Coalition of Landlords, Homeowners & Merchants v Alessi
2018 NY Slip Op 30594(U)
April 2, 2018
Supreme Court, Suffolk County
Docket Number: 08720/2016
Judge: William G. Ford
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SHORT FORM ORDER **INDEX NO.: 08720/2016**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motions Submit Date: 05/18/17
Motion Seq 001 MG; CASE DISP
Motion Seq 002 MG

THE COALITION OF LANDLORDS, HOMEOWNERS & MERCHANTS,

Plaintiff,

-against-

SALVATORE ALESSI, SOLOMON ELIMAN, DEBORAH L. COMBS, PETER M. RIVERA, MELISSA YOUNG & ROXANNE TEAL,

Defendants.

PLAINTIFF'S COUNSEL:
Judith N. Berger, Esq.
28 East Main Street
Babylon, New York 11702

DEFENDANTS' COUNSEL:
Eric T. Schneiderman,
New York Attorney General
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Hauppauge, New York 11788

The Court considered the following on the parties' motions:

1. Notice of Motion & Affirmation in Support of Motion to Dismiss dated January 25, 2017 and supporting papers;
2. Affirmation in Opposition dated April 14, 2017 and supporting papers;
3. Affirmation in Support of Cross-Motion to Compel dated May 3, 2017 and supporting papers;
4. Reply Affirmation in Further Support dated April 26, 2017;
5. Affirmation in Opposition to Cross-Motion dated May 8, 2017; it is

ORDERED that the parties' motions are resolved in accord with the following, and it is further

ORDERED that counsel for defendants' is hereby directed to serve a copy of this decision and order with notice of entry on counsel for plaintiff.

This matter centers around plaintiff's unemployment insurance policy dispute. Plaintiff the Coalition of Landlords, Homeowners & Merchants ("the Coalition") is a non-profit advocacy organization holding itself out as a check on government waste and abuse. Although not explicitly clear in any of the submissions before the Court, it appears that plaintiff's policy went into arrears for nonpayment of its premium. Thus, the New York State Department of Labor, and specifically, its Unemployment Insurance Unit contacted plaintiff concerning the delinquent account. It was the government's efforts and plaintiff's response that forms the basis of this

litigation.

Plaintiff commenced this action filing a Summons with Notice pursuant to CPLR 305 on September 9, 2016 against defendants, all individuals employed by the Unemployment Insurance Unit of the State Department of Labor. By that pleading, seeking redress pursuant to 42 U.S.C. §§ 1983 & 1985, plaintiff alleged causes of action of deprivation of its constitutional rights, specifically of due process of law, equal protection of the laws, fraud, conspiracy to violate its civil and constitutional rights, extortion, and intentional and negligent infliction of emotional distress. Plaintiff subsequently amended its Summons with Notice on September 23, 2016.

Plaintiff caused the pleadings to be served on defendants at their usual place of employment, the Unemployment Insurance Division in the State Department of Labor's Suffolk Regional Office located at the Perry J. Duryea State Office Building at 250 Veterans Memorial Highway, Hauppauge New York in Suffolk County. Specifically, by the Affidavits of Service plaintiff has attached to its motion papers dated October 19, 2016, filed with the Suffolk County Clerk on October 21, 2016, plaintiff claims it served defendants pursuant to CPLR 308 (1) and (2). Plaintiff's process server testifies that defendant Alessi was personally served in his own right, and that he accepted service as a person of suitable age and discretion on behalf of his co-workers and co-defendants on October 12, 2016. Follow up service by mail was made on October 14, 2016 at that same employment address for all defendants.

Plaintiff's papers further indicate that service of the amended Summons with Notice was attempted on defendants Combs, Teal, Rivera and Young, but was only successful as to Combs, having been personally served on December 12, 2016 in an Affidavit of Service filed with the County Clerk on December 23, 2016. Plaintiff further has provided affidavits of attempted service on defendants Teal, Rivera and Young indicating that service was refused on December 6, 2016.

Sometime prior, defendants by their counsel, the New York State Department of Law, appeared in the action to demand service of a Complaint pursuant to CPLR 3012 dated October 21, 2016. Based on plaintiff's amendment and service of Combs, defendant made a second demand for a complaint dated December 19, 2016.

Thereafter, counsel for the parties unsuccessfully negotiated on plaintiff's request for an extension of time to serve the complaint. Plaintiff's account is that defendants counsel refused to extend her a simple and routine courtesy of executing a stipulation enlarging her time to file. Contrasting that account is defense counsel's representation that plaintiff's stipulation was rife with errors and that plaintiff's counsel failed to communicate with her to address the errors. Be that as it may, defendants apparently never either explicitly granted or rejected consent to extend plaintiff's time. On this point, plaintiff's counsel submitted the affidavit of her legal secretary Erica Horn whose testimony corroborates this. Ultimately, plaintiff served defendants with a complaint postmarked January 13, 2017, and received on January 17, 2017.

Defendants have thus moved to dismiss this action. First, they argue that under CPLR 3012(b), plaintiff has failed to serve a timely complaint on demand. Failing that, defendants also dispute proper service of process as regards defendants Eliman, Rivera, Teal and Young on the grounds that defendant Alessi was not a proper person of suitable age and discretion to accept

service of process on behalf of State employees at their place of business.1 Lastly, defendants argue under CPLR 3211(a)(7) that as presently plead, plaintiffs fail to state a claim for relief.

On a motion to dismiss a pleading pursuant to CPLR 3211(a)(7), all of the allegations in it are deemed true and the plaintiff is afforded the benefit of every favorable inference" (***Kunik v New York City Dept. of Educ.***, 142 AD3d 616, 617, 37 NYS3d 22, 24 [2d Dept 2016]). Thus, for the court, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail." Further, the complaint must be liberally construed in the light most favorable to the non-movant/plaintiff, and all allegations must be accepted as true (***Cheslowitz v Bd. of Trustees of Knox School***, 156 AD3d 753, 757, 68 NYS3d 103, 107 [2d Dept 2017]). This is all with the added caveat however that, the courts are reminded that on a motion to dismiss the facts pleaded are presumed to be true and are to be accorded every favorable inference, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration" (***Intl. Fid. Ins. Co. v Quenzer Elec. Sys., Inc.***, 132 AD3d 811, 812, 18 NYS3d 645, 647 [2d Dept 2015]; *see also* ***Greene v Doral Conference Ctr. Assoc.***, 18 AD3d 429, 430, 795 NYS2d 252, 253 [2d Dept 2005][on a motion pursuant to CPLR 3211(a)(7), a court must accept the facts alleged in the complaint as true, but this does not apply to legal conclusions or factual claims which were either inherently incredible or flatly contradicted by documentary evidence]).

Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate (***Hallwood v Inc. Vil. of Old Westbury***, 130 AD3d 571, 571–72, 10 NYS3d 899, 900 [2d Dept 2015]).

I. Personal Jurisdiction & Proper Service of Process

Defendants seek dismissal arguing principally that plaintiff failed to properly serve them with the Summons with Notice and thus the Court lacks personal jurisdiction over them. More particularly, defendants argue that the defendants, all being State employees could not be served with process by CPLR 308(2) by person of suitable age and discretion, here their co-worker and co-defendant. Further, defendants argue that defendant Alessi was not "authorized" to accept service on behalf of his co-workers. Instead, defendants maintain that they should have been served pursuant to CPLR 307 which provides in pertinent part that:

> Personal service on a **state officer sued solely in an official capacity** or state agency, which shall be required to obtain personal jurisdiction over such an officer or agency, shall be made by (1) delivering the summons to such officer or to the chief executive officer of such agency or to a person designated by such chief

1 This point warrants additional mention. Here, defense counsel additionally argues that it is debatable whether the Suffolk County Hauppauge Unemployment Insurance office was indeed the actual place of business for all defendants since she claims at least one defendant has subsequently retired, and that at least one other works in Albany, New York. However, defendants have notably provided no affidavits to that effect or anything other than counsel's argument. Thus, this point appears premature and is not dispositive of these applications now.

> executive officer to receive service, or (2) by mailing the summons by certified mail, return receipt requested, to such officer or to the chief executive officer of such agency, and by personal service upon the state in the manner provided by subdivision one of this section ...

Civil Practice Law and Rules 307 [McKinney's 2018][emphasis supplied]

It is settled that plaintiff bears the ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process" (***Thacker v Malloy***, 148 AD3d 857, 857, 49 NYS3d 165, 166 [2d Dept 2017]). In satisfaction of its burden, plaintiff has submitted affidavits indicating that defendants were served with the original Summons with Notice at their place of work, service accepted by their co-worker, also a defendant to this action. While the CPLR is silent as to the number of copies of a summons and complaint that must be served on a person conceivably acting in more than one representative capacity, the guiding principle must be one of notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" (***Raschel v Rish***, 69 NY2d 694, 696 [1986], ***Ruffin v Lion Corp.***, 15 NY3d 578, 582 [2010]).

CPLR 308(2) permits personal service on a natural person 'by delivering the summons within the state to a person of suitable age and discretion at the actual place of business of the person to be served and, within 20 days thereafter, mailing a copy of the summons to the actual place of business in a specified manner." "A person's 'actual place of business' must be where the person is physically present with regularity, and that person must be shown to regularly transact business at that location" (***Rosario v NES Med. Services of New York, P.C.***, 105 AD3d 831, 833, 963 NYS2d 295, 297–98 [2d Dept 2013]). Our courts have also noted that under analogous circumstances authority is not a relevant criterion with respect to service on individuals under CPLR 308(2) (*see* ***City of New York v VJHC Dev. Corp.***, 125 AD3d 425, 425, 2 NYS3d 453, 454 [1st Dept 2015]).

The law clearly holds that a process server's affidavit of service constitutes prima facie evidence of proper service on a corporation pursuant to CPLR 311(a)(1) (*see* ***Indymac Fed. Bank FSB v. Quattrochi***, 99 AD3d 763, 764; ***C & H Import & Export, Inc. v. MNA Global, Inc.***, 79 AD3d 784; ***McIntyre v. Emanuel Church of God in Christ, Inc.***, 37 AD3d 562). "Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing, no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server affidavits" (*see* ***Countrywide Home Loans Servicing, LP v. Albert***, 78 AD3d 983, 984–985; ***Scarano v. Scarano***, 63 AD3d 716, 716; ***Rosario v. NES Med. Servs. of N.Y., P.C.***, 105 AD3d 831, 832 [2d Dept 2013]). Put another way, no evidentiary hearing is required upon defendant's bare and unsubstantiated assertion that she did not receive the complaint as same remains an insufficient basis to establish a reasonable excuse for default (***Stevens v Charles***, 102 AD3d 763, 764 [2d Dept 2013]).

Additionally, reliance on an attorney's affirmation, without submission of any sworn testimony by a competent witness with direct personal or firsthand knowledge of the facts and circumstances specifically refuting service of process, is insufficient to disturb the inference of proper service. On this point, the Second Department has repeatedly counseled attorneys that

reliance upon an attorney's affirmation, absent any other reliance on sworn testimony from witnesses with personal knowledge, is insufficient to raise a triable question of fact (***Huerta v Longo***, 63 AD3d 684, 685, 881 NYS2d 132, 133 [2d Dept 2009]; ***Collins v Laro Serv. Sys. of New York, Inc.***, 36 AD3d 746, 746–47, 829 NYS2d 168, 169 [2d Dept 2007][attorney's affirmation, together with inadmissible hearsay documents insufficient to warrant denial of the motion]; ***Cordova v Vinueza***, 20 AD3d 445, 446, 798 NYS2d 519, 521 [2d Dept 2005][attorney's affirmation offering speculation unsupported by any evidence insufficient to raise a triable issue of fact]).

The Court is not persuaded that defendants have made their case that the service on defendant Alessi as a person of suitable age and direction under CPLR 308(2) was ineffective or improper. Defense counsel seemingly argues that the State does not permit its employees to accept service on behalf of the State. Missing from the moving papers is any support for the proposition that individual state employees may not be served at their place of work during the workday. Nor does defense counsel explain why the State's employees cannot serve as persons of suitable age and discretion to accept service on behalf of co-workers or subordinates in their individual capacity. This latter part bears mention since only individuals appear in the caption for this action. Put differently, the State is not joined as a party here. Accordingly, no municipal defendant appears before this Court and no party is being sued in an official capacity. Therefore, CPLR 307 is inapposite. Also, defendants' argument that Alessi was not authorized to accept service is irrelevant, because authority has not factored into courts' analysis under CPLR 308 and the propriety of service.

As noted above, defendants obliquely referenced their doubt that service was proper in Hauppauge for all defendants, no proof is present as to which defendants no longer work for the State Labor Department, Unemployment Insurance Unit, or who is employed outside the jurisdiction of this Court. More important, defendant has not adduced any evidence suggestive of when those defendants separated from government service. Thus, defendants have not carried their burden to dispute that the location of service here was not defendants' actual place of employment for the purposes of this motion.

Moreover, defense counsel's affirmation, lacking direct, personal or firsthand knowledge of the facts and circumstances is insufficient to rebut the inference of proper service arising from plaintiff's affidavits of service. Thus, dismissal on the grounds of improper service is unwarranted. Nor is an evidentiary hearing appropriate based on defendants' submissions.

Thus, that branch of defendants' motion seeking an order dismissing the Summons with Notice for lack of personal jurisdiction premised on improper service of process is **denied.**

II. Motion to Compel Acceptance of an Untimely Complaint

CPLR 3012(b) provides that "[i]f the complaint is not served with the summons, the defendant may serve a written demand for complaint" "Service of the complaint shall be made within twenty days after service of the demand." "If no demand is made, the complaint shall be served within twenty days after service of the notice of appearance." "The court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision (***Ryan v High Rock Dev., LLC***, 124 AD3d 751, 751–52, 2 NYS3d 519, 520–21 [2d Dept 2015]). Where, as here, an action is commenced by the filing of a summons with notice, "[t]o avoid

dismissal for failure to timely serve the complaint after a demand had been made pursuant to CPLR 3012(b), and to be entitled to an extension of time to serve the complaint under CPLR 3012(d), plaintiff must demonstrate both a reasonable excuse for the delay and a potentially meritorious cause of action" (***Harris v City of New York***, 121 AD3d 852, 855, 995 NYS2d 578, 580–81 [2d Dept 2014]; ***J L Collier Corp. v Wells Fargo Bank, Nat. Ass'n***, 127 AD3d 1026, 1027, 5 NYS3d 884 [2d Dept 2015][holding that under CPLR 3012(b) if the complaint is not served with the summons, service of the complaint shall be made within 20 days after service of a demand for a complaint, to avoid dismissal, plaintiff must demonstrate a reasonable excuse for the delay]). The determination of what constitutes a reasonable excuse lies within the sound discretion of the Supreme Court" (***Park Lane N. Owners, Inc. v Gengo***, 151 AD3d 874, 876, 58 NYS3d 81, 83 [2d Dept 2017]).

Defendants alternatively seek to dismiss this case on the grounds that plaintiff failed to timely serve a complaint on demand within the meaning of CPLR 3012(b). In support of that application, defendants argue that they originally demanded that plaintiff serve a complaint on October 21, 2016, making the complaint due 20 days thereafter, or on or before November 10, 2016. Plaintiff in response notes that pursuant to CPLR 2103, the complaint was served by mail and thus plaintiff should benefit from 5 extra days' time, making the deadline November 15, 2016. For the purposes of this motion, assuming that to be true, it is clear that plaintiff's service of a complaint postmarked on January 13, 2017, and received by the defendants on January 17, 2017 was clearly untimely.

Defendants by their moving papers appear to have conceded proper service as regards defendant Combs. Perhaps due to this and plaintiff's amendment of the Summons with Notice in December 2016, defendants renewed their demand for a complaint on December 19, 2016, with a deadline of January 9, 2017. Under this timeline, it also clear that plaintiff's filed complaint is still untimely. Because of this, in addition to opposing defendants' motions to dismiss in their entirety, plaintiff has cross-moved pursuant to CPLR 3012(d) to compel defendants' acceptance of their untimely complaint in the interests of justice.

New York courts, in view of the public policy favoring the resolution of cases on their merits, may compel a party to accept service of untimely pleadings where the record demonstrates that there was only a short delay, that there was no willfulness on the part of the moving party, that there would be no prejudice to the non-moving party, and that a potentially meritorious cause of action exists (*see generally* ***Yongjie Xu v JJW Enterprises, Inc.***, 149 AD3d 1146, 1147, 53 NYS3d 660, 661 [2d Dept 2017][affirming order compelling acceptance of late answer construing CPLR 2004 & 3012[d]]).

A. Reasonable Excuse for the Delay

Arguing in support of its cross-motion, plaintiff argues reasonable excuse premised on assertions of bad faith on the part of defense counsel. Succinctly stated, plaintiff's counsel argues that defendants unreasonably delayed executing a stipulation extending their time to serve the complaint in response to defendants' demand, while at the same time, not explicitly rejecting their request for an adjournment. In support of their motion, plaintiff's counsel submits its legal assistant's affidavit sworn by Erica Horn which in sum and substances states that she faxed over a stipulation, and despite several follow up phone calls and conversations, it was never executed.

To their part, defendants by counsel's affirmation indicate that that the stipulation was rife with typographical errors which counsel sought to address by conversation with plaintiff's counsel to no avail. At any rate, this Court notes that plaintiff's complaint was untimely measuring by either demand, but only by a matter of days measure from defendants' second demand dated December 19, 2016. More importantly, the present record does not raise any impression of willfulness on plaintiff's part despite the apparent bad blood amongst the parties. Moreover, defendants have not articulated any substantial or unfair prejudice, having already appeared by counsel to vigorously contest the pleadings.

At first blush, this Court is skeptical that plaintiff's assertion of excuse presents as reasonable. Myriad courts have ruled that movants fail to provide a reasonable excuse for the delay in serving untimely pleadings with alleged reliance on settlement discussions, much less than the reliance on hardnosed tactics and uncivil litigation conduct (***Community Preserv. Corp. v Bridgewater Condominiums, LLC***, 89 AD3d 784, 785, 932 NYS2d 378, 379 [2d Dept 2011]). However, assuming but not deciding, that for the purposes of this application, that plaintiff's delay of mere days of timely serving its complaint was premised upon a mistaken belief that defense counsel would consent to its request for an extension of time and act accordingly by executing the proffered stipulation memorializing that agreement, this element of the analysis is far from outcome determinative as indicated below.

B. Meritorious Causes of Action

It is with respect to meritorious causes of action that gives this Court pause. Annexed to its cross-motion appears a copy of the untimely complaint. Therein, superseding the previously made claims in the Summons with Notice, plaintiff generally alleges that defendants under color of law and using the authority associated with their public employment and offices, breached plaintiff's unemployment insurance contract or otherwise tortuously interfered with it; that defendants Alessi and Eliman entered into an illegal conspiracy to violate plaintiff's constitutional and civil rights under 42 U.S.C. § 1985; that defendants committed invidious discrimination in violation of the equal protection of the laws under the 14th Amendment to the Constitution by selectively enforcing Labor Law and assessing unemployment insurance tax liability assessment and penalties against them without an adequate record or having received employment or financial records or documentation; that defendants abused civil process, that defendants engaged in fraud; that defendants committed *prima facie* tort, and otherwise violated Public Officers Law, Article 6.

The Court notes that having reviewed the parties' motion record, that this litigation ensued from a contentious history between the parties summarized as follows: Plaintiff's unemployment insurance policy fell into arrears prompting action by the State Department of Labor and defendants' Unemployment Insurance Unit. Defendants have emphasized that administrative subpoenas and letter requests for information were sent to plaintiff's accountant, William Wall & Company. By September 18, 2014, defendants took the position that plaintiff had not cooperated with its investigation and advised in writing that pursuant to Labor Law §§ 570.4, 571 & 575, it would impute assessments and penalties at the highest amount allowable by law. In response, by letter dated December 21, 2012, plaintiff's counsel advised defendants that its accountant no longer represented it and that counsel had taken over. Counsel further requested that it be forwarded a copy of all pertinent correspondence on the matter. This request was reiterated by letter from plaintiff's counsel to defendant Young dated October 22, 2014,

wherein counsel specifically advised that plaintiff had not received prior correspondence or requests for information. This in turn triggered defendants' response by letter dated October 31, 2014 directed to plaintiff's counsel requesting that she execute a power of attorney to allow for change of address and forwarding of the correspondence and records requested. This request was apparently renewed by letter dated November 7, 2014 as well.

Rather than comply with defendants' seemingly reasonable request however, plaintiff instead again wrote asking for defendants file on the matter in letters dated November 25, 2014 addressed directly to defendants Young and Eliman. Having no success in obtaining copies of the prior requests for information or documentation, plaintiff by counsel then made complaint in writing dated February 19, 2015 to the New York Governor's Office as well as the Commissioner for the State Department of Labor, both of which referred the matter back to defendants for consideration and response. Thus, defendants by letter dated March 9, 2015 acknowledged plaintiff's request for hearing. Subsequently, in letters dated June 6, 2016 and September 6, 2016 and, defendants reached out to plaintiff to schedule a pre-hearing conference with defendant Alessi. Again, instead of meeting defendants to discuss the matter, plaintiff instead wrote on July 14, 2016 and August 12, 2016, disputing defendants' authority to assess tax liability and penalties absent receipt of financial records. Further, plaintiff demanded that defendants provide it with a precise calculation or breakdown supporting their assessments in the matter. Having not received this information, plaintiff then sent a request for administrative appeal to defendants dated August 19, 2016. Thus, plaintiff's matter was noticed for hearing by letter dated December 30, 2016 for January 12, 2017. It is unclear whether that hearing was held as scheduled. Presently, plaintiff has been assessed liable to the State Department of Labor, Unemployment Insurance Unit in the amount of $ 14,522.76 in unpaid unemployment insurance liability with $7,261.38 in penalties. This amount was imputed to plaintiff pursuant to Labor Law § 571 on defendants' assertions that plaintiff failed to comply with its requests for production of documentation as part of its investigation.

Viewing the complaint, verified by plaintiff's president, in a light most favorable to plaintiff as the non-movant on defendants' motion to dismiss, it is clear that certain claims are conclusory in nature and or not credibly plead. While this Court takes the facts as represented as true, particularly when corroborated by the evidentiary submissions submitted by both parties, the legal conclusions do not warrant or otherwise are not entitled to the same treatment. Chiefly, this Court notes that none of the pleadings before it supports plaintiff's allegation of fraud against any of the defendants. New York law requires that parties plead fraud with specificity which plaintiff has not done here (*see* ***Cheslowitz v Bd. of Trustees of Knox School***, 156 AD3d 753, 756, 68 NYS3d 103, 107 [2d Dept 2017][under CPLR 3016(b), a fraud or misrepresentation claim must be pleaded with specificity, thus where plaintiff fails to comply dismissal of the claim under CPLR 3211(a)(7) is appropriate]). Thus, plaintiff's claim for fraud as against the defendants is accordingly **dismissed**.

As a threshold matter, for plaintiff to recover on its claims of constitutional tort under 42 U.S.C. § 1983, to state a claim under § 1983, a plaintiff must allege two elements: (1) "the violation of a right secured by the Constitution and laws of the United States," and (2)"the alleged deprivation was committed by a person acting under color of state law." (***Vega v Hempstead Union Free School Dist.***, 801 F3d 72, 87–88 [2d Cir 2015]).

This Court views askance at and finds serious doubt with plaintiff's claims of illegal or unconstitutional conspiracy against defendants Alessi and Eliman. To recover for an unconstitutional conspiracy arising under 42 U.S.C. § 1985, plaintiff must demonstrate (1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages. (***Scroxton v Town of Southold***, 08-CV-4491 (JS)(AKT), 2010 WL 1223010, at *7 [EDNY Mar. 24, 2010]; *quoting* ***Pangburn v. Culbertson***, 200 F3d 65, 72 [2d Cir.1999]).

Here, viewed in its best light, plaintiff alleges that some combination of Alessi and Eliman broached the possibility of plaintiff resolving its matter before the Labor Department with the payment of $20,000. Plaintiff claims this is evidence of an illegal attempt of extortion, by defendants to personally enrich themselves at plaintiff's expense. Defendants, for their part, deny that plaintiff could have fully satisfied its assessments or penalties at any amount less than the cited amount. Be that as it may, plaintiff's pleadings fall woefully short of what is required to state a plausible claim for relief of an unconstitutional conspiracy. The proposed complaint is completely silent as to any agreement, and thus otherwise speculates to what degree, if any, the two agreed or conspired to violate plaintiff's rights. Further, it is unduly speculative at this juncture to determine that defendants Alessi and Eliman's to settle or resolve the dispute was unconstitutional for reasons appearing below.

Plaintiff also claims that it is the victim of invidious discrimination. However, as a non-profit entity, it does not claim any membership in any statutorily protected or suspect classification. Plaintiff also does not identify any similarly situated comparator which it asserts was treated more favorably than it. Rather, it appears that plaintiff claims that it suffered selective enforcement for bad faith or arbitrary, capricious or irrational reasons. The Fourteenth Amendment to the United States Constitution provides that "no state shall ... deny to any person within its jurisdiction the equal protection of the laws," and is "essentially a direction that all persons similarly situated should be treated alike." (***City of Cleburne, Texas v. Cleburne Living Center***, 473 U.S. 432, 439 [1985])2. To prove a selective enforcement claim, plaintiff must demonstrate that laws were not applied to him as they were applied to similarly situated individuals and that the difference was intentional and unreasonable (***Bush v City of Utica, N.Y.***, 558 Fed Appx 131, 134 [2d Cir 2014]; ***Deegan v City of Ithaca***, 444 F3d 135, 146 [2d Cir 2006]; ***Kantha v Blue***, 262 FSupp2d 90, 107 [SDNY 2003][to recover for selective enforcement, a plaintiff must prove that "(1) the [plaintiff], compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person"]).

Allowing plaintiff the most generous view of its claim, it essentially argues that defendants' refusal to provide it with prior sent requests for information or documentation, defendants' refusal to change address on file and acknowledge new representation absent execution of a power of attorney, and the assessment of liability and penalties without receiving requested employment or financial records were arbitrary, capricious, and done in bad faith. Thus, plaintiff posits that defendants do not ordinarily treat other similarly situated companies

2 All of plaintiff's claims for deprivation of constitutional rights are plead in the complaint as arising from the federal Constitution.

with unemployment insurance policies subject to their jurisdiction in a similar fashion, therefore resulting in selective enforcement and differential treatment of the plaintiff.

In opposition, defendants argue that plaintiff fails to identify membership in a suspect classification or other historically disfavored and discriminated group. More importantly, defendants further argue that its actions were rational and in accordance with law, following the procedure set forth in Labor Law § 571 which provides:

> If an employer fails to file a quarterly combined withholding, wage reporting and unemployment insurance return ... for the purpose of determining the amount of contributions due or for the purpose of determining contribution rates ... or if such return when filed is incorrect or insufficient and the employer fails to file a corrected or sufficient return within thirty days after the commissioner requires the same by written notice, the commissioner shall determine the amount of contribution due from such employer and the amount of wages paid by such employer on the basis of such information as may be available and shall give written notice of such determination to the employer. Such determination shall finally and irrevocably fix the amount of contribution and the amount of wages paid for the purpose of computing contribution rates, unless the commissioner shall modify the amounts thereof, as provided under this article, subject, however, to the right to a hearing as hereinafter provided.

Labor Law § 571 [McKinney's 2018]

Moreover, courts have recognized the Labor Department Commissioner's discretion in this regard. In a line of cases emanating from administrative appeals of the State Unemployment Insurance Board, the Third Department has acknowledged that under analogous circumstances the State Department of Labor Commissioner possesses wide latitude and broad discretion to impute or estimate assessments without documentation in accord with Labor Law § 571 (*see e.g.* ***In re Calon***, 257 AD2d 855, 856, 684 NYS2d 308, 309 [3d Dept 1999][Commissioner of Labor did not exceed his authority by estimating the number of operators and the amount received by them in tips to be factored into the calculation of the amount due from employer premised upon employer's faulty recordkeeping and failure to file reports for the audit period that necessitated the estimated assessments]; ***In re Mamash Rest. Corp.***, 270 AD2d 723, 723, 704 NYS2d 376, 376 [3d Dept 2000][finding Labor Department Commissioner acted within discretion when it issued an estimated assessment where *inter alia* employer failed to produce accurate employee records]). Thus, plaintiff faces a heavy burden of constitutionalizing defendants' reliance on regulatory authority, discretion and settled law in acting as described herein.

Defendants have questioned whether this matter is justiciable in its present form, a point also worthy of discussion. Thus in their moving papers have argued that this matter is unripe for judicial review precisely because plaintiff has failed to exhaust its administrative remedies (*see e.g.* ***Rackley v City of New York***, 186 FSupp 2d 466, 482 [SDNY 2002][an Article 78 action in many instances in itself constitutes sufficient procedural due process under the Constitution and an adequate post-deprivation remedy to warrant dismissal of plaintiff's procedural due process claim for failure to exhaust administrative remedies]; *see also* ***Locurto v. Safir***, 264 F3d 154, 174–75 [2d Cir.2001]; ***Hellenic Am. Neighborhood Action Cmt. v. City of New York***, 101

F3d 877, 880 [2d Cir.1996][recognizing that Article 78 provides a proceeding that is a perfectly adequate post-deprivation remedy to redress constitutional issues]). Their point is well taken as statute itself supports this notion (*see* Labor L. § 624). Thus, at this juncture plaintiff's claims sounding in deprivation of equal protection of the laws, just as easily interpreted as arguing arbitrary, capricious, malicious or bad faith misconduct on the part of the defendants, should be held in abeyance until the resolution of this issue at hearing, and post-hearing Article 78 proceeding, if any should that prove necessary.

Assuming *arguendo*, this Court is of the view that plaintiff's equal protection claim of arbitrary, capricious or bad faith action cannot be severed and spun off into a plenary petition seeking Article 78 relief either. To determine whether a matter is ripe for judicial review, it is necessary " 'first to determine whether the issues tendered are appropriate for judicial resolution, and second to assess the hardship to the parties if judicial relief is denied.' " Specifically, the court must determine whether an agency has arrived at a definitive position on the issue that inflicts an actual concrete injury and whether the resolution of the dispute requires any fact-finding, for "[e]ven if an administrative action is final, however, it will still be 'inappropriate' for judicial review and, hence, unripe, if the determination of the legal controversy involves the resolution of factual issues" (***Town of Riverhead v Cent. Pine Barrens Joint Planning and Policy Com'n***, 71 AD3d 679, 681, 896 NYS2d 382, 384 [2d Dept 2010]). "The concept of finality requires an examination of the completeness of the administrative action and a pragmatic evaluation of whether the 'decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury' (***Equine Facility, LLC v Pavacic***, 155 AD3d 1033, 1035, 66 NYS3d 521, 523 [2d Dept 2017]).

Here, if anything, the parties' submissions make painstakingly clear that plaintiff's dispute is non-final. It remains unsettled whether plaintiff's matter proceeded to hearing before an unemployment insurance administrative law judge. Also unanswered is whether plaintiff has engaged that administrative appeals process or sought Article 78 relief at all, as would be its right to do so. Thus, that branch of defendants' motion to dismiss plaintiff's pleadings asserting claims of denial of equal protection of the laws under the 14th Amendment to the U.S. Constitution is **granted** to the extent that those claims in the Summons with Notice and the complaint are **dismissed** as unripe for judicial review and thus nonjusticiable.3

Further, this Court finds incredible, and thus not actionable, plaintiff's claim for infliction of emotional distress, intentional or negligent. Initially, the Courts notes that plaintiff is an organization and not a natural person and thus is suspicious of the notion that the organization could be made to suffer emotional distress of the same kind or quality that a natural person might. Notably plaintiff provides no arguments supportive of this claim. Nothing in the present record establishes precisely who plaintiff alleges has been made to suffer mental distress or anxiety of any kind. This Court is guided by the Court of Appeals which has made clear that to successfully plead the tort, plaintiff must show: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a

3 The Court further notes that albeit pleading a claim for deprivation of due process in the Summons with Notice and proposed untimely complaint, plaintiff's counsel appears by her motion papers to have abandoned those claims. Specifically, plaintiff argues that the nature of this action is not challenging the lack of pre-deprivation hearing, but rather that defendants' failure to document its assessment calculation, and its imposition of liability without receipt of supporting documentation alone, constituted a constitutional violation. Thus, this Court deems plaintiff's claims for deprivation of due procedural due process abandoned.

causal connection between the conduct and injury; and (iv) severe emotional distress (***Howell v New York Post Co., Inc.***, 81 NY2d 115, 121 [1993]). Nevertheless, the pleadings such as they are do not adequately or sufficiently plead this cause of action and thus for purposes of the instant motion, is **dismissed** for failure to state a claim

Similarly lacking in substance is any explanation how defendants should be found liable for violation of Public Officers Law or *prima facie* tort. Courts have previously determined that a plaintiff lacks a private right of action to sue for recovery or to enforce Public Officers Law, Article 6 (*see* ***Warburton v State***, 173 Misc2d 879, 882, 662 NYS2d 706, 708 [Ct Cl 1997][Article 6 of the Public Officers Law does not expressly confer on citizens the right to bring an action for money damages in the event of a violation.]). Nor can plaintiff recover for *prima facie* tort on the pleadings in their current state. To do so, plaintiff would have to successfully plead and prove (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful" (***Smith v Meridian Tech., Inc.***, 86 AD3d 557, 558–59, 927 NYS2d 141, 143 [2d Dept 2011]). For all of the previous reasons appearing above, the lawfulness, propriety and reasonableness of defendants' action, i.e. assessing liability and penalties against plaintiffs pursuant to the Labor Department Commissioner's discretion under statute absent receipt of supporting records or documentation, are inextricably interwoven and linked with plaintiffs' claims of arbitrary, capricious, bad faith or malicious action. Given the present posture of this matter, this Court finds plaintiff's pleadings both substantively deficient and at the same time, premature. Thus, defendant's motion to dismiss these causes of action is **granted.**

Lastly, plaintiff's claims for breach of contract or tortious interference must also fail. It is well settled that the elements of a cause of action to recover damages for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of the contract, and (4) resulting damages (*see* ***JP Morgan Chase v. J.H. Elec. of N.Y., Inc.***, 69 AD3d 802, 803; ***Furia v. Furia***, 116 AD2d 694, 695; ***Palmetto Partners, L.P. v AJW Qualified Partners, LLC***, 83 AD3d 804, 806 [2d Dept 2011]). To state a cause of action to recover damages for tortious interference with prospective contractual relations, the plaintiff must allege that the defendant engaged in culpable conduct which interfered with a prospective contractual relationship between the plaintiff and a third party (***Adler v 20/20 Companies***, 82 AD3d 915, 918, 918 NYS2d 585, 587 [2d Dept 2011]). Further, the alleged misconduct must amount to a crime or an independent tort, and may consist of "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions" (***Smith v Meridian Tech., Inc.***, 86 AD3d 557, 560, 927 NYS2d 141, 144 [2d Dept 2011]). Both claims fail. Plaintiff has not supplied the Court with a copy of its unemployment insurance policy agreement leaving to speculation as to the nature of its relationship, if any, with such a carrier, leaving aside the additional speculation of the precise degree of its relationship with the State Department of Labor. Moreover, plaintiff fails to identify the third party and the relationship, if any, that defendants' actions impaired. The propriety of defendants' actions remains an open unanswered question whose resolution is more appropriately referred to the Article 78 administrative arena. More importantly, although alleging criminal conduct, plaintiff has not indicated that any charges have been filed against any of the parties in this action to date. Thus, defendants' motion to dismiss these causes is successful and accordingly these claims are **dismissed.**

In conclusion, defendants' motion to dismiss this action is resolved as follows:

1. Defendants' motion to dismiss for lack of personal jurisdiction, deemed under CPLR 3211(a)(8) for lack of personal jurisdiction premised upon improper service of process is **denied;**
2. Plaintiff's cross-motion to compel defendants' acceptance of its late complaint pursuant to CPLR 3012(d) **is granted** to the extent that the proposed complaint served in January 2017 is deemed timely filed for the purposes of this determination;
3. Defendant's motion to dismiss the action pursuant to CPLR 3012(d) is **granted in part and denied in part.** The motion is **denied** to the extent provided above in that plaintiff's complaint is deemed timely served and defendants are hereby **compelled** to accept the late service as timely for the purposes of this decision and order. The motion is **granted** however to the extent that due to plaintiff's failure to bring meritorious causes of action, the complaint is therefore **dismissed**.
4. Defendants' motion to dismiss the pleadings for failure to state claim pursuant to CPLR 3211(a)(7) is **granted** and the plaintiff's complaint is hereby **dismissed.**

The foregoing constitutes the decision and order of this Court.

Dated: April 2, 2018
Riverhead, New York

WILLIAM G. FORD, J.S.C.

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**