[*1] SCANNED ON 2/12/2006

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Index Number : 117705/2005

RUSSIAN SAMOVAR, INC.

VS.

TRANSIT WORKER'S UNION

SEQUENCE NUMBER : 003

AMEND

PART 2

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

[illegible] CIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
DEC 12 2006
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11/29/06

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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RUSSIAN SAMOVAR, INC. d/b/a RUSSIAN SAMOVAR, SCH FOOD SERVICE d/b/a Papoo's Restaurant, UNITED HOUSEHOLD DISTRIBUTERS, INC., GLENN F. SCHWARTZ, MD, PC, GREENWICH JEWELERS, INC., CAMPANILE, INC., S.S. JOHN CORP., d/b/a Patuca Fine Food Eatery, CUPPING ROOM CAFÉ, INC., SPA 88, LLC, d/b/a Spa 88, GAETANINA'S KITCHEN INC., d/b/a Manganaro'S Hero Boy, GROTTA AZZURRA INN, INC., d/b/a Grotta Azzura, on behalf of themselves and OTHER BUSINESSES and CORPORATIONS SIMILARLY SITUATED,

Plaintiffs,

INDEX NO.
117705/05

-against-

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

Defendants

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LOUIS YORK, J.:

Motion sequence numbers 001, 002 and 003 are consolidated for disposition.

In motion sequence no. 001 defendant Transport Workers Union of America, AFL-CIO ("TWU") moves pursuant to CPLR 3211(a)7 for an order dismissing the Second Amended Complaint (the "complaint") for failure to state a cause of action.

In motion sequence no. 002 defendant Metropolitan Transportation Authority ("MTA") (incorrectly sued herein as Metropolitan Transit Authority) moves for an order (a) pursuant to CPLR 3211(a)7 dismissing the complaint for failure to state a cause of action and (b) dismissing

the complaint for failure to meet the notice and pleading requirements of Public Authorities Law §§ 1276(1) and 1276(2).

In motion sequence no. 003 defendants Transport Workers Union of Greater New York Local 100, AFL-CIO ("Local 100") and Roger Toussaint ("Toussaint") move for an order dismissing the complaint.

Plaintiffs are a disparate group of eleven or so businesses including restaurants, a jewelry store and an incorporated physician who are seeking to recover monetary damages for themselves and an unspecified number of other similarly situated businesses allegedly sustained as a result of the December 2005 New York City transit strike. The complaint (exhibit 3 to Mashberg April 3, 2006 affirmation) recites two purported causes of action. The first alleges in pertinent part that on December 20, 2005 defendants Toussaint and Local 100 "authorized a full and total illegal strike by all employees of the MTA ... which was in total disregard for the 'Taylor Law' ... [and that Local 100] ... and all the Defendants, knowingly, intentionally, purposely, with malice aforethought, knowing full and well the devastating impact the strike would have upon the small, and large, businesses of New York City, and with the specific intent of causing that devastation, foisted this illegal, unlawful, impermissible violative strike (complaint, ¶¶ 19- 23) ...[and that] ... [a]s a direct and proximate result of the dramatic decrease in [the] number of individuals traveling to and from Manhattan, restaurants and businesses have experienced a decrease in the number of patrons for their businesses ... with the result that ... Plaintiffs have suffered severe economic hardship and monetary loss with damages in the amount in excess of FIFTY THOUSAND ($50,000.00) DOLLARS per day, per plaintiff (*id.* ¶¶ 31-33). Defendant TWU is also accused of condoning the strike (*id.* ¶ 23). Defendant MTA is accused of violating section

201 of the Taylor Law because it demanded concessions in pension rights (*id.* ¶ 24). The second cause of action incorporates the complaint's prior allegations and alleges that "by reason of the negligence, malfeasance, and misfeasance" of the defendants, the named plaintiffs and the similarly situated business plaintiffs have "suffered monetary damages in the amount of FIFTEEN MILLION ($15,000,000.00) DOLLARS, per day (*id.* ¶¶ 36-37).

In support of their motions to dismiss the complaint for failure to state a cause of action TWU and Local 100 (collectively the "Unions") Toussaint and MTA contend that plaintiffs' first cause of action is barred by *Burns Jackson v. Linder* wherein the Court of Appeals found that violation of the Taylor Law does not confer a private right of action. TWU then argues that plaintiffs' second cause of action, to the extent that it sounds in negligence, cannot be maintained for the following reasons: TWU owed no duty to plaintiffs; the complaint fails to allege that the strike was authorized by each and every member of TWU as required by *Martin v. Curran*; and, the complaint fails to allege any injury peculiar to plaintiffs. TWU concludes that the complaint against it should be dismissed in its entirety because it fails to allege any wrongdoing on TWU's part. MTA argues that plaintiffs' attempt to allege a tort claim fails as a matter of law because plaintiffs have failed to allege the elements of *prima facie* tort, intentional interference with business relations or public nuisance. Local 100 and Toussaint argue that the second cause of action cannot be maintained because plaintiffs failed to allege that every member of Local 100 participated in or authorized the strike as required by *Martin* and because no tort claim cognizable under New York law is alleged.

In single opposition to all three motions plaintiffs contend that *Burns Jackson* is not applicable because plaintiffs are not basing their claims on violations of the Taylor Law, but

rather on defendants' intentionally tortious acts "that were directed with intent, pre-meditation, and malice-aforethought to cause harm to Plaintiffs." Plaintiffs argue that Local 100 and Toussaint are liable because according to newspaper and other media reports all members of the Local knew of and ratified the strike and were aware of the dire consequences the strike would have upon plaintiffs. Plaintiffs then argue that their claims against TWU are viable because TWU has produced no proof that its members did not know of and did not ratify the strike and because TWU gave "aid and comfort" to Local 100 and Toussaint. Next, plaintiffs argue that MTA is liable because it intentionally bargained with Local 100 in bad faith by improperly making the downsizing of pensions a mandatory element of the contract negotiations knowing that its actions would result in the strike. Plaintiffs contend further that they are third-party beneficiaries of the MTA's contractual obligation to the people of New York to provide uninterrupted mass transportation services. Curiously, plaintiffs conclude that "summary judgment [sic] should not be granted as triable issues of fact exist" with respect to whether each member of Local 100 ratified the strike, whether Local 100 and Troussaint intended to cripple the economy of the City "to demonstrate their power and importance," whether all of TWU's members knew that the strike was illegal and nontheless ratified it; and, whether the MTA was guilty of committing an intentional tort against plaintiffs.

Plaintiffs, who are opposing a motion to dismiss the complaint for failure to state a cause of action (CPLR 3211[a][7])[1] enjoy the benefit of an extremely liberal and protective standard. As to

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[1] Plaintiffs' arguments pertaining to summary judgment (CPLR 3212) are inapposite to the relief sought by defendants.

allegations and everything reasonably to be implied therefrom (See, *Foley v D'Agostino*, 21 AD2d 60, 65 [1964]). Furthermore, plaintiffs are given the benefit of every possible favorable inference (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]) and the motion to dismiss will be denied if factual allegations are discerned which taken together manifest any cause of action cognizable at law (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]).

Notwithstanding the above, the court finds that plaintiffs' claims against the Unions and Touissaint cannot be maintained. To the extent that plaintiffs rely on the Taylor Law (Civil Service Law, Art 14), which proscribes strikes by public employees, their reliance is misplaced. The Taylor Law does not create a private right to sue for damages arising out of an illegal public employee strike (see *Burns Jackson Miller Summit & Spitzer, v. Lindner*, 59 NY2d 314, 322 [1983]). Consequently, plaintiffs' Taylor Law claims against the defendants will be dismissed.

According to defendants, the remnants of plaintiffs' first cause of action together with the second appear to allege claims based upon negligence, intentional or *prima facie* tort and interference with prospective business relations, all of which are inadequately pleaded. Plaintiffs contend that they have validly pleaded a cause of action for intentional tort. Notwithstanding plaintiffs' theory of liability, under the Court's holding in *Martin v. Curran* (303 NY 276 [1951]) plaintiffs' failure to allege that every Union member had actual knowledge of the alleged unlawful conduct and authorized or ratified it is fatal to its remaining claims against the Unions and Toussaint (see *id.*, at 282) . Although *Martin* was decided 13 years prior to the implementation of the CPLR with its liberalized pleading requirements, it is still good law (see *Duane Reade, Inc.*, v. *Local 338 Retail, Wholesale, Department Store Union*, 17 AD3d 277, 278 [1st Dept 2005] [dismissal of complaint against union required because plaintiff failed to plead

that each union member authorized or ratified unlawful action])[2]. In this connection, the court notes that plaintiffs have not moved to amend the complaint.

Martin does not bar plaintiffs' second cause of action against MTA because union membership is not involved. *Burns Jackson* does not bar plaintiffs' second cause of action against MTA because those claims are not based on the provisions of the Taylor Law. Although the Taylor Law does not create a private right of action to sue for violation of its provisions, it "[does not preempt] the right of persons injured by an unlawful strike to sue for damages" based on other theories of liability (*Burns Jackson, supra,* 59 NY2d at 322). To constitute an intentional tort, the tortfeasor or malfeasor must have knowledge to a substantial certainty that an intended result will ensue from his actions (see *Acevedo* v. *Consolidated Edison Company of New York*, 189 AD2d 497, 501 [1st Dept 1993]; see also, *Staples v. Sisson*, 274 AD2d 779, 781 [3d Dept 2000]). The court finds that plaintiffs' allegation that the MTA intentionally caused the strike by bargaining in bad faith despite its awareness of the likely impact on plaintiffs, when given the benefit of every favorable inference and factoring in the Draconian impact of the Taylor Law on public employee labor unions, is sufficient to withstand MTA's motion to dismiss for facial insufficiency (see *e.g.*, *Foley v. D'Agostino*, *supra*, 21 AD2d at 65).

Plaintiffs' somewhat amusing contention that they are third-party beneficiaries of MTA's contractual obligation to the people of New York to provide uninterrupted mass transportation services does not withstand scrutiny. Were this the case, MTA would be involved in endless,

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[2] The Appellate Division in *Duane Reade* affirmed the motion court's denial of plaintiff's cross-motion to amend the complaint, apparently because the unnamed union members were also union officials.

unremitting litigation. In any event, this claim cannot be sustained because plaintiffs were, at best, an incidental beneficiary of an expired contract (see *Burns Jackson Miller Summit & Spitzer, supra*, 59 NY2d at 336; see also *Liberty Ins. Corp.v. U.S. Security Associates Inc.*, NYLJ, Nov. 6, 2006 at 22, col 1 [Sup Ct, NY Co, Stallman, J] [incidental beneficiary of contract cannot recover]). Finally, the court notes that, notwithstanding its notice of motion (see p 2, *supra*), MTA has not argued (but for a footnote in its moving memorandum of law) that plaintiffs violated the notice and pleading requirements of Public Authorities Law § 1276(1) and (2), and that plaintiffs have not sought class action certification (see CPLR 901[a]).

Accordingly, the motion by TWU (seq. no. 001) to dismiss the complaint for failure to state a cause of action is granted.

The motion by MTA (seq. no. 002) to dismiss the complaint for failure to state a cause of action and failure to comply with the Public Authorities Law is denied.

The motion by Local 100 and Toussaint (seq. no. 003) to dismiss the complaint is granted; and it is hereby

ORDERED that the complaint is dismissed as to TWU, Local 100 and Toussaint, and it is further

ORDERED that MTA shall serve an answer to the complaint within 20 days of service of a copy of this order with notice of entry.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: [illegible], 2006

J.S.C.
LOUIS B. YORK
J.S.C.