SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 24
NASSAU COUNTY

SHRI SAI KRUPA, INC,

Plaintiff,

-against-

INCORPORATED VILLAGE OF FLORAL PARK,

Defendant.

MOTION SUBMITTED: October 2, 2009
MOTION SEQUENCE:01, 02
INDEX NO. 017020-09

The following papers and the attachments and exhibits thereto have been read on the motion and cross motion:

Motion to Consolidate	1
Notice of Cross Motion	2
Affidavit in Opposition to Cross Motion	3
Affirmation in Opposition to Cross Motion	4
Reply Affirmation	5

Plaintiff moves for an order of consolidation pursuant to CPLR 602.

Defendant cross-moves for an order dismissing plaintiff's complaint, pursuant to CPLR 3211 (a) (7).

For the reasons that follow, plaintiff's motion for an order of consolidation is denied, and defendant's cross motion for an order dismissing the complaint is granted.

The plaintiff corporation commenced this action to recover monetary damages allegedly sustained as a result of actions taken by a police officer, or police officers, employed by the defendant Village.

The complaint, read in conjunction with the affidavit submitted in opposition to defendant's cross motion, alleges, in pertinent part: that the plaintiff is a domestic corporation engaged in the business of buying and selling liquors; that Madhukar Parmar is the president of the corporate plaintiff; that on or about February 5, 2009, Mr. Parmar and his partner, Nadeem Noormohammad purchased the business known as Floral Park Wines and Liquors, having a place of business located at 318 Jericho Turnpike, floral Park, New York, from Everad Williams; that on January 31, 2009, Mr. Noormohammad executed a lease for the aforementioned business premised with the landlord, Henry T. Radziewicz; that the term of the lease ran from February 1, 2009, until January 31, 2019; that on or about April 5, 2009 at approximately 9:00 A.M., Everad Williams broke into the business premises located at 318 Jericho Turnpike., Floral Park, New York, setting off an alarm; that the alarm company then contacted Madhukar Parmar who instructed the alarm company to call the police; that upon the arrival of Madhukar Parmar and his son at the aforementioned business premises, they were informed by the police that the gentleman who broke into the premises was the owner of the business and, that neither the plaintiff not its agents had a right to be in the premises; that Mr. Parmar informed the police that he was the new owner of the premises, and presented a valid Bill of Sale and Lease (Affidavit in Opposition to Cross Motion at p 3 ¶ 11)[1]; that the police informed Madhukar Parmar that if he or his agents attempted to go into the premises they would be arrested; that the landlord of the subject premises contacted the Floral Park Police and was informed by them that they left Mr. Williams in possession of the premises because the license for the liquor store at the premises was in the name of Everad Williams.[2]

For a first cause of action, the plaintiff seeks to recover the sum of $100,000.00 plus interest "as it was not only illegally taken out of possession from the business by the Floral Park Police, agents of the Village of Floral Park but because of their action the Plaintiff also lost revenue from its business" (Verified Complaint at ¶ 7, annexed to the Cross Motion as Exhibit "A"). For a second cause of action, the plaintiff seeks to recover the sum of $100,000.00 plus interest for "mental anguish" (Verified Complaint at ¶¶ 8, 9). For a third cause of action, plaintiff seek punitive damages "in the sum of no less than $100,000,000.00" (stated in the "Wherefore" clause as "the sum of $1,000,000.00", plus interest (Verified Complaint at ¶¶ 10, 11).

In support of the cross motion, defendant correctly points out that because the official acts of the Village Police Officer or Officers complained of involve the exercise of discretion,

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[1] The Bill of Sale actually lists Nadeem Noormohammed as purchaser of the business known as Floral Park Wines and Liquor Store. The lease agreement is signed "by Nadeem Noormohammed-Tenant" without indicating Mr. Noormohammed's relationship to the corporate plaintiff.

[2] Plaintiff's counsel adds that subsequent to the closing for the sale of the business, a dispute arose between Mr. Williams and the plaintiff corporation "as to the payments of the balance of the $39,000.00" apparently owed to Mr. Williams by the plaintiff corporation pursuant to an "Addendum to Management Rider" (Supporting Affirmation to Motion to Consolidate at ¶ ¶ 6-8).

those acts cannot constitute a basis for liability.[3]

It is well settled that where, as here, the actions of government officials involve the exercise of discretion, there can be no governmental tort liability for the injurious consequences of those actions even if resulting from negligence or malice (*McLean v City of New York*, 12 NY3d 194, 202 [2009]; *Lauer v City of New York*, 95 NY2d 99, 100 [2000]; *Tango v Tulevech*, 61 NY2d 34, 40 [1983]; *Arias v City of New York*, 22 AD3d 436 [2d Dept 2005] [municipal immunity from liability for conduct involving the exercise of discretion and reasoned judgment extend to actions of police officers engaged in law enforcement activities]).

Plaintiff attempts to avoid application of the general rule by contending that the defendant Village somehow owed a "special duty" to the plaintiff, citing *Cuffy v City of New York*, 69 NY2d 255 [1987]). Specifically, plaintiff's counsel opines:

> [i]n [the] instant case (1) Village Police Officers assured through promises, or actions, an affirmative duty to act on behalf of the injured party (Plaintiff); (2) Knowledge on the part of the Municipal's Agents' that inaction would lead to harm; (3) some form of contact between the Municipal's Agents and injured party; and (4) Plaintiff, justifiably relied on the Municipal's Agents' affirmative undertaking (Attorney's Affirmation in Opposition to Cross Motion at ¶ 15; as in original).

In *Cuffy v City of New York, supra*, the court recognized that an exception to the general rule can be found in a narrow class of cases where there exists a "special relationship" between the municipality and the claimant. The elements of the "special relationship" or "special duty" exception are: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) the party's justifiable reliance on the municipality's affirmative undertaking (*Id.* at p. 260; *see also Dixon v Village of Spring Valley*, 50 AD3d 943 [2d Dept 2008]).

Absent, however, from plaintiff's opposition papers and from it's complaint, are any allegations as to the purported assurances, knowledge, contact, and justifiable reliance which might give rise to a "special duty" of care in this case. Instead, plaintiff's counsel merely articulates the elements required to establish a "special duty" without offering any analysis as to how each element has been properly alleged or could be established in this action. There is no allegation that either the defendant or its officers assumed an affirmative duty to act on plaintiff's

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[3]It is noted that neither the complaint nor the opposing affidavit satisfy the requirements of General Municipal Law § 50-i (1), although plaintiff's counsel does allege that a notice of claim "was filed against the Corporation on May 8, 2009" (Affirmation in support of Motion to Consolidate at ¶ 11). This issue was not, however, raised by the defendant in its Cross Motion to dismiss.

behalf in its contract dispute with Everad Williams, nor is there any allegation that the defendant was provided advance knowledge that a failure to act could lead to harm. The only suggestion of contact between plaintiff and the responding Village Police Officers are the actual events giving rise to this action. Lastly, there is no allegation that plaintiff justifiably relied upon any affirmative undertaking of the defendant Village or its Police Officers to act on plaintiff's behalf.

In addition to the fact that plaintiff cannot establish any basis for liability against the defendant Village, the second and third causes of action set forth in the complaint are patently improper. A corporation cannot suffer "mental anguish" (*see Wolf Street Supermarkets, Inc. v McPartland*, 108 AD2d 25, 32 [4th Dept 1985]), and it is well settled that punitive damages are not recoverable against a municipal defendant (*Sharpata v Town of Islip*, 56 NY2d 332, 339 [1982]).

In view of the foregoing, defendant's cross motion to dismiss the complaint is granted.

Plaintiff's motion to consolidate is denied as academic. The court notes that the motion would have been denied in any event, because common questions of law and fact warranting consolidation do not exist.

This constitutes the decision and order of the court.

Dated: November 10, 2009

Hon. Vito M. DeStefano, J.S.C.