

<b>McBride v Village of Tuckahoe</b>
2014 NY Slip Op 33026(U)
April 4, 2014
Sup Ct, Westchester County
Docket Number: 66237/2013
Judge: Francesca E. Connolly
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
THOMAS KEVIN MCBRIDE, PHILIP A. WHITE, and  
ANTHONY J. DeCINTIO,

Plaintiffs,

DECISION and ORDER  
Sequence No. 1  
Index No. 66237/2013

-against-

VILLAGE OF TUCKAHOE and JOHN FITZPATRICK,

Defendants.

-----X  
CONNOLLY, J.

The following documents were read in connection with the defendants' motion to dismiss:

Defendants' Notice of Motion, Affirmation, Exhibits, Memo of Law	1-11
Affirmation in Opposition, Memo of Law	12-13
Reply Memo of Law	14

This action was commenced by the plaintiffs against the defendants Village of Tuckahoe (the Village) and its mayor, John Fitzpatrick, alleging that they improperly removed the plaintiffs from their positions as Commissioners of the Tuckahoe Housing Authority (THA). The plaintiffs seek compensatory and punitive damages for causes of actions sounding in abuse of process, malicious prosecution, defamation, and intentional infliction of emotional distress. The complaint also seeks a declaration that the suspension of DeCintio and the removals of McBride and White from their posts as THA Commissioners by Mayor John Fitzpatrick violated the plaintiffs' constitutional due process rights. The defendants now move to dismiss the complaint pursuant to CPLR 3211 (a) (1), (2), (5), and (7), and to disqualify DeCintio from acting as attorney for McBride and White.

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiffs DeCintio and McBride were appointed as Commissioners of the THA in 1997 and the plaintiff White was appointed as a Commissioner in March of 2007. The Board of Commissioners is comprised of seven members: two elected by the tenants residing in the units owned by the THA and five appointed by the mayor of the Village. The members of the board who are mayorally appointed may be removed from office by the mayor in accordance with the New York Public Housing Law. The defendant Fitzpatrick became mayor of the Village in April of 2007.

Fitzpatrick was a vocal opponent of the construction of a senior housing complex that the THA had approved to be built. In 2008, the United States Department of Housing and Urban Development (HUD) issued an audit report on the THA, finding, among other things, that in 1999, although HUD had authorized the THA to transfer land to its nonprofit for construction of a 36-unit senior housing complex, the project was never realized due to financial and zoning approval difficulties, which HUD attributed to weaknesses in oversight by the THA board.

It is further undisputed that, at Fitzpatrick's request, on July 14, 2008, the Village Board of Trustees adopted a resolution requesting that the five mayorally appointed THA Commissioners (including the plaintiffs) resign based upon the finding of the HUD audit report. The plaintiffs refused to resign, and on May 8, 2009, Fitzpatrick preferred charges against the plaintiffs for substantial inefficiency, neglect of duty, and misconduct, seeking to remove them as Commissioners of the THA. However, since DeCintio's term as Commissioner expired on June 30, 2009, the charges against him were held in abeyance for the remainder of his term, and he was not reappointed.

McBride and White appeared for a hearing on November 13, 2009, and Mayor Fitzpatrick presided as the hearing officer. DeCintio appeared as pro bono counsel for McBride. At the hearing, DeCintio requested an adjournment stating that he did not have time to prepare an adequate defense since McBride only contacted him two hours prior to the hearing. The request was denied. Despite the fact that White obtained the services of John Pappalardo, Esq., to represent him at the hearing, Pappalardo had an existing conflict with the hearing date, which he brought to Fitzpatrick's attention through four letters requesting an adjournment. Fitzpatrick denied White's request for an adjournment. The plaintiffs chose not to testify or defend against the charges and left during the proceedings. Fitzpatrick found McBride and White guilty of the charges and removed them from office, however, no written findings of fact were issued. DeCintio claims he requested a transcript of the hearing, which was denied.

On January 28, 2010, the plaintiffs filed a proceeding pursuant to CPLR article 78 challenging their removal from office as Commissioners of the THA. In a judgment dated October 27, 2010, the Supreme Court, Westchester County (Holdman, A.J.S.C.), granted the petition, annulled Fitzpatrick's determination, and ordered a new hearing with respect to White and McBride's removal from the THA board.

The defendants appealed the determination to the Appellate Division, Second Department. On November 21, 2012, the Second Department issued a decision and order reversing the lower court's order insofar as appealed from, finding that "although Fitzpatrick should have recused himself from presiding over the removal hearing," the CPLR article 78 petition had been rendered academic since the plaintiffs' terms expired prior to the submission of the appeal, and they no longer hold public office (*see Matter of DeCintio v Village of Tuckahoe*, 100 AD3d 887, 888 [2d Dept 2012]).

On or about January 10, 2013, the plaintiffs served a notice of claim on the Village and commenced this action on October 7, 2013. The complaint seeks to recover damages for abuse of

process, malicious prosecution, defamation, and intentional infliction of emotional distress, and seeks a declaration that the removals of McBride and White from their posts as THA Commissioners violated the plaintiffs' constitutional due process rights. With respect to the defamation cause of action, the complaint alleges: "Between July 2008 and November 2012, Fitzpatrick made several statements to the press which mentioned Plaintiff's performances as THA Commissioners, and falsely charged Plaintiffs with fiscal irresponsibility and misconduct in office" (Complaint ¶ 90).

The defendants now move to dismiss the plaintiffs' complaint on several grounds. The defendants argue the plaintiffs' notice of claim is defective and untimely, the plaintiffs' claims are barred by the statute of limitations and the claims fail to state a cause of action. The defendants further move for an order disqualifying DeCintio from representing McBride and White in this action insofar as he is a material witness. The plaintiffs oppose the motion.

### DISCUSSION/ANALYSIS

#### 1. The complaint is dismissed insofar as asserted against the Village

With respect to the causes of actions asserted against the Village, the plaintiffs were required to commence this action within one year and ninety days from the date the causes of action accrued (*see* General Municipal Law § 50-i [1]; *see also* *Agoglia v Benepe*, 84 AD3d 1072, 1072 [2d Dept 2011]).

Contrary to the plaintiffs' contention that the causes of action sounding in malicious prosecution and abuse of process did not accrue until resolution of the defendants' appeal, the plaintiffs' causes of action accrued, *at the latest*, on October 27, 2010, when the plaintiffs' Article 78 petition was granted, annulling Fitzpatrick's determination removing the plaintiffs from the board and ordered a new hearing (*see* *Cunningham v State of New York*, 53 NY2d 851, 853 [1981] ["[T]he accrual of a cause of action for abuse of process need not await the termination of an action in claimant's favor"]; *Pico Products, Inc. v Eagle Comtonics, Inc.*, 96 AD2d 736, 736 [4<sup>th</sup> Dept 1983] ["These causes of action [abuse of process and malicious prosecution] accrued to plaintiff when the temporary restraining order was vacated. It was then that plaintiff had a legal right to relief"]; *Vil. of Val. Stream v Zulli*, 64 AD2d 609, 610 [2d Dept 1978]). Consequently, the abuse of process and malicious prosecution causes of action insofar as asserted against the Village are time-barred as the plaintiffs seek to recover damages incurred more than one year and ninety days prior to the commencement of this action (*see* CPLR 3211 [a] [5]).

Additionally, the cause of action which seeks a declaratory judgment that the termination of McBride and White and the suspension of DeCintio violated the plaintiffs' "rights to due process and *are void and of no effect*" (Complaint ¶ 81 [emphasis added]), is time-barred. "The CPLR does not provide a specific statute of limitations for declaratory judgment actions" (*Town of Huntington v County of Suffolk*, 79 AD3d 207, 215 [2d Dept 2010]). "Instead, in order to determine the applicable statute of limitations, the court must determine whether the 'rights of the parties sought to be stabilized in the action for declaratory relief are, or have been, open to resolution through a

form of proceeding for which a specific limitation period is statutorily provided,' and, in the event no other form of proceeding exists, the six-year statute of limitations set forth in CPLR 213 (1) should be applied" (*id.*). Here, the plaintiffs' request for a declaration that their terminations were "void and of no effect" is a matter that was open to resolution in a proceeding pursuant to CPLR article 78 and, therefore, even assuming that the plaintiffs' request for this relief is not barred by the doctrine of res judicata or collateral estoppel, their cause of action is clearly time-barred (*see Merrill v Friends Acad.*, 298 AD2d 439, 440 [2d Dept 2002]; *see also* CPLR 217 ["Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner or the person whom he represents in law or in fact"]).

With respect to the cause of action for defamation, while the complaint alleges that certain defamatory statements were made as late as November 2012, to the extent that any of those alleged statements are not barred by the statute of limitation, the plaintiffs' notice of claims fails to give any notice of their intention to sue in defamation, and, therefore, the defamation cause of action is dismissed (*see Palmer v Society for Seamen's Children*, 88 AD3d 970, 971 [2d Dept 2011] ["The requirements of [General Municipal Law § 50-e] are met when the notice describes the accident with sufficient particularity so as to enable the defendant to conduct a proper investigation thereof and to assess the merits of the claim"]).

Accordingly, the complaint is dismissed insofar as asserted against the Village.

## 2. The complaint is dismissed insofar as asserted against Fitzpatrick

With regard to the intentional tort causes of action asserted against Fitzpatrick in his individual capacity, the statute of limitations is one year (*see* CPLR 215; *see e.g. Benyo v Sikorjak*, 50 AD3d 1074, 1077 [2d Dept 2008] ["Abuse of process is an intentional tort and, thus, is governed by a one-year statute of limitations"]; *Kwarren v Am. Airlines*, 303 AD2d 722 [2d Dept 2003] ["plaintiff's cause of action to recover damages for intentional infliction of emotional distress is barred by the one-year statute of limitations"]). Accordingly, for the reasons discussed above, the causes of actions sounding in malicious prosecution, abuse of process, and intentional infliction of emotional distress insofar as asserted against Fitzpatrick are time-barred (*see* CPLR 3211 [a] [5]).

The declaratory judgment cause of action is time-barred, since, as discussed above, it seeks review of Fitzpatrick's determination as hearing officer, and is, therefore, governed by the 4-month statute of limitations applicable to proceedings pursuant to CPLR article 78 (*see* CPLR 3211 [a] [5]).

With respect to the defamation cause of action, "the statute of limitations for an action to recover damages for defamation is one year, measured from the date of publication of the allegedly defamatory statement" (*Blair v Meth*, 112 AD3d 769 [2d Dept 2013]). Here, the complaint alleges that the defamatory statements occurred between July 2008 and November 2012, and since the action was commenced on October 7, 2013, the defamation cause of action is time-barred with the exception of statements made after October 7, 2012 (*see* CPLR 3211 [a] [5]).

[\* 5]

Nevertheless, the alleged defamatory statements made by Fitzpatrick after October 7, 2012 are not actionable because the complaint fails to state a cause of action. "The elements of a cause of action for defamation are a 'false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se'" (*Salvatore v Kumar*, 45 AD3d 560, 563 [2d Dept 2007], quoting *Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). To state a cause of action for defamation, "[t]he complaint must set forth the particular words allegedly constituting defamation (*see* CPLR 3016 [a]), and it must also allege the time when, place where, and manner in which the false statement was made, and specify to whom it was made" (*Epifani v Johnson*, 65 AD3d 224, 233 [2d Dept 2009]). Here, even assuming that the complaint sufficiently alleges the particular words constituting the defamatory statements, the complaint fails to allege with sufficient particularity the time, place, or manner that these statement were made. The complaint alleges that the statements were made over a four and a half year period to unspecified members of the press, working for unspecified media organizations (*see* Complaint ¶ 90). The complaint fails to allege when any of the alleged articles were published. In opposition to the motion, the plaintiffs argue that an exhibit annexed to the defendants' moving papers cures any deficiencies in its complaint (*see* Plaintiff's memo of law in opposition at 21 [citing to Defendants' exhibit F, sub-exhibit 15]). However, an examination of the subject exhibit, which consists of a compilation of newspaper articles about the matter at bar, reveals that each and every article is dated prior to October 7, 2012, and therefore, the statements contained therein are time-barred. Thus, with respect to any alleged statements occurring after October 7, 2012, the plaintiffs' cause of action for defamation insofar as asserted against Fitzpatrick, is dismissed for failure to state a cause of action (*see* CPLR 3211 [a] [7]).

Accordingly, the complaint is dismissed insofar as asserted against Fitzpatrick.

Since the action is dismissed in its entirety, the branch of the defendants' motion which is to disqualify DeCintio from acting as attorney for McBride and White is academic.

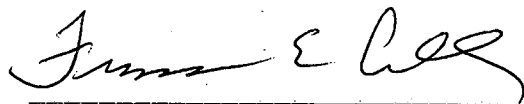
Based upon the foregoing, it is hereby,

ORDERED that the branch of the defendants' motion which is to dismiss the complaint pursuant to CPLR 3211 is granted, and the action is dismissed; and it is further

ORDERED that all other relief requested and not decided herein is denied.

This constitutes the decision and order of the Court.

Dated: White Plains, New York  
April 4, 2014



HON. FRANCESCA E. CONNOLLY, J.S.C.