UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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GEORGE R. SIMPSON,

CV-06-6743

Plaintiff,

-against-

TOWN OF SOUTHAMPTON, PATRICK A. HEANEY, Individually and in his official capacity, NANCY S. GRABOSKI,individually and in her Official capacity, LINDA A. KABOT, Individually and in her official Capacity, STEVEN T. KENNY, Individually and in his official Capacity, CHRISTOPHER R. NUZZI, Individually and in his official Capacity, GARRETT W. SWENSON, JR., Individually and in his official Capacity, JOSEPH M. BURKE, Individually and in his official Capacity, NOREEN MCCULLEY, Individually and in her official Capacity, SUNDY A. SCHERMEYER, Individually and in her official Capacity, PAULA POBAT, individually And in her official capacity, RICHARD BLOWES, Individually and in His official capacity,

(Bianco, J)
(Wall, M.J)

Defendants.
----------X

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

This is an action to recover damages for defendants' alleged failure to comply with New York's Freedom of Information Law ("F.O.I.L."). Plaintiff seeks a judgment compelling defendants to answer his F.O.I.L. requests; terminating five Town officials; compensatory damages in the sum of $2,000,000 and punitive damages in the sum of $2,000,000 along with attorneys' fees[1].

Plaintiff's original complaint was filed on December 22, 2006. Defendants sought permission to make a motion to dismiss, and a pre-motion conference was held, at which the plaintiff indicated a desire to amend his complaint. Leave to amend was given. Thereafter plaintiff filed his first amended complaint on March 1, 2007. The first amended complaint stated that the defendants violated plaintiff's First Amendment right to free speech, that they defamed the plaintiff, that they conspired to violate his rights to free speech and that they violated his due process right, equal protection rights and right to free trade.

In lieu of an answer, and with the permission of this Court, the defendants served a motion to dismiss dated March 14, 2007. By decision dated June 15, 2007 (Exhibit A)[2], the Court granted defendants' motion in part and dismissed all of the plaintiff's claims with the exception of his equal protection claim. The Court granted plaintiff leave to re-plead his First Amendment, conspiracy, antitrust and state law defamation claims in order to cure, if possible, the deficiencies in said claims, and allowed him thirty days in which to file a second amended complaint.

Plaintiff served his second amended complaint on July 16, 2007 (Exhibit B). It should initially be pointed out that this second amended complaint was not timely served within

[1] Plaintiff is acting pro se.
[2] Exhibits referred to herein are annexed to the declaration of Jeltje DeJong dated August 30, 2007.

the thirty day timeframe permitted by the Court[3]. In any event, when compared to the first amended complaint, only two changes were noted in the second amended complaint. At paragraph number 140, plaintiff added the following additional language:

> "Plaintiff, George R. Simpson, on two separate occasions in the weeks after receiving the "speech limiting" letter from the Defendant Town Attorney, tried to talk to personnel in the Town Clerk's office and was told that because of the Town Attorney's ban on contacts (speech) with the Town employees, members of the Town Clerk's staff could not talk to him."

At paragraph number 162, plaintiff included a reference to the Sherman Act, 25 U.S.C. § 2[4] and added the following additional language:

> "Defendants engage in predatory and anti-competitive conduct with specific intent to monopolize, and a dangerous probability of achieving monopoly power."

Plaintiff's proposed amendments do not cure the deficiencies noted by the Court in its June 15, 2007 decision, and to that extent, plaintiff's first amendment and antitrust claims should be dismissed. Further, plaintiff's second amended complaint fails to remove the claims asserting F.O.I.L. and due process violations (which have already been dismissed *without* leave to re-plead) and fails to alter or remove the conspiracy and defamation claims (which the Court dismissed with leave to re-plead). Accordingly, defendants' motion should be granted in its

[3] This Complaint was served one day beyond the permitted timeframe, on the 31st day following Judge Bianco's decision.

[4] Although plaintiff's complaint alleges a violation of 25 U.S.C. § 2, we presume, as the Court did in its June 15, 2007 decision, that plaintiff is referring to 15 U.S.C. § 2

entirety and the Complaint, save plaintiff's equal protection claim, should be dismissed with prejudice.

ARGUMENT

PLAINTIFF'S SECOND AMENDED COMPLAINT DOES NOT ADD ANY ADDITIONAL COGNIZABLE CLAIMS, REQUIRING THAT ALL OF THE CLAIMS OTHER THAN PLAINTIFF'S EQUAL PROTECTION CLAIMS BE DISMISSED

Plaintiff has ignored the Court's decision dated June 15, 2007 by interposing a second amended complaint which does nothing to cure the deficiencies noted in the first amended complaint. The second amended complaint fails to remove the claims asserting F.O.I.L. and due process violations (which have already been dismissed *without* leave to re-plead) and fails to alter or remove the conspiracy and defamation claims (which the Court dismissed with leave to re-plead). Further, as will be discussed in greater detail, *infra*, plaintiff's proposed amendments to paragraphs 140 and 162 are ineffectual to forge First Amendment or antitrust claims. This failure by plaintiff to state any cognizable claims commands that the second amended complaint, like its predecessor, be dismissed with prejudice.

POINT I

PLAINTIFF'S COMPLAINT, AS AMENDED, FAILS TO STATE A VALID CLAIM FOR DEPRIVATION OF PLAINTIFF'S FIRST AMENDMENT RIGHTS

Plaintiff's First Amendment constitutional claims set forth in the second amended complaint are unsupported by sufficient factual detail, mandating that the complaint be dismissed. *See* Schuloff v. Fields, 950 F.Supp. 66 (E.D.N.Y. 1997) (Refusal to allow document inspection under F.O.I.L. does not violate the First Amendment). Moreover, although the Court already decided in its June 15, 2007 decision that failure to comply with F.O.I.L. procedures does not, in and of itself, violate any rights protected by the First Amendment, plaintiff continues to plead that the purported failure by the Town to comply with F.O.I.L. violates his First Amendment rights. *See* decision of Hon. Joseph F. Bianco dated June 15, 2007; *see also* Schuloff v. Fields, 950 F.Supp. at 68. While the First Amendment guarantees a right of access to certain types of public information, such as transcripts of certain criminal proceedings, *see* Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986), or other court records, *see* Gambale v. Deutsche Bank AG, 377 F.3d 133, 140 & n. 4 (2d Cir.2004), courts have declined to extend the First Amendment right of access to encompass the type of non-criminal, non-judicial public records sought by plaintiff in this case. *See* Houchins v. KQED, Inc., 438 U.S. 1, 9, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978) ("[T]his Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control.").

The additional language in this second amended complaint does not set forth a cognizable First Amendment claim. The additional portion of paragraph 140 provides as follows:

> "Plaintiff, George R. Simpson, on two separate occasions in the weeks after receiving the "speech limiting" letter from the Defendant Town Attorney, tried to talk to personnel in the Town Clerk's office and was told that because of the Town Attorney's ban on contacts (speech) with the Town employees, members of the Town Clerk's staff could not talk to him."

The "speech limiting" letter referred to is apparently the January 23, 2007 letter (Exhibit C) from Assistant Town Attorney Joseph Burke. As pointed out elsewhere in plaintiff's complaint, the aforementioned letter merely stated that "All future communications in regard to this matter [plaintiff's F.O.I.L. requests] must be made in writing to avoid unnecessary confusion. In addition, request is hereby made that you refrain from using profanity and making harassing phone calls to staff in the Town Clerk's Office." (Exhibit C)

Despite plaintiff's characterization, the January 23, 2007 letter is not a limitation on plaintiff's speech deserving of First Amendment protection; indeed, it is simply a request that the plaintiff put all requests in writing and stop harassing Town of Southampton officials. First, it should be noted that this letter does not appear to limit plaintiff's freedom of expression in any way. Indeed, the letter speaks for itself in simply requesting that plaintiff stop using profanity and making harassing phone calls to the Town. It is well-settled that the government may enforce reasonable time, place, and manner regulations as long as restrictions are content-neutral, are narrowly tailored to serve significant governmental interest, and leave open ample alternative channels of communication. *See, e.g.*, United States v. Grace, 461 U.S. 171, 103 S.Ct. 1702, 75 L. Ed. 2d 736 (1983). Here, the Town of Southampton has a legitimate interest in being able to conduct its business without undue interference and harassment.

Pursuant to established F.O.I.L. procedure, plaintiff's appeal was reviewed and decided by the Town Clerk. The Clerk sent a response dated January 26, 2007. Plaintiff was advised that the appeal had been decided by the Town Clerk and that any further remedy would have to come via an Article 78 law suit. (Plaintiff's complaint at paragraph 129). Nevertheless, plaintiff refused to accept the Town's decision and move on (to an Article 78 proceeding or otherwise) and continued to send threatening and insulting emails and letters to the Town on an almost daily basis. (Exhibit D)

Further, plaintiff's own allegation that "because of the Town Attorneys' ban on contacts (speech) with the Town employees, members of the Town Clerk's staff could not talk to him" (Plaintiff's complaint at 140) does not indicate that *plaintiff's* speech rights were curtailed. Indeed, it cannot be said that plaintiff has a constitutionally protected right in having other persons speak to him. Schuloff, 950 F.Supp. at 68 ("[The First Amendment] does not encompass the right to compel a speaker to speak or otherwise provide information and ideas. Thus plaintiff cannot rely on his right to receive information and ideas to compel the government to produce the records in question [under F.O.I.L.]). Plaintiff was not prevented from going to Town Hall nor was he forcibly removed or silenced. The Town merely requested that his F.O.I.L.-related complaints and concerns be memorialized in writing (which, incidentally, is the procedure called for by F.O.I.L.).

Indeed, plaintiff continued to communicate with the Town by email following receipt of said letter. Also attached to the Declaration of Jeltje de Jong are multiple e-mails (Exhibit D) and other correspondence between the plaintiff and the Town of Southampton which show that the Town did not prevent plaintiff from engaging in Constitutionally-protected speech, but rather, asked that in view of the litigious and contentious nature of the matter, that any issues

with respect to the F.O.I.L. requests be brought directly to the Town Attorney. Simply put, this request by the Town Attorney's office to put all future requests in writing did not constitute a denial of plaintiff's free speech rights.

POINT II

PLAINTIFF'S COMPLAINT, AS AMENDED, FAILS TO STATE A VALID ANTITRUST CLAIM UNDER THE SHERMAN ACT (15 U.S.C. § 2)

The Sherman Act, codified at 15 U.S.C. § 2, prohibits attempts to "monopolize any part of the trade or commerce among the several states." 15 U.S.C. § 2. As this Court pointed out in its June 15, 2007 decision, to state a claim for attempted monopolization, a plaintiff must allege that: (1) the defendants engaged in predatory or anticompetitive conduct; (2) with a specific intent to monopolize; and (3) a dangerous probability of achieving monopoly power. Spectrum Sports, Inc. v. McQuillen, 506 U.S. 447, 456, 113 S.Ct. 884, 122 L.Ed.2d 247 (1993); Tops Markets, Inc. v. Quality Markets. Inc., 142 F.3d 90, 99-100 (2d Cir.1998); *see* Dolan v. Fairbanks Cap. Corp., No. 03 Civ. 3285(DRH), 2005 WL 1971006, at *7 (E.D.N.Y. Aug.16, 2005).

Further, "[f]or any antitrust violation, 'a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent.' *In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 134 n. 5 (2d Cir.2001) (*quoting* J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562, 101 S.Ct. 1923, 68 L.Ed.2d 442 (1981)). The complaint must allege facts which show injury to competition, as distinct from injury to plaintiff as a competitor. *See* Jarmatt Truck Leasing Corp. v. Brooklyn Pie Co., *Inc.*, 525 F.Supp. 749, 750 (S.D.N.Y.1981) (*citing* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477,

488, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977) ("The antitrust laws ... were enacted for the protection of competition not competitors.")

Here, plaintiff's second amended complaint alleges, in conclusory fashion, that "Defendants engage in predatory and anti-competitive conduct with specific intent to monopolize, and a dangerous probability of achieving monopoly power." (Plaintiff's second amended complaint at Para. 162). No specific facts are pled which show injury to competition or any cognizable antitrust violation. Thus, the second amended complaint again fails to sufficiently allege an antitrust claim. The only fact alleged in support of plaintiff's antitrust claim is the assertion that the Town failed to respond to plaintiff's F.O.I.L. requests. The complaint does not allege that the Town has taken any steps to limit competition in the market for such data or to otherwise engage in anticompetitive conduct. This conduct is insufficient, as a matter of law, to establish the requisite "predatory or anticompetitive conduct" that must be alleged in order to state a claim under the Sherman Act; *see* Santana Prods., Inc. v. Sylvester & Assocs., Ltd., 121 F.Supp.2d 729, 736 (E.D.N.Y.1999) ("[W]here only one competitor is alleged to be targeted, as opposed to an entire market, a conspiracy to monopolize claim must fail.").

POINT III

PLAINTIFF HAS FAILED TO STATE A CLAIM AGAINST DEFENDANTS PATRICK A. HEANEY, NANCY GRABOSKI, LINDA A. KABOT, STEVEN KENNY, CHRISTOPHER R. NUZZI, NOREEN MCCULLEY, SUNDY A. SCHERMEYER AND RICHARD BLOWES IN THEIR RESPECTIVE INDIVIDUAL CAPACITIES

Simpson's second amended complaint names eleven Town officials as defendants, who he professes to sue in both their individual and official capacities. However, only three of the eleven individual defendants have specific allegations made about them in the body of the Complaint. In this Circuit, it is well-settled that "personal involvement of

defendants in alleged constitutional deprivations is a prerequisite to an award for damages under §1983". Hernandez v. Keane, 341 F.3d 137, 144 (2d Cir. 2003); Davis v. New York, 316 F.3d 93, 101 (2d Cir. 2002); Moffitt v. Town of Brookfield, 950 F.2d 880, 885 (2d Cir. 1991); McKinnon v. Patterson, 568 F.2d 930, 934 (2d Cir. 1977). A § 1983 complaint that does not allege the personal involvement of the defendant(s) is "fatally defective on its face." Alfaro Motors, Inc. v. Ward, 814 F. 2d 883, 886 (1987). Plaintiff has not and cannot allege the requisite personal involvement of eight of the eleven individual defendants in this case. As such, the "individual capacity" claims against those defendants should be dismissed.

Although the lengthy caption of plaintiff's complaint indicates that defendants Patrick A. Heaney, Nancy Graboski, Linda A. Kabot, Steven Kenny, Christopher R. Nuzzi, Noreen Mcculley, Sundy A. Schermeyer and Richard Blowes, are being sued individually and in their respective official capacities, the complaint itself (Exhibit "A") is devoid of any factual allegations which show any of these defendants' personal involvement. The plaintiff only makes claims against three of the individual defendants in the body of the complaint following the preliminaries: Joseph Burke, Paula Pobat and Garrett Swenson. The only allegations in the complaint that specifically address the other eight individual defendants are paragraphs numbered 23 through 34, which simply state that each defendant is a resident of Suffolk County and is being sued both individually and in his or her official capacity due to his or her position in the Town of Southampton (board members, Town Attorneys, councilpersons, clerks, investigators and other Town Employees). There is absolutely no allegation of any of these defendants' involvement with the plaintiff's claimed injuries. They are merely mentioned in passing and quickly dispensed with by paragraph 34 of the complaint. It is with these flimsy non-allegations that the defendants find themselves sued in their respective individual capacities.

Without an allegation of personal involvement, the pleading is plainly insufficient to allege any claim, individually, against Patrick A. Heaney, Nancy Graboski, Linda A. Kabot, Steven Kenny, Christopher R. Nuzzi, Noreen Mcculley, Sundy A. Schermeyer or Richard Blowes, mandating that the "individual capacity" claims against these defendants be dismissed. Moffitt, *supra*, 950 F.2d 880, 886; Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994).

POINT IV

PLAINTIFF HAS FAILED TO STATE A CLAIM AGAINST ANY OF THE ELEVEN INDIVIDUAL DEFENDANTS IN THEIR RESPECTIVE OFFICIAL CAPACITIES

In general, claims against municipal officials in their official capacities are really claims against the municipality and, thus, are redundant when the municipality is also sued. Case law holds that plaintiffs cannot sue individual defendants in their official capacities when the municipality is also named as defendant. Wallikas and Schaffer v. Harder, 67. F. Supp. 2d 82 (N.D.N.Y. 1999). Likewise, suits against legislators in their official capacity are mounted as a way of bringing an action against the entity of which a legislator is an agent. Goldberg v. Town of Rocky Hill, 973 F.2d 70, 72-73 (2d Cir. 1992). In Goldberg, where both the city and the city council members were sued (in their official capacity), the Court held that the suit against the individual city council members should be dismissed as redundant. In light of the fact that the Town of Southampton is a party to the instant action, and the individual defendants are all employees or representatives of the Town of Southampton, the official capacity suits against all of these individual defendants should rightly be dismissed.

CONCLUSION

For the reasons set forth above, defendants' motion to dismiss should be granted and the complaint dismissed in its entirety, with prejudice.

Dated: Smithtown, New York
August 30, 2007

Respectfully Submitted,

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