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SHORT FORM ORDER

INDEX NO. 9464/2007

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

ROBERT O'GORMAN and JAYNE O'GORMAN,

Plaintiffs,

-against-

COUNTY OF SUFFOLK, SUFFOLK COUNTY POLICE DEPARTMENT, SUFFOLK COUNTY POLICE DETECTIVE CLIFFORD, CID, SUFFOLK COUNTY POLICE OFFICERS, JOHN "DOE" 1 THROUGH 10, AND POLICE OFFICERS. JANE "DOE" 1 THROUGH 10, SUFFOLK COUNTY DISTRICT ATTORNEY THOMAS SPOTA and HIS AGENTS, SERVANTS, REPRESENTATIVES AND EMPLOYEES, including but not limited to SUFFOLK DISTRICT ATTORNEY INVESTIGATOR ROBERT BERGER, LONG ISLAND POWER AUTHORITY ("LIPA"), RICHARD KESSEL, CHAIRMAN OF LIPA, HEATHER SCHAPIRO - LIPA CUSTOMER RELATIONS, BARBARA O'BRITIS - LIPA REPRESENTATIVE - REVENUE PROTECTION DIVISION, MICHAEL LOWNDES - LIPA REPRESENTATIVE, DAVID WHIDDON - LIPA INVESTIGATOR,

Defendants.

ORIG. RETURN DATE: MAY 14, 2009
FINAL SUBMISSION DATE: AUGUST 20, 2009
MTN. SEQ. #: 001
MOTION: MD

ORIG. RETURN DATE: MAY 14, 2009
FINAL SUBMISSION DATE: AUGUST 20, 2009
MTN. SEQ. #: 002
CROSS-MOTION: XMG

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Upon the following papers numbered 1 to 15 read on this motion _____ FOR A PROTECTIVE ORDER AND CROSS-MOTION TO DISMISS_____. Notice of Motion and supporting papers 1-3; Affirmation in Opposition 4; Affirmation in Opposition and supporting papers 5, 6; Replying Affirmation and supporting papers 7, 8; Replying Affirmation 9; Notice of Cross-motion and supporting papers 10-12; Affirmation in Opposition and supporting papers 13, 14; Replying Affirmation 15; it is,

ORDERED that this motion by plaintiffs for an Order, pursuant to CPLR 3101, 3103 (a) (b) and (c), 3106, 3107, 3120, 3124 and the Rules of this Court: (1) granting plaintiffs a protective order conditionally striking the answers of defendants SUFFOLK COUNTY DISTRICT ATTORNEY THOMAS SPOTA ("District Attorney") and RICHARD KESSEL, CHAIRMAN OF LIPA ("Mr. Kessel"), based upon their willful failure and deliberate refusal to provide discovery in this matter and to appear for examinations before trial as demanded by plaintiffs, is hereby **DENIED** for the reasons set forth hereinafter; and its further

ORDERED that this cross-motion by defendants COUNTY OF SUFFOLK for an Order, pursuant to CPLR 3211 (a) (7), dismissing plaintiffs' complaint and any and all cross-claims that have been asserted against the District Attorney, upon the grounds that the complaint fails to state a cause of action against the District Attorney, is hereby **GRANTED** for the reasons set forth hereinafter.

This action, commenced by plaintiffs on March 27, 2007, asserts causes of action sounding in false arrest, false imprisonment, malicious prosecution, abuse of process, and defamation. Plaintiffs allege that plaintiff ROBERT O'GORMAN ("Mr. O'Gorman") was charged with petit larceny and theft of services by having an illegal electrical meter bypass at his residence located at 5 Wedgewood Lane, East Northport, New York, thereby stealing more than $500.00 worth of electricity from LIPA. Mr. O'Gorman was arrested and prosecuted, but the charges were ultimately dismissed on May 1, 2006. In addition, plaintiffs allege that in connection with the arrest and prosecution of Mr. O'Gorman, the District Attorney and Mr. Kessel made certain statements that were false and defamatory. Plaintiffs seek to recover compensatory damages as well as punitive damages against defendants.

Plaintiffs have now filed the instant application for a "protective order" conditionally striking the answers of the District Attorney and Mr. Kessel based upon their willful failure and deliberate refusal to provide discovery and to appear

for examinations before trial pursuant to plaintiffs' discovery demands, including "Cross Notices to Take Deposition Upon Oral Examination," dated March 7, 2008, and served upon the County defendants and the LIPA defendants on even date. Plaintiffs indicate that they were compelled to make the instant motion after counsel for both the District Attorney and Mr. Kessel indicated at the within preliminary conference on December 3, 2008 that they would not be voluntarily producing these defendants for deposition.

In opposition, the District Attorney argues that his deposition is not material and necessary herein, and moreover, that he maintains absolute immunity with respect to his actions associated with the prosecutorial phase of the criminal process. In addition, Mr. Kessel contends that although this action was commenced in 2007, "virtually no disclosure proceedings have taken place," and that plaintiffs' application is premature in that the depositions of the plaintiffs have yet to be conducted. Mr. Kessel alleges that the parties agreed in the preliminary conference stipulation and order to schedule the depositions of the plaintiffs first, with the depositions of the defendants to follow in the order of the caption. Furthermore, Mr. Kessel indicates that the allegedly defamatory statements made by Mr. Kessel were made during a press conference held on July 2, 2003 ("press conference"), and that plaintiffs' counsel is in possession of a videotape of such press conference. As such, Mr. Kessel contends that plaintiffs have preserved the allegedly defamatory statements, and thus a deposition of Mr. Kessel would serve "no useful purpose."

A court may strike a pleading as a sanction against a party who "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed" (CPLR 3126). The nature and degree of the penalty to be imposed pursuant to CPLR 3126 is a matter of the court's discretion (*see Espinal v City of New York*, 264 AD2d 806 [1999]; *Soto v City of Long Beach*, 197 AD2d 615 [1993]). The striking of a pleading is appropriate where there is a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith (*see Rowell v Joyce*, 10 AD3d 601 [2004]; *Beneficial Mtge. Corp. v Lawrence*, 5 AD3d 339 [2004]; *cf. Harris v City of New York*, 211 AD2d 663 [1995]). Willful and contumacious conduct can be inferred from a party's repeated failures to adequately respond to both discovery demands or court directives to comply with such demands, coupled with inadequate explanations for the failures to comply (see *Schwartz v Suebsanguan*, 15 AD3d 565 [2005]; *Rowell v Joyce*, 10 AD3d 601, *supra*; *Penafiel v Puretz*, 298 AD2d 446 [2002]).

At this juncture, the Court finds that it would be inappropriate to conditionally strike the answers of the District Attorney and Mr. Kessel, as the Court does not find those defendants' conduct herein to be willful or contumacious. At the time plaintiffs' application was made, none of the depositions of the parties had been conducted. As discussed, in the within preliminary conference stipulation and order, the parties stipulated to schedule the depositions of the plaintiffs first, with the depositions of the defendants to follow in the order of the caption. In addition, the County defendants have priority of depositions herein (*see* CPLR 3106 [a]), as the County defendants served a Notice of Examination Before Trial upon plaintiffs on or about June 27, 2007, prior to service of plaintiffs' Cross Notices to Take Depositions. In view of the foregoing, plaintiffs' motion to conditionally strike the answers of the District Attorney and Mr. Kessel is **DENIED**.

The COUNTY OF SUFFOLK has filed a cross-motion seeking to dismiss plaintiffs' complaint and any and all cross-claims asserted against the District Attorney upon the grounds that the complaint fails to state a cause of action against the District Attorney. The County argues that the District Attorney had a qualified privilege when he communicated certain information about Mr. O'Gorman's arrest at the press conference. Moreover, the County alleges that in a malicious prosecution action such as this where the actions complained of are associated with the prosecutorial phase of the criminal process, the District Attorney has absolute immunity.

In opposition, plaintiffs argue that the press conference was not an event that is subject to absolute immunity, and that a claim of qualified privilege must fail based upon the "unearthed evidence of actual malice, ill will and reckless disregard of the true facts," as demonstrated by the statements made by the District Attorney at the press conference. Plaintiffs inform the Court that the District Attorney stated, among other things, that Mr. O'Gorman was a "thief" who "tampered with his electrical meter" and "will pay a steep price for his foolish decisions." Plaintiffs contend that the press conference was not held for any legitimate public purpose, but rather primarily for "political and prosecutorial shock." Plaintiffs claim that the press conference had no relationship to the actual judicial proceedings, and that such statements are not protected by the District Attorney's qualified privilege. Further, plaintiffs allege that when a District Attorney acts as an investigator, administrator or law enforcement police officer, the District Attorney is entitled to qualified immunity that may be negated by a showing of bad faith, malice or lack of any reasonable basis for the action.

Initially, the Court notes that County Law § 54 prevents suit for money damages against the head of any agency, department, bureau, or office of a county for any act or omission of subordinates. Thus, plaintiffs' complaint which seeks to hold the District Attorney vicariously accountable for the acts or omissions of his subordinates, must be dismissed, as claims premised on vicarious liability do not lie against the head of a county agency (*see* County Law § 54; *Barr v County of Albany*, 50 NY2d 247 [1980]; *Shmueli v N.Y. City Police Dep't*, 295 AD2d 271 [2002]).

Next, a prosecutor is entitled to absolute immunity from civil suit in tort for quasi-judicial actions taken within the scope of his official duties, i.e., initiating a prosecution and in presenting the State's case (*Imbler v Pachtman*, 424 US 409 [1976]; *Johnson v Kings County DA's Office*, 308 AD2d 278 [2003]; *Minicozzi v Glen Cove*, 97 AD2d 815 [1983]; *Whitmore v City of New York*, 80 AD2d 638 [1981]). The purpose of this immunity is to prevent harassment by unfounded litigation which would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust; it would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system (*see Imbler v Pachtman*, 424 US 409, *supra*). It has been repeatedly held that a prosecutor's absolute immunity extends to those acts, whether in or out of the courtroom, which occur in the course of the prosecutor's role as an advocate for the state (*Buckley v Fitzsimmons*, 509 US 259 [1993]; *Pinaud v County of Suffolk*, 52 F3d 1139 [1995]; *Dockery v Tucker*, 2000 US Dist LEXIS 14908 [EDNY]). However, where the prosecutor acts in the clear absence of all jurisdiction and without any colorable claim of authority, he loses the absolute immunity he would otherwise enjoy (*see Rodrigues v City of New York*, 193 AD2d 79, *supra*). When a prosecutor acts outside of his or her quasi-judicial role, such as in an investigative capacity, such prosecutor is entitled to qualified immunity (*see Rodrigues v City of New York*, 193 AD2d 79 [1993]).

Here, plaintiffs allege that the District Attorney's office prepared and filed a misdemeanor information, sworn to on June 23, 2003, which initiated a criminal proceeding against Mr. O'Gorman. As such, the Court finds that the District Attorney is entitled to absolute immunity with respect to the quasi-judicial actions taken thereafter within the scope of his official duties (*see Johnson v Kings County DA's Office*, 308 AD2d 278, *supra*). Further, by initiating a prosecution and presenting the State's case, the District Attorney is immune from

a civil suit for damages under 42 USC § 1983 (*see Bernard v County of Suffolk*, 356 F3d 495 [2004]; *Imbler v Pachtman*, 424 US 409, *supra*).

A review of the complaint herein reveals that notwithstanding multiple references to actions undertaken by "the defendants," the only actions complained of that are specific to the District Attorney himself were the allegedly defamatory statements made at the press conference. In general, a qualified or conditional privilege attaches to statements in which the party communicating possesses a legal duty to communicate information about another, provided that the communicator has a good-faith belief that the information is true (*see Shapiro v Health Ins Plan*, 7 NY2d 56 [1959]; *Chase v Grilli*, 127 AD2d 728 [1987]), which may be overcome by a showing of actual malice in communicating the information (*see Shapiro v Health Ins. Plan*, 7 NY2d 56, *supra*; *Cahill v County of Nassau*, 17 AD3d 497 [2005]).

In the instant matter, plaintiffs have pleaded that the statements were published falsely by the District Attorney and with actual malice. The burden of proving actual malice requires a plaintiff to demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement (*see Bose Corp. v Consumers Union*, 466 US 485 [1984]; *Shulman v Hunderfund*, 12 NY3d 143 [2009]; *Crowe Deegan, LLP v Schmitt*, 38 AD3d 590 [2007]). The Court finds that the District Attorney was acting as an advocate for the state when he participated in the press conference, inasmuch as the District Attorney communicated certain information about Mr. O'Gorman to the public following his arrest and after a criminal proceeding was commenced against him. Therefore, the District Attorney is entitled to a qualified privilege with respect to the statements made thereat. The Court finds that plaintiffs' complaint does not allege facts to support a claim of actual malice sufficient to overcome the District Attorney's privilege.

It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action under CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true (*see Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]). Upon favorably viewing the facts alleged in plaintiffs' verified complaint, and affording plaintiffs "the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State Street*

Bank and Trust Co., 5 NY3d 582 [2005]), the Court finds that plaintiffs have failed to sufficiently plead any causes of action against the District Attorney.

In view of the foregoing, this cross-motion to dismiss plaintiffs' complaint and any and all cross-claims that have been asserted against the District Attorney, is **GRANTED** in its entirety.

The foregoing constitutes the decision and Order of the Court.

Dated: April 7, 2010

HON. JOSEPH FARNETI
Acting Justice Supreme Court