

Structure Point LLC v City of New York

2025 NY Slip Op 32365(U)

July 1, 2025

Supreme Court, New York County

Docket Number: Index No. 156884/2024

Judge: Carol Sharpe

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. CAROL SHARPE PART 52M

Justice

-----X

STRUCTURE POINT LLC,

Plaintiff,

- v -

THE CITY OF NEW YORK, CITY OF NEW YORK
DEPARTMENT OF PARKS AND RECREATION

Defendant.

-----X

INDEX NO. 156884/2024

MOTION DATE 09/27/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for DISMISSAL

The City of New York (“The City”) and the City of New York Department of Parks and Recreation (“Parks”) (collectively “defendants”), filed this pre-answer motion seeking dismissal with prejudice of the first, second, and third causes of action in the complaint pursuant to CPLR §3211(a)(1) and (a)(2) on the grounds that plaintiff failed to timely serve a notice of claim pursuant to GML § 50-e; dismissal with prejudice of the first and second causes of action in the complaint pursuant CPLR §3211(a)(1) and (a)(5) as it relates to the Astoria Pool subcontract on the grounds that the action cannot be maintained based on the documentary evidence and the applicable statute of limitations; and dismissal with prejudice of the complaint in its entirety pursuant to CPLR §3211(7)(a) on the grounds that all four causes of action fail to state a cause of action. Written opposition was filed. Plaintiff thereafter filed an amended complaint which defendants addressed in their reply and requested that their motion to dismiss be applied to the amended complaint. The motion to dismiss the amended complaint is granted in part and denied in part.

Structure Point LLC (“Structure Point”) commenced this action by the filing of the summons and complaint on July 29, 2024, and affidavits of service on August 8, 2024, after filing two notices of claim. The complaint alleges four causes of action and listed the sum sought for each action: tortious interference with contract (\$10,000.00); tortious interference with prospective business (\$10,000.00); prima facie tort (\$285,000.00), and breach of duty of good faith and fair dealing (\$10,000.00). (NYSCEF Doc. #1). Structure Point thereafter filed an amended complaint after defendant filed this motion to dismiss, and annexed certain documents to both the complaint and the amended complaint.

Structure Point, a woman owned construction business that specializes in masonry, alleges that the defendants wrongfully and tortiously interfered with its business relationships with defendants and the general contractors hired by Parks. Structure Point alleges that after completing two playground projects as a subcontractor for Parks’ general contractor, Mongiove Associates, Ltd. (“Mongiove”), and not getting paid for the work they performed, they reached out by email to Mongiove on November 7, 2021, and copied Christopher Adkins, Parks’ Agency Chief Contracting Officer, believing he might be able to assist them with getting paid by Mongiove. Mr. Adkins responded by email on November 8, 2021, inquiring whether Mongiove had been provided with the documents they had previously requested, and informed Structure Point that he would be reluctant to approve them as a subcontractor on future Parks projects if the complaints and delays persisted. Structure Point alleges that Mr. Adkins initiated an investigation with Parks’ Labor Law Investigation Unit (“LLIU”), because Parks received complaints from the Bricklayers and Allied Craftworkers Local 1, and the Construction and General Building Laborers’ Local 79, that Structure Point failed to pay its workers supplemental benefit payments from August to November of 2021 during the construction of the two playground projects. Structure Point alleges that

between April and early June of 2022, LLIU's investigator, John Gaweda, delayed the investigation by repeatedly claiming he did not receive the proof of payments made by Structure Point, although they provided him with copies of the checks multiple times, thereby preventing them from getting additional work. In a letter dated July 3, 2023, Eric Green, a LLIU investigator, notified Structure Point that the investigation was resolved by the receipt of Bricklayers and Allied Craftworkers Local 1 report on March 29, 2023, which notified LLIU that Structure Point paid the required restitution. The letter explained the factors affecting the delays in the investigation and stated that the findings would be forwarded to the Agency ACCO for further redress/consideration should Structure Point bid on contracts in the future.

Structure Point alleges that on January 13, 2023, it entered into a contract with AAH Construction Corporation ("AAH") as a subcontractor to perform work on the Astoria Pool, which was a Parks project. In early May 2023, AAH called and told Structure Point that they would have to use another subcontractor as Mr. Adkins would not approve the contract because of the ongoing LLIU investigation. Structure Point alleges that because they knew Mr. Adkins would not approve them for jobs, they did not bid on any future Parks projects, resulting in a catastrophic loss of business. Structure Point filed the first notice of claim regarding the Astoria Pool project on July 27, 2023.

On June 25, 2024, Structure Point filed a second notice of claim, alleging that Parks and Adkins tortiously interfered with prospective business relations, and with a contract Structure Point had with Brentwood Building Restoration Inc. ("Brentwood") to work on a project for FDNY Engine 159 ("FDNY"). On January 29, 2024, Structure Point was notified by email that they were denied the job because of the investigation by LLIU. Structure Point, in a responsive email, requested a further review of the decision because there was no pending investigation at that time.

(NYSCEF Doc. # 32). David Francis of FDNY responded stating “Standby-Researching Further.” Structure Point alleges that on March 28, 2024, it was informed by Brentwood that it would be moving forward without Structure Point, relying on the information it had received from FDNY regarding the pending investigation.

In support of its motion, defendants submitted, among other documentation, an affirmation by Christopher Adkins; an email message from plaintiff to the Queens Borough President’s Office; and an affirmation by Johnny Thomas, an employee with the Comptroller’s Office of the City of New York. Annexed to Mr. Adkins’s affirmation was an email chain forwarded to him on April 17, 2023, which began on April 7, 2023, with Yaaqob Yatzilel of Structure Point e-mailing John Harris of the Queens County Borough President’s Office, stating that: “Structure Point, a MWBE certified with NYC, has just lost the contract for Astoria Pool, ...” Mr. Thomas stated in his affirmation that his responsibilities include maintaining the notice of claim database, OASIS, and that his research revealed that Structure Point’s first notice of claim was served on August 1, 2023, and the second on June 25, 2024.

Defendants moved for dismissal of the claims relating to the Astoria Pool subcontract on the grounds that the notice of claim was filed after the statutory 90 days, and the action was commenced after the 1 year and 90-day statute of limitations. Defendants moved for dismissal of plaintiff’s cause of action for tortious interference with contract on the grounds that the City, as the property owner and beneficiary of the Astoria Pool contract, cannot commit tortious interference. Defendants moved for dismissal of the causes of action for tortious interference with business relations and prima facie tort on the grounds that the conduct by the defendant Parks was justified, not criminal or tortious in nature as plaintiff alleges, and does not amount to “disinterested malevolence.” (NYSCEF Doc. #26 ¶¶111 and 113) Defendants also moved for

dismissal of the cause of action for breach of duty of good faith and fair dealing as plaintiff was never party to any contract with the City.

In response to defendants' motion to dismiss, plaintiff filed an amended complaint in which they alleged two causes of action: tortious interference with prospective business relations, alleging that the delayed LLIU investigation interfered with their relationships with AAH (Astoria Pool) and Brentwood (FDNY); and prima facie tort, alleging that based on personal bias and disinterested malevolence, defendants intentionally inflicted harm by interfering with the Astoria Pool and FDNY contracts. Plaintiff further contends that the motion to dismiss should be denied as moot, or if considered, should still be denied as the amended complaint contains facts which were not addressed in the motion. Plaintiff further opposed the use of the email from Yaaqob Yatzilel to John Harris as evidence to support a CPLR §3211 motion to dismiss.

In its reply papers, defendants asked for the motion to dismiss to be applied to the amended complaint as the complaint did not add any new causes of action. The Court will apply the motion to the amended complaint and treat plaintiff's letter to the Court dated December 10, 2024 (NYSCEF Doc. #40), as a sur-reply, as the letter contained legal arguments in response to defendants' reply. *See, Sage Realty Corp. v. Proskauer Rose L.L.P.*, 251 A.D.2d 35, 38, 675 N.Y.S.2d 14 (1st Dept. 1998) ("the moving party has the option to decide whether its motion should be applied to the new pleadings."); *DiPasquale v. Sec. Mut. Life Ins. Co.*, 293 A.D.2d 394, 395, 740 N.Y.S.2d 626 (1st Dept. 2002) ("Since the insured did not attempt to defend his pleading but instead sought the amendment, we consider the insurers' motion to dismiss as directed to the proposed amendment").

GML § 50-i (1)(c) provides in pertinent that in an action for tort in which the city is a defendant, "the action or special proceeding shall be commenced within one year and ninety days

after the happening of the event upon which the claim is based.” As such, the one year and ninety days is the statute of limitations within which actions against The City must be commenced. *See generally, Campbell v. City of N.Y.*, 4 N.Y.3d 200, 791 N.Y.S.2d 880, 825 N.E.2d 121 (2005).

GML § 50-e (1)(a) provides in pertinent parts that a notice of claim shall be served “within ninety days after the claim arises.” GML § 50-e (5) permits, upon application and at the court’s discretion, the extension of time to serve a notice of claim; however, “[t]he extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation.” Late service of a notice of claim without leave of the court is a nullity. “Plaintiff’s service of an admittedly late notice of claim was a nullity (*McGarty v City of New York*, 44 AD3d 447, 448, 843 NYS2d 287 [2007]), and his failure to seek a court order excusing such lateness within the time limited for commencement of the action (General Municipal Law § 50-e [5]), i.e., within one year and 90 days after the happening of the accident (General Municipal Law § 50-i [1] [c]), requires dismissal of the action.” *Croce v. City of N.Y.*, 69 A.D.3d 488, 893 N.Y.S.2d 48 (1st Dept. 2010); *Bobko v. City of N.Y.*, 100 A.D.3d 439, 953 N.Y.S.2d 214 (1st Dept. 2012)(“plaintiff’s service of the notice of claim, however, was untimely by three days. This late service, without leave of court, was a nullity”); *Cassidy v. N.Y.C. Transit Auth.*, 2025 NY Slip Op 02849*2 (1st Dept.).

CPLR §3211(a) provides in pertinent parts that, “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1) a defense is founded upon documentary evidence; or 2) the court has not jurisdiction of the subject matter of the cause of action;... or 5) the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party,

payment, release, res judicata, statute of limitations, or statute of frauds;... or 7) the pleading fails to state a cause of action;...”

Pleadings which are the subject of a CPLR §3211 motion to dismiss are liberally construed, the court is to accept the facts as alleged in the complaint to be true, accord plaintiff “the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Leon v. Martinez*, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511 (1994). However, on a motion to dismiss pursuant to CPLR §3211 (a)(1), where allegations are contradicted by documentary evidence, they are not presumed to be true.” *Sterling Fifth Assocs. v. Carpentille Corp.*, 9 A.D.3d 261, 779 N.Y.S.2d 485 (1st Dept. 2004).

Under CPLR §3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law...” *Id.*, at 88, and “only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190 (2002). “Email correspondence can, in a proper case, suffice as documentary evidence for purposes of CPLR 3211(a)(1).” *Art & Fashion Grp. Corp. v. Cyclops Prod., Inc.*, 120 A.D.3d 436, 438, 992 N.Y.S.2d 7 (1st Dept. 2014). “In our electronic age, emails can qualify as documentary evidence if they meet the “essentially undeniable” test [citing *Art & Fashion Grp. Corp.*].” *Amsterdam Hosp. Grp., LLC v. Marshall-Alan Assocs., Inc.*, 120 A.D.3d 431, 433, 992 N.Y.S.2d 2 (1st Dept. 2014). “The motion should be granted where the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted.” (*Blackgold Realty Corp. v Milne*, 119 AD2d 512, 513, *affd* 69 NY2d 719.)” *Biondi v. Beekman Hill House Apartment, Corp.*, 257 A.D.2d 76, 81, 692 N.Y.S.2d 304 (1st Dept. 1999).

CPLR 3211(a)(5) provides for dismissal of an action if it is time barred. The initial burden is on the defendant to establish when the cause of action accrued. *Swift v. N.Y. Med. Coll.*, 25 A.D.3d 686, 687, 808 N.Y.S.2d 731 (2nd Dept. 2006). “Once this showing has been made, the burden shifts to the plaintiff to “aver evidentiary facts establishing that the action was timely or to raise an issue of fact as to whether the action was timely...” (*Lessoff v 26 Ct. St. Assoc., LLC*, 58 AD3d 610, 611, 872 NYS2d 144 [2009]; see *Lake v New York Hosp. Med. Ctr. of Queens*, 119 AD3d 843, 844, 989 NYS2d 365 [2014]). “The plaintiff has the burden of establishing that the statute of limitations has not expired, that it is tolled, or that an exception to the statute of limitations applies [internal citation omitted].” *Wells Fargo Bank, N.A. v. Burke*, 155 A.D.3d 668, 669-670, 64 N.Y.S.3d 228 (2nd Dept. 2017).

Here, it is essentially undeniable that Yaaqob Yatzilel of Structure Point sent an email to John Harris of the Queens County Borough President’s Office acknowledging that it had lost the subcontract for Astoria Pool. This Court finds that there is undeniable documentary evidence - through that email - that plaintiff was aware that they lost the Astoria Pool subcontract on April 7, 2023, that the time frame within which to file the notice of claim and to commence the action started then, and the 90 days ran on July 7, 2023. This Court does not have jurisdiction over any claims in the two causes of action in the amended complaint regarding the Astoria Pool subcontract as the documentary evidence established that the notice of claim was late, and the action was commenced after the 1 year and 90-day statute of limitations. Defendant is therefore entitled to dismissal of any claims regarding the Astoria Pool subcontract.

“In assessing a motion under CPLR §3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*Rovello v Orofino Realty Co., supra*, at 635) and “the criterion is whether the proponent of the pleading has a cause

of action, not whether he has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275; *Rovello v Orofino Realty Co.*, *supra*, at 636).” *Leon v. Martinez*, 84 N.Y.2d at 88.

As for the FDNY subcontract with Brentwood, pursuant to their submission (NYSCEF Doc. #32), Structure Point became aware on January 29, 2024, that FDNY was instructed not to use them for the project because of the pending investigation. Yaaqob Yatzilel was on the email chain when the inquiry was made as to why Structure Point had been rejected. Marina Kim, of ZHL Group, responded in the same e-mail chain that “there’s no any investigations, violations, or liens against his company. Can you please review the company again as it might be a different company under investigation?” The response from David Francis of FDNY was, “Standby – Researching further.” Structure Point alleges that on March 28, 2024, Brentwood ultimately decided they could not wait any longer and notified Structure Point they would be making alternative arrangements for the project. Giving every possible favorable inference to plaintiff and accepting the facts stated as alleged to be true for the purpose of the CPLR §3211 motion, the notice of claim for the FDNY contract was timely filed.

Defendants moved to dismiss, pursuant to CPLR 3211 (a)(7), the claim of breach of duty of good faith and fair dealing in the complaint, and to the extent that such claims may be intertwined in the claim in the amended complaint, that motion is granted as there was no contract between the defendants and plaintiff. *Am.-European Art Assocs. v. Trend Galleries*, 227 A.D.2d 170, 171, 641 N.Y.S.2d 835 (1st Dept. 1996)(“duty of good faith and fair dealing by defendants...was also properly dismissed for lack of a valid and binding contract from which such a duty would arise.”); *Kim v. Francis*, 184 A.D.3d 413, 414, 125 N.Y.S.3d 411 (1st Dept. 2020).

“To state a claim for tortious interference with prospective business relations, a plaintiff must allege (1) business relations with a third party, (2) the defendant’s interference with those

business relations, (3) the defendant acted for the sole purpose of harming plaintiff or used wrongful means, and (4) injury to the business relationship (*see Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 108, 890 N.Y.S.2d 16 [1st Dept 2009], *lv denied* 15 NY3d 703, 933 N.E.2d 216, 906 N.Y.S.2d 817 [2010]). For this cause of action it must be affirmatively alleged that the defendant's conduct was motivated solely by malice or to inflict injury by unlawful means going beyond mere self-interest or other economic considerations (*see Shared Communications Servs. of ESR, Inc. v Goldman Sachs & Co.*, 23 AD3d at 163).” *Valkyrie AI LLC v. PriceWaterhouseCoopers LLP*, 233 A.D.3d 460, 462, 221 N.Y.S.3d 101 (1st Dept 2024); *Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88, 109, 890 N.Y.S.2d 16 (1st Dept. 2009). “The implication is that, as a general rule, the defendant's conduct must amount to a crime or an independent tort.” Conduct that is not “criminal or tortious will generally be “lawful” and thus insufficiently “culpable” to create liability for interference with prospective contracts or other nonbinding economic relations.” *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 190, 785 N.Y.S.2d 359, 818 N.E.2d 1100 (2004). Where the alleged “conduct was neither criminal or independently tortious, they cannot recover unless an exception to the general rule is applicable. Such an exception has been recognized where a defendant engages in conduct “for the sole purpose of inflicting intentional harm on plaintiffs” (*NBT Bancorp, Inc. v Fleet/Norstar Fin. Group Inc.*, 215 A.D.2d 990, 628 N.Y.S.2d 408 [3d Dept 1995], *affd* 87 N.Y.2d 614, 664 N.E.2d 492, 641 N.Y.S.2d 581 [1996]). *Id.* “[C]onduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship.” *Id.*, at 192. Here, plaintiff has not alleged that defendants’ actions were criminal.

“The time on that claim begins to run when the defendant performs the action (or inaction) that constitutes the alleged interference. It does not commence anew each time the plaintiff is unable to enter into a contract, unless the defendant takes some further step. ...Even where, as here, the claim is based entirely on the assertion that the defendants’ action (or inaction) had a negative effect on contractual relationships that plaintiff might later have had, the subsequent injuries alleged do not affect the timeliness issue (*Johnson v Nyack Hosp.*, 891 F Supp 155, 166 [SD NY 1995]).” *Thome*, 70 A.D.3d 88, 108. This further supports that the statute of limitation relative to the Astoria Pool contract expired before the action was commenced or the notice of claim was filed.

“The requisite elements of a cause of action for prima facie tort are (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 (*Curiano v Suozzi*, 63 NY2d 113, 117; *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 332). A critical element of the cause of action is that plaintiff suffered specific and measurable loss, which requires an allegation of special damages[internal citation omitted].” *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 142-143, 490 N.Y.S.2d 735, 480 N.E.2d 349 (1985). Plaintiff must allege special damages. *Id.* Prima facie tort may be pled as an alternative relief. *Id.*, at 43 (“where a traditional tort remedy exists, a party will not be foreclosed from pleading, as alternative relief, a cause of action for prima facie tort.”).

Under CPLR 3211(a)(7), the court’s role is to determine whether the facts as alleged fit within a cognizable legal theory,” and “not to determine whether the plaintiff will ultimately be successful on the claim [internal citations omitted].” *CSC Holdings, LLC v. Samsung Elecs. Am., Inc.*, 192 A.D.3d 556, 2021 NY Slip Op 01717, 146 N.Y.S.3d 17 (1st Dept. 2021). The amended

complaint sufficiently pled the causes of action for tortious interference with prospect business relations and prima facie tort. As such, defendants' motion to dismiss the two causes of action in the amended complaint regarding the FDNY subcontract are denied. It is hereby

ORDERED, that defendants' motion to dismiss claims relating to the Astoria Pool subcontract in plaintiff's amended complaint is granted; it is further

ORDERED, that defendants' motion to dismiss claims relating to the FDNY subcontract in plaintiff's amended complaint is denied; it is further

ORDERED, that City shall serve a copy of this Decision and Order with Notice of Entry upon all parties and on the Clerk of the Court, within thirty (30) days of the date herein, and file proof of said service; and it is further

ORDERED, that service of this Decision and Order upon the Clerk of the Court shall be made in hard-copy format if this action is a hard-copy matter or if it is an e-file case, shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-filing" page on the court's website).

This constitutes the Decision and Order of the Court.

E N T E R:

July 1, 2025

DATE


HON. CAROL SHARPE, J.S.C.
HON. CAROL SHARPE
J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: