

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----X
RIVENDELL WINERY, LLC, and SUSAN L. WINE,

Plaintiffs,

-against-

09-CV-00547
(DNH)(DRH)

THE TOWN OF NEW PALTZ,
THE ZONING BOARD OF APPEALS
OF THE TOWN OF NEW PALTZ,
LINDA DONOVAN, individually,
GAIL CHRISTMAN, individually,
PATRICIA SCHWARTZ, individually,
ROBERT HUGHES, individually,
JEFFREY CLOCK, individually,
THOMAS WIACEK, individually,
RODNEY WATROUS, individually,
KEVIN C. HARP, individually,
SUSAN ZIMET, individually,
THE COUNTY OF ULSTER, and
"JOHN DOES" and/or "JANE DOES" #1-8,
individually and personally, representing
the fictitious or partially fictitious names of individuals,
whose full names are unknown to the Plaintiffs,

Defendants.

-----X

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE
COUNTY DEFENDANTS' MOTIONS TO DISMISS THE COMPLAINT**

Respectfully submitted,
CAMPANELLI & ASSOCIATES, P.C.
Attorneys for Plaintiffs

By: _____/s
David A. Antwork, Esq. (Bar No. 515392)
129 Front Street
Mineola, New York 11501
Tel: (516) 746-1600
Fax: (516) 746-2611
daa@campanellipc.com

TABLE OF CONTENTS

STATEMENT OF FACTS1

LEGAL ARGUMENT 1

POINT I

THE PLAINTIFFS HAVE SUFFICIENTLY ALLEGED THE PERSONAL INVOLVEMENT OF DEFENDANT ZIMET IN VIOLATING THEIR CONSTITUTIONAL RIGHTS 1

POINT II

DEFENDANT ZIMET CANNOT ENJOY LEGISLATIVE IMMUNITY BASED ON THE ALLEGATIONS IN THE COMPLAINT WHICH MUST BE TAKEN AS TRUE6

POINT III

THE PLAINTIFFS HAVE SUFFICIENTLY ALLEGED MUNICIPAL LIABILITY ON THE PART OF THE DEFENDANT COUNTY8

CONCLUSION10

TABLE OF AUTHORITIES

Alfaro Motors Inc. v. Ward, 814 F.2d 883 (2d Cir. 1987) 4,5

Bogan v. Scott-Harris, 523 U.S. 44, 54-56 (1998) 6

Cutting v. Muzzey, 724 F.2d 259, 261-62 (1st Cir. 1984) 7

Ellenhorn v. Superintendent of Securities of State, 1999 WL 804123 (S.D.N.Y. 1999) 1

Garcia v. Senkowski, 919 F. Supp. 609 (N.D.N.Y. 1996) 1

Goldberg v. Town of Rocky Hill, 973 F.2d 70, 71-72 (2d Cir. 1992) 6

Haskel v. Washington Township, 864 F.2d 1266 (6th Cir. 1988) 7

Lacorte v. Hudacs, 884 F. Supp. 64, 70 (N.D.N.Y. 1995) 7

Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978) 8,9

Moore v. Trippe, 743 F. Supp. 201, 207 (S.D.N.Y. 1990) 7

Messina v. Mazzeo, 854 F.Supp. 116 (E.D.N.Y. 1994) 5

State Emples. Bargaining Agent Coalition v. Rowland, 494 F.3d 71, 77 (2d Cir. 2007) 6

St. Louis v. Praprotnik, 485 U.S. 112 (1988) 8,9

STATEMENT OF FACTS

For the sake of brevity and to avoid unnecessary repetition, for a full statement of the facts, the Court is respectfully referred to the plaintiffs' memorandum of law in opposition to the Town of New Paltz defendants' motion to dismiss and to the plaintiffs' complaint, which is annexed as Exhibit "1" to the declaration of David A. Antwork.

LEGAL ARGUMENT

POINT I

THE PLAINTIFFS HAVE SUFFICIENTLY ALLEGED THE PERSONAL INVOLVEMENT OF DEFENDANT ZIMET IN VIOLATING THEIR CONSTITUTIONAL RIGHTS

To properly maintain an action pursuant to 42 U.S.C. §1983, a plaintiff must allege the personal involvement of the state official she names as a defendant. Ellenhorn v. Superintendent of Securities of State, 1999 WL 804123 (S.D.N.Y. 1999)¹; Garcia v. Senkowski, 919 F. Supp. 609 (N.D.N.Y. 1996).

Contrary to the defendants assertions in its motion, the plaintiffs in their complaint, have clearly alleged the personal involvement of defendant Susan Zimet, Ulster County Representative, in the violation of the plaintiffs' constitutional rights.

In March 2007, the plaintiffs submitted their first application to have their property become included into Ulster County Agricultural District No. 2, the express purpose of which was to obtain New York State protection against local governments which unreasonably interfere, restrict or regulate agricultural and farming operations. (Compl. ¶¶119-132).

¹This unreported decision is annexed as Exhibit "8" to the Declaration of David A. Antwork.

On or about May 31, 2007, the Ulster County Agriculture and Farmland Protection Board sent a letter to the Ulster County Legislature, of which defendant Zimet is a member, recommending the plaintiffs' parcel for *inclusion* into Ulster County Agricultural District No. 2. (Compl. ¶133).

However, on or about July 9, 2007, as specifically alleged in the plaintiffs' complaint, when the defendants learned that approval of the plaintiffs' application for inclusion was imminent, in what can only be classified as a highly unusual and improper occurrence, defendant Zimet, who is also the former supervisor of the defendant Town of New Paltz, personally called one of plaintiffs' principals and "suggested" that the plaintiffs withdraw their application. (Compl. ¶134).

Defendant Zimet, citing public opposition to the plaintiffs' inclusion which obviously had no bearing on the recommendation of the County Agricultural and Farmland Protection Board, told the plaintiffs to "let the dust settle" and that it would be a "neighborly gesture" to withdraw their application. (Compl. ¶135).

However, defendant Zimet failed to mention that she possessed a personal and financial motivation to keep the plaintiffs' property out of the Agricultural District and prevent the establishment of their as of right farm winery within the defendant Town of New Paltz, a fact the plaintiffs would later learn. (Compl. ¶¶137,143).

Heeding defendant Zimet's "suggestion" while blind to her ulterior motives, and after already being recommended for inclusion into the Agricultural District, the plaintiffs withdrew their application. (Compl. ¶136).

Less than three (3) weeks later, as set forth in the plaintiffs' complaint, the Town of New Paltz building inspector issued his arbitrary and irrational determination that the plaintiffs' proposed use as a farm winery was not agricultural in nature. (Compl. ¶138).

Forced to wait another year before being able to once again apply for inclusion into the Agricultural District, the plaintiffs submitted their second application with Ulster County for inclusion in or about March 2008. (Compl. ¶140).

Just as the year before, the Ulster County Agriculture and Farmland Protection Board voted to recommend inclusion of the plaintiffs' parcel in the Agricultural District, although this time it was unanimous. (Compl. ¶141).

However, on or about July 9, 2008, the Ulster County Legislature voted to *deny* the plaintiffs' inclusion into the Agricultural District. (Compl. ¶142).

Defendant Zimet abstained from voting, citing the fact that her property values would be adversely affected by the establishment of the plaintiffs' farm winery on their property, a fact that she conveniently neglected to mention to the plaintiffs when she coerced the plaintiffs into withdrawing their first application. (Compl. ¶143).

However, as alleged in the plaintiffs' complaint, while she abstained from voting, that did not stop defendant Zimet, for her own personal, political and economic advantage, from influencing her fellow legislators to vote against the plaintiffs' inclusion into the Agricultural District. (Compl. ¶144).

As evidence of this, during the executive session, when it appeared that the Ulster County Legislature was prepared to vote to exclude the plaintiffs' premises from the Agricultural District in direct contravention to the recommendation of the County's Agriculture and Farmland

Protection Board, Legislator Felicello explicitly indicated *on the record* that the Legislature was *not* making a decision based on legitimate reasons, but rather for *political reasons*. (Compl. ¶145).

Legislator Felicello unequivocally stated on the record: “There is a lot of politics going on here. We better take a good hard look at what we are doing to these people. Not including [the plaintiffs] in the Agricultural District is totally wrong. A winery is a part of farming. If a winery is not agricultural, what is? Think about what you are doing. This is an injustice to our democratic process.” (Compl. ¶146).

The significance of these statements by Legislator Felicello cannot be overstated and respectfully must be seriously considered by this Court when weighing the defendants’ motives. Legislator Felicello had obvious inside personal knowledge of the actual motivation for the denial of the plaintiffs’ inclusion into the Agricultural District when everything pointed to an opposite result.

Based on the foregoing, the plaintiffs have clearly alleged the personal involvement of defendant Zimet in the violation of their constitutional rights.

In support of their position the defendants cite to one case, Alfaro Motors Inc. v. Ward, 814 F.2d 883 (2d Cir. 1987) wherein the §1983 claims against certain individual defendants were dismissed for the plaintiff’s failure to properly allege their personal involvement.

However, the Second Circuit’s decision in Alfaro Motors Inc. is inapposite to the matter at bar as the plaintiff’s complaint in that case, other than naming the defendants in the caption, was “*entirely devoid* of any allegations of their personal involvement.” Id., at 886 [emphasis supplied].

As described above, in the instant matter, the plaintiffs' complaint contains specific allegations of defendant Zimet's personal involvement in the deprivation of the plaintiffs' rights, including, but not limited to, her highly improper conduct of personally calling the plaintiffs to coerce them into withdrawing their first agricultural district application; her personal, political and economical motivation for preventing the plaintiffs' inclusion into the County's agricultural district; and her influence over her fellow legislators to unlawfully prevent the plaintiffs' inclusion as confirmed on the record by Legislator Felicello.

The instant matter is more akin to Messina v. Mazzeo, 854 F.Supp. 116 (E.D.N.Y. 1994), wherein the Eastern District Court, after considering Alfaro Motors Inc., supra, declined to dismiss the plaintiff's §1983 claims against the individual defendants. In so holding, the Court stated that "it cannot be said that the Complaint contains 'no allegations indicating how the defendant[s] violated the law or injured the plaintiff'" after determining that the plaintiff's complaint, just as in the instant action, specifically alleged the personal involvement of the individual defendants.

Accordingly, because the plaintiffs have specifically alleged the personal involvement of defendant Zimet in the deprivation of their constitutional rights, this branch of the defendants motion should be denied.

POINT II

DEFENDANT ZIMET CANNOT ENJOY LEGISLATIVE IMMUNITY BASED ON THE ALLEGATIONS IN THE COMPLAINT WHICH MUST BE TAKEN AS TRUE

It is well-settled that legislative immunity is not a jurisdictional bar, but is rather a personal defense that may be asserted to challenge the sufficiency of a complaint under Rule 12(b)(6). Goldberg v. Town of Rocky Hill, 973 F.2d 70, 71-72 (2d Cir. 1992) (reviewing denial of motion to dismiss on legislative immunity grounds under Fed. R. Civ. P. 12(b)(6)). Therefore, when making its determination of legislative immunity, this Court must accept all plaintiffs' facts alleged in the complaint and the supporting documents as true. Id.

In order to determine if a defendant is eligible for legislative immunity, the Supreme Court has developed a functionality test. Whether immunity attaches is dependant on the actions of the individual defendant and not the defendant's title or motive. Bogan v. Scott-Harris, 523 U.S. 44, 54-56 (1998). In order to successfully claim legislative immunity in the case at bar, defendants must show that their actions involved general policy making **and** were passed by means of established legislative procedures. State Emples. Bargaining Agent Coalition v. Rowland, 494 F.3d 71, 77 (2d Cir. 2007).

In Rowland, the defendant legislature and Governor of the State of Connecticut were sued by a union representing State Workers terminated because of alleged budgetary concerns. The defendants raised the defense of legislative immunity based upon the fact that preparing the budget is a legislative act and should be afforded the protections of immunity. Id. The Court found however, that denial of legislative immunity was proper because the defendants had not proven that the actions they took were part of the integral process of the legislative body. Id. Here, defendant Zimet acting to further her own personal pecuniary interests, was not taking part

in any legislative process when she worked a deprivation of the plaintiffs' constitutionally protected rights as alleged in the complaint and described above.

As explained by the Sixth Circuit in Haskel v. Washington Township, 864 F.2d 1266 (6th Cir. 1988), in reversing and remanding a 42 U.S.C. §1983 case which had been dismissed by a District Court:

“ [A]bsolute immunity does not extend to even traditionally legislative actions of public officials taken either in bad faith, because of corruption, or primarily in furtherance of personal instead of public interests. . . While the interaction between local officials and their constituents or other interested parties may often be legislative, it is protected only if it is in furtherance of a reasonably ascertainable legislative activity.”

Haskel v. Washington Township, 864 F.2d 1266, 1278 (6th Cir. 1988).

The Court in Haskell further proceeded to direct, and hold:

“We also reverse the district courts holding dismissing the claim for punitive damages. A review of the record indicates that there is sufficient evidence from which one can infer that the actions of the individual Trustees were in less than good faith and were instead intended to further *personal pecuniary interests* . . .”

Id. [emphasis supplied].

Moreover, there are a line of cases which hold that legislative immunity is unavailable where the complained of action affects only specified individuals and does not turn on broad general policy statements or generally applicable rules of conduct. Lacorte v. Hudacs, 884 F. Supp. 64, 70 (N.D.N.Y 1995); see also Cutting v. Muzzey, 724 F.2d 259, 261-62 (1st Cir. 1984); Haskell, 864 F.2d at 1277-78; Moore v. Trippe, 743 F. Supp. 201, 207 (S.D.N.Y. 1990) [“Courts have recognized that local legislative immunity may be lost if the actions taken impact on particular individuals, rather than on a community generally, or if the factors considered in adopting the legislation relate to specific individuals, instead of

general policy implications." [citations omitted]. Clearly the actions of the defendants as alleged in the complaint, were specifically directed toward the plaintiffs only and do not turn on broad general policy statements.

POINT III

THE PLAINTIFFS HAVE SUFFICIENTLY ALLEGED MUNICIPAL LIABILITY ON THE PART OF THE DEFENDANT COUNTY

As stated by the United States Supreme Court in Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978) a municipality can be held liable pursuant to 42 U.S.C. §1983 if the conduct that caused the unconstitutional deprivation was undertaken pursuant to "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers... [or] pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels." Id. at 690-691.

Furthermore, a municipality can be liable where the "injury was inflicted by [its] lawmakers or by those whose edicts or acts may fairly be said to represent official policy." St. Louis v. Praprotnik, 485 U.S. 112 (1988), quoting Monell, 436 U.S. at 694 [internal quotations omitted].

While the plaintiffs' complaint contains specific policy and custom allegations with respect to the Town defendants as acknowledged in the County defendants' memorandum of law (p. 10), through what can only be described as mere oversight, there is an absence of a similar section with respect to the County defendants.

However, based on the allegations in the complaint that the defendants twice prevented the plaintiffs from having their property included in the County's Agricultural District, once by coercion and once by unlawful political influence and interference as confirmed by one of the County's own legislators, it is clear that the plaintiffs have properly alleged a municipal policy and/or custom spearheaded by defendant Zimet, with the specific target to keep the plaintiffs out of the Agricultural District.

Upon receipt of the plaintiffs' Agricultural District applications, everything pointed to the plaintiffs' property rightfully being included into the County's Agricultural District, two years running. Both years, the Ulster County Agriculture and Farmland Protection Board recommended that the plaintiffs' property be included into the County's Agricultural District and in the second year, the vote was unanimous. (Compl. ¶¶133,141).

Notwithstanding the foregoing, for no reason other than to further her own personal pecuniary interests, defendant Zimet unlawfully influenced her fellow legislators to vote against the plaintiffs' inclusion into the Agricultural District.

Clearly, the plaintiffs have alleged municipal liability on the part of the County of Ulster as the alleged unconstitutional deprivation was undertaken pursuant to "a decision officially adopted and promulgated by [its] officers," Monell, 436 U.S. at 690, and the "injury was inflicted by [its] lawmakers." St. Louis, 485 U.S. at 121-122.

Based on the foregoing, this branch of the defendants motion should be denied.

CONCLUSION

For all of the foregoing reasons as well as the facts and arguments addressed in the plaintiffs' memorandum of law in opposition to the Town defendants' motion, the plaintiffs respectfully request that the Court deny the County defendants' motion to dismiss in its entirety.

Dated: Mineola, New York
September 11, 2009

CAMPANELLI & ASSOCIATES, P.C.
Attorneys for Plaintiffs

By: _____s/_____
David A. Antwork, Esq. (Bar No. 515392)
129 Front Street
Mineola, New York 11501
Tel: (516) 746-1600
Fax: (516) 746-2611
daa@campanellipc.com