

<b>Mione v City of New York Dept. of Homeless Servs.</b>
2010 NY Slip Op 32460(U)
September 1, 2010
Supreme Court, New York County
Docket Number: 116366/08
Judge: Karen Smith
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KAREN SMITH  
*Justice*

PART 2

Index Number : 116366/2008  
**MIONE, PETER**  
vs.  
**CITY OF NEW YORK**  
SEQUENCE NUMBER : 004  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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

**FILED**  
PAPERS NUMBERED  
SEP 09 2010  
NEW YORK  
COUNTY CLERKS OFFICE

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

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

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

Cross-Motion:  Yes  No

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

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

Dated: 9/2/10

K.S.S.  
**HON. KAREN SMITH** J.S.C.

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

-----X  
PETER MIONE and BROOKLYN SITE 3 CORP.,

Plaintiff,  
-against-

Index №.: 116366/08  
Motion seq.: 04  
Motion date:

**DECISION AND ORDER**

CITY OF NEW YORK DEPARTMENT OF HOMELESS  
SERVICES, ROGER NEWMAN, CALVIN PITTER,  
TREVOR JARDINE, CINDY TETA, JULIA MOTEN,  
BUSHWICK ECONOMIC DEVELOPMENT  
CORPORATION (BEDCO), FRANK BOSWELL, GARY  
DOVE, 884 BROADWAY REALTY LLC  
Defendants.

-----X

**FILED**  
SEP 09 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

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

Defendants City of New York Department of Homeless Services ("DHS") and the individual DHS co-defendants' motion to dismiss pursuant to CPLR §§ 3211(a)(5) and 3211(a)(7), is hereby granted, in part, and denied, in part, as explained more fully below.

This case arises from plaintiff Brooklyn Site 3 Corp.'s ("BS3") participation in defendant DHS's Neighborhood Based Transitional Residence Program ("the Program"). Plaintiff Peter Mione is the president and sole shareholder of BS3, whose participation in the DHS program was governed by a contract signed on June 24, 2004. Under the contract, BS3 was obligated to furnish 27 units of transitional housing for homeless families. Pursuant to the contract, BS3 was to provide housing and social services to DHS clients.

Plaintiffs allege that DHS, through its employees, defendants, Roger Newman, Calvin Pitter, Trevor Jardine, Cindy Teta, and Julia Moten, engaged in a conspiracy with defendants Bushwick Economic Development Corporation ("Bedco"), and its president Frank Boswell, as well as defendants 884 Broadway Realty LLC, and its principal Gary Dove. Plaintiffs allege that this conspiracy included kickback payments by Boswell to DHS defendants, and that the defendants worked together to extort money from plaintiffs, and deprive him of the benefit of

his contract with DHS. Plaintiffs also allege the defendants collectively acted to have an unspecified person make a threat, *via* cell phone, against the life of Peter Mione.

Plaintiffs' allegations begin a year and one-half before the contract between BS3 and DHS was signed in June 2004; at that time, plaintiffs allege that defendant Gary Dove, a business associate of Mione, suggested that plaintiffs submit a proposal to participate in the Program. Following Dove's advice, plaintiffs allege, they submitted a proposal to DHS, but it was rejected. Subsequent to the rejection, plaintiffs allege, City defendant Calvin Pitter advised plaintiffs that their proposal needed bolstering, and suggested that they contact co-defendants Bedco and Frank Boswell, as a potential provider of social services.

Plaintiffs' second proposal, which included Bedco as the prospective provider of social services, was accepted by DHS and the contract was entered into in June 2004. Almost two years later, DHS terminated the contract by letter dated March 9, 2006.

The complaint sets forth twenty-one causes of action, fifteen of which are directed at the City defendants. Plaintiffs' first cause of action alleges breach of contract by DHS. Plaintiffs Second, Third, Sixth, Seventh and Eighth causes of action claim that the individual DHS defendants, Calvin Pitter, Trevor Jardine, Roger Newman, Cindy Teta and Julia Moten, tortiously interfered with the contract. The twelfth cause of action alleges that all defendants operated a criminal enterprise within the meaning of 18 USC § 1962, the Racketeer Influenced and Corrupt Organization Act ("RICO"). The thirteenth cause of action alleges that all defendants engaged in a conspiracy to conduct racketeering activity in violation of RICO.

Plaintiffs' fifteenth cause of action alleges that DHS has engaged in deceptive trade practices in violation of General Business Law § 349. Cause of action sixteen alleges that Mione, the president and sole shareholder of BS3, is entitled to damages as a third-party beneficiary of the contract. Plaintiffs allege, in causes of action seventeen, eighteen, nineteen, twenty, and twenty-one that each of the individual City defendants committed fraud and misrepresentation.

On a motion to dismiss pursuant to CPLR § 3211(a)(7), the pleading is to be afforded a liberal construction, and courts are to "accept the facts as alleged in the complaint as true, accord plaintiffs every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v. Martinez*, 84 NY2d 83, 87 [1994]).

### **The Breach of Contract Claim**

Plaintiffs first cause of action for breach of contract based is brought only against DHS. Plaintiffs claim that DHS's termination of the contract constituted a violation of the implied covenant of good faith and fair dealing.

New York recognizes that "[i]n every contract there exists an implied covenant of good faith and fair dealing" (*Kirke v. LaShelle Co. v. Armstrong Co.*, 263 NY 79 [1933]). However, the implied covenant of good faith and fair dealing "will be enforced only to the extent it is consistent with the provisions of the contract" (*Phoenix Capital Invs. LLC v. Ellington Mgt. Group, L.L.C.*, 51 A.D.3d 549 [1st Dept 2008]).

DHS argues that it is entitled to dismissal because Article 6 of the contract provides that DHS could terminate the contract without cause, and there is no cause of action for breach of a contract that may be terminated without cause. Plaintiffs respond that the present case is different from the ones DHS relies upon because in those cases the right to terminate without cause was granted to both parties and in the subject contract only DHS had the right to terminate without cause.

Plaintiffs do not have a viable breach of contract claim against DHS since DHS had a right to terminate the contract at will. To find that DHS's termination constituted a breach would be inconsistent with the termination provision in the contract. The fact that BS3 did not have a reciprocal right to terminate is a distinction without a difference, as DHS is the party that terminated the contract; as such, it is DHS's right to terminate which is relevant to our inquiry. As a result, plaintiffs first cause of action, for breach of contract, must be dismissed.

### **The Tortious Interference Claims**

The second, third, sixth, seventh, and eighth causes of action allege that the individual DHS defendants tortiously interfered with the contract between BS3 and DHS.

There are four elements of the tort of intentional interference with contractual relations: "(1) the existence of a contract, enforceable by the plaintiff, (2) the defendant's knowledge of the

existence of that contract, (3) the intentional procurement by the defendant of the breach of the contract, and (4) resultant damages to the plaintiff" (*Joan Hansen & Co. v. Everlast World's Boxing Headquarters Corp.*, 296 A.D.2d 103, 111 [1st Dept 2002]). A cause of action for tortious interference is properly dismissed where "defendant induced no breach of the underlying contract" (*Fox News Network, L.L.C. v. N.S. Bienstock, Inc.*, 304 A.D.2d 498 [1st Dept 2003]).

DHS argues that the tortious interference causes of action must be dismissed as waived. In support, DHS submits Part II, Article 7.4 of the contract, which provides that "[n]o claim whatsoever shall be made by the Contractor against any officers, agent or employee of the City for, or on account of, anything done or omitted in connection with this agreement." DHS argues that interference with contract plainly pertains to action undertaken "in connection with this Agreement." Finally, DHS argues that it is not aware of any policy precluding enforcement of such a waiver clause. Plaintiffs do not respond to DHS's argument that plaintiffs contractually waived any tortious interference claims.

Here, the elements of tortious interference with contractual relations require that such a claim involve a breach of contract. Since DHS did not breach its contract with BS3, plaintiffs' second, third, sixth, seventh, and eighth causes of action must be dismissed.

### **The RICO Claims**

Plaintiffs' twelfth cause of action alleges that "DHS through its personnel and associates including but not limited to Roger Newman, Cindy Teta, Trevor Jardine, Julia Moten, Calvin Pitter, Frank Boswell, Bedco, Calvin Pitter and Gary Dove were engaged in a pattern of racketeering pursuant to 18 USC § 1962." Plaintiffs' thirteenth cause of action alleges that these defendants were engaged in a conspiracy to commit racketeering activity in violation 18 USC § 1962.

In order to establish a substantive 18 USC § 1962(c) RICO violation, a plaintiff must show "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity" (*DLJ Mortg. Capital, Inc. v. Kontogiannis*, 594 F. Supp. 2d 308, 325 [EDNY 2009]). These requirements "must be established as to each individual defendant" (*De Falco v. Bernas*, 244

F.3d 286, 306 [2d Cir. 2001]). Generally, "RICO is to be read broadly" (*Russello v. United States*, 464 U.S. 16, 21 [1983] [noting "the pattern of the RICO statute in utilizing terms and concepts of breadth"]).

A RICO enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity" (18 USC § 1961[4]). The Supreme Court has defined an association-in-fact for the purposes of RICO's enterprise requirement as "a group of persons associated together for a common purpose of engaging in a course of conduct" (*United States v. Turkette*, 452 U.S. 576, 583 [1981]). The Court has held that such an association-in-fact enterprise must have a structure. (*Boyle v. United States*, 129 S. Ct. 2237, 2244 [2009]). This structure must have three parts: "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose" (*Id.*). The Court, however, has held that the structure need not be formal:

an association-in-fact enterprise is simply a continuing unit that functions with a common purpose. Such a group need not have a hierarchical structure or a "chain of command"; decisions may be made on an ad hoc basis and by any number of methods -- by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; different members may perform different roles at different times. The group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies. While the group must function as a continuing unit and remain in existence long enough to pursue a course conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence. Nor is the statute limited to groups whose crimes are sophisticated, diverse, complex, or unique; for example, a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute's reach (*Id.* at 2245-46).

A pattern of racketeering "requires at least two acts of racketeering activity . . . the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity" (18 USC § 1961[5]). To constitute a pattern, these acts must be "related, and either amount to or pose a threat of continuing criminal activity" (*Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 183 [2d Cir. 2008]). Continuity of criminal activity may be established "either by

showing a 'closed-ended' pattern -- a series of related predicate acts extending over a substantial period of time -- or by demonstrating an 'open-ended' pattern of racketeering activity that poses a threat of continuing criminal conduct beyond the period during which the predicate acts were performed" (*Id.*). With respect to the closed-ended patterns, the *Spool* court noted that it did not view "two years as a bright-line requirement, it will be rare that conduct persisting for a shorter period of time establishes closed-ended continuity..." (*Id.* at 184).

Racketeering activity is defined to include a number of specific state and federal offenses (18 USC § 1961[1]). Courts in the Second Circuit have held that "a municipality cannot form the requisite intent to establish a predicate act" (*Frooks v. Town of Cortlandt*, 997 F Supp 438 [SDNY 1998]).

Additionally, a civil RICO plaintiff "only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." (*Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 1985]). This injury must be proximately caused by the predicate acts of the RICO violation (See *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 120 [2d Cir. 2003]).

DHS argues that municipal entities such as DHS cannot be held liable under RICO because such entities are incapable of the criminal intent necessary to support the alleged predicate offenses. DHS also argues that RICO claims are subject to the precise pleading requirements, and that plaintiffs claims do not meet the four requirements of a civil RICO claim.

As to conduct, the City argues that none of the individual City defendants are alleged to have played any particular role in the conduct of the alleged racketeering activity. As to the enterprise requirement, DHS argues that plaintiffs' allegation of an association-in-fact is devoid of description as to any organization apart from the alleged pattern of activity. As to the pattern requirement, DHS argues that the only alleged victims are the plaintiffs, and since the allegations are contract-related and the contract was terminated almost three years ago, there does not appear to be any threat of future criminal conduct. Finally, as to racketeering activity, DHS argues that plaintiffs' claim that an unspecified person threatened the life of Peter Mione is the sole allegation of a racketeering activity.

Plaintiffs argue that RICO is to be read broadly and that they have set forth a host of

criminal actions by DHS employees and contractors including the threat of death, extortion, bribery and illegal kickbacks. Plaintiffs argue that municipal entities can be part of an associated-in-fact enterprise that is liable under RICO. Plaintiffs also argue that the requirement of two predicate acts of racketeering activities applies to other RICO claims, but not to RICO conspiracy claims.

Here, plaintiffs allege a threat of murder, extortion, and bribery, all of which constitute acts of racketeering under 18 USC § 1961[1]. While these allegations satisfy the racketeering activity element as against the individual DHS employees, DHS itself lacks the intent required to commit any of these acts, and thus plaintiffs' RICO claims as against DHS must be dismissed. Plaintiffs have standing since they allege that these violations caused injury to their business.

For the purposes of stating a claim, plaintiffs satisfy the enterprise element by alleging that the individual DHS defendants, in collusion with Gary Dove and Frank Boswell, constituted an association-in-fact enterprise. While this group may have lacked structure to be liable under older § 1962(c) RICO analysis, the Supreme Court loosened this requirement in *Boyle*, which specifically allowed that "a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute's reach" (129 S. Ct. 2237 at 2246). Plaintiffs, among other things, allege extortion through old-fashioned means, backed up by a death threat allegedly made at the collective behest of the defendants, including the DHS individual defendants, Roger Newman, Cindy Teta, Trevor Jardine, Julia Moten, Calvin Pitter.

Plaintiffs satisfy the pattern element as defendants' conduct may qualify as a closed-ended pattern since there is more than one act alleged, *e.g.*, the death threat and the kickback payments, and the conduct spans a period allegedly longer than two years. As a result, the portion of DHS's motion which seeks to dismiss plaintiffs RICO claims against the individual DHS employees is denied.

### **The Claim That DHS Violated General Business Law**

In their fifteenth cause of action, plaintiffs claim that DHS violated General Business Law § 349, which prohibits "deceptive acts or practices in the conduct of any business, trade or

commerce or in the furnishing of any service” (General Business Law § 349[a]). The statute provides a right of action to “any person who has been injured by reason of any violation of this section” (General Business Law § 349 [h]).

In order to make out a *prima facie* claim under section 349, plaintiffs must allege 1) “conduct of the defendant that is consumer-oriented” and 2) “that defendant is engaging in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof” (*Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25 [1995]).

With regard to the “consumer-oriented” requirement of the first element, plaintiffs “must demonstrate that the acts or practices have a broader impact on consumers at large” (*Id.*). Courts have held that “[p]rivate transactions not of a recurring nature or without ramifications for the public at large” do not fall under the purview of section 349 (*Genesco Entertainment, Div. of Lymutt Industries, Inc. v. Koch*, 593 F. Supp. 743, 752 [SDNY 1984]; see also *New York Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308 [1995] [holding that a private contract dispute which does not effect the consuming public at large is not actionable under section 349]).

DHS argues that parties who make claims under the statute must allege conduct that is “consumer oriented,” *i.e.*, conduct that has a broad impact on consumers at large, as opposed to an essentially private contract dispute that is unique to the parties involved. Plaintiffs do not address this argument in their response.

Plaintiffs do not claim that DHS’s alleged conduct had a broad impact on the consumer public. As a result, plaintiffs’ fifteenth cause of action, which alleges that DHS violated General Business Law § 349, must be dismissed.

### **The Third Party Beneficiary Claim**

Plaintiffs sixteenth cause of action alleges that Peter Mione is entitled to recovery as a third party beneficiary of the contract between DHS and BS3.

“A third party may sue as a beneficiary on a contract made for his benefit” (*Flemington Nat'l Bank & Trust Co. v. Domler Leasing Corp.*, 65 AD2d 29, 33 [1st Dept 1978]). However,

“an intent to benefit the third party must be shown, and, absent such intent, the third party is merely an incidental the third party is merely an incidental beneficiary with no right to enforce the particular contracts” (*Id.*).

DHS argues that Mione lacks standing to bring this claim. DHS also argues that there is no basis in the contract to conclude that the contract was anything more than an ordinary bilateral agreement between DHS and BS3.

Plaintiffs argue that the contract was entered into to benefit Mione and that the failure of defendants to honor this contract coupled with Mione’s reliance has left Mione in ruin and justice requires that plaintiff be given a remedy.

Here, plaintiffs have made no showing that Peter Mione was an intended third party beneficiary of the contact between DHS and BS3. Mione is thus merely an incidental beneficiary of the contract with no right to enforce. Thus, plaintiffs’ sixteenth cause must be dismissed.

### **The Fraudulent Misrepresentation Claims**

The seventeenth, eighteenth, nineteenth, twentieth and twenty-first causes of action each allege that defendants Pitter, Newman, Jardine, Moten, and Teta “committed the tort of fraud/misrepresentation” without specifically identifying a fraudulent misrepresentation.

To state a legally cognizable claim of fraudulent misrepresentation, “the complaint must allege that the defendant made a material misrepresentation of fact; that the misrepresentation was made intentionally in order to defraud or mislead the plaintiff; that the plaintiff reasonably relied on the misrepresentation; and that the plaintiff suffered damage as a result of its reliance on the defendant’s misrepresentations” (*P. T. Bank Cent. Asia v. ABN AMRO Bank N.V.*, 301 A.D.2d 373, 376 [1st Dept 2003]; *see also Berger v. Roosevelt Inv. Group Inc.*, 28 A.D.3d 345, 346 [1stDept 2006]). It is well settled that “a cause of action for fraud does not arise where the only fraud alleged merely relates to a party’s alleged intent to breach a contractual obligation” (*767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75, 76 [2004]).

CPLR 3016(b) provides that where a cause of action is based on fraud, “the circumstances constituting the wrong shall be stated in detail.” The Court of Appeals has limited CPLR § 3016(b) to require “only that the misconduct complained of be set forth in sufficient

detail to clearly inform a defendant with respect to the incidents complained of and is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud” (*Lanzi v. Brooks*, 43 NY2d 778 [1977]). Additionally, courts may waive CPLR 3016(b) if “details of the alleged fraud were peculiarly within the knowledge of the defendants” (*Bernstein v. Kelso & Co.*, 231 A.D.2d 314 [1st Dept 1997]).

DHS argues that plaintiffs fail to plead fraud and misrepresentation with the heightened particularity required by CPLR 3016(b); specifically, DHS argues that plaintiffs do not connect any factual allegations to their fraud and misrepresentation claims.

DHS also argues that no independent duty outside of the contract is alleged as the basis of the fraud and misrepresentation claims, and thus these claims must be denied, as a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract has been violated.

Plaintiffs argue in opposition that defendants read CPLR § 3016(b) too strictly and that the incidents complained of are pled in sufficient detail since many of the facts constituting the fraud are in the sole possession of defendants.

Here, plaintiffs never specifically connect any factual allegations to the elements of fraudulent misrepresentation. In the factual allegations section of the complaint, plaintiffs claim that “Pitter, Jardine and the named DHS personnel promised a one or two month lapse of time between acceptance of the RFP and approval.” Plaintiffs never specify who made the misrepresentation, when, or where it was made; nor do they explain how they relied on the alleged misrepresentation. All of this information should be within plaintiffs’ possession. As such, plaintiffs have not complied with the heightened pleading requirement of CPLR § 3016(b) and the seventeenth, eighteenth, nineteenth, twentieth and twenty-first causes of action must be dismissed.

Accordingly, it is

ORDERED that the portion of defendants’ motion to dismiss which seeks to dismiss plaintiffs’ claim for breach of contract is granted and the first cause of action is dismissed; it is further

ORDERED that the portion of defendants' motion which seeks dismissal of plaintiffs' claims for tortious interference is granted and the second, third, sixth, seventh, and eighth causes of action of the complaint are dismissed; it is further

ORDERED that the portion of defendant's motion which seeks dismissal of plaintiffs' claims under the Racketeer Influenced and Corrupt Organizations Act, is granted as against the City of New York Department of Homeless Services and the twelfth and thirteenth causes of the complaint are dismissed as against the City of New York Department of Homeless Services; it is further

ORDERED that the portion of defendants' motion which seeks dismissal of plaintiffs' claims under the Racketeer Influenced and Corrupt Organizations Act, is denied as against individual DHS defendants Roger Newman, Calvin Pitter, Trevor Jardine, Cindy Teta, and Julia Moten; it is further

ORDERED that the portion of defendants' motion which seeks dismissal of plaintiffs' claim under General Business Law § 349 is granted and the fifteenth cause of action of the complaint is dismissed; it is further

ORDERED that the portion of defendants' motion which seeks dismissal plaintiff Peter Mione's claims as a third party beneficiary is granted and the sixteenth cause of action of the complaint is dismissed; it is further

ORDERED that the portion of defendants motion which seeks dismissal of plaintiffs' claims of fraudulent misrepresentation is granted and the seventeenth, eighteenth, nineteenth, and twenty-first causes of action of the complaint are dismissed; it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendant City of New York Department of Homeless Services; and it is further

ORDERED that the causes of action which have not been dismissed are hereby severed and continued.

Dated: 9/1/2010

ENTER:



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

**FILED**

SEP 09 2010

NEW YORK  
COUNTY CLERK'S OFFICE