

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

PRESENT: HON. BARBARA JAFFE
Justice

PART 12

-----X

THE CITY OF NEW YORK,

Plaintiff,

INDEX NO. 450230/15

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

B GREEN CONSTRUCTION CORP.,

Defendant.

DECISION AND ORDER

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In this action seeking damages for injury to property, plaintiff alleges in its verified complaint that it incurred costs for the removal and replacement of two trees located at 319 E. 25th Street in Manhattan after they were damaged on or about November 1, 2013, and that plaintiff unsuccessfully demanded payment for the damage from defendant. There is no specific claim or cause of action alleged therein. (NYSCEF 1).

Underlying plaintiff's claim are citations issued by the New York City Environmental Control Board (ECB) to defendant for its failure to obtain a permit and for damaging the trees, which constitute violations under the New York City Rules and Regulations (Rules) pertaining to the Department of Parks and Recreation. After a hearing, an ECB Administrative Law Judge sustained the violations and imposed a civil penalty of \$2,550, which defendant paid.

In its bill of particulars, plaintiff alleges, relying on 56 RCNY 1-03(b) and 1-04(b)(1), that defendant was careless, reckless, and negligent in failing to obtain required permits to

perform construction work in and around plaintiff's property and to ensure the safety and health of the trees in the vicinity of its work. (NYSCEF 12).

Defendant now moves pursuant to CPLR 3211(a)(3) and (7) for an order dismissing this action on the grounds that plaintiff lacks the capacity to bring this action and the complaint fails to state a claim against it. It argues that while the Rules and the New York City Charter (Charter) detail punishment for defendant's violations, it does not authorize a suit for money damages based on those violations. Thus, as neither the Rules nor the Charter specify that a civil action may be commenced based on or related to the violations at issue, defendant argues, plaintiff lacks the capacity to sue. It contends that the Legislature's failure to provide for authority or permission to bring a civil action reflects a legislative intent that no such suits are authorized or permitted, a conclusion supported by other provisions in the Rules and Charter for which civil actions to recover penalties or damages related to certain violations are provided. (NYSCEF 7).

Plaintiff denies that it seeks payment for the penalties imposed by the ECB. Rather, it claims that it seeks restitution for the costs of removing and replacing the damaged trees, and argues that the assessment of fines does not address the environmental damage caused by the violations, which can be addressed by a civil action only. It also maintains that the ECB penalties are "not meant to be the sole redress available to [it], considering the vast amount of expenses that were involved in removing and replacing trees that had been destroyed as a result of Defendant's sidewalk repair work." (NYSCEF 20).

Pursuant to 56 RCNY 1-03(b), when any provision of the rules requires a permit as a condition to the performance of an act or activity, no such act or activity may be implemented or

commenced before receipt of written authorization, and section 1-04(b)(1) prohibits anyone from cutting, removing, or destroying any trees without permission.

Pursuant to 56 RCNY 1-07, a violation of subsection 1-04(b):

- (a) shall constitute a misdemeanor triable by the Criminal Court of the City of New York and punishable by not more than one year imprisonment or by a fine of not more than \$15,000, or both.
- (c) shall also constitute a violation triable by the ECB and punishable by a civil penalty of not more than \$10,000, in accordance with section 533(a)(9) of Chapter 21 of the New York City Charter.

This section was repealed and replaced as set forth in the City Record dated June 13, 2017, section 5, and made effective as of that date.

The applicable section of the Charter also provides that the destruction of trees without permission is a misdemeanor triable in criminal court, and subjects the violator to a civil penalty, which may be recovered in a proceeding before the ECB. The proceeding is commenced by service of a notice of violation returnable to the ECB, which has the authority to impose civil penalties.

The construction or interpretation of a statute is a question of law for the court (McKinney's Statutes § 77), and "where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded" (McKinney's Statutes § 240). Thus, in *Matter of Pearl Leather Finishers, Inc. v Gloversville-Johnstown Jt. Sewer Bd.*, the Court held that where a statute gave localities authority to pursue three different options for recovering past due sewer rents, the locality was not authorized or permitted to use a different mechanism to recover the rents, as, "given the explicit nature of these remedies, the [different mechanism] must be deemed to have been excluded." (79 NY2d 430, 432 [1992]).

At issue in *E. Williamson Roofing and Sheet Metal Co., Inc. v Town of Parish*, at issue was whether a violation of a Labor Law provision governing the hours and wages of employees on public works contracts permitted the imposition of civil liability or the bringing of a plenary action for the employee's benefit. As the statute provided for both civil and criminal liability with a specific remedy, the Court held that the "express imposition of liability and creation of particular remedies suggests that the Legislature did not intend to impose any other liability or create other remedies." (139 AD2d 97, 103-4 [4th Dept 1988]; *see also Long Is. Power Auth. v Shoreham-Wading River Cent. School Dist.*, 195 AD2d 140 [2d Dept 1994], *lv dismissed* 83 NY2d 1001 [as Act at issue did not include remedies provided in other law and acts, court would not "engraft" those remedies onto Act]).

Here, section 56 of the Rules and the Charter provides that if a person destroys a tree without permission to do so, he may be charged with a misdemeanor triable in Criminal Court, and/or charged with a violation triable by the ECB, with specific penalties for each option. It does not include any provision for civil liability or for damages resulting from a violation. Thus, the Rules and the Charter do not authorize the recovery of damages in a civil action based on the violations at issue.

Authorization for the imposition of civil liability is provided for in other provisions of the Rules and the Charter. For example, section 558 of the Charter provides that penalties for violations of the health code "may be recovered in a civil action before any court in the city having jurisdiction of civil actions," and section 2903(a)(17)(j) provides that in addition to the Department of Transportation's ability to collect a charge for a particular violation, "the city" may also maintain a civil action for recovery of such charge. And pursuant to 17 RCNY 1-04, a violator may be held liable for a civil penalty or a fine and/or imprisonment, the penalty may be

recovered in a civil action, and the corporation counsel is authorized to commence a civil action on behalf of the city to recover the penalty.

Other New York City rules and regulations, such as the Administrative Code of the City of New York (Code), contain provisions permitting the maintenance of a civil action for violations, such as:

Section 16-515 of the Code, related to violations involving commercial waste removal, provides that any person who violates an applicable provision shall be liable for a civil penalty, the civil penalty may be recovered in a civil action, and the corporation counsel is authorized to commence a civil action on behalf of the City for injunctive relief and for civil penalties;

Section 22-215 (civil penalty may be recovered in civil action or administrative proceeding before ECB);

Section 20-1212 (if reasonable cause exists to believe that employer engaged in violation of chapter, corporation counsel may commence civil action on behalf of city, and may recover civil penalty); (see also sections 20-934 and 20-960, containing identical language); and

Section 16-324 (civil penalty for violation of rules related to solid waste recycling recoverable in civil action or in proceeding before ECB).

To the extent that plaintiff denies that it seeks to recover the penalties, and only seeks additional damages, and asserts that the provided penalties are not exclusive, it cites no supporting authority. In any event, its denial rings hollow given its bill of particulars, wherein it specifically relies on 56 RCNY 1-03(b) and 1-04(b)(1) in arguing that defendant was careless, reckless, and negligent in not obtaining permits to perform the work.

Other New York City rules and regulations explicitly allow for the maintenance of a civil action in addition to recovering a penalty, thereby indicating that other remedies may be sought, and that the penalty is not the exclusive remedy, including:

NYC Admin Code 23-408, which provides that a person guilty of certain violations related to the installation of public payphones on city streets is liable for a civil penalty which may be enforced either in a civil action or in a proceeding before the ECB, further

provides that a person “who is liable for a civil penalty for a violation . . . shall also be liable in a civil action for an additional civil penalty in the amount of the expense, if any, incurred by the city in the removal of the public pay telephone and the performance of related repair and restoration work.” (*See also* 67 RCNY 6-02 [containing identical language]);

Section 25-317.1 of the Code, related to landmarks preservation and historic districts, provides in the first instance that a violation of its provisions render a person liable for a civil penalty which may be recovered by the corporation counsel in a civil action in any court of competent jurisdiction, and which may include a penalty equal to two times the estimated cost of replicating features that were demolished, removed, or altered, and thereafter further specifies that “in addition to or as an alternative to any of the remedies and penalties provided in this chapter,” a violator is liable for a civil penalty to be recovered before an administrative tribunal;

Section 10-202, pertaining to the unlawful sale or possession of controlled substances, states that any person convicted of violating a specific Penal Law section shall be liable to the city for a civil penalty, and that under certain circumstances, the city may commence a civil action, wherein it may recover, in addition to the penalty, the costs of the investigation and prosecution of the person in the criminal action and the costs of the civil action;

In section 24-610, a violation thereof will expose the violator to punishment which includes a civil penalty of a specific amount and an additional civil penalty in an amount at least equal to the amount of any costs incurred by the city as a result of the person’s violation, which penalties may be recovered in a civil action, plus the violator will be guilty of a misdemeanor and may be fined and/or imprisoned;

Section 15-223.1, which provides that the failure to comply with an order of the fire commissioner shall be punished by fine and by civil penalty to be recovered in civil action; and

Section 20-106 provides that if person violates rules set forth therein, he or she is subject not only to fine or imprisonment, but also to civil penalty to be recovered in civil action.

Other sections permit the recovery in a civil action of “damages” for their violations, in addition to or instead of a penalty, such as:

Section 8-404 of the Code, related to unlawful discriminatory practices, which provides that in a civil action commenced pursuant to that chapter, a civil penalty may be imposed, but nothing in the section “shall be construed to preclude the city from recovering damages, including punitive damages, and other relief . . . in addition to civil penalties.”;

Pursuant to section 22-507, a person may bring civil action for a violation thereof, and in such civil action, remedies include not only penalties authorized by the section, but also

certain monetary damages, and attorney fees and costs incurred in maintaining the action; (*see also* NYC Admin Code 8-208 [same]);

Section 6-130 provides that an aggrieved party may bring a civil action for the section's violation and "shall have a cause of action in any court of competent jurisdiction for damages, including punitive damages, and for injunctive relief and such other remedies as may be appropriate; and

Section 8-804, which provides that upon a violation of the section, a civil action may be brought for injunctive relief, the treble amount of actual damages suffered, and/or attorney fees and costs.

Thus, in these above-mentioned rules and regulations, it is explicitly provided that a civil action for damages, costs, and/or penalties may be commenced in addition to, or instead of, a proceeding before an administrative tribunal for a civil penalty. Here, there is no such provision.


Moreover, certain of the above rules and regulations permit the recovery of the same kind of expense or damage that plaintiff seeks to recover here, i.e., the cost of compensating for or mitigating the damage caused by a person's violation. Thus, if a person violates section 23-408 of the Code by installing a public payphone on a city street without permission, he may be held liable for an additional penalty consisting of the city's expense in removing the phone and repairing and restoring the street, which additional penalty may be recovered in a civil action. Similarly, section 25-317.1, related to landmarks preservation and historic districts, provides that the corporation counsel in a civil action may recover from the violator a penalty equal to two times the estimated cost of replicating features that were demolished, removed, or altered. Pursuant to both of these sections, the recovery in a civil action of a penalty consisting of expenses or costs incurred in addressing the damage caused by a violation of the section is provided as an additional or alternative remedy to the imposition of a penalty for the violation before an administrative tribunal. Here, again, there is no such provision or language in the rules at issue.

Absent any authority for or indication of the authority or capacity of plaintiff to interpose a claim in a civil action seeking damages related to a violation of the regulations at issue, the motion to dismiss is granted. In light of this result, I need not consider defendant's other arguments.

Accordingly, it is hereby

ORDERED, that defendant's motion to dismiss is granted, and the complaint is dismissed in its entirety, with costs and disbursements for the defendant to be taxed by the clerk upon submission of an appropriate bill of costs.

11/21/2017
DATE



BARBARA JAFFE, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

APPLICATION:

CHECK IF APPROPRIATE:

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