SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 4

NASSAU COUNTY

JUDITH WILNER, individually and as executor of the Estate of the late HARRY WILNER,

Plaintiffs,

-against-

VILLAGE OF ROSLYN, RICHARD BARBIERI, WADE CURRY, JOHN GIBBONS, JR.,

Defendants.

MOT. DATE: 10/10/10
MOT. SEQ. NO.: 004, 005, 007

INDEX NO.: 16161/07

The following papers read on this motion (numbered 1-8):

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Memorandum of Law in Opposition to Plaintiff's Motion to Reargue and for Clarification.....A
Defendant's Memorandum of Law in Support Of Their Motion to Dismiss Plaintiff's Complaint.....B
Memorandum of Law in Support of Cross-Motion and in Opposition to Defendant's Motion For Summary Judgment.....C
Defendants' Memorandum of Law in Further Support of their Motion for Summary Judgment.....D
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The following motions are determined herein. In the interest of consistency and economy, the Court has adjourned the motions for one month so that it may decide concurrently all ten motions pending in four separate actions arising out the same events.

Motion Sequence 004: Motion by plaintiffs JUDITH WILNER, individually and as executor of the Estate of the late HARRY WILNER (collectively "Plaintiffs") for an Order (a) clarifying the prior order of this Court dated March 31, 2009 and entered in the office of the Nassau County Clerk on April 14, 2009 (the "Prior Order"); and (b) pursuant to **CPLR §2221(d)** granting reargument of Plaintiffs' cross-motion to compel disclosure of all communications with defendant John P. Gibbons, Jr. ("GIBBONS") in his role as the Village Prosecutor for the defendant Village of Roslyn (the "VILLAGE") which relate to the Criminal Court Information, summons number 101105-2 (the "Summons") against Plaintiffs.

Motion Sequence 005: Motion by defendants the VILLAGE, Richard Barbieri ("BARBIERI") and Wade Curry ("CURRY") (collectively "Defendants") for an Order pursuant to **CPLR §3212** granting summary judgment in their favor and dismissing the action as against them. (The action was dismissed as against GIBBONS in the Prior Order.)

Motion Sequence 007: Motion by Plaintiffs for an Order pursuant to **CPLR §3212** granting partial summary judgment in their favor on the issue of liability, and setting the matter down for a trial on the issue of damages.

BACKGROUND

This is an action alleging malicious prosecution, abuse of process, and deprivation of the Plaintiffs' civil rights in violation of **42 U.S.C. §1983,** predicated upon Defendants' prosecution of Plaintiffs for alleged violations of the Code of the Incorporated Village of Roslyn (the "VILLAGE Code"). The action is one of a series of actions arising out of a water flow and mudslide event that occurred in October 2005.

The essential facts are as follows. Plaintiffs are the owners of property located at 6 Verity Lane, Roslyn, NY (the "WILNER Property"). The WILNER Property and contiguous properties are burdened by a storm sewer drainage easement in favor of the VILLAGE, which encompasses a system of VILLAGE-owned manholes and underground pipes designed to collect water from the street uphill of the properties and to funnel it downhill toward Old Northern Boulevard. On or about October 7, 2005 through October 9, 2005, a heavy rainstorm occurred that overwhelmed the storm drainage

system, resulting in a concentrated flow of water across the rear of the WILNER Property and downhill toward the VILLAGE Hall. This undermined the hillside in the rear of the WILNER Property, resulting in the collapse of Plaintiffs' retaining wall, uprooting of several trees, and damage to the WILNER Property and that of the VILLAGE.

During the course of the storm and in the days immediately afterward, the scene was investigated by CURRY, then the VILLAGE Code Enforcement Officer, and others. CURRY testified that in the course of his investigation he observed, at the base of the collapsed portion of the Plaintiffs' retaining wall, a garbage pail and pipe, which he believed to be a makeshift drainage device. In his narrative report dated October 11, 2005 (the "CURRY Report"), CURRY described the scene as follows:

> I accessed the wooded hillside at the rear of [the WILNER Property] where I observed a large and fresh gully created by a section of the hillside collapsing. The collapse undermined a large retaining wall at the rear of [the WILNER Property]. The collapse also exposed a pipe running into the gully from a plastic garbage pail that had been buried and had another pipe running out of it in the direction of the house . . . .

CURRY reported further that two weeks prior to the storm, in response to a call from Ella Javich, a homeowner at 4 Verity Lane (the "Javich Property"), he and an associate had come to the scene to investigate what they thought to be a clogged private dry well on the Javich Property. They found the dry well in a state of collapse, and had found evidence of water runoff from this location to the rear of the WILNER Property and down the hillside to the rear of the VILLAGE Hall. CURRY concluded:

> Based on my above investigation the large washout was caused by the drywell that is in disrepair and not functioning properly at [the Javich Property], and exacerbated by additional drainage from the hose and garbage can arrangement buried at the rear of [the WILNER Property] and illegally discharging to the hillside. As a result of the above, I have issued summons to the property owners of [the Javich Property and the WILNER Property].

The Summons and attached Information, dated October 11, 2005, charged Plaintiffs with three violations of the VILLAGE Code:

> a) Sec. 18-23.A. in that "Plumbing, heating, electrical, ventilating, air conditioning, refrigerating, cooking, and fire protection equipment, elevators, dumbwaiters, escalators, and other mechanical additions, installations, or systems for the use of buildings and structures shall be installed, located, and maintained so that such equipment and systems will operate satisfactorily, and not be a danger to safety, health or welfare." *Specifically, the storm drain system at the premises was not properly installed.* [recodified in 2010 at VILLAGE Code §265-23.A.]
>
> b) 18-24.D(1).(b). in that "Storm drains shall be discharged in such manner that water will not flow onto the land of an adjoining landowner or onto sidewalks, streets, roads, highways or public rights of way in the Village." *Specifically, the storm drain at the premises discharged water across other properties and into the public right-of-way.* [recodified in 2010 at VILLAGE Code §265-24.D.(1).(b).]
>
> C) 18-24.D.(1).(c). All storm water disposal shall have an acceptable drainage system self-contained upon the premises and adequate to dispose of the water therein. *Specifically, the storm water at the premises was not contained on the premises.* (Emphasis in original.). [recodified in 2010 at VILLAGE Code §265-24.D.(1).(c).]

Violations of these provisions are punishable by a fine of not more than $1,000 or imprisonment of not more than 15 days, or both. [*see* VILLAGE Code §1.8].

On or about October 12, 2005, GIBBONS, in his capacity as VILLAGE attorney, sent a letter to Plaintiffs (the "GIBBONS Letter") which stated, in part:

> It has been determined that the collapse was caused, in part, by a drainage system on your property which was illegally discharging storm water down the hillside. . . The Village intends to hold you responsible for the cost of the damage to the Village Hall, including the repair and shoring up of the hillside.

On October 13, 2005 and October 15, 2005, at the request of the VILLAGE, engineers from Cameron Engineering & Associates, LLP ("Cameron Engineering") conducted a field investigation and made recommendations concerning stabilization of the hillside. *See* Memorandum of Cameron Engineering to BARBIERI dated October 18, 2005. In addition, the VILLAGE retained Tri-County Plumbing ("Tri-County") to perform emergency repair of the storm drainage system on October 12, October 15 and October 21, 2005. *See* Motion Seq. 007, Exhibit J. On or about November 2, 2005,

letters were exchanged between Plaintiffs and representatives of the VILLAGE, regarding the VILLAGE's access to the WILNER Property for purpose of stabilizing the hillside.

On or about November 9, 2005, Anita Frangella, the VILLAGE Clerk, wrote to Plaintiffs (the "Frangella Letter"):

> . . . The Village had been prepared to take remedial action to stabilize the hillside. However, you have advised the Village, and the Village has confirmed, that the hillside property is owned by you. Therefore, based upon the urgency of this matter, we request that you take immediate action to stabilize the hillside. This action must be done by you within ten (10) days of this letter. If such action is not taken within the time specified, the Village shall perform such work and assess the cost of that work against your property. Such assessment shall include all costs of remediation, including legal fees and an administrative fee equal to 15% of such cost. . . .

[Motion Seq. 005, Exhibit M]

On December 5, 2005, Plaintiffs filed a Notice of Claim with the VILLAGE, asserting a claim for property damages sustained as a result of the VILLAGE's negligent failure to maintain the VILLAGE-owned storm drainage system. On December 8, 2005, Cameron Engineering returned to the site for follow-up inspection and recommendations.

The criminal matter that is the subject of the instant action was brought to trial on August 22, 2006. CURRY testified that he did not see whether or not the pipe was connected to the garbage pail, because part of the hose between the two was covered with dirt. He further testified that he did not verify whether or not the garbage pail came from a neighbor's yard. On September 26, 2006, upon the application of the prosecution, the criminal matter was dismissed, based upon the prosecution's inability to prove beyond a reasonable doubt that the garbage pail and pipe found at the WILNER Property constituted a drainage device that diverted water off of the premises.

Plaintiffs brought the instant action on September 12, 2007, asserting three causes of action: (1) malicious prosecution; (2) abuse of process; and (3) violation of **42 USC § 1983** by knowing and wilful deprivation of Plaintiffs' rights under the United States Constitution to be free from excessive and unreasonable police action; the deprivation of liberty without due process of law; the right to be secure against unreasonable searches and seizures; and the right to equal protection of the laws.

GIBBONS moved to dismiss the action as against him on the ground that he was entitled to absolute prosecutorial immunity, insofar as all acts complained of were within the scope of his authority as VILLAGE prosecutor. Plaintiffs' cross-moved to compel further disclosure of all communications with GIBBONS which related to the storm event and the prosecution of plaintiffs. GIBBONS' motion was granted, and Plaintiff's cross-motion was denied, as set forth in the Prior Order.

Plaintiffs now move for clarification of the discovery portion of the Prior Order and for reargument of their cross-motion to compel. Both sides move for summary judgment pursuant to **CPLR §3212.**

DISCUSSION

Summary Judgment Motions

Plaintiffs' three causes of action are predicated upon a single set of allegations. Plaintiffs claim: (i) that CURRY issued the Summons, despite having knowledge that the excessive flow of water which undermined the hillside came from a source other than the purported makeshift drainage device; namely, the structure that CURRY identified as a private dry well on the Javich Property; (ii) that Defendants continued the prosecution, despite the mounting evidence that the so-called private dry well was in fact a VILLAGE-owned drain manhole that was in a state of disrepair and partial collapse; (iii) that Defendants withheld exculpatory evidence, including, among other things, the CURRY Report, the Cameron Engineering memoranda, and the Tri-County invoices, which indicated that the VILLAGE's defective manhole was the source of the excessive water flow and resulting property damage; and (iv) that Defendants had a collateral motive for the prosecution of the criminal action; namely, to compel Plaintiffs to pay for the damages to VILLAGE property, and to thwart Plaintiffs' ability to establish their property damage claim against the VILLAGE. As evidence of Defendants' collateral motive, the Plaintiffs point to the GIBBONS Letter and Frangella Letter, which, they claim, threaten to hold Plaintiffs responsible for the cost of repair to the hillside and the VILLAGE Hall. Plaintiffs claim that they were forced to incur attorneys fees to defend against the Summons, and Plaintiffs' counsel states that Plaintiffs' were required to appear in VILLAGE court approximately twelve times between the date of the Summons and the date of the trial, almost two years later. Memorandum of Law, p.17. (The Court assumes that counsel's overstatement was inadvertent, noting that the Complaint lists only three dates on which the Plaintiffs appeared in VILLAGE court before the trial, and that the trial was conducted on August 22, 2006, only ten months after the issuance of the Summons.)

Defendants assert that they are entitled to summary judgment dismissing the complaint against them on the grounds that: (i) Plaintiffs cannot sustain their causes of action insofar as Defendants had probable cause to issue the summons and proceed to trial based upon CURRY's reasonable belief that the garbage pail and pipe was an illegal drainage device in violation of the VILLAGE Code; (ii) Plaintiffs cannot establish liability against BARBIERI because he did not participate in the issuance of the Summons or the prosecution; (iii) Plaintiffs cannot establish liability against the VILLAGE because Plaintiffs have not pled any municipal pattern or practice which would impute liability upon the VILLAGE; (iv) CURRY and BARBIERI are entitled to qualified immunity because they were acting within the scope of their authority, and because they did not violate any clearly established laws.

Malicious Prosecution.

To maintain a claim for malicious prosecution, the plaintiff must establish four elements: (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff; (2) a termination of the proceeding in favor of the plaintiff; (3) the absence of probable cause for the proceeding; (4) actual malice. **Cantalino v. Danner,** 96 NY2d 391; **Smith-Hunter v. Harvey,** 95 NY2d 191; **Broughton v. State of New York,** 37 NY2d 451, *cert. denied sub nom.* Schanbarger v. Kellogg, 423 U.S. 929. Because public policy dictates that there be some room for "benign misjudgments," the burden on malicious prosecution plaintiffs is a heavy one. **Smith-Hunter**, 95 NY2d at 195. Failure to establish any one of the four elements defeats the entire claim. **Hoyt v. City of New York,** 284 AD2d 501.

The Court finds that Plaintiffs have not met their burden to establish the absence of probable cause. In the context of a malicious prosecution claim, probable cause consists of such facts and circumstances as would lead a reasonably prudent person to believe that the accused had committed the acts upon which the prosecution is based. **Rivera v. City of New York,** 40 AD3d 334, 337; **Colon v. City of New York,** 60 NY2d 78, 82; **BCRE 230 Riverside LLC v. Fuchs,** 59 AD3d 282. Probable cause does not require evidence sufficient to support a conviction, or proof beyond a reasonable doubt. The ultimate dismissal of charges on the basis of insufficient evidence does not negate probable cause. **Id.**

CURRY reported that he observed a garbage pail that appeared to have been buried at the base of the Plaintiffs' retaining wall, with one pipe leading out of the garbage pail in the direction of the Plaintiffs' house, and another pipe leading into the gully created by the water flow and mudslide. There is no evidence to contradict

CURRY's account of the location and position of the pipe and garbage pail, or the pattern of water runoff that he observed. Based upon the physical evidence, and CURRY's professed familiarity with such devices, it was not unreasonable for CURRY to believe that the garbage pail and pipe configuration was a makeshift drainage system that violated the VILLAGE Code. *Cf.,* **Plataniotis v. TWE-Advance/Newhouse Partnership,** 270 AD2d 627, 628.

Plaintiffs argue that probable cause is negated, and malice inferable, by facts showing that Defendants disregarded or concealed exculpatory evidence, and failed to perform an adequate investigation before issuing the Summons. The Court is not persuaded.

First, the evidence that was allegedly disregarded or concealed – that a substantial cause of the excessive water flow and resulting property damage was a malfunctioning VILLAGE-owned manhole – is not exculpatory of the violations with which Plaintiffs' were charged. The existence of one source of water flow to the hillside does not negate the existence of another. As stated in the CURRY Report, CURRY believed that the hillside washout was caused by both the malfunctioning dry well and the drainage from the makeshift device, the latter being an exacerbating factor. It was not necessary for CURRY to believe that the illegal drainage device was the sole or primary cause of the property damage. In fact, it was not necessary for CURRY to believe that the illegal drainage device caused any damage at all. The language of the VILLAGE Code does not incorporate damages, or any causal relationship to such damages, as an element of the charge. The offense is complete upon the presence of a drainage device that discharges water off the premises.

Second, the fact that CURRY issued the Summons without first ascertaining that the so-called device functioned as he believed it did, and without ascertaining whether or not the garbage pail could have been owned by a neighbor, or blown in by the storm, does not defeat probable cause or imply malice. As discussed above, probable cause does not require proof beyond a reasonable doubt. While the accuser is not entitled to ignore or conceal exculpatory evidence, the accuser is not obligated to pursue every lead that may yield evidence beneficial to the accused, even if there is knowledge and the capacity to do so. **Panetta v. Crowley**, 460 F.3d 388, **Williams v. City of New York**, Not Reported in F.Supp.2d, 2003 WL 22434151; **Gisondi v. Town of Harrison,** 72 NY2d 280. In the instant case, there is no evidence that CURRY knew or had reason to believe that the garbage pail or pipe were not connected or were placed into position by storm or by chance. CURRY testified that the apparent connection between the pail and the pipe was partially covered in dirt. CURRY's failure to dig deeper, literally, shows a deficit of diligence, but does not rise to the level of egregious conduct or reckless disregard

necessary to defeat probable cause or imply malice, particularly in view of the nature of the offense charged. *See* **Gisondi**, 72 NY2d 280. *Compare* **Ramos v. City of New York,** 285 AD2d 284; **Hernandez v. State,** 228 AD2d 902.

The Court finds that plaintiff has failed to establish the absence of probable cause or to raise an issue of fact warranting a trial. Accordingly, the malicious prosecution cause of action is not sustained.

Abuse of Process

To maintain a claim for abuse of process, the plaintiff must show: (1) regularly issued legal process compelling performance or forbearance of some act; (2) that the process was motivated by an intent to do harm without excuse or justification; (3) the use of process in a perverted manner, to obtain a collateral objective (or detriment to the plaintiff) outside the legitimate ends of the process; and (4) actual or special damages. **Curiano v. Suozzi,** 63 NY2d 113; **Board of Educ. of Farmingdale v. Farmingdale Classroom Teachers Ass'n,** 38 NY2d 397. It has been held repeatedly that an action for abuse of process requires more than the issuance of process with an improper motive. Rather, it requires some improper conduct or some misuse of the process, after the process was issued. *See* **Curiano,** 63 NY2d at 117; **Hauser v. Bartow,** 273 NY 370, 373-374; **Dean v. Kochendorfer,** 237 NY 384, 390.[1]

In this case, the Court accepts Plaintiffs' version of the facts, and gives Plaintiffs the benefit of every favorable inference to be drawn therefrom. The Court nonetheless finds that Plaintiffs' have not established, *prima facie,* the elements of the cause of action.

There is no evidence that the issuance of the Summons was motivated by an intent to do harm without excuse or justification, or undertaken to obtain a collateral objective. CURRY testified that, at the time he issued the Summons, he believed that the garbage pail and pipe was an illegal drainage device diverting water from the WILNER Property. The Court found such belief to be reasonable, under the circumstances. Evidence of a reasonable belief that the accused committed the offense for which he or she is charged generally militates against a claim for abuse of process. *See* **Santoro v. Smithtown,** 40

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[1] Although the Court of Appeals has, in dicta, left open the question whether the issuance of process without any subsequent improper use might be sufficient to support an abuse of process cause of action [**Parkin v. Cornell University, Inc.,** 78 NY2d 523], cases decided thereafter have adhered to the requirement of showing misuse of process after it is issued. *See, e.g.* **Jones v. Maples/Trump,** 2002 WL 287752; **Noel v. Houtman,** 1997 WL 176316; **Minasian v. Lubow,** 49 AD3d 1033.

AD3d 736 (park rangers' illegal issuance of appearance tickets, founded upon probable cause, was not an abuse of process); **Plataniotis v. TWE-Advance/Newhouse Partnership,** 270 AD2d 627 (cable provider's filing of charges against restaurant owner, based upon employee's personal observation that restaurant received a pay-per-view event, and his review of records showing that the restaurant did not pay for it, was not an abuse of process). *Compare* **Cook v. Sheldon,** 41 F3d 73 (unreasonable arrest of all adult occupants of a car for violation of VIN statute because none would identify, or admit to being, the vehicle owner, was an abuse of process).

Plaintiffs' argue that CURRY's prior knowledge that a drainage structure uphill of the WILNER Property was deteriorated and overflowing demonstrates his ulterior motive for issuing the Summons. Plaintiff's imply, without any factual basis, that CURRY knew that the structure belonged to the VILLAGE, and that he was trying to deflect responsibility for the VILLAGE's negligence by issuing a Summons to Plaintiffs. CURRY testified, however, that at the time he issued the Summons, he believed that the structure was a private dry well on the Javich Property. There is no conflicting evidence. To the contrary, the evidence that CURRY also issued a summons to the Javich's is consistent with his testimony. Without evidence that CURRY knew that the VILLAGE was responsible for the hillside damage, there is no basis to infer that he issued the Summons in order to deflect such responsibility.

Plaintiffs also imply that CURRY's knowledge of the uphill structure must have informed CURRY that the garbage pail and pipe arrangement was not the source of the hillside deluge. As discussed above, however, CURRY's knowledge of one source of the excessive water flow, even if it was the primary or predominate source, does not negate the reasonableness of CURRY's belief that the garbage pail and pipe arrangement on the WILNER Property also discharged water onto the hillside. The CURRY Report, issued on the same date as the Summons, stated CURRY's opinion that the damage to the hillside was caused by both the overflowing dry well and the discharge from Plaintiffs' illegal drainage device.

Plaintiffs' claim rests upon the argument that, as Defendants became aware of the VILLAGE's own responsibility for the condition of the hillside, Defendants continued the prosecution against Plaintiffs for the collateral purpose of thwarting a civil suit by Plaintiffs against the VILLAGE and compelling the Plaintiffs to pay for the damage to the hillside and to the VILLAGE Hall. In Plaintiffs' view, the GIBSON Letter and Frangella letter prove the Defendants' collateral motive, insofar as they manifest the Defendants' intent, if not blatant threat, to hold the Plaintiffs liable.

Assuming that the letters are threatening or coercive, they nonetheless provide no basis for the inference that the *criminal process* was being used to coerce payment from Plaintiffs, or to deter them from proceeding with their own claim against the VILLAGE. If anything, the threat seems civil in nature (although there is no evidence that the VILLAGE ever sent Plaintiffs a bill, filed a claim or assessment, or otherwise sought to collect money from Plaintiffs). Neither letter refers to the criminal proceeding, either implicitly or explicitly. For example, the letters make no offer (express or implied) to drop the charges if payment were made, or threat to continue them if it were not. There is no evidence that any reference to the criminal proceeding was ever used in the manner of an incentive or a threat, either orally or in writing, directly or by insinuation.

Moreover, there is no evidence that the Defendants took any action in the context of the criminal proceeding except to hold a hearing and to dismiss the charges for insufficient evidence. Plaintiffs' counsel claims that Plaintiffs were hailed into Court twelve times to answer the charges, suggesting a pattern or motive of harassment. The Complaint, however, gives only five appearance dates: the trial date, the date upon which the charges were finally dismissed and three unexplained pre-trial appearances. Apart from counsel's repeated exaggerations, the Plaintiffs offer no factual basis to infer that the three pre-trial appearances were at the behest of the VILLAGE. The omission of specific reasons for the appearances suggests with all likelihood that they were initiated by or for the benefit of Plaintiffs.

Plaintiffs' implicit argument, that Defendants were required to spontaneously dismiss the charges, without a hearing, as soon as they learned of the VILLAGE's responsibility for the property damage, is unpersuasive. As discussed above, there is no evidence that the proceedings were inordinately or improperly prolonged, and there is no logic to the premise that, in these circumstances, mounting evidence of the VILLAGE's liability negated the culpability of the Plaintiffs.

Even assuming that Defendants had a collateral motive for issuing or continuing the criminal charges, Plaintiffs have not met their burden to show, *prima facie* that they used the process in a "perverted" or otherwise improper manner. There was a reasonable basis for issuing the summons and proceeding with the trial. The trial was held. The case was dismissed. Whatever the motive, the conduct was not actionable as an abuse of process.

42 USC § 1983

A federal claim under **42 USC §1983 ("Section 1983")** requires a showing: (1) that the challenged conduct was attributable to a person acting under color of state law;

and (2) that such conduct deprived the plaintiff of a right, privilege or immunity secured by the Constitution or the laws of the United States. **Jones v. Maples/Trump,** 2002 WL 287752. The conduct alleged by Plaintiffs includes malicious prosecution, abuse of process, and violation of the Fourth and Fourteenth Amendments, specifically the right to be free from excessive and unreasonable police action; the deprivation of liberty without due process of law; the right to be secure against unreasonable searches and seizures; and the right to equal protection of the laws.

The Court finds no violation of **42 USC §1983. Section 1983** causes of action for malicious prosecution and abuse of process have the same elements as their counterpart State causes of action, with the additional requirement of State action. **Jones v. Maples/Trump,** 2002 WL 287752 at 9. In view of this Court's determination that the State causes of action for malicious prosecution and abuse of process are not sustainable, those portions of the **Section 1983** cause of action fail as well.

Plaintiffs contend that the issuance of the Summons constituted a "seizure" in violation of the Fourth Amendment, because Plaintiffs were required to appear in Court upon penalty of incarceration. This argument also fails. The Second Circuit has ruled that a non-felony summons requiring a later court appearance, without further restrictions, is not a Fourth Amendment seizure. *See* **Burg v. Gosselin**, 591 F3d 95. Plaintiffs' attempt to distinguish **Burg** is unpersuasive at best.

Plaintiffs' assertion that their due process rights were violated is predicated upon the Defendants' failure to produce the CURRY Report, the VILLAGE Incident Report, the Cameron Engineering memoranda, and other documents showing that a clogged VILLAGE-owned manhole was the primary source of the overflowing water that undermined the hillside. Among other things, Plaintiffs demanded production of all exculpatory material and all reports pertaining to the investigation of the crimes charged. In response, the VILLAGE prosecutor stated that there were no documents responsive to Plaintiffs request, but that the entire Building Department file and VILLAGE Court file was available for inspection by Plaintiffs' upon reasonable notice. *See* Motion Seq. 005, Exhibits U and V. The Court finds this response disingenuous, but not literally false. There apparently was no investigation of the garbage pail and pipe arrangement, and thus there were no documents pertaining to the crimes charged. In any event, to the extent that the prosecutor's response falls short of candor, it does not rise to the level of a due process violation. As discussed above, the evidence contained in the CURRY Report, and other documents relating to the clogged manhole, is not exculpatory and does not exonerate Plaintiffs of the charge of having an illegal drainage device on their own property. To the extent that these documents demonstrate causation of the hillside washout, they are relevant to a civil property damage dispute, but they do not prove or

disprove the offenses charged. Plaintiffs received due process. A trial was held, and the charges against Plaintiffs were dismissed, not because another source of the hillside damage was found, but because the VILLAGE could not prove that the garbage pail and pipe were connected in such a way as to discharge water from the Property.

Plaintiffs' Equal Protection claim is equally unavailing. "The Fourteenth Amendment right to Equal Protection of the law is essentially a direction that all persons similarly situated be treated alike. . . . To establish an Equal Protection violation, plaintiff must show purposeful discrimination directed to an identifiable class. . . Even if no suspect class or identifiable right is implicated, an Equal Protection violation may be found based upon 'arbitrary and irrational discrimination' or an allegation of selective treatment . . . where it is shown that such treatment was motivated by an intention to discriminate based upon impermissible considerations, such as race or by a malicious or bad faith intent to injure the person." **Longo v. Suffolk County Police Dept. County of Suffolk**, 429 F.Supp.2d 553 (internal citations omitted).

Plaintiffs' argue that they were discriminated against; i.e., that they suffered arbitrarily selective treatment as opposed to their similarly situated neighbors, the Javich's, insofar as the Javich prosecution was dropped once the VILLAGE learned that the Javich's did not own the manhole, but the Plaintiffs' prosecution continued for two years. First, counsel exaggerates. Plaintiffs' prosecution was dismissed within one year after issuance of the Summons. Second, even assuming that the Javich prosecution was dismissed months earlier than the Plaintiffs' (of which there is no evidence in the record), that does not give rise to an inference of intentional discrimination. Both homeowners were charged with violations. The charges against both homeowners were dismissed. That one dismissal occurred somewhat later than another does not demonstrate a malicious intent to injure, and is not of the magnitude or nature of disparate treatment contemplated by the Equal Protection Clause and its enforcement statute.

Motion for Clarification and Reargument

Plaintiffs move to reargue their prior motion to compel disclosure, and upon reargument, for an order compelling further discovery. In particular, Plaintiffs seek to re-depose GIBBONS, CURRY, BARBIERI and Alan King of Cameron Engineering in order to establish Defendants' knowledge of exculpatory evidence, and knowledge regarding the cause and amount of the damage to the VILLAGE Hall, for purposes of demonstrating Defendants' collateral motive for the prosecution.

The Court finds such further discovery unwarranted. For purpose of the above discussion, the Court has accepted as true the allegation that Defendants knew that the

primary cause of the damage to the VILLAGE Hall was not the purported illegal drainage device found on the WILNER Property. As discussed above, however, this knowledge was not exculpatory. One source of water runoff does not preclude the existence of another, and no element of causation was required to sustain the Code violations with which Plaintiffs were charged.

Moreover, new evidence of collateral motive will not supply the missing elements of Plaintiffs' causes of action. Bad thoughts are not actionable without bad acts. The Court has found that, whatever their intentions, Defendants did not issue the Summons without probable cause, they did not mis-use the criminal process to further their collateral purpose, and their conduct did not deprive Plaintiffs of liberty, due process or equal protection of the law. The discovery Plaintiffs seek will not cure the infirmity of their claims.

CONCLUSION

The evidence in this case suggests that, in the aftermath of the storm event, Defendants sought to determine the cause or causes of the substantial property damage, and to allocate the financial burden. In so doing, Defendants made mistakes. Antagonism between the parties flourished. At best, Defendants' mistakes were the product of haste and overzealousness. At worst, they were the product of ill will or the desire to avoid financial responsibility. Without more, however, they do not rise to the level of actionable misconduct. The real dispute between the parties concerns payment for the repairs to the hillside. That matter is addressed in a separate decision.

In the instant action, the Court finds no material issues of fact warranting a trial. Insofar as the Court determines, as a matter of law, that Plaintiffs cannot sustain the subject causes of action, the Court need not address the defenses raised. The Court finds that summary judgment in favor of Defendants is warranted

The Court has considered the remaining arguments of the parties and finds them to be without merit or rendered academic by the determinations herein. In accordance with the foregoing, it is

ORDERED, that Plaintiffs' motion for an Order (a) clarifying the Prior Order; and (b) pursuant to **CPLR §2221(d)** granting reargument of Plaintiffs' cross-motion to compel [Motion Sequence 005] is **denied;** and it is further

ORDERED, that Defendants' motion for an Order pursuant to **CPLR §3212** granting summary judgment in their favor and dismissing the action as against them [Motion Sequence 005] is **granted**; and it is further

ORDERED, that Plaintiffs' motion for an Order pursuant to **CPLR §3212** granting partial summary judgment in their favor on the issue of liability, and setting the matter down for a trial on the issue of damages is **denied**.

This constitutes the decision and Order of the Court.

Dated: March 13, 2011

J.S.C.

ENTERED

MAR 2 8 2011

NASSAU COUNTY
COUNTY CLERK'S OFFICE