E-FILE

**SHORT FORM ORDER** **INDEX NO.: 603669/2018**

**SUPREME COURT - STATE OF NEW YORK**
**PART 6- SUFFOLK COUNTY**

**PRESENT:**
**Hon. Sanford Neil Berland, A.J.S.C.**

PET TIME ENTERPRISES, INC.,

Plaintiff,

-against-

TOWN OF ISLIP, LAWRENCE LABS, INC. d/b/a TOTAL PET CARE and 780 BROADWAY LLC,

Defendant(s).

**ORIG. RETURN DATE:** April 24, 2018
**FINAL RETURN DATE:** June 12, 2018
**MOT. SEQ.#:** 002 **MG; CASEDISP**

**ORIG. RETURN DATE:** May 16, 2018
**FINAL RETURN DATE:** June 12, 2018
**MOT. SEQ.#:** 003 **MG; CASEDISP**

PLAINTIFF'S ATTORNEYS:
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by defendant Town of Islip dated March 27, 2018 and supporting papers; (2) Notice of Motion by defendants Lawrence Labs, Inc. d/b/a Total Pet Care and 780 Broadway LLC dated April 27, 2018; (3) Affirmation In Further Support of Plaintiff's Preliminary Injunction Request and In Opposition to Both Motions Filed by the Defendants by plaintiff dated May 10, 2018 and supporting papers; (4) Reply Affirmation by defendants Lawrence Labs, Inc. d/b/a Total Pet Care and 780 Broadway LLC dated May 24, 2018 and supporting papers; and (5) Oral argument at a hearing held before the Court on January 10, 2019 it is

***ORDERED*** that the motions (#002 and #003) by defendants are consolidated for purposes of this determination; and it is further

***ORDERED*** that defendant Town of Islip's motion to dismiss the complaint against it

herein pursuant to CPLR §§ 3211[a][3] and [a][7] is **GRANTED**; and it is further

***ORDERED*** that defendants Lawrence Labs, Inc. d/b/a Total Pet Care and 780 Broadway LLC's motion to dismiss the complaint against them herein pursuant to CPLR § 3211 [a][7] is **GRANTED**.

This action arises out of a decision by defendant Town of Islip ("the Town") to permit defendant Lawrence Labs, Inc d/b/a Total Pet Care ("Total Pet Care") to operate an Animal Care Center in a building owned by defendant 780 Broadway LLC in an Industrial 1 zone in the Town of Islip. Plaintiff commenced this action by filing a summons and complaint in which it alleges that the action by the Town has violated plaintiff's rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution and that the Town and the other defendants have acted in violation of General Business Law § 340, causing injury to plaintiff and its business. The Town now moves to dismiss the complaint against it pursuant to CPLR § 3211[a][3], on the ground that plaintiff does not have standing to bring this action, and, together with the other defendants, pursuant to CPLR § 3211[a][7], on the ground that plaintiff has failed to state a cause of action.

Background

Plaintiff operates a retail store at 4601 Sunrise Highway in Bohemia, in the Town of Islip, in a district zoned "Business 2." Plaintiff describes its primary focus to selling pet food and supplies to the public. Pet Time leases the premises in which its store is located. Defendant 780 Broadway LLC owns the building located at 780 Broadway, Holbrook ("the premises") in which defendant Lawrence Labs, Inc. operates its business known as "Total Pet Care." The 780 Broadway building is in a district in the Town of Islip zoned "Industrial L-1." Pet Time is situated approximately 2.9 miles from Total Pet Care. On January 22, 2015, a Town Fire Marshal investigating a complaint of safety violations at 780 Broadway found that 780 Broadway LLC was not in compliance with certain provisions set forth in the Islip Town Code, including that it had changed its use of the premises without a permit for its changed use. The Fire Marshal issued appearance tickets to 780 Broadway LLC which were returnable in the Fifth District Court. On June 24, 2015, 780 Broadway LLC submitted a request to the Town to permit a change of use of the premises by a new tenant, Total Pet Care, as an "Animal Care Center." Over the course of the prosecution of the charges pending in Fifth District Court, 780 Broadway LLC took steps to become compliant under the Town Code, including submitting plans to the Town Planning Department for review and adhering to various directives from the Town. On February 28, 2017, the Islip Town Code was amended to revise the definition of "Animal Care Center." As of that date, Islip Town Code § 68-3[B] provides, in pertinent part: "[An Animal Care Center is defined as] an establishment whose primary service is the boarding of dogs and cats, inclusive of day care, grooming, veterinary care and behavior training . . . . The accessory sale of animal care products, including, but not limited to, food, toys, and cleaning products, shall

be clearly incidental and limited to 10% of the overall gross floor area or 2,000 square feet, whichever is less." On June 29, 2017, 780 Broadway LLC obtained a temporary certificate of occupancy to allow the premises to be used for the operation of an Animal Care Center. On November 1, 2017, a conditional discharge was issued by the Fifth District Court to 780 Broadway LLC , requiring, *inter alia*, that by May 1, 2018, it obtain a final certificate of occupancy. A survey of the premises dated June 23, 2017 showed that of the 15,400 square feet of gross floor area at 780 Broadway, 1540 square feet, or 10% of that space was retail space. Ultimately, in May 2018, the Town found that 780 Broadway LLC was compliant with the Town Code and issued a final certificate of occupancy, dated August 28, 2018, permitting the space to be used by Total Pet Care as an Animal Care Center.

On February 27, 2015, approximately a month after 780 Broadway LLC was charged with violations of the Town Code, counsel for Pet Time sent a letter to the Town indicating that inasmuch as Total Pet Care had been allowed to use their premises for a retail business, it was hoping to move to a premises in Holbrook, located in the same Industrial 1 zoned area as Total Pet Care, and seeking a permit from the Town to do so. In the letter, plaintiff asserted that "[being aware of the Equal Protection Clause of the Constitution, it would seem unfair that [Pet Time] cannot rent a site in the Holbrook Commercial Center when Total Pet Care is operating a major retail facility in the same Industrial-1 Zoning." In response, the Town informed plaintiff that a retail use was not allowed in an Industrial District under the Town of Islip Code. Plaintiff never made any attempt to apply to the Town to be permitted to operate as an Animal Care Center as Total Pet Care had.

Plaintiff commenced this action by filing a Summons and Verified Complaint on February 25, 2018. The complaint alleges four causes of action. The first three causes of action are asserted against the Town only, alleging that the Town conspired with its co-defendants to give preferential treatment to Total Pet Care, allowing it to operate a retail business in violation of the Town Code while prohibiting plaintiff from doing so. Plaintiff alleges that the rents in an Industrial 1 zoned area are significantly lower than in a Business 2 zoned district and that Total Pet Care thus was in a position to charge less for its retail products than Pet Time could. Plaintiff further alleges that the Town's conduct gave Total Pet Care an unfair competitive edge and that because, among other things, the Town does not require a permit to operate a business and, therefore, there is no formal procedure by which Pet Time can contest the Town's refusal to operate its business in an Industrial 1 zone, its rights to due process and equal protection under the United States Constitution and 42 USC § 1983 have been violated. The fourth cause of action charges all defendants with violating General Business Law § 340 ("the Donnelly Act"). Plaintiff is seeking recompense for the damages it has suffered in the form of lost income, profits and business opportunities and, consequently, reduced shareholder dividends. Defendants Total Pet Care and 780 Broadway LLC answered the complaint on February 25, 2018, denying plaintiff's allegations, and asserting the affirmative defense that plaintiff lacks standing to bring the action. They join in the Town's motion to dismiss the complaint.

CPLR § 3211[a][3]: Standing:

The United States Supreme Court has written that:

> [T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " . . . . Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

(***Lujan v Defs. of Wildlife***, 504 US 555, 560-61 [1992] (internal citations omitted)). As pertinent to the current action, the New York standing requirements are not materially different: "[T]o establish standing to challenge governmental action, a party must show that it 'will suffer direct harm, injury that is in some way different from that of the public at large,' and that 'the in-fact injury of which it complains . . . falls within the "zone of interests," or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted'" (***Tilcon New York, Inc. v Town of New Windsor***, 172 AD3d 942, 102 NYS3d 35 [2d Dept 2019] (internal citations omitted); ***W.T. Grant Co. v Srogi***, 52 NY2d 496, 438 NYS2d 761 [1981]). Here, although plaintiff alludes to dangers to the public in the operation of a retail business in an industrial zone, the injuries that plaintiff alleges it suffered as a result of the Town action about which it complains - a loss of profits and reduced shareholder dividends - are not injuries to interests protected by the Town's zoning laws (*see* ***Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of the Town of North Hempstead***, 69 NY2d 406, 415, 515 NYS2d 418 [1987], *citing* ***Matter of Dairylea Coop. v Walkley***, 38 NY2d 6, 9, 377 NYS2d 451 [1975]; ***Cord Meyer Dev. Co. v Bell Bay Drugs***, 20 NY2d 211, 211, 282 NYS2d 259 [1967]; ***Matter of Paolangeli v Stevens***, 19 AD2d 763, 241 NYS2d 518 [3d Dept 1963]). Therefore, plaintiff is without standing to maintain this action against the Town.[1]

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[1]Plaintiff would have standing to maintain this action if the requirements of Town Law § 268[2] were met, which provides that if town authorities fail or refuse to enjoin zoning violations within ten days of "written request by a resident taxpayer of the town so to proceed, any three taxpayers of the town residing in the district wherein such violation exists, who are jointly or severally aggrieved by such violation, may institute such appropriate action or proceeding in like manner as such local officer, board or body of the town is authorized to do." Plaintiff would also

CPLR 3211[a][7]: Failure to state a cause of action:

"[I]n considering a motion to dismiss pursuant to CPLR § 3211 [a] [7], the court should 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (***Sinensky v. Rokowsky***, 22 A.D.3d 563,564, 802 NYS2d 491 [2d Dept. 2005] quoting ***Leon v. Martinez***, 84 N.Y.2d 83,87-88, 614 NYS2d 972 [1994]; ***Simos v. Vic-Armen Realty, LLC***, 92 A.D.3d 760, 938 NYS2d 609 [2d Dept. 2012]). On a pre-answer motion to dismiss pursuant to CPLR § 3211 [a][1], dismissal is proper only where the documentary evidence utterly refutes the plaintiff's factual allegations and conclusively establishes a defense as a matter of law (***Goshen v. Mutual Life Ins. Co. of N.Y.***, 98 N.Y.2d 314, 746 NYS2d 858 [2002]; *see* ***Leon v. Martinez***, 84 N.Y.2d 83, 614 NYS2d 972 [1994]; ***Fleming v. Kamden Props., LLC***, 41 A.D.3d 781, 839 NYS2d 197 [2d Dept. 2007]). For a defendant to be successful on a motion to dismiss pursuant to CPLR 3211[a][1], the evidence the defendant offers must establish conclusively that the plaintiff has no cause of action and that in light of the evidence presented, no significant dispute exists (***Kaufman v. Int'l Bus. Machs. Corp.***, 97 A.D.2d 925, 470 NYS2d 720 [3d Dept. 1983], *affd*, 61 N.Y.2d 930, 474 NYS2d 721 [1984]).

(1) Plaintiff's Constitutional claims:

In context of land use regulation, a plaintiff asserting a substantive due process claim must sufficiently allege "(1) that it has a constitutionally protected property interest, and (2) that the [defendant] arbitrarily or irrationally deprived it of that property interest" (***Hones 52 Corp. v Town of Fishkill***, 1 FSupp2d 294, 300 [SDNY 1998], *citing* ***Crowley v Courville***, 76 F3d 47, 52 [2d Cir 1996]; ***Southview Assocs., Ltd. v Bongartz***, 980 F2d 84, 97, 101 [2d Cir 1992]; *see* ***Great Atlantic & Pacific Tea Co., Inc. v Town of East Hampton***, 997 FSupp 340, 350 [EDNY 1998]). "To implicate federal constitutional law, the conduct must be 'so outrageously arbitrary as to constitute a gross abuse of governmental authority'" (***Bower Assoc. v Town of Pleasant Val.***, 304 AD2d 259, 264, 761 NYS2d 64 [2d Dept 2003], *quoting* ***Harlen Assoc. v Incorporated Vil. of Mineola***, 273 F3d 494, 505 [2d Cir 2001]; *see also* ***Sonne v Board of Trustees of Village of Suffern***, 67 AD3d

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have standing to maintain this action if it could demonstrate that it suffered a special damage beyond the general inconvenience to the public at large (*see* ***Little Joseph Realty v Town of Babylon***, 41 NY2d 738, 395 NYS2d 428 [1977]; ***Guzzardi v Perry's Boats***, 92 AD2d 250, 460 NYS2d 78 [2d Dept 1983]; ***Zupa v Paradise Point Ass'n, Inc.***, 22 AD3d 843, 803 NYS2d 679 [2d Dept 2005]). Businesses "have to show more than mere loss of business in order to suffer special damage"(***Cord Meyer Development Co. v Bell Bay Drugs, Inc.***, 20 NY2d 211, 217-218, 282 NYS2d 259 [1967]). However, plaintiff has elected not to bring this action pursuant to Town Law § 268[2] or upon any claim that it sustained special damages, and it has failed to establish that it has standing to maintain this action on any other ground.

192, 201, 887 NYS2d 145 [2d Dept 2009]; ***City of Cuyahoga Falls v Buckeye Community Hope Found.***, 538 US 188, 198 [2003]; ***St. Joseph Hosp. of Cheektowaga v Novello***, 43 AD3d 139, 144, 840 NYS2d 263 [4th Dept 2007]).

"Protectable property interests arise when there is a legitimate claim of entitlement pursuant to state or local law" (***Bower Assoc. v Town of Pleasant Val.***, 304 AD2d 259, 262-263, 761 NYS2d 64 [2d Dept 2003], *citing* ***Town of Orangetown v Magee***, 88 NY2d 41, 52, 643 NYS2d 21 [1996]; ***Board of Regents of State Colls. v Roth***, 408 US 564, 577 [1972]; ***Crowley v Courville***, 76 F3d 47 [2d Cir 1996]; ***RRI Realty Corp. v Incorporated Vil. of Southampton***, 870 F2d 911, 917-918 [2d Cir 1989]; ***Yale Auto Parts, Inc. v Johnson***,758 F2d 54, 58 [2d Cir 1985]). Here, plaintiff's complaint fails to allege that such a constitutionally protected property interest exists. Plaintiff sought permission from the Town to move its retail business to a location in an Industrial 1 zoned district in the Town of Islip, which was denied pursuant to the Town's zoning laws. Plaintiff does not dispute the legitimacy of the Town's enactment of the restrictions that are embodied in Industrial 1 zoning classification; rather, its complaint is that an alleged competitor has been permitted to operate its business in an Industrial 1 zone but plaintiff has been advised that it will not be allowed to do so. However, plaintiff has never contended that it qualifies as an Animal Care Center, a permitted use in an Industrial 1 zone nor has it taken steps to apply to the Town to operate an Animal Care Center in such a zone. Accordingly, the Court finds that plaintiff has not stated a claim for the denial of substantive due process under the United States Constitution,

As to plaintiff's claims under the equal protection clause of the Fourteenth Amendment, in order to state a valid equal protection cause of action, plaintiff must allege that (1) compared with others similarly situated, plaintiff was selectively treated to its detriment, and (2) the Town acted with the bad faith intent to injure plaintiff or with maliciousness (*see* ***Penlyn Development Corp. v Incorporated Village of Lloyd Harbor***, 51 FSupp2d 255, 264 [EDY 1999], *citing* ***Zahra v Town of Southold***, 48 F3d 674, 683-684 [2d Cir 1995]). A public authority is forbidden "from applying or enforcing an admittedly valid law 'with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances.'" (***303 West 42nd St. Corp. v Klein***, 46 NY2d 686, 693 [1979], *quoting* ***Yick Wo v Hopkins***, 118 US 356, 373-374 [1886]). Here, although Pet Time in effect asserts that Total Pet Care's characterization of itself as an Animal Care Center is a subterfuge, or ruse, used by it to gain a competitive advantage by operating in a lower rent zoning district, Pet Time has never claimed that it operates anything other than a retail business nor has it alleged that it was selectively and invidiously singled out for disparate treatment or that the Town acted in bad faith in doing so. Moreover, it is undisputed that 780 Broadway was in fact ticketed by the Town and prosecuted in District Court for noncompliance with the use restrictions applicable to the premises and that it was not issued a final certificate of occupancy, allowing the premises to be used for an Animal Care Center until it had satisfied the Town that it had brought the premises into compliance with the Town Code and that there was no final disposition of the charges against it in District Court until it had done so. Accordingly, the Court finds that plaintiff has not stated - and on the record presented cannot state - a claim for the

denial of equal protection under the United States Constitution.

(2) Plaintiff's claim under General Business Law § 340:

In order to state a claim under General Business Law § 340, the Donnelly Act, a plaintiff must "(1) identify the relevant product market, (2) describe the nature and effects of the purported conspiracy, (3) allege how the economic impact of that conspiracy is to restrain trade in the market in question, and (4) show a conspiracy or reciprocal relationship between two or more entities (***Benjamin of Forest Hills Realty, Inc. v Austin Sheppard Realty, Inc.***, 34 AD3d 91, 94, 823 NYS2d 79 [2d Dept 2006], *citing* ***Altman v Bayer Corp.***, 125 FSupp2d 666 [SDNY 2000]; ***Great Atl. & Pac. Tea Co, Inc. v Town of Easthampton***, 997 FSupp 340 [EDNY 1998]; ***Newsday, Inc. v Fantastic Mind***, 237 AD2d 497, 655 NYS2d 583 [2d Dept 1997]; ***Bello v Cablevision Sys. Corp.***, 185 AD2d 262, 587 NYS2d 1 [2d Dept 1992]; ***Creative Trading Co. v Larkin-Pluznick-Larkin, Inc.***, 136 AD2d 461, 552 NYS2d 558 [1988]).

Plaintiff's complaint fails sufficiently to state a claim under the Donnelly Act. Plaintiff has failed to allege the nature and effect of the claimed conspiracy and the manner in which the economic impact of that conspiracy restrained trade in the market (*see* ***Shaw v Club Mgrs. Assn. of Am., Inc.***, 84 AD3d 928, 923 NYS2d 127 [2d Dept 2011]). Additionally, plaintiff's complaint "contains only vague, conclusory allegations insufficient to adequately plead a conspiracy or reciprocal relationship between two entities" (***LoPresti v Massachusetts Mut. Life Ins. Co.***, 30 AD3d 474, 475, 820 NYS2d 275 [2d Dept 2006], *citing* ***Creative Trading Co. v Larkin-Pluznick-Larkin***, 75 NY2d 830, 552 NYS2d 558 [1990]; ***State of New York v Mobil Oil Corp.***, 38 NY2d 460, 381 NYS2d 426 [1976]; ***Heart Disease Research Foundation v General Motors Corp.***, 463 F2d 98 [2d Cir 1972]). Plaintiff merely alleges that the purported conspiracy had an adverse effect on plaintiff alone. "Antitrust laws . . . were enacted for 'the protection of competition not competitors,'" (***Brunswick Corp. v Pueblo Bowl-O-Mat, Inc.***, 429 US 477, 488 [1977], *quoting* ***Brown Shoe Co. v United States***, 370 US 294, 320 [1962]). The alleged adverse impact of the claimed conspiracy upon plaintiff alone is not tantamount to injury to competition in the market as a whole and thus does not constitute a cognizable claim under the Donnelly Act (*see* ***Benjamin of Forest Hills Realty, Inc. v Austin Sheppard Realty Inc.***, 34 AD3d 91, 97, 823 NYS2d 79 [2d Dept 2006], *citing* ***Beyer Farms, Inc. v Elmhurst Dairy, Inc.***, 142 FSupp2d 296, 304 [EDNY 2001]; ***Korshin v Benedictine Hosp.***, 34 FSupp2d 133, 137-138 [NDNY 1999]; *see also* ***Victoria T. Enters, Inc. v Charmer Indus., Inc.***, 63 AD3d 1698, 881 NYS2d 570 [4th Dept 2009]).

Finally, of the three entities that plaintiff alleges have engaged in the purported conspiracy, one is the Town and another is 780 Broadway. Neither is a competitor of plaintiff. In order to support a claim under the Donnelly Act, a plaintiff must establish that the entities that participated in the purported underlying conspiracy were plaintiff's competitors *(see* ***Newsday, Inc. v Fantastic Mind***, 237 AD2d 497, 655 NYS2d 583 [2d Dept 1997]; ***People v Rattenni,*** 81 NY2d 166, 597 NYS2d 280 [1993]). Unilateral action is insufficient to support a claimed violation of General

Business Law § 340 (*see* ***Hall Heating Co. v New York State Elec. & Gas Corp.***, 180 AD2d 957, 580 NYS2d 528 [3d Dept 1992]; ***Benjamin of Forest Hills Realty, Inc. v Austin Sheppard Realty, Inc.***, 34 AD3d 91, 823 NYS2d 79 [2d Dept 2006]). Accordingly, it is plain that plaintiff has failed to state a cause of action cognizable under General Business Law § 340.

The court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the court's determination. Accordingly, and for all of the reasons stated above, the defendants' respective motions to dismiss the complaint are granted.

The foregoing constitutes the decision and order of the court.

**Dated:** 1/15/2020
**Riverhead, New York**

**HON. SANFORD NEIL BERLAND, A.J.S.C.**

**__XX__ FINAL DISPOSITION** **_____ NON-FINAL DISPOSITION**