Troise v NYC Dept. of Bldgs.
2021 NY Slip Op 33008(U)
December 21, 2021
Supreme Court, Richmond County
Docket Number: Index No. 150686/2021
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C-2

HON. THOMAS P. ALIOTTA

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Emanual Troise and Troise Master Plumbing Corp.

Plaintiff,

-against-

NYC Department of Buildings, Debra Palmieri Russo, in her capacity as Executive Director of Training at DOB and individually, Office of Administrative Trials and Hearings, NYC Comptroller, and John and Jane Doe (said names being fictitious, the persons intended being those who aided and abetted the unlawful conduct of the named Defendants).

Defendants.

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DECISION AND ORDER

Index No: 150686/2021
Motion No. 001

Recitation of the following numbered "1" through "4" pursuant to CPLR 2219(a) were marked fully submitted on October 28, 2021

	Papers Numbered
Defendant City's Motion for Summary Judgment with Supporting Papers	1, 2
Plaintiff's Affirmation in Opposition with Supporting Papers	3
Defendants' Reply Affirmation	4

Upon the foregoing, defendants' motion for an Order dismissing plaintiff's complaint is granted for the reasons set forth below.

Defendants NYC Department of Buildings (DOB) Debra Palmieri Russo, in her Capacity as Executive Director of Training at DOB, Office of Administrative Trials and Hearings (Oath) and NYC Controller (collectively City Defendants) move for an Order pursuant to

CPLR 3211(a)(7) to dismiss plaintiff's complaint for failure to state a cause of action. Plaintiff opposes the motion arguing, *inter alia*, that the pre-answer motion is premature.

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, and accord it "the benefit of every possible favorable inference" (*id.* at 152; *see Romanello v Intesa Sanpaolo, S.P.A.*, 22 NY3d 881 [2013]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267 [1st Dept 2004]. "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d at 152; *see Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]).

Where, however, the court considers evidentiary material, the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one" (*Guggenheimer v Ginzburg*, supra, at 275), but dismissal will not eventuate unless it is "shown that a material fact as claimed by the pleader to be one is not a fact at all" and that "no significant dispute exists regarding it" *(id.)*.

To begin, defendant City correctly points out that the agencies listed in the caption of the complaint are not proper parties to the action. Section 396 of the City Charter provides:

> Actions and proceedings for recovery of penalties. All actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the city of New York and not in that of any agency, except where otherwise provided by law.

Accordingly, the claims against said agencies are dismissed as they are not proper parties. Although the City of New York has not been named in the complaint, plaintiff did file a Notice of Claim on February 26, 2020.

In the first cause of action, plaintiff alleges that defendant(s) violated General Business Law Section 340 more commonly known as the Donnelly Act, which makes illegal the establishment or maintenance of a monopoly or the restraint of competition, in business, trade or commerce. Specifically, plaintiff alleges that defendants actively sought to interfere with plaintiff's contracts with multiple education providers to teach gas courses, by excessive audit, threatening communications and false statements all secretly made to approved providers by DOB and its agents.

A review of the complaint does not allege that DOB took any action to create a monopoly in the area of continuing education courses, nor did they prevent plaintiff from participating in the market for said courses. To the contrary, defendant City attaches as an exhibit, plaintiff's application to be a Course Provider dated December 19, 2019. On January 13, 2020, the application was reviewed and approved by Debra Palmieri Russo, the Executive Director of Training at the Department of Buildings. On January 23, 2020, DOB mailed Troise Plumbing a letter of approval and posted Troise Master Plumbers Corp to the Department Approved Course Provider List page on its website. A copy of the approval letter was also attached to defendants' motion.

Since plaintiff's application was approved and plaintiff was listed as a provider, there is no cause of action for which relief can be granted. Accordingly, plaintiff's first of cause of action is dismissed.

Plaintiff's second cause of action for tortious interference must also fail. Under well-established New York state law, "a plaintiff is bound by the Notice of Claim and all new causes of action are barred if they are not alleged in the Notice of Claim" (*Levy v. Incorporated Village of East Hampton,* 193 AD3d 714 [2nd Dept. 2021] *citing*, *Semprini v. Village of Southampton,* 48 AD3d 543, 544 [2nd Dept. 2008]; *C.D. v. Goshen Central School District,* 186 AD3d 1316, 1318 [2nd Dept. 2020]; and *see Ana R. v. New York City Housing Authority*, 95 AD3d 981 [2nd Dept. 2012]). As such, a plaintiff is precluded from alleging a narrow claim of liability within their Notice of Claim and later add to, and not simply expand upon, their theory of liability in subsequent pleadings (*Semprini v. Village of Southampton, supra*). Here, the notice of claim does not allege that defendant tortiously interfered with the plaintiff's business and, therefore, this theory of liability is precluded (*Robinson v. City of New York,* 138 AD3d 1093, 1094 [2d Dept. 2016]).

Plaintiff inadvertently alleges two third causes of action in the remainder of the complaint, both of which must fail, again, because they were not alleged in the Notice of Claim (*Robinson v. City of New York* and *C.D. v. Goshen Central School District, supra*). Additionally, even construing the complaint liberally and according the plaintiff the benefit of every possible favorable inference, plaintiff's causes of action for "false claims" and "bad faith" do not establish the sole criteria necessary to survive a motion pursuant to CPLR 3211 , i.e., "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" (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 274-275 [1977]; and *see, Mistretta v. Newsday Media Group,* __ AD3d __, 2021 N.Y. Slip Op. 06844 [2nd Dept. 2021]).

The Court has reviewed the remaining arguments and finds them to be unavailing.

Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment is granted and this action is dismissed in its entirety; and it is further

ORDERED, that the Clerk shall enter judgment accordingly.

The foregoing constitutes the decision and order of the court.

Dated: December 21, 2021

ENTER:

HON. THOMAS P. ALIOTTA, J.S.C.