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

PRESENT: HON. KAREN SMITH Justice

PART 62

Index Number : 600941/2009
FAVARA CONSTRUCTION, LLC
VS.
COMPTROLLER OF THE CITY OF NY
SEQUENCE NUMBER : 004
DISMISS ACTION

INDEX NO. ____

MOTION DATE ____

MOTION SEQ. NO. 004

MOTION CAL. NO. ____

n this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached memorandum decision and order.

FILED
JAN 06 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/22/09

HON. KAREN SMITH J.S.C.

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

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: PART 62

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FAVARA CONSTRUCTION, LLC, and DOMENICO GALLUZZO, Individually,

Plaintiff,

-against-

THE COMPTROLLER OF THE CITY OF NEW YORK, BUILDING, CONCRETE & EXCAVATING & COMMON LABORERS UNION, LOCAL 731 OF GREATER NEW YORK, LONG ISLAND & VICINITY OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, VERIZON SERVICES CORPORATION, VERIZON CORPORATE SERVICES GROUP, INC., EMPIRE CITY SUBWAY COMPANY, LTD., and JEFF ELMER, Individually,

Defendants.

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Index No.: 600941/09
Motion Seq.: 002, 003, 004
Motion Date: December 10, 2009

DECISION AND ORDER

PRESENT: KAREN S. SMITH, J.S.C.:

Motion sequence numbers 002, 003 and 004 are hereby consolidated for disposition.

Plaintiffs Favara Construction, LLC and Domenico Galluzzo, by this action, seek to recover for damages arising from the termination of Favara Construction, LLC's contract with defendant Verizon Services Corporation. Plaintiffs commenced this action by filing of a summons and complaint on March 27, 2009. Defendants Verizon Services Corporation, Inc., Verizon Corporate Services Group, Inc., and Empire City Subway (hereinafter "Verizon") now move, pre-Answer, for an order dismissing the plaintiffs' complaint pursuant to CPLR § 3211(a)(1), (a)(5) and (a)(7) (Motion Sequence No. 002). Defendant Building, Concrete, Excavating & Common Laborers Union, Local 731 (hereinafter "Local 731") also moves, pre-

Answer, for an order dismissing plaintiffs' complaint pursuant to CPLR § 3211(a)(7)[1] (Motion Sequence No. 003). Defendants Comptroller of the City of New York and Jeff Elmer (hereinafter "Comptroller" and "Elmer") move for an order dismissing Favara's complaint pursuant to CPLR § 3211(a)(1), (a)(5), (a)(7) and (a)(8). Plaintiffs oppose each of the motions individually.

In deciding a motion brought pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the complaint should be liberally construed and the facts alleged in the complaint and any submissions in opposition to the dismissal motion accepted as true, according plaintiffs the benefit of every possible favorable inference. *(511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). "The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law'." (*Id.*). On a motion to dismiss pursuant to CPLR §3211(a)(1), the defendant has the burden of demonstrating that the documentary evidence conclusively resolves all factual issues, and that plaintiff's claims fail as a matter of law. (*Robinson v. Robinson*, 303 AD2d 234, 235 [1st Dept. 2003]). While a complaint is to be liberally construed in favor of the plaintiff on a CPLR §3211 motion to dismiss, where documentary evidence flatly contradicts the factual claims, the entitlement to the presumption of truth and the favorable inferences is rebutted. (*Robinson v. Robinson, id.*; *accord Scott v. Bell Atlantic Corp.*, 282 AD2d 180, 183 [1st Dept. 2001], *mod on other grounds*, 98 NY2d 314 [2002]).

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[1] Although Local 731 seeks, in the alternative, summary judgment pursuant to CPLR § 3212, as no answer has been interposed, this relief is not appropriate at this time.

The facts herein have been taken from plaintiffs' complaint and affidavit in opposition to the within motions. In February 2006, plaintiff Favara entered into a contract with defendant Verizon for certain conduit services in the City of New York. Pursuant to the contract, the job was a union job and the workers were to be paid prevailing wage. Favara contracted with a Staten Island union, identified by plaintiff only as Local 175. Thereafter representatives of Building, Concrete & Excavating & Common Laborers Union Local 731, a defendant herein, visited the job site and told Galluzzo or his employees that they were unhappy that the contract went to Local 175 and not their union. Galluzzo alleges that he observed Field Representative Ronald Valdner and Organizer John Rodriguez, both of Local 731, waiting outside the yard and videotaping crews at his job site. In or about October or November 2006, Galluzzo called the police to report this activity and was told that, as the Local 731 members were on a public street, there was nothing the police could do. The representatives allegedly followed Favara's crew daily for several weeks thereafter.

From late September to October 2006, Galluzzo was receiving phone calls from Larry Curcio, a Second Line Boss for Verizon, regarding reports received by the Comptroller through defendant Jeff Elmer, that Favara was not paying the crew the required prevailing wages. Curcio told Galluzzo that if they were not paying prevailing wages, Verizon would terminate the contract. Galluzzo states that he was not concerned, as he knew that prevailing wages were being paid. In March 2007, Curcio called Galluzzo and requested audits from specific jobs, which consisted a roster of workers and the jobs they performed, which were provided. Between April and June 2007, Galluzzo was asked by Verizon Corporate to provide information about certain jobs, which information was to be provided to the Comptroller's office and/or Elmer. Galluzzo

states that he never heard back from the Comptroller's office regarding any violations.

On or about August 14, 2007, Favara had approximately 10 employees working at the Rustic Woods development located on Staten island, which was one of Verizon's contract sites. The foreman, Ray Galluzzo,[2] called plaintiff Domenico Galluzzo to report that Rodriguez of Local 731 was driving around the site. The next morning, August 15, 2007 at approximately 8:00 a.m., Rodriguez began to videotape activities at the job site. When Favara's superintendent confronted Rodriguez, who was standing inside of the private development on the corner of Dinsmore Street and Signs Road, Rodriquez ignored the superintendent's request that he leave the premises. Galluzzo called the police and Rodriguez was issued a trespassing summons. Rodriguez informed police that he was working with the Comptroller investigating Favara. Local 731 Field Representative Valdner then arrived and spoke to one of the police officers, after which the police left. Valdner and Rodriguez continued to discuss the summons with plaintiff Galluzzo, and when Galluzzo tried to end the conversation, they threatened him that everything was going to "come to a head" that day and stated that Favara would be out of New York forever. At approximately 11:00 a.m. that same morning, August 15, 2007, Verizon inspector Jim McCue called Galluzzo and told him to clean up, make everything safe, and leave the job site immediately. When asked the grounds for termination, McCue stated he had just been directed by Curcio to make the call and was simply doing as he was directed. When Galluzzo inquired with the Comptroller and Elmer, Elmer told Galluzzo that the Comptroller's records reflected that Favara was "underpaying certain classifications in violation of prevailing wage laws."

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[2] It is unclear what, if any, relationship there is between Ray Galluzzo and plaintiff Domenico Galluzzo, but Ray Galluzzo is not a party to this action. He will be referred to by his full name throughout.

According to plaintiffs, Favara was replaced by non-party Granite Construction, a company that hired union workers from Local 731.

Plaintiffs allege that during this period, between 2005 and 2007, Verizon was negotiating a lucrative contractual relationship with the City of New York and/or Comptroller, and that the Comptroller and/or Jeff Elmer and/or the City of New York used the negotiations to threaten Verizon, expressly or impliedly, to terminate the contract with plaintiffs at the insistence of Local 731.

Plaintiffs allege the following causes of action in their complaint: 1) Breach of Contract (against Verizon, Comptroller and Elmer); 2) *Prima Facie* Tort (against each defendant); 3) Tortious Interference with Contract (against Local 731, Comptroller and Elmer); 4) Tortious Interference (against Local 731, Comptroller and Elmer); 5) Injurious Falsehood (against Comptroller, Elmer, Local 731 and Verizon); 6) Breach of Duty of Good Faith and Fair Dealing (against Verizon and Comptroller); 7) Negligent Hiring and Retention (against Comptroller and Verizon).

Verizon's Motion to Dismiss (Motion Sequence No. 002)

Verizon contends that plaintiffs' cause of action for breach of contract against it must be dismissed because plaintiffs have failed to identify the precise provision of the contract on which the claim is based. According to Verizon, plaintiffs' allegations that Verizon terminated the contract on August 15, 2007 "in violation of Plaintiffs' written contract" is insufficient to support a cause of action for breach of contract. In addition, Verizon contends that this contract was an "as ordered" contract, terminable for a variety of reasons or for no reason at all. In opposition,

plaintiffs argue that the complaint identifies the subject contract, the terms of the contract, that it was terminated with no notice, and the damages alleged to have resulted from the termination of the contract, all of which is sufficient to state a breach of contract cause of action.

Verizon submits the parties' contract, to which plaintiffs pose no objection. Section 35.0 governs "Termination", while Section 36.0 governs "Termination Without Cause." Those sections state, in relevant part:

> **35.0 Termination**
>
> 35.1 VERIZON may terminate this Agreement as follows: (i) immediately upon notice in response to regulatory or legal concerns or any concerns that activities under this agreement may endanger the health or safety of a person, the environment or the VERIZON network; (ii) at any time upon ten (10) days notice; or (iii) immediately upon notice for cause as follows: (a) for failure to perform, if VERIZON first gave Supplier notice of breach and an opportunity to cure in seven(7) days, or (b) based on VERIZON's belief that Supplier has engaged in illegal, criminal or fraudulent conduct in connection with services performed or to be performed under this Agreement, or (c) the failure to pay its subcontractors or employees providing services under this Agreement.
>
> . . .
>
> 35.3 Upon termination for cause, Supplier shall not be entitled to further payments under this Agreement and for a material breach, Supplier shall immediately refund all amounts it received for the applicable Services.
>
> **36.0 Termination Without Cause**
>
> VERIZON may terminate this Agreement without any liability to Supplier (except for Services already purchased pursuant to a PO) upon seven-(7) days' written notice to the other party.

While it is true that plaintiffs' complaint does not explicitly state that Verizon breached the termination provisions of the Contract, this omission is not fatal. The standard on a motion to dismiss prior to issue being joined, is whether the plaintiffs have a cause of action, considering

the allegations of the complaint and any submissions in opposition to the motion as a whole. (*See, 511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 [2002]). "The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law'." (*Id.* at 152 [internal citations omitted]).

Verizon does not dispute that it terminated the parties' contract. Rather, Verizon contends that its termination was permitted under the parties' contract and, therefore, cannot form the basis for a breach of contract action. While Verizon may be correct that the contract was for services "as ordered" and could be terminated at any time, the express terms of the contract provide for the manner of termination and plaintiffs' complaint sufficiently states a cause of action for breach of those provisions to survive Verizon's motion to dismiss. Verizon does not submit any evidence that it provided either, 1) a reason for the termination (i.e., for cause or not for cause), or 2) written notice to plaintiffs regarding the termination, so it has not submitted documentary evidence to flatly contradict the allegations in the complaint that it improperly terminated the parties' contract. (*Robinson v. Robinson*, 303 AD2d 234, 235 [1st Dept. 2003]).

Verizon also seeks dismissal of plaintiffs' claim for breach of the duty of good faith and fair dealing as duplicative of plaintiffs' breach of contract cause of action. Verizon argues that plaintiffs have not alleged any basis for this alleged breach other than the alleged "improper termination" of the contract, and that merely reformulating the same allegations as a separate tort cause of action is improper and insufficient to state a cause of action. Plaintiffs, on the other hand, insist that New York courts have repeatedly held that a claim for breach of the implied duty of good faith and fair dealing can be asserted independent of the breach of contract claim, where

a defendant has exercised its rights under the contract in bad faith and in order to deprive the other party of the fruit of its bargain.

Even where one has an apparently unlimited right under a contract, that right may not be exercised solely for personal gain in such a way as to deprive the other party of the fruits of the contract. (*Richbell Info Servs., Inc. v Jupiter Partners, L.P.*, 309 AD2d 288 [1st Dept 2003]). The covenant of good faith and fair dealing, implied in every contract, acts as a limitation even on apparently unfettered or discretionary contractual rights, to prohibit parties from exercising such rights in bad faith so as to frustrate the other party's right to the benefit under the agreement. (*Id.*) However, "'the implied obligation 'is in aid and furtherance of other terms of the agreement of the parties,'" and "'[n]o obligation can be implied . . . which would be inconsistent with other terms of the contractual relationship.'" (*Sheth v New York Life Ins. Co.*, 273 AD2d 72, 74 [1st Dept 2000], *quoting Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304 [1983]). In the context of an at-will employment contract, for example, "'it would be incongruous to say that an inference may be drawn [by the implied covenant of good faith and fair dealing] that the employer impliedly agreed to a provision which would be destructive of his right of termination.'" (*Id.*).

While plaintiffs have alleged that Verizon's termination of the parties' contract was done in bad faith and with the intention of depriving plaintiffs of the fruits of the contract, specifically that Verizon precipitously and without notice terminated the contract in order to curry favor with the City of New York and improve its chances of obtaining further lucrative contracts with it, these facts do not constitute a separate cause of action. "[T]he allegation of a breach of the duty of good faith is duplicative of the cause of action for breach of contract since, where appropriate,

the courts will imply the obligation of good faith and fair dealing between parties to a contract." (*McMahan & Co. v Bass*, 250 AD2d 460, 462 [1st Dept 1998]). As plaintiffs' breach of contract claim against Verizon is not being dismissed, a separate cause of action for breach of the duty of good faith and fair dealing is duplicative and will be dismissed.

Verizon next seeks an order dismissing plaintiffs' cause of action for injurious falsehood, contending that it is barred by the statute of limitations and that plaintiffs have failed to state a cause of action. An injurious falsehood is a statement that injures a person by leading other persons into action that is detrimental, as opposed to a statement that injures a party's reputation, which would fall under the torts of libel or slander. (103 NY Jur Torts § 19 [2009]). The elements of a cause of action for injurious falsehood are, 1) a false and misleading statement harmful to the interests of another, 2) uttered or published maliciously and with intent to harm another, or done recklessly and without regard to its consequences, and 3) a reasonably prudent person would or should anticipate that damage to another would naturally flow therefrom. (*Id.*). A failure to specifically set forth the actual utterances is a failure to state a cause of action, (*see Penn-Ohio Steel Corp v Allis-Chalmers Mfg. Co.*, 7 AD2d 441 [1st Dept 1959]), as is the failure to sufficiently alleged special damages. (*Henkin v News Syndicate Co.*, 27 Misc2d 987 [Sup Ct NY Cty 1960], *aff'd* 19 AD2d 862 [1st Dept 1963]).

The tort of injurious falsehood is subject to the one year statute of limitations as set forth in CPLR § 215(3) for actions to recover for "false words causing special damages." (*See Clark v New York Tel. Co.*, 41 NY2d 1069 [1977]). The Court can discern no acts alleged by plaintiff that occurred after Verizon's termination of plaintiffs' services on August 15, 2007, which is more than one year prior to the date plaintiffs commenced this action on March 27, 2009.

Plaintiffs do not dispute that the acts they contend comprise a cause of action for injurious falsehood end on August 15, 2007, or that the statute of limitations is one year, but claim that the cause of action is not barred by the statute of limitations because it is subject to the "continuing tort doctrine." While plaintiffs are correct that certain ongoing, continuing or repeated wrongs may sometimes be subject to the continuing tort doctrine, which, where applicable, holds that the statute of limitations runs from the last tortious act, (*see Selkirk v State*, 249 AD2d 818 [3d Dept 1998]), here plaintiffs have alleged no tortious conduct within one year prior to the commencement of this action or after August 15, 2007, and no facts that would constitute a "continuing tort." That plaintiffs may still be suffering harm from Verizon alleged injurious falsehood is not a factor in whether the continuing tort doctrine applies, contrary to plaintiffs' arguments in opposition. As the cause of action is barred by the statute of limitations, the Court need not evaluate whether plaintiffs otherwise stated a cause of action for injurious falsehood.

Verizon also moves to dismiss plaintiffs' cause of action against it for *prima facie* tort. The theory behind the *prima facie* tort doctrine is that the law should provide a remedy for intentional and malicious actions that cause harm and for which there is otherwise no remedy. (3-15 NY Practice Guide: Business and Commercial § 15.02 [2009]). The elements are, 1) the intentional infliction of harm, 2) resulting in special damages, 3) without excuse or justification, and 4) by an act or series of acts that otherwise would be lawful. *(Burns Jackson Miller Summit & Spitzer v Lindner,* 59 NY2d 314 [1983]). A cause of action for *prima facie* tort is also subject to a one-year statute of limitations. (*Russek v Dag Media, Inc.*, 2008 NY Slip Op 193, at *2 [1st Dept 2008]; *Havell v Islam et al.*, 292 AD2d 210 [1st Dept 2002], *citing Gallagher v Directors Guild of Am.*, 144 AD2d 261, 262-3, *lv denied* 73 NY2d 708 [2002]). While plaintiffs cite to

several cases in other Appellate Division departments which have allowed a three-year statute of limitations, particularly where the *prima facie* tort was based on a personal injury or directed at economic interests, (*see, Jemison v Crichlow*, 139 AD2d 332 [2d Dept 1988]; *Besicorp Ltd. v Kahn*, 290 AD2d 147 [3d Dept 2002]; *Barrett v Huff*, 6 AD3d 1164 [4th Dept 2004]), this Court is bound by the First Department precedent, which seems to clearly hold a one-year statute of limitations is applicable. Plaintiffs have cited to no First Department or New York Court of Appeals cases to the contrary. As such, plaintiffs' cause of action for *prima facie* tort is barred by the statute of limitations.

However, even if plaintiffs' *prima facie* tort claim was subject to a three-year statute of limitations, as plaintiffs argue, the Court would have to dismiss it for failure to state a cause of action. While plaintiffs allege that Verizon's actions were "for the sole malicious purpose of inflicting injury" on plaintiffs, this runs counter to their more specific allegations elsewhere in the complaint that Verizon's actions were taken to curry favor with the City of New York, with which it was in serious negotiations for other lucrative business deals. *Prima facie* tort may only lie where the *sole* motivation for the defendant's alleged conduct was disinterested malevolence, and where plaintiffs allege the defendant was motivated by profit, self-interest or business advantage, they may not recover for *prima facie* tort. (*See,* 3-15 NY Practice Guide: Business and Commercial § 15.02).

Furthermore, plaintiffs have failed to sufficiently plead special damages, as is required to maintain a cause of action for *prima facie* tort. Plaintiffs' complaint states that they "have been proximately caused to sustain special damages, including, but not limited to damage to reputation, loss of business opportunity, lost revenues, lost profits, lost income, attorneys' fees

and expenses and other damages in an amount in excess of FIVE MILLION ONE HUNDRED THOUSAND DOLLARS. . . ." However, "[s]pecial damages . . . must be fully and accurately stated. If it was a loss of customers, 'the persons who ceased to be customers, or who refused to purchase, must be named . . . if they are not named, no cause of action is stated." (*Continental Air Ticketing Agency, Inc. v Empire Int'l Travel, Inc.*, 51 AD2d 104, 108 [4th Dept 1976], *quoting Reporters' Assn. of Amer. v Sun Print. & Pub. Assn.*, 186 NY 437, 442 [1906]). General allegations of lost sales from unidentified lost customers are insufficient to support an action for *prima facie* tort. (*DiSanto v Forsyth*, 258 AD2d 497 [2d Dept 1999]) "It is also not sufficient to allege the amount that damages are not going to exceed." (3-15 NY Practice Guide: Business and Commercial § 15.02, *citing Keslin v State of New York*, 2006 NY Slip Op 26480 [Ct. Cl. 2006]). Accordingly, plaintiffs' complaint has failed to state special damages for which recovery under a theory of *prima facie* tort can be maintained.

Finally, Verizon argues that plaintiffs' purported claim for negligent hiring and/or retention fails to state a cause of action and should be dismissed. Plaintiffs allege that Verizon should have anticipated that the careless, reckless and/or negligent actions by its employees McCue and Curcio, in addition to an unnamed Verizon employee, would cause injury to them, and that Verizon's failure to ensure that its employees and/or agents were free from conflicts of interest was so careless, reckless and/or negligent that it caused plaintiffs' injuries. Plaintiff contends that these allegations are sufficient to support a cause of action for negligent hiring and/or retention.

"Generally, where an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence

under a theory of *respondeat superior*, no claim may proceed against the employer for negligent hiring or retention. This is because if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training." (*Russek v Dag Media Inc.*, 2008 NY Slip Op 193, ***3-4 [1st Dept 2008] [internal citations omitted]). Plaintiffs have not alleged that Verizon's employees were acting intentionally or outside the scope of their employment, and Verizon admits in its moving papers that, in fact, it was within the scope of employment for its employees to make determinations regarding its contract with Favara. Further, as plaintiffs themselves acknowledge, a necessary element for claims of negligent hiring and retention is that the employer knew or should have known of the employee's propensity for the allegedly injurious conduct. Here, plaintiffs have failed to make any such an allegation in the complaint and in its opposition merely states that certain employees of Verizon directed the improper termination of the parties' contract. Although plaintiffs allege that the individual employees of Verizon acted negligently, recklessly or carelessly in carrying out their duties, since those actions allegedly resulted in the termination of the parties' contract, this cause of action is duplicative of plaintiffs' cause of action for breach of contract against Verizon.

Local 731's Motion to Dismiss (Motion Sequence No. 003)

Local 731 moves to dismiss plaintiffs' complaint as against it, including the causes of action for *prima facie* tort, tortious interference with contract and tortious interference, and injurious falsehood, pursuant to CPLR § 3211(a)(7). According to Local 731, it is a voluntary

association pursuant to General Associations Law § 13, and plaintiffs' action cannot be maintained against it unless it is alleged that the actions taken were ratified or authorized by all of the association's individual members. As the complaint makes no allegation regarding ratification or authorization, Local 731 argues, it must be dismissed pursuant to CPLR § 3211(a)(7). Further, Local 731 contends that even if the complaint is not dismissed on that basis, each of the causes of action against it are legally deficient and must be dismissed. Plaintiffs oppose the motion, contending first that Local 731 has not met its burden under CPLR § 3211(a)(7) because it did not submit an affidavit or other evidence to show that no ratification or authorization was granted. Plaintiffs maintain that each of the causes of action against Local 731 are properly stated, and argue that, should the Court determine that the complaint must be dismissed against Local 731 because it is a voluntary association, plaintiffs should be granted leave to re-plead against Local 731 and also to amend the complaint to name the individual actors.

"A voluntary, unincorporated membership association is neither a partnership nor a corporation. It is not an artificial person, and has no existence independent of its members." (*Martin v Curran*, 303 NY 276, 280 [1951] [internal citations omitted]). In *Martin*, the Court dismissed the plaintiff's complaint because it failed to plead that the allegedly tortious actions of the individual members were authorized or ratified by all the members of the group. (*Id.*) *Martin* compels the same result here. Although plaintiffs oppose the motion, in part, arguing that Local 731 has failed to establish that the actions of Valdner and Rodriguez were not authorized or ratified, this is clearly not defendant's burden where the allegation is required to be pled by plaintiffs. Nor is it sufficient to state that discovery is required to determine whether this

allegation is true. Such an admission by plaintiffs only reveals that they do not have a good faith basis for its complaint against Local 731.

Plaintiffs alternatively seek leave to amend their complaint, both to re-plead as against Local 731 and also to amend to add the individual members or personnel identified in the complaint's factual allegations. Plaintiffs have not cross-moved for this relief or even submitted a proposed amended complaint, and they have not specified how they would amend the allegations of the complaint. Nor have plaintiffs submitted an affidavit by a person with knowledge, or other evidence to indicate that they have a good faith basis for alleging that the actions of the individual members were authorized or ratified by the entire membership of Local 731. As such, plaintiffs' unspecified and unsupported plea for leave to amend the complaint as to Local 731 in order to defeat its motion to dismiss, must be denied. As to plaintiffs' plea for leave to amend the complaint to name the individual Local 731 members, as there is no proper motion or cross-motion for this relief and no proposed pleading before the Court, this request must also be denied, but without prejudice to move separately for this relief.

Because the Court is dismissing plaintiffs' complaint against Local 731 in its entirety based on the above, it need not address the merits of the separate causes of action against it.

Comptroller of the City of New York's Motion to Dismiss (Motion Sequence No. 004)

Defendant Comptroller moves to dismiss each of the causes of action against it, specifically, 1) *prima facie* tort, 2) tortious interference with contract, 3) tortious interference, 4) injurious falsehood, 5) breach of the duty of good faith and fair dealing, 6) breach of contract,

and 7) negligent hiring and retention, and also disputes personal jurisdiction over defendant Elmer.

The Comptroller first argues that the complaint must be dismissed in its entirety as against it because the tort causes of action are beyond the statute of limitations. Pursuant to General Municipal Law § 50-i(1), the statute of limitations for negligence and other tort actions against the City of New York and its officers, agents or employees is one year and ninety days. As discussed, *supra*, the last factual allegations contained in the plaintiffs' complaint occurred on August 15, 2007, making this the last date on which the within causes of action could have accrued. Plaintiffs' action was commenced on March 27, 2009, more than four months beyond the statute of limitations.

Plaintiffs argue that defendants continued to work to "black list" them and prevent plaintiffs from obtaining work well into the summer of 2008, when plaintiffs discovered it and filed the Notice of Claim. Based on these allegations, plaintiffs contend that the Comptroller and Elmer are equitably estopped from asserting the statute of limitations because it was their own wrongdoing which prevented plaintiffs from commencing the action sooner. However, these allegations are impermissibly vague, are not contained in the complaint, and even in opposition to this motion they are contained only in counsel's affirmation, and not in an affidavit by a person with knowledge, and therefore are insufficient to defeat a motion to dismiss.

Further, the Comptroller contends that even if the action had been commenced in a timely fashion, plaintiffs failed to file a timely Notice of Claim, mandating dismissal of the tort claims against it. General Municipal Law § 50-e makes the filing of a Notice of Claim within 90 days of the accrual of the cause of action a condition precedent to commencing an action sounding in tort

against the City of New York or its officers, agents or employees. To be timely, then, plaintiffs were required to file their Notice of Claim on or before November 13, 2007; however, plaintiffs' Notice of Claim was not filed with the City until July 2, 2008. Although General Municipal Law § 50-e(5) sets forth some circumstances in which leave to serve and file a late Notice of Claim may be granted, the Court is without discretion to grant such leave when it is sought more than one year and ninety days from the date the cause of action accrued. (*Armstrong v New York Convention Center Operating Corp.*, 203 AD2d 170 [1st Dept 1994]). Plaintiffs never moved or brought a special proceeding seeking leave to serve and file a late Notice of Claim and the time to do so is well past, making the Notice of Claim filed by plaintiffs on July 2, 2008 a legal "nullity." (*Walker v New York City Health and Hospitals Corp.*, 36 AD3d 509 [1st Dept 2007]; *Wollins v New York City Board of Education*, 8 AD3d 30 [1st Dept 2004]).

Although plaintiffs argue that the "injuries" suffered continued through at least July 2008, making the July 2, 2008 Notice of Claim timely, as discussed previously, injury is not the dispositive factor in the rare cases in which a "continuing tort doctrine" has been applied. Not only have plaintiffs failed to allege any facts which would give rise to application of the doctrine, but they have cited to no cases in which the doctrine has been applied to override the strictly construed provisions of General Municipal Law §§ 50(i) or (e). Plaintiffs' arguments regarding whether the Comptroller did or did not have an opportunity to investigate in a timely manner or suffered prejudice by the delay are factors that would only have been considered had they been presented in a special proceeding or at least a motion for leave to serve and file a late Notice of Claim within one year and ninety days from August 15, 2007. The cases cited by plaintiffs in opposition to the Comptroller's motion actually support dismissal and directly contradict

plaintiffs' arguments. (*See, e.g., Williams v Nassau County Medical Center*, 6 NY3d 531 [2006] [denying leave to serve a late Notice of Claim beyond statutory period even where petitioner argued for infancy toll]; *Rivera v City of New York*, 169 AD2d 387 [1st Dept 1991] [finding plaintiff's *timely* filed Notice of Claim provided the City sufficient notice, even though it lacked some specificity]).

Although plaintiffs' causes of action against the Comptroller which sound in negligence or other tort (*prima facie* tort, tortious interference with contract, tortious interference, injurious falsehood, and negligent hiring and retention) must be dismissed as both barred by the statute of limitations and for failure to timely file a Notice of Claim, plaintiffs' causes of action for breach of contract and breach of the duty of good faith and fair dealing require separate analysis, as they are not subject to GML § 50-e.

As an initial matter, plaintiffs have not alleged that it had a contract with the Comptroller or Elmer. In fact, in the complaint, plaintiffs allege that Verizon, "acting in concert with and/or conspiring with Defendants Comptroller and/or Elmer, wrongfully and/or unlawfully materially breached Plaintiffs'" contract with Verizon. Plaintiffs do not allege that the Comptroller or Elmer breached any contract with plaintiffs. To state a cause of action for breach of contract, plaintiffs' must allege "the terms of an existing contract" between the parties. (22A NY Jur Contracts § 442, 443). Furthermore, the duty of good faith and fair dealing is not a contract between the parties in and of itself. Rather, it is a covenant which is implied in all existing, legally enforceable contracts. (*Richbell Info Servs., Inc. v Jupiter Partners, L.P.*, 309 AD2d 288 [1st Dept 2003]). As plaintiffs have not alleged that a contract existed between them and either

the Comptroller or Elmer, no cause of action based on the duty of good faith and fair dealing may lie.

Finally, Elmer disputes that plaintiffs obtained personal jurisdiction over him by service of the summons and complaint upon the New York City Law Department. According to counsel for Elmer, pursuant to CPLR § 308, service upon a Elmer, a natural person, required plaintiffs to both deliver the summons and complaint to him or to a person of suitable age and discretion at Elmer's "actual place of business, dwelling place or usual place of abode, and to mail same to Elmer at his last known residence or actual place of business," none of which was done. Although they do not dispute that service of the summons and complaint was only made on the Law Department, plaintiffs oppose this portion of the motion, contending that, since the allegations in the complaint are asserted against Elmer only in his official capacity as an employee of the Comptroller, service upon the Law Department, counsel for the Comptroller, is sufficient.

As counsel for Elmer points out, plaintiffs' argument, based on the assertion that Elmer is only being sued in his official capacity, is inconsistent with the fact that Elmer is named in the complaint individually and not in his official capacity, and by the fact that plaintiffs seek damages against Elmer personally. In addition, plaintiffs' reliance on CPLR § 311 for the proposition that service upon Elmer by way of the New York City Law Department was sufficient, is misplaced. While that provision allows for service upon the City of New York by serving the Law Department, plaintiffs have not named the City of New York in this action. However, as plaintiffs have admitted in their opposition papers that the allegations are only against Elmer in his capacity as an employee of the Comptroller's Office, the Court need not

determine whether service upon Elmer was proper and those causes of action against him must be dismissed for the same reasons that the causes of action against the Comptroller directly must be dismissed.

Accordingly, it is

ORDERED that the portion of the motion by defendants Verizon Services Corporation, Inc., Verizon Corporate Services Group, Inc., and Empire City Subway (Motion Seq. No. 002) which seeks an order dismissing plaintiff's First Cause of Action for breach of contract as against them, pursuant to CPLR § 3211, is denied; it is further

ORDERED that those portions of the motion by defendants Verizon Services Corporation, Inc., Verizon Corporate Services Group, Inc., and Empire City Subway (Motion Seq. No. 002) which seeks an order dismissing plaintiff's Second Cause of Action for *prima facie* tort, Fifth Cause of Action for injurious falsehood, Sixth Cause of Action for breach of the duty of good faith and fair dealing, and the Seventh Cause of Action (improperly labeled the Sixth Cause of Action) for negligent hiring/retention as against them, pursuant to CPLR § 3211, is granted; it is further

ORDERED that the motion by defendant Building, Concrete, Excavating & Common Laborers Union, Local 731 (Motion Seq. No. 003), seeking an order dismissing plaintiffs' complaint in its entirety as against it, pursuant to CPLR § 3211, is granted; it is further

ORDERED that the motion by defendants Comptroller of the City of New York and Jeff Elmer (Motion Seq. No. 004), seeking an order dismissing plaintiffs' complaint in its entirety as against them, pursuant to CPLR § 3211, is granted; it is further

ORDERED that the remaining causes of action against defendants Verizon Services Corporation, Inc., Verizon Corporate Services Group, Inc., and Empire City Subway are severed and will continue under this index number; it is further

ORDERED that the moving defendants serve a copy of this decision and order with notice of entry upon plaintiffs and upon the Clerk of the Court within 20 days of entry hereof; it is further

ORDERED that upon service of a copy of this decision and order with notice of entry, the Clerk of the Court enter judgment as provided herein.

The foregoing constitutes the decision and order of this court. The parties are on notice that, since the New York City Comptroller's Office is no longer a defendant, this case will be transferred to the Trial Support Office for reassignment to a non-City Part under separate cover.

Dated: December 23, 2009

ENTER:

Hon. Karen S. Smith, J.S.C.