SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. R. BRUCE COZZENS, JR.
Justice.

TRIAL/IAS PART 6
NASSAU COUNTY

JAVID ZARABI,

Plaintiff(s),

-against-

INCORPORATED VILLAGE OF ROSLYN HARBOR, KERRY G. COLLINS and JOHN AMISANO,

Defendant(s).

MOTION #010, 011
INDEX#13213/2003
MOTION DATE:
FEB 16 2010
APR 28 2010

The following papers read on this motion:

Notice of Motion.....2
Answering Affidavits.....6
Defendant's Brief.....2

Motions by defendant John Amisano, the Incorporated Village of Roslyn Harbor ("the Village"), and Kerry G. Collins, for summary judgment dismissing the complaint and all cross-claims are granted.

This action arises out of problems and delays encountered by plaintiff in his efforts to obtain a certificate of occupancy for a home that he was rebuilding on property located at 15 Church Street, in Roslyn Harbor. Plaintiff is a builder and real estate investor. Although he was represented by an attorney at the commencement of this litigation, and the amended complaint was drafted by an attorney, at this time plaintiff is *pro se*. Defendant John Amisano is the architect, with whom plaintiff had an oral agreement for the provision of plans and specifications for the rebuilding. Defendant Kerry Collins is the new building inspector for the Village, who was responsible for issuing the certificate of occupancy at issue.

Defendant Amisano filed the application for a building permit and plans on December 20, 2000. They were approved the same day. Building inspections for the Village were conducted by the then building inspector, Mr. Kuless.

By early December, 2001, the new building was largely completed. Changes to the plans were made during the construction because, according to plaintiff, Mr. Amisano had failed to address many important aspects of the site, especially its hilly nature. Those changes included the creation of low and long retaining walls and walkways, the installation of a brick facade, changes in the location of drywells, the rejection of specified steel for the top of the kitchen and master bedroom, the elimination of some semi-circular windows and skylights, and changes in the structural elements for a turret. In addition, the driveway was changed from paved asphalt to gravel. Plaintiff alleges that he was told by Mr. Kuless that the changes were minor and could be addressed later in the "as built" plans.

As set forth in the amended complaint, plaintiff discharged Amisano in mid-January 2002, "as a result of prior disputes not here relevant" (Amended complaint, par. 11). When plaintiff attempted to set up a final inspection with Mr. Kuless, he was told that Mr. Collins was the new building inspector. According to plaintiff, Mr. Collins never returned plaintiff's phone calls, nor phone calls made on his behalf. Finally, plaintiff was advised by Mr. Acierno, an expediter from the Town of North Hempstead, that "Mr. Collins will only work with John Amisano and no one else" (Plaintiff's affidavit, p. 4).

A final inspection was scheduled for February 11, 2002. When plaintiff advised Mr. Collins that he would like to replace Mr. Amisano with his regular architect, John Barbieri, he was told that Mr. Amisano's filed plans could not be used by a new architect (Plaintiff's affidavit, p.5).

On February 11, 2002, Mr. Collins and his assistant, Mr. Post, were present. According to plaintiff, Mr. Amisano conducted the inspection, and thereafter advised plaintiff that he would do an "as built" set of plans reflecting the changes in the construction that had taken place. That "as built" set of plans was dated February 12, 2002.

By letter dated March 6, 2002, plaintiff advised the Building Department that the house was sold and the buyers were ready to move in. When he received no response, plaintiff hired an attorney in his effort to obtain the certificate of occupancy. By letter dated March 19, 2002, Mr. Collins advised Mr. Amisano that the changes made by plaintiff required further certifications, inspections, and "as built" calculations and survey.

Plaintiff alleges that as he complied with the additional requirements, Mr. Collins requested additional engineer certifications, and inspections. In addition plaintiff alleges that he was forced to apply for a variance for area coverage that included the driveway, even though the change from asphalt to gravel should have eliminated the need for a variance. The variance was granted on May 9, 2002 (Exhibit Y to Defendants' Exhibits).

Finally, in July, 2002, plaintiff alleges that Mr. Amisano refused to submit new " final as built" plans, a prerequisite to the certificate of occupancy, unless he was paid for his work. Although Mr. Amisano's bill for his services was $16,500.95, he ultimately reduced his fee to $12,000. Plaintiff's nephew paid the bill, and a partial certificate of occupancy was issued on August 6, 2002. According to plaintiff, there is no difference between the "as built" plans and the "final as built" plans, except the addition of a few notations for information already submitted to the Building Department regarding the Engineer's certification and drawings.

The partial certificate of occupancy did not include the garage, because Mr. Collins claimed that no certificate of occupancy existed for the garage (Exhibit 23 to Zarabi affirmation). Plaintiff alleges that this was Mr. Collins' final act of harassment. Ultimately, by letter dated September 23, 2002, plaintiff sent the mayor of the Village a copy of the certificate of occupancy for the garage (also part of Exhibit 23).

Summary judgment is the procedural equivalent of a trial [*S.J.Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 (1974)]. The function of the Court in deciding a motion for summary judgment is to determine if triable issues of fact exist [*Matter of Suffolk County Dept. of Social Services on behalf of Michael V. v James M.*, 83 NY2d 178, 182 (1994)]. The proponent must make a *prima facie* showing of entitlement to judgment as a matter of law [*Giuffrida v Citibank Corp.*, 100 NY2d 72, 82 (2003); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986)]. Once a *prima facie* case has been made, the party opposing the motion must come

forward with proof in evidentiary form establishing the existence of triable issues of fact or an acceptable excuse for its failure to do so [*Zuckerman v City of New York*, 49 NY2d 557, 562 (1980)]. Summary judgment will not be defeated by mere conclusions or unsubstantiated allegations [*Zuckerman*].

While courts generally allow *pro se* litigants some leeway in the presentation of their case, they must nevertheless comply with Court procedures [*Stoves & Stones, Ltd. v Rubens*, 237 AD2d 280 (2nd Dept. 1997)]. *Pro se* litigants acquire no greater rights than those of any other litigant and cannot use such status to deprive a defendant of the same rights as other defendants [*Correnti v Suffolk County District Attorney's Office*, 34 AD3d 578 (2nd Dept. 2006); *Goldmark v Keystone & Grading Corp.*, 226 AD2d 143 (1st Dept. 1996)].

The sole claim against defendant Amisano in the amended complaint is found in the second cause of action. Plaintiff alleges that defendant Amisano engaged in a conspiracy with defendant Collins to interfere with plaintiff's contractual relationship with the Village and Collins, and with plaintiff's contractual rights with a third-party purchaser.

There is no cause of action for civil conspiracy; instead, the claim stands or falls with the underlying tort [*Hebrew Institute for Deaf and Exceptional Children v Kahana*, 57 AD3d 734 (2nd Dept. 2008); *Salvatore v Kumar*, 45 AD3d 560 (2nd Dept. 2007), lv app den 10 NY2d 703(2008)]. Here the underlying tort alleged against defendant Amisano in the second cause of action appears to be tortious interference with contract. One of the elements of tortious interference with a contractual relationship is the existence of a valid contract [*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 (1996); *Pink v Half-Moon Co-op. Apartments*, 68 AD3d 739 (2nd Dept. 2009)], with which the defendant interfered.

Here, plaintiff had no contractual relationship with the Village and Collins. The decision to grant a certificate of occupancy is a discretionary act [*Celani v Marconi*, 256 AD2d 1064 (4th Dept. 1998), lv app den 93 NY2d 805 (1999)], for which both the building inspector and the municipality are immune from liability [*Rottkamp v Young*, 21 AD2d 373 (2nd Dept. 1964), affd 15 NY2d 831 (1965)]. The plaintiff did have a contract with the third-party purchasers, the Masones, but the closing took place on August 16, 2002, and the property sold for the contract price. In short, no breach of the Masone contract has been shown.

Plaintiff argues that he was forced to borrow money at a high interest rate, and further forced to relinquish charges for extras in the sum of $50,000. However plaintiff has failed to provide proof of either of these two claims. There is no evidence of the cost of other loans, and no contractual basis for additional charges of $50,000. Under these circumstances, plaintiff has no claim for tortious interference by defendant Amisano with any contract.

For the record, in his opposition papers to defendants' motions plaintiff alleges that defendant Amisano's plans for the house were deficient, and that plaintiff's pleading should have included claims against Amisano for breach of contract, negligence, and malpractice. This is truly the heart of the matter, but the limitations period for all of these claims has long passed. Based on the foregoing, defendant Amisano's motion for summary judgment dismissing the complaint against him must be granted.

Turning now to the motion by defendant Collins and the Village for summary judgment, the first cause of action alleges violations of plaintiff's civil rights, discrimination against him based on his race and religion, and the failure to afford plaintiff the equal protection under the laws of the State of New York. In this cause of action plaintiff alleges that defendant Collins

referred to plaintiff as "too pushy" and "Jewish," stated that "you Iranian Jews are not going to be able to push me around," that plaintiff was a "crummy contractor," and that he would insure that "plaintiff would never work again in the Village."In his opposition papers plaintiff challenges defendant Collins with acting improperly "under color of state law."

At this juncture, the Court notes that all of plaintiff's federal claims were withdrawn, and therefore plaintiff's citation of 42 USC 1983 is not relevant. What remains are plaintiff's claims for violation of state law only, and the Court further notes that the state constitutional equal protection clause offers the same protection as the federal constitutional equal protection clause [*Dorsey v Stuyvesant Town Corp.*, 299 NY 512, 531 (1949), cert. den. 339 US 981 (1950); see generally *Golden v Clark*, 76 NY2d 618, 624 (1990)].

A violation of equal protection arises where a person, compared with others similarly situated, is selectively treated, and such treatment is based on impermissible considerations such as race or religion [*Bower Associates v Town of Pleasant Valley*, 2 NY3d 617, 631 (2004)]. Similarly situated, generally means, "roughly equivalent" (*Id.*)

Defendant Collins denies that he took any action with respect to plaintiff's project based on race, religion or national origin (Collins affidavit, par. 9). The only builder identified by plaintiff as similarly situated is Robert Preston. Defendants establish that Preston's project was dissimilar in that it had been subjected to a full SEQRA review, several public hearings, and rigorous review by the Planning Board. Inspector Collins further testifies that the Preston project did not involve substantial deviations without Village approval. On this record defendants have presented a *prima facie* case that they did not violate the equal protection clause of the state constitution in their treatment of the Preston project as compared to plaintiff's project.

In opposition, plaintiff submits only partly legible inspection records of the two Preston houses, and argues that the certificates of occupancy for these houses were issued either on the same day or about a week after the first final inspection, without the need for any "as built" plans or numerous final inspections. In addition plaintiff claims that Preston was allowed to have an improper parking area in the front of one of the houses because Collins favorably characterized it as " an active driveway."

This evidence does not rise to the level of raising a triable issue of fact because it does not establish that the Preston projects were similar or "roughly equivalent" to plaintiff's. Without evidence of similarity or equivalence, the Court is compelled to grant the request of the defendant Collins and the Village for summary judgment dismissing all state equal protection claims by plaintiff against them.

To the extent that the first cause of action in the amended complaint purports to allege claim against defendants Collins and the Village for breach of contract (amended complaint, par. 55-56), it must be dismissed as a matter of law. As noted above, plaintiff had no contract with the defendant Village or Collins, because the decision to grant a certificate of occupancy is a discretionary act [*Celani v Marconi*], not part of a contractual bargain.

To the extent that the first cause of action in the amended complaint purports to allege a claim against defendants Collins and the Village for interference with the contractual rights of plaintiff with the Masones (amended complaint, par. 59), such a claim must also be dismissed as a matter of law. Plaintiff has failed to submit evidence of any breach of the Masone contract, including the breach of any contractual agreement for the payment of an additional $50,000 for

"extras."

To the extent that the first cause of action purports to allege a claim against defendant Collins for defamation based on the allegations that he was a "crummy contractor" or a "poor contractor" (amended complaint, par. 49, 50), such claims are fatally deficient for failure to identify the persons to whom the words were uttered, as well as the time, place, and manner of the statements [*Lesesne v Lesesne*, 292 AD2d 507 (2nd Dept. 2002); *Sirianni v Rafaloff*, 284 AD2d 447 (2nd Dept. 2001)]. Although defendant Collins admits that he had a telephone conversation with plaintiff's friend Mr. Goykadosh, wherein Collins referred to plaintiff's work as "crap" (Collins transcript annexed as Exhibit O, at p. 74-77), such a statement is plainly a crude but nonactionable statement of opinion [see *Colantonio v Mercy Medical Center*, __ AD3d __, 2010 WL 2000446 (2nd Dept. 2010); *Wahrendorf v City of Oswego,* 72 AD3d 1604 (4th Dept. 2010); *Galasso v Saltzman*, 42 AD3d 310 (1st Dept. 2007); ; *Lacher v Engel*, 33 AD3d 10, 16 (1st Dept. 2006); Leone *v Rosenwach*, 245 AD2d 343 (2nd Dept. 1997)].

Overall, it appears to this Court that in the first cause of action plaintiff seeks from defendant Collins and the Village damages sustained due to the alleged unreasonable delay in issuing a Certificate of Occupancy. Viewing such a claim in the light most favorable to plaintiff, the claim cannot be sustained. The building inspector and a municipality are immune from claims arising out of the issuance of a certificate of occupancy [*Newhook v Hallock*, 215 AD2d 804, 805 (3rd Dept. 1995); *City of New York v 17 Vista Associates,* 84 NY2d 299, 307 (1994); see *Rottkamp v Young*].

Moving on to the second cause of action, as noted above, there is no cause of action for civil conspiracy [*Hebrew Institute for Deaf and Exceptional Children v Kahana*; *Salvatore v Kumar*]; nor does New York recognize a cause of action to recover damages for harassment [*Ralin v City of New York*, 44 AD3d 838 (2nd Dept. 2007), lv app den 10 NY3d 784 (2008)]. To the extent that the second cause of action purports to allege a claim for tortious interference with plaintiff's contract with the Masones and/or the Village (amended complaint, par. 65), the unavailability of such claims here has already been addressed.

To the extent that the second cause of action purports to allege a claim against the Village and Inspector Collins for tortious interference with plaintiff's contract with "defendant Amisano and third-party engineers" (amended complaint, par. 70), the element of a breach of contract is missing. Plaintiff has not alleged a breach of contract claim against Amisano, nor any breached contracts with any engineers.

To the extent that the second cause of action purports to allege a claim against the Village for negligent hiring and supervision of defendant Collins, the claim involves discretionary judgment by the Village which would be cloaked by immunity [*Mon v City of New York*, 78 NY2d 309 (1991)]. While a narrow exception to governmental immunity does exist, plaintiff has not shown the requisite special relationship needed to meet the exception [*Pelaez v Seide*, 2 NY3d 186, 199 (2004); *Lauer v City of New York*, 95 NY2d 95, 102 (2000)].

The third cause of action in the amended complaint fails to state any recognizable claim against defendant Collins and the Village. Defendants are entitled to summary judgment dismissing this claim.

Finally, New York does not recognize an independent cause of action for punitive damages. As all of plaintiff's actual and purported causes of action have been dismissed, plaintiff is unable to assert an underlying cause of action upon which a claim for punitive

damages may be grounded [*Rocanova v Equitable Life Assur. Soc. of US.*, 83 NY2d 603, 616(1994); *Tartaro v Allstate Indemnity Co.*, 56 AD3d 758 (2nd Dept. 2008)], plaintiff's requests for punitive damages must also be dismissed.

As all of the underlying causes of action have been dismissed, the cross-claims of the defendants against each other must also be dismissed.

Dated: JUN 3 2010

J.S.C.

ENTERED

JUN 07 2010

NASSAU COUNTY

COUNTY CLERK'S OFFICE