

**City of New York v Berkeley Educ. Servs. of N.Y.,  
Inc.**

2020 NY Slip Op 31155(U)

May 4, 2020

Supreme Court, New York County

Docket Number: 452025/2018

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

THE CITY OF NEW YORK, LORELEI SALAS, AS
COMMISSIONER OF THE NEW YORK CITY
DEPARTMENT OF CONSUMER AFFAIRS

Plaintiff,

- v -

BERKELEY EDUCATIONAL SERVICES OF NEW YORK,
INC.,

Defendant.

-----X

INDEX NO. 452025/2018
MOTION DATE 09/16/2019
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 52, 54, 56

were read on this motion to/for DISMISSAL.

Upon the foregoing papers, and for the reasons set forth below, the Plaintiffs' motion to dismiss Berkley Educational Services of New York, Inc.'s (Berkley) counterclaims pursuant to (i) CPLR §§ 3211(a)(5) and 217(1) as time-barred, (ii) CPLR § 7804(f) for failing to state a cause of action under Article 78 and (iii) CPLR § 3211(a)(7) is granted in its entirety.

THE RELEVANT FACTS AND CIRCUMSTANCES

The relevant factual background is set forth in detail in the court's decision on motion seq. 001 (NYSCEF Doc. No. 36). Briefly, this action was commenced against Berkley, a for-profit college, by the City of New York (the City) and Lorelei Salas, as commissioner of the New York City Department of Consumer Affairs (DCA; the City and DCA, together, the Plaintiffs), alleging numerous deceptive and predatory practices by Berkley with respect to its students.

Following the court's decision denying Berkley's motion to dismiss (seq. no. 001), on July 25,

2019, Berkley filed a Verified Answer with Counterclaims (the **VAC**), alleging, in sum and substance, that the City, through its various administrative agencies, engaged in a “clandestine and coordinated effort” with the City University of New York (**CUNY**), which is a state agency, to harass and attack Berkley so as to boost CUNY as an educational institution over Berkley (VAC, ¶ 390). The VAC asserts the following counter-claims against the Plaintiffs: (i) violation of due process – declaratory judgment, (ii) violation of due process and other tortious conduct – equitable relief, and (iii) violation of NY Gen. Bus. Law (**GBL**) § 349 (NYSCEF Doc. No. 38, ¶¶ 346-433). Subsequently, the Plaintiffs moved to dismiss.

## **DISCUSSION**

### **I. Notice of Claim**

As an initial issue, inasmuch as the Plaintiffs argue that Berkley's claims are barred because Berkley never filed a Notice of Claim, the court notes that the failure to file a Notice of Claim would only bar Berkley's claims for money damages, not injunctive relief (*Johnson v City of Peekskill*, 91 AD3d 825 [2d Dept] [plaintiff not required to serve notice of claim on city for complaint seeking equitable relief]). Accordingly, while Berkley's failure to file a notice of claim certainly limits its claim, it does not definitely resolve the issues raised by this motion.

### **II. The First Counterclaim for Declaratory Judgment is Untimely**

The Plaintiffs argue that dismissal of the first counterclaim is required because although styled as a counter-claim for declaratory judgment, Berkley's claim is in its essence a challenge to the City's administrative determination and challenges to administrative determinations must

exclusively be brought under Article 78. Inasmuch as this challenge was brought more than four months after the City made its determination, the Plaintiffs argue that it is time barred under CPLR § 217(1).

In other words, an Article 78 proceeding must be dismissed as untimely if it is commenced beyond the applicable four-month statute of limitations (CPLR § 217). Article 78 of the CPLR is the exclusive vehicle by which a court may review a challenge to an administrative determination. Where the gravamen of the claim challenges an administrative determination, a court may treat it as a cause of action sounding in Article 78 regardless of how it is denominated in the pleading (*Foster v City of NY*, 157 AD2d 516, 518 [1<sup>st</sup> Dept 1990] [affirming trial court determination that claim was for an Article 78 proceeding and dismissing as untimely]; *Todras v City of New York*, 11 AD3d 383 [1<sup>st</sup> 2003] [same]).

In their opposition papers, Berkley argues that its claim is saved by CPLR § 203(d), which provides that:

A defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed...

(CPLR § 203[d]).

The argument fails. CPLR § 203(d) permits the relating back of claims which existed at the time of the original complaint. When the Complaint was filed on October 18, 2018, Berkley's counterclaim did not exist as the actions Berkley challenges did not occur until November 29, 2018 (i.e., when HRA "deactivated" its vendor codes in purported violation of 68 RCNY § 3-05) and in January 2019 (i.e., when the City allegedly began funneling Berkley's students to debt

counselors without giving Berkley “notice or any opportunity to be heard”) (VAC, ¶¶ 364, 367, 374-387). Indeed, the very harm alleged by Berkley is largely that it suffered damages as a result of the Plaintiffs commencing this lawsuit. As such, CPLR § 203(d) does not permit Berkley to “relate back” its counterclaim to the filing of the Complaint since, necessarily, the cause of action did not accrue until after the Complaint was filed. Because the VAC was not filed until July 25, 2019 (i.e., nine months after the Complaint was filed and seven months after the debt counseling commenced), the first counterclaim is dismissed as time-barred.

In addition, the first counterclaim must be dismissed as it fails to state a claim upon which relief can be granted. Berkley simply does not cite any basis for its allegation that the Plaintiffs are prohibited from offering debt-counseling services to students who are enrolled in education and training programs. Inasmuch as Berkley seeks to allege a vast conspiracy and a “war against proprietary colleges” by the City to lure students away from Berkley in favor of CUNY, the most that is actually alleged is basic, intra-agency coordination. In addition, CUNY is a *state agency* and the State is not a party to this lawsuit so any allegations with respect to CUNY are wholly besides the point.

### III. The Second Counterclaim Fails to State a Claim and Must be Dismissed

The second counter-claim is labeled as “violation of due process and other tortious conduct,” but really sounds in defamation as it is based on the alleged “false and defamatory statements” about Berkley to its students. As an initial matter, CPLR § 3016 subjects defamation claims to a heightened pleading standard and requires that they be pled with particularity which the second counterclaim is not (*Three Amigos SJL Rest., Inc. v CBS News, Inc.*, 132 AD3d 82, 92 n 1 [1<sup>st</sup>

Dept 2015]; *Pappalardo v State of NY*, 109 AD2d 873, 873 [2d Dept 1985]). To wit, the counterclaim does not allege when the purportedly defamatory statement was made (i.e., only alleging the statements were made sometime “in early 2019”) and does not state where the publication was made, how or by whom (VAC, ¶ 420). Nor does Berkley allege how any allegedly defamatory statement is knowingly false, which is a critical element of any defamation claim (*Stepanov v Dow Jones & Co.*, 120 AD3d 28, 34 [1<sup>st</sup> Dept 2014]).

To the extent that the second counterclaim is for tortious interference with either existing business relations or a prospective business advantage, it also fails. To assert a claim for tortious interference with existing business relations, Berkley must assert (1) a valid contract between it and a third party, (2) the Plaintiffs’ knowledge thereof, (3) the Plaintiffs’ intentional procurement of the third-party’s breach without justification, (4) actual breach and (5) resulting damages (*Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413, 424 (1996)). Berkley does not allege any actual specific contract or breach thereof, nor that the Plaintiffs acted without justification.

To assert a claim for tortious interference with prospective business advantage, Berkley must plead that (i) it had business relations with a third party, (ii) with which the Plaintiffs interfered (iii) for the sole purpose of harming Berkley or by using unlawful means, and (iv) resulting damages (*Thome v Alexander & Louisa Calder Fndt.*, 70 AD3d 88, 108 [1<sup>st</sup> Dept 2009]). Here, even if Berkley had pled any specific damages, which it does not, Berkley simply cannot show that the Plaintiffs acted with the sole purpose of harming Berkley. Rather, all Berkley asserts are wholly conclusory and hyperbolic allegations about the City’s “war” with for-profit colleges. This is insufficient and the second counterclaim is dismissed for failure to state a claim.

For the avoidance of doubt, inasmuch as the second cause of action may be read as a claim for *prima facie* tort, it also fails as it fails to plead any special damages (*Curiano v Suozzi*, 63 NY2d 113, 117 [1984]). A claim for *prima facie* tort requires four elements: (1) intentional infliction of harm, (2) causing special damages, (3) without excuse or justification, (4) by an act or series of acts that would otherwise be unlawful (*id.*). The VAC fails to plead these elements save for its conclusory allegation concerning intentional infliction of harm. And, the court need not base its decision here on “technical pleading grounds” alone, for as the Court of Appeals explained in *Curiano*, “New York courts have consistently refused to allow retaliatory lawsuits based on *prima facie* tort predicated on the malicious institution of a prior civil action,” or, in this case, of the initial plenary proceeding against Berkley (*id.* at 118 [collecting cases]). Based on all the foregoing, the second cause of action is dismissed.

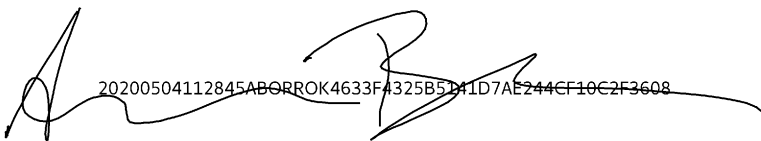
#### IV. The Third Counterclaim Fails to State a Claim

The third counterclaim alleges violations of GBL § 349. Section 349 of the GBL authorizes an action against a “person, firm, corporation or association,” but it does not expressly apply to government agencies or municipalities performing government functions as the Plaintiffs were here (e.g., *Downing v New York City Housing Auth.*, 64 Misc 3d 1218[A] at \*13 [Sup Ct Kings Cnty July 25, 2019]; *Singh v City of NY*, 2017 WL 4791469, \*5 [Sup Ct Queens Cnty September 28, 2017])). Moreover, GBL § 349 prohibits “deceptive acts or practices in the conduct of *any business, trade, or commerce or in the furnishing of any service*” (GBL § 349 [emphasis added]). Here, the Plaintiffs were plainly not involved in any “any business, trade, or commerce or in the furnishing of any service.” This counterclaim is, therefore, also dismissed.

Accordingly, it is

ORDERED that the Plaintiffs' motion to dismiss the counterclaims is granted and the counterclaims in defendant's verified answer are dismissed; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.



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5/4/2020  
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER

OTHER

APPLICATION:

SETTLE ORDER

FIDUCIARY APPOINTMENT

REFERENCE

CHECK IF APPROPRIATE: