include "information sufficient to enable the city to investigate the claim" (*O'Brien v City of Syracuse*, 54 NY2d 353, 358 [1981]; *see also* General Municipal Law § 50-e). Here, Bolofsky's second cause of action for tortious interference with contract requires allegations of "the existence of [the plaintiff's] valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages" (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]). The notice of claim contains no

allegations that any of ASP's clients have breached their contracts with ASP. Because such a claim is not stated in the notice, the court has no jurisdiction over it (*O'Brien*, 54 NY2d 358).

Further, even if the court had jurisdiction, Bolofsky has failed to state a claim for tortious interference with contract. As with the notice of claim, Bolofsky fails to allege in the amended complaint that any of ASP's clients breached their contracts, nor does he mention any breached contracts in his opposition papers. Thus, this claim must be dismissed (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 425 [1996] ("There is, however, no allegation ... that Bankers Trust in fact breached its contract to provide financial advice and represent Lama in the disposition of Lama's Smith Barney stock")

Accordingly, that branch of defendants' motion to dismiss the second cause of action is granted.

Intentional and Negligent Infliction of Emotional Distress (Third Cause of Action)

Bolofsky asserts that defendants' allegedly illegal practices inflicted both intentional and negligent emotional distress on him. As an initial matter, Bolofsky may not bring a claim for intentional infliction of emotional distress against a municipality or municipal defendants (*e.g. Lauer v City of New York*, 240 AD2d 543, 544 [2d Dept 1997] ["It is well settled that public policy bars claims sounding in intentional infliction of emotional distress against a governmental entity"]).

A claim for negligent infliction of emotional distress requires allegations of "extreme and outrageous conduct" (*Goldstein v Massachusetts Mut. Life Ins. Co.*, 60 AD3d 506, 508 [1st Dept 2009] [internal quotation marks and citation omitted]). The conduct alleged must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*id.* at

508 [internal quotation marks and citation omitted]; *see also Kerzhner v G4S Govt. Solutions, Inc.*, 138 AD3d 564, 564 [1st Dept 2016]). Bolofsky alleges nothing that approaches that level of conduct by any of the defendants. Moreover, negligent infliction of emotional distress will only lie against municipal defendants where they owed the plaintiff a specific duty (*Lauer v City of New York*, 95 NY2d 95, 100 [2000] ["To sustain liability against a municipality, the duty breached must be more than that owed the public generally"]). Here, Bolofsky does not, and, indeed, cannot, allege that defendants owed him any specific duty.

Accordingly, that branch of defendants' motion to dismiss the third cause of action is granted.

The Court has considered the remaining arguments of the parties and finds them to be unavailing. As the above discussed points are independent grounds for dismissing the complaint, the Court declines to address the remaining balance of the application, as it would be merely academic.

Accordingly, it is hereby,

ORDERED that the motion of defendants the City of New York, New York City Department of Finance, and Jacques Jiha, to dismiss the amended complaint is granted and the amended complaint is dismissed with costs and disbursements to said defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 31, 2018

ENTER:

ALEXANDER M. TISCH, A.J.S.C.

HON. ALEXANDER M. TISCH