

**Vidurek v New York State Board of Elections**

2012 NY Slip Op 32241(U)

August 28, 2012

Sup Ct, Albany County

Docket Number: 0042242/0121

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

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JOHN VIDUREK, GERARD APREA, ANTHONY FUTIA JR.,  
ANTHONY MARESCO, CARL SCHEUERING, PAUL BLACK,  
DAVID PAUL, DONNA FIELDS, EMANUELE MARINARO,  
CHRISTOPHER CIRAULO, CHRISTOPHER RODRIGUEZ,  
JEFFREY MONHEIT, ROBERT SMITH,

Plaintiffs,

-against-

**DECISION and ORDER**  
**INDEX NO. 4224-12**  
**RJI NO. 01-12-107627**

NEW YORK STATE BOARD OF ELECTIONS,

Defendant.

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Supreme Court Albany County All Purpose Term, August 24, 2012  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

John Vidurek  
*Plaintiff, Pro-Se*  
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Hyde Park, New York 12538

Eric T. Schneiderman, Esq.  
Attorney General of the State of New York  
*Attorneys for the Respondent*  
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**TERESI, J.:**

According to the "Cause of Action" section of the document Plaintiffs filed to commence this action, Plaintiffs set forth five claims: "breach of fiduciary duty, negligence, breach of contract, constructive fraud, and conspiracy." Prior to answering, Defendant moves to dismiss. Plaintiffs oppose the motion. Because Defendant demonstrated its entitlement to dismissal, its motion is granted.

“When assessing whether a complaint states a cause of action for purposes of a motion to dismiss pursuant to CPLR 3211(a)(7), the pleading is to be given a liberal construction, the allegations contained within it are assumed to be true and the plaintiff is to be afforded every favorable inference.” (Tenney v Hodgson Russ, LLP, 97 AD3d 1089 [3d Dept 2012], quoting Simkin v. Blank, 19 NY3d 46 [2012]).

First, because Plaintiffs proffered no fiduciary relationship allegations, they stated neither a breach of fiduciary duty nor a constructive fraud cause of action. (Sears v First Pioneer Farm Credit, ACA, 46 AD3d 1282 [3d Dept 2007], Doe v. Holy See [State of Vatican City], 17 AD3d 793 [3d Dept 2005]). Plaintiffs’ pleading alleges nothing more than a candidate’s relationship with the state agency that oversees elections, which is not a fiduciary relationship. As such, no fiduciary duty or constructive fraud cause of action was stated.

Plaintiffs’ breach of contract cause of action is similarly defective. Because Plaintiffs set forth no factual allegations to establish the existence of a contract, i.e. “offer, acceptance, consideration, mutual assent, and intent to be bound” (Waverly Properties, LLC v KMG Waverly, LLC, 2011 WL 4472284 [SDNY 2011], quoting Williams v. Time Warner Inc., 2010 WL 846970 [SDNY 2010]), it stated no breach of contract cause of action.

Plaintiffs set forth no negligence cause of action either, because they alleged no “special duty.” (McLean v. City of New York, 12 NY3d 194, 203 [2009]; Signature Health Ctr., LLC v State, 935 NYS2d 357, 359 [3d Dept 2011]). Being a candidate does not create a “special duty,” and again no cause of action was stated because Plaintiffs’ pleading did not set forth the necessary negligence allegations.

Nor have Plaintiffs properly set forth a conspiracy cause of action. “Allegations of

conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort,” and Plaintiffs failed to proffer any such allegations. (Alexander & Alexander of New York, Inc. v Fritzen, 68 NY2d 968, 969 [1986]).

Each of the above causes of action are also barred by the doctrine of collateral estoppel. “Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity.” (Corporate Woods 11, LP v Bd. of Assessment Review of Town of Colonie, 83 AD3d 1250, 1251 [3d Dept 2011] lv to appeal denied, 17 NY3d 707 [2011], quoting Buechel v. Bain, 97 NY2d 295 [2001], cert. denied 535 US 1096 [2002][quotation marks omitted]). Here, identical to this action, Plaintiffs Vidurek and Aprea brought a prior action against Defendant for its “Breach of Contract,” Breach of Fiduciary Duty,” “Negligence,” “Constructive Fraud,” and “Conspiracy.” These causes of action, both in the prior action and in this one, are based upon the same “committeeman” issue. The prior action was decided against Vidurek and Aprea, when this Court dismissed it for failing to state a cause of action. (Aprea v New York State Board of Elections, Sup Ct, Albany County, February 28, 2012, Teresi, J., index No. 7215-11). Vidurek and Aprea also brought an earlier claim, which too was dismissed because they “failed to state a cause of action for breach of contract, breach of fiduciary duty, negligence, constructive fraud, and conspiracy.” (Aprea v New York State Board of Elections, Sup Ct, Albany County, July 22, 2011, Connolly, J., index No. 4710-11). Moreover, all of the “new” Plaintiffs in this proceeding “can be said to have been represented in the prior proceeding” because they have played no active role in the prosecution of this matter, letting pro se Plaintiff Vidurek prosecute their claims, just as he did in the prior action. (Corporate Woods 11, LP v Bd. of Assessment Review



of Town of Colonie, supra at 1252, quoting Comi v. Breslin & Breslin, 257 AD2d 754 [3d Dept. 1999]). Accordingly, the doctrine of collateral estoppel requires that this action be dismissed.

Lastly, Plaintiffs set forth no declaratory judgment cause of action based upon Defendant's alleged breach of "New York State Constitution Article 1, Section 1; and 'Election Law §6-118'." Plaintiffs claims are based upon the "committeeman" petitions they filed and the allegedly wrongful actions taken thereon. Such petitions, however, were not filed with Defendant. Rather, Plaintiffs filed all of their "committeeman" petitions with local county<sup>1</sup> boards of elections. It is these local boards, according to Plaintiffs' factual allegations, that acted wrongfully on the "committeeman" petitions, not the Defendant. While Plaintiffs allege, in conclusory terms, that the local boards' wrongful acts were taken because of the Defendant's policies and procedures, such bare allegation is insufficient. Plaintiffs offered no proof, or even an unsupported allegation, to establish what "policies and procedures" they are challenging. As such, Plaintiffs failed to set forth a declaratory judgment cause of action.

Accordingly, Defendant's motion to dismiss is granted. In addition, because this is Vidurek and Aprea's third action based upon their "committeeman" claims, and each action has been dismissed for failure to state a cause of action, their continued prosecution of this issue is frivolous. In an exercise of discretion, to prevent the filing of another frivolous action, and in the interest of judicial economy and justice, Vidurek and Aprea are hereby prohibited from commencing another action against Defendant on the "committeeman" issues set forth herein

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<sup>1</sup> The local boards of elections are: Westchester County Board of Elections, Dutchess County Board of Elections, Niagara County Board of Elections, Monroe County Board of Elections, Greene County Board of Elections Orange County Board of Elections (hereinafter collectively "local boards").

absent an attorney's certificate of merit. (see generally Bikman v 595 Broadway Assoc., 88 AD3d 455 [1st Dept 2011]).

This Decision and Order is being returned to the attorneys for the Defendant. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York  
August 28, 2012

  
Joseph C. Teresi, J.S.C.

**PAPERS CONSIDERED:**

1. Summons, dated July 26, 2012; Action at Law w/ verified affidavits (9), dated July 26, 2012; with attached Exhibits "A" - "E" and "Affidavits".
2. Notice of Motion, dated August 14, 2012, Affirmation of Roger Kinsey, dated August 14, 2012, with attached Exhibits "A" - "B".
3. Writ of Error, dated August 13, 2012; Affidavit of Gerard Aprea, dated August 11, 2012; Affidavit of Christopher Ciraulo, dated August 8, 2012; Affidavit of John Vidurek, dated August 13, 2012.
4. Plaintiff's Answer to Defendants Motion to Dismiss unsigned, dated August 27, 2012; Affidavit of Service of James Perone, dated July 26, 2012.