Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE BERNICE D. SIEGAL
Justice

IA Part 5

SOUTHEAST HOLDINGS, LLC, et al. x

- against -

METROPOLITAN TRANSPORTATION AUTHORITY, et al.
x

Index Number 28614 2008

Motion Date March 17, 2009

Motion Cal. Number 26

Motion Seq. No. 1

The following papers numbered 1 to 12 read on this motion by defendants Metropolitan Transportation Authority and the New York City Transit Authority (defendants) pursuant to CPLR 3211(a)(5) and (7) to dismiss the complaint of plaintiffs Southeast Holdings, LLC and Southeast Produce, Ltd.(USA) (plaintiffs) on the grounds that the causes of action asserted therein are barred by the applicable statutes of limitations and that the fifth cause of action is insufficient to allege a claim for tortious interference with a prospective business relationship and on this cross motion by plaintiffs pursuant to CPLR 3025(a) to confirm that their attached amended complaint has been properly served upon defendants or pursuant to CPLR 3025(b) to grant them leave to amend the complaint to set forth additional transactions or occurrences related to matters before the court, to discard certain claims and to add claims for inverse condemnation against defendants; to deny defendants' CPLR 3211(a)(5) motion because the action was properly brought within the appropriate statute of limitations for inverse condemnation in that the action was commenced within three years after defendants occupied plaintiffs' easement without color of right or power of law; to deny defendants' CPLR 3211(a)(7) motion to dismiss because the notice of claim requirements under the pertinent statutes cited by defendants do not apply to claims asserted under inverse condemnation and violations of constitutional rights asserted under 42 USC § 1983; to deny defendants' motion to dismiss the claims for tortious interference with business relations because the amended complaint contains allegations sufficient to state a cause of action under New York Law; and pursuant to CPLR 602(a) to consolidate this action with another action pending in this same court before Justice Duane A. Hart entitled *Southeast Holdings, LLC and New York & Atlantic Railway Company v Abrosino*

Construction Inc., Index No. 28441/1999, into a single civil action for purposes of trial pursuant to CPLR 1001 and further to order that such consolidated proceedings shall henceforth be heard and adjudicated before Justice Hart.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits - Exhibits	5-9
Reply Affidavits	10-12

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

In May of 2000, New York City Transit Authority (NYCTA) purchased two parcels of industrially-zoned real property in Maspeth, Queens, New York, intending to construct a bus depot and maintenance facility thereon. The parcels are traversed by railroad tracks connecting to a freight rail trunk line owned by the Long Island Railroad (LIRR). At the time of NYCTA's purchase, the parcels were burdened by a railroad access easement that permitted certain adjacent and nearby property owners to make use of the tracks in order to transport freight to the LIRR's trunk line. It appears that New York & Atlantic Railway (NYAR) is a rail carrier authorized to conduct freight operations over the subject track.

On October 28, 2002, the Metropolitan Transportation Authority (MTA), acting on behalf of the NYCTA, commenced a proceeding pursuant to Eminent Domain Procedure Law § 402 to acquire the easement by condemnation and thereafter extinguish it, effectively resulting in the forced relinquishment of the tracks and the discontinuance of any possible rail service over them. NYAR and Southeast Produce, Ltd., a tenant of one of the lots owned by Southeast Holdings, LLC and benefitted by the easement, commenced a hybrid Article 78 proceeding/declaratory judgment action, seeking, among other things, to review determinations by the NYCTA and the MTA, respectively, that the proposed condemnation was de minimis and did not require a public hearing, and that the preparation of an environmental impact statement in connection with the proposed bus depot was unnecessary, or for a declaration that the proposed condemnation was preempted by federal law.

On or about January 1, 2004, the NYCTA and the MTA commenced construction of the bus depot and maintenance facility on the subject parcels, which construction allegedly was completed on or about July 1, 2007. In an order and judgment dated September 1, 2004,

the Honorable Jaime A. Rios granted the petition in the condemnation proceeding to terminate the railroad easements, ordered that the MTA make compensation therefor to Southeast Produce, Ltd. and dismissed the hybrid Article 78 proceeding/declaratory judgment action.

On September 30, 2004, NYAR and Southeast Produce, Ltd. appealed Justice Rios' order and judgment and on September 19, 2006, the Appellate Division, Second Department reversed, the petition in the condemnation proceeding was denied and the proceeding was dismissed, the petition/complaint in the hybrid Article 78 proceeding/declaratory judgment was reinstated, and that petition/complaint was granted to the extent that it was declared that the condemnation proceeding was preempted by federal law, specifically, the Interstate Commerce Commission Termination Act of 1995 (49 USC § 10101 *et seq.*).

On November 25, 2008, plaintiffs commenced this action against defendants seeking injunctive and monetary relief. The complaint sets forth causes of action for trespass, nuisance, unlawful encroachment and tortious interference with prospective business relations. Defendants now move to dismiss plaintiffs' complaint. Plaintiffs oppose the motion and cross-move, among other things, for confirmation that their amended complaint, withdrawing the claims of trespass, nuisance and unlawful encroachment and adding claims for inverse condemnation and violations of 42 USC § 1983, has been properly served.

CPLR 3025(a) allows a party to amend a pleading as of right within 20 days after a responsive pleading is served. Defendants' motion to dismiss the complaint pursuant to CPLR 3211 extended their time to answer (*see* CPLR 3211[f]) and, therefore, extended the time in which plaintiffs could amend their complaint as of right. (*See* CPLR 3025[a]; *see also STS Management Development, Inc. v New York State Department of Taxation and Finance*, 254 AD2d 409 [1998]; *Sholom & Zuckerbrot Realty Corp. v Coldwell Banker Commercial Group, Inc.*, 138 Misc 2d 799 [1988].)

Accordingly, the amended complaint attached to the cross motion papers is deemed served and the branch of plaintiffs' cross motion seeking to confirm that the amended complaint was properly served upon defendants is granted.

Defendants' motion to dismiss will be addressed with respect to plaintiffs' amended complaint which supersedes the original complaint. (*See 49 West 12 Tenants Corp. v Seidenberg*, 6 AD3d 243 [2004]; *see also Sage Realty Corp. v Proskauer Rose L.L.P.*, 251 AD2d 35 [1998]; *Sholom & Zuckerbrot Realty Corp. v Coldwell Banker Commercial Group, Inc.*, *supra*.)

Plaintiffs' causes of action for inverse condemnation or de facto taking, tortious interference with prospective business relations and under 42 USC § 1983 were timely commenced within their applicable statutes of limitations of three years (*see* CPLR 214[4], [5]) as said causes of action did not accrue until the reversal by the Appellate Division, Second Department on September 19, 2006, of Justice Rios' order and judgment of September 1, 2004, which had extinguished plaintiffs' railroad easements. Until such reversal, plaintiffs had no claim for inverse condemnation or de facto taking, tortious interference with business relations and under 42 USC § 1983. Moreover, CPLR 203(e) provides that where the defendant has served an answer and a defense or counterclaim is timely interposed, if the plaintiff's action is subsequently terminated because of the plaintiff's death or by dismissal or voluntary discontinuance, the time which elapsed between the commencement of the plaintiff's action and its termination will not be considered part of the time within which an independent action must be commenced by the defendant to recover on a claim previously asserted by way of defense or counterclaim in the terminated action. Here, in light of the Appellate Division, Second Department's dismissal of the condemnation proceeding on September 19, 2006, the time which elapsed between the commencement of that proceeding on October 28, 2002, and its September 19, 2006 termination date, was not considered part of the time within which plaintiffs' current action to recover on claims previously asserted by way of defenses and counterclaims in the terminated action was to be commenced.

Accordingly, the branch of defendants' motion seeking to dismiss plaintiffs' causes of action for inverse condemnation or de facto taking, tortious interference with prospective business relations and under 42 USC § 1983 as untimely pursuant to CPLR 3211(a)(5) is denied.

The branch of defendants' motion seeking to dismiss plaintiffs' cause of action for tortious interference with prospective business relations for failure to state a cause of action pursuant to CPLR 3211(a)(7) is granted.

The elements of a cause of action for tortious or intentional interference with prospective business relations are: (1) the defendant knew of the proposed business relations between the plaintiff and a third party; (2) the defendant intentionally interfered with the proposed business relations; (3) the parties would have entered into the proposed business relations but for defendant's interference; (4) the defendant's interference was done in a wrongful manner; and (5) plaintiff sustained damages. (*See Carvel Corp. v Noonan*, 3 NY3d 182 [2004]; *see also NBT Bancorp Inc. v Fleet/Norstar Financial Group, Inc.*, 87 NY2d 614 [1996]; *Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 50 NY2d 183 [1980].) Wrongful conduct for this purpose requires that the interference with the proposed business relationships be caused by physical violence, fraud, misrepresentation,

civil suits or criminal prosecution. (*See NBT Bancorp Inc. v Fleet/Norstar Financial Group, Inc.*, *supra*; *see also Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, *supra*; *BGW Development Corp. v Mount Kisco Lodge No. 1552 of the Benevolent and Protective Order of Elks of the United States of America, Inc.*, 247 AD2d 565 [1998].)

In this case, no interference with any valid, binding contract is alleged in plaintiffs' complaint and the complaint is devoid of allegations satisfying the requisite elements of tortious interference with prospective business relations. Plaintiffs' allegations fail to specifically allege any malice by defendants or conduct which could be characterized as committed for the sole purpose of harming them, or any wrongful means used by defendants. (*See Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, *supra*; *see also RSA Distributors, Inc. v Contract Furniture Sales, Ltd.*, 248 AD2d 370 [1998]; *John R. Loftus, Inc. v White*, 150 AD2d 857 [1989].)

The branch of defendants' motion seeking to dismiss plaintiffs' causes of action for inverse condemnation or de facto taking and under 42 USC § 1983 for failure to timely file a notice of claim is denied as notice of claim requirements are inapplicable to claims for inverse condemnation or de facto taking which are not founded in tort (*see Clempner v Town of Southold*, 154 AD2d 421 [1989]; *see also Borntrager v County of Delaware*, 76 AD2d 969 [1980]; *Torino v Town of Pleasant Valley*, 36 AD2d 963 [1971]), and claims under 42 USC § 1983. (*See Sangermano v Board of Cooperative Educational Services of Nassau County*, 290 AD2d 498 [2002]; *see also Lopez v Shaughnessy*, 260 AD2d 551 [1999]; *Gorman v Sachem Central School District*, 232 AD2d 452 [1996].)

The branch of plaintiffs' cross motion seeking to consolidate this action with the action entitled *Southeast Holdings, LLC and New York & Atlantic Railway Company v Ambrosino Construction Inc.*, Index No. 28441/1999, is denied as academic as a review of court records reveals that such action was dismissed with prejudice by the Honorable Duane A. Hart on December 19, 2005.

Dated: August 17, 2009

Bernice D. Siegal J.S.C.