

NRT Bus v. City of Lowell, 2021 Mass. Super. LEXIS 534

Superior Court of Massachusetts, At Suffolk, Business Litigation Session

December 16, 2021, Decided

Opinion No.: 147757, Docket Number: 2084CV1814 BLS2

Reporter

2021 Mass. Super. LEXIS 534 * | 2021 WL 7083283

NRT Bus, Inc. v. City of Lowell

Prior History: NRT Bus, Inc. v. City of Lowell, 2021 Mass. Super. LEXIS 358, 2021 WL 3355333 (Mass. Super. Ct., June 4, 2021)

Core Terms

transportation, Counterclaim, motion to dismiss, good faith, fair dealing, alleges, contract claim, covenant, drivers, parties

Case Summary

Overview

HOLDINGS: [1]-The school bus transportation company's motion to dismiss the city's

counterclaims for breach of contract, breach of the covenant of good faith and fair

dealing, and unfair and deceptive practices, in violation of Mass. Gen. Laws ch. 93A, §

11, was allowed because the counterclaim failed to allege that the city (as opposed to

its families) suffered damages; in the absence of a viable breach of contract claim, any

good faith and fair dealing claim grounded on it also failed; and, for purposes of Mass.

Gen. Laws ch. 93A, § 11, the city not allege that it suffered compensable losses of

money or property arising from unfair or deceptive acts committed by the bus

company with respect to the contract claims.

Outcome

Motion allowed.

LexisNexis® Headnotes

• Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to

Dismiss > Failure to State Claim

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Motions to Dismiss, Failure to State Claim

To survive a motion to dismiss under Mass. R.Civ.P. 12(b)(1) or 12(b)(6), a complaint

must allege facts that, if true, would plausibly suggest an entitlement to relief. More

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Deceptive & Unfair Trade Practices, State Regulation

Mass. Gen. Laws ch. 93A, § 11 cases require both parties to be acting in a business

context. While it is unsettled whether a municipality is subject to Mass. Gen. Laws ch.

93A, caselaw is clear that a municipality is not liable under Mass. Gen. Laws ch.

93A when it is not acting in a business context, that is, when it is not engaged in trade

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Deceptive & Unfair Trade Practices, State Regulation

Whether a municipality is acting in a business context depends on the nature of the transaction, the character of the parties involved and their activities and whether the transaction was motivated by business reasons. Thus, whether a public entity has standing to assert a Mass. Gen. Laws ch. 93A claim turns on determining whether the entity entered into a commercial transaction in pursuit of a public purpose (in which case the public entity has no standing) or whether it was instead acting in a purely business context. More like this Headnote

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Deceptive & Unfair Trade Practices, State Regulation

A plaintiff in a Mass. Gen. Laws ch. 93A, § 11 case may recover for any loss of money or property, real or personal. Money means money, not time, and property means the

kind of property that is purchased or leased, not such intangibles as a right to a sense

of security, to peace of mind, or to personal liberty. More like this Headnote

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Judges: MICHAEL D. RICCIUTI, Justice of the Superior Court.

Opinion by: MICHAEL D. RICCIUTI

Opinion

MEMORANDUM OF DECISION ON PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIMS

NRT Bus, Inc. ("NRT") contracted to provide school bus transportation and special education transportation services to the City of Lowell. Then the COVID-19 pandemic hit. It forced Lowell public schools to close from mid-March 2020 to the end of the school year in June 2020, and to open late in September 2020. NRT did not transport any students when the schools were closed, and the City did not pay NRT for days when its vehicles and drivers were idle.

A dispute arose between the parties, and NRT sued on several grounds. Though NRT conceded it was not entitled to full compensation for those days on which it transported no students, it sought partial payment for having made buses and drivers available, which it was required to do. It claimed that the City's refusal to pay NRT for keeping buses and drivers at the ready violated either the express terms of the parties' contracts or the implied covenant of good faith and fair dealing, or that the City had been unjustly enriched and must pay NRT under the doctrine of "quantum meruit." NRT also sought a declaratory judgment stating that a certain contract amendment the parties entered into in 2020, Amendment #4, was enforceable and required the City to pay an agreed-upon amount for the days school remained closed in September 2020.

Earlier in this litigation, the City moved to dismiss all claims under Mass.R.Civ.P. 12(b)(6), arguing that it has no obligation to pay NRT for anything other than actual transportation of students. In June, by written order (Docket No. 12), the Court agreed with the City with respect to regular school bus transportation services for the 2019-2020 school year and with respect to special education transportation at any time, but concluded that NRT had stated a viable claim for breach of Amendment #4 to the "Big Bus Agreement" for the days

in September 2020 when school was scheduled and NRT was ready and able to transport students, but the City had not yet reopened its schools because of public health issues. The Court thus allowed the motion to dismiss in part as to all claims except the portion of NRT's contract claim that invoked Amendment #4 and the related claim for declaratory relief.

In July, Lowell answered the complaint and brought counterclaims for breach of contract (Count 1), breach of the covenant of good faith and fair dealing (Count 2) and unfair and deceptive practices in violation of G.L.c. 93A, §11 (Count 3). NRT now moves to dismiss them.

In consideration of the parties' memoranda of law and oral arguments, and for the reasons that follow, NRT's motion to dismiss is *ALLOWED*.

APPLICABLE LEGAL STANDARDS

To survive a motion to dismiss under 12(b)(1) or 12(b)(6), a complaint "must allege facts that, if true, would plausibly suggest[] . . . an entitlement to relief." *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 635-36, 888 N.E.2d 879 (2008), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 577, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *Sullivan v. Chief Just. for Admin. & Mgmt. of Trial Ct.*, 448 Mass. 15, 20-21, 858 N.E.2d 699 (2006) ("In reviewing a motion to dismiss under rule 12(b)(1) or (6), 'we accept the factual allegations in the plaintiffs' complaint, as well as any favorable inferences reasonably drawn from them, as true'") (citations omitted).

DISCUSSION

A. Counts 1 and 2

Lowell alleges two theories to support its breach of contract claim in Count 1.

Firstly, Lowell alleges that NRT "failed to provide and maintain an adequate number of bus drivers and other staff necessary to meet the needs of the City of Lowell as required under the Agreements." Counterclaim ¶46. Only one paragraph of the factual section of the Counterclaim supports that allegation; it states: "NRT materially breached its agreements with LPS when it notified the district that it did not have sufficient resources to continue performance." *Id.*, ¶43. In its motion, NRT contends that the Counterclaim "never alleges that NRT actually failed to provide adequate personnel" and never alleges that the City incurred damages. Plaintiff's Memo, at 9-10. Lowell tacitly concedes the latter point in its memorandum by providing further factual support to show it. See, e.g., Defendant's Memo at 2 (as a result of NRT's conduct, the City expended resources looking into transportation options), 5 & n.2 ("[a]s of September 14, 2021, NRT has been unable to meet its transportation obligations . . . and the City has been forced to seek relief from the

Commonwealth"); 6 (the City expended significant resources looking into transportation options). But these facts are not alleged in the Counterclaim. Even accepting an allegation in the Chapter 93A section as supporting damages for breach of contract, in which the City alleged that "NRT was unable to perform under the Special Education Transportation Contract, leaving the City schoolchildren without transportation services (*id.* at ¶66), the Counterclaim still fails to allege that the City (as opposed to Lowell families) has suffered damages.¹ Thus, Lowell has not adequately alleged an actionable breach of contract claim on this theory.

In the absence of a viable breach of contract claim on this basis, any good faith and fair dealing claim grounded on it (Count 2) also fails. See, e.g., *Eigerman v. Putnam Invs., Inc.*, 450 Mass. 281, 289, 877 N.E.2d 1258 (2007) ("the implied covenant of good faith and fair dealing cannot create rights and duties that are not already present in the contractual relationship. The covenant concerns the manner in which existing contractual duties are performed").

Secondly, the City also alleges breach of contract on the grounds that NRT "issued invoices to the City in an attempt to charge for transportation services that were not actually rendered . . . these invoices [list] a number of buses that [NRT] claims ran round-trip and include[] the itemized charges for a driver and a bus monitor in each bus just [as] if these buses made the trips, when in fact these trips did not occur." *Id.*, ¶¶2, 47. But Lowell does not allege it paid these invoices. Thus, while this part of the Counterclaim is premised on an adequate breach of contract theory, the Counterclaim nonetheless fails because it lacks an adequate allegation of damage.² In support of its good faith and fair dealing claim, Lowell alleges that NRT, in the absence of good faith, repeatedly threatened to terminate services unless the City agreed to its demands, including paying for services that were not provided. *Id.*, ¶¶53-54. This is an adequate theory on which to ground a claim for breach of the covenant of good faith and fair dealing, see, e.g., *Anthony's Pier Four, Inc. v. HBC Assocs.*, 411 Mass. 451, 473, 583 N.E.2d 806 (1991), but the absence of an allegation of damage is, again, fatal.

Counts 1 and 2, as framed, thus will be dismissed.

B. Count 3

NRT claims that Lowell's Count 3, alleging a violation of Chapter 93A, §11, is defective because the City (1) is not a proper Section 11 plaintiff; (2) has not alleged unfair or deceptive conduct; and (3) has not alleged tangible loss.

As to the standing issue, Section 11 cases require both parties to be acting in a business context. While it is unsettled whether a municipality is subject to Chapter 93A, caselaw is "clear that a municipality is not liable under G.L.c. 93A when it is not 'acting in a business context,' that is, when it is not engaged in 'trade or commerce'" *Park Drive Towing, Inc. v. City Of Revere*, 442 Mass. 80, 86, 809 N.E.2d 1045 (2004); see also *Peabody N.E., Inc. v. Town*

of *Marshfield*, 426 Mass. 436, 440-41, 689 N.E.2d 774 (1998) (citations omitted) ("The statute contains no explicit indication that government entities like the town are subject to its provisions. This court, however, has repeatedly held that c. 93A does not apply to parties motivated by 'legislative mandate, not business or personal reasons.'"). "Whether a municipality is acting in a business context depends on 'the nature of the transaction, the character of the parties involved and [their] activities . . . and whether the transaction [was] motivated by business . . . reasons.'" *Park Drive Towing, Inc.*, 442 Mass. at 86.3 Thus, "whether a public entity has standing to assert a c. 93A claim turns on determining whether the entity entered into a commercial transaction in pursuit of a public purpose (in which case the public entity has no standing) or whether it was instead acting in a purely 'business context.' *All Seasons Serv., Inc.*, 416 Mass. at 271 (citation omitted). Determining the difference is not an easy task. For example, in *All Seasons*, the SJC held that a publicly funded hospital did not engage in trade or commerce in managing vending machines because the contracts in question did not generate any profit for the hospital and were incidental to its public purpose. In contrast, a public hospital was held to be engaged in trade or commerce where it was acting as an assignee of patients' claims against the defendant insurance company. *Boston v. Aetna Life Ins. Co.*, 399 Mass. 569, 575, 506 N.E.2d 106 (1987)." *City of Boston v. Purdue Pharma, LP*, No. 1884CV02860, 2020 Mass. Super. LEXIS 2, 2020 WL 416406, at *8 (Mass.Super. Jan. 3, 2020).

In *Park Drive*, the Court found that a city was not engaged in trade or commerce where its engagement of the plaintiff to provide towing services to the city "was merely incidental to its primary function of maintaining public order in the streets, see *All Seasons Servs., Inc. v. Commissioner of Health & Hosps. of Boston*, [416 Mass. 269,] at 271, 620 N.E.2d 778 [(1993)], and the regulation of illegally parked vehicles has been assigned to the city by statute." *Id.* Much like in *Park Drive*, Lowell was assigned the task of educating its students, including, at least in some circumstances, to also provide them with transportation, see G.L.c. 71, §68, which was incidental to its educational mission. See *All Seasons Servs., Inc.*, 416 Mass. at 271-72 (finding that a hospital's contracting for food services was not within the scope of Chapter 93A because it was "merely incidental to the hospital's primary function of providing medical services").

Even were the City a proper plaintiff, its Chapter 93A claim would still fail because the counterclaim does not allege that the City suffered compensable damages. A plaintiff in a Section 11 case may recover for "any loss of money or property, real or personal." "'Money' means money, not time, and . . . 'property' means the kind of property that is purchased or leased, not such intangibles as a right to a sense of security, to peace of mind, or to personal liberty." *Tech Plus, Inc. v. Ansel*, 59 Mass.App.Ct. 12, 19-20, 793 N.E.2d 1256 (2003), quoting *Baldassari v. Public Fin. Trust*, 369 Mass. 33, 45, 337 N.E.2d 701 (1975). In this case, Lowell does not allege that it suffered compensable losses of this type. The closest it comes is to allege that, as the result of NRT's inability to "fully perform . . . City schoolchildren [were left] without transportation services." Counterclaim, ¶66. This does not amount to a claim that the City lost money or property arising from unfair or deceptive acts committed by NRT and, as noted above with respect to the contract claims, the Court cannot consider facts that are only alleged in the City's memo that suggest it suffered such

damage. See Defendant's Memo at 10 (the City expended resources looking into transportation options). On this basis alone, the City's Chapter 93A count fails.

ORDER

For the foregoing reasons, NRT's motion to dismiss is *ALLOWED*.

SO ORDERED

M.D. Ricciuti

MICHAEL D. RICCIUTI

Justice of the Superior Court

Dated: December 16, 2021

Footnotes

- **1**

Similarly, at argument, the City contended that it was required to expend resources to address NRT's alleged lapses, but again, these facts were not alleged in the Counterclaim.

- **2**

This is also true of any claim based on NRT's not complying with notice provisions as alleged in paragraph 29; even if true, there are no alleged resulting damages.

- **3**

Even though *Park Drive* concerned whether a municipality could be a Section 11 defendant, its analysis of the trade and commerce issue for a municipality is no different when the municipality seeks to bring a Section 11 case as a plaintiff.

[NRT Bus v. City of Lowell, 2021 Mass. Super. LEXIS 534, 2021 WL 7083283, 2021 WL 7083283](#)