Enviroventures, Inc. v Wingert
2017 NY Slip Op 33182(U)
November 22, 2017
Supreme Court, Sullivan County
Docket Number: 1241-2017
Judge: Stephan Schick
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN
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ENVIROVENTURES, INC., et al.,

Plaintiffs,

- against -

DECISION & ORDER

CAROL WINGERT as Supervisor of Town of Tusten and Individually, et al.,

Defendants.

---X

Motion Return Date: October 3, 2017
RJI No.: 52-39525-2017
Index No.: 1241-2017

Appearances:

For Plaintiffs
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For Defendants Wingert and Merolla
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Schick, J.:

Before the Court are defendants' Wingert and Merolla's motion to dismiss pursuant to CPLR 3211(a)(7) and plaintiffs' cross-motion for leave to file a late notice of claim pursuant to General Municipal Law § 50-e. For the reasons set forth below, the motion is **GRANTED** and the cross-motion is **DENIED**.

I. BACKGROUND

Plaintiffs Enviroventures, Inc., Lang Industries, Inc., and Edward Lang (collectively "plaintiffs") are involved in the business of sewer and septic service. Complaint at ¶¶ 2, 6. Defendant Carol Wingert is the Town of Tusten Supervisor and Defendant Brandi Merolla is a

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Town of Tusten Councilperson (collectively "defendants"). *Id.* at ¶¶ 3, 4. The complaint alleges that on August 22 and 23, 2016, defendants, on Town of Tusten computers, contacted the New York State Department of Environmental Conservation ("DEC") to report that "raw sewage" and "septic waste" discharges onto plaintiffs' real property were making residents sick. *Id.* at ¶ 20-22. The DEC subsequently conducted an inspection of plaintiffs' property and issued a Notice of Violation for land application of "eggshell waste." *Id.* at ¶ 24. Plaintiffs sent a letter to the DEC claiming that what was observed on their property was not "eggshell waste," but rather "eggshell soil amendments." *Id.* at ¶ 25.[1] Plaintiff Edward Lang claims to be a "political rival" of defendants, and believes that their actions were revenge against him for bringing a federal lawsuit against other town officials two years earlier. *Id.* at ¶¶ 7-9; Affirmation of Marvin Newberg dated September 18, 2017 at Ex. B.[2]

II. ANALYSIS

Defendants claim, in opposition to plaintiffs' cross-motion for leave to file a late Notice of Claim, that any such leave would be futile, as defendants are entitled to absolute immunity with regard to their report to the DEC. The Court agrees.

"Town supervisors and town board members are afforded absolute immunity from liability for defamation 'with respect to statements made during the discharge of [their] responsibilities about matters which come within the ambit of [their] duties.'" *Hull v. Town of Prattsville*, 145 A.D.3d 1385, 1389 (3d Dep't 2016) (quoting *Clark v. McGee*, 49 N.Y.2d 613, 617 (1980)).[3] It is

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[1] The complaint does not allege whether the Notice of Violation was administratively appealed, made subject to an Article 78 proceeding, or otherwise vacated or rescinded. The DEC is not a party to this action.

[2] Although the parties have submitted evidence in support of and opposition to the motion to dismiss, the Court has not considered such evidence in dismissing the complaint, and will not treat this motion as one for summary judgment pursuant to CPLR 3211(c). *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635 (1976). The complaint fails on its face, and the evidence submitted does not preserve plaintiffs' claims. *Id.* at 635-636.

[3] This doctrine is alternatively referred to as an "absolute privilege." *See Toker v. Pollak*, 44 N.Y.2d 211, 219 (1978).

beyond question that one of the duties—indeed, the overarching duty—of a Town Supervisor and Councilperson is to protect and promote the general health, safety, and welfare of the town's residents. Thus, the potential discharge of raw sewage (or a substance smelling like raw sewage) onto plaintiffs' property is a "matter . . . within the ambit of [defendants'] duties." *Id.* The complaint alleges that "*by reason of* their elective positions, [d]efendants . . . have[] interaction with various state agencies, including the [DEC]." Complaint at ¶ 5 (emphasis added). Thus, any reports by defendants to the DEC that residents were being sickened by waste discharges onto plaintiffs' property were admittedly "made during the discharge of [defendants'] responsibilities" as elected officials. *Id.*; *see also Hull*, 145 A.D.3d at 1390 ("[T]he sworn statement that [the Town Supervisor] provided to an investigator with the Department of Financial Services . . . was also made in the performance of his public duties and, therefore, he is entitled to an absolute privilege."). That such reports may have been motivated in whole or in part by malice is irrelevant. *Sheridan v. Crisona*, 14 N.Y.2d 108, 114 (1964) ("The absolute privilege to which defendant is entitled is a complete bar to this action in libel, regardless of whether the publication was motivated by malice or that the matter so published was false and defamatory.").

The Court is cognizant that the facts alleged here fall between the two poles of the commonly cited caselaw on this issue. At one pole are statements by government officials made within the confines of governmental proceedings or legislatively mandated reports, which the appellate courts have found to be absolutely privileged communications. *See, e.g.*, *Sheridan*, 14 N.Y.2d at 113; *Hull*, 145 A.D.3d at 1389. At the other pole are statements made by government officials to the press or the general public, which the appellate courts have found to not be absolutely privileged, even though the statements themselves concerned matters within the ambit of the officials' duties. *See, e.g.*, *Cheatum v. Wehle*, 5 N.Y.2d 585, 593 (1959); *Clark*, 49 N.Y.2d at 619-620; *Stapleton Studios, LLC v. City of New York*, 26 A.D.3d 236, 237 (1st Dep't 2006). The

Court finds that a Town Supervisor and Councilperson's report of possible environmental law violations to the very state agency charged with enforcing those laws falls more closely in line with the former category of cases than the latter.

The case of *Cheatum v. Wehle* makes an apt comparison. There, plaintiff alleged that defendant state conservation commissioner had accused him, in a public speech at a dinner gathering, of deliberately sabotaging a particular state conservation effort. *Cheatum*, 5 N.Y.2d at 589-590. The Court of Appeals found the remark to not be absolutely privileged against plaintiff's claim of defamation, and in doing so, observed that defendant instead "had at hand a ready, effective, orderly and legal means of dealing with [plaintiff], such, for instance, as the filing of charges and giving him an opportunity to be heard." *Id.* at 593. It strikes this Court that this is exactly what defendants did in this case—rather than making a charge of misconduct to the press or general public "who can do nothing about it in any event," they went instead to the particular legal authority who could. *Id.* Under such circumstances, to expose defendants to the time and expense of discovery and possible trial would cut directly against the weighty public policy concerns that animate the absolute privilege. *See, e.g.*, *Stukuls v. State of New York*, 42 N.Y.2d 272, 278 (1977) ("The [absolute] privilege exists to protect . . . those to whose official functioning it is essential that they be insulated from the harassment and financial hazards that may accompany suits for damages by the victims of even malicious libels or slanders."); *Lombardo v. Stoke*, 18 N.Y.2d 394, 401 (1966) ("[T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.") (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, C.J.)).

The forgoing analysis is sufficient to dispose of the entire action, as all of plaintiffs' asserted theories of recovery relate to the report defendants made to the DEC. Furthermore, plaintiffs' bare

legal conclusion that defendants acted also in their individual capacities, unsupported by any specific factual allegations indicating such, does not save the complaint. *See, e.g.*, *Wiggins & Kopko, LLP v. Masson*, 116 A.D.3d 1130, 1131 (3d Dep't 2014). Indeed, the complaint specifically alleges the contrary—that the reports to the DEC were made upon the "Town of Tusten computer" and that defendants' interactions with the DEC were "by reason of their elective positions." Complaint at ¶¶ 5, 21, 22.

III. CONCLUSION

The Court has considered all other arguments and found them to be either without merit or rendered academic. Accordingly, it is hereby

ORDERED that defendants' motion to dismiss be **GRANTED** and plaintiffs' cross-motion for leave to file a late notice of claim be **DENIED**. The clerk is hereby directed to dispose of this action.

This shall constitute the Decision and Order of the Court. The original Decision and Order, along with all papers submitted for consideration, are being forwarded to the Sullivan County Clerk's Office for filing. Counsel are not relieved from the provisions of CPLR 2220 regarding service with notice of entry.

Dated: November 22, 2017
Monticello, New York

ENTER

HON. STEPHAN G. SCHICK, JSC

Papers considered: (1) Notice of Motion, (2) Affirmation of Judith A. Waye dated August 17, 2017, (3) Notice of Cross-Motion, (4) Affirmation of Marvin Newberg dated September 18, 2017, (5) Affirmation of Judith A. Waye dated October 2, 2017