

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DANIEL T. WARREN,

PLAINTIFF,

v.

JOEL GIAMBRA, JOSEPH PASSAFIUME, NANCY
NAPLES, DAVID J. SWARTS, COUNTY
LEGISLATURE, COUNTY OF ERIE, NEW YORK,
KEVIN M. KELLEY AND COUNTY OF ERIE, NEW
YORK,

DEFENDANTS.

VERIFIED ANSWER

INDEX NO. 2004-12768

**PRESIDING JUSTICE:
JOHN P. LANE**

Defendants JOEL GIAMBRA, JOSEPH PASSAFIUME, DAVID J. SWARTS, ERIE
COUNTY LEGISLATURE, KEVIN M. KELLEY, AND COUNTY OF ERIE ("Defendants"), by
and through their attorneys, Harter, Secrest & Emery LLP, for their Verified Answer to the
Verified Complaint herein, sets forth and alleges as follows:

**VERIFIED COMPLAINT PARAGRAPH 1: Plaintiff, Daniel T. Warren is a
resident of the Town of West Seneca, County of Erie and State of New York.**

ANSWER: Defendants deny knowledge or information sufficient to form a belief as
to the truth or falsity of the allegation contained in Paragraph 1 of the Verified
Complaint.

**VERIFIED COMPLAINT PARAGRAPH 2: Plaintiff owns property in the
County of Erie, State of New York and pays New York State Income Taxes, Town
and County property taxes on property with as assessed value of more than
\$1,000.00 and sales taxes on all purchases made within the State of New York.**

ANSWER: Defendants deny knowledge or information sufficient to form a belief as
to the truth or falsity of the allegations contained in Paragraph 2 of the Verified
Complaint.

VERIFIED COMPLAINT PARAGRAPH 3: Plaintiff is a duly registered voter in the County of Erie and State of New York.

ANSWER: Defendants deny knowledge or information sufficient to form a belief as to the truth or falsity of the allegation contained in Paragraph 1 of the Verified Complaint.

VERIFIED COMPLAINT PARAGRAPH 4: That in accordance with the County Charter and County Code the County Executive submitted a budget to the County Legislature on or about November 5, 2004. A copy of this budget is can be [sic] viewed on the internet at <http://www.erie.gov/pdf/Grants.pdf> and <http://www.erie.gov/pdf/book1A.pdf>.

ANSWER: Defendants admit the allegations contained in Paragraph 4 of the Verified Complaint.

VERIFIED COMPLAINT PARAGRAPH 5: That on or about Wednesday the 8th day of December 2004 the Erie County Legislature passed legislation and issued a message of necessity requesting that the State Legislature increase the sales an [sic] use tax in this county to be increase [sic] by 1%.

ANSWER: Defendants deny the allegations contain in Paragraph 5 of the Verified Complain but admit that on December 8, 2005, Defendant Erie County Legislature amended an item identified as Comm. No. 26E-4, a resolution which, among other things, memorialized to the State Legislature Erie County's request for authority to impose an additional 1% Erie County sales tax (subject to a \$12.5 million revenue sharing formula incorporated in the amendment), and thereupon approved same, as amended, by a vote of 10 Ayes and 5 Noes.

VERIFIED COMPLAINT PARAGRAPH 6: Upon information and belief legislators met in an office in the Liberty Building with County Executive Giambra. Attached hereto and marked as Exhibit "A" is a copy of a Buffalo News Article by Robert J. McCarthy entitled "At the end, a lot of blinking" which appeared in the December 9, 2004 issue.

ANSWER: Defendants admit that a number of legislators met in an office in the Liberty Building with County Executive Giambra on the evening of December 8, 2005. Defendants further admit that a copy of the referenced Buffalo News article is appended to the verified complaint as Exhibit A. Defendants deny all other allegations contained in paragraph 6 of the Verified Complaint.

VERIFIED COMPLAINT PARAGRAPH 7: Upon information and belief this meeting of 8 to 10 legislators consisted of a quorum and was not open to the public and in fact was done in this manner to avoid public viewing. Shortly after the meeting at the Liberty Building ended the 10 legislators present at that meeting voted in favor of the tax increase agreed to vote in favor of it in exchange for certain concessions on the part of the County Executive. Attached hereto and marked as

Exhibit "B" is a copy of a Buffalo News article by Mathew Spina entitled "County budget process anything but pretty" which appeared in the December 13, 2004 issue.

ANSWER: Defendants deny the allegations contained in Paragraph 7 of the Verified Complaint except admit that the referenced Buffalo News article is attached as Exhibit B to the Verified Complaint

VERIFIED COMPLAINT PARAGRAPH 8: This meeting and the subsequent vote was had in violation of Article 7 of the Public Officers Law.

ANSWER: Defendants deny the allegations contained in Paragraph 8 of the Verified Complaint.

VERIFIED COMPLAINT PARAGRAPH 9: That on or about Wednesday the 8th day of December 2004 the Erie County Legislature purportedly adopted with amendments to the budget submitted by the County Executive [sic].

ANSWER: Defendants neither admit nor deny the allegations contained in Paragraph 9 of the Verified Complaint because said paragraph is unintelligible. To the extent that any answer is warranted, Defendants deny the allegations of this paragraph.

VERIFIED COMPLAINT PARAGRAPH 1: Article XVII § 1803(B) of the County Charter provides "If the budget is passed by the county legislature with no additions or increases, such budget shall be deemed to have been adopted without any further action by the county executive; if, however, the budget as passed by the county legislature contains any such additions or increases, the same shall be presented by the clerk of the legislature to the county executive not later than the Wednesday following the first Tuesday in December, for his consideration of such additions or increases. If the county executive approves all additions and increases, he shall affix his signature to a statement thereof and return the budget and such statement to the clerk of the legislature. The budget, including the additions and increases as part thereof, shall then be deemed adopted."

ANSWER: Defendants neither admit nor deny the allegations contained in Paragraph 1 [second] of the Verified Complaint on the grounds that Article XVII § 1803(B) of the County Charter speaks for itself.

VERIFIED COMPLAINT PARAGRAPH 2: These budget amendments were proposed after the tabling of the budget committee report, and less than 48 hours prior to the annual meeting of the County Legislature.

ANSWER: Defendants neither admit nor deny the allegations contained in Paragraph 2 [second] of the Verified Complaint on the grounds that it is unclear to what "budget amendments" the paragraph refers. To the extent that any answer is warranted, Defendants deny the allegations of this paragraph.

VERIFIED COMPLAINT PARAGRAPH 3: Upon information and belief these amendments totaled approximately 165 pages of amendments to the budget. Attached hereto and marked as Exhibit "C" is a copy of a Buffalo News Article by Mathew Spina entitled "Naples questions legality of how budget was passed" which appeared in the December 11, 2004 issue.

ANSWER: Defendants neither admit nor deny the allegations contained in Paragraph 3 [second] of the Verified Complaint on the grounds that it is unclear to what "amendments" the paragraph refers. To the extent that any answer is warranted, Defendants deny the allegations of this paragraph.

VERIFIED COMPLAINT PARAGRAPH 4: Within these 165 pages of amendments were an increase in the E-911 fee and possible other fee increases.

ANSWER: Defendants neither admit nor deny the allegations contained in Paragraph 3 [second] of the Verified Complaint on the grounds that it is unclear to what "amendments" the paragraph refers, except that defendants admit that certain fee increases were contained in certain budget amendments proposed and adopted by the Legislature on December 8, 2004.

VERIFIED COMPLAINT PARAGRAPH 5: The increase of any fee or taxes must be approved by two thirds of the legislature or by a vote of at least 10 for and 5 against.

ANSWER: Defendants admit the allegations contained in Paragraph 5 [second] of the Verified Complaint, although approval by a simple majority vote of the legislature, coupled with voter referendum approval, would also suffice.

VERIFIED COMPLAINT PARAGRAPH 6: The budget and amendments that have purportedly been passed was on a vote of 8 for and 7 against which is less than the necessary votes to increase any fee pursuant to Article XVIII § 1812 of the County Charter.

ANSWER: Defendants deny the allegations contained in Paragraph 6 [second] of the Verified Complaint except admit that the budget and certain amendments were passed by the Legislature by a vote of 8 to 7 on December 8, 2004.

VERIFIED COMPLAINT PARAGRAPH 7: The County Legislature suspended its rule of operation in order to vote on the budget amendments.

ANSWER: Defendants deny the allegations contained in Paragraph 7 [second] of the Verified Complaint.

VERIFIED COMPLAINT PARAGRAPH 8: Approval of all budget amendments were done by a single vote and were not considered and voted on separately.

ANSWER: Defendants deny the allegations contained in Paragraph 8 [second] of the Verified Complaint.

VERIFIED COMPLAINT PARAGRAPH 9: This vote of the County Legislature was in violation of Article XVIII § 1803 of the County Charter which provides that “Budget amendments proposed subsequent to the tabling of the budget committee report, and less than forty-eight hours prior to the annual meeting, shall be considered separately and voted on individually on the floor of the legislature.”

ANSWER: Defendants deny the allegations contained in Paragraph 9 [second] of the Verified Complaint.

VERIFIED COMPLAINT PARAGRAPH 10: Since the budget adopted as amended by the County Legislature on Wednesday, December 8, 2004 did not comply with the County Charter the tentative budget as submitted by the County Executive on or about November 5, 2004 is the budget that is in full force and effect.

ANSWER: Defendants deny the allegations contained in Paragraph 10 of the Verified Complaint.

VERIFIED COMPLAINT PARAGRAPH 11: Article XVIII § 1803(E) provides that if a budget is not adopted as provided in § 1803 by the second Tuesday in December the tentative budget shall be the budget for the ensuing year.

ANSWER: Defendants neither admit nor deny the allegations contained in Paragraph 11 of the Verified Complaint on the grounds that the language of Article XVIII § 1803(E) of the County Charter speaks for itself.

VERIFIED COMPLAINT PARAGRAPH 12: Upon information and belief at the time of the vote not all legislators had copies of the proposed amendments and therefore could not properly consider them.

ANSWER: Defendants deny the allegations contained in Paragraph 12 of the Verified Complaint.

VERIFIED COMPLAINT PARAGRAPH 13: This conduct violates plaintiff’s due process rights as guaranteed by the State and U.S. Constitutions and the concomitant right to a republican form of government.

ANSWER: Defendants deny the allegations contained in Paragraph 13 of the Verified Complaint.

VERIFIED COMPLAINT PARAGRAPH 14: Plaintiff has no adequate remedy at law.

ANSWER: Defendants deny the allegations contained in Paragraph 14 of the Verified Complaint.

GENERAL DENIAL: Defendants deny each and every allegation contained in the Complaint not specifically heretofore, admitted, denied or otherwise controverted.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

The Verified Complaint fails to state a cause of action upon which relief may be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

Plaintiff lacks standing to pursue each of the claims stated in this Complaint.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

Many of the claims raised in the Complaint have been rendered moot by subsequent occurrences, ratified by subsequent action and/or resolved through this Court's prior decision dated December 31, 2004 in Mohr, et al. v. Giambra, Index No. 2004/12707 and compliance therewith.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

That the interpretation of Erie County Code § 1803 (Local Law 1978) advanced by Plaintiff would render the subject provision unenforceable since Local Law 1978 was not passed by Public referendum.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

The Plaintiff raises non-justiciable claims over which this Court lacks subject matter jurisdiction.

WHEREFORE, Defendants pray for an Order and direction of this Court dismissing the Verified Complaint in its entirety, with prejudice, together with attorney's fees, statutory costs and disbursements, and for such other and further relief as is just and proper.

DATED: Buffalo, New York
February 1, 2005

Respectfully submitted,

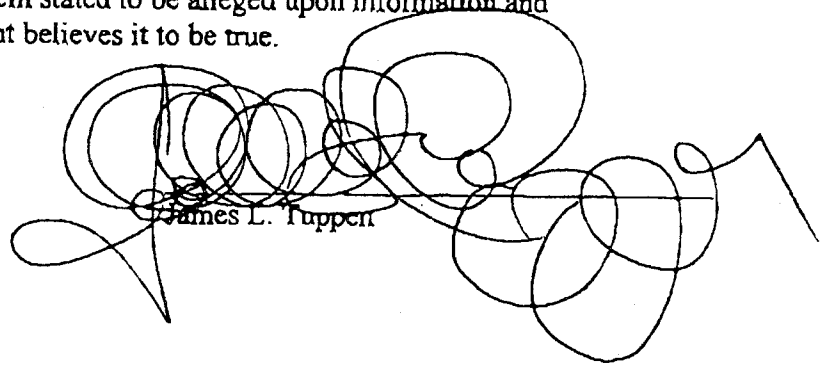
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By 

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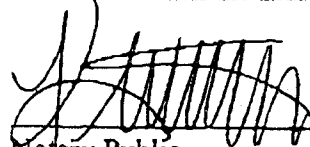
STATE OF NEW YORK)
COUNTY OF ERIE) ss:

James L. Tuppen, being duly sworn, deposes and says: That he is an Assistant County Attorney in the Erie County Department of Law; that he has read the foregoing Answer and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and as to those matters, deponent believes it to be true.


James L. Tuppen

STATE OF NEW YORK)
COUNTY OF ERIE) ss.

On the 1st day of February in the year 2005 before me, the undersigned, a Notary Public in and for said State, personally appeared JAMES L. TUPPEN, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.


Notary Public

KRISTIN KLEIN WHEATON
Notary Public, State of New York
Qualified in Erie County
My Commission Expires 3/20/2007