

Dibble v Schrodel

2022 NY Slip Op 34992(U)

November 21, 2022

Supreme Court, Westchester County

Docket Number: Index No. 61549/2021

Judge: James W. Hubert

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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KARL DIBBLE, KARL DIBBLE INC. and
RIVER ROCK SUPPLY CORP.,

Plaintiffs,

Index No. 61549/2021

- against-

DECISION and ORDER

DAVID SCHRODEL, ANTHONY GIACCIO,
HUDSON VALLEY MANAGEMENT CONSULTING
LLC, JOHN LEAVY, SLEEPY HOLLOW LOCAL
DEVELOPMENT CORPORATION LLC, ANDREW
CORTESE, CORTESE CONSTRUCTION INC.,
KENNETH WRAY, THE VILLAGE OF SLEEPY HOLLOW,
JAMES MCGOVERN, EARTH IMPROVEMENTS, INC.
and Defendants Joseph Dow And Jane Dow,
No. 1 through 10, being individuals whose Names
and/or conduct is not presently known to the Plaintiffs,

Motion Seq. No. 1, 2 & 3

Defendants.

-----X
J. Hubert, J.S.C.

Before the Court is a motion filed (motion seq. # 1) by the Defendants, DAVID SCHRODEL, ANTHONY GIACCIO, SLEEPY HOLLOW LOCAL DEVELOPMENT CORP., KENNETH WRAY, THE VILLAGE OF SLEEPY HOLLOW, and JOHN LEAVY (collectively “Village Defendants”) seeking to dismiss the complaint pursuant to CPLR § 3211 for failure to comply with and timely commence an action in accordance with GML § 50-e and CPLR § 9802; and/or the failure to state a cause of action. Defendant HUDSON VALLEY MANAGEMENT CONSULTING LLC, (“Defendant HVMC”) has filed a cross motion (motion seq. # 2) to dismiss the complaint pursuant to CPLR §§ 3211 (a) (1), (2), (3) (lack capacity to sue), (7) (failure to state a cause of action) and/or (10) (failure to join a necessary party) and/or lack of personal jurisdiction and that the action is time barred. Defendants ANDREW CORTESE and CORTESE CONSTRUCTION INC. (“Defendant Cortese”) seek dismissal of the complaint on similar grounds as the above stated cross-motion (motion seq. # 3). Defendant JAMES

MCGOVERN (“McGovern”), self-represented, has submitted a letter (which shall be deemed a cross-motion) requesting that the Court dismiss the complaint as against him (NYSCEF doc. # 37). Plaintiffs have submitted papers in opposition to the motion, cross-motions, and McGovern letter, contending that the complaint is timely, complies with all relevant statutes and sufficiently states a claim against each Defendant. Upon review of the papers filed herein and applying the applicable legal standards, the motion, cross-motions, and letter application are granted.

Plaintiff, Karl Dibble, owns River Rock Supply Corp., which is in the business of supplying and delivering construction materials to construction sites and contractors and Karl Dibble, Inc. which does work as subcontractor or developer at construction sites (collectively “Plaintiffs”). Briefly stated, Plaintiffs commenced this action seeking to recover monetary damages alleging through a series of actions, the Defendants interfered with existing and prospective contracts causing the businesses to suffer economic losses.

In 2014, the Village of Sleepy Hollow (the “Village”) created Sleepy Hollow Land Development Corp. (SHLDC), for the purpose of developing land located within the Village. A former Village Trustee, David Schroedel (Schroedel), was appointed Chairman of SHLDC by the Mayor, Kenneth Wray (Wray). Plaintiffs allege prior to resigning as Chairman, Schroedel recommended SHLDC retain the services of his company, Hudson Valley Management Consulting LLC (HVMC) as a consulting firm. Following interviews of several firms, HVMC was appointed.

Plaintiffs further allege SHLDC minutes and/or resolutions state contracts would be awarded following a competitive bidding process. Plaintiffs allege prior to 2017, they were awarded several contracts with the Village and SHLDC. Following a disagreement with his neighbor, James McGovern, Plaintiffs allege the businesses were not awarded as many contracts

as anticipated with the Village. It is alleged McGovern exerted influence over various Village Defendants affecting the outcome. Plaintiffs allege Anthony Giaccio (Giaccio), Village Manager and CEO of SHLDC, John Leavy (Leavy), a Village Trustee, Schroedel, Wray, SHLDC and HVMC acted intentionally with McGovern, Cortese Construction and Earth Improvements to advance their own pecuniary interest to the detriment of Plaintiffs.

Plaintiffs' complaint contains six causes of action. The first cause of action alleges Leavy, Schroedel, Giaccio, Wray, HVMC and McGovern tortiously interfered with Plaintiffs existing and prospective contracts. The second causes of action alleges that on June 13, 2017, Schroedel interfered with an existing contract Plaintiffs had with a third-party. The third cause of action alleges in June 2018, Schroedel, HVMC, McGovern and Leavy interfered with Plaintiffs' ability to perform a contract with a third-party. The fourth cause of action alleges Leavy, Schroedel, HVMC and Giaccio interfered with Plaintiffs' prospective contract with a third-party seeking to do business with the Village. The fifth cause of action alleges a violation of the Donnelly (Anti-trust) Act by Schroedel, SHLDC, HVMC, McGovern, Leavy, Giaccio, Wray, Cortese Construction, Cortese and Earth Improvements. The sixth cause of action seeks to enjoin the Village and SHLDC from entering into any further contracts that do not comply with federal, state, or local bidding laws and from engaging in improper bidding practices.

Notice of Claim requirement

Turning to the claims being asserted against the Village Defendants, specifically, Schroedel, Village of Sleepy Hollow, SHLDC, Leavy, Giaccio, and Wray, the first question to resolve is whether the claims asserted against the municipal Defendants are governed by the procedures set forth in CPLR § 9802 and GML § 50-e. Plaintiffs contend the claims being

asserted against the above Defendants are for “actions taken in their individual capacity”, outside the scope of their official duties thus a notice of claim is not required.

It is well settled that a condition precedent to commencing an action against a village requires timely service of a notice of claim. Pursuant to CPLR § 9802, any action (except one arising from a contract) against a village must be “commenced within one year after the cause of action therefor shall have accrued” and a notice of claim shall have been “served in compliance with section fifty-e of the general municipal law.” General Municipal Law § 50–e(1)(a) states a notice of claim shall be served “within ninety-days after the claim arises.” Since interference with a contract whether tortious or intentional is a claim sounding in tort, it is governed by the ninety-day notice of claim requirement.

In addition, CPLR § 9802 makes clear that “*no other action* shall be maintained against a village” unless there has been compliance with the notice of claim condition precedent. The “no other action” language contained in CPLR § 9802 permits no exceptions including causes of action for declaratory relief (*see Matter of BT Holdings, LLC v. Village of Chester*, 162 A.D.3d 881 [2d Dep’t 2018]; *Solow v. Liebman*, 175 A.D.2d 867 [2d Dep’t 1991]). Here, Plaintiffs have asserted claims for tortious interference with an existing or prospective contract and seeks declaratory relief, thus, the service of a notice of claim would be a prerequisite to commencement of an action against the Village of Sleepy Hollow or SHLDC, its agent (*Eugene Racanelli, Inc. v. Incorporated Vil. of Babylon*, 92 A.D.3d 635, 635–36 [2d Dep’t 2012]).

Service of a notice of claim upon an officer, trustee or agent of a village is not a condition precedent to the commencement of an action against such person unless the village is required to indemnify such person (*see GML § 50-e (1)(b)*; *Bardi v. Warren County Sheriff’s Dept.*, 194 A.D.2d 21, 23–24 [3rd Dept 1993]). The village’s duty to indemnify turns on

whether the individual was acting within the scope of their employment or acting in the course of their official duties (*see Public Officer's Law § 18*).

Applying these principles herein, a notice of claim was required as to Defendants Village of Sleepy Hollow, and SHLDC which are public entities, or agents thereof, as that term is defined by Public Officers Law § 18. Moreover, a notice of claim was also required for Defendants Schroedel, Leavy, Giacco, and Wray to the extent any claim relates to actions undertaken in the performance of their official duties.

Plaintiffs served a notice of claim on February 9, 2018 upon the Village of Sleepy Hollow and Sleepy Hollow Local Development Corp, asserting three claims 1) that the Village, its officers, trustees, and SHLDC on November 9, 2017 refused to award Plaintiffs a proposed contract with the Village; 2) since July 2017, the Village failed to pay for supplies provided pursuant to a contract; and 3) on May 22, 2017, the Village and/or SHLDC failed to award Plaintiffs a proposed contract to stock pile fill in the Village. Although three claims are asserted in the notice of claim, this action involves the two tort claims contained therein.

Based upon when the notice of claim was served, any claims which accrued prior to November 11, 2017 are time barred. Here, the tort claims (the first and third claims) asserted in the notice of claim are alleged to have occurred on November 9, 2017 and May 22, 2017. Both dates are more than ninety days from when the notice of claim was served. Plaintiffs' notice of claim does not allege any wrongdoing by the Village Defendants between November 11, 2017 and February 18, 2018. Accordingly, none of the claims asserted in the notice of claim are timely. In the absence of a timely served notice of claim, any action asserted against the Village, its' officers or trustees for actions taken in the course of their official duties, and SHLDC must be dismissed for failure to comply with the notice of claim requirements set forth in the statute.

Motion to Dismiss

Addressing the specific claims in the complaint, when considering pre-answer motions to dismiss the complaint for failure to state a cause of action, “the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Ferrera v. City of New York*, 164 A.D.3d 754, 755 [2d Dep’t 2018]); *Doe v. Bloomberg, L.P.*, 36 N.Y.3d 450, 454 [2021]); *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858 [2002]). “Initially, 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” (*Hersh v. Cohen*, 131 A.D.3d 1117, 1118, 16 N.Y.S. 3d 606 [2d Dep’t 2015]). “Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its [causes of action], of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss” (*Barry’s Auto Body of NY, LLC v. Allstate Fire & Cas. Ins. Co.*, 190 A.D.3d 807 [2d Dep’t 2021]; *Dee v. Rakower*, 112 A.D.3d 204, 208, 976 N.Y.S.2d 470 [2d Dep’t 2013]).

First cause of action against Leavy, Schroedel, Giacco, Wray, HVMC and McGovern

a) Interference with an existing contract

The first cause of action in the complaint has multiple allegations and claims commingled within it against various Defendants. It is alleged Leavy, Schroedel, Giacco, Wray, HVMC and McGovern tortiously interfered with Plaintiffs’ existing and prospective contracts with the Village, Kataeyna Arencibia and Sentrael Contracting. Here, accepting Plaintiffs’

allegations as true and giving every favorable inference, the first cause of action fails to state a cause of action.

To assert a cause of action for tortious interference with a contract a plaintiff must allege the existence of a contract between plaintiff and a third-party, defendant's knowledge of that contract, and the defendant's intentional and improper inducement of the third-party to breach that contract, and damages therefrom (*see Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 94, 595 N.Y.S.2d 931 [1993]). Further, the plaintiff must specifically allege that the contract would not have been breached but for the defendant's conduct (*see White Knight of Flatbush, LLC v. Deacons of the Dutch Congregation of Flatbush*, 159 A.D.3d 939, 941, 72 N.Y.S.3d 551 [2d Dep't 2018]).

The only third-party existing contract referenced in the first cause of action, is a contract with Sentrael Contracting. Plaintiffs state the Defendants (Leavy, Schroedel, Giacco, Wray, HVMC and McGovern) "[prohibited] Plaintiffs from fulfilling a contract with Sentrael Contracting to remove stone that had been stored on the East Parcel". No further factual statement is offered to support the necessary elements for a claim alleging tortious interference with an existing contract. Plaintiffs do not allege that the Defendants were aware of the contract with Sentrael or that the above-named Defendants' conduct induced Sentrael to breach its' contract with Plaintiffs. Indeed, there is no claim that the contract was breached by Sentrael.

No other existing contract is mentioned within the first cause of action. "The complaint fail[s] to identify all of the relevant contracts with third parties, fail[s] to allege facts describing how those contracts were breached by the third parties and how the [D]efendants allegedly induced those breaches, and fail[s] to sufficiently allege that the contracts would not have been breached but for the defendants' conduct" (*Influx Cap., LLC v. Pershin*, 186 A.D.3d 1622, 1624,

131 N.Y.S.3d 712 [2d Dep't 2020]). Thus, the first cause of action fails to state a claim for the tortious interference with an existing contract. Further to the extent any portion of the claim is based upon actions undertaken by Leavy, Schroedel, Giacco, and Wray in conjunction with their official duties, such claim would be dismissed for failure to timely file a notice of claim. As noted above, a timely notice of claim pertaining to the allegations in the complaint has not been served.

b) Interference with a prospective contract

The tort of intentional interference with prospective contracts, requires a showing that through the intentional and wrongful acts of defendant, identified third parties were prevented from entering into a business relationship with plaintiff (*see Smith v. Meridian Tech., Inc.*, 52 A.D.3d 685, 861 N.Y.S.2d 687 [2nd Dep't 2008]). To assert a claim for tortious interference with prospective contractual relations, the plaintiff must set forth that the defendant engaged in wrongful conduct which interfered with a prospective contractual relationship between the plaintiff and a third-party.

As a general rule, such wrongful conduct must amount to a crime or an independent tort, and may consist of “physical violence, fraud or misrepresentation, civil suits and criminal prosecutions” (*Guard-Life Corp. v. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 191, 428 N.Y.S.2d 628 [1980]) and “some degrees of economic pressure...[m]ere knowing persuasion would not be sufficient” (*Adler v. 20/20 Cos.*, 82 A.D.3d 915, 918, 918 N.Y.S.2d 585 [2d Dep't 2011]; *Smith v. Meridian Techs., Inc.*, 86 A.D.3d 557, 559–60 [2d Dep't 2011]). If the allegations shows that the interference is intended, at least in part, to advance defendant's own interests, then defendant is not acting solely to harm the plaintiff (*see Newport Serv. & Leasing, Inc. v. Meadowbrook Distrib. Corp.*, 18 A.D.3d 454, 455; 794 N.Y.S.2d 426 [2d Dep't 2005]).

Conclusory allegations are insufficient to state a cause of action for tortious interference with prospective business opportunities (*Hersh v. Cohen*, 131 A.D.3d 1117, 1119, 16 N.Y.S.3d 606 [2d Dep't 2015]). In *J.M. Bldrs & Assoc., Inc. v. Linder*, 67 A.D.3d 738, 889 N.Y.S.2d 60 [2d Dep't 2009], the plaintiff alleged the defendants interfered with its business and contract rights by "badmouthing" it to third parties including prospective customers and removed a sign from the property bearing its name. It was held the complaint failed to adequately plead that the defendants' actions were motivated solely by malice.

In this case, the Plaintiffs' cause of action in this regard are similarly defective. Plaintiffs' mere conjecture that his bid for a contract with the Village was not successful because of the alleged actions of Defendants, offered with no factual basis to support the allegations, was insufficient to state a cause of action for tortious interference with prospective contracts (*see Nero v. Fiore*, 165 A.D.3d 823, 825, 86 N.Y.S.3d 96 [2d Dep't 2018]); *Coughlin v. Neefus*, 153 A.D.2d 78, 81, 549 N.Y.S.2d 891 [3d Dep't 1990]; *Edward B. Fitzpatrick, Jr. Constr. Corp. v. County of Suffolk*, 138 A.D.2d 446, 449, 525 N.Y.S.2d 863 [2d Dep't 1988]). Further interference with a third-party, has not been sufficiently alleged, as the individual Defendants, except McGovern, are Officers of the Village.

In sum, the first cause of action alleging tortious interference with an existing or prospective contract by Leavy, Schroedel, Giacco, Wray, HVMC and McGovern is dismissed.

Second Cause of Action against Schroedel

The second cause of action alleges that Schroedel, acting outside the scope of his official duties, interfered with Plaintiffs' contract with Sentrael Contracting to remove stone and fill that was stored on a parcel in the Village. In the second cause of action, Plaintiffs similarly have failed to state a cause of action.

While it is alleged that Sentrael was under contract with SHLDC to perform stone removal work on certain parcels within the Village, and that Plaintiffs had a contract with Sentrael to perform some or all of the removal, what is absent is any allegation that Sentrael breached its contract with Plaintiffs due to improper influence from Schroedel. Schroedel and his firm HVMC were hired by SHLDC to manage the particular parcel. Plaintiffs allege Schroedel, acting in his capacity as head of HVMC, contacted the police on one occasion preventing Plaintiffs from removing the stone and fill from the property. Plaintiffs concludes as a result, Sentrael was unable to perform under its contract with SHLDC. There is no claim of any actual breach of the contract. As such the second cause of action is insufficient.

Third Cause of Action against McGovern, Schroedel, HVMC and Leavy

The third cause of action alleges Schroedel, HVMC, McGovern and Leavy interfered with Plaintiffs' ability to perform a contract with a third-party, namely Historic Hudson Valley. Plaintiffs stored equipment at the site of its' customer. A zoning violation was issued by the Village to the property owner for illegally storing equipment on the site. It was noted that Plaintiffs were illegally operating a landscaping business without a proper license. As a result, Plaintiffs removed the equipment to a new site, incurring storage costs for its' equipment.

Here again, Plaintiffs do not allege they were unable to fulfill their commitments under the contract with the third-party. Considering the issuance of code violations is within the authority of the Village, Plaintiffs do not contend that they were not in violation of the code, or that the violation was issued in error. The third cause of action is dismissed for the failure to state a cognizable cause of action as well as for the failure to serve a notice of claim.

Fourth Cause of Action against Leavy, Schroedel, HVMC and Giacco

The fourth cause of action alleges in the Spring of 2018, Leavy, Schroedel, HVMC and Giacco informed a prospective client that was seeking a contract with the Village, that she could not purchase materials from Plaintiffs in the fulfillment of the contract. To the extent Plaintiffs claims are being asserted against these individual Defendants based upon actions taken on behalf of the Village, the claims are dismissed for failure to comply with the General Municipal Law.

In addition, tortious interference with business relations “applies to those situations where the third party would have entered into or extended a contractual relationship with plaintiff but for the intentional and wrongful acts of the defendant” (*WFB Telecom. v. NYNEX Corp.*, 188 A.D.2d 257, 257, 590 N.Y.S.2d 460 [1st Dep’t 1992]). In such case the motive for the interference must be solely malicious, and the plaintiff has the burden of presenting factual allegations sufficient to set forth the claim. A claim for tortious interference with prospective business does not require a breach of an existing contract, but the party asserting the claim must meet a “more culpable conduct” standard (*NBT Bancorp. v. Fleet/Norstar Fin. Group*, 87 N.Y.2d 614, 621, 641 N.Y.S.2d 581 [1996]).

Here, the allegations in the complaint are insufficient to plead a cause of action of tortious interference with a prospective contract. Even affording the allegations in the complaint a liberal construction, Plaintiffs needed to support their claim with more than mere speculation” (*Influx Capital, LLC v. Pershin*, 186 A.D.3d 1622, 1624–25, 131 N.Y.S.3d 712 [2d Dep’t 2020]). Plaintiffs’ conclusive contention that Defendants were motivated by an agreement between the Village Defendants and McGovern are unsupported by factual information but based upon speculation and conjecture. In addition, where the offending party’s actions are motivated by

self-interest, as alleged in the complaint they cannot be characterized as solely malicious (*Law Offs. of Ira H. Leibowitz v. Landmark Ventures, Inc.*, 131 A.D.3d 583, 585–86 [2d Dep’t 2015]).

Fifth Cause of Action against Schroedel, SHLDC, HVMC, McGovern, Leavy, Giacco, Wray, Cortese Construction, Cortese and Earth Improvements

The fifth cause of action alleges a violation of the Donnelly (Anti-trust) Act by Schroedel, SHLDC, HVMC, McGovern, Leavy, Giacco, Wray, Cortese Construction, Cortese and Earth Improvements. “To state a claim under the Donnelly Act, a party must: (1) identify the relevant product market, (2) describe the nature and effects of the purported conspiracy, (3) allege how the economic impact of that conspiracy is to restrain trade in the market in question, and (4) show a conspiracy or reciprocal relationship between two or more entities. Merely claiming or even proving a form of monopoly does not demonstrate violation of the statute without concomitant establishment of the relevant market factors” (*Benjamin of Forest Hills Realty, Inc. v. Austin Sheppard Realty, Inc.*, 34 A.D.3d 91, 94, 823 N.Y.S.2d 79 [2d Dep’t 2006] [internal citations omitted]). The complaint must allege a conspiracy among Plaintiffs’ competitors (see *Neri’s Land Improvement, LLC v. J.J. Cassone Bakery, Inc.*, 65 A.D.3d 1312, 1315, 886 N.Y.S.2d 202 [2d Dep’t 2009]).

Here, the complaint fails to allege a violation of the Donnelly Act by the above-named Defendants. The gravamen of this cause of action is that some contracts were awarded by SHLDC without consistently using the bidding process or that available contracts were not made publicly known. Plaintiffs allege the Village Defendants, namely Schroedel, SHLDC, HVMC, Leavy, Giacco, and Wray, were predisposed to use Defendant Cortese Construction for certain projects. Further Plaintiffs states when bids were submitted, due to the vagueness in the RFP’s it was difficult to submit a competitive bid or that Defendants Earth Improvements and Cortese

submitted bids to disguise the fact that the Village would be awarding that bid to Cortese.

Plaintiffs assert the conspiracy to award bids to predetermined bidders restrained trade within the market. It is noted Plaintiffs allege notwithstanding the above, they were awarded other contracts.

Here, the fifth cause of action fails to state a cause of action. The alleged conspirators are the Village and its' officials, and McGovern, none of whom are competitors of Plaintiffs. Further, merely claiming something constitutes a relevant market for antitrust purposes is not enough. "For antitrust purposes, a relevant market consists of both a product market—those commodities or services that are reasonably interchangeable, and a geographic market—the area in which such reasonable interchangeability occurs" (*Benjamin of Forest Hills Realty, Inc. v. Austin Sheppard Realty, Inc.*, 34 A.D.3d 91, 95, 823 N.Y.S.2d 79 [2d Dep't 2006]). Plaintiffs have failed to sufficiently plead a relevant market. The fifth cause of action is dismissed.

Sixth Cause of Action for injunctive relief against Village and SHLDC

The sixth cause of action seeks to enjoin the Village and SHLDC from entering into any further contracts that do not comply with federal, state, or local bidding laws and from engaging in improper bidding practices. As stated above, "[t]he notice of claim requirements in ...CPLR § 9802 encompass causes of action for equitable relief" (*Mendik v. Incorporated Vil. of Lattintown*, 76 A.D.3d 616, 618, 906 N.Y.S.2d 599 [2d Dep't 2010]). Having failed to serve a timely notice of claim upon the Village, this cause of action is dismissed.

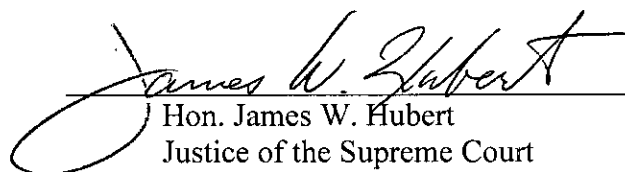
Accordingly, it is hereby

ORDERED, that Motion Seq. No. 1, Motion Seq. No 2, Motion Seq. No. 3 and the deemed cross-motion by Defendant McGovern are granted. The complaint is dismissed for failure to state a cause of action and the failure to comply with GML § 50-e; and it is further

ORDERED, that the Village Defendants shall serve a copy of this Order on all parties within thirty days of notice of entry; and it is further

The foregoing constitutes the Decision and Order of the Court.

Date: White Plains, New York
November 21, 2022


Hon. James W. Hubert
Justice of the Supreme Court