DOCKET NO. CV-23-6028236-S	:	SUPERIOR COURT
HARRIS UNITED, LLC	:	J.D. OF TOLLAND
v.	:	AT ROCKVILLE
TOWN OF WILLINGTON	:	MAY 30, 2024

MEMORANDUM OF DECISION

HON. CODY N. GUARNIERI, JUDGE. Before this court is the defendant's motion to strike counts four, five, eight and twelve of the operative complaint (complaint) dated February 14, 2024 (entry at Docket No. 112.00). The court heard oral argument at short calendar on May 20, 2024. For the reasons discussed herein, the motion to strike counts four, five, eight and twelve is GRANTED.

I. BACKGROUND

On October 23, 2023, the plaintiff, Harris United, LLC, filed the present action against the defendants, the town of Willington (Town), town zoning agent, Michael D'Amato, and town treasurer, Laurie Semprebon. The complaint alleges the following relevant facts.

The plaintiff is an Oklahoma based company that was hired by Love's Travel Stops & Country Stores, Inc. (Love's) to act as its general contractor for construction work at Love's rest stop located at 3 Polster Road in Willington, Connecticut. As the project at the rest stop neared completion in July of 2022, the Town required two bonds to be posted by the plaintiff. Those bonds were the subject of a written agreement with the Town and were intended to provide the Town with a financial guarantee against missing or incorrectly installed site improvements at the rest stop. The first bond was for $139,000, which related to the completion of outstanding site improvements, while the second bond was for $44,000, to guarantee the completion and function of the rest stop for a year. The bond agreement contemplated the return of the bonds to the plaintiff at the end of the bond term if all required conditions were met. The plaintiff executed the bond agreement on July 28, 2022, and deposited the total bond amount of $183,400 with the Town shortly thereafter.

S. Pappas

STEVEN PAPPAS
ASSISTANT CLERK

Notice of memorandum sent on 5-30-24 to:
- All counsel of record; JDNO
- Reporter of Judicial Decisions

received
5-30-2024

The plaintiff and its subcontractor finished the work at the Love's rest stop by April 21, 2023, and made written demand for the return of the performance bond ($139,000) on April 25, 2023. At some point in late April or May of 2023, the Town did release $124,000 of the performance bond to the plaintiff and indicated that it was retaining $15,000 due to some of the landscaping having not fully established, as well as to ensure those areas were fully stabilized and established before release of the funds. The maintenance bond ($44,000) expired on July 28, 2023, one year after its deposit.

The plaintiff demanded the return of the outstanding balance on both bonds, in full, on August 22, 2023. The Town has continued to withhold funds from these bonds, citing damage to the Town's right-of-way by members of the public, and a paint issue on certain public street improvements. In total, the Town has continued to hold $59,000 from the two bonds.

Pertinent to the motion now pending before the court are certain allegations of misconduct set forth in paragraphs sixty through seventy of the complaint. In those pleadings, the plaintiff claims that the Town routinely provides services as a certifying agency, requires and administers bonds similar to a private surety bond transaction, sells and distributes its services underwriting and valuing the risk posed by construction projects, and sells and distributes services regarding private site improvement and consulting. The plaintiff asserts that the Town engaged in these activities in the present case and, in the course thereof, "effectively offered to sell its sign-off" on the completion of the Love's project and for the corresponding release of the performance bond in exchange for the plaintiff performing free work for the Town (Complaint, paragraph 61 and 66). As such, the plaintiff claims that the Town stood to profit at the expense of the plaintiff, which is further evidenced by the Town's refusal to return all the bond money without the plaintiff performing additional work not covered by the bonds.[1]

The defendants filed a motion to strike counts four, five, eight and twelve of the complaint on February 26, 2024, along with a memorandum in support of the motion (entry at Docket Nos. 113.00, 114.00). The plaintiff filed its objection on April 1, 2024 (entry at Docket No. 117.00).

II. STANDARD OF REVIEW

[1]The same allegations in substance are pled as against defendant D'Amato (Complaint, paragraphs 112 - 22.).

"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 be 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 . . . [The court] construe[s] the complaint in the manner most favorable to sustaining its legal sufficiency . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied . . . Moreover, [the court notes] that [w]hat is necessarily implied [in an allegation] need not be expressly alleged. . . . It 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 . . . Indeed, pleadings must be construed broadly and realistically, rather than narrowly and technically." (Internal quotation marks omitted.) *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, 309 Conn. 342, 350, 71 A.3d 480 (2013).

"If any facts provable under the express and implied allegations in the plaintiff's complaint support a cause of action . . . the complaint is not vulnerable to a motion to strike." *Bouchard* v. *People's Bank*, 219 Conn. 465, 471, 594 A.2d 1 (1991). On the other hand, "[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).

III. DISCUSSION

a. Count Five - Connecticut Unfair Trade Practices Act ("CUTPA") General Statutes § 42-110b

The defendant Town moves to strike count five of the complaint, arguing that the complaint fails to state a claim against it for which relief can be granted, as a matter of law, under Connecticut Unfair Trade Practices Act (CUTPA) and General Statutes § 42-110b et seq. The Town argues that it is not subject to CUPTA because it was engaging in governmental activity and not "trade" or "commerce" for purposes of CUTPA. The Town also argues that even if it were engaged in trade or business of a kind, such trade and alleged misconduct did not arise out of its primary trade or business but would be instead only an incidental matter. See *McCann Real Equities Series XXII, LLC* v. *David McDermott Chevrolet, Inc.*, 93 Conn. App. 486, 890 A.2d 140, cert. denied, 277 Conn. 928, 895 A.2d 798 (2006). Finally, the Town argues that

the governmental exemption to CUTPA, General Statutes § 42-110c (a) (1), also shields it from liability.

In response, the plaintiff asserts that the Town sought to profit by leveraging its role in administering the bond and supervising construction and that, as a result, it was engaging in activities similar to those of private enterprises. Specifically, the plaintiff claims that the Town was engaged in trade or commerce by virtue of routinely providing services as a certifying agency, requiring and administering bonds, selling and distributing its services underwriting and valuing the risk posed by construction projects, and selling and distributing services regarding private site improvements and consulting. The plaintiff claims that, having alleged that the Town routinely engages in such business-like activities, such activities cannot be considered merely incidental to the Town's primary trade or business. Finally, the plaintiff argues that the governmental exemption to CUTPA under § 42-110c (a) (1) does not apply to the Town, which is alleged to have engaged in unlawful conduct. The plaintiff asserts that the allegations of illegality or unlawful conduct by the Town removes the possible application of § 42-110c (a) (1).

CUTPA provides, inter alia, that "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." General Statutes § 42-110b (a). As noted, however, § 42-110c (a), which is also referred to as the "governmental exemption," expressly exempts from liability "[t]ransactions 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 . . . ." Pursuant to § 42-110c (b), a party claiming an exemption under § 42-110c (a) has the burden of proving its entitlement to such exemption. "Whether the defendant is subject to CUTPA is a question of law, not fact." (Internal quotation marks omitted.) *Muniz v. Kravis*, 59 Conn. App. 704, 712, 757 A.2d 1207 (2000); see also *Connelly* v. *Housing Authority*, 213 Conn. 354, 364 - 65, 567 A.2d 1212 (1990).

In *Connelly* v. *Housing Authority*, supra, 213 Conn. 364 - 65, our Supreme Court affirmed the trial court's granting of summary judgment to the defendant housing authority, applying the governmental exemption under § 42-110c (a) (1). In that case, the plaintiffs alleged that the defendant housing authority was violating state law by not providing adequate heat and hot water to tenants in federally subsidized low-income apartments it rented. Id., 356 - 57. The Supreme Court held that the governmental exemption applied because the defendant, "a creature of statute, [is] expressly authorized and pervasively regulated by both the state department of housing and [the United States Department of Housing and Urban Development]. As such, the

plain language of § 42-110c exempts the leasing or renting of apartments by the defendant from CUTPA scrutiny." Id., 361.

In *Danbury* v. *Dana Investment Corp.*, 249 Conn. 1, 18, 730 A.2d 1128 (1999), our Supreme Court affirmed a trial court decision, striking the plaintiff's CUTPA claims alleging that a municipality was over-assessing real estate and bringing a large volume of foreclosure actions, rather than just one action, thereby engendering needless costs and fees. In holding that the governmental exemption applied, the Supreme Court made specific reference to the statutes which create a pervasive statutory scheme regulating the process by which the city assesses real estate, the procedures by which taxpayers may challenge those assessments, and the processes by which the municipality may collect unpaid taxes. Id., 20.

Appellate authority following *Connelly* and *Danbury* has reinforced that that the governmental exemption under § 42-110c (a) (1) applies where the defendant municipality or quasi-public agency was engaged in activities that are authorized by statute. See *Tremont Public Advisors, LLC* v. *Materials Innovation and Recycling Authority*, 216 Conn. App. 775, 782, 286 A.3d 485 (2022) (holding that governmental exemption provided by § 42-110c (a) (1) applied against claims that defendant, a quasi-public agency, employed unfair bidding process because bidding process defendant engaged in was expressly authorized by statute); *Parnoff* v. *Stratford*, 216 Conn. App. 491, 502, 285 A.3d 802 (2022) (affirming trial court's decision striking CUTPA claim against town officials relating to responding to public record requests as activity authorized and regulated by state statute); *Neighborhood Builders, Inc.* v. *Madison*, 142 Conn. App. 326, 332, 64 A.3d 800 (2013) (holding that governmental exemption provided by § 42-110c (a) (1) applied against claims that defendant town was overcharging for building permits and collecting fees because those activities are authorized and regulated by state statute and regulation).

Thus, while there is no appellate authority expressly holding that § 42-110c (a) (1) provides a blanket exemption for all municipal and quasi-public agency conduct from CUTPA liability, trial courts have routinely rejected many such claims in reliance on the reasoning in *Connelly*, *Danbury*, and *Neighborhood Builders, Inc.* See *Ippoliti* v. *Town of Ridgefield*, Superior Court, judicial district of Danbury, Docket No. CV-99-0337600-S (August 7, 2000, *Moraghan, J.*) (27 Conn. L. Rptr. 629) (stating that "[t]his court is in accord with the numerous Superior Court decisions which have held that CUTPA is inapplicable to the acts of a municipality"); *Wagner* v. *State*, Superior Court, judicial district of Hartford, Docket No. CV-09-5026341-S (November 17, 2010, *Pellegrino, J.T.R.*) (holding that CUTPA claim must be dismissed because defendant

state had not waived sovereign immunity as to plaintiff's allegations); *JM Osowiecki, LLC* v. *Plymouth*, Superior Court, judicial district of Waterbury, Docket No. CV-09-5014112-S (March 4, 2010, *Gallagher, J.*) (denying motion to strike CUTPA count where defendant town did not reference any statutory or regulatory scheme pursuant to which it was acting).

In this case, the plaintiff's allegations stem from the Town's conduct in administering bonds intended to guarantee the completion and maintenance of site plan improvements from a private construction project at a rest stop. Moreover, the Town was engaged in this conduct in the broad context of the authority granted to the Town by the legislature under Chapter 124 of the General Statutes. Through those provisions, the legislature has granted expansive zoning regulatory powers to municipalities- including the authority to require bonds such as the ones at issue in this case. See General Statutes § 8-3.

The plaintiff's arguments against the application of the governmental exemption are unavailing. First, the plaintiff argues that there was not a state or federal actor in this case, but a municipality. This argument misses the determinative factor that the municipality, when engaged in zoning regulation and enforcement, is acting pursuant to authority granted by the state of Connecticut. See General Statutes § 8-3. Second, the plaintiff argues that the illegality or unlawfulness of the conduct by the Town, as pled, removes the possible application of the governmental exemption. However, in virtually every case applying the governmental exemption, there are underlying allegations that the municipality or quasi-public agency had been engaged in some character of illegal, tortious, or otherwise improper conduct in carrying out activities authorized by statute. These have included allegations of rigging a public bidding process; (*Tremont Public Advisors, LLC*, supra., 216 Conn. App. 775); overcharging building fees for building permits; (*Neighborhood Builders, Inc.*, supra, 142 Conn. App. 326); over-assessing real estate taxes to maximize fees and costs in foreclosure; (*Danbury* v. *Dana Investment Corp.*, supra, 249 Conn. 1); and renting subsidized housing to low income tenants without heat and hot water. (*Connelly* v. *Housing Authority*, supra, 213 Conn. 354).

Thus, merely pleading that a municipality acted unlawfully or illegally cannot circumvent the protections afforded by § 42-110c (a). See *Parnoff* v. *Stratford*, supra, 216 Conn. App. 502 ("Although the plaintiff takes issue with [the defendants'] decision to involve [legal counsel] . . . [d]oing so does not convert the authorized and regulated activity - here, responding to a public records request - into an activity outside the scope of the CUTPA exemption set forth in § 42-110c (a) (1)"). Because

the protections afforded by § 42-110c (a) apply, the court concludes that count five of the complaint fails to state a claim upon which relief can be granted.[2]

b. Counts Four, Eight, and Twelve: General Statutes § 8-3 (g)

The defendants next move to strike counts four, eight and twelve of the complaint, which purport to state a claim for illegal detention of bond under General Statutes § 8-3 (g) against, respectively, the Town, D'Amato, and Semprebon. The defendants argue that § 8-3 (g) does not create a private right of action, expressly or impliedly, and that the provision is part of a much larger statutory scheme related to municipal zoning authority, which was neither intended to specifically benefit financial guarantors such as plaintiff, nor would reading such a right of action into the statute be consistent with the legislative scheme of which it is a part.

The plaintiff argues in response that the express terms of § 8-3 (g), which it claims create a right to return of bond on a particular timeline, impliedly creates a private right of action. The plaintiff argues that § 8-3 (g) (3), in particular, was intended to benefit persons in the plaintiff's position and that failing to recognize a private right of action would create a right without a remedy.

"[T]here exists a presumption in Connecticut that private enforcement does not exist unless expressly provided in a statute. In order to overcome that presumption, the plaintiff bears the burden of demonstrating that such an action is created implicitly in the statute." *Provencher* v. *Enfield*, 284 Conn. 772, 777- 78, 936 A.2d 625 (2007). The parties agree that the appropriate test for whether the legislature intended to create a private right of action by implication can be found in *Provencher*, which expounds upon the test first announced in *Napoletano* v. *CIGNA Healthcare of Connecticut, Inc.*, 238 Conn. 216, 249, 680 A.2d 127 (1996), cert. denied, 520 U.S. 1103, 117 S. Ct. 1106, 137 L.Ed.2d 308 (1997) overruled on other grounds by *Batte-Holmgren* v. *Commissioner of Public Health*, 281 Conn. 277, 284, 914 A.2d 996, 1002 (2007).

"In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff one of the class for whose . . . benefit the statute was enacted . . . ? Second, is there any indication of

[2] Finding that the governmental exemption under § 42-110c (a) (1) applies against count five of the complaint, the court need not reach the alternative arguments advanced by the defendant that the Town was not engaged in "trade" or "business," or that any such activity was merely incidental to the Town's primary trade or commerce, if it was deemed to have one.

legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?" (Internal quotation marks omitted.) *Provencher* v. *Enfield*, supra, 284 Conn. 778. "Finally, we note that in examining [the three *Napoletano*] factors, each is not necessarily entitled to equal weight. Clearly, these factors overlap to some extent with each other, in that the ultimate question is whether there is sufficient evidence that the legislature intended to authorize [this plaintiff] to bring a private cause of action despite having failed expressly to provide for one." (Internal quotation marks omitted.) Id., 779.

"Consistent with the dictates of General Statutes § 1-2z, however, we do not go beyond the text of the statute and its relationship to other statutes unless there is some textual evidence that the legislature intended, but failed to provide expressly, a private right of action. Textual evidence that would give rise to such a question could include, for example, language granting rights to a discrete class without providing an express remedy or language providing a specific remedy to a class without expressly delineating the contours of the right." Id., 778. "The stringency of the test is reflected in the fact that, since this court decided *Napoletano*, we have not recognized an implied cause of action despite numerous requests." Id., 779.

In evaluating the factors first announced in *Napoletano*, the court first considers whether the plaintiff is one of the class for whose benefit § 8-3 (g) was enacted. General Statutes § 8-3 (g) is a part of Chapter 124 of the General Statutes, in which the legislature granted expansive zoning regulatory powers to the municipalities. Section 8-3 is specifically entitled: "Establishment and changing of zoning regulations and districts. Enforcement of regulations. Certification of building permits and certificates of occupancy. Site plans. Districts for water dependent uses." Moreover, as its title suggests, § 8-3 (which includes subparagraphs (a) through (m)) addresses a wide array of the powers and limitations of municipal zoning authorities, including to effectuate zone changes, regulate building permits, occupancy, site planning and approvals, and shorefront land uses use regulations. Within this broad statute, subparagraph (g) includes subparts (1) through (3), which further address site planning processes and procedures.

General Statute § 8-3 (g) (3) provides that "[i]f the person posting a financial guarantee under this section requests a release of all or a portion of such financial guarantee, the commission or its agent shall, not later than sixty-five days after receiving such request, (A) release or authorize the release of any such financial guarantee or portion thereof, provided the commission or its agent is reasonably

satisfied that the site improvements for which such financial guarantee or portion thereof was posted have been completed, or (B) provide the person posting such financial guarantee with a written explanation as to the additional site improvements that must be completed before such financial guarantee or portion thereof may be released."

Weighing the arguments of the parties, it is unclear whether the first *Napoletano* factor directs the court to evaluate the statute as a whole, § 8-3, the pertinent statutory subparagraph, § 8-3 (g), or, in this case, the subpart of the subparagraph of the statute, § 8-3 (g) (3). Viewing the statute as a whole would suggest that the statute was enacted for the benefit of residents of the town, as part of empowering local zoning authorities to engage in appropriate planning and control of building and development in the community. However, viewing § 8-3 (g) (3) independently would tend to support the plaintiff's argument, as the procedure and timeline associated with returning of a financial guarantee may have been enacted for the benefit of a class of individuals in the plaintiff's position, the financial guarantor on a municipal bond. The court will accept, arguendo, that the plaintiff has met its burden with regard to the first prong in that it is one of the class for whose benefit § 8-3 (g) (3) was enacted.

With regard to the second and third prongs, however, the plaintiff has failed to demonstrate an implied private right of action under § 8-3 (g) (3). Regarding the second prong, there is no apparent explicit legislative intent to create or deny such a private right of action. The plaintiff argues that to have created a process and timeline for the return of a financial surety, the legislature impliedly intended a means by which to enforce it through a private right of action. On the other hand, the Town argues that a private right of action is neither implied by the text of § 8-3 (g) (3), nor consistent with the statutory scheme under the third prong, as the legislature has provided elsewhere in Chapter 124 a redress to court for approval or denial of site plans.

General Statutes § 8-8 (b) provides in relevant part that "any person aggrieved by any decision of a board, including a decision to approve or deny a site plan pursuant to subsection (g) of section 8-3 . . . may take an appeal to the superior court for the judicial district in which the municipality is located . . . ." Thus, elsewhere within Chapter 124 the legislature has expressly provided that any person aggrieved by any decision of a board, including the denial of a site plan under General Statutes § 8-3 (g), may seek redress in Superior Court. This is strong textual evidence that the legislature did not intend to permit a private right of action to enforce the return of a bond submitted under § 8-3 (g). See *Provencher* v. *Enfield*, supra, 284 Conn. 788 n.10

("We previously have considered the existence of alternative remedies and procedures for the enforcement of a statute as strong, if not conclusive, evidence of legislative intent not to create additional implied remedies under the statute" [emphasis omitted.]).

The plaintiff has, therefore, failed to demonstrate that § 8-3 (g) creates an implied right of action. As such, counts four, eight and twelve of the complaint each fail to state a claim as a matter of law and must be stricken.

IV. CONCLUSION

For the reasons stated above, counts four, five, eight and twelve of the plaintiff's complaint are insufficient as a matter of law. The defendant's motion to strike those counts from the operative complaint is therefore GRANTED.

SO ORDERED

BY THE COURT

Guarnieri, J.