

**Southampton Fire Dist. v Village of  
Southampton**

2008 NY Slip Op 30926(U)

March 25, 2008

Supreme Court, Suffolk County

Docket Number: 0021104/2007

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 33 - SUFFOLK COUNTY

**PRESENT:**

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 10/2/07  
ADJ. DATES 11/30/07  
Mot. Seq. # 001 - Mot D  
Mot. Seq. # 002 - X Mot D

-----X  
THE SOUTHAMPTON FIRE DISTRICT, THE :  
BOARD OF FIRE COMMISSIONERS OF THE :  
SOUTHAMPTON FIRE DISTRICT, WILLIAM :  
MARK PRESS, Chairman, DAVID G. PRICE, :  
Commissioner, THOMAS B. WHITE, :  
Commissioner, ROBERT E. GRISNIK, :  
Commissioner, HAROLD G. STEUDTE, :  
Commissioner, and on behalf of all residents of :  
THE SOUTHAMPTON FIRE DISTRICT, :  
similarly situated and aggrieved, :  
:

Plaintiffs, :

-against- :

VILLAGE OF SOUTHAMPTON, HONORABLE :  
MARK EPLEY, individually and as Mayor of THE :  
VILLAGE OF SOUTHAMPTON, THE BOARD :  
OF TRUSTEES OF THE VILLAGE OF :  
SOUTHAMPTON and "JOHN DOE(s)" and :  
"JANE DOE(s)" intended to designate the Agents, :  
Servants, Representatives and Employees of the :  
defendants, including but not limited to, one or :  
more present and/or former Village Trustees or :  
elected or appointed officials, individually and as a :  
Trustee(s) and RICHARD BRAUN and BRAUN :  
MARKETING, :  
:

Defendants. :  
-----X

STANLEY E. ORZECOWSKI, PC  
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195 E. Main St.  
Smithtown, NY 11787

ESSEKS, HEFTER & ANGEL, LLP  
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P.O. Box 279  
Riverhead, NY 11901

DEVITT, SPELLMAN, BARRETT, LLP  
Attys. For Village Defendants  
50 Route 111  
Smithtown, NY 11787

Upon the following papers numbered 1 to 19 read on this motion          and cross motion to dismiss           
        ; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of  
Cross Motion and supporting papers 4-6; Answering Affidavits and supporting papers 7-9;  
Replying Affidavits and supporting papers 10-11; Other 12-13 (affidavit); 14-15 (memorandum); 16-17  
(memorandum); 18 (memorandum); 19 (memorandum); (~~and after hearing counsel in support and opposed to the~~  
~~motion~~) it is,

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**ORDERED** that this motion (#001) by the defendants, Village of Southampton, Honorable Mark Epley, individually and as Mayor of the Village of Southampton, the Board of Trustees of the Village of Southampton, and "John Doe(s)" and "Jane Doe(s)" seeking an Order dismissing the complaint based upon plaintiffs' failure to state a cause of action is granted only to the extent that the first three causes of action brought by the Southampton Fire District, only are dismissed, the first three causes of action by the individual Fire Commissioners remain viable. Plaintiffs' fourth cause of action based upon a prima facie tort is dismissed without prejudice with leave to renew within thirty (30) days from the date herein. In the event it is not, then and in that event, it shall be deemed to have been waived. In all other respects, the motion is denied; and it is further

**ORDERED** that the cross motion (#002) by the defendants, Richard Braun and Braun Marketing, seeking an Order pursuant to CPLR 2212 and CPLR 3211(a)(7) dismissing the complaint based upon plaintiffs' failure to state a cause of action is granted only to the extent that the first three causes of action brought by the Southampton Fire District, only are dismissed, the first three causes of action by the individual Fire Commissioners remain viable. Plaintiffs' fourth cause of action based upon a prima facie tort is dismissed without prejudice with leave to renew within thirty (30) days from the date herein. In the event it is not, then and in that event, it shall be deemed to have been waived. In all other respects, the cross motion is denied; and it is further

**ORDERED** that the defendants are directed to serve an answer to the complaint pursuant to CPLR 3211(f); and it is further

**ORDERED** that the movants on the motion and cross motion shall serve a copy of this Order with Notice of Entry upon counsel for the plaintiff within forty (40) days of the date herein pursuant to CPLR 2103(b)(1),(2) or (3) and thereafter file the affidavits of service with Clerk of the Court; and it is further

**ORDERED** that a Preliminary Conference is scheduled for **June 20, 2008**, at 9:30 a.m. in the DCM Part located at the courthouse at 1 Court Street, Riverhead, New York.

This is an action brought by the plaintiffs to recover damages due to defendants' alleged tortious and intentional conduct constituting defamation, libel, libel per se, slander, slander per se, prima facie tort, negligent and intentional interference with contractual rights and relationships in that the defendants have accused plaintiffs of official misconduct and criminal conduct. Plaintiffs also allege that defendants violated state election laws, federal postal regulations and plaintiffs' constitutional and civil rights in connection with a publication that was mailed to the community serviced by the fire district a few days prior to a general election on a referendum seeking public approval to purchase private property to build a fire district building and fire facility. Familiarity with previous Orders regarding this matter are presumed and only relevant facts will be restated where necessary.

The complaint sets forth seven causes of action. The first cause of action alleges defamation, libel and libel per se. The second cause of action alleges defamation and slander and seeks special and punitive damages. The third cause of action alleges libel and slander per se and seeks compensatory, special and punitive damages. The fourth cause of action alleges prima facie tort and seeks compensatory, special and punitive damages. The fifth cause of action alleges that the defendants have engaged in conduct constituting negligent and intentional interference with contractual rights and relationships and loss of business opportunity with malice. The sixth cause of action alleges that the defendants have engaged in conduct which constitutes a violation of the Election Laws of the State of New York and Federal Laws in the form, inter alia, of the United States Postal regulations. The seventh cause of action alleges that the defendants have engaged in conduct constituting a violation and deprivation of the plaintiffs' constitutional and civil rights to substantive due process, procedural due process and equal protection of the law.

Defendants move and cross move in these pre-answer motions to dismiss the complaint for failure to state a cause of action. Plaintiffs oppose the motions and submit the affidavit of William Mark Press in support thereof.

In considering a motion to dismiss pursuant to CPLR 3211, the court's role is limited to "determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint" (*Frank v Diamler Chrysler Corp.*, 292 AD2d 118, 121, 741 NYS2d 9 [1<sup>st</sup> Dept 2002] citations omitted; *lv den.* 99 NY2d 502, 752 NYS2d 589 [2002]), limiting the Court's inquiry to determining whether, taking the allegations of the complaint as true and affording plaintiffs the benefit of every reasonable inference, plaintiffs have stated a cause of action against one or more defendants (see *Dunleavy v Hilton Hall Apts. Co., LLC*, 14 AD3d 479, 789 NYS2d 164 [2d Dept 2005]). In addition, the pleading "is to be afforded liberal construction (see CPLR 3026) and the court should accept as true facts alleged in the complaint, accord the plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory (see *Klepetko v Reisman*, 41 AD3d 551, 839 NYS2d 101 [2d Dept 2007]; *Frank v Diamler Chrysler Corp.*, 292 AD2d 118, *supra*) not whether there is evidentiary support for the complaint (see *McGee v City of Rensselaer*, 174 Misc2d 491, 663 NYS2d 949 [Sup Ct, Rensselaer Cty 1997]; *Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]). However, bare legal conclusions are not presumed to be true and are not accorded every favorable inference (see *Morris v Morris*, 306 AD2d 449, 763 NYS2d 622 [2d Dept 2003] citation omitted).

In applying the standard, the Court expresses no opinion as to the truth or falsity of the allegations of the complaint or the conclusions plaintiffs argue should be drawn therefrom. On the procedural posture of the action, these issues are not properly before the Court.

The Court will first address the complaint's first cause of action alleging defamation, libel and libel per se, the second cause of action alleging defamation and slander and seeking special and punitive damages and the third cause of action alleging libel and slander per se and seeking compensatory, special and punitive damages. The Southampton Fire District is a governmental entity and is incapable of being libeled. Therefore, it cannot sue for libel.

It is well settled law that a government agency may not maintain a libel or defamation action regardless of the veracity of the statements or the existence of malice (see 1 Law of Defamation § 4:76 [2d ed]; PLIREF-DEFAM § 2.10.1 ; 53 C.J.S. Libel and Slander; Injurious Falsehood § 171, *supra*; 43A N.Y. Jur. 2d Defamation and Privacy § 198; 50 Am. Jur. 2d Libel and Slander § 333; REST 2d TORTS § 561; 45 A.L.R. 3d 1315; *Rosenblatt v Baer*, 383 U.S. 75, 86 S. Ct. 669, 15 L. Ed 597 [1966]; *City of Philadelphia v Washington Post Co.*, 482 F. Supp 897 [E.D. Pa. 1979]; *Capital Dist. Regional Off-Track Betting Corp. v Northeastern Harness Horseman's Assoc.*, 92 Misc2d 232, 399 NYS2d 597 [Sup Ct Schenectady County 1977]). Therefore, the first three causes of action of plaintiffs' complaint on behalf of the Southampton Fire District are dismissed.

Commissioners may bring an action as individuals under certain circumstances (see 53 C.J.S. Libel and Slander; Injurious Falsehood § 171; see also 6 U. Pa. J. Const. L. 881). In the landmark defamation case, *New York Times Co. v Sullivan*, 376 U.S 254, 84 S. Ct. 710, 11 L. Ed 2d 686, the Court ruled that the "First Amendment permits a public official to recover damages for a defamatory falsehood only if he can show that the defamatory publication was not only false, but was uttered with 'actual malice-that is, with knowledge that it was false or with reckless disregard of whether it was false or not' (*supra* at 280)" (*Goetz v Kunstler*, 164 Misc2d 557, 560, 625 NYS2d 447 [Sup Ct, New York County 1995]). However, the Second and Fourth Departments have recently held that where an action is commenced, a plaintiff is not required to show any evidentiary facts to support his or her allegation of malice (see *Kotowski v Hadley*, 38 AD3d 499, 833 NYS2d 103 [2d Dept 2007]; *Fain v Gleasman*, 34 AD3d 1246, 824 NYS2d 749 [4<sup>th</sup> Dept 2006]).

CPLR 3016(a) sets forth special pleading rules for libel and slander and requires that in said action, "the particular words complained of . . . be set forth in the complaint." The complaint also must allege the time, place and manner of the false statement and specify to whom it was made (see *Arsenault v Forquer*, 197 AD2d 554, 602 NYS2d 653 [2d Dept 1993]; *Vardi v Mutual Life Ins. Co.*, 136 AD2d 453, 523 NYS2d 95 [1<sup>st</sup> Dept 1988]). Plaintiffs have alleged in their complaint the specific defamatory statements and have specified to whom they were published (*cf. Schwegel v Chiramonte*, 4 AD3d 519, 772 NYS2d 379 [2d Dept

2004]; *Loria v Plessner* 267 AD2d 213, 699 NYS2d 439 [2d Dept 1999]). Therefore, the first three causes of action of plaintiffs' complaint on behalf of the individual commissioners remain viable as against the defendants (see *Klepetchko v Reisman*, 41 AD3d 551, *supra*).

Regarding plaintiffs' fourth cause of action, which alleges a prima facie tort by defendants, it is well established that the elements of a cause of action for prima facie tort are (1) the intentional infliction of harm; (2) causing special damages; (3) without lawful excuse or justification; and (4) by an act or series of acts that would be otherwise unlawful (see *Freihofer v Hearst Corp.*, 65 NY2d 135, 490 NYS2d 735 [1985]; *Curiano v Suozzi*, 63 NY2d 113, 480 NYS2d 466 [1984]). There can be no recovery under this tort unless disinterested malevolence is the sole motive for the defendant's otherwise lawful act (see *Lynch v McQueen*, 309 AD2d 790, 765 NYS2d 645 [2d Dept 2003]; *Landor-St. Gelais v Albany Int'l. Corp.*, 307 AD2d 671, 763 NYS2d 369 [3d Dept 2003]; *Avgush v Town of Yorktown*, 303 AD2d 340, 755 NYS2d 647 [2d Dept 2003]; *Burns Jackson Miller Summit & Spitzer v Linder*, 59 NY2d 314, 464 NYS2d 712 [1983]; *Tramontozzi v St. Francis Coll.*, 232 AD2d 629, 649 NYS2d 43 [2d Dept 1996]; *Schotthauer v Sanders*, 143 AD2d 84, 531 NYS2d 334 [2d Dept 1988]; *Molinoff v Sassower*, 99 AD2d 528, 471 NYS2d 312 [2d Dept 1984]).

Here, the complaint alleges that defendants engaged in a conduct constituting prima facie tort and did so intentionally, with knowledge of the falsity of the publications, a reckless disregard of the truth of the publication, and for the purpose and intent of injuring the plaintiff in that the referendum was defeated. Since the complaint does not allege that defendants' sole motivation was disinterested malevolence, the prima facie tort cause of action must fail (see *Lynch v McQueen*, 309 AD2d 790, 765 NYS2d 645 [2d Dept 2003]; *Landor-St. Gelais v Albany Int'l. Corp.*, 307 AD2d 671, *supra*; *Avgush v Town of Yorktown*, 303 AD2d 340, *supra*; *Hakim v Paine Webber*, 261 AD2d 578, 739 NYS2d 371 [2d Dept 1999]; *Tramontozzi v St. Francis Coll.*, 232 AD2d 629, *supra*; *Schotthauer v Sanders*, 143 AD2d 84, *supra*; *Molinoff v Sassower*, 99 AD2d 528, *supra*; *Burns Jackson Miller Summit & Spitzer v Linder*, 59 NY2d 314, *supra*).

Furthermore, special damages are an essential element of a prima facie tort and must be pleaded with sufficient particularity (see *Spinale v 10 West 66<sup>th</sup> St. Corp.*, 291 AD2d 234, 736 NYS2d 879 [1<sup>st</sup> Dept 2002]; *Havell v Islam*, 292 AD2d 210, *supra*; *Board of Mgr. of Executive Plaza Condominium v Jones*, 251 AD2d 89, 674 NYS2d 304 [1<sup>st</sup> Dept 1998]; *Charnis v Shoheit*, 195 Misc2d 188, 189, 757 NYS2d 671 [App Term 2002], *affd* 2 AD3d 663, 768 NYS2d 638 [2d Dept 2005]; *DiSanto v Forsyth*, 258 AD2d 497, 684 NYS2d 628 [2d Dept 1999]; *Curiano v Suozzi*, 63 NY2d 113, 117, *supra*). This was not done here.

In the matter before the Court, the fourth cause of action only sets forth an amount of compensatory, special and punitive damages in amounts in excess of the jurisdictional limits of all lower courts without any particularity as to a specific and measurable loss so as to identify and casually relate the actual losses to the allegedly tortious act as required for a prima facie tort cause of action (see *Dembitzer v Chera*, 305 AD2d 531, 761 NYS2d 60 [2d Dept 2003]; *Del Vehicco v Nelson*, 300 AD2d 277, 751 NYS2d 290 [2d Dept 2002]; *Broadway & 67<sup>th</sup> St. Corp. v City of New York*, 100 AD2d 478, 475 NYS2d 1 [1<sup>st</sup> Dept 1984]). Therefore, since the fourth cause of action fails to show that defendants acted with disinterested malevolence and set forth special damages with particularity, this cause of action is dismissed. However, the Court, in its discretion, will allow the plaintiffs leave to renew the cause of action, without prejudice, within thirty (30) days from the date herein identifying the specific acts of disinterested malevolence and specific special damages sustained by the plaintiffs as the result of defendants' alleged actions. Should plaintiff fail to replead this cause of action within the time period set forth herein, then in that event, it shall be deemed waived.

Plaintiff's fifth cause of action alleges that the defendants engaged in conduct constituting negligent and intentional interference with contractual rights and relationships, loss of business opportunity with malice and intentional interference with contract rights. Plaintiffs claim that as a result of the actions by defendants, they were denied the business opportunity to purchase a specific property necessary for the construction of fire facilities within the Southampton Fire District and plaintiffs must now search for a new location, allegedly at a higher price.

To plead a tortious interference claim, a plaintiff must allege (1) a valid contract between the plaintiff and a third party; (2) defendant's knowledge of that contract; (3) defendant's intentional procurement of a breach of that contract without justification; (4) actual breach; and (5) damages (*see NBT Bancorp Inc. v Fleet/Norstar Fin. Group, Inc.*, 87 NY2d 614, 641 NYS2d 581 [1996]). Defendant's knowledge of the third-party contract at the time that a breach is induced is a key consideration (*see Caprer v Nussbaum*, 36 AD3d 176, 825 NYS2d 55 [1<sup>st</sup> Dept 2006]; *Bogani v Friedlander*, 197 AD2d 281, 610 NYS2d 511 [1<sup>st</sup> Dept 1994]). To establish a breach of contract, plaintiffs must set forth the terms of the agreement, either expressly referencing it or attaching a copy of it (*see Chrysler Capital Corp. v Hilltop Egg Farms, Inc.*, 129 AD2d 927, 514 NYS2d 1002 [3d Dept 1987]).

The defendants have alleged that the plaintiffs received secret, unauthorized salaries by state law, amongst other grievous acts by defendants, which was an intentional allegation to defeat the referendum. This allegation is sufficient to raise a triable issue of fact as to whether defendants intentionally interfered with a valid contract (*see Lana & Samer, Inc. v Goldfine*, 7 AD3d 300, 749 NYS2d 249 [1<sup>st</sup> Dept 2004]; *Cantor Fitzgerald Assocs., L.P. v Tradition No. Am., Inc.*, 299 AD2d 204, 776 NYS2d 66 [1<sup>st</sup> Dept 2002]; *lv app den* 99 NY2d 508, 759 NYS2d 819 [2003]; *Waste Serv. Inc. v Jamaica Ash & Rubbish Removal Co.*, 262 AD2d 401, 691 NYS2d 150 [2d Dept 1999]), thereby inducing a breach of these contracts, without justification, for the sole purpose of harming plaintiffs (*accord Simaee v Levi*, 22 AD3d 559, 563, 802 NYS2d 493 [2d Dept 2005]; *Rapp Boxx, Inc. v MTV, Inc.*, 226 AD2d 324, 642 NYS2d 228 [1<sup>st</sup> Dept 1996]; *Benjamin Goldstein Prod., Ltd. v Fish*, 198 AD2d 137, 603 NYS2d 849 [1<sup>st</sup> Dept 1993]). The affidavit and the copy of the contract for the sale of the property submitted in opposition to defendants' motions are sufficient to withstand dismissal of this cause of action.

The sixth cause of action alleges that the defendants have engaged in conduct, which constitutes a violation of the Election Laws of the State of New York and a violation of the Federal Laws in the form, inter alia, of the United States Postal regulations. The seventh cause of action alleges that the defendants have engaged in conduct constituting a violation and deprivation of the plaintiffs' constitutional and civil rights to substantive due process, procedural due process and equal protection of the law. While the Court may freely consider the affidavits submitted by the plaintiffs to remedy any defects in the complaint, the sole criteria should be whether the proponent has a cause of action and not whether he has stated one (*see Guggenheimer v Ginsburg*, 43 NY2d 268, 401 NYS2d 182 [1977]; *Rovello v Orofeno Realty Co.*, 40 NY2d 633, 389 NYS2d 314 [1976]). Although inartfully drafted, there are sufficient allegations in the two causes of action and the supporting affidavit to withstand defendants' motions to dismiss at this early stage of the action.

Punitive damages are recoverable in actions where a party "engages in wilful or wanton conduct evincing a deliberate intention to harm or an utter indifference or conscious disregard of others" (*Colombini v Westchester County Healthcare Corp.*, 24 AD3d 712, 808 NYS2d 705 [2d Dept 2005]). While there exists no independent cause of action for punitive damages (*see Feger v Warwick Animal Shelter*, 29 AD3d 515, 814 NYS2d 700 [2d Dept 2006]; *Yong Wen Mo v Chan*, 17 AD3d 356, *supra*; *Park v YMCA of Greater New York Flushing*, 17 AD3d 333, 791 NYS2d 848 [2d Dept 2005]), plaintiffs have requested same as part of their ad damnum clause. Therefore, the claim of punitive damages set forth in plaintiffs' causes of action in the complaint shall remain since it raises possible viable issues as to alleged wilful misconduct of defendants.

Under this liberal approach and upon review of the complaint, the Court finds that plaintiffs' first, second, third, fifth, sixth and seventh causes of action set forth cognizable legal theories. Therefore, defendants' application seeking to dismiss plaintiffs' complaint is granted only to the fourth cause of action and is otherwise denied.

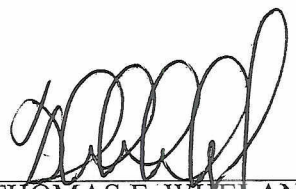
Counsel for the plaintiffs in his affirmation and in the affidavit of William Mark Press seek recusal of the Court from this matter, having previously sought recusal on its motion to reargue the Court's denial of plaintiffs' motion for pre-action discovery. Plaintiffs seek recusal based upon this Court's employment with the law firm of Esseks, Hefner & Angel, LLP. This Court's association ended approximately ten years ago and in the Court's opinion and upon careful consideration of §§ 100.2 and 100.3(E)(1) of the Rules of

the Chief Administrator (*see* NY Advisory Committee on Judicial Ethics, Op 05-143), this does not qualify as grounds for the Court to recuse itself (*see People ex rel Smulczeski ex rel Smulczeski v Smulczeski*, 18 AD3d 785, 795 NYS2d 695 [2d Dept 2005]). Any objection would be without merit (*see* NY Advisory Committee on Judicial Ethics, Op 94-11 and 88-95).

Furthermore it is well settled that, absent a legal disqualification under Judiciary Law § 14, a trial judge is the sole arbiter of whether recusal is warranted by the appearance of partiality and this discretionary decision is within the personal conscience of the Court (*see The People of the State of New York by Eliot Spitzer, Attorney General of the State of New York v Grasso* \_\_\_ AD3d \_\_\_, \_\_\_ NYS2d \_\_\_ [1<sup>st</sup> Dept 2008]). “Recusal, as a matter of due process, is required only where there exists a direct, personal, substantial or pecuniary interest in reaching a particular conclusion, or where a clash in judicial roles is seen to exist” (*Matter of Khan v Dolly*, 39 AD3d 649,650-651, 833 NYS2d 608 [2d Dept 2007], *citations omitted*), which are not present here. Therefore, this second application for recusal is denied.

Accordingly, the motion and cross motion are denied as noted herein. This constitutes the Order and decision of the Court.

DATED: 3/25/08

  
\_\_\_\_\_  
THOMAS F. WHELAN, J.S.C.