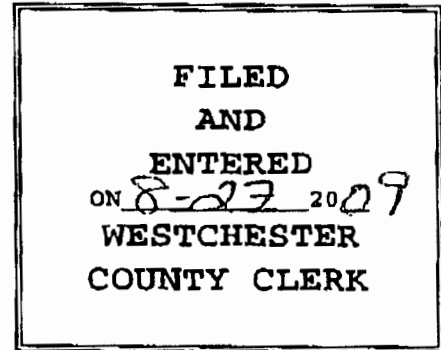


To commence the statutory time for appeals as of right (CPLR 55(3)(a)), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
RICHARD OTTINGER and JUNE OTTINGER,

Plaintiffs,



- against -

DECISION AND ORDER
Sequence No. 3 and No. 4

Index No. 16429/08

STUART TIEKERT, JOHN DOE 1-10, and
JANE DOE 1-10 (potential computer users at
130 Beach Avenue, Mamaroneck, New York),

Defendants.

-----X
LIEBOWITZ, J.

The following documents numbered 1 to 63 were read in connection with the motion of defendant Stuart Tiekert ("Tiekert") for an Order pursuant to CPLR §3212(h) granting him summary judgment and dismissing the complaint herein, and for an Order pursuant to Civil Rights Law §70-a awarding him compensatory and punitive damages, attorney's fees and costs and disbursements, and the cross-motion of plaintiffs Richard Ottinger and June Ottinger (the "Ottingers") for an Order allowing them to amend their complaint, and for an Order awarding them summary judgment dismissing Tiekert's counterclaim and his first, second, third, fifth, sixth, seventh, eighth, ninth and twelfth affirmative defenses, or alternatively, striking paragraphs 51, 54, 56, 57, 83, 87 and 88 of the Amended Answer.

Notice of Motion, Affidavits and Supporting Papers	1-51
Notice of Cross-Motion, Affidavits and Supporting Papers	52-62
Reply Memorandum of Law	63

The facts underlying this action are relatively simple and not in dispute. In the course of a renovation project to their house in the Village of Mamaroneck (the "Village"), the Ottingers applied for building permits and approvals from several Village entities, including the Building Department, the Zoning Board of Appeals ("ZBA"), the Harbor and Coastal Zone Management Commission ("HCZMC") and the Architectural Review Board. Richard Ottinger is a former Congressman from the State of New York. June Ottinger served as a Village Trustee for one term, and was the Chairperson of the HCZMC at the time that the Ottingers' building permit was being considered. June Ottinger did not participate in the consideration of said building permit.

Some of the Ottingers' neighbors and local activists began attending public meetings which were held in connection with the various approvals and permits that the Ottingers needed in order to complete their renovation project. One such neighbor and activist was Suzanne McCrory ("McCrory"). McCrory became convinced that the Village was treating the Ottingers' applications in a different manner than those of others. McCrory, a co-petitioner in two Article 78 petitions challenging determinations that the ZBA had made in connection with the Ottingers' property, spoke at a televised public meeting of the Village Trustees held on September 10, 2007. At that meeting, McCrory articulated her belief that the confirming deed regarding the Ottinger property was "invalid" and "fraudulent".

On September 11, 2007, Tiekert posted a forum on the LoHUD website of The Journal News entitled the "Sounds of Silence." Tiekert posted various comments on this forum, which comments suggested that the Ottingers' deed was fraudulent, and that the Ottingers had used political pressure and bribery to obtain the requisite permits for their renovation project. In all, Tiekert posted four "blogs" under the names SAVE10543, aoxomoxoa and hadenough. Tiekert is an acquaintance of McCrory and the two had shared their concerns regarding the Ottingers' renovation project. The Ottingers learned of Tiekert's identity via a special proceeding to obtain pre-action disclosure that the Ottingers brought against The Journal News.

The Ottingers then commenced the within action which seeks \$500,000.00 in compensatory damages from Tiekert for the allegedly defamatory remarks he posted on the "Sounds of Silence" forum, as well as \$1,000,000.00 in punitive damages, a public apology and the costs and disbursements of this action. The complaint also names John Doe 1-10 and Jane Doe 1-10 as potential computer users at Tiekert's address. However, Tiekert admits that he alone made all four of the online posts that form the gravamen of the Ottingers' action. It is the Ottingers' contention that the statements posted by Tiekert were false, and that Tiekert published those statements either knowing that the statements were false, or in reckless disregard of the truth or falsity of those statements.

Tiekert denies that his statements concerning the Ottingers were defamatory. Tiekert further avers that the allegedly defamatory statements were matters of opinion on issues of legitimate public interest. Tiekert has counterclaimed for compensatory damages in the amount of \$500,000.00, punitive damages in the amount of \$1,000,000.00, attorney's fees and the costs and disbursements of this action. Tiekert maintains that he is entitled to the above damages because

the Ottingers violated Civil Rights Law §76-a in commencing and continuing a Strategic Lawsuit Against Public Participation ("SLAPP").

Tiekert brings the instant motion for an Order pursuant to CPLR §3212(h) granting him summary judgment, and awarding him damages, attorney's fees and costs and disbursements pursuant to Civil Rights Law §70(a)(1)(a), (a)(1)(b) and (a)(1)(c). Tiekert argues that this action is a SLAPP, and that the Ottingers have not met their burden of establishing that their action "has a substantial basis in fact and law, or is supported by a substantial argument for an extension, modification or reversal of existing law." CPLR §3212(h).

The Ottingers cross-move for an Order allowing them to amend their complaint by eliminating references to a "fraudulent deed", deleting their second cause of action and amending the caption herein. The Ottingers also move for summary judgment dismissing Tiekert's counterclaim and his first, second, third, fifth, sixth, seventh, eighth, ninth and twelfth affirmative defenses. Should the counterclaim not be dismissed, the Ottingers ask that this Court strike paragraphs 51, 54, 56, 57, 83, 87 and 88 of the Amended Answer.

§76-a(1)(a) of the Civil Rights Law states that "[a]n 'action involving public petition and participation' is an action, claim, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission."

§76-a(1)(b), in pertinent part, defines a "public applicant or permittee" as "any person who has applied for or obtained a permit, zoning change ... or other entitlement for use or permission to act from any government body ... that is materially related to such application or permission" A

“government body” includes a “municipality ... [or] ... any other political subdivision or agency of such” Civil Rights Law §76-a(1)(d).

§76-a(2) provides that damages in a SLAPP “may only be recovered if ... in addition to all other necessary elements... [it is]...established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false” The term “communication” as used above includes statements, writings or “other expression.” Civil Rights Law §76-a (1)(c).

§70-a(1)(a) of the Civil Rights Law provides that in a lawsuit involving public petition and participation, “costs and attorney’s fees may be recovered upon a demonstration that the action ... was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law.” §70-a(1)(b) provides that in order to recover compensatory damages in such a lawsuit, a party must demonstrate that the action “was commenced or continued for the purpose of harassing, intimidating, punishing, or otherwise maliciously inhibiting the free exercise of speech, petition or association rights.” §70-a(1)(c) goes on to state that “punitive damages may only be recovered upon an additional demonstration that the action ... was commenced or continued for the sole purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights.”

This Court has carefully reviewed the applicable law and the facts of the case at bar, and has heard oral argument from the parties in regard to same. Based on the foregoing, the Court finds that the within action, which action involves public petition and participation brought

by a public applicant, and which action is materially related to the defendant's efforts to comment on, challenge or oppose said application, is a SLAPP within the meaning of Civil Rights Law §76-a(1)(a). Since the Ottingers have failed to demonstrate that their action has a substantial basis in fact and law, or is supported by a substantial argument for an extension, modification or reversal of existing law, the Court grants Tiekert's motion for summary judgment pursuant to CPLR §3212(h) and dismisses this action.

The Court has also carefully examined the issue of what damages, if any, should be awarded to Tiekert as a result of the Court's ruling that the within action is a SLAPP. The Court finds that Tiekert has not established that he is entitled to either compensatory or punitive damages in this action. As stated previously, compensatory damages may **only** be awarded in a SLAPP if the Court determines that the lawsuit was brought to harass, intimidate, punish or otherwise maliciously inhibit the free exercise of speech. The standard for awarding punitive damages is even more stringent and requires an additional demonstration that the SLAPP was commenced or continued for the **sole** purpose of the above. Tiekert has not established that the Ottingers brought or continued the within lawsuit with the requisite malicious intent, and therefore Tiekert is not entitled to compensatory damages in this SLAPP. Since Tiekert has not met this initial hurdle, it is axiomatic that he is not entitled to an award of punitive damages herein.

In the exercise of its discretion, the Court also declines to award Tiekert costs and attorney's fees in connection with his defense of the within action. Miness v. Alter, 262 A.D.2d 374, 691 N.Y.S.2d 171 (2nd Depr., 1999); West Branch Conservative Ass'n, Inc. v. Planning Bd.

of Town of Clarkstown, 222 A.D.2d 513, 636 N.Y.S.2d 61 (2nd Dept., 1995.) See also, Friends of Rockland Shelter Animals, Inc. (FORSA) v. Mullen, 313 F.Supp.2d (S.D.N.Y., 2004).

Therefore, that branch of the Ottingers' cross-motion for an Order granting them summary judgment dismissing Tiekert's counterclaim for compensatory and punitive damages, attorney's fees and costs and disbursements, is granted, and said counterclaim is dismissed. The balance of the Ottingers' cross-motion is denied as moot.

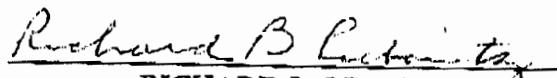
On the basis of the foregoing, it is hereby

ORDERED that the motion of defendant Stuart Tiekert for an Order pursuant to CPLR §3212(h) awarding him summary judgment is granted, and the within action is dismissed; and it is further

ORDERED that the cross-motion of plaintiffs Richard Ottinger and June Ottinger to dismiss the counterclaim of defendant Stuart Tiekert is granted, and the counterclaim is dismissed.

This constitutes the Decision and Order of this Court.

Dated: White Plains, New York
August 27, 2009


RICHARD B. LIEBOWITZ
SUPREME COURT JUSTICE

Henry R. Kaufman, P.C.
60 East 42nd Street
47th Floor
New York, New York 10165

Debra S. Cohen, Esq.
470 Mamaroneck Avenue
White Plains, New York 10605

Russell J. Ippolito, Esq.
150 White Plains Road
Suite 300
Tarrytown, New York 10591