



acting within the scope of his public employment or duties at the time of the occurrence, act or omission giving rise to a claim shall be made in the first instance by the County Attorney."

In this article 78 proceeding brought by a Suffolk County police officer, the issue is whether the County Attorney's denial of petitioner's request for a legal defense under Suffolk County Code § 35-3 (A) -- on the ground that he was not acting within the scope of employment in connection with the incidents that formed the basis of the complaint -- was arbitrary or capricious. We conclude, as did the trial court, that the County Attorney's decision was not arbitrary or capricious.

The action for which petitioner seeks a taxpayer-paid defense grew out of a long feud between petitioner and his neighbor, Corey Kay, over Kay's use of his property. Brought in the United States District Court for the Eastern District of New York under 42 USC §§ 1983, 1985 and 1986, Kay's complaint,<sup>1</sup> served in March 2000, was lodged against the County of Suffolk, and against petitioner and a fellow Suffolk County police officer, personally and in their official capacity. According to the complaint, in July 1996 Kay purchased property next door to petitioner in Mt. Sinai, New York, and leased two cottages on the

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<sup>1</sup> Winfield Properties, Ltd., is also a named plaintiff. Kay is its sole shareholder.

premises for year-round occupancy to recipients of social services -- to which petitioner objected. Kay charged that petitioner, who himself had attempted to purchase the property for similar purposes, persistently complained to Town authorities and to the District Attorney that documents relating to year-round use of the cottages were forged or illegal, resulting in the arrest of Joan Van Middlelem, the realtor on Kay's purchase of the property.

After the realtor's acquittal, and again at petitioner's behest -- the complaint continues -- a warrant was issued for Kay's arrest on similar charges; those charges also were dismissed. Kay alleged that the arrests were based on false statements provided by petitioner, and that as a police officer petitioner used his position and contacts to harass, annoy and alarm Kay and to "cause a reign of terror upon" him, including proceedings instituted before Town boards and Supreme Court over use of his property. Kay asserted that petitioner's actions constituted a deprivation of constitutional rights, malicious prosecution and false arrest, and other wrongdoing.

Kay's lawsuit actually followed by months a similar action filed in the same court by the realtor (see Joan Van Middlelem v County of Suffolk, Civil Action No. 99-2707). Shortly after the Van Middlelem action was instituted, petitioner

requested a taxpayer-paid defense under Suffolk County Code § 35-3 (A). After investigation by his Defense Evaluation Committee, the County Attorney concluded that petitioner had not acted in his capacity as a police officer in the alleged wrongdoing and denied his request for a defense. As the Committee reported:

"[T]he facts as presently known to the committee show that [petitioner] did not act in his capacity as a police officer in pursuing this matter. Rather, he acted as a concerned homeowner, and utilized resources, including FOIL, available to any private citizen, in bringing this matter to the attention of responsible authorities. Stated differently, [petitioner] did not act in the scope of his duties or authority as a police officer. He sought to protect his private interests as a homeowner in engaging in the course of conduct."

The Committee noted its reliance on a Police Department Internal Affairs report which explained that, through his own FOIL requests, petitioner learned that there had been no zoning change for the cottages from summer to year-round occupancy, and that the Town's Certificate of Zoning Compliance had been based on affidavits (allegedly false) secured by the broker from two elderly neighbors. Petitioner's persistence included commencing administrative proceedings and litigation.<sup>2</sup> According to the

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<sup>2</sup>(see e.g. Matter of Gary Salino v Town of Brookhaven et al., Sup Ct, Suffolk County, June 10, 1999, Seidell, J., Index No. 24221/98 [remitting the matter to the Town's Zoning Board of Appeals for further hearing and findings of fact to determine the

Internal Affairs report, petitioner took the information he had learned to his co-defendant fellow officer. Based in part on petitioner's deposition, which did not indicate in any way that he was acting in an official capacity, that officer swore out a criminal complaint against the broker; those charges were dismissed on the death of one of the affiants. Other Internal Affairs documents, which are part of the record before us, include a variety of Kay and Van Middlelem reports about petitioner to the Police Department reflecting escalating acrimony between the parties, such as petitioner's alleged obscene gestures, inappropriate traffic stop and operation of an unlicensed business.<sup>3</sup>

Petitioner did not pursue the County Attorney's denial of his request for a legal defense in the Van Middlelem action.

After Kay commenced his federal court action, petitioner asked that the County provide for his defense in that case because the Kay complaint alleges that he was acting as a police officer, and because Department directives required all

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nonconforming status of the property)).

<sup>3</sup> Though these complaints were for the most part ultimately found unsubstantiated, petitioner was relocated because of ongoing disputes with civilians in his patrol area. The Internal Affairs documents also show that petitioner and the arresting officer were exonerated by the Department for the arrests of Kay and Van Middlelem, which were found to have been supported by probable cause.

off-duty officers to report suspected or observed unlawful activities to on-duty police personnel. Again the County Attorney denied petitioner's request for a County-funded defense, finding that petitioner was not acting within the scope of employment in connection with the incidents that formed the basis of Kay's complaint. Again the County Attorney relied on a Defense Evaluation Committee report, which rested in part on its earlier findings and concluded that

"[n]otwithstanding the boilerplate allegations in the complaint, the operative facts, as distinguished from the legal conclusions asserted in the complaint do not establish that [petitioner] was acting within the scope of his employment. For example, the complaint recites [petitioner's] private litigation, which was clearly not brought by him in his official capacity."

Petitioner then instituted this article 78 proceeding arguing that a plain reading of Suffolk County Code § 35-3 (A) obligates the County to provide him with a defense. Supreme Court agreed with the County's determination that the acts attributed to petitioner were not committed while he was acting in furtherance of his public employment. The Appellate Division, however, reversed and found that the "clear and unambiguous language" contained in the legislation obligated the County to afford petitioner a defense because "[s]ome of the acts asserted

in the complaint in the underlying federal civil rights action were alleged by the plaintiff to have been performed by the petitioner in his capacity as an employee of the County of Suffolk" (298 AD2d 589, 590 [2d Dept 2002]). We now reverse and reinstate Supreme Court's dismissal of the petition.

Discussion

Suffolk County Code § 35-3 (A) was enacted in 1981 to provide for the defense of its employees who may be charged in civil actions with violating the law "in the performance of their duties" (Suffolk County Code § 35-1). The Legislature viewed the provision as a way to encourage qualified applicants to accept employment with the County, without burdening them with legal expenses incurred in defense of allegations of misconduct "in office" (id.).

As the Appellate Division noted, the Code provides for a defense, in clear and unambiguous language, for acts alleged in the complaint to have occurred while the employee was acting within the scope of his public employment, or actions brought to enforce any provisions of 42 USC §§ 1981-1988. But that is not the end of the matter, or the section. The Code goes on to provide, in equally clear and unambiguous language, that the

County Attorney is to determine "in the first instance" whether an employee was acting within the scope of employment.<sup>4</sup>

While the two provisions of Section 35-3 (A) are seemingly at odds with each other, in fact they are fully reconcilable. Clearly, the Suffolk County Legislature by this provision did not commit public funds to an employee's defense based solely on the words chosen by a plaintiff in framing a complaint. Allowing a plaintiff to dictate whether Suffolk County must provide an employee with a defense would indeed be an unintended result of section 35-3 (A) (see Bestafka v County of Suffolk, 121 AD2d 670, 671 [2d Dept 1986], lv denied 68 NY2d 610). The reconciling principle between the provision for a public defense protecting employees, and the provision for review by the County Attorney, is that the action of the County Attorney must not be arbitrary or capricious, or it will be set aside (see Williams v City of New York, 64 NY2d 800, 802 [1985]).<sup>5</sup>

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<sup>4</sup> Similar "first instance" clauses are found elsewhere (see e.g. General Municipal Law § 50-k [2] [as determined by Corporation Counsel]; Code of the City of Buffalo § 35-28 [same]; Code of the City of Albany § 38-7 [A] [same]).

<sup>5</sup> So long as the County Attorney's determination has a factual basis, it will be sustained. As counsel recognized at oral argument, however, should the factfinder in the federal action ultimately determine that petitioner was indeed acting within the scope of his public employment, as Kay alleges, an issue regarding petitioner's right to indemnification might arise (see Jeffreys v Griffin, \_\_ NY2d \_\_, 2003 Slip Op 17895 [Oct. 30, 2003] [collateral estoppel is a flexible doctrine]).

Here, the factual record supports the County Attorney's determination that petitioner's alleged acts of wrongdoing against Kay were the consequence of his private interest as a property owner, not his public responsibility as a police officer.<sup>6</sup> That he was acting to protect and advance his private self-interest is demonstrated, for example, by his individual FOIL requests, by his statements submitted as a long-time community member, not as a police officer, in support of criminal charges against Kay, and by the proceedings in his name challenging Kay's use of the property. Plainly, the County Attorney's determination denying him a defense was neither arbitrary nor capricious.

Finally, we do not reach petitioner's alternative argument that Suffolk County Code § 35-3 (A) is preempted by General Municipal Law § 50-m. Preemption was not raised in the petition, or before Supreme Court. Petitioner raised preemption for the first time in his motion for "reargument and/or renewal," which Supreme Court denied. Neither court below having addressed preemption, we will not be the first to do so (see Bingham v New York City Tr. Auth., 99 NY2d 355, 359-360 [2003]).

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<sup>6</sup> According to petitioner's Memorandum of Law submitted in Supreme Court, his fellow officer was advised that Suffolk County would provide for his defense in the federal litigation.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the judgment of Supreme Court dismissing the petition, reinstated.

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Order reversed, with costs, and judgment of Supreme Court, Suffolk County, reinstated. Opinion by Chief Judge Kaye. Judges Smith, Ciparick, Rosenblatt, Graffeo and Read concur.

Decided December 18, 2003