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SHORT FORM ORDER

INDEX
NO.: 28766-06

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 8 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 1-22-07; 1-16-07
SUBMITTED: 1-24-07
MOTION NO: 002-MD
003-MD

TOWN OF SOUTHAMPTON,

Plaintiff,

-against-

LILIA POALASIN, NUBE G. VALENTIN, NELSON VALENTIN, MARIA A. RODRIGUES, CARLOS A. TIGUILA, MARVIN O. TIGUILA, EDWIN O. ARAGON, BEATRIZ ROJOGALICIA, EVER ELI MAZAT, JUAN C. CAMACHO, MARIA SALGRANADOS, CHRISTIAN CAMACHO, MARIA SANTOS, and "JOHN DOES" and "JANE DOES" Nos. "1" through "5", names being and intended to be unknown individuals residing at and/or occupying the premises located at 149 Ludlam Avenue, Riverside, Town of Southampton,

Defendants.

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Upon the following papers numbered 1 to 10 read on these motions for leave to file late notice of claim and to amend counterclaims ; Notice of Motion and supporting papers 1-3; 6-8 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 4-5; 9 ; Replying Affidavits and supporting papers 10 ; it is,

ORDERED that the motion by the defendants Lilia Poalasin, Nelson Valentin, and Nube G. Valentin for leave to serve a late notice of claim is denied; and it is further

ORDERED that the motion by the defendants Lilia Poalasin, Nelson Valentin, and Nube G. Valentin for leave to amend their counterclaims is denied.

The plaintiff commenced this action on October 12, 2006, to enjoin the defendants from using and occupying a single-family residence in the Town of Southampton due to overcrowding and building and fire code violations. Without serving a notice of claim, the defendants Lilia Poalasin, Nelson Valentin, and Nube G. Valentin counterclaimed to recover damages for trespass, invasion of privacy, and intentional infliction of emotional distress, among

other things. They now move for leave to serve a late notice of claim and for leave to amend their counterclaims.

General Municpal Law § 50-e requires as a condition precedent to a lawsuit against a municipal corporation timely service of a notice of claim on the municipal corporation. In deciding whether to permit service of a late notice of claim, courts generally will consider three factors: (1) whether the movant has a reasonable excuse for the failure to serve a timely notice of claim, (2) whether the municipality or agency acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and (3) whether the delay would substantially prejudice the municipality in its defense (*see*, General Municipal Law 50-e[1]; **Matter of Conroy v Smithtown Central School District**, 3 AD3d 492, 493; **Benzinger v Town of Brookhaven**, 288 AD2d 412, 412-413). While, as a general proposition, a court considering an application for leave to serve a late notice of claim should not examine the merits of the claim, the motion is appropriately denied when the claim is patently meritless (*see*, **Caldwell v 302 Convent Ave. Hous. Dev. Fund Corp**. 272 AD2d 112, 114; **Matter of Finneran v City of New York**, 228 AD2d 596, 597; **Matter of Katz v Town of Bedford**, 192 AD2d 707, 708).

The court finds that the moving defendants have not proffered a reasonable excuse for their failure to serve a timely notice of claim. The fact that they are asserting counterclaims does not relieve them of the obligation (*see*, **County of Orange v Grier**, 30 AD3d 556, 557; **City of New York v Kashau**, 133 AD2d 205, 206). Moreover, they have been represented by counsel since the last week of October 2006, shortly after this action was commenced on October 12, 2006.

The moving defendants' counterclaims fail to state a cause of action against the plaintiff Town of Southampton. It is well settled that public policy bars claims sounding in intentional infliction of emotional distress against a governmental entity (*see* **Lauer v City of New York**, 240 AD2d 543, 544). In any event, the acts alleged by the moving defendants are not so extreme, outrageous, utterly reprehensible and intolerable in a civilized society as to sustain a cause of action for intentional infliction of emotional distress (**Id.** at 544). Although any unauthorized entry upon the land of another constitutes a trespass, law enforcement personnel acting lawfully in the furtherance of their duty are excused from what may otherwise be trespassory acts (*see*, **Hand v Stray Haven Humane Society & SPCA**, 21 AD3d 626, 628). The court finds that the intrusions onto the moving defendants' property were for a permissible purpose and appropriately limited in scope (**Id.** at 628). In fact, one such intrusion was pursuant to a search warrant. There is no common-law right of privacy in New York (*see*, **Grodin v Liberty Cable**, 244 AD2d 153, 154), and the moving defendants do not allege that their names, portraits, or pictures were used for a commercial purpose without their consent (*see*, Civil Rights Law § 51). As a matter of law, the mere filing of a summons and complaint by the plaintiff is an insufficient predicate for an abuse of process claim (*see*, **Gleich v Rose**, 294 AD2d 177; *see also*, **Leon v Couri**, 285 AD2d 493, 494). Moreover, New York does not recognize a cause of action to recover damages for harassment (*see*, **Goldstein v Tabb**, 177 AD2d 470, 471) or persecution. The moving defendants' remaining claims, which allege unspecified violations of their civil, property, state and federal constitutional rights, are too vague to state a cause of action.

In view of the foregoing, it would make little sense to grant the moving defendants

the right to serve a late notice of claim (*see*, **Katz v Town of Bedford**, *supra* at 708). Likewise, it would make little sense to grant their motion for leave to amend their counterclaims. The proposed amendments do not correct the aforementioned defects. Moreover, the moving defendants allege that Police Officer Lynne, whom they seek to add as a party defendant, was acting within the scope of her employment. Public officers cannot be held individually liable, even if charged with malicious intent, when they are acting in their official capacity (*see*, **Van Buskirk v Bleiler**, 46 AD2d 707; *see also*, **Miller v City of Rensselaer**, 94 AD2d 862, 863, *citing* **Brandt v Winchell**, 3 NY2d 628, 635). Accordingly, both motions are denied.

DATED: May 17, 2007

HON. ELIZABETH HAZLITT EMERSON

J. S.C.