SHORT FORM ORDER

INDEX No. 12-23144

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 5-20-13 (#001)
MOTION DATE 7-22-13 (#002)
ADJ. DATE 9-17-13
Mot. Seq. # 001 - MG CASEDISP
002 - XMD

HENRY BORING, GLENNIS BORING, and GAYLE BORING,

Plaintiffs,

- against -

TOWN OF BABYLON, STEVE BELLONE, individually and in his capacity as Town Supervisor, PAUL MARGIOTTA, individually and in his capacity as Town Attorney, JACK FARRELL, individually and in his capacity as building department and zoning enforcement supervisor, ARTHUR CLEMENS, individually and in his capacity as zoning inspector, MARYANN ANDERSON, individually and in her capacity as zoning inspector, Town Building Inspector John/Jane Doe 1-10 and any other unknown agents, assigns and/or employees of The Town of Babylon, individually and in the capacity of each as employees for the Town of Babylon,

Defendants.

JUDITH N. BERGER, ESQ.
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Upon the following papers numbered 1 to 67 read on this motion to dismiss and to consolidate ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 40 ; Notice of Cross Motion and supporting papers 41 - 48 ; Answering Affidavits and supporting papers 49 - 61 ; Replying Affidavits and supporting papers 62 - 63; 64 - 65 ; Other memorandum of law, 66 - 67; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants pursuant to CPLR 3211 and CPLR 3212 for an order dismissing the complaint against them is granted; and it is further

ORDERED that the cross motion by plaintiffs pursuant to CPLR 602 for an order consolidating this action with the action entitled *Henry Boring and Glennis Boring, plaintiffs, against Harold Murray and*

3-27-14

Esther Murray, defendants, assigned index number 29301/2011, is denied, as moot.

Plaintiffs Henry Boring, Glennis Boring, and Gayle Boring commenced this action against defendants after officials from defendant Town of Babylon entered the premises where they allegedly reside located at 34 Birchfield Avenue. The complaint alleges that on June 9, 2011, defendant Arthur Clemens, a zoning inspector for defendant Town of Babylon, created a disturbance by loudly banging on the door of the subject premises. It alleges that defendant Paul Margiotta, the town attorney, knowingly filed an application for a search warrant which included a patently false affidavit by Clemens. It alleges that on June 13, 2011, Clemens, defendant Jack Farrell, the building department and zoning enforcement supervisor, defendant Maryann Anderson, a zoning enforcement inspector, a fire marshal and two police officers entered the subject premises with the search warrant and proceeded to inspect and take pictures of the entire property. It alleges that the fire marshal inspected the basement of the subject premises and stated that certain flammable items needed to be removed. It alleges that on June 13, 2011, an appearance ticket was given to Henry Boring, and that on June 14, 2011, the fire marshal returned to the subject premises and re-inspected the basement. It alleges that Anderson also returned on that date to the premises and proceeded to take pictures, even though she was told to leave by plaintiffs. The complaint further alleges that after Andersen was refused entry into the premises, she "hung over the fence" to take additional pictures of the premises. The complaint asserts causes of action for trespass, illegal search, harassment, conspiracy, public taking, abuse of office, abuse of power, negligent supervision, intentional infliction of emotional distress, selective enforcement, discrimination and malicious prosecution.

Defendants now move to dismiss the complaint on the grounds that plaintiffs failed to comply with General Municipal Law §50-h, that the legal theories asserted in the fourth, fifth, eight, tenth, eleventh, twelfth, and thirteenth causes of action were not set forth in the notice of claim, and that plaintiffs failed to state a cause of action in their first, second, third, sixth, seventh, ninth, and thirteenth causes of action. Defendants also argue that the complaint should be dismissed as to defendants Steve Bellone and Paul Margiotta, because plaintiffs failed to obtain personal jurisdiction over them. In support of their motion, defendants submit copies of the notice of claim, the pleadings, transcripts of plaintiffs' testimony at the 50-h hearing, the application for a search warrant, the search warrant signed by Judge Joseph Santorelli, and affidavits of Bellone and Margiotta.

Plaintiffs cross-move pursuant to CPLR 602 for an order consolidating this action with the action entitled *Henry Boring and Glennis Boring, plaintiffs, against Harold Murray and Esther Murray, defendants*, assigned index number 29301/2011. Plaintiffs also oppose defendants motion, arguing that Bellone and Margiotta were properly served and that the notice of claim requirements were met. They further argue that a fire marshal and town official do not have a right to enter private property without a warrant or consent.

The branch of defendants' motion to dismiss the complaint as to Bellone and Margiotta pursuant to CPLR 3211(a)(8) is granted. Service of process must be made in strict compliance with statutory methods for effecting personal service upon a natural person pursuant to CPLR 308 (***Estate of Edward S. Waterman v Jones***, 46 AD3d 63, 843 NYS2d 462 [2d Dept 2007]). CPLR 308 (1) requires that service be attempted by personal delivery of the summons to the person to be served. CPLR 308 (2) requires service by delivery to a person of suitable age and discretion at the defendant's actual place of business, dwelling place or usual place of abode and by either mailing the summons to the defendant at his or her last known residence or by

mailing the summons by first class mail at his or her actual place of business in an envelope bearing the legend "personal and confidential" within twenty days. Here, plaintiffs attempted to serve Bellone and Margiotta by delivering the summons with notice to the Babylon Town Clerk's Office and the Babylon Town Attorney's Office, and by subsequently mailing the summons with notice to those offices in November 2012. However, it is undisputed that as of January 2012, Bellone and Margiotta were no longer employed by the Town of Babylon, and were employed by the County of Suffolk. Plaintiffs' contention that as Bellone, in his capacity as Suffolk County Executive, oversees the Town of Babylon, and that Margiotta, as Chief Deputy County Attorney, oversees the Babylon Town Attorneys office, the delivery of the summons with notice on the Babylon Town Clerk's Office and the Babylon Town Attorney's Office was proper is without merit.

When a party moves under CPLR 3211 (a)(7) for dismissal based on the failure to state a cause of action, the test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (***Sokol v Leader***, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). A court must determine whether, accepting the facts as alleged in the pleading as true and according the plaintiff the benefit of every favorable inference, those facts fit within any cognizable legal theory (***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]). Affidavits may be used to remedy pleading defects, thereby preserving "inartfully pleaded, but potentially meritorious, claims" (***Rovello v Orofino Realty Co.***, 40 NY2d 633, 635-636, 389 NYS2d 314 [1976]). "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss" (***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19, 799 NYS2d 170 [2005]). However, "conclusory averments of wrongdoing are insufficient to sustain a complaint unless supported by allegations of ultimate facts" (***Muka v Greene County***, 101 AD2d 965, 965, 477 NYS2d 444 [4 th Dept 1984]; *see* ***DiMauro v Metropolitan Suburban Bus Auth.***, 105 AD2d 236, 483 NYS2d 383 [2d Dept 1984]; ***Melito v Interboro Mut. Indem. Ins. Co.***, 73 AD2d 819, 423 NYS2d 742 [4th Dept 1979]; ***Greschler v Greschler***, 71 AD2d 322, 422 NYS2d 718 [2d Dept 1979]). Thus, "factual allegations which are flatly contradicted by the record are not presumed to be true, and '[i]f the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211 (a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action'" (***Deutshe Bank Natl. Trust Co. v Sinclair***, 68 AD3d 914, 915, 891 NYS2d 445 [2d Dept 2009], *quoting* ***Peter F. Gaito Architecture, LLC v Simone Dev. Corp.***, 46 AD3d 530, 530, 846 NYS2d 368 [2d Dept 2007]).

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Here, the fifth cause of action for public taking, the eighth cause of action for abuse of process, the tenth cause of action for intentional infliction of emotional distress, and the eleventh cause of action for

selective enforcement were not asserted, either directly or indirectly, in the original notice of claim and would substantially alter the nature of plaintiff's claims (*see* ***Wanczowski v New York***, 186 AD2d 397, 588 NYS2d 1011 [1st Dept 1992]; ***Demorcy v City of New York***, 137 AD2d 650, 524 NYS2d 742 [2d Dept 1988]). As such theories were not previously interposed, they are time barred (*see* General Municipal Law §50-e [5]). While plaintiffs' counsel contends that the facts alleged in the notice of claim does not commence a law suit, but rather give notice of an impending lawsuit to allow a municipality the opportunity to investigate the merits of a claim, plaintiffs are not permitted to raise new theories of liability not included in their notice of claim even if the new theories of liability relate to the same underlying facts (*see* ***Scott v The City of New York***, 40 AD3d 408, 836 NYS2d 140 [1st Dept 2007]; ***Garcia v O'Keefe***, 34 AD3d 334, 825 NYS2d 38 [1st Dept 2006]). As to the tenth cause of action for intentional infliction of emotional distress, such a cause of action is barred by public policy and cannot be sustained against a governmental entity (***Wyllie v District Attorney of County of Kings***, 2 AD3d 714, 770 NYS2d 110 [2d Dept 2003]; ***Liranzo v New York City Health & Hosps. Corp.***, 300 AD2d 548, 752 NYS2d 568 [2d Dept 2003]). Accordingly, the fifth, eighth, tenth, and eleventh causes of action are dismissed.

"The elements of a cause of action sounding in trespass are an intentional entry onto the land of another without justification or permission" (***Volunteer Fire Assn. of Tappan, Inc. v County of Rockland***, 101 AD3d 853, 956 NYS2d 102 [2d Dept 2012]; ***Carlson v Zimmerman***, 63 AD3d 772, 882 NYS2d 139 [2d Dept 2009]; ***Woodhull v Town of Riverhead***, 46 AD3d 802, 849 NYS2d 79 [2d Dept 2007]). A trespass action cannot be maintained where the purported trespasser has a right of access to the premises, and entry pursuant to a facially valid court order is not actionable in trespass (*see* ***Iovinella v Sheriff of Schenectady County***, 67 AD2d 1037, 413 NYS2d 497 [3d Dept 1979]). Here, the defendants entered the subject premises on June 14, 2011 pursuant to a search warrant, and, thus, are not liable for trespass. Even if it was based on a false affidavit, as contended by plaintiffs, the search warrant was valid on its face, and town officials are protected from being held liable as trespassers (*see* ***Iovinella v Sheriff of Schenectady County***, *supra*). In opposition, plaintiffs failed to raise a triable issue of fact. Plaintiffs contend that a fire marshal and town officials do not have the right to enter private property without a warrant or consent. However, it is undisputed that the fire marshal and town officials entered the subject premises pursuant to a search warrant on June 14, 2011. Accordingly, the first cause of action for trespass and the second cause of action for illegal search are dismissed.

The third cause of action for harassment has been withdrawn by plaintiffs. The Court notes that New York does not recognize a common law cause of action to recover damages for harassment (*see* ***Mago, LLC v Singh***, 47 AD3d 772, 851 NYS2d 593 [2d Dept 2008]; ***Ralin v City of New York***, 44 AD3d 838, 844 NYS2d 83 [2d Dept 2007], *lv denied* 10 NY3d 784, 857 NYS2d 19 [2008]).

The fourth cause of action for conspiracy also is dismissed. New York does not recognize civil conspiracy as an independent cause of action (*see* ***Salvatore v Kumar***, 45 AD3d 560, 845 NYS2d 384 [2d Dept 2007]; ***Plymouth Drug Wholesalers v Kirschner***, 239 AD2d 479, 658 NYS2d 64 [2d Dept 1997]). Allegations of conspiracy are permitted "only to connect the actions of separate defendants with an otherwise actionable tort" (***Alexander & Alexander, Inc. v Fritzen***, 68 NY2d 968, 969, 510 NYS2d 546, 547 [1986]). Inasmuch as plaintiffs' claim for civil conspiracy stands or falls with the underlying tort, plaintiffs' claim for conspiracy as against defendants is rendered legally deficient as a result of the plaintiffs' failure to establish their trespass claims (*see* ***Ward v City of New York,*** 15 AD3d 392, 789 NYS2d 539 [2d Dept 2005]).

The sixth cause of action for abuse of office and seventh cause of action for abuse of power are dismissed, as they are merely duplicative of the causes of action alleging trespass and malicious prosecution (*see* ***Santoro v Town of Smithtown***, 40 AD3d 736, 835 NYS2d 658 [2d Dept 2007]; ***Leonard v Reinhardt***, 20 AD3d 510, 799 NYS2d 118 [2d Dept 2005]).

The ninth cause of action alleging negligent hiring and supervision is dismissed. It is well settled that when the action of a government official involves the conscious exercise of discretion of a judicial or quasi-judicial nature, such office is entitled to absolute immunity. This entitlement is based on "sound reasons of public policy" in allowing government officials to execute their duties free from fear of vindictive or retaliatory damage suits (***Haddock v City of New York***, 75 NY2d 478, 554 NYS2d 439 [1990]; *see* ***Tango v Tulevech***, 61 NY2d 34, 471 NYS2d 73 [1983]; ***Kelleher v Town of Southampton***, 306 AD2d 247, 760 NYS2d 235 [2003]; ***Rottkamp v Young***, 21 AD2d 373, *affd* 15 NY2d 831 [1965]). When official action involves the exercise of discretion, the officer is not liable for the injurious consequences of that action even if resulting from negligence or malice (*see* ***Tango v Tulevech***, 61 NY2d 34, 471 NYS2d 73 [1983]). Here, defendants are entitled to governmental immunity in the exercise of their discretion in investigating the alleged housing code violations at the subject premises (*see* ***Valdez v City of New York***, 18 NY3d 69, 936 NYS2d 587 [2011]; ***Santoro v Town of Smithtown***, 40 AD3d 736, 835 NYS2d 658 [2d Dept 2007]).

The twelfth cause of action alleging that defendants denied them equal protection under the law is dismissed. 42 USC § 1983, in the land use context, "protects against municipal actions that violate a property owner's rights to due process, equal protection of the laws and just compensation for the taking of property under the Fifth and Fourteenth Amendments to the United States Constitution" (***Bower Assocs. v Town of Pleasant Valley***, 2 NY3d 617, 626, 781 NYS2d 240 [2004], *citing* ***Town of Orangetown v Magee***, 88 NY2d 41, 49, 643 NYS2d 21 [1996]). However, 42 USC § 1983 is not simply an additional vehicle for judicial review of land-use determinations (***Bower Assocs. v Town of Pleasant Valley***, *supra*). To state a claim under the Equal Protection Clause, a plaintiff must allege that (1) compared with others similarly situated, the plaintiff was selectively treated adversely; and (2) such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith or intent to injure a person (*see* ***Miner v Clinton County***, 541 F3d 464 [2008]; ***Bizzarro v Miranda***, 394 F3d 82 [2005]; *see also* ***Seymour's Boatyard, Inc. v Town of Huntington***, 2009 WL 1514610 [2009]). Alternatively, instead of alleging that the selective treatment was based on an impermissible consideration, a plaintiff may establish that there was no rational basis for the selective treatment (*see* ***Village of Willowbrook v Olech***, 528 US 562 [2000]; *see also* ***Seymour's Boatyard, Inc. v Town of Huntington***, *supra*). Here, it is clear that the actions taken by defendants were under color of state law. Plaintiffs have failed to allege facts demonstrating that defendants' actions were wholly without legal justification or that there was an impermissible motive not related to legitimate governmental objectives (***Bower Assoc. v Town of Pleasant Val.***, *supra*; ***Sonne v Board of Trustees of Vill. of Suffern***, 67 AD3d 192, 887 NYS2d 145 [2009]).

Finally, as to the thirteenth cause of action, to prevail on a claim for malicious prosecution, a plaintiff must establish that (1) a criminal proceeding was commenced, (2) it was terminated in favor of the accused, (3) it lacked probable cause, and (4) it was commenced out of actual malice (*see* ***Cantalino v Danner***, 96 NY2d 391, 729 NYS2d 405 [2001]; ***Broughton v State of New York***, 37 NY2d 451, 373 NYS2d 87 [1975]; ***Rivera v County of Nassau***, 83 AD3d 1032, 922 NYS2d 168 [2d Dept 2011]). A claim is only established when the criminal proceeding instigated by defendants has been resolved in the plaintiff's favor, on the merits, such as to indicate the plaintiff's innocence (*see* ***MacFawn v Kresler***, 88 NY2d 859, 644 NYS2d 486 [1996]; ***Lemberg v John Blair Communs.***, 251 AD2d 205, 674 NYS2d 355 [1st Dept 1998]). Here, the actions against plaintiff

Henry Boring were dismissed as insufficient, and were not terminated in his favor on the merits (*see* ***Avgush v Town of Yorktown***, 35 AD3d 331, 824 NYS2d 735 [2d Dept 2006]; ***Cahill v County of Nassau***, 17 AD3d 497, 793 NYS2d 190 [2d Dept 2005]). Accordingly, the thirteenth cause of action is dismissed.

Dated: March 13, 2014

W. Gerard Asher
J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION