SHORT FORM ORDER

INDEX No. 04-11376
CAL. No. 07-01959-EQ

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 1-24-08
ADJ. DATE 6-4-08
Mot. Seq. # 002 - MG; CASEDISP

ALBERT R. WALLS, Plaintiff, - against - TOWN OF ISLIP and JOSEPH MANDANCINI, individually, Defendants.	MICHAEL J. KAPER, ESQ. Attorney for Plaintiff 28 E. Main Street Babylon, New York 11702 LEWIS JOHS AVALLONE AVILES, LLP Attorneys for Defendants 21 East Second Street Riverhead, New York 11901

Upon the following papers numbered 1 to 11 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 4 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 5 - 8 ; Replying Affidavits and supporting papers 10 - 11 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by the defendants for, *inter alia*, summary judgment dismissing the plaintiff's complaint in this tort action for recovery of damages is considered under CPLR 3212 and is granted to the extent that summary judgment dismissing the plaintiff's complaint is awarded to the defendants.

The plaintiff commenced this action to recover damages allegedly sustained by reason of the defendants' engagement in conduct which purportedly defamed the plaintiff, injured his reputation and credit standing and violated his constitutional rights. The plaintiff's claims emanate from a September 19, 2001 letter written by defendant Mandancini in his capacity as Deputy Commissioner of the Department of Code Enforcement for co-defendant, Town Islip. In said letter, Mandancini advised the plaintiff of the existence of a possible use violation on his residential premises located at 36 Spray Court, Bayport, NY 11705, as follows:

> The above premises has been reported to the Town of Islip as an illegal multi-family dwelling. Your Certificate of Occupancy reflects that this is not a permitted use. We require immediate compliance to rectify this situation. Please contact Code Enforcement Investigators at 224-5547.
>
> The Town of Islip had adopted an ordinance which allows an owner-occupied premise to have one accessory apartment if the property complies with ordinance requirements. Failure to comply with this ordinance or to restore the premises to one-family use, will result in immediate enforcement, including legal proceedings.
>
> An application package under the Accessory Apartment Ordinance may be obtained from the Town of Islip Board of Appeals at 224-5489.

Upon receipt of the foregoing letter, the plaintiff responded in writing advising the defendants that his premises were not being put to the non-permitted multi-family use described in defendant Mandancini's letter, notwithstanding the fact that the plaintiff shared his home with two, unrelated adults. The plaintiff further advised that he and the two unrelated adults with whom he shared his home "live as a family" and accordingly, his residential premises were entirely compliant with the residence use permitted under the Town of Islip Zoning Code. There were no further communications between the plaintiff and the Department of Code Enforcement until late April of 2003. It was then that the plaintiff, upon his return home from a two week vacation, found a business card in the door of his premises bearing the name of Gregory Clifton from the Town of Islip's Department of Code Enforcement. Mr. Clifton did not, however, return to the plaintiff's premises and there was no further contact between the plaintiff and the Department of Code Enforcement.

Prior to Mr. Clifton's unsuccessful attempt to meet with the plaintiff in April of 2003, the plaintiff learned from a title report prepared in connection with a mortgage application he submitted to a prospective lender in November of 2002, that the Town of Islip reported, by correspondence dated December 2, 2002, that a notice of violation dated November 25, 2002 had issued against the plaintiff's premises due to the plaintiff's use of the dwelling situated on said premises as a two-family dwelling. In February of 2003, the plaintiff was advised by the prospective lender that the mortgage for which he applied was not available due to unacceptable credit and the existence of the zoning violation noted in the title report. Although the plaintiff remedied the unacceptable credit listed by the lender as one of the two grounds for denial of the mortgage, the two-family use zoning violation was never remedied or otherwise removed and the plaintiff never received mortgage monies from that lender. The plaintiff was allegedly unable to purchase a condominium in Florida that was the object of the mortgage monies he hoped to secure in November of 2002.

By the complaint served and filed herein, the plaintiff demands a judgment declaring that the plaintiff's premises have not been put to a multi-family use and directing the defendants to remove the notice of violation filed against said premises. The plaintiff further demands a judgment awarding the plaintiff money damages by reason of the defendants' purported violations of the rights afforded the plaintiff under the First, Fifth, Sixth, Ninth and Fourteenth Amendments of the Federal Constitution and those afforded under 42 USC §§1983 and 1988. The plaintiff also demands an award of money damages under common law defamation theories attributable to the purported ruination of the plaintiff's good name, reputation and credit rating by reason of the purportedly false and malicious statements published by the defendants in their September 19, 2002 letter to the plaintiff and in their November 25, 2002 Notice of Violation which was disseminated to the title company and to the plaintiff's potential lender in January or February of 2003.

Now before the court is the instant motion by the defendants for summary judgment dismissing the plaintiff's complaint and for other relief. In support thereof, the defendants contend, *inter alia*, that the plaintiff has no cognizable claim for relief under the Federal Constitution or the Federal statutes recited in the his complaint and that the plaintiff's state law claims, all of which sound in defamation, are not actionable because, *inter alia*, the statements attributed to the defendants were absolutely privileged. With these contentions the court agrees and thus finds that the defendants are entitled to the summary judgment demanded by them.

To formulate a cognizable claim under the Due Process Clause of the Fourteenth Amendment, a plaintiff must demonstrate that he or she possesses a constitutionally protected interest in life, liberty or property and that state action has deprived him or her of that interest (***Valmonte v Bane***, 18 F.3d 1992 [2d Cir. 1994]). Here, the plaintiff's claims are premised on a loss of liberty interest due to the defendants' purported defamatory writings of September 19, 2001 and November 25, 2002. However, it is well settled that defamation of an issue of state law, not federal constitutional law and therefore provides an insufficient basis to maintain an action under 42 USC §1983 (*see* ***Sadallah v City of Utica***, 383 F3d 34 [2nd Cir. 2004]). Even palpably false statements by a governmental actor will thus not support a §1983 claim where the only injury is to the plaintiff's reputation ***(see Paul v Davis***, 424 US 693, 96 S.Ct 1155[1976]). Harm or injuries which "are not 'in addition to' the alleged defamation .... bur rather are direct 'deleterious effects' of that defamation are not actionable under federal law (***Sadallah v City of Utica***, *supra* @ 383 F3d 39 [2nd Cir. 2004]). Since the plaintiffs claims sound in common-law defamation, the Court finds that the plaintiff's due process claims are without merit.

Equally unavailing are the plaintiff's pleaded claims for damages pursuant to 42 USC §1983 by reason of the defendants' purported violations of the rights afforded the plaintiff under the Fourth and Fourteenth amendments to the Federal Constitution. The record is devoid of any evidence that the defendants' perpetrated an unreasonable search and/or seizure of the plaintiff's property or that they engaged in conduct violative of the Equal Protection Clause of the Fourteenth Amendment that is actionable under 42 USC §§1983 or 1988 (*see* ***Olivera v Town of Woodbury***, 281 F.Supp 674 [SDNY 9/2/2003]). Nor is there any evidence that the conduct on the part of the defendants about

which the plaintiff complains is actionable as a violation of the rights afforded to the plaintiff under the First, Fifth and/or Ninth Amendments to the Federal Constitution. The defendants are thus entitled to an accelerated judgment dismissing the plaintiff's federal claims.

Left for consideration are those portions of the instant motion wherein the defendants seek summary judgment dismissing the plaintiff's claims for recovery of damages under common law theories of defamation. Defamation has been defined by the courts of this state to be the making of a false statement which tends to expose the plaintiff to public contempt, ridicule or disgrace, or induces an evil opinion of him or her in the minds of right thinking persons and deprives him or her of a friendly enter intercourse in society (*see* ***Rinaldi v Holt, Rinehart & Winston, Inc.***, 42 NY2d 369, 397 NYS2d 943 [1977]). To be actionable, the complained of statements uttered or disseminated in writing by the defendant must convey a defamatory meaning and it is for the court to determine, in the first instance, whether the words ascribed to the plaintiff are reasonably capable of conveying a defamatory import (*see* ***Lenz Hardware, Inc., v Wilson***, 94 NY2d 913, 707 NYS2d 619 [2002]; ***Aronson v Wiersma***, 65 NY2d 592, 493 NYS2d 1006 [1985]). Statements which are susceptible to a defamatory meaning will nevertheless be rendered non-actionable where the privilege of absolute immunity accorded to public officials applies. Said privilege is bestowed upon public officials who are principal executives of the State or local governments or who are entrusted by law with administrative or executive policy-making responsibilities of considerable magnitude (*see* ***Stukuls v State of New York***, 42 NY2d 272, 397 NYS2d 740 [1997]), and it extends to those of subordinate rank who exercise delegated powers (***Ward Telecom & Computer Services v State of New York***, 42 NY2d 289, 397 NYS2d 751 [1977]).

Public officials cloaked with immunity under this absolute privilege are not liable for statements or comments uttered during the discharge of their official duties about matters which come within the ambit of those duties *(see* ***Bisaccia v Funicello***, 149 AD2d 645, 540 NYS2d 302 [2nd Dept. 1989]). While purely ministerial acts of pubic officials do not fall within the ambit of the absolute privilege (*see* ***Tango v Tulevech***, 61 NY2d 34, 471 NYS2d 73 [1983], official acts of building inspectors and other code enforcement officers which form a predicate for civil actions and/or criminal prosecutions for zoning code violations have been held to be sufficiently discretionary to be immune from suit under the absolute privilege bestowed upon public officials (*see* ***Stromberg v Town of Oyster Bay***, 140 Misc 2d 295, 530 NYS2d 476 [1988] and the cases cited therein).

Assuming without so finding that the statements contained in the defendants' September 19, 2002 letter to the plaintiff and the November 25, 2002 Notice of Violation issued by the defendants are reasonably susceptible to a defamatory meaning, said statements are not actionable because they fall under the absolute privilege accorded to public officials. The defendants are thus entitled to summary judgment dismissing the plaintiff's claims for recovery of damages by reason of the allegedly defamatory statements which are the subject of this action.

In view of the foregoing, those portions of the instant motion by the defendants wherein they demand summary judgment dismissing the plaintiff' complaint are granted. The remaining portions of said motion are denied as moot. Although the plaintiff demanded declaratory relief pursuant to CPLR 3001, such demands are an improper attempt to evade a code enforcement action by the defendants (*see* ***Reed v Littleton***, 275 NY 150, 9NE2d 814 [1937]; see also ***City of New York v Times' Up, Inc.***, 11 Misc3d 252 (a), 814 NYS2d 890 (Table). Accordingly the court declines to issue declaratory relief (CPLR 3001).

Dated: 7/7/08

DENISE F. MOLIA

J.S.C.

_X_ FINAL DISPOSITION ____ NON-FINAL DISPOSITION