

<b>OTR Media Group, Inc. v City of New York</b>
2007 NY Slip Op 30405(U)
March 23, 2007
Supreme Court, New York County
Docket Number: 0116293
Judge: Eileen A. Rakower
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SCANNED ON 3/29/2007  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Rakower

PART 5

**EILEEN A. RAKOWER**  
Justice  
J.S.C.

Index Number : 116293/2006

OTR MEDIA GROUP, INC.

vs

LANCASTER, PATRICIA J.

Sequence Number : 002

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1, 2, 3

Answering Affidavits — Exhibits \_\_\_\_\_

4, 5

Replying Affidavits \_\_\_\_\_

6, 7

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

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

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

**FILED**

MAR 29 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/23/07

  
**EILEEN A. RAKOWER**  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

[\* 1]

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
OTR Media Group, Inc.,

Plaintiff,

Index No.  
116293/06

- against -

Decision and  
Order

The City of New York; Michael R. Bloomberg, in his official capacity as the Mayor of the City of New York; Patricia J. Lancaster, in her official capacity as Commissioner of the New York City Department of Buildings; Iris Weinshall, in her official capacity as Commissioner of the New York City Department of Transportation; Cemusa, Inc.,

Defendants.

**FILED**  
MAR 29 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
HON. EILEEN A. RAKOWER

Plaintiff brings this action challenging the constitutionality of several local laws and rules which regulate the size and placement of outdoor advertising signs in proximity to the defendant New York City's ("City") arterial highways and larger public parks. Specifically, plaintiff alleges that these regulations violate its rights under the free speech and equal protection clauses of the New York State Constitution ("Constitution"). The subject of this motion involves plaintiff's allegation that the City contracted with defendant Cemusa, Inc. ("Cemusa") in violation of N.Y. Gen. Bus. Law §340 ("Donnelly Act"). Cemusa now moves to dismiss plaintiff's third cause of action alleged in the complaint pursuant to CPLR 3211(a)(7). Plaintiff opposes Cemusa's motion. City defendants do not cross move, but submit an affirmation in support of Cemusa's motion and assert that if the court grants plaintiff's motion to dismiss against Cemusa, it must also dismiss the third cause of action as against the City .

The pertinent legislation evolved as follows: the New York City Council, on February 27, 2001, enacted Local Law 14, which required that all outdoor advertising companies obtain permits for the construction and maintenance of outdoor advertising signs within 200 feet of arterial highways and made such permits subject to §32-662, 45-55 of the City Zoning Resolution. Local Law 14 was amended in April 2005 with the enactment of Local Law 31. Taken together, these laws ban all advertising signs without a permit within nine hundred linear feet from and within view of an arterial highway or within two hundred linear feet from and within view of a public park with an area of one half acre or more. ("the 900 foot ban"). Exempted from the ban are advertising signs no greater than two hundred square feet and no more than three feet above the second story of a building to which they are affixed. In March 2006, the New York City Department of Transportation ("DOT") issued a request for bids for its street furniture franchise and Cemusa won the contract.

Cemusa, in support of its motion, argues that plaintiff fails to state a cause of action in its third cause of action, because the complaint fails to satisfy the requirements of the Donnelly Act claim. Cemusa asserts that plaintiff does not even show the most basic requirement of a "contract, agreement, arrangement or combination...for the purpose of...unlawfully interfering with the free exercise of any activity in the conduct of any business..." Cemusa argues that plaintiff's complaint does not plead the existence of an anticompetitive conspiracy or combination between it and the City. Specifically, it does not allege that Cemusa and the City conspired to enact the bans on the billboard or that the bans were in any way a condition of the Franchise agreement between it and the City. Rather, Cemusa argues, plaintiff, alleges that when viewed together, the legislation and restrictions combined with the franchise agreement merely have the effect of reducing competition which does not rise to the level of a conspiracy to restrain trade that is required by the Donnelly Act. Cemusa argues that, if the Donnelly Act has been violated at all it has been violated by the City but adds that there can be no unilateral violation of the act. Further, Cemusa contends that plaintiff does not satisfy the Donnelly Act's requirement that a claim adequately define a "relevant product market." Cemusa claims that plaintiff's reference to "outdoor advertising" is too vague and thus is insufficient for pleading purposes.

City, in its affirmation of support, agrees with Cemusa, and highlights that the Donnelly Act cannot be violated unilaterally. Thus, City argues, if the Donnelly Act claim is to be dismissed against Cemusa, it must also be dismissed against the City,

as they are the only two parties that plaintiff alleges violated the Act.

Plaintiff argues, in its opposition, that the Cemusa franchise agreement is a reciprocal contract between it and the City which unfairly restrains trade in the outdoor advertising market. That agreement states that Cemusa agreed to pay the City in excess of \$1.3 Billion for exclusive advertising rights for 20 years on public bus shelters, new stands and toilets installed on city sidewalks. Further, plaintiff defines the affected product market with the sworn affidavit of Ari Noe, OTR's president. Mr. Noe explains the interplay and limitations of various outdoor advertising products and formats in the affected market.

Section one of the Donnelly Act states:

Every contract, agreement, arrangement or combination whereby

a monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby

Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained or whereby

For the purpose of establishing or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state or any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against public policy.

When considering a motion to dismiss, the court in *Leon v. Martinez*, 84 N.Y.2d 83 (1994), held that:

the pleading is to be afforded a liberal construction. We 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.

Further, the court found that when assessing the sufficiency of the complaint in stating a cause of action:

a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint...and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.

To state a cause of action under the Donnelly Act, a party 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 A.D.3d 91. (2<sup>nd</sup> Dept. 2006).

Plaintiff has alleged that the franchise agreement between Cemusa and the City is a reciprocal agreement and has described the nature and effects that the franchise agreement will have on the outdoor advertising market. Further, plaintiff has submitted, in its opposition papers, an affidavit by the president of OTR Media Group which explains in detail the relevant product market which will be affected. Finally, plaintiff has supplemented its original complaint with its motion papers and has shown how the franchise agreement between Cemusa would have a negative economic impact on the market.

Wherefore it is hereby


ORDERED that Cemusa, Inc.'s motion to dismiss plaintiff's 3<sup>rd</sup> cause of action pursuant to 3211(a)(7) is denied.

This constitutes the decision and order of the court.

**FILED**

Dated: March 23, 2007

MAR 29 2007

  
Eileen A. Rakower, J.S.C.

NEW YORK  
COUNTY CLERK'S OFFICE