

**Matter of James v Scores**

2022 NY Slip Op 34582(U)

November 21, 2022

Supreme Court, Dutchess County

Docket Number: Index No. 2021-54005

Judge: Christie L. D'Alessio

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This opinion is uncorrected and not selected for official publication.



Respondent Robert Scores was self-represented at the time of pre-action discovery motion. According to the Petitioner's letter dated October 20, 2021, Petitioner acknowledged receipt of certain unidentified documents submitted by Respondent Robert Scores on October 19, 2021 (*see*, NYSCEF doc. 10). Scores subsequently filed certain document disclosures with the Court on February 9, 2022 in connection with Motion Sequence No. 1 (*see*, NYSCEF docs. 18-29).

*Petitioner's Application for Relief: [Motion Seq. No. 2]*

Petitioner filed a Notice of Petition, Petition, and supporting papers [Motion Seq. No. 2]. According to the Notice of Petition, the Petitioner specifically requested this Court issue an Order and Judgment granting the following requested relief:

1. "Permanently enjoining Respondent from violating Executive Law §63(12), Article 22-A and Poughkeepsie City Code Chapter 13, §13-311, and from engaging in the fraudulent, deceptive and illegal practices alleged [in the Petition];
2. Permanently enjoining Respondent from engaging in the towing operation business, either as a driver or proprietor within the State of New York until a \$100,000 performance bond is filed with the Attorney General by a surety or bonding company licensed by and in good standing with the New York State Department of Insurance, guaranteeing that Respondent comply with any injunction which may be entered herein, the proceeds of that bond to provide a fund for restitution to consumers defrauded or damaged by the past or future conduct of the Respondent and to ensure payment of penalties and costs herein;
3. Directing Respondent to make full monetary restitution to aggrieved consumers known and unknown;
4. Directing Respondent to prominently and publicly display towing and storage rates at their facility and on tow away signage at each private property Respondent is contracted to tow from;
5. Directing Respondent to proactively notify the owner/operator when their car is being towed and where it will be stored;
6. Directing Respondent to accept other forms of payment than cash, including, without limitation, credit cards and money orders;
7. Requiring Respondent to photograph vehicles before moving the vehicle from its original location, with such photographs necessarily showing the absence of a parking permit (or other indicia [i.e., relevant signage] as justification for the tow) and the location where the vehicle was parked. Respondent should further be directed to annex copies of such photos to the tow receipt which shall be provided to the vehicle owner/operator and to the Office of Attorney General upon demand. Failure to provide such photographs shall render the specific tow invalid and necessitate release without a tow fee;
8. Requiring Respondent to release a vehicle at no charge or a nominal "drop fee" to be determined by the Court if the owner/operator returns before the vehicle has been removed from the property;
9. Requiring Respondent to allow owners/operators to access and retrieve all personal items from their towed vehicles, such as keys, wallets, cell phones and medication;
10. Requiring Respondent to reimburse vehicle owners/operators for illegal or unjustified tows, with such reimbursement to include any and all damages, such as

- lost wages, in the circumstance of an illegal tow;
11. Requiring Respondent to reimburse vehicle owners and operators for damage to vehicles during the towing and storage process;
  12. Strictly prohibiting Respondent from engaging in predatory towing practices, i.e., patrolling or scanning for illegally parked cars without being called by the private property owner; in addition, requiring Respondent to keep a handwritten logbook that contains the name, phone number, date, time of such calls together with the location of the alleged illegally parked vehicle, make of the vehicle, license plate number, time of tow, location towed from and reason for the tow;
  13. Requiring Respondent to provide an itemized bill to the owner/operator of each towed vehicle, with photos annexed, showing the date, time and place of the tow, the justification for the tow, and providing the vehicle owners/operators with an opportunity to dispute any suspicious charges;
  14. Directing Respondent to pay a civil penalty in the sum of \$5,000 to the State of New York for each instance of a deceptive act or practice, pursuant to GBL §350-D;
  15. Directing Respondent to pay a civil penalty in the sum of \$5,000 to the State of New York for each instance of a violation of GBL Article 22-A, pursuant to GBL §350-D;
  16. Directing Respondents to pay costs totaling \$2,000 pursuant to CPLR §8303(a)(6); and
  17. Granting Petitioner such other and further relief as this Court deems just and proper.” (NYSCEF doc. 30).

Petitioner contends that Respondents have engaged in “predatory towing practices, which serve to unjustly enrich tow truck operators while financially victimizing the consuming public, neither serve public policy nor the public interest.” (NYSCEF doc. 32, Lee Affirmation ¶11). Counsel for the Petitioner provided the following general statement of the aggrieved conduct:

“Respondent[s] repeatedly and persistently patrols for illegally parked vehicles and tows these vehicles even if the operator/owner is present at the scene before the vehicle is attached to any towing apparatus, requesting Respondent not to tow the vehicle and ready and able to correct the condition warranting the tow. Often, these vehicles are not ‘parked’ at all, but merely stopped and standing to unload merchandise or passengers. See, e.g. NYS VTL Section 129. The sworn statements by the...vehicle owners/ drivers make clear Respondents' repeated violations of the City of Poughkeepsie ordinance<sup>1</sup>, GBL [General Business Law] § 349, and NYS VTL [Vehicle and Traffic Law] § 129.” (NYSCEF doc. 32, Lee Affirmation ¶25).

Petitioner submitted sworn affidavits of sixteen (16) aggrieved persons alleging harm resulting from the Respondent’s practices (*see*, NYSCEF doc. 34-49). Each affidavit provides a factual account of the aggrieved person’s experience with the Respondent(s), which the Petitioner summarily characterizes as Respondent’s “stealth tactics... utilized to sneak up on vehicles left idling for a few moments, using intimidation and even physical aggression to deter civilians from asserting

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<sup>1</sup> Petitioner states that in the year 2020, the City of Poughkeepsie enacted a towing ordinance that contains strong protections against predatory towing practices within the municipality. (Lee Affirmation ¶¶12-13, *citing* Poughkeepsie City Code at Chapter 13, entitled Motor Vehicles and Traffic, Article XX, Towing of Vehicles from Private Property, Section 13-311, Towing of Vehicles Improperly Parked on Private Property [the “Towing Ordinance”]).

their rights at the scene of a tow, and then holding vehicles hostage while charging outrageous fees for unwarranted tows.” (NYSCEF doc. 32, Lee Affirmation ¶11). Based on the foregoing, Petitioner requests a court order, inter alia, permanently enjoining Respondent from engaging in deceptive, fraudulent and illegal business practices and from performing vehicle towing services, including the towing of parked vehicles from private property and at the behest of police departments in the State New York; awarding restitution to injured consumers; directing disgorgement of wrongfully obtained profits; and imposing an award of penalties and costs to the State of New York.

*Respondent’s Motion for Dismissal [Motion Seq. No. 3]:*

Respondents, now appearing by counsel of record, filed a pre-answer motion for dismissal of this proceeding on three specific grounds, together with a general request for any such other and further relief as the Court may deem just and proper.

First, Respondent contends that the Petition must be dismissed pursuant to CPLR §3211(a)(2) based upon the Court’s lack of subject matter jurisdiction. Second, Respondent contends that the Petition must be dismissed pursuant to CPLR §3211(a)(3) based upon the Petitioner’s lack of capacity or standing to bring this proceeding. Third, Respondent contends that the Petition must be dismissed pursuant to CPLR §3211(a)(7) based upon Petitioner’s failure to state a valid cause of action.

Counsel for the Respondents contends that the Petition “rests entirely on the legal theory that the Petitioner may pursue alleged violations of the Code of the City of Poughkeepsie.” (Rappleyea Affirmation ¶4, *citing* the “Towing Ordinance” codified in the Poughkeepsie City Code). Counsel asserts that Paragraph 12 of the Petition succinctly states that the alleged violations emanate from Chapter 13, Article XX, section 13-311 of the City Code. Counsel notes that the Towing Ordinance entitles an aggrieved person to seek recovery thereunder, including “Penalties for Offenses” under section 13-1315 of the Towing Ordinance. Counsel also cites section 13-309 of the Towing Ordinance which further defines “person” as “[a]n individual, partnership, corporation, unincorporated association or any other entity”. Counsel notes that Towing Ordinance’s definition of an aggrieved person does not include “the people of the State of New York” by its Attorney General, as alleged in paragraph 2 of the Petition, or any other governmental entity. (Rappleyea Affirmation ¶6). In terms of possible punishment, counsel contends that the Towing Ordinance sets forth specific relief in the form of: “(a) possible fines; (b) a proceeding by the City of Poughkeepsie; or (c) a private right of action by a person claimed to be harmed. Aside from the City of Poughkeepsie and the allegedly aggrieved person, the Code does not confer other rights of enforcement, and none upon any other governmental entity.” (Rappleyea Affirmation ¶7). Moreover, counsel stated that section 13-1315(b) of the Towing Ordinance specifically only confers such right of enforcement upon the City of Poughkeepsie, and sub-section (c) thereof confers upon a private right of action by the alleged claimant, not a branch of government outside the City of Poughkeepsie.

Counsel refutes Petitioner’s assertions that alleged violations of the Towing Ordinance provides the necessary legal predicate for Petitioner to commence this proceeding under New York’s Executive Law § 63(12). In that regard, counsel rejects Petitioner’s assertion that “. . . courts have repeatedly found that a violation of state, federal or *local law* constitutes illegality within the meaning of Executive Law section 63-12.” (Rappleyea Affirmation ¶9, *citing* Petitioner’s Memorandum of Law in Support of Petition, page 5). To the contrary, counsel contends that the local city Towing

Ordinance does preclude Petitioner's challenges asserted in this petition. Counsel states that "[i]n fact, while injunctive relief is contemplated [by the Towing Ordinance], the right to seek it belongs to the City of Poughkeepsie, or the claimant, under the plain language of the law." (Rappleyea Affirmation ¶13). Counsel further states that "[t]he remedies sought by Petitioner are greatly in excess than that permitted by the local law." (Rappleyea Affirmation ¶14). In that same vein, counsel argues that "[w]hile examining a comparable part of Executive Law 63, *the Attorney General itself* in Opinion 71 from 1978, wrote "[c]learly the Attorney General *does not engage in prosecuting a corporation for violation of a local ordinance.*" (Rappleyea Affirmation ¶14).

Lastly, in the event the Court denies Respondents' motion for dismissal, counsel for Respondents requested sixty (60) days to file an Answer, "as this multi-year investigation will take significant time to respond to." (Rappleyea Affirmation ¶15).

#### Petitioner's Opposition to Respondents' Motion:

Petitioner filed opposition to Respondents' motion for dismissal. Counsel contends that Respondent's motion is without legal or factual basis and must be denied in its entirety.

First, Petitioner contends that "Respondent's motion should be returnable on the Answer Due Date and, should the Motion be denied, the Court should exercise its discretion and decline to allow Respondents to file an answer". (Lee Reply Affirmation, Part I). Counsel contends that CPLR §404(a) indicates "[i]f the motion is denied, the court may permit the Respondent to answer, upon such terms as may be just...such answer shall be served and filed within five days after service of the order with notice of entry..." (Lee Reply Affirmation ¶7). Counsel also argues the Petitioner has grounds to move to strike Respondents' answer or alternative relief for failure to comply with the prior subpoena based upon the discrepancy between Scores' prior disclosure versus the City of Poughkeepsie records of Scores' towing and impound practices during the requested period. (Lee Reply Affirmation ¶13).

Second, Petitioner contends that "the Petition does not reply exclusively on violations of the Local Law of the City of Poughkeepsie but also upon Respondents' repeated, ongoing deceptive, illegal and fraudulent activities which violate various state laws, inter alia, New York Executive Law §63(12) and General Business Law §34. (Lee Reply Affirmation, Part II).

Third, Petitioner contends that the Attorney General has standing to commence this special proceeding pursuant to its broad authority under New York Executive Law §63(12). (Lee Reply Affirmation, Part III).

#### Decision:

On a motion for dismissal pursuant to CPLR § 3211(a)(2), the movant must demonstrate that a court lacks subject matter jurisdiction to hear an action, when, by operation of law, jurisdiction to hear an action has been exclusively placed with another tribunal (CPLR § 3211[a][2]; *see Finkel v D.H. Blair & Co., Inc.*, 213 A.D.2d 588, 589 [2d Dept. 1995][citations omitted]).

On a motion to dismiss a pleading pursuant to CPLR § 3211(a)(3), the movant has the burden to establish, prima facie, that the Plaintiff/Petitioner, as the non-moving party, lacks standing to bring

the action as a matter of law. (CPLR §3211[a][3]; see *Katz v Hampton Hill Associates General Partnership*, 186 A.D.3d 688 [2d Dept. 2020]).

On a motion for dismissal pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, “the court must liberally construe the complaint, accept all facts as alleged in the pleading to be true, accord the Plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Minovici v Belkin BV*, 109 AD3d 520 [2d Dept. 2013]; see also, *Leon v Martinez*, supra.; *Treeline 990 Stewart Partners, LLC v RAIT Atria, LLC*, 107 A.D.3d 788, 791 [2d Dept. 2013]).

In applying the aforementioned legal principles to the case at bar, this Court denies Respondents’ motion for dismissal. Contrary to Respondents’ contentions, the Petitioner has demonstrated its standing and authority to commence this special proceeding under Executive Law § 63(12) and General Business Law § 349(a).

Executive Law § 63(12) empowers the Attorney General to bring a special proceeding on five days’ notice for permanent injunctive relief, restitution, and damages whenever any person or business engages in persistent or repeated “fraud or illegality.” To proceed, the Attorney General is required to demonstrate “any number of separate and distinct fraudulent or illegal acts which affect more than one individual.” (*People v. 21st Cent. Leisure Spa Int’l Ltd.*, 153 Misc.2d 938, 944, 583 N.Y.S.2d 726 [Supreme Ct., New York County 1991]). In the case at bar, the Attorney General, as Petitioner herein, is entitled to proceed with its claims premised upon Executive Law § 63(12) for the alleged repeated or persistent fraud and for the alleged repeated or persistent illegality.

The Attorney General, as Petitioner herein, is likewise entitled to proceed with its claims premised upon General Business Law (“GBL”) § 349(a), which prohibits “[d]eceptive acts or practices in the conduct of any business, trade, or commerce or in the furnishing of any service in this state.” Similar to Executive Law § 63(12), GBL § 349 is “intended to be broadly applicable, extending far beyond the reach of common law fraud.” (*New York v. Feldman*, 210 F. Supp. 2d 294, 301 [S.D.N.Y. 2002]). Acts or omissions with the capacity to mislead or deceive a reasonable person violate GBL § 349, regardless of whether it falls within the scope of common law fraud. (*See generally, Gaidon v. Guardian Life Ins. Co.*, 94 N.Y.2d 330, 348 [1998][acts constituting fraud]; *People ex. rel. Spitzer v. Applied Card Systems, Inc.*, 27 A.D.3d 104, 107 [3d Dept. 2005] [omissions constituting fraud]). Here, Petitioner’s claims that Respondents repeatedly falsifies the tow ticket receipts provided to consumers, misstated the justification for the tow as a “jump start” rate, and other similar conduct fit within the purview of this statutory provision.

As it relates to Respondents’ request for additional time to file an answer to the petition, it is noted that CPLR §404(a) permits a court to grant an extension of the five-day timeframe within which to file an answer “upon such terms as may be just”. Accordingly, the Court will grant a limited timeframe within which to interpose an Answer as set forth hereunder.

All other arguments raised on the motion and evidence submitted by the parties in connection thereto have been considered by this court, notwithstanding the specific absence of reference thereto.

Based on the foregoing, it is hereby

ORDERED that the Respondents' pre-answer motion for dismissal of this special proceeding is denied. It is further

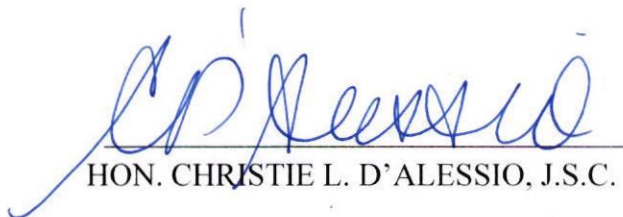
ORDERED that the Petition [Motion Seq. No. 2] is held in abeyance pending Respondents' interposing an Answer within the timeframe set forth by this Court. It is further

ORDERED that Respondents shall interpose an answer to the allegations set forth in the Petition [filed as Motion Seq. No. 2] within forty-five (45) days of notice of entry of this decision and order. It is further

ORDERED that the movant is directed to serve a copy of this decision and order with notice of entry within five (5) days hereof.

The foregoing constitutes the Decision and Order of this Court.

Dated: November 21<sup>st</sup>, 2022  
Poughkeepsie, New York



HON. CHRISTIE L. D'ALESSIO, J.S.C.

TO: Filed to NYSCEF

Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.