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

PRESENT: PAUL G. FEINMAN Justice PART 52

Pedro A. Mendez

- v -

City of New York, et al.

INDEX NO. 102487/06

MOTION DATE 9/22/06

MOTION SEQ. NO. 002

MOTION CAL. NO. 15

The following papers, numbered 1 to _____ were read on this motion to/for 55

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

All attached

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision & order.

FILED
JAN 09 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/3/07

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52
----------X
PEDRO A. MENDEZ,
Plaintiff,

against

THE CITY OF NEW YORK, THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION AND CHILD SUPPORT ENFORCEMENT,
Defendants.
----------X

Index Number 102487/2006
Submission Date Sept. 22, 2006
Mot. Seq. No. 002
Cal. No. 15

DECISION AND ORDER

For the Plaintiff:
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For the Defendants:
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Papers considered in review of this motion for summary judgment:

Papers	Numbered
Notice of Motion, Memo of Law, Affirmation	1,2,3
Answering Affirmation	4
Reply Memo, Affidavit	5,6
Verified Answer	7

PAUL G. FEINMAN, J.:

By interim decision and order dated July 27, 2006, the parties were notified pursuant to CPLR 3211 (c) that the Court would treat the defendants' pre-answer motion to dismiss the complaint as a motion for summary judgment.[1] Upon a complete search of the record, summary judgment is granted in the defendants' favor and the complaint is dismissed in its entirety.

Factual and Procedural Background

According to the verified complaint, on about October 27, 1976, a petition for child

[1] The Court afforded the parties an opportunity to file additional papers. Although defendants filed an answer and other documents, plaintiff did not submit any further papers.

support was filed in the New York State Family Court, New York County, under Docket No. F-4379/76, with judgment granted and an Order of Support entered on December 9, 1976 (Ver. Compl. ¶¶ 7, 8). "Pedro Mendez" was named as the respondent in that petition. At some point thereafter, plaintiff became the "constant target" of defendant's "methods of debt collection and enforcement"of the Order of Support (Ver. Compl. ¶ 9). Plaintiff learned that debt collection notices were being sent to the apartments of his brother in New York County and sister-in-law in Riverdale (Ver. Compl. ¶¶ 10,11). On about June 1, 2004, his attorney appeared in Family Court to dispute the enforcement of the Order against plaintiff and was directed to continue the dispute with the Child Support Enforcement Office (Ver. Compl. ¶¶ 12,13). In July 2004, plaintiff's attorney found that the documents contained in the Family Court file and those contained in the Enforcement Office showed that plaintiff was not the individual named as the respondent in the original 1976 petition and Order of Support (Ver. Compl. ¶ 14). Because the Child Support Enforcement Office would not designate the matter a case of mistaken identity, plaintiff commenced an action in Family Court on about January 14, 2005 by order to show cause, seeking to vacate the 1976 judgment and order of support (Ver. Compl. ¶¶ 15,16).[2]

On July 27, 2005, by order of a support magistrate of the Family Court, Child Support Enforcement Term, plaintiff was held not to be the respondent father of the child under docket F-

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[2]Although not asserted in the verified complaint, plaintiff includes in his motion papers a copy of a May 6, 2005 notice mailed to him at the Riverdale address from the United States Treasury Department informing him that it had withheld his federal tax refund and applying it to outstanding child support payments (see Aff. in Opp. Ex. B). The verified complaint refers obliquely to this event in paragraph 54, and plaintiff's papers in opposition to the motion state that he was given the notice from his sister-in-law only in about August 2005 and that he believes there could be other, more recent, seizures of funds (Aff. in Opp. ¶¶38, 39).

12800-04 or F-04379/76, that there were no arrears due to anyone under those docket numbers, and that the Support Collection Unit was to conform the account and any money collection efforts to the order (Ver. Compl. ¶ 17; Pl. Aff. in Opp. Ex. A).

On September 19, 2005, plaintiff served a Notice of Claim upon the City of New York and upon the New York City Human Resources Administration (HRA) pursuant to General Municipal Law § 50-e (Ver. Compl. ¶¶ 3,4; Pl. Aff. in Opp. Ex. C [hereinafter Notice of Claim]). The notice of claim alleged emotional damages, attorney's fees, negligent retention and hiring, and special damages, negligence and recklessness, based on defendants' failure to properly verify plaintiff's identity prior to commencing and pursuing "harmful methods of debt collection for child support" against plaintiff. It further alleged that defendants "constant[ly]" forward[ed]. . monthly billing statements and collection notices . . . seeking arrears in the amount of $30,000.00," and that they "repeatedly caused reductions in [plaintiff's] Federal and State income tax refunds since the year of 2004" (Notice of Claim).

After waiting more than 30 days without an offer of settlement from defendants, plaintiff commenced this action by filing a copy of the summons and verified complaint on February 22, 2006. The complaint alleges causes of action sounding in negligence, wrongful identification (resulting in bad credit), unlawful deprivation of property and violation of due process rights under the 4th and 14th amendments; malicious prosecution; negligent hiring and retention; abuse of process; and attorneys fees accrued in defense of the Child Support Enforcement Action.[3]

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[3]As noted by defendants' attorney, City agencies are not suable entities, and the proper defendant is the City of New York (Memo of Law in Supp. of Def. Mot. to Dismiss p. 10-11, n. 5, citing NY City Charter § 396). For consistency, this decision will refer to "defendants."

Defendants initially moved to dismiss the complaint on several grounds, including failure to allege sufficient facts to establish his claims of violations of the 4th and 14th Amendments of the United State Constitution and procedural due process, and of malicious prosecution and abuse of process. They additionally argued that plaintiff's complaint failed to establish the prerequisites to bring a civil rights action pursuant to 42 USC § 1983 and that he failed to file a notice of claim. The subsequently submitted verified answer includes five defenses: failure to timely file a notice of claim; statute of limitations; failure to state a cause of action; contributory negligence; and denial that any state or federal constitutional rights have been violated. As part of their motion papers for summary judgment, they include the July 11, 2006 affidavit of Pauline Allen, Administrative Director of Social Service at the Human Resources Administration of the City of New York (HRA), which includes the Office of Child Support Enforcement and its "misidentification ('mis-id') section." The mis-id section investigates claims that the Office of Child Support Enforcement is incorrectly enforcing child support obligations against individual claimants. Allen reviewed the records maintained by the City of New York, including the Child Support Maintenance Systems database (CSMS), created to assist child support enforcement agencies in enforcing child support orders that emanate from the New York State Supreme and Family Courts (Allen Aff. ¶ 1). Allen avers that her review of the records shows that on about January 21, 1982, CSMS was updated to reflect that child support was to be collected from plaintiff, and set forth his social security number and date of birth (Allen Aff. ¶ 2). Thereafter, defendants unsuccessfully attempted to garnish plaintiff's wages on about December 12, 1995, but "successfully intercepted" his 2004 tax refund on August 29, 2004, which had been mailed to

the Riverdale address (Allen Aff. ¶¶ 3,4).[4] According to Allen, plaintiff has since received "a full refund of all monies collected by" the Office of Child Support Enforcement (Allen Aff. ¶ 4).

Legal Analysis

Summary judgment is proper when there are no issues of triable fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Issue finding rather than issue determination is its function (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). The evidence will be construed in the light most favorable to the one moved against (*Weiss v Garfield*, 21 AD2d 156 [3rd Dept 1964]).

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor (*GTF Mtkg, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]). A party opposing summary judgment must lay bare its proofs so that the matters raised in the pleadings are shown to be real and capable of being established upon trial (*W.W. Norton & Co. v Roslyn Targ Literary Agency, Inc.*, 81 AD2d 798 [1st Dept. 1981]). In opposing a motion for summary judgment, a party may not rely solely upon the affirmation of his or her attorney who is without personal knowledge of the facts, as this will not supply the evidentiary showing necessary to successfully resist the motion (*Roche v Hearst Corp.*, 53 NY2d 767, 768 [1981]; *see*

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[4]Plaintiff includes a notice from the U.S. Treasury Department dated May 6, 2005, concerning the forwarding of his tax refund to the Office of Child Support Enforcement (Crespo Aff. in Opp. Ex. B).

also, Vermette v Kenworth Truck Co., 68 NY2d 714, 717 [1986]; *Bendik v Dybowski*, 227 AD2d 228 [1st Dept 1996]). However, an attorney's affirmation may serve as the "vehicle for the submission of acceptable attachments" which do provide evidentiary proof in admissible form (*Adams v Cutner & Rathkopf*, 238 AD2d 234, 240 [1st Dept 1997] [quoting *Zuckerman v City of New York*, 49 NY2d 557, 563 (1980)]). Bare conclusory allegations are insufficient to defeat a motion for summary judgment (*see, Thanasoulis v. National Assn. for the Specialty Foods Trade, Inc.*, 226 AD2d 227 [1st Dept 1996]; *Lee v Weinstein*, 116 AD2d 700 [2d Dept], *lv denied* 68 NY2d 601 [1986]). Suspicions, surmises, and accusations are insufficient (*Zuckerman v City of New York*, 49 NY2d at 557). Unsubstantiated allegations are also insufficient (*Id*).

1. Violation of 42 USC § 1983

Plaintiff brings claims of violations of his federal civil rights by the municipality and its agent. "In any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States" (*Parratt v Taylor*, 451 U.S. 527, 535 [1981], *overruled on other grounds*, *Daniels v Williams*, 474 U.S. 327, [1986]). Moreover, "in procedural due process claims, the deprivation by state action of a constitutionally protected interest in life, liberty, or property is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law" (*Zinermon v Burch*, 494 U.S. 113, 125 [1990], citations omitted). To determine whether a constitutional violation has occurred, the Court must determine what process the State provided and whether it was constitutionally adequate (*Zinermon*, at 126).

a. Violation of Fourth Amendment

The Fourth Amendment to the United States Constitution provides that

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(U.S. Const. 4th Amend.). The verified complaint does not articulate a Fourth Amendment claim of an unreasonable search and seizure or a warrant issued without probable cause, and plaintiff does not address defendants' argument that this cause of action should be dismissed. Accordingly, this branch of defendants' motion for summary judgment is granted and the claim sounding in violation of the Fourth Amendment is dismissed.

b. Violation of Due Process

The Due Process Clause states that the State may not "deprive any person of life, liberty, or property, without due process of law." (U.S. Const., 14th Amend, § 1). "Due process is flexible and calls for such procedural protections as the particular situation demands." (*Weeks Marine Inc. v City of New York*, 291 AD2d 277, 278 [1st Dept. 2002], citing *Mathews v Eldridge,* 424 US 319, 333-335 [1976]). Substantive due process prevents the deprivation of life, liberty or property for arbitrary reasons, and involves a "reasonable connection" between the challenged law or procedure and the promotion of the health, comfort, safety and welfare of society (*New York State Crime Victims Bd. v Majid*, 193 Misc. 2d 710, 714 [Sup. Ct. Albany County 2002] citing *Health Ins. Assn. of Am. v Harnett,* 44 NY2d 302, 310 [1978]). Procedural due process, "[r]educed to its most elemental terms . . . requires notice and an opportunity to be heard." (*Sanford v Rockefeller*, 35 NY2d 547, 567 [1974] [dissent, Wachtler, J.], *app. dismissed* 421

U.S. 973 [1975]).

"The first steps in any case involving due process are to ascertain whether the plaintiff has a property interest and whether there has been a deprivation thereof." (*Gudema v Nassau County*, 163 F. 3d 717, 724 [2d Cir. 1998]). Here, the property interest consists of plaintiff's intercepted tax refunds as well as other, speculative funds. Defendants argue that they are obligated to enforce support orders issued by Family Court and to collect court-mandated child support payments and that there was a "social justification" for sending enforcement notices, an argument with which plaintiff does not quarrel (Memo of Law in Supp. of Mot. to Dismiss at 8). Because plaintiff does not address the issue of the social justification for seeking child support payments, defendants sufficiently establish that there are no questions of fact as concerns the claim of substantive due process violation (*see, Lave v Shepard*, 48 Misc 2d 478 [Sup. Ct. NY County 1965], *aff'd* 25 AD2d 498 [1st Dept.], *lv denied* 17 NY2d 420 [1966] [where a key fact appears in the movant's papers to which the opposing party makes no reference, it is deemed admitted]). Moreover, according to the affidavit of defendants' witness, and not disputed by plaintiff, there was a process in place by which plaintiff could dispute the amount garnished. Plaintiff did so and he has been reimbursed for the full amount collected by the Office of Child Support Enforcement. Therefore, plaintiff no longer has a colorable claim for a due process violation based on deprivation of property rights.[5]

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[5]Even reading the complaint in the broadest terms, the court finds nothing to show that HRA's conduct falls within the established exceptions to the mootness doctrine. In *Hearst Corp. v Clyne*, 50 NY2d 707 (1980), the Court set forth the three factors common to matters that fall within the exception to the doctrine. They are, first, "a likelihood of repetition, either between the parties or among other members of the public," second, "a phenomenon typically evading review," and third, "a showing of significant or important questions not previously passed on,

In addition, the courts distinguish between claims based on established state procedures and claims based on random, unauthorized acts by state employees (*Hellenic Am. Neighborhood Action Comm. v City of New York*, 101 F.3d 877, 880 [2d Cir. 1996], *cert. dismissed* 521 U.S. 1140 [1997], citing *Hudson v Palmer*, 468 U.S. 517, 532 [1984]). In the latter situation, the Due Process Clause is not violated when a state employee intentionally deprives an individual of property or liberty, so long as the State provides a "meaningful post-deprivation remedy" (*Hellenic Am. Neighborhood*, at 880 citing *Hudson v Palmer*, 468 U.S. at 531, 533). Where the deprivation occurs in a "more structured environment of established state procedures," the existence of post-deprivation procedures will not necessarily satisfy due process (*Hellenic Am. Neighborhood*, at 880 citing *Hudson v Palmer* at 532; *Logan v Zimmerman Brush Co.*, 455 U.S. 422 [1982]).

The complaint alleges in the alternative either that employees of defendants diverged from established procedures when they enforced the Order of Support against him, or that defendants' established procedures improperly failed to consider "certain factors in identifying the target of their enforcement," and that there was a policy of deliberate indifference in the training and instructing of employees to accurately identify the persons who were the subject of Support Orders. Plaintiff asserts that if the mistaken identify was the result of one or more City employees following City procedures, then his deprivation of property was caused by deliberate indifference of policy makers within HRA to properly instruct and supervise its personnel on

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i.e., substantial and novel issues." (*Hearst Corp. v Clyne*, at 714-715). Mere speculation as to the frequency of such mistakes, with nothing more, is insufficient to create an exception to the mootness doctrine (*Hearst*).

how to enforce an order of support (Aff. in Opp. ¶ 14, 15, citing *Alexander v Cortes*, 140 F.3d 406 [2d Cir. 1998] [reversing summary judgment for municipal defendants based on lack of procedure by which a prisoner could contest release of his car to a lien holder]). Although he contends that without discovery he cannot more specifically detail the allegations (Aff. in Opp. ¶ 13), plaintiff is notably not asserting a claim of the lack of any procedure, nor does he make assertions establishing a particular policy employed by the City defendants either in their training of personnel or their enforcement proceedings of Orders of Support. Mere vague and conclusory assertions are insufficient.

Plaintiff concedes that he was repeatedly notified concerning defendants' intention to enforce the Support Order and collect the debt he supposedly owed. Pursuant to CPLR 5241(e), plaintiff was entitled to challenge the imminent execution of his income by asserting a mistake of fact. Alternatively, as noted by defendants, he could have sought an administrative review before HRA, and then commenced an Article 78 proceeding (Memo of Law in Supp. of Def. Mot. to Dismiss pp. 6-7, citing *Stokley v Dorville*, 177 Misc. 2d 86, 92 [Fam. Ct., Kings County 1998]). It appears that plaintiff chose to ignore the notices, of which he had knowledge although they were not mailed to his actual address, and that he sat on his rights for a long period of time, until perhaps the time that defendants seized a tax refund. Thus, he does not establish that his due process rights were violated and that there were inadequate post-deprivation remedies for defendants' error (*Hellenic American Neighborhood Action Comm.*, 101 F.3d 877).

For the above reasons, plaintiff fails to establish that he has valid section 1983 claims. Defendants' motion for summary judgment and dismissal of those causes of action is therefore granted.

2. Malicious Prosecution

In order to establish a cause of action for malicious civil prosecution, plaintiff must allege (1) the institution of an action or proceeding by defendants (2) malice as the motivating factor, (3) lack of probable cause, (4) and termination of the proceeding in his favor (*Butler v Ratner*, 210 AD2d 691 [3d Dept. 1994]; *app. denied*, 85 NY2d 924 [1995]). There is also a requirement to show special injury (*Engel v CBS, Inc.*, 93 NY2d 195 [1999]). Malicious prosecution has a one-year statute of limitations (CPLR 215[3]). Here, the only proceeding was commenced by plaintiff in Family Court in an attempt to stop the issuance of enforcement notices wrongfully sent to him. Plaintiff does not address defendants' arguments concerning summary judgment and dismissal of this cause of action as time-barred. Accordingly, defendants' motion for summary judgment and dismissal of the claims of malicious prosecution is granted.

3. Abuse of Process and Harassment

In order to establish the claim of abuse of process, plaintiff must establish (1) regularly issued legal process, civil or criminal, compelling performance or forbearance of some act; (2) the person or entity activating the process was moved by an ulterior purpose to do harm, without economic or social excuse or justification; (3) the person or entity activating the process sought some collateral advantage or corresponding detriment to the plaintiff that is outside the legitimate ends of the process; and (4) actual or special damage (*Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn., Inc., Local 1998 AFT AFL-CIO*, 38 NY2d 397 [1975]). Legal process is defined as a direction or demand that the person to whom it is directed shall perform or refrain from doing some described act (*Julian J. Studley, Inc. v Lefrak*, 41 NY2d 881 [1977]).

Defendants argue that plaintiff does not allege that they were motivated to do harm or that they or their employees sought any collateral advantage by identifying him mistakenly as the respondent to the Support Order. They further argue that they are obligated to enforce support orders issued by Family Court by collecting court-mandated child support payments and thus had a "social justification" for sending him support enforcement notices in the belief that he was the respondent to the Support Order at issue (Memo of Law in Supp. of Mot. to Dismiss at 8). Plaintiff does not dispute defendants' assertions. Where a party fails to deny a material allegation, that allegation is thereby deemed admitted (*Kuehne & Nagel, Inc. v F.W. Baiden*, 36 NY2d 539 [1975]). Here, plaintiff's failure to deny that defendants had a social justification and that they did not seek any collateral advantage together establish that there are no issues of fact and that summary judgment and dismissal of the claims of abuse of process is appropriate. In addition, New York does not recognize a civil cause of action for harassment (*Broadway Cent. Prop., Inc. v 682 Tenants Corp.*, 298 AD2d 253, 254 [1st Dept. 2002]), and such claims are also appropriately dismissed.

4. Notice of Claim

Pursuant to General Municipal Law sections 50-e(1)(a) and 50-i, prior to commencing a tort action against a municipality or its officers, a plaintiff must file a notice of claim within 90 days of the event giving rise to the claim. The court may, in its discretion and upon application by the plaintiff, extend the time to serve a notice of claim (Gen. Mun. L. §§ 50-e[5]). This exercise of discretion is circumscribed by the clear legal mandate that the late filing of the notice of claim must be accomplished within the statute of limitations period, i.e., not more than one year and 90 days after the cause of action accrued, unless the statute of limitations was tolled

(Gen. Mun. L. §§ 50-e[5]; 50-i; *Pierson v City of New York*, 56 NY2d 950, 954 [1982]). "[The] Court [of Appeals] has consistently treated the year-and-90-day provision contained in section 50-i as a statute of limitations" (*Campbell v City of New York*, 4 NY3d 200, 203 [2005]).

A cause of action accrues upon the violation of a legal right (*Schwartz v Heyden Newport Chem. Corp.*, 12 NY2d 212, 216 [1963]). Except for claims of fraud, statutes of limitations commence to run at the accrual of the cause of action, "regardless of knowledge of its existence" (*De Vito v New York Centr. Sys.*, 22 AD2d 600, 601 [1st Dept. 1965], citation omitted). Here, the violation that is alleged to have occurred is the mistaken identification of plaintiff as the father of the child in whose name support payments were being sought. This error occurred at some point after 1976 but absolutely no later than June 1, 2004 when plaintiff's attorney appeared in Family Court on his behalf seeking clarification as to what had occurred. Before the error was ultimately corrected by Order of July 27, 2005, plaintiff's federal tax refund had been garnished, he had unspecified damages to his credit, he had spent sums in attorney's fees, and he had suffered emotional distress. All of these damages derived from defendants' alleged misconduct. Accordingly, plaintiff should have filed a notice of claim no later than August 31, 2004 to comply with General Municipal Law section 50-e(1)(a). Moreover, the notice of claim, filed on September 19, 2005, was filed more than one year and 90 days after June 1, 2004 and the court is without power to extend the time to file nunc pro tunc (*Campbell v City of New York*, 4 NY3d at 203). Accordingly, the State law claims sounding in tort are dismissed based on the failure to timely serve a notice of claim and the running of the statute of limitations.

5. Attorney's Fees

Other than plaintiff's claim under 42 USC § 1983, there is no statute, regulation, or case

law identified by plaintiff which would allow a cause of action for the repayment of attorney's fees. Inasmuch as that claim has been dismissed, so too must this cause of action be dismissed.

Conclusion

While the Court appreciates that plaintiff was forced to expend time, effort and funds to correct the error at issue, it is also clear that his own decision to ignore the mistake early helped contribute to the perpetuation of the defendants' conceded error. Certainly it cannot be said that there was an absence of process here. Indeed, it was the very processes which plaintiff claims were lacking which ultimately cured the error. That these court processes may have been difficult to navigate without the assistance of an attorney may be self-evident, however, absent authorization from a statute, this Court is without power to award plaintiff his attorneys' fees expended to correct the error. Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk of the Court is to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: January 3, 2007
New York, New York

Paul G. Feinman
J.S.C.

Courtesy copies mailed.