Taffet v Incorporated Vil. of Ocean Beach
2020 NY Slip Op 34722(U)
May 4, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 609185/2017
Judge: Sanford Neil Berland
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER **INDEX NO.: 609185/2017**

SUPREME COURT - STATE OF NEW YORK
PART 6- SUFFOLK COUNTY
PRESENT:

Hon. Sanford Neil Berland, A.J.S.C.

JORDAN TAFFET,

Plaintiff,

-against-

INCORPORATED VILLAGE OF OCEAN BEACH, TRUSTEES OF THE INCORPORATED VILLAGE OF OCEAN BEACH, POLICE OFFICER GEORGE HESSE, HON. WILLIAM DOUGLAS WEXLER, ESQ., ROBERT T. FUCHS, ESQ., KENNETH GRAY, ESQ., JOANNEIGH ADRION, COUNTY OF SUFFOLK NY DISTRICT ATTORNEY, and COUNTY OF SUFFOLK, NY,

Defendants.

ORIG. RETURN DATE: July 6, 2017
FINAL RETURN DATE: May 28, 2019
MOT. SEQ. #: 001 **MG**

ORIG. RETURN DATE: July 27, 2017
FINAL RETURN DATE: May 28, 2019
MOT. SEQ. #: 002 **MotD**

ORIG. RETURN DATE: August 16, 2017
FINAL RETURN DATE: May 28, 2019
MOT. SEQ. #: 003 **MD**

ORIG. RETURN DATE: June 26, 2018
FINAL RETURN DATE: May 28, 2019
MOT. SEQ. #: 004 **MG**

ORIG. RETURN DATE: January 8, 2019
FINAL RETURN DATE: May 28, 2019
MOT. SEQ.#: 005 **MD**

PLAINTIFF PRO SE:
JORDAN TAFFET
P.O. Box 658
Rockville Centre, New York 11571

DEFENDANTS' ATTORNEYS:

SUFFOLK COUNTY ATTORNEY'S OFFICE
100 VETERANS MEMORIAL HIGHWAY
HAUPPAUGE, NY 11788

DEVITT, SPELLMAN & BARRETT, LLP
Attorneys for Village Defendants
50 ROUTE 111
SMITHTOWN, NY 11787

RIVKIN RADLER LLP
Attorneys for Defendant Kenneth A. Gray, Esq.
926 RXR Plaza
Uniondale, New York 11556-0926

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion (#001), by defendants County of Suffolk NY District Attorney, William Reynolds, and County of Suffolk, dated June 5,

2017, and supporting papers; (2) Affidavit In Opposition by plaintiff, dated June 27, 2017, and supporting papers; (3) Notice of Motion (#002) by defendant Kenneth Gray, Esq., dated July 10, 2017, and supporting papers; (4) Affidavit In Opposition by plaintiff, dated August 17, 2017, and supporting papers; (5) Affirmation In Opposition by defendant Kenneth Gray, dated August 22, 2017, and supporting papers; (6) Notice of Motion (#003) by plaintiff dated July 19, 2017, and supporting papers; (7) Affirmation In Opposition by defendants Incorporated Village of Ocean Beach, Trustees of the Incorporated Village of Ocean Beach, Police Officer George Hesse, Hon.William Douglas Wexler, Esq., Robert T. Fuchs, Esq., and Joanneigh Adrion, dated August 8, 2017, and supporting papers; (8) Affidavit In Opposition by plaintiff, dated August 16, 2017; (9) Notice of Motion (#004) by defendants Incorporated Village of Ocean Beach, Trustees of the Incorporated Village of Ocean Beach, Police Officer George Hesse, Hon. William Douglas Wexler, Esq., Robert T. Fuchs, Esq., and Joanneigh Adrion, dated April 4, 2018 and supporting papers; (10) Affidavit In Opposition by plaintiff, dated July 24, 2018 and supporting papers; (11) Reply Affirmation by defendants Incorporated Village of Ocean Beach, Trustees of the Incorporated Village of Ocean Beach, Police Officer George Hesse, Hon. William Douglas Wexler, Esq., Robert T. Fuchs, Esq., and Joanneigh Adrion, dated August 15, 2018 and supporting papers; (12) Notice of Motion (#005) by plaintiff, dated December 19, 2018 and supporting papers; and (13) Affirmation In Opposition by defendants Incorporated Village of Ocean Beach, Trustees of the Incorporated Village of Ocean Beach, Police Officer George Hesse, Hon. William Douglas Wexler, Esq., Robert T. Fuchs, Esq., and Joanneigh Adrion, dated December 28, 2018; it is

ORDERED that the motions sequenced #001, #002, #003, #004, and #005 are consolidated for the purposes of this determination; and it is further

ORDERED that the motion (seq. #001) by defendants County of Suffolk NY District Attorney, County of Suffolk, and William Reynolds, Esq. to dismiss the complaint against them pursuant to CPLR 3211 is granted; and it is further

ORDERED that the motion (seq. #002) by defendant Kenneth Gray, Esq., to dismiss the complaint against him pursuant to CPLR 3211 is granted; and it is further

ORDERED that the motion (seq.#002) by defendant Kenneth Gray, Esq. for an order imposing sanctions against plaintiff pursuant to 22 NYCRR § 130.1, *et seq.* is denied; and it is further

ORDERED that the motion (seq.#003) by plaintiff for a protective order is denied; and it is further

ORDERED that the motion (seq. #004) by defendants Incorporated Village of Ocean Beach, Trustees of the Incorporated Village of Ocean Beach, Police Officer George Hesse, Hon. William Douglas Wexler, Esq., Robert T. Fuchs, Esq., and Joanneigh Adrion for summary judgment pursuant to CPLR 3212 is granted; and it is further

ORDERED that the motion (seq.#005) by plaintiff for poor person relief pursuant to CPLR 1101 is denied.

This action arises out of a series of prosecutions of plaintiff for alleged violations of a number of provisions of the Code of the Village of Ocean Beach and of the New York State Penal Law related to his management of rental properties in the Village of Ocean Beach. Plaintiff contends that these prosecutions were the result of what amounted to a conspiracy by the defendants to harass and damage him in order to put him out of business. Plaintiff commenced this action by filing a Summons and Verified Complaint on May 15, 2017. Defendants Incorporated Village of Ocean Beach, Trustees of the Incorporated Village of Ocean Beach, Police Officer George Hesse, Hon. William Douglas Wexler, Esq., Robert T. Fuchs, Esq., and Joanneigh Adrion (collectively, the Village defendants) answered the complaint on June 27, 2017. Defendants County of Suffolk NY District Attorney, the County of Suffolk and William Reynolds[1] (collectively, the County defendants) have moved to dismiss the complaint pursuant to CPLR 3211 (seq. #001) for failure to state a cause of action and as time barred and for plaintiff's failure to serve a notice of claim as required by the General Municipal Law and, as to William Reynolds, on the additional ground that he is immune from civil liability. Defendant Kenneth Gray, Esq. has separately moved to dismiss the complaint pursuant to CPLR 3211 (seq.#002) for failure to state a cause of action and for the imposition of sanctions against the plaintiff. The Village defendants have moved for summary judgment in their favor, dismissing the complaint, on a variety grounds, pursuant to CPLR 3212 (seq.#004). Plaintiff has moved, pro se, for a protective order pursuant to CPLR 3103, directing that his deposition be held at a location other than the office of counsel for the Village defendants (seq.#003) and for permission to proceed as a poor person pursuant to CPLR 1101 (seq.#005).

Background:

The complaint seeks to allege twenty causes of action. Plaintiff, who is proceeding *pro se*, alleges essentially as follows: Plaintiff managed rental houses in the Village of Ocean Beach. In 2007 and 2010, the Village enacted new statutes revising the rental permit process to require that the name, address and telephone number of all tenants who would be occupying each dwelling be provided and that applications be amended with each change in tenant. Failure to comply with these new requirements would result in fines and/or jail. Plaintiff contends that these new statutes were designed to discourage rentals to groups of unrelated tenants. Plaintiff's business expanded with the institution of these new rules. Plaintiff alleges that defendant Hesse, the Chief of the Village of Ocean Beach Police Department, asked plaintiff to stop renting to groups and to rent instead to

---

[1]William Reynolds is not named in the caption of the Summons and Verified Complaint, but is cited in various sections of the complaint.

families. When plaintiff refused to do so, indicating that there was more money to be made under his current business model, Hesse threatened to write tickets imposing fines in order to take the profit out of plaintiff's business. On June 21, July 3 and July 5, 2013, six summonses were issued to plaintiff for violations that plaintiff claims the issuing officer knew plaintiff had not committed.[2] On August 3, 2013, plaintiff was arraigned on the tickets by defendant Hon. William Douglas Wexler, Esq., the Village Justice, and pled not guilty. Plaintiff alleges that the Village prosecutor handling plaintiff's case, defendant Robert T. Fuchs, Esq., ignored the facts and the law presented and argued by plaintiff's attorney and threatened to prolong plaintiff's case with repeated and unnecessary adjournments. At a court appearance on October 29, 2013, plaintiff alleges that defendants Fuchs and Justice Wexler refused to take the steps necessary to dismiss the tickets and threatened to continue to harass plaintiff. Plaintiff requested the minutes of this proceeding and filed a complaint against Fuchs and Justice Wexler with Appellate Term, which ordered that the minutes for the October 29, 2013 proceeding be released to the plaintiff. In July 2014, Justice Wexler filed an affidavit in the Appellate Term indicating that the Village Court's laptop had "crashed" and that the minutes from the October 29, 2013 proceeding had been destroyed. On May 29, 2014, Justice Wexler allegedly conducted what plaintiff has characterized as a "secret and undocumented arraignment" at which plaintiff was arraigned *in absentia* on six misdemeanor charges and twenty-three new tickets charging plaintiff with non-criminal violations of the Village of Ocean Beach code. The new tickets were signed by Hesse. Fuchs again appeared the Village prosecutor at this proceeding. Plaintiff was not present, but his attorney, Arnold Wolsky did appear. Mr. Wolsky indicated that he was not authorized to represent the plaintiff in connection with any criminal charges. In light of plaintiff's failure to appear, Justice Wexler issued a bench warrant, which he signed on May 31, 2014. When plaintiff sought the minutes from this proceeding, Justice Wexler advised that the court inadvertently had failed to record it. On June 7, 2014, plaintiff was arrested pursuant to the bench warrant issued by Justice Wexler and brought to the local police precinct. Hesse arrived at the precinct later that day and informed plaintiff that Justice Wexler had ordered that plaintiff be brought before him on the warrant, and plaintiff was released and directed to appear before Justice Wexler on June 14, 2014. Plaintiff appeared in court on the designated date, at which time Justice Wexler made a record of the arraignment held on May 29, 2014, and plaintiff was served with the new tickets. Plaintiff challenged the court's jurisdiction over him, and the court set $1,000.00 bail on each of the six misdemeanor charges against plaintiff. Plaintiff was remanded for several hours until his father posted the $6,000.00 bail that had been set by Justice Wexler. On August 30, 2014, plaintiff appeared for re-arraignment on the six misdemeanor charges. Even though he had been afforded several weeks' notice of the proceeding, plaintiff appeared without his

---

[2]The tickets were issued for the following alleged violations of the Code of the Village of Ocean Beach: (1) § 127-4.A-Rental Permit Required; (2) §96-01-Hours of Refuse Collection; (3) §87-10-No Smoke Detectors; (4) §87-9-No Fire Extinguisher; (5) §96-05-Bulk Items on Side of House; and (6) §96-2.A-No Proper Containers.

retained attorney, David Grossman, choosing instead to appear *pro se*. Plaintiff was arraigned and provided with hard copies of the criminal complaints against him. During the course of the summer of 2014, plaintiff had a number of court appearances. Plaintiff alleges that at some point during that summer, Fuchs suggested that plaintiff "settle" the various charges against him by paying $25,000.00 and threatened that if he did not accept this offer, plaintiff would be subjected to a significantly greater amount in fines and would also be sent to jail.

On October 7, 2014, Justice Wexler held a trial against plaintiff on the six tickets that had been issued in June and July of 2013. Plaintiff was found guilty of four of the violations and acquitted on two. The court imposed consecutive sentences totaling twenty days, and plaintiff served eleven days in jail.

Plaintiff also claims that Hesse engaged in a campaign to spread "defamatory rumors" that negatively impacted plaintiff's business and forced him to shut it down. In an omnibus motion submitted by plaintiff to the Village Court on August 5, 2015, plaintiff requested that criminal charges be brought against Hesse. Plaintiff claims that he has "video evidence" of Hesse's crimes, which he alleges include false filings, harassment and obstruction of governmental administration. Plaintiff contends that Fuchs' and Reynolds' refusal to prosecute Hesse constituted an "abuse of process." Plaintiff further claims that an article that appeared in the *Fire Island Newspaper* on August 28, 2015 attributes to Hesse statements about plaintiff that plaintiff claims were untrue and defamatory. The following day, August 29, 2015, plaintiff again appeared before Justice Wexler. Fuchs appeared as the Village Prosecutor and William Reynolds appeared on behalf of the Suffolk County District Attorney's Office. At this proceeding, plaintiff was arraigned on four superseding misdemeanor informations and approximately twenty-one superseding informations on the previously-filed tickets for violations of the Village Code. These matters were set down for trial on September 16, 2015. On September 2, 2015, plaintiff commenced an Article 78 proceeding seeking, *inter alia*, a writ of prohibition on the grounds that Justice Wexler had never obtained jurisdiction over him because he was never properly arraigned on the misdemeanor charges. The court (Baisley, J.) held that, although the court was constrained to agree with plaintiff that he had not been properly arraigned on May 29, 2014 given the conceded unavailability of those proceedings, plaintiff's submissions had failed to establish a "clear legal right" to the relief sought in his petition.[3] Plaintiff sought a bill of particulars regarding the various tickets and misdemeanors with which he was

---

[3]Respondents had argued that even if plaintiff was not properly arraigned either on May 29, 2014 or on August 30, 2014, the error was corrected by subsequent proceedings and rendered moot by plaintiff's arraignment on superseding instruments on August 29, 2015. Justice Baisley opined that any jurisdictional or constitutional claims by plaintiff "are manifestly addressable on direct appeal if petitioner is aggrieved by any final verdict and judgment." (*See* ***Matter of Taffet v. Wexler***, 2016 NY Slip Op 32131, 2016 WL 6472029 [S. Ct. Suffolk County August 2, 2016]).

charged, to which Reynolds responded by contending that the accusatory instruments in question adequately provided the information to which plaintiff was entitled pursuant to the Criminal Procedure Law.

On September 16, 2015, the trial of the now four misdemeanor charges was commenced before Justice Wexler. Pursuant to a plea offer made by Reynolds, plaintiff pled guilty to one of the pending tickets against him, which charged him with a violation of § 112-5F of the Village Code (Unreasonable Noise) in full satisfaction of all of the charges against him. As part of the plea agreement, a fine of $1,000.00 was imposed upon plaintiff, which plaintiff agreed would be deducted from the bail posted on his behalf by his father. On November 3, 2015, plaintiff made a motion demanding the return of all of the bail posted on his behalf. On February 22, 2016, the Appellate Term reversed plaintiff's conviction on three of the four violations of which he had been convicted after trial on October 7, 2014, on the grounds that the accusatory instruments charging him with those violations were facially insufficient because they did not charge plaintiff with every element of each of the offenses in question. The Appellate Term affirmed plaintiff's conviction for violating § 127-4.A of the Village Code (Rental Permit Required). A total of $550.00 in fines for the violations that had been reversed by the Appellate Term had been deducted from the bail money posted by plaintiff's father. This amount was refunded to Martin Taffet on March 28, 2016. On November 1, 2016, the Appellate Term reversed, in the interests of justice, plaintiff's conviction on the remaining Village Code violation for which he had been convicted on October 7, 2014, and on February 2, 2017, defendant Adrion wrote to the Office of State Comptroller requesting that the $1,000 that had been deducted from the bail money posted by plaintiff's father to pay the fine that been imposed on that conviction be refunded to Martin Taffet. On December 28, 2016, plaintiff made a motion for the return of all bail money and the dismissal of all charges against him.

MOTION TO DISMISS BY THE COUNTY DEFENDANTS (SEQ.# 001):

The County defendants move to dismiss the complaint pursuant to CPLR 3211[a][5], [7] and [8] and General Municipal Law §§ 50-e and 50-h. In support of their motion, they proffer, *inter alia*, copies of notices of claim propounded by plaintiff, their demands for examination pursuant to GML § 50-h, and for medical record authorizations, notices regarding mailings to plaintiff, a letter to plaintiff rejecting his notice of claim and the summons and complaint in this action. Plaintiff provides his own affidavit in opposition to the motion.

The procedural history as pertinent to plaintiff's claim against the County defendants is as follows: On December 3, 2014, plaintiff addressed to the Suffolk County Attorney a paper entitled "Notice of Intention to File Claim," stating his intention to file a claim against "the State of New York and Village of Ocean Beach." On December 9, 2014, the Suffolk County Attorney's Office sent a letter to plaintiff advising him that his "Notice of Claim" did not "set forth" or "state the

nature of" any claim against the County and advising him that the County is "not legally responsible for the conduct of Village personnel." On or about November 1, 2016, plaintiff sent a Notice of Claim, dated and executed on October 29, 2016, to both the County and the Village. On November 23, 2016, the County sent plaintiff both a demand that he appear for examination pursuant to GML § 50-h and a demand for executed medical record authorizations. Both demands were sent to plaintiff by certified mail, return receipt requested, using the address stated on his Notice of Claim. However, according to notices received from the post office, two failed attempts were made to deliver these demands to plaintiff, and on December 10, 2016 they were returned as "undeliverable." It appears that a GML § 50-h examination of plaintiff was never conducted.

The County defendants contend that the only claim described against them consists of an allegation that Assistant District Attorney William Reynolds failed to provide plaintiff with a bill of particulars on his misdemeanor charges and that this failure, coupled with the various allegations against the Village defendants, served to coerce plaintiff into his guilty plea. The County contends that this allegation is insufficient to state a cause of action as a matter of law and that plaintiff has failed to state a single viable claim against any of the County defendants. The County defendants also contend that, among other grounds for their motion to dismiss for failure to state a claim, that Reynolds and the Suffolk County District Attorney are cloaked in absolute immunity from civil liability. They also content that the court lacks personal jurisdiction over William Reynolds because he is not named in the caption of the complaint, that plaintiff has failed to comply with the mandates of the General Municipal Law by failing to appear for a duly demanded examination pursuant to § 50-h and that the complaint is barred by the applicable statute of limitations.

In addressing each element of the County defendants' motion to dismiss, the court is guided by black-letter law that "in considering a motion to dismiss pursuant to CPLR § 3211 [a] [7], the court should 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (***Sinensky v. Rokowsky***, 22 A.D.3d 563,564, 802 NYS2d 491 [2d Dept. 2005] quoting ***Leon v. Martinez***, 84 N.Y.2d 83,87-88, 614 NYS2d 972 [1994]; ***Miglino v. Bally Total Fitness of Greater N.Y., Inc.***, 20 NY3d 342, 351, 961 NYS2d 364 [2013]); ***Simos v. Vic-Armen Realty, LLC***, 92 A.D.3d 760, 938 NYS2d 609 [2d Dept. 2012]).

Prosecutorial Immunity:

Individual district attorneys are held absolutely immune from liability "for acts within the scope of their duties in initiating and pursuing a criminal prosecution" (***Pinaud v. County of Suffolk***, 52 F3d 1139, 1147 [2d Cir. 1995]; ***Imbler v. Pachtman***, 424 US 409, 410, 96 SCt 984 [1976]). Absolute immunity is extended to a prosecutor "so far as is necessary to the effective functioning of the judicial process "(***Robison v. Via***, 821 F2d 913, 918 [2d Cir. 1987]; *see also* ***Taylor v.***

Kavanagh, 640 F2d 450, 452 [2d Cir. 1981]). "The test is whether the prosecutor is engaged in activities that are 'intimately associated with the judicial phase of the criminal process'"(***Day v. Morgenthau***, 909 F2d 75, 77 [2d Cir. 1990], *quoting* ***Imbler v. Pachtman,*** *supra* at 430]); *see generally* ***Buckley v. Fitzsimmons***, 509 US 259, 113 SCt 2606 [1993]). Prosecutorial immunity is broadly defined, covering all acts by the prosecutor as an advocate (*see* ***Hill v. City of New York***, 45 F3d 653 [2d Cir. 1995]; *see e.g.* ***Brenner v. County of Rockland***, 67 AD2d 901, 413 NYS2d 185 [2d Dept 1979](prosecutor had absolute immunity for manner in which he presented evidence to the Grand Jury and investigated the matter); ***Spinner v. County of Nassau***, 103 AD3d 875, 962 NYS2d 222 [2d Dept 2013](prosecutors had absolute immunity for their alleged actions concerning investigation in the course of pretrial preparation); ***Johnson v. Kings County District Attorney's Office***, 308 AD2d 278, 763 NYS2d 635 [2d Dept 2003] (prosecutor had absolute immunity for alleged failure to obtain fingerprints and other identifying evidence to determine if defendant was the fugitive sought); ***Whitmore v. City of New York***, 80 AD2d 638, 436 NYS2d 323 [2d Dept 1981] (prosecutor had absolute immunity for the alleged withholding of exculpatory evidence). Here, although the failure of Reynolds to provide a bill of particulars does not give rise to a cognizable cause of action, even if it did, Reynolds is absolutely immune from liability as a matter of law.

Municipal Liability for Alleged Constitutional Violations:

"[A] municipality may not be held liable for unconstitutional acts of its municipal employees on the basis of *respondeat superior*"(***Johnson v. Kings County District Attorney's Office***, 308 AD2d 278, 293, 763 NYS2d 635 [2d Dept 2003], *citing* ***City of Canton, Ohio v. Harris***, 489 US 378 [1989]); *see also* ***Hillary v. St. Lawrence County***, 2019 WL 977876 [NDNY 2019]; ***Ricciuti v. N.Y.C. Transit Authority***, 941 F2d 119, 122 [2d Cir. 1991]). In order for a municipality to be held liable, there must be some direct, affirmative culpability on the part of the municipality (***Johnson v. Kings County District Attorney's Office***, *supra* at 293, *citing* ***Monell v. New York City Dept. of Social Servs.***, 436 US 658, 691, 98 SCt 2018, 2036 [1978]). To prevail in a cause of action to recover damages against a municipality, "the plaintiff must specifically plead and prove (1) an official policy or custom that (2) causes the claimant to be subjected to (3) a denial of a constitutional right"(***Jackson v. Police Dept. of City of N.Y.***, 192 AD2d 641, 642, 596 NYS2d 457 [2d Dept 1993]; *see* ***Monell v. New York City Dept. of Social Servs.***, 436 US 658, 98 SCt 2018 [1978]; ***Batista v. Rodriguez***, 702 F2d 393 [2d Cir. 1983]; ***Willinger v. Town of Greenburgh***, 169 AD2d 715, 716, 564 NYS2d 466 [2d Dept 1991]). In order to maintain a cause of action against the Suffolk County District Attorney or the County, the plaintiff must plead that "some affirmative policy or custom or other knowing act on the part of . . . the county has caused the alleged constitutional deprivation" (***Payne v. County of Sullivan***, 12 AD3d 807, 809, 784 NYS2d 251 [3d Dept 2004], *quoting* ***LaBelle v. County of St. Lawrence***, 85 AD2d 759, 760, 445 NYS2d 275 [3d Dept 1981]), that is, that the policy or custom at issue "caused or was the "moving force" behind the violation" (***Dominguez v. Beame***, 603 F2d 337, 341 [2d Cir. 1979](internal citations omitted); *see also* ***Olori v. Village of***

Haverstraw, 2002 WL 1997891 [SDNY 2002]; ***Sulkowska v. City of New York***, 129 FSupp2d 274, 297 [SDNY 2001]; ***Polk County v. Dodson***, 454 US 312, 326, 102 SCt 445 [1981]). The complaint is devoid of the requisite allegations and his claims against the County for alleged constitutional violations must, therefore, be dismissed.

Statute of Limitations

General Municipal Law § 50-i[] provides, in pertinent part, as follows: "No action or special proceeding shall be prosecuted or maintained against a city, county, town, village . . . for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful action of such city, county, town, village . . . or any officer, agent or employee thereof . . . unless . . . (a) a notice of claim shall have been made and served upon the city, county, town [or] village . . . in compliance with section fifty-e of this chapter, *and . . . (c) the action or special proceeding shall have commenced within one year and ninety days after the happening of the event upon which the claim is based*"(*see* GML § 50-i[1])(emphasis supplied). The requirement that the action or proceedings be commenced within one year and ninety days after the happening of the event constitutes a statute of limitations, and failure to comply with it in an action brought against a municipality or one or more of its officers, agents or employees acting in their official capacities requires dismissal of the action (*see* ***Campbell v City of New York***, 4 NY3d 200, 203 [2005]; ***Baez v New York City Health and Hosps. Corp.***, 80 NY2d 571, 576 [1992]; ***Cohen v. Pearl Riv. Union Free School Dist.***, 51 NY2d 256, 434 NYS2d 138 [1980]; ***Pierson v. City of New York***, 56 NY2d 950, 453 NYS2d 615 [1982]; ***Campbell v. City of New York***, 4 NY3d 200, 791 NYS2d 880 [2005]; ***Bonnano v. City of Rye***, 280 AD2d 630, 721 NYS2d 98 [2d Dept 2001]; ***Barnes v. County of Onondaga***, 103 AD2d 624, 481 NYS2d 539 [4th Dept 1984]). Here, the events complained of in plaintiff's Notice of Claim against the County defendants occurred on May 29, 2014, July 7, 2014, July 14, 2014, and August 28, 2015, respectively. The action was not commenced until May 15, 2017, when the summons and complaint were filed (CPLR 203[c]), more than twenty months later. The complaint specifically alleges that Reynolds and the District Attorney were each acting in his official "capacity as agent, servant, official, and/or employee of Defendant COUNTY OF SUFFOLK NY" (Verified Complaint, ¶¶ 10 and 11) with respect to the matters upon which plaintiff's claims are predicated. Accordingly, the action against the County defendants is time barred and must be dismissed.

MOTION TO DISMISS BY DEFENDANT KENNETH GRAY, ESQ. (SEQ.#002):

Defendant Kenneth Gray, Esq. has moved both to dismiss the complaint against him pursuant to CPLR 3211[a][7] for failure to state a cause of action and for the imposition of sanctions against plaintiff pursuant to 22 NYCRR § 130.1 *et seq*. In support of the motion, Gray proffers, *inter alia*,

the Summons and Verified Complaint, Appellate Term's decision dated November 1, 2016 and emails and a letter he sent to plaintiff.

Mr. Gray is an attorney who represents the Incorporated Village of Ocean Beach. Although he is named in the caption of the complaint, a search of the body of the complaint fails to yield any explicit or implicit reference to him. Plaintiff opposes the motion, however, averring that Mr. Gray's purported comment in the Fire Island Newspaper in which he expressed confidence that the 2014 verdict against plaintiff would be upheld by the appellate court was an intentional disparagement of plaintiff and poisoned the jury pool for his upcoming trial. This argument is unavailing, first, because these allegations are not contained within the complaint, and second, because the comment allegedly made by Mr. Gray is not actionable. As the complaint as originally pleaded against Mr. Gray is bereft of any allegations of wrongful conduct on Mr. Gray's part, and as the additional allegations plaintiff seeks to assert raise only inactionable matter, the complaint against Mr. Gray must be dismissed as a matter of law (*see* ***Laxer v. Edelman***, 75 AD3d 586, 903 NYS2d 920 [2d Dept 2010]; ***Aberbach v. Biomedical Tissue Servs., Ltd.***, 48 AD3d 716, 718, 854 NYS2d 143 [2d Dept 2008]; ***Kew Gardens Hills Apt. Owners, Inc. v. Horing Welikson & Rosen, P.C.***, 35 AD3d 383, 386, 828 NYS2d 98 [2d Dept 2006]). Accordingly, so much of Mr. Gray's motion as seeks an order dismissing the complaint against him is granted. So much of Mr. Gray's motion as seeks the imposition of sanctions against plaintiff pursuant to 22 NYCRR § 130.1 is denied, in the exercise of the court's discretion based upon the facts and circumstances before the court.

THE VILLAGE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (SEQ.#004):

The Village defendants have moved for summary judgment in their favor pursuant to CPLR 3212. They contend that Justice Wexler and defendants Fuchs and Hesse are immune from liability, that plaintiff failed to comply with the requirements of the General Municipal Law, that certain of the causes of action are time barred and that plaintiff has failed to allege and/or a factual basis is wanting for the elements of each of the causes of action brought against them. In support of the motion, the defendants proffer, *inter alia*, the pleadings, an affidavit by defendant Adrion, resolutions concerning the hiring of defendant Adrion as a part-time court clerk and employee of the Village, tickets for Village Code violations issued to plaintiff, transcripts of proceedings before Justice Wexler, a certificate of conviction dated October 6, 2014, notices of claim, letters by plaintiff, a transcript of a statement made on the record memorializing plaintiff's failure to appear for a scheduled hearing pursuant to GML § 50-h, a bench warrant issued by Justice Wexler, a bail receipt for $6,000.00 issued to Martin Taffet, a proposed judgment for $1,550.00, checks issued to Martin Taffet, letters by Justice Wexler to the Office of the New York State Comptroller and Justice Wexler's decision of June 14, 2014. In opposition to the motion, plaintiff proffers, *inter alia*, a transcript of a proceeding held before Justice Wexler on October 6, 2014; undated Appellate Term affirmations by Justice Wexler and defendant Fuchs, both under the caption of a criminal proceeding against Mr. Taffet; an

Appellate Term affirmation by Arnold Wolsky, Esq., dated July 9, 2014, under the same caption as the Justice Wexler's and Mr. Fuchs's affirmations; an email by Arnold Wolsky to plaintiff dated July 17, 2014 forwarding an email of the same date addressed to the Ocean Beach Village Court Clerk; a tracking document from the USPS; and news articles dated March 27 and 28, 2007.

It is well settled that a party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion, who must produce evidentiary proof in admissible form sufficient to require a trial of any material issues of fact (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Immunity – Defendants Fuchs and Adrion and Justice Wexler:

The complaint alleges against Robert T. Fuchs various actions that he either took or failed to take as a prosecutor engaging in advocacy activities that were associated with the judicial phase of the criminal process. He therefore is absolutely immune from civil liability, and the motion for summary judgment in favor defendant Fuchs, dismissing the claims against him, is granted.

Justice Wexler is also absolutely immune from civil liability with respect to the allegations asserted against him in this action. Judicial immunity extends to all judges and encompasses all judicial acts, even if they are alleged to have acted in excess of their jurisdiction and to have done so maliciously or corruptly (*see* ***Sassower v. Finnerty***, 96 AD2d 585, 586, 465 NYS2d 543 [2d Dept 1983], *see also* ***Mosher-Simons v. County of Alleghany***, 99 NY2d 214, 753 NYS2d 444 [2002]; ***Greer v. Garito***, 47 AD3d 677, 848 NYS2d 900 [2d Dept 2008]; ***Montesano v. State***, 11 AD3d 435, 782 NYS2d 362 [2d Dept 2004]). In opposition to the motion, plaintiff argues that Justice Wexler was not acting as a judge and, therefore, is not entitled to judicial immunity from liability. Plaintiff has not, however, produced any proof in admissible form to support this contention and to raise a triable issue of fact. Accordingly, the motion for summary judgment dismissing the claims against Justice Wexler is granted.

The actions allegedly taken by George Hesse, such as issuing tickets for Village Code violations, were discretionary acts in his function as a police officer for which he is immune from liability (*see* ***Shahid v. City of New York***, 144 AD3d 1127, 1129, 43 NYS2d 88 [2d Dept 2016]; ***Wolfanger v. Town of West Sparta***, 245 AD2d 1071, 666 NYS2d 77 [4th Dept 1977]). Accordingly,

the motion for summary judgment as to defendant Hesse is granted.

Plaintiff alleges, in his eighth cause of action, that defendant Joanneigh Adrion converted $6,000.00 in bail money posted by plaintiff's father. Adrion argues that ministerial actions carried out during the course of her duties as a court clerk may only be the basis for civil liability on her part if she violated a special duty owed to the plaintiff apart from the duties she owed to the public in general (*see* ***McLean v. City of New York***, 12 NY3d 194, 203, 878 NYS2d 238 [2009]; ***Lauer v. City of New York***, 95 NY2d 95, 711 NYS2d 112 [2000]). Whether or not Adrion's contention is correct in the context of the plaintiff's specific allegations against her, her affidavit and supporting exhibits account for the proper disposition of all of the bail money posted by plaintiff's father[4] and thus established *prima facie* her entitlement to summary judgment dismissing this claim. The burden therefore shifted to plaintiff to demonstrate, through the submission of proof in admissible form, the existence of a triable issue of fact material with respect to this claim against Adrion. He has failed to do so. Moreover, with respect to the claims asserted in the seventh and ninth causes of action in the complaint, Adrion has provided copies of Village declarations showing that she was not yet employed by the Village at the time of the events alleged in those causes of action. Plaintiff has failed to produce any evidence to the contrary. Accordingly, so much of the Village defendants' motion as seeks summary judgment in favor of Adrion is granted, dismissing the claims against her.

First through Fourth Causes of Action - Malicious Prosecution:

The Village defendants contend, and plaintiff concedes, that the elements of malicious prosecution, alleged in the first four causes of action in the complaint, have not been met and that they must be dismissed as a matter of law. The court is in agreement (*see* ***Rahman v Incagliato***, 84 AD3d 917, 918 [2d Dept 2011], *quoting* ***MacFawn v. Kresler,*** 88 N.Y.2d 859, 860 [1996] ("'A criminal proceeding terminates favorably to the accused, for purposes of a malicious prosecution claim, when the final disposition of the proceeding involves the merits and indicates the accused's innocence'")). Accordingly, the Village defendants are granted summary judgment dismissing those causes of action are dismissed.

General Municipal Law §§ 50-e and 50-i

---

4 As of the date of her affidavit, Ms. Adrion was awaiting the refund of $1,000 due Mr. Taffet father as a result of the vacation by Appellate Term of plaintiff's final remaining Village Court conviction so that she could, in turn, refund that amount to the elder Mt. Taffet. A copy Ms. Adrion's February 2, 2017 letter to the Office of the Comptroller's Justice Court Fund is annexed to the Village defendants' moving papers.

Pursuant to General Municipal Law § 50-e[1] and [3] and § 50-i[1] and CPLR 9801, a Notice of Claim that, *inter alia*, sufficiently identifies the claimant, states the nature of the claim, and describes the time when, the place where, and the manner in which the claim arose, is a condition precedent to a tort action against a municipality including a village, "for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such . . . village . . . or of any officer, agent or employee thereof, . . . " and must be served within ninety days after the claim arises (*see* ***Boring v. Town of Babylon***, 147 AD3d 892, 47 NYS3d 419 [2d Dept 2017]; ***Steins v. Incorporated Village of Garden City***, 127 AD3d 957, 959, 7 NYS3d 419 [2d Dept 2015]). Here, as to the eleventh, thirteenth and nineteenth causes of action against the Village, this condition precedent was not met. Further, as set forth below, to the extent these causes of action are asserted against the individual Village defendants allegedly acting in their respective official capacities, they are barred by the one-year-and-ninety-day commencement requirement of General Municipal Law § 50-i[1]; to the extent those defendants are alleged to have acted in their individual capacities, they are barred by the one-year statute of limitations of CPLR 215 (*see* cases cited *supra*, page 9). .

For the reasons that follow, the court finds with respect to each of the remaining causes of action asserted in the complaint that the Village defendants are entitled to summary judgment in their favor, dismissing the claims against them:

Statute of Limitations: Fifth Cause of Action - Defamation; Sixth through Eleventh Causes of Action - Abuse of Process; Fifteenth Cause of Action - Intentional Infliction of Emotional Distress; Eighteenth Cause of Action False - Arrest/False Imprisonment:

To the extent these claims are asserted against the Village, or against the individual Village defendants allegedly acting in their respective official capacities, they are governed by the one-year-and-ninety-day commencement time limit of General Municipal Law § 50-i[1][c] and are time barred (*see* ***Campbell v City of New York***, *supra,* 4 NY3d at 203; ***Baez v New York City Health and Hosps. Corp.***, *supra,* 80 NY2d at 576; ***Cohen v. Pearl Riv. Union Free School Dist.***, *supra,* 51; ***Pierson v. City of New York***, *supra*; ***Campbell v. City of New York***, *supra*; ***Bonnano v. City of Rye***, *supra*; ***Barnes v. County of Onondaga***, *supra*. To the extent the time limit of General Municipal Law § 50-i[1][c] may be deemed to be inapplicable to any of these claims against individual Village defendants because the claimed unlawful or otherwise tortious acts are alleged, in whole or in part, to have been undertaken outside the scope of the individual Village defendants' respective official duties (*see, e.g.*, ***Collins v Davirro***, 160 AD3d 1343, 1344 [4th Dept 2018]; *compare* ***Blake v City of New York***, 148 AD3d 1101, 1105 [2d Dept 2017]), the claims asserted in each of these causes of action are governed by the one-year statute of limitations of CPLR 215, running from the accrual of each alleged cause of action, which, in each instance, occurred more than a year before this action was

commenced in May 2017 (*see, e.g.*, ***Morrison v. Nat'l Broad. Co.***, 19 N.Y.2d 453, 459, 280 N.Y.S.2d 641, 227 N.E.2d 572 (1967), and ***Melious v Besignano***, 125 AD3d 727, 728 [2d Dept 2015] ("A cause of action alleging defamation is governed by a one-year statute of limitations . . . Such a cause of action accrues at the time the alleged statements are originally uttered"); ***Cunningham v State***, 53 NY2d 851, 853 [1981] (abuse of process claim accrues at time of) ***Rice v New York City Hous. Auth***., 149 AD2d 495, 496 [2d Dept 1989]) (false imprisonment, intentional infliction of emotional distress, libel and slander are governed by one-year statute of limitations of CPLR 215[3]), and ***Hone v City of Oneonta***, *supra,* 157 AD3d at 1032 ("[a] cause of action for false arrest and imprisonment accrues when a party is released from confinement"); ***Orellana v Macy's Retail Holdings, Inc.***, 17 CIV. 5192 (NRB), 2018 WL 3368716, at *17 [SDNY July 10, 2018], *reconsideration denied sub nom.* ***Reyes Orellana v Macy's Retail Holdings, Inc.***, 17 CIV. 5192 (NRB), 2019 WL 6334925 [SDNY Oct. 22, 2019] ("[u]nder New York law, a cause of action for abuse of process is subject to a one-year statute of limitations"[citation omitted] and "ordinarily 'accrues at such time as the criminal process is set in motion—typically at arrest—against the plaintiff'" (*quoting* ***Anderson v. County of Putnam***, No. 14-CV-7162 (CS), 2016 WL 297737, at *3 [SDNY Jan. 22, 2016] *quoting* ***Duamutef v. Moris***, 956 F. Supp. 1112, 1118 [SDNY 1997]), and ***Cunningham v State***, *supra*, 53 NY2d 851, 853 [1981] ("accrual of a cause of action for abuse of process need not await the termination of an action in claimant's favor").

Accordingly, the claims alleged against the Village defendants for defamation, abuse of process, failure to intervene, intentional infliction of emotional distress, false arrest and false imprisonment in the Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fifteenth and Eighteenth Causes of Action, respectively, are time barred and so much of the Village defendants' motion as seeks summary judgment in their favor with respect to each of those claims must be granted.

Twelfth Cause of Action - 42 USC § 1983 and "Monell" Negligent Hiring, Training and Supervision Claims - Incorporated Village of Ocean Beach and Village Trustees:

A claim for damages under 42 USC § 1983 is fatally defective if it fails to allege that the defendant against whom the claim is asserted is directly and personally responsible for the purported unlawful conduct (***Alfaro Motors, Inc. v. Ward***, 814 F2d 883, 886-887 [2d Cir. 1987], *citing* ***Black v. United States***, 534 F2d 524, 527-528 [2d Cir. 1976]; ***Owens v. Coughlin***, 561 FSupp 426, 428 [SDNY 1983]; *see also* ***Brown v. New York City Housing Authority***, 2015 WL 4461558 [SDNY 2015]; ***Green v. Bauvi***, 46 F3d 189, 194 [2d Cir. 1995]). That is, there must be some direct, affirmative culpability on the part of the municipality (***Johnson v. Kings County District Attorney's Office***, *supra* at 293, *citing* ***Monell v. New York City Dept. of Social Servs.***, 436 US 658, 691, 98 SCt 2018, 2036 [1978]). Thus, as noted, above, in connection with the claims alleged against the

County and the District Attorney, "a municipality may not be held liable for unconstitutional acts of its municipal employees on the basis of *respondeat superior*"(***Johnson v. Kings County District Attorney's Office***, *supra*, 308 AD2d at 293, *citing* ***City of Canton, Ohio v. Harris***, *supra*. Again, to recover damages against a municipality, "the plaintiff must specifically plead and prove (1) an official policy or custom that (2) causes the claimant to be subjected to (3) a denial of a constitutional right"(***Jackson v. Police Dept. of City of N.Y.***, *supra*, 192 AD2d at 642; *see* ***Monell v. New York City Dept. of Social Servs.***, *supra*; ***Batista v. Rodriguez***, *supra*; ***Willinger v. Town of Greenburgh***, *supra*, 169 AD2d at 716).

Plaintiff alleges, in his Twelfth Cause of Action, that there were civil and criminal proceedings brought with respect to alleged misconduct by defendant Hesse and other members of the Village's police department in 2007 and earlier. However, the unlawful acts that he alleges were committed against him, and upon which he bases his claims, are alleged, by him, to have first occurred in 2013, and the complaint is devoid of any allegation that the injurious conduct complained of in this cause of action was undertaken directly or personally by the Village or its Trustees or was the result of a municipal custom or policy existing at the time of the 2013 and later unlawful acts he alleges caused injury to him. Accordingly, any claims asserted in the Twelfth Cause of Action against the Incorporated Village of Ocean Beach and the Trustees of the Incorporated Village of Ocean Beach must be dismissed. Further, because plaintiff's 42 USC § 1983 is in substance a claim for malicious prosecution, it fails for the same reason his state law claims for malicious prosecution fail:

> In order to prevail on a § 1983 claim against a state actor for malicious prosecution, a plaintiff must show a violation of his rights under the Fourth Amendment, *see, e.g., Murphy v. Lynn,* 118 F.3d 938, 944 (2d Cir.1997), *cert. denied,* 522 U.S. 1115, 118 S.Ct. 1051, 140 L.Ed.2d 114 (1998), <u>and establish the elements of a malicious prosecution claim under state law</u>, *see, e.g., Russell v. Smith,* 68 F.3d 33, 36 (2d Cir.1995); *Janetka v. Dabe,* 892 F.2d 187, 189 (2d Cir.1989). To establish a malicious prosecution claim under New York law, a plaintiff must show that a proceeding was commenced or continued against him, with malice and without probable cause, <u>and was terminated in his favor</u>. *See, e.g., id.; Murphy v. Lynn,* 118 F.3d at 947; *Broughton v. State,* 37 N.Y.2d 451, 457, 373 N.Y.S.2d 87, 94, 335 N.E.2d 310, *cert. denied,* 423 U.S. 929, 96 S.Ct. 277, 46 L.Ed.2d 257 (1975).

(***Fulton v Robinson***, 289 F3d 188, 195 [2d Cir 2002] (emphasis supplied); *see also* ***Cornejo v Bell***, 592 F3d 121, 129 [2d Cir 2010] ("§ 1983, in recognizing a malicious prosecution claim when the prosecution depends on a violation of federal rights, adopts the law of the forum state so far as the elements of the claim for malicious prosecution are concerned"). Because, as plaintiff concedes, he

cannot establish a claim for malicious prosecution because the criminal proceedings against him were not terminated on the merits and did not establish his innocence, his 42 USC § 1983 claim must fail as well.

Failure to Intervene: Twelfth and Thirteenth Causes of Action:

"A police officer cannot be held liable in damages for failure to intercede unless such failure permitted fellow officers to violate a suspect's "clearly established statutory or constitutional rights" of which a reasonable person would have known"(***Ricciuti v. N.Y.C. Transit Authority***, 124 F3d 123, 129 [2d Cir.1997], *quoting* ***Harlow v. Fitzgerald***, 457 US 800, 818, 102 SCt 2727 [1982]). Whatever application a claim of failure to intervene may have in other settings (*see, e.g.*, ***Ying Li v City of New York***, 246 F Supp 3d 578, 620 [EDNY 2017]) , here, however, it is nothing more than an attempt to recast in the language of a duty to intervene the very derivative liability that the courts have repeatedly refused to impose upon municipalities and their officers for the alleged unconstitutional acts of municipal employees in the absence of "(1) an official policy or custom that (2) causes the claimant to be subjected to (3) a denial of a constitutional right"(***Jackson v. Police Dept. of City of N.Y.***, *supra*, 192 AD2d at 642; *see* ***Monell v. New York City Dept. of Social Servs.***, *supra*; ***Batista v. Rodriguez***, *supra*; ***Willinger v. Town of Greenburgh***, *supra*, 169 AD2d at 716). Moreover, to the extent the plaintiff's direct claims for the alleged underlying acts are barred, his "failure to intervene" claims are necessarily barred as well, and for the same reasons. Accordingly, so much of the Village defendants' motion as seeks summary judgment in their favor with respect plaintiff's failure to intervene claims must be granted.

Failure to Protect: Thirteenth Cause of Action:

Municipalities may only be held subject to tort liability for a failure to protect individual citizens upon a showing of a special relationship between the municipality and the claimant, the elements of which are "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agent that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking" (***Cuffy v. City of New York***, 69 NY2d 255, 260, 513 NYS2d 372 [1987]; *see also* ***Etienne v. New York City Police Dept.***, 37 AD3d 647, 649, 830 NYS2d 349 [2d Dept 2007]; ***Valdez v. City of New York***, 18 NY3d 69, 76, 936 NYS2d 587 [2011]). Defendants correctly argue that the complaint does not allege the existence of a special relationship between plaintiff and the municipal Village defendants, nor do the elements of a cause of action for failure to protect apply to the individual Village defendants. Further, as in the case of plaintiff's failure to

intervene claim, to the extent the plaintiff's direct claims for the alleged underlying acts are barred, his failure to protect claims are necessarily barred as well.

Fourth Amendment Right to Privacy: Fourteenth Cause of Action:

Defendants argue that plaintiff has failed to allege any specific conduct that serves as the basis for this cause of action, nor has he identified which defendants are implicated in this claim. The court is constrained to agree.

Negligent Infliction of Emotional Distress: Fifteenth Cause of Action:

To the extent the claims asserted by plaintiff in his Fifteenth Cause of Action are not barred by the one-year-and-ninety-day commencement period of GML § 50-i[1][c] or the one-year statute of limitations of CPLR 215 (discussion in text, *supra*), . . . The elements of a cause of action for intentional infliction of emotional distress are (1) extreme and outrageous conduct; (2) intent to cause, or disregard a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and the injury; and (4) the resultant severe emotional distress (*see* ***Howell v. New York Post Co.***, 81 NY2d 115, 121, 596 NYS2d 350 [1993]; ***Klein v. Metropolitan Child Servs., Inc.***, 100 AD3d 708, 710-711, 954 NYS2d 559 [2d Dept 2012]; ***Taggart v. Costabile***, 131 AD3d 243, 249, 14 NYS3d 388 [2d Dept 2015]). Negligent infliction of emotional distress is recognized where "the mental injury is a direct, rather than a consequential, result of the breach and when the claim possesses some guarantee of genuineness"(***Taggart v. Costabile***, *supra* at 249). Defendants correctly argue that plaintiff has failed to allege any conduct which could be characterized as "extreme and outrageous" and has also failed to identify which defendants are implicated in this cause of action and what conduct they engaged in to inflict emotional distress upon plaintiff. Moreover, as to the Village municipal defendants, public policy bars claims for intentional infliction of emotional distress against a governmental entity (*see* ***Liranzo v. New York City Health & Hosps. Corp.***, 300 AD2d 548, 752 NYS2d 568 [2d Dept 2002], *citing* ***Lauer v. City of New York***, 240 AD2d 543, 659 NYS2d 57 [2d Dept 1997]; ***Wheeler v. State of New York***, 104 AD2d 496, 479 NYS2d 244 [2d Dept 1984]). Accordingly, the Village defendants are entitled to summary judgment dismissing the Fifteenth Cause of Action.

***Prima Facie* Tort: Sixteenth Cause of Action:**

The elements of a cause of action for *prima facie* tort are (1) intentional infliction of harm; (2) which results in special damages; (3) without any excuse or justification; (4) by an act or series of acts which would otherwise be lawful (*see* ***Freihofer v. Hearst Corp.***, 65 NY2d 135, 141-142, 490 NYS2d 735 [1985]; ***Diorio v. Ossining Union Free School Dist.***, 96 AD3d 710, 712, 946 NYS2d

195 [2d Dept 2012]). Special damages in this context consist of a specific and measurable loss "of something having economic or pecuniary value"(***Rufeh v. Schwartz***, 50 AD3d 1002, 1004, 858 NYS2d 194 [2d Dept 2008], *quoting* ***Liberman v. Gelstein***, 80 NY2d 429, 434-435, 590 NYS2d 857 [1992], *and citing* ***Aronson v. Wiersma***, 65 NY2d 592, 594-595, 493 NYS2d 1006 [1985]). Defendants argue that none of the elements of a cause of action for *prima facie* tort have been alleged in the complaint. The court is constrained to agree.

Denial of Right to a Fair Trial: Seventeenth Cause of Action:

Defendants argue that this cause of action is premised upon plaintiff's claim that he was denied a fair trial because Justice Wexler was biased against him and refused to recuse himself, and that even if true, Justice Wexler is cloaked in judicial immunity. There are no facts pled in the complaint implicating the other Village defendants in this cause of action. Accordingly, this cause of action must be dismissed.

Unjust Enrichment: Nineteenth Cause of Action:

"To prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'"(***Citibank, N.A. v. Walker***, 12 AD3d 480, 481, 787 NYS2d 48 [2d Dept 2004]; *quoting* ***Paramount Film Distr. Corp. v. State of New York***, 30 NY2d 415, 421, 334 NYS2d 388 [1972]). Defendants argue that the complaint is devoid of any factual allegations to support this cause of action and that unjust enrichment was not asserted in any of the notices of claim plaintiff served. Further, to the extent that the claim is based upon the alleged failure to return the bail money posted by plaintiff's father, they provide the affidavit of defendant Adrion, who avers that all such bail money was, or is in the process of being, returned. Plaintiff has failed to provide any proof in opposition to defendants' contentions sufficient to refute them or to raise a triable issue of material fact with respect to his claim that defendants were unjustly enriched.

Twentieth Cause of Action - Punitive Damages:

A "demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action" (***Tighe v. North Shore Animal League Am.***, 142 AD3d 607, 610, 36 NYS3d 500 [2d Dept 2016], *citing* ***McMorrow v. Angelopoulos***, 113 AD3d 736, 740, 979 NYS2d 353 [2d Dept 2014], *and quoting* ***Rocanova v. Equitable Life Assur. Socy. of U.S.***, 83 NY2d 603, 616-617, 612 NYS2d 339 [1994]). Thus, the claim for punitive damages, to the extent it is asserted as an independent cause of action, is nugatory.

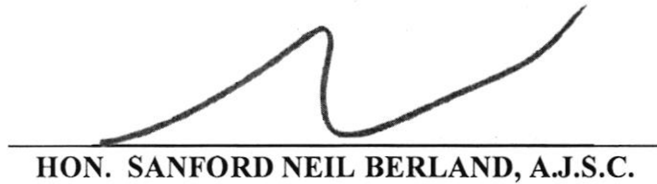
For all of the above reasons, the motion for summary judgment dismissing the complaint and

all claims against the Village defendants is granted.

In light of the foregoing, plaintiff's motions for a protective order (seq.#003) and poor person relief (seq.#005) are both denied as moot.

The court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the above determinations.

The foregoing constitutes the decision and order of the court.



Dated: May 4, 2020

HON. SANFORD NEIL BERLAND, A.J.S.C.

XX FINAL DISPOSITION ____ NON-FINAL DISPOSITION