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

REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

This is an action to recover damages allegedly sustained by plaintiff in connection with a series of events in which plaintiff claims that defendants violated his rights by failing 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 Town officials; and awarding compensatory and punitive damages[1].

Briefly, the Court granted defendants' previous motion to dismiss the First Amended Complaint in part, dismissing all of the plaintiff's claims save his equal protection claim. The plaintiff was, however, given an opportunity to re-plead several of his claims to attempt to cure the deficiencies in same.[2] The Second Amended Complaint was subsequently served, but, as will be set forth more fully herein, there were only two minor changes to the Complaint that do not save plaintiff's claims. The Complaint, as amended, still fails to state cognizable claims for First Amendment violations, conspiracy, antitrust or state law defamation. Indeed, plaintiff's complaint does not in any way alter the conspiracy or defamation claims in any way, and fails to remove the claims for F.O.I.L. and due process violations.[3] Thus, with the permission of the Court, defendants filed the instant motion to dismiss.

Plaintiff's opposition to defendants' motion to dismiss is not supported by any legal authority – instead, he merely goes through point-by-point, stating that he "disagrees" with defendants' motion. Moreover, he is effectually arguing "It's not fair to me, so defendants' motion should be denied." Throughout his opposition, he says that defendants' arguments are without merit without ever offering a legal basis or factual support for those assertions. It is

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[1] Plaintiff is acting pro se.

[2] For a more detailed statement of the procedural history of this case, the Court is respectfully directed to the defendants' Memorandum of Law and the exhibits annexed to the Declaration of Jeltje de Jong, both of which are dated August 30, 2007.

[3] Plaintiff's due process and FOIL claims have already been dismissed without leave to re-plead

respectfully submitted that for these reasons, and for the reasons set forth in defendants' original moving papers, that defendants' motion should be granted in its entirety.

POINT I

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

Despite plaintiff's contentions to the contrary, the complaint, as amended for the second time, still does not adequately state a First Amendment violation. 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 plaintiff argues in his opposition papers that this isn't about F.O.I.L., the surrounding circumstances of the F.O.I.L. requests are the only facts that plaintiff points to in support of his case. Clearly, he is trying, albeit unsuccessfully, to convert his dissatisfaction over the handling of his F.O.I.L. requests into a constitutional violation. In spite of the fact that this 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. While the First Amendment guarantees a right of access to certain types of public information, such as transcripts of certain criminal proceedings or other court records, *see* Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986), Gambale v. Deutsche Bank AG, 377 F.3d 133, 140 (2d Cir.2004), courts have declined to extend the First Amendment right of access to encompass the type of 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. 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 has a legitimate interest in being able to conduct its business without undue interference and harassment.

Plaintiff's argument is misplaced in any event because his claims that his letters were ignored and/or given to the "lying" Town Attorneys does not constitute a First Amendment violation. First, even assuming, arguendo, that the persons involved in handling plaintiff's F.O.I.L. requests did not properly perform their duties, the remedy would be an Article 78 proceeding under F.O.I.L., not a First Amendment claim. Further, plaintiff's argument that his

speech was curtailed is unavailing because plaintiff could and did communicate with the Town incessantly about this matter by calling, appearing in person, and sending e-mails on an almost daily basis. The fact that some of the persons he wrote to chose not to continue to respond to his letters and bullying tactics him does not constitute a First Amendment violation. It is well-settled that there is no First Amendment right to compel a person to speak. 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.") Plaintiff was not prevented from going to Town Hall nor was he forcibly removed or silenced. As the Court already pointed out, the Town merely followed the establish F.O.I.L. procedure by asking that all requests be made in writing.

POINT II

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

With respect to plaintiff's claim under the Sherman Act, plaintiff's Second Amendment Complaint merely regurgitates the language contained in Judge Bianco's decision without alleging a single fact in support of the elements of such a claim. Again, plaintiff misses the mark. 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. 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

Plaintiff argues in his opposition that each of the aforementioned individuals are liable in their individual capacity because he sent each of them certified letters, which he claims were ignored and/or misdirected back to the Town Attorney's office for handling. He advances the theory that this "stone-walling and non-responsive action was not within the prerogative of these individuals in their official capacity." (Plaintiff's opposition at paragraph 28). Plaintiff offers no legal support for this novel claim. In short, such claims must fail. 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 the individual defendants herein. As such, the "individual capacity" claims against those defendants should be dismissed.

The named defendants acted in their respective official capacities by adhering to the directives of their superiors that all future correspondence with respect to Simpson's FOIL requests be routed through the Town Attorney. The fact that plaintiff is dissatisfied with this internal directive does not give rise to individual capacity suits against each of these individuals.

Plaintiff herein can offer no evidence or argument to support a conclusion that each of the individual defendants acted outside the scope of his or her employment and was personally involved in depriving him of his constitutional rights such that they should be subject to individual liability. The fact that they may have ignored and/or re-directed his certified letters is patently insufficient to cast them in individual liability for the plaintiff's claims.

Aside from plaintiff's contention that each defendant is individually liable because of the certified mailings, the complaint itself only makes substantive claims against three of the individual defendants: Joseph Burke, Paula Pobat and Garrett Swenson. In any event, the allegations of "wrongdoing" by these three individuals are de minimis, and do not rise to the level of a constitutional violation, nor do they take the defendants out of the scope of their employment. Thus, the individual capacity suits are clearly improper.

Further, 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. Without an allegation of personal involvement, the pleading is plainly insufficient to allege any claim, individually, against the defendants, mandating that the "individual capacity" claims 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

It is well-settled that 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
October 4, 2007

Respectfully Submitted,

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