[* 1]

SHORT FORM ORDER

INDEX No. 06-34064
CAL. No. 10-00561OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 7-2-10
ADJ. DATE 1-13-11
Mot. Seq. # 001 - MotD

UDAY SHAH and UNS MANAGEMENT ASSOCIATES LTD,	:	O'CONNOR, O'CONNOR, HINTZ & DEVENEY, LLP
	:	Attorney for Plaintiff
Plaintiff,	:	One Huntington Quadrangle, Suite 3C01
	:	Melville, New York 11747-4415
- against -	:	
	:	ROSENBERG CALICA & BIRNEY, LLP
THE TOWN OF ISLIP,	:	Attorney for Defendant
	:	100 Garden City Plaza, Suite 408
Defendant.	:	Garden City, New York 11530-3200

Upon the following papers numbered 1 to 183 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 158 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 159 - 176 ; Replying Affidavits and supporting papers 177 - 180 ; Other memoranda of law, 181 - 183 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Town of Islip for summary judgment dismissing the complaint and awarding it attorney fees is determined as set forth herein.

Plaintiffs Uday Shah and UNS Management Associates, LTD. were the owners of premises known as The Fairwood Gardens Apartments located on 2259 Union Boulevard in Bay Shore, New York. On September 12, 2005, employees from the Building Department, the Department of Code Enforcement, and the Fire Marshal's office of defendant Town of Islip inspected the subject premises. Plaintiffs' complaint alleges that after the inspection, the Town issued 57 citations for violations of Town and New York State Building codes and placed condemnation placards on all units of the subject premises. Alleging that there was no imminent danger which would justify the issuance of the condemnation proceeding and eviction of the tenants from the property, the complaint asserts causes of action for trespass, *de facto* taking, wrongful and negligent interference with contractual relationship, negligence, intentional infliction of emotional harm, harassment, and violation of plaintiffs' rights under 42 USC § 1983.

The Town of Islip now moves for summary judgment on the grounds that plaintiffs' causes of action are frivolous and that plaintiffs failed to exhaust their administrative remedies. In support of its

KAK

motion, the Town submits, among other things, a copy of the pleadings; affidavits of John Scimeca and Deborah Betz; the citations issued to plaintiffs on September 12, 2005; a copy of the condemnation placard; a report from John Scimeca to the Town Supervisor at the time, Peter McGowan; and transcripts of the deposition testimony of plaintiff, Robert Bambino, John Scimeca, and Anthony Varrichio. The Town also submits a copy of the building department report dated September 12, 2005, memoranda prepared by John Scimeca, photographs taken of the subject premises in September 2005, engineering reports of MIB Consulting and Cashin Associates, and a transcript of plaintiff's guilty plea as to certain building code violations.

Plaintiffs oppose the motion, arguing that numerous issues of fact exist as to whether an imminent danger existed to justify the condemnation of the subject premises, and as to the inspection and condemnation of the premises. In opposition, plaintiffs submit a transcript of Uday Shah's deposition testimony, a copy of the Property Condition Survey of the subject premises in 1999, an engineering report by Joseph Schmitt Consulting Engineers dated August 15, 2000, an invoice from an exterminator, an engineering report by Malcolm Barkan dated September 30, 2005, letters between John Scimeca and Uday Shah, and the engineering report of Cashin Associates. Plaintiffs also indicate they have withdrawn their causes of action for negligent interference with contractual relationship and civil harassment.

At his examination before trial, Robert Bambino testified that he is employed by the Town of Islip and the Town of Babylon as a fire marshal, and that his duties consist of, among other things, building inspections and investigation of complaints. He testified that on September 7, 2005, he was called to the subject premises by Chief Fire Marshal William Coyle to meet a Suffolk County Department of Health inspector, who was called there on a complaint filed by Ms. Betz, a tenant at the subject premises. He testified that when he went to the apartment, he observed rotting of the bathroom floor, tub settling, electrical wires stripped bare, and windows that were partially inoperable. He testified that on September 8, 2005, he spoke with Joseph Mandanici, Deputy Commissioner of Code Enforcement, about what was found during the inspection and discussed whether a further inspection of the complex was necessary. He testified that Mr. Shah was contacted and told that there would be a full inspection of the apartment complex on September 12, 2005. He testified that on the inspection date, he was accompanied by several fire marshals, investigators from the Department of Code Enforcement, and a building inspector. He stated that the Suffolk County Police Department also was notified of the inspection, because there were reports of violence and drugs at the subject premises. He testified that the inspection began at 10:00 a.m., and that a majority of the apartments and the common areas were inspected. He testified that they issued various summonses and that some of the violations were found to be "serious life safety issues," including a lack of smoke detection, exposed wiring, vermin infestation, missing sanitary components, water leaks, mold, rotted floor boards, and uneven walking surfaces. He also testified that alterations were done inside some apartments that created rooms that "were not a proper size for living" and did not have "required emergency escape egress." He testified that Deputy Commissioner Mandanici instructed the inspectors to "placard the doors of the apartments." He explained that the placard is a "sign that is placed on the door or affixed to the building that identifies it as being a hazard or dangerous to life safety."

At his examination before trial, John Scimeca testified that in September 2005 he was employed as Commissioner of Code Enforcement for the Town of Islip, and that his duties included overseeing the Fire Marshal's office, the officials who investigate Town Code violations, and the Department of Public Safety. He testified that an inspection of the subject premises conducted by the fire marshals and an inspector from the Department of Health showed that an apartment at the premises had a bathroom floor that was deteriorated and that the structural integrity of the floor was compromised. He testified that another inspection was set up for September 12, 2005. He testified that as fire marshals and investigators are certified as code enforcement officials, they are authorized to make a determination as to whether the premises should be condemned. He testified that on the day of the inspection, Chief Fire Marshal William Coyle determined that several units in the premises would be condemned. Mr. Scimeca testified that when he was contacted by Deputy Commissioner Mandanici, who advised him of the situation at the premises, he directed Mandanici to "post the building," meaning stickers were placed on the building stating it was condemned for habitation. He testified that the inspection began at 10:00 a.m. and the posting of the building was completed by 1:00 p.m. He further testified that an employee from his office notified the Suffolk County Department of Social Services that the premises had been condemned, as some tenants required emergency housing. He testified that he later met with Mr. Shah and his attorney and advised them how to proceed to correct the violations at the property.

At his examination before trial, plaintiff testified that he bought the subject property in January 2000 and that it consisted of four buildings and 63 units. He testified that before he closed on the property, an inspection was done, and the sellers made repairs to all the stairwells, some of the apartment doors, and the walkways. He testified that in September 2005, Ms. Betz's apartment was under construction, but that there was an operating toilet during the construction. He explained that at some point, water backed up from a pipe underneath Ms. Betz's apartment causing the wet condition in her bathroom. He testified that the condition was repaired and the floors were rebuilt. He testified that he was aware that some tenants complained about water damage to the floors of their bathrooms, and that a child fell through a hole in the bathroom. He further testified that there were no complaints regarding rats, but there had been complaints regarding roaches. Mr. Shah testified that he was not aware of any mold found in the apartments, but that there might have been leaks in the pipes and rotting floors. He testified that beams holding up the building "may have been rotting," but that the condition was fixed during his ownership prior to the inspection. He stated that the Town came to inspect the premises on September 12, 2005, and that he allowed access to his property. He testified that when the inspection was completed, Mr. Mandanici came to his office and handed him all the tickets and left without an explanation. He further testified that after placards were placed around the building, a Town official told him that if he told the tenants not to leave, he would be arrested. He claimed that he did not replace any beams to any of the buildings as a result of the inspection, but that they were reinforced. He claimed that documents and invoices regarding repairs and maintenance performed at the apartment complex were discarded after he sold the complex.

Plaintiff testified that after placards were placed around the building, some of the tenants prepared a petition, and that he and a few of the tenants went to meet with Peter McGowan, the Town Supervisor, but were refused a meeting. He stated that after he went to his attorney, a meeting was set up on September 14, 2005 with Commissioner Scimeca, Deputy Commissioner Mandanici and Chief

Fire Marshal Coyle, and he was informed that the tenants would be allowed to move back into their apartments if he installed smoke detectors, exterminated the premises and ordered an engineering report. He testified that as a result of the September 12, 2005 inspection, some of the tenants left the premises. Mr. Shah stated that he, his superintendent, and a contracting firm he hired made the necessary repairs after the inspection. He testified that he believes Town officials had an improper motive with regard to the condemnation, as they were in a rush to "close the place" and already had 60 to 70 placards with them. He further claimed that the officials never explained why the premises was being condemned and never gave him an opportunity to correct the conditions. He testified that his attorney had a difficult time arranging a meeting with Town officials and that a meeting was granted after the news media put pressure on the Town. He further testified that a few days prior to the subject inspection, owners of a development next to his premises made an offer for the subject premises. He stated that prior to the inspection, there were "rumors" among the tenants that owners of the development next door were going to "throw [them] out," and that the tenants were contacted by those owners encouraging them to leave in anticipation of being thrown out.

At his examination before trial, Anthony Varrichio, a licensed engineer, testified that in 2005, he was employed by Cashin Associates and that the Town of Islip was one of its clients. He stated that in October of 2005, Cashin Associates was asked to perform an inspection of the subject property and to determine the apartments' "suitability in accordance with livable and habitable circumstances and codes." He testified that during the inspection, he inspected the girders, joists and beams in the basement which hold the structure up, and also looked for anything that would be deemed unsafe or without structural integrity. Varrichio testified that after the inspection, he found that "there were a number of repairs made that looked very recent and it was structurally acceptable." He further testified that based upon the nature and extent of the repairs that were performed, the condition of the building was not habitable prior to those repairs.

It is well-settled that when the action of a government official involves the conscious exercise of discretion of a judicial or quasi-judicial nature, such office is entitled to absolute immunity. This entitlement is based on "sound reasons of public policy" in allowing government officials to execute their duties free from fear of vindictive or retaliatory damage suits (***Haddock v City of New York***, 75 NY2d 478, 554 NYS2d 439 [1990]; *see* ***Tango v Tulevech***, 61 NY2d 34, 471 NYS2d 73 [1983]; ***Kelleher v Town of Southampton***, 306 AD2d 247, 760 NYS2d 235 [2003]; ***Rottkamp v Young***, 21 AD2d 373, *affd* 15 NY2d 831 [1965]). Further, the decision whether to issue a permit is a discretionary determination and the actions of the government in such instances are immune from lawsuits based on such decisions (***City of New York v 17 Vista Assocs.***, 84 NY2d 299, 618 NYS2d 249 [1994]; ***Matter of Parkview Assocs. v City of New York***, 71 NY2d 274, 525 NYS2d 176 [1988]; ***F.A.S.A. Constr. Corp. v Village of Monroe***, 14 AD3d 532, 789 NYS2d 175 [2004]).

When official action involves the exercise of discretion, the officer is not liable for the injurious consequences of that action even if resulting from negligence or malice (*see* ***Tango v Tulevech***, 61 NY2d 34, 471 NYS2d 73 [1983]). Conversely, when the action is exclusively ministerial, the officer will be liable if it is otherwise tortious and not justifiable pursuant to statutory command (***McLean v City of New York,*** 12 NY3d 194, 878 NYS2d 238 [2009], ***Lauer v City of New York***, 95 NY2d 95, 711 NYS2d

112 [2000]). Even where an act is ministerial to sustain liability against a municipality, the duty breached must be more than that owed the public generally (*see* ***McLean v City of New York***, *supra*; ***Lauer v City of New York***, *supra*). A duty to exercise reasonable care toward the plaintiff is born of a special relationship between the plaintiff and the governmental agency (*see* ***McLean v City of New York***, *supra*; ***Pelaez v Seide***, 2 NY3d 186, 778 NYS2d 111 [2004]). To form a special relationship by voluntarily assuming a duty to an injured person, plaintiff must demonstrate: (1) an assumption by the municipality through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking (*see* ***McLean v City of New York***, *supra*).

It has been determined as a matter of law that official acts of building inspectors and other code enforcement officers are sufficiently discretionary to be immune from suit under the absolute privilege bestowed upon public officials (*see* ***Tango v Tulevech***, 61 NY2d 34, 471 NYS2d 73 [1983];***Walls v Town of Islip***, 71 AD3d 669, 894 NYS2d 899 [2010]; ***Broncati v City of White Plains***, 6 AD3d 476, 774 NYS2d 573 [2004]). Here, the employees of the Town have governmental immunity for placing the placards on plaintiffs' property, as such act involves a discretionary governmental function, and the exercise of which may not form the basis for liability. Moreover, there is no evidence of a special relationship in this case which would support plaintiffs' claims against the Town. Accordingly, the claims by plaintiffs sounding in negligence cannot be sustained.

As to plaintiff's federal and constitutional claims against the Town, 42 USC § 1983, in the land use context, "protects against municipal actions that violate a property owner's rights to due process, equal protection of the laws and just compensation for the taking of property under the Fifth and Fourteenth Amendments to the United States Constitution" (***Bower Assocs. v Town of Pleasant Valley***, 2 NY3d 617, 626, 781 NYS2d 240 [2004], *citing* ***Town of Orangetown v Magee***, 88 NY2d 41, 49, 643 NYS2d 21 [1996]). However, 42 USC § 1983 is not simply an additional vehicle for judicial review of land-use determinations (***Bower Assocs. v Town of Pleasant Valley***, *supra*). To state a claim under the Equal Protection Clause, a plaintiff must allege that: (1) compared with others similarly situated, the plaintiff was selectively treated adversely; and (2) such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith or intent to injure a person (*see* ***Miner v Clinton County***, 541 F3d 464 [2008]; ***Bizzarro v Miranda***, 394 F3d 82 [2005]; *see also* ***Seymour's Boatyard, Inc. v Town of Huntington***, 2009 WL 1514610 [2009]). The person must be singled out for an impermissible motive not related to legitimate governmental objectives, which could include personal or political gain, or retaliation for the exercise of constitutional rights (*see* ***Sonne v Board of Trustees of Vil. of Suffern***, 67 AD3d 192, 887 NYS2d 145 [2009]; *see also* ***Bizzarro v Miranda***, *supra*; ***Gallo v Suffolk County Police Dept.***, 360 FSupp2d 502 [2005]). Substantive due process rights are violated only by conduct so outrageously arbitrary as to constitute a gross abuse of governmental authority (***Natale v Town of Ridgefield***, *supra*; *see* ***Bower Assocs. v Town of Pleasant Valley***, *supra*).

Here, it is clear that the actions taken by the Town were under color of state law. Section 107.1 of the Property Maintenance Code of New York State states that when "a structure or equipment is found to be unsafe, or when a structure is found unfit for human occupancy, or is found unlawful, such structure shall be condemned pursuant to the provisions of this code." The record reveals that a tenant living at the subject premises made a complaint as to the living conditions, and an inspector from the Department of Health and a fire marshal went to investigate those claims. Due to the findings of the initial inspection, a more thorough inspection was scheduled and plaintiff was contacted in regards to the inspection. The second inspection resulted in the Town enforcement officers issuing 57 violations to plaintiffs and placing placards on the subject property. The Court notes that contrary to plaintiffs' contention, while the deposition transcript of Mr. Bambino, who testified on behalf of defendant Town, was not signed, it was certified by the reporter, and was properly considered in support of defendant's motion since the testimony was not challenged as inaccurate (*see* ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2011]; ***Zabari v City of New York***, 242 AD2d 15, 672 NYS2d 332 [1998]). The evidence in the record demonstrates that the Town had sufficient cause to take prompt action to address the building code violations at plaintiffs' property. Moreover, an engineer from Cashin Associates who inspected the subject property in October 2005 testified that he observed repairs that were recently made to the property that made it structurally acceptable. However, he testified that the property was structurally unsound prior to those recent repairs performed by plaintiffs after the subject inspection by the Town. Thus, the Town has established *prima facie* that its actions were not so outrageously arbitrary as to constitute a gross abuse of governmental authority (*see* ***Spinelli v City of New York***, 579 F3d 160 [2009]; ***Catanzaro v Weiden***, 188 F3d 56 [1999]).

In opposition, plaintiffs failed to raise a triable issue of fact. Here, plaintiffs failed to allege facts demonstrating that the Town's actions were wholly without legal justification or that there was an impermissible motive not related to legitimate governmental objectives (***Bower Assoc. v Town of Pleasant Val.***, *supra*; ***Sonne v Board of Trustees of Vil. of Suffern***, *supra*). Since "enforcement officials are unlikely to avow that their intent was to practice constitutionally proscribed discrimination" and the "difficulties in obtaining detailed knowledge of unprosecuted violators in order to meet the burden of demonstrating similarity are likely to be great," the absence of similar action against other buildings would constitute some evidence of disparate treatment (*see* ***Sonne v Board of Trustees***, *supra*; ***Matter of 303 W 42nd St v Klein***, 46 NY2d 686, 416 NYS2d 219 [1979]). Thus, proof that a defendant intentionally treated the plaintiff differently is essential to an equal protection claim (*see* ***Gagliardi v Village of Pawling***, 18 F3d 188 [1994]). Here, plaintiffs failed to submit any evidence demonstrating that the Town targeted their property while ignoring building owners whose situation was similar to their own. Furthermore, plaintiffs' unsubstantiated assertion that the Town's inspection and subsequent condemnation was due to an impermissible motivation, in that a neighboring property developer was politically connected and was somehow involved in the condemnation is insufficient to defeat the Town's motion for summary judgment (*see* ***Kerzer v Kingly Mfg.***, 156 F.3d 396 [1998]). The Court notes that plaintiffs' submission of newspaper articles relating to the circumstances of the subject inspection are inadmissible (*see* ***Young v Fleary***, 226 AD2d 454, 640 NYS2d 593 [1996]). Plaintiff also failed to submit records of repairs made to the property before and after the subject inspection, claiming that the documents were discarded when he sold the subject property. In addition, during plaintiff's deposition when he was asked whether the allegations in each of the tickets issued to him during the

subject inspection were true, he answered mainly that he could not confirm or deny the truthfulness of the allegation. Accordingly, as plaintiffs failed to raise a triable issue of fact, the branch of the Town's motion for summary judgment dismissing the federal and constitutional claims against it is granted.

As to plaintiff's claims against the Town sounding in intentional infliction of emotional distress, it is well-established that public policy bars such claims against a governmental entity (*see* ***Lauer v City of New York***, 240 AD2d 543, 659 NYS2d 57 [1997]; ***Wheeler v State***, 104 AD2d 496, 479 NYS2d 244 [1984]; ***La Belle v County of St. Lawrence***, 85 AD2d 759, 445 NYS2d 275 [1981]). Furthermore, the alleged conduct of the Town employees relating to the condemnation of the subject property was not so extreme, outrageous, utterly reprehensible, and intolerable in a civilized society so as to sustain a cause of action for intentional infliction of emotional distress (*see* ***Howell v New York Post Co.***, 81 NY2d 115, 596 NYS2d 350 [1993]).

As to plaintiffs' claim of a *de facto* taking, such a finding requires a "showing that the government has intruded onto the ... property and interfered with the owner's property rights to such a degree that the conduct amounts to a constitutional taking requiring the government to purchase the property from the owner" (***O'Brien v City of Syracuse***, 54 NY2d 353, 357, 445 NYS2d 687 [1981]; *see* ***Weaver v Town of Rush***, 1 AD3d 920, 768 NYS2d 58 [2003]). A *de facto* taking can consist of either a permanent ouster of the owner, or a permanent interference with the owner's physical use, possession, and enjoyment of the property, by one having condemnation powers (*see* ***Mickel v State of New York***, 77 AD2d 794, 430 NYS2d 741 [1980]). In order to constitute a permanent ouster, "defendant's conduct must constitute a permanent physical occupation of plaintiff's property amounting to the exercise of dominion and control thereof" (***Reiss v Consolidated Edison Co.***, 228 AD2d 59, 61, 650 NYS2d 480 [1996]). Here, there is no evidence of a taking in the constitutional sense in that there was no permanent ouster or interference with plaintiffs' possession of the subject property. While the condemnation of the property did exclude access to the premises temporarily, plaintiffs regained access after correcting the violations that were issued during the subject inspection.

With regard to plaintiffs' claim of trespass, it is well-settled that a person entering upon the land of another without permission, whether innocently or by mistake, is a trespasser (*see* ***Woodhull v Town of Riverhead***, 46 AD3d 802, 849 NYS2d 79 [2007]; ***Burger v Singh***, 28 AD3d 695, 698, 816 NYS2d 478, 480 [2006]). The Town has satisfied its *prima facie* burden of establishing its entitlement to judgment on this issue, as it is undisputed that plaintiff and plaintiffs' tenants consented to the subject inspection and allowed the Town officers access to the property.

As to the cause of action for tortious interference with a contract, recovery on such a claim requires the existence of a valid contract between the plaintiff and a third party, the defendant's knowledge of that contract, the defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom (***Lama Holding Co. v Smith Barney, Inc.***, 88 NY2d 413, 646 NYS2d 76 [1996]; ***NBT Bancorp v Fleet/Norstar Fin. Group***, 87 NY2d 614, 641 NYS2d 581 [1996]). As with a claim for *prima facie* tort, the plaintiff must establish that the defendant's procurement of the alleged breach was "solely malicious" (*see* ***Rosario-Suarz v Wormuth Bros. Foundry***, 233 AD2d 575, 649 NYS2d 225 [1996];

Leibowitz v Szoverffy, 80 AD2d 692, 436 NYS2d 451 [1981]). Here, the evidence was insufficient to raise a question as to whether the Town's conduct was motivated by malice, personal gain or a desire to injure plaintiffs.

Accordingly, the motion by the Town for summary judgment dismissing the complaint against it, is granted as to each cause of action.

Finally, as to the Town's motion for attorney's fees pursuant to 42 USC § 1983, such awards should be permitted "not routinely, not simply because [defendant] succeeds, but only where the action brought is found to be unreasonable, frivolous, meritless or vexatious (*see* ***Christiansburg Garment Co. v Equal Employment Opportunity Commission***, 434 US 412, 420 [1978]). Furthermore, the Court retains discretion to deny or reduce fee requests after considering all the nuances of a particular case (*see* ***Bercovitch v Baldwin Sch., Inc.***, 191 F3d 8 [1999]). Here, as the Town has failed to establish that plaintiffs' claims were unreasonable, frivolous, meritless or vexatious, its request for attorney fees is denied.

Dated: April 27, 2011

Hon. Joseph Farneti
Acting Justice Supreme Court

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**