

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOSEPH KOWALCZYK and ALIL PERICIO,

Index No.: 08 CIV 6992

Plaintiff,

VERIFIED ANSWER

- against -

JOHN BARBARITE, SUE FLORA, GORDON
JENKIN AND THE VILLAGE OF MONTICELLO,

Defendants.

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Defendants, JOHN BARBARITE, GORDON JENKIN AND THE VILLAGE OF MONTICELLO, by their attorneys, MIRANDA SOKOLOFF SAMBURSKY SLONE VERVENIOTIS LLP, hereby answer plaintiffs' Verified Complaint, upon information and belief, as follows:

THE PARTIES

1. (a) Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "1a" of the Verified Complaint and refer all questions of law to the Court.

(b) Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "1b" of the Verified Complaint and refer all questions of law to the Court.
2. (a) Deny the truth of the allegations contained in paragraph "2a" of the Verified Complaint except admits that JOHN BARBARITE is currently Village Manager of the Village of Monticello and resides within the Village of Monticello.

(b) Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "2b" of the Verified Complaint and refer all questions of law to the Court.

(c) Deny the truth of the allegations contained in paragraph "2c" of the Verified Complaint except admits that GORDON JENKINS is currently Mayor of the Village of Monticello and resides within the Village of Monticello.

(d) Upon information and belief, Admit.

JURISDICTION

3. Deny the truth of the allegations contained in paragraph "3" of the Verified Complaint insofar as the allegations pertain or relate to these answering defendants and refer all questions of law to the Court.

4. Deny the truth of the allegations contained in paragraph "4" of the Verified Complaint insofar as the allegations pertain or relate to these answering defendants and refer all questions of law to the Court.

VENUE

5. Deny the truth of the allegations contained in paragraph "5" of the Verified Complaint insofar as the allegations pertain or relate to these answering defendants and refer all questions of law to the Court.

RELATIONSHIP OF THE PARTIES

6. Deny the truth of the allegations contained in paragraph "6" of the Verified Complaint insofar as the allegations pertain or relate to these answering defendants and begs leave to refer to such documents for the terms and conditions thereof and refer all questions of law to the Court.

7. Deny the truth of the allegations contained in paragraph "7" of the Verified Complaint insofar as the allegations pertain or relate to these answering defendants and refer all questions of law to the Court.

FACTS RELATING TO KOWALCYK'S CLAIMS

8. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "8" of the Verified Complaint.
9. Deny the truth of the allegations contained in paragraphs "9" of the Verified Complaint insofar as the allegations pertain or relate to these answering defendants and refer all questions of law to the Court.
10. Deny the truth of the allegations contained in paragraph "10" of the Verified Complaint insofar as the allegations pertain or relate to these answering defendants and begs leave to refer to same at the time of trial and refer all questions of law to the Court.
11. Deny the truth of the allegations contained in paragraph "11" of the Verified Complaint insofar as the allegations pertain or relate to these answering defendants and begs leave to refer to same at the time of trial and refer all questions of law to the Court.
12. Deny the truth of the allegations contained in paragraph "12" of the Verified Complaint except Admit that JOHN BARBARITE, upon information and belief became Deputy Village Manager during 2007.
13. Deny the truth of the allegations contained in paragraph "13" of the Verified Complaint.

14. Deny the truth of the allegations contained in paragraph "14" of the Verified Complaint insofar as the allegations pertain or relate to these answering defendants.
15. Deny the truth of the allegations contained in paragraph "15" of the Verified Complaint insofar as the allegations pertain or relate to these answering defendants.
16. Deny the truth of the allegations contained in paragraphs "16" of the Verified Complaint.
17. Deny the truth of the allegations contained in paragraphs "17" of the Verified Complaint.
18. Deny the truth of the allegations contained in paragraph "18" of the Verified Complaint.
19. Deny the truth of the allegations contained in paragraph "19" of the Verified Complaint.

ANSWERING THE FIRST CAUSE OF ACTION, PLAINTIFF KOWALCZYK

20. Deny the truth of the allegations contained in paragraph "20" of the Verified Complaint.
21. Deny the truth of the allegations contained in paragraph "21" of the Verified Complaint.

ANSWERING THE SECOND CAUSE OF ACTION, PLAINTIFF KOWALCZYK

22. Deny the truth of the allegations contained in paragraph "22" of the Verified Complaint.

23. Deny the truth of the allegations contained in paragraph "23" of the Verified Complaint.

ANSWERING THE THIRD CAUSE OF ACTION, PLAINTIFF KOWALCZYK

24. Deny the truth of the allegations contained in paragraph "24" of the Verified Complaint.
25. Deny the truth of the allegations contained in paragraph "25" of the Verified Complaint.
26. Deny the truth of the allegations contained in paragraph "26" of the Verified Complaint.

ANSERING THE FOURTH CAUSE OF ACTION, PLAINTIFF KOWALCZYK

27. Deny the truth of the allegations contained in paragraph "27" of the Verified Complaint.
28. Deny the truth of the allegations contained in paragraph "28" of the Verified Complaint.
29. Deny the truth of the allegations contained in paragraph "29" of the Verified Complaint.
30. Deny the truth of the allegations contained in paragraph "30" of the Verified Complaint.

ANSWERING THE FIFTH CAUSE OF ACTION, PLAINTIFF KOWALCZYK

31. Deny the truth of the allegations contained in paragraph "31" of the Verified Complaint and refer all questions of law to the Court.
32. Deny the truth of the allegations contained in paragraph "32" of the Verified Complaint and refer all questions of law to the Court.

33. Deny the truth of the allegations contained in paragraph "33" of the Verified Complaint and refer all questions of law to the Court.

ANSWERING THE SIXTH CAUSE OF ACTION, PLAINTIFF KOWALCZYK

34. Deny the truth of the allegations contained in paragraph "34" of the Verified Complaint and refer all questions of law to the Court.
35. Deny the truth of the allegations contained in paragraph "35" of the Verified Complaint.
36. Deny the truth of the allegations contained in paragraph "36" of the Verified Complaint.

FACTS RELATING TO PERICIC'S CLAIM

37. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "37" of the Verified Complaint.
38. Deny the truth of the allegations contained in paragraph "38" of the Verified Complaint insofar as the allegations pertain or relate to these answering defendants and begs leave to refer to said building permit for the terms & conditions thereof and refer all questions of law to the Court.
39. Deny the truth of the allegations contained in paragraph "39" of the Verified Complaint insofar as the allegations pertain or relate to these answering defendants and begs leave to refer to same at the time of trial and refer all questions of law to the Court.
40. Deny the truth of the allegations contained in paragraph "40" of the Verified Complaint

41. Deny the truth of the allegations contained in paragraph "41" of the Verified Complaint insofar as the allegations pertain or relate to these answering defendants.
42. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "42" of the Verified Complaint.
43. Deny the truth of the allegations contained in paragraph "43" of the Verified Complaint.
44. Deny the truth of the allegations contained in paragraph "44" of the Verified Complaint insofar as the allegations pertain or relate to these answering defendants.
45. Deny the truth of the allegations contained in paragraph "45" of the Verified Complaint.
46. Deny the truth of the allegations contained in paragraph "46" of the Verified Complaint.

ANSWERING THE FIRST CAUSE OF ACTION , PLAINTIFF PERICIC

47. Deny the truth of the allegations contained in paragraph "47" of the Verified Complaint
48. Deny the truth of the allegations contained in paragraph "48" of the Verified Complaint insofar as the allegations pertain or relate to these answering defendants.

ANSWERING THE SECOND CAUSE OF ACTION , PLAINTIFF PERICIC

49. Deny the truth of the allegations contained in paragraph "49" of the Verified Complaint.

50. Deny the truth of the allegations contained in paragraph "50" of the Verified Complaint.

ANSWERING THE THIRD CAUSE OF ACTION , PLAINTIFF PERICIC

51. Deny the truth of the allegations contained in paragraph "51" of the Verified Complaint.

52. Deny the truth of the allegations contained in paragraph "52" of the Verified Complaint.

53. Deny the truth of the allegations contained in paragraph "53" of the Verified Complaint.

ANSWERING THE FOURTH CAUSE OF ACTION , PLAINTIFF PERICIC

54. Deny the truth of the allegations contained in paragraph "54" of the Verified Complaint.

55. Deny the truth of the allegations contained in paragraph "55" of the Verified Complaint.

ANSWERING THE FIFTH CAUSE OF ACTION , PLAINTIFF PERICIC

56. Deny the truth of the allegations contained in paragraph "56" of the Verified Complaint

57. Deny the truth of the allegations contained in paragraph "57" of the Verified Complaint and refer all questions of law to the Court.

58. Deny the truth of the allegations contained in paragraph "58" of the Verified Complaint and refer all questions of law to the Court.

ANSWERING THE SIXTH CAUSE OF ACTION , PLAINTIFF PERICIC

59. Deny the truth of the allegations contained in paragraph "59" of the Verified Complaint.
60. Deny the truth of the allegations contained in paragraph "60" of the Verified Complaint.

AFFIRMATIVE DEFENSES

AS AND FOR A FIRST AFFIRMATIVE DEFENSE TO THE ENTIRE COMPLAINT, THESE ANSWERING DEFENDANTS ALLEGE:

At all times relevant to the acts alleged in the Verified Complaint, these answering defendants, their agents and officials, acted reasonably, properly, and in the lawful exercise of their discretion. Therefore, they are entitled to legislative immunity from liability.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE TO THE ENTIRE COMPLAINT, THESE ANSWERING DEFENDANTS ALLEGE:

Plaintiffs' conduct leading up to and during the events alleged in plaintiffs' Verified Complaint, and any damages suffered by the plaintiffs, whether based upon Constitutional rights or otherwise, were the result of plaintiffs' culpable conduct.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE TO THE ENTIRE COMPLAINT, THESE ANSWERING DEFENDANTS ALLEGE:

Plaintiffs have failed to comply with the requirements of General Municipal Law Sections 50-e and 50-h.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE TO THE ENTIRE COMPLAINT, THESE ANSWERING DEFENDANTS ALLEGE:

Plaintiffs' alleged economic damages are entirely speculative

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE TO THE ENTIRE COMPLAINT, THESE ANSWERING DEFENDANTS ALLEGE:

Plaintiffs' Complaint fails to state a cause of action.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE TO THE ENTIRE COMPLAINT, THESE ANSWERING DEFENDANTS ALLEGE:

Plaintiffs' claim(s) are barred by the applicable statute of limitations.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE TO THE ENTIRE COMPLAINT, THESE ANSWERING DEFENDANTS ALLEGE:

Plaintiffs' failed to exhaust their administrative remedies.

AS AND FOR THE EIGHTH AFFIRMATIVE DEFENSE TO THE ENTIRE COMPLAINT, THESE ANSWERING DEFENDANTS ALLEGE:

Plaintiffs claims against these answering defendants are barred by law insofar as they assert a right of recovery of against a municipal entity, its departments, agencies, and employees.

AS AND FOR THE NINTH AFFIRMATIVE DEFENSE TO THE ENTIRE COMPLAINT, THESE ANSWERING DEFENDANTS ALLEGE:

Plaintiffs' claims for equitable relief are barred by the doctrines of waiver, laches, and estoppel.

AS AND FOR THE TENTH AFFIRMATIVE DEFENSE TO THE ENTIRE COMPLAINT, THESE ANSWERING DEFENDANTS ALLEGE:

Defendants' actions were privileged because they were discretionary determinations made while acting within the scope of official duties. As such, defendants are immune from liability for their actions.

AS AND FOR THE ELEVENTH AFFIRMATIVE DEFENSE TO THE ENTIRE COMPLAINT, THESE ANSWERING DEFENDANTS ALLEGE:

Plaintiffs have failed to file a notice of claim under the New York State General Municipal Law and the New York State Town Law.

AS AND FOR THE TWELFTH AFFIRMATIVE DEFENSE TO THE ENTIRE COMPLAINT, THESE ANSWERING DEFENDANTS ALLEGE:

Defendants' actions did not give rise to a procedural due process claim under the Fourteenth Amendment based upon a failure to meet the standard two part test under Strong v. Board of Education, 902 F.2d 208, 211 (2d Cir.1990): 1) plaintiffs' assertion of a property interest protected by the Constitution; and 2) defendants' depriving plaintiff of that property interest without due process.

AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE TO THE ENTIRE COMPLAINT, THESE ANSWERING DEFENDANTS ALLEGE:

Defendants' actions did not give rise to a substantive due process claim under the Fourteenth Amendment since they were not "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." County of Sacramento v. Lewis, 523 U.S. 833, 848 n.8 (1998).

AS AND FOR A FOURTEENTH AFFIRMATIVE DEFENSE TO THE ENTIRE COMPLAINT, THESE ANSWERING DEFENDANTS ALLEGE:

Defendants did not intentionally treat plaintiffs differently from other similarly situated persons because of a malicious intent to injure, or in the alternative, defendants

did not intentionally treat plaintiffs differently from others with no rational basis for the difference in treatment; as such, plaintiffs' alleged Equal Protection violation under the Fourteenth Amendment must be dismissed as a matter of law. See e.g. Neilson v. D'Angelis, 409 F.3d 100, 104 (2d Cir. 2005).

AS AND FOR A FIFTEENTH AFFIRMATIVE DEFENSE TO THE ENTIRE COMPLAINT, THESE ANSWERING DEFENDANTS ALLEGE:

Plaintiffs did not suffer any actual damages as a result of defendants' conduct.

AS AND FOR A SIXTEENTH AFFIRMATIVE DEFENSE TO THE ENTIRE COMPLAINT, THESE ANSWERING DEFENDANTS ALLEGE:

Punitive damages are not assessable against these defendants as a matter of law.

AS AND FOR A SEVENTEENTH AFFIRMATIVE DEFENSE TO THE ENTIRE COMPLAINT, THESE ANSWERING DEFENDANTS ALLEGE:

Plaintiffs' Verified Complaint fails to state a viable constitutional claim under the First or Fourteenth Amendments as a matter of law.

AS AND FOR A EIGHTEENTH AFFIRMATIVE DEFENSE TO THE ENTIRE COMPLAINT, THESE ANSWERING DEFENDANTS ALLEGE:

At all times relevant to the acts alleged in the Verified Complaint, these named defendants, their agents and officials, acted reasonably, properly, and in the lawful exercise of their discretion. Therefore, they are entitled to governmental immunity from liability.

AS AND FOR A NINETEENTH AFFIRMATIVE DEFENSE TO THE ENTIRE COMPLAINT, THESE ANSWERING DEFENDANTS ALLEGE:

Plaintiffs failed to exercise ordinary care to effect a cure and to prevent aggravation of the alleged injury and damages.

AS AND FOR A TWENTIETH AFFIRMATIVE DEFENSE TO THE ENTIRE COMPLAINT, THESE ANSWERING DEFENDANTS ALLEGE:

Any injury alleged to have been sustained resulted from plaintiffs' own culpable or negligent conduct, or the culpable or negligent conduct of third parties, and was not the proximate result of any act or omission of these answering defendants.

AS AND FOR A TWENTY FIRST AFFIRMATIVE DEFENSE TO THE ENTIRE COMPLAINT, THESE ANSWERING DEFENDANTS ALLEGE:

This individual defendant has not violated any clearly established constitutional or statutory right of which a reasonable person would have known and therefore are protected by qualified immunity.

AS AND FOR A TWENTY SECOND AFFIRMATIVE DEFENSE TO THE ENTIRE COMPLAINT, THESE ANSWERING DEFENDANTS ALLEGE:

These answering defendants have not violated any rights, privileges or immunities under the Constitution or laws of the United States or the State of New York or any political subdivision thereof, nor have they violated any Act of Congress providing for the protection of civil rights.

AS AND FOR A TWENTY THIRD AFFIRMATIVE DEFENSE TO THE ENTIRE COMPLAINT, THESE ANSWERING DEFENDANTS ALLEGE:

These answering defendants specifically reserve their right to assert further affirmative defenses as are appropriate as further discovery and inspection reveals.

WHEREFORE, Defendants, JOHN BARBARITE, GORDON JENKIN AND THE VILLAGE OF MONTICELLO demand judgment dismissing the Plaintiffs' Verified Complaint together with the attorneys' fees, costs and disbursements of this action.

DATED: ELMSFORD, NEW YORK
October 9, 2008

MIRANDA SOKOLOFF, SAMBURSKY
SLONE VERVENIOTIS, LLP

MICHAEL V. LONGO (MVL-7214)
Attorneys for Defendants
JOHN BARBARITE, GORDON JENKIN AND
THE VILLAGE OF MONTICELLO
570 Taxter Road – Suite 561
Elmsford, New York 10523
(914) 345-6510
Our File No.: 08-378

TO:

ORSECK LAW OFFICES PLLC
Attorney for Plaintiffs
1924 State Route 52
PO Box 469
Liberty, New York 12754
(845) 292-5800

ATTORNEY'S VERIFICATION

The undersigned, an attorney admitted to practice in the Courts of the State of New York, hereby affirms:

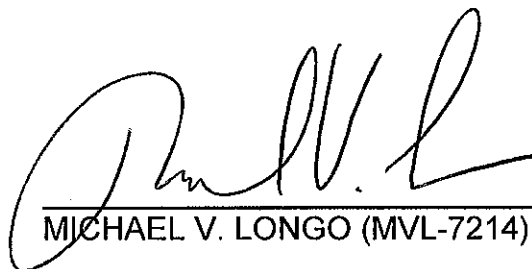
That Affirmant is an associate of the firm of MIRANDA SOKOLOFF SAMBURSKY SLONE VERVENIOTIS LLP, the attorneys of record for these answering defendants in the within action; that Affirmant has read the foregoing Answer and knows the contents thereof; that the same is true to Affirmant's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters, Affirmant believes same to be true. Affirmant further states that the reason this Verification is made by Affirmant and not by defendant is that said defendant does not reside or have an office in Westchester County wherein Affirmant maintains offices.

The grounds of Affirmant's belief as to all matters not stated upon Affirmant's knowledge are as follows:

1. Records and correspondence in Affirmant's possession.

The undersigned affirms that the foregoing statements are true under the penalties of perjury.

Dated: Elmsford, New York
October 9, 2008



MICHAEL V. LONGO (MVL-7214)