SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable Thomas Rademaker, J.S.C.

TRIAL/IAS, PART 14
NASSAU COUNTY

LOOKS GREAT SERVICES, INC.,

Plaintiff(s),

-against-

TWEED ROOSEVELT and THE THEODORE ROOSEVELT ASSOCIATION,

Defendant(s).

Index No. 608337/2022
Motion Seq. No.: 002
Motion Submitted: 5/16/2023

DECISION AND ORDER

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, including e-filed documents/exhibits numbered 19 through and including 32, this motion is decided as follows:

The Defendants move the Court for an Order pursuant to CPLR 3211(a)(1) and (7), dismissing the Amended Complaint, dated October 18, 2022.

The Plaintiff's Amended Complaint provides that the Defendants knowingly and intentionally interfered with its contract with the National Park Service ("National Park Service") to remove a valuable and historic Copper Beech Tree at Sagamore Hill in Nassau County, New York (the "Beech Tree"). This alleged interference caused the National Park Service to terminate the Plaintiff's contract, resulting in significant financial losses to the Plaintiff. (NYSCEF Doc. 21, Plaintiff's Amended Complaint, paragraph 1.) The Amended Complaint contains three causes of

action which include tortious interferences with contract, tortious interference with a business relationship, and conversion.

The Plaintiff is a Delaware corporation with its principal place of business located at 7 Lawrence Hill Road, #2, Huntington New York. The Defendant Theodore Roosevelt Association is an IRC § 501[c][3] charitable organization located in Oyster Bay, New York. The Defendant Tweed Roosevelt is described in both the Amended Complaint and in the Defendants' moving papers as a great grandson of Theodore Roosevelt, the 26th President of the United States ("President Roosevelt").The Sagamore Hill National Historic Site ("Sagamore Hill") was President Roosevelt's home during his lifetime, and is currently a historical site under the supervision of the National Park Service.

The parties agree that President Roosevelt purchased and planted several Copper Beech trees at Sagamore Hill. Significantly for this case, the Beech Tree planted by President Roosevelt that was located in front of the home became diseased and required removal.

The National Park Service issued Solicitation No. 0040424577 for the removal of the Beech Tree, with quotations due on March 13, 2019 (the "RFQ"). Specifically, the scope of work contained within the RFQ provided that the contractor was required to "Cut and Remove Copper Beech Tree from site." (NYSCEF Doc 21, Amended Complaint, paragraphs 13-14). The Plaintiff responded to this bid with a proposal to remove the Beech Tree for the fee of one cent ($ 0.01). The Plaintiff contends that it offered such a low fee for removal of the tree because it intended to "take possession of the tree and utilize the wood to craft historic goods." (NYSCEF Doc 21, Amended Complaint, paragraphs 2) The National Park Service discontinued its relationship with Plaintiff when there was objection to the Plaintiff's proposed commercial use of the wood to make gift items.

It is the Plaintiff's contention that Defendants used their "status and political capital" to influence the Plaintiff's performance under the contract so that the Defendants could themselves use the Plaintiff's business idea to manufacture craft items from "a historic tree that was planted by Tweed's ancestor." (NYSCEF Doc 21, Amended Complaint, paragraphs 2) .

It is undisputed between the parties that on or about August 19, 2019, the Beech Tree was removed by another provider. However, the Plaintiff contends that the contract for removal of the tree was terminated in "bad faith and was based on the Defendants' intentional and improper interference with the Contract." (NYSCEF Doc 21, Amended Complaint, paragraph 43). Ultimately, the Plaintiffs argue that the Defendants "unlawfully and improperly usurped [Plaintiff's] business plan to monetize the tree for their ill-conceived benefit."

The Plaintiff filed its Summons and Complaint with the Court on June 24, 2022, and the Defendants responded with their motion to dismiss (motion sequence 001), which had been withdrawn by mutual agreement of the parties to permit the Plaintiff to file its Amended Complaint, and also extended the Defendants' time to answer, move to dismiss or otherwise respond to the Amended Complaint. (NYSCEF Doc. 18, Stipulation, dated November 3, 2022.) The Defendants filed this motion to dismiss the Amended Complaint on December 7, 2022.

In reviewing a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the Court is to accept all facts alleged in the complaint as being true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (see *Delbene v. Estes*, 52 AD3d 647 [2nd Dept. 2008]; see also *511 W.232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2D 144 [2002]). Pursuant to CPLR § 3026, the complaint is to be liberally construed. (*Leon v. Martinez*, 84 NY2d 83 [1994]). It is not the

Court's function to determine whether plaintiff will ultimately be successful in proving the allegations. (*Aberbach v. Biomedical Tissue Services*, 48 AD3d 716 [2nd Dept. 2008]; see also *EBCI, Inc. v. Goldman Sachs & Co.*, 5 NY3D 11 [2005]). The pleaded facts and any submissions in opposition to the motion are accepted as true and given every favorable inference (*see 511 W. 323nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d at 151-152; *Dana v. Malco Realty, Inc.*, 51 AD3d 621 [2d Dept 2008]; *Gershon v. Goldberg*, 30 AD3d 372, 373 [2d Dept 2006]). However, a court may consider evidentiary material submitted by a defendant in support of a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7) (*see* CPLR § 3211[c]; *Sokol v. Leader*, 74 AD3d at 1181). "When evidentiary material is considered" on a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), the criterion is whether the plaintiff has a cause of action, not whether they have properly stated one, and unless it has been shown that a material fact as claimed is not a fact at all or that no significant dispute exists, the dismissal should not be granted (*Guggenheimer v. Ginzburg*, 43 NY2d at 275; *see Sokol v. Leader*, 74 AD3d at 1182).

Under CPLR §3211 (a) (7), a party may move for dismissal of one or more causes of action on the ground that the pleading fails to state a cause of action. On such a motion, the Court is concerned with whether the plaintiff has a cause of action and not whether he has properly stated one. (Rovello v. Orofino Realty Co., 40 NY2d 633, 636 [1976]). "However imperfectly, informally or even illogically the facts may be stated, a complaint, attacked for insufficiency, is deemed to allege 'whatever can be implied from its statements by fair and reasonable intendment'" (Foley v D'Agostino, 21 AD2d 60, 65 [1st Dept 1964]. "[W]e look to the substance [of the pleading] rather than to the form" (id.). The court will liberally construe the pleadings in plaintiff's favor, accept the facts as true, and determine whether the facts alleged fit within any cognizable theory. (Cron v.

Hargro Fabrics, 91 NY2d 362, 366[1998]; see also *Colella v City of NY*, 2020 NY Slip Op 31999[U], *1-2 [Sup Ct, NY County 2020])

From the Defendants'perspectives, the Amended Complaint describes a series of events in which the National Park Service rejected the Plaintiff's plan to remove a diseased Beech Tree because the Plaintiff's ultimate business plan would have violated federal regulations that prohibit a private business concern from obtaining government property that has commercial value. The Defendants were never in privity of contract with the Plaintiff, and the United States Court of Federal Claims dismissed the Plaintiff's contractually based claims against the United States Government. (*Looks Great Services, Inc. v the United States*, October 17, 2019, United States Court of Federal Claims, Wheeler, J. Docket No. 19-937C, Order and Opinion).

In *Looks Great Services v. The United States*, Supra, the Plaintiff filed a two-count complaint with the Federal Claims Court in which the Plaintiff asked the Court to enjoin the National Park Service from allowing a third-party contractor to remove and retain the Beech Tree, and alleged that the National Park Service had taken the Beech Tree, which the Plaintiff contends is a taking of its property without just compensation in violation of the Fifth Amendment. In ruling against the Plaintiff, the Federal Court of Claims observed that the federal case before it "presents a suitable law school exam question." (*Looks Great Services, Inc. v the United States*, Supra, at page 1).

The Federal Claims Court rejected both the Plaintiff's application for equitable relief and its takings clause claim. The Federal Claims Court determined that "[s]pecifically, the Court may grant equitable relief in (1) bid protests pursuant to 28 U.S.C. § 1491(b)(2), or (2) in cases where the claim for equitable relief is related to a claim for monetary relief pending before this court. In other words, in cases not involving bid protests the Court of Federal Claims may only grant equitable relief when

"it is tied and subordinate to a money judgment." (Looks Great Services, Inc. Supra, at page 3 [cites omitted]).

In rejecting the Plaintiff's application for injunctive relief, the Federal District Claims Court determined that the Plaintiff's application to enjoin the removal of the tree could not be considered a bid protest, since the contract was already awarded to the Plaintiff, and then was terminated by the National Parks Service for convenience. A termination for convenience dispute does not involve objections to a solicitation, a proposed award, or an award, and must be considered a contract dispute, in which the contractor must submit a written claim to the contracting officer within six years of the accrual of said claim. The Federal Claims Court denied the Plaintiff's request for injunctive relief under its bid protest regulations, and determined that the action was not ripe as a breach of contract claim because the Plaintiff failed to seek a final agency determination from the contracting officer at the National Park Department. (*Looks Great Services, Inc. v the United States*, October 17, 2019, United States Court of Federal Claims, Wheeler, J. Docket No. 19-937C, Order and Opinion, page 4-5 [cites omitted]).

With respect to the takings clause analysis, the Federal Claims Court determined that the Plaintiff did not have a cognizable interest in the Beech Tree and that the National Parks Service did not act in violation of the Takings Clause. Significantly, in considering the same common nucleus of operative facts, the Federal District Claims Court determined that:

> The National Park Service awarded the contract to remove the decaying copper beach tree to [Plaintiff] on March 21, 2019. In the contract, the Government was simply paying for a service: the removal of a diseased tree. It was not until March 29, 2019, that [Plaintiff] revealed its intention to realize "post work profits" from its tree removal; that is, to resell the wood for profit. In fact, [Plaintiff] rationalized its low bid to the contracting officer prior

> to its award of the contract. [Plaintiff] explained that the tree had "historic and communal value," and that removing it would be "an honor." These pre-award representations do not indicate that [Plaintiff] intended to profit from a decaying tree after its removal. Rather, these statements make [Plaintiff's] actions appear to be more charitable in nature and grounded in national historical pride and civic duty. (Looks Great Services, Inc. Supra, at 6 Citations omitted)

The Defendants contend that all three of the Plaintiff's causes of action must be dismissed. The Defendants reject the Plaintiff's claim that it had any ownership or possessory interest in the Beech Tree, and accordingly could not establish a claim for conversion. The Defendants further contend that the Plaintiff's claims for tortious interference with contract and tortious interference with business relation claims must fail because the rejection of the Plaintiff's contract with the National Park Service was sustained by the Federal Claims Court.

As determined by the Federal Claims Court, it is readily apparent that the National Parks Service acted within its authority when rescinding its contract with Plaintiff, and that the Defendants herein, who never contracted with the Plaintiff and are not in privity with the Plaintiff regarding the underlying contract, cannot be held liable for interfering with the Plaintiff's non-existing property rights.

It was well within the discretion of the National Parks Service to prevent the potential commercial exploitation of the historic remains of the Beech Tree.The Plaintiff never held a property interest in the Beech Tree which could be converted by the Defendants, and that the Defendants cannot possibly be held liable for interfering with the deliberative process of the National Parks Service, as it was well within the discretion of that agency to deny Plaintiff access to the Beech Tree remnant.

In following the Federal Claims Court determination that the National Park Service acted properly when terminating the Plaintiff's contract for convenience, the Court herein does not reach the question of whether or not the Defendants exerted "undue influence" over the National Park Service though "political influence" – an allegation which the Amended Complaint couches in "upon information and belief language," but does not otherwise support.

This case, which considers sophisticated federal and state questions of law, recalls an ancient question regarding the property rights over personalty. (Cf Pierson v Post, 3 Cai R. 175 [Sup. Ct. New York, 1805][Hunter not entitled to remains of fox based upon his pursuit and mortal wounding of said animal]). To borrow from *Pierson*, the Plaintiff in this matter "manifests no title" in the tree, and therefore cannot maintain actions for common law conversion or tortious interference with a contractually derived right or business relationship. (Id.)

Accordingly, upon careful review of the papers submitted to the Court both in support of and in opposition to the Defendants' motion, including the supporting exhibits, it is hereby

ORDERED that the Defendants' motion for Dismissal of the Complaint with prejudice is **GRANTED.**

This constitutes the Decision and Order of the Court.

Dated: May 23, 2023
Mineola, N.Y.

Hon. Thomas Rademaker, J. S. C.