NO. NNH-CV-13-6040558 : SUPERIOR COURT

SHORELINE SHELLFISH, LLC, ET AL : J.D. OF NEW HAVEN

VS. : AT NEW HAVEN

TOWN OF BRANFORD, : APRIL 8, 2014

Memorandum of Decision in Re: Motion to Strike, #109

The defendant has filed a motion to strike all three counts of the plaintiff's complaint on legal sufficiency grounds. Specifically, the defendant seeks to have the court strike count one sounding in breach of contract. The defendant claims that the purported contract was invalid. The defendant seeks to strike count two which sounds in promissory estoppel, arguing that estoppel does not apply to municipalities. Lastly, the defendant argues count three should be stricken on the ground that CUTPA does not apply to municipalities. For the reasons that follow, the court denies so much of the motion which seeks to strike counts one and two and grants the motion to strike as to count three.

FACTS

This action was commenced by service of writ, summons, and complaint on the clerk of the defendant town of Branford on June 25, 2013. The plaintiff, Shoreline Shellfish, LLC, filed a two count complaint on August 5, 2013. On October 18, 2013, the plaintiff filed a motion to add a party[1] and to amend its complaint which was granted by the court, *Blue, J.*, on November 4, 2013. The amended complaint is the operative complaint for purposes of the present motion.

In the amended complaint, the plaintiff alleges the following relevant facts. The plaintiff

[1] The plaintiff added Shoreline Shellfish, LTD, the general partner of the plaintiff. The plaintiff states that Shellfish Partners, LTD, as general partner, has an interest in the present action. Although both entities are parties to the present action, they will be referred to collectively as the plaintiff in this memorandum.

entered into an agreement with the Branford Shellfish Commission (the commission), an agent of the defendant, permitting the plaintiff to conduct shoreline exploration to locate and commercially exploit shellfish beds. The agreement granted the plaintiff a right of first refusal with respect to long-term leases on several particular shellfish beds. The right of first refusal was approved by the commission on May 10, 2011. Subsequently, a different company, Mid-State Shellfish, LLC (Mid-State), filed an application with the commission to lease several specific shellfish beds, including bed 511. Bed 511 was one of the lots subject to the plaintiff's right of first refusal.

The plaintiff further alleges that at a meeting on June 12, 2012, the commission approved leases for Mid-State on all of the beds except for bed 511, which the commission allegedly recognized was still subject to the plaintiff's right of first refusal. One month later, the plaintiff applied to lease several beds, including bed 511, pursuant to its rights under the agreement. The commission approved leases on all beds except for bed 511. On October 16, 2012, the commission passed a motion to lease bed 511 to Mid-State. The lease was approved. The plaintiff subsequently filed the present action to enforce its rights under the agreement. The amended complaint contains three counts. Count one is a claim for damages on breach of contract grounds. Count two is for promissory estoppel. Count three is a claim for unfair trade practices in violation of the Connecticut Unfair Trade Practices Act (CUTPA).

The defendant filed the present motion to strike on November 12, 2013, together with a memorandum of law and exhibits.[2] The plaintiff filed an objection on January 23, 2014, to

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[2] Both parties submitted a number of exhibits to their respective memoranda. Connecticut courts have held repeatedly that "[i]n ruling on a motion to strike, the court is limited to the facts alleged in the complaint." (Internal quotation marks omitted.) *Faulkner* v.

which the defendant replied on January 28, 2014. The matter was heard at the short calendar on February 24, 2014.

DISCUSSION

"A motion to strike shall be used whenever any party wishes to contest: (1) the legal sufficiency of the allegations of any complaint, counterclaim or cross claim, or of any one or more counts thereof, to state a claim upon which relief can be granted . . . ." Practice Book § 10-39 (a). "The purpose of a motion to strike is to contest . . . the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can by granted." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *Alves*, 262 Conn. 480, 498, 815 A.2d 1188 (2003). "A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court." (Internal quotation marks omitted.) *Simms* v. *Seaman*, 308 Conn. 523, 529, 69 A.3d 880 (2012). "A motion to strike admits all facts well pleaded; it does not admit legal conclusions or the truth or accuracy of opinions stated in the pleadings." (Emphasis omitted; internal quotation marks omitted.) *Faulkner* v. *United Technologies Corp.*, 240 Conn. 576, 588, 693 A.2d 293 (1997). "A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." (Internal quotation marks omitted.) *Santorso* v. *Bristol Hospital,* 308 Conn. 338, 349, 63 A.3d 940 (2013).

United Technologies Corp., 240 Conn. 576, 580, 693 A.2d 293 (1997). "A speaking motion to strike is one improperly importing facts from outside the pleadings." *Mercer* v. *Cosley*, 110 Conn. App. 283, 292 n.7, 955 A.2d 550 (2008). Because this is a motion to strike, the court will not consider any of these documents. "It is well established that a motion to strike must be considered within the confines of the pleadings and not external documents . . . ." *Zirinsky* v. *Zirinsky*, 87 Conn. App. 257, 268 n.9, 865 A.2d 488, cert. denied, 273 Conn. 916, 871 A.2d 372 (2005).

"[I]t is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted. . . . The role of the trial court in ruling on a motion to strike is to examine the [complaint], construed in favor of the [plaintiff], to determine whether the [pleading party has] stated a legally sufficient cause of action. (Citation omitted; internal quotation marks omitted.) *Coe* v. *Board of Education*, 301 Conn. 112, 116-17, 19 A.3d 640 (2011). "[P]leadings are to be construed broadly and realistically, rather than narrowly and technically . . . ." (Internal quotation marks omitted.) *Downs* v. *Trias*, 306 Conn. 81, 92, 49 A.3d 180 (2012). "[Courts] take the facts to be those alleged in the complaint . . . and . . . construe the complaint in the manner most favorable to sustaining its legal sufficiency." (Internal quotation marks omitted.) *Santorso* v. *Bristol Hospital,* 308 Conn. 338, 349, 63 A.3d 940 (2013). "[W]hat is necessarily implied [in an allegation] need not be expressly alleged." (Internal quotation marks omitted.) *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, 295 Conn. 240, 252, 990 A.2d 206 (2010).

The defendant argues that count one alleging breach of contract is legally insufficient because the plaintiff's purported right of first refusal was never properly authorized. The defendant also argues that counts two and three alleging promissory estoppel and violations of CUTPA, respectively, are legally insufficient because such claims cannot be brought against a municipality.

I

BREACH OF CONTRACT

The defendant first argues that the plaintiff's first count seeking damages for breach of

contract is legally insufficient. "If a complaint contains the necessary elements of a cause of action, it will survive a motion to strike." *Malizia* v. *Anderson*, 42 Conn. Supp. 114, 116, 602 A.2d 1076 (1991). "The elements of a breach of contract action are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages." (Internal quotation marks omitted.) *300 State, LLC* v. *Hanafin*, 140 Conn. App. 327, 330, 59 A.3d 287 (2013). "[A] bald assertion that the defendant has a contractual obligation, without more, is insufficient to survive a motion to strike." (Internal quotation marks omitted.) *Commissioner of Labor* v. *C.J.M. Services, Inc.*, 268 Conn. 283, 293, 842 A.2d 1124 (2004). "When a plaintiff pleads a cause of action for breach of contract by setting forth a specific contractual obligation and alleges that it has not been met, this is sufficient to sustain a motion to strike. It is not necessary to allege specific terms of the contract." *Golek* v. *St. Mary's Hospital*, Superior Court, judicial district of Waterbury, Docket No. CV 08 5007118 (August 22, 2008, *Roche, J.*). "Nevertheless, our Supreme Court has determined that a breach of contract claim should not be stricken if a plaintiff has set forth a specific contractual obligation and alleged that it had not been met." *Szynkowicz* v. *Boniauto–O'Hara*, Superior Court, judicial district of Waterbury, Docket No. CV-12-6016649-S (July 26, 2013, *Zemetis, J.*), quoting *Commissioner of Labor* v. *C.J.M. Services, Inc.*, supra, 268 Conn. 293.

The defendant's argument regarding the plaintiff's breach of contract claim is essentially that a right of first refusal was not validly granted to the plaintiff. First, the defendant argues that the right of first refusal was subject to a condition precedent[3] that has not been met, and therefore

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[3] The defendant claims that the agreement was contingent upon the repeal or revision of Branford Town Ordinance 88-8. See Def.'s Mem. Supp. Mot. Strike, 5.

the plaintiff has no rights with respect to bed 511. Second, the defendant argues that the plaintiff has not satisfied a relevant provision of the Branford town ordinance. Specifically, the plaintiff failed to secure approval of the agreement either by the board of selectmen and/or at the representative town meeting. Thus, the defendant argues no right of first refusal was ever established and asks the court to strike count one.

Far from making "[a] bald assertion that the defendant has a contractual obligation"; *Commissioner of Labor* v. *C.J.M. Services, Inc.*, supra, 268 Conn. 293; the plaintiff has made specific allegations in count one of the amended complaint that are sufficient to survive the defendant's motion to strike. The plaintiff has alleged that it entered into an agreement with the commission permitting the plaintiff to exercise a right of first refusal on certain shellfish beds, including bed 511. The plaintiff further alleged that the defendant failed to honor that contractual obligation when the commission ignored the plaintiff's lease application and instead leased bed 511 to the defendant. Having "set forth a specific contractual obligation and alleged that it had not been met"; *Szynkowicz* v. *Boniauto–O'Hara*, supra, Superior Court, judicial district of Waterbury, Docket No. CV-12-6016649-S; the plaintiff has alleged a legally sufficient claim for breach of contract.

The defendant's contention that a contractual contingency has not been met is irrelevant on a motion to strike. "Whether the terms of the contract support that allegation is a factual question to be determined by the fact finder and, therefore, is not at issue when the trial court considers a motion to strike." *Commissioner of Labor* v. *C.J.M. Services, Inc.*, supra, 268 Conn. 293. Further, the issue of whether the underlying agreement is invalid is not a matter of legal sufficiency. When considering legal sufficiency, the court must admit "all well-pleaded facts and

those facts necessarily implied from the allegations"; *Coe* v. *Board of Education*, supra, 301 Conn. 116-17; and "construe the[m] . . . in the manner most favorable to sustaining . . . legal sufficiency"; (Internal quotation marks omitted.) *Santorso* v. *Bristol Hospital,* supra, 308 Conn. 349; so that, if believed, they support a viable cause of action. Because the plaintiff's allegations support a viable cause of action sounding in breach of contract, the defendant's motion to strike count one is denied.

II

PROMISSORY ESTOPPEL

The defendant next challenges the legal sufficiency of the plaintiff's promissory estoppel count. The defendant argues that, as a municipality, it is not susceptible to claims of promissory estoppel. "In its general application, we have recognized that [t]here are two essential elements to an estoppel—the party must do or say something that is intended or calculated to induce another to believe in the existence of certain facts and to act upon that belief, and the other party, influenced thereby, must actually change his position or do some act to his injury which he otherwise would not have done." (Internal quotation marks omitted.) *Blackwell* v. *Mahmood*, 120 Conn. App. 690, 695, 992 A.2d 1219 (2010). "It is axiomatic that to maintain such a claim, it is not enough that a promise was made; reasonable reliance thereon, resulting in some detriment to the party claiming the estoppel, also is required." *Ferrucci* v. *Middlebury*, 131 Conn. App. 289, 305, 25 A.3d 728, cert. denied, 302 Conn. 944, 31 A.3d 382 (2011).

In certain circumstances, municipalities are exempted from claims of promissory estoppel. "[I]n general, estoppel may not be invoked against the government or a public agency functioning in its governmental capacity." (Internal quotation marks omitted.) *Dupuis* v.

Submarine Base Credit Union, Inc., 170 Conn. 344, 353, 365 A.2d 1093 (1976). The Supreme Court held that the general rule is that "a town cannot be estopped by the *unauthorized* acts of its agents from enforcing its zoning laws." (Emphasis added.) Id., 352. "The general rule is qualified, however, in that one may invoke the doctrine where his action has been induced by the conduct of municipal officers and where he would be subjected to a substantial loss if the municipality were permitted to negate the acts of its agents." Id., 353.

The Supreme Court has explained this qualification in subsequent opinions. "[I]n order for a court to invoke municipal estoppel,[4] the aggrieved party must establish that: (1) an authorized agent of the municipality had done or said something calculated or intended to induce the party to believe that certain facts existed and to act on that belief; (2) the party had exercised due diligence to ascertain the truth and not only lacked knowledge of the true state of things, but also had no convenient means of acquiring that knowledge; (3) the party had changed its position in reliance on those facts; and (4) the party would be subjected to a substantial loss if the municipality were permitted to negate the acts of its agents." (Internal quotation marks omitted.) *Russo* v. *Waterbury*, 304 Conn. 710, 735, 41 A.3d 1033 (2012). "[A] municipality can be estopped by erroneous acts of its officers . . . as long as those officers act within the scope of their authority." *West Hartford* v. *Rechel*, 190 Conn. 114, 121, 459 A.2d 1015 (1983). "The courts have consistently held that the general rule applicable to the invocation of the doctrine of estoppel against municipal corporations should be limited and invoked (1) only with great caution, (2) only when the resulting violation has been unjustifiably *induced* by an agent having

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[4] "[A] claim of municipal estoppel is an action for promissory estoppel against a municipality . . . ." *Levine* v. *Sterling*, 300 Conn. 521, 534 n. 11, 16 A.3d 664 (2011).

authority in such matters, and (3) only when special circumstances make it highly inequitable or oppressive to enforce the . . . regulations." (Emphasis in original.) *Dupuis* v. *Submarine Base Credit Union, Inc.*, supra, 170 Conn. 354.

In the amended complaint, the plaintiff's allegations sufficiently pleaded the essential elements of a general cause of action sounding in promissory estoppel. Specifically, the plaintiff pleaded that the commission promised to grant the right of first refusal, that the plaintiff reasonably relied upon this promise, that the plaintiff acted in reliance upon this promise, and that the plaintiff has been thereby injured. In addition, the plaintiff has properly alleged the elements necessary to invoke municipal estoppel. With respect to authorization of the commission, the plaintiff alleges that the defendant, through the commission which had the authority to regulate and administer shellfisheries, promised and subsequently refused to honor the right of first refusal. The plaintiff also alleged that the chairman of the board of the commission made this promise as "a duly authorized agent of the [d]efendant. See Pl.'s Compl., ¶ 23. Another of the plaintiff's allegations–that the commission's failure to honor its promise denied the plaintiff of revenue from bed 511 it would otherwise have enjoyed over a ten year period–necessarily implies that the plaintiff "[will] be subjected to a substantial loss if the municipality [is] permitted to negate the acts of its agents." *Russo* v. *Waterbury*, supra, 304 Conn. 735. In light of these allegations, it appears the plaintiff's second count is legally sufficient and, therefore, should survive the defendant's motion to strike.

III

CUTPA

The final issue is the legal sufficiency of the plaintiff's third count alleging violations of

CUTPA. The defendant argues, without qualification, that CUTPA claims may not be brought against municipalities. CUTPA is set forth in General Statutes § 42-110a et seq. Section 42-110b (a) provides in relevant part: "No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." "CUTPA was intended to provide a remedy that is separate and distinct from the remedies provided by contract law when the defendant's contractual breach was accompanied by aggravating circumstances." *Ulbrich* v. *Groth*, 310 Conn. 375, 411, 78 A.3d 76 (2013). "[B]ecause CUTPA is a self-avowed 'remedial' measure, General Statutes § 42–110b (d), it is construed liberally in an effort to effectuate its public policy goals." (Internal quotation marks omitted.) *Associated Investment Co. Ltd. Partnership* v. *Williams Associates IV*, 230 Conn. 148, 158, 645 A.2d 505 (1994).

The defendant is incorrect to state that CUTPA never applies to municipalities. "Connecticut's appellate courts have never expressly held that municipalities in general are not subject to CUTPA." *Loureiro Contractors, Inc.* v. *Danbury*, Superior Court, judicial district of New Britain, Docket No. CV-09-6002650-S (April 29, 2010, *Swienton, J.*) (49 Conn. L. Rptr. 772). Nevertheless, municipalities are entitled to exemption from CUTPA by statute under certain circumstances. The relevant statute in the present case is General Statutes § 42–110c, which provides in relevant part: "Nothing in this chapter shall apply to: (1) Transactions or actions otherwise permitted under law as administered by any regulatory board or officer acting under statutory authority of the state or of the United States . . . ." This provision has been relied upon in a number of significant decisions exempting municipalities from claims arising under CUTPA. See *Connelly* v. *Housing Authority*, 213 Conn. 354, 567 A.2d 1212 (1990) (holding New Haven housing authority exempt from CUTPA scrutiny by virtue of § 42–110c);

Danbury v. *Dana Investment Corp.*, 249 Conn. 1, 730 A.2d 1128 (1999) (holding Danbury real estate tax collectors exempt from CUTPA by virtue of § 42–110c).

The *Dana Investment Corp.* decision is instructive to the court's inquiry in determining the applicability of § 42–110c. The city of Danbury in that case foreclosed on over 100 of the defendants' real estate lots. The defendants argued that the city's assessments of the lots were excessive and constituted an unfair trade practice under CUTPA. The court upheld the city's § 42–110c defense, reasoning that "[t]he process by which the city assesses real estate is authorized and regulated expressly by a pervasive statutory scheme." *Danbury* v. *Dana Investment Corp.*, supra, 249 Conn. 20. The court also noted that "we are aware of [no cases] in which CUTPA has been applied to a municipality that is acting pursuant to statute . . . ." Id. In the present case, the commission is expressly authorized to conduct transactions as a regulatory board with respect to shellfisheries within the town of Branford. See General Statutes §§ 26-266, 26-257.[5] As such, it is entitled to exemption under § 42–110c.

CONCLUSION

For the foregoing reasons, the defendant's motion to strike as to counts one and two of the plaintiff's complaint is denied. The motion to strike count three is granted.

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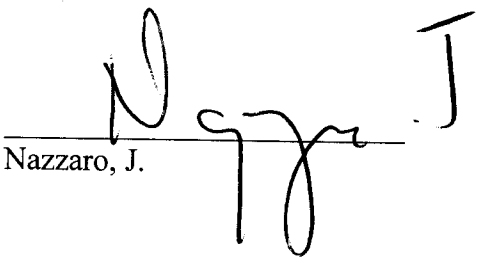
[5] Section 26-257 provides in relevant part: "Any town, city or borough, acting by its legislative body or its board of selectmen, if a town, or its mayor, if a city, or its warden, if a borough, may establish a shellfish commission or may join with one or more other towns, cities or boroughs, acting by their respective legislative bodies or boards of selectmen or mayors or wardens, as the case may be, in establishing such a commission."

Section 26-266 (a) provides in relevant part: "The selectmen of the town of Branford or shellfish commission established in accordance with section 26-257a shall have charge of all the shellfisheries and shell and shellfish grounds lying in said town . . . with power to issue licenses for the taking of shellfish and shells therefrom and to designate the quantities of such shellfish and shells to be taken, the sizes of such shellfish and the methods of taking."

It is So Ordered,



Nazzaro, J.