

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DANIEL T. WARREN,

PLAINTIFF,

v.

COUNTY LEGISLATURE, COUNTY OF
ERIE, NEW YORK, ET AL.,

DEFENDANTS.

**AMENDED VERIFIED
ANSWER TO AMENDED
VERIFIED COMPLAINT**

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 Amended Verified Answer to the Amended Verified Complaint herein, sets forth and alleges as follows:

AMENDED 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 Amended Verified Complaint.

AMENDED 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 Amended Verified Complaint.

AMENDED 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 Amended Verified Complaint.

AMENDED VERIFIED COMPLAINT PARAGRAPH 4: 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% and adopted the tentative budget for 2005 as amended.

ANSWER: Defendants deny the allegations contain in Paragraph 4 of the Amended 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.

AMENDED VERIFIED COMPLAINT PARAGRAPH 5: 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 5 of the Amended Verified Complaint.

AMENDED VERIFIED COMPLAINT PARAGRAPH 6: Attached hereto and marked as Exhibit "B" is the Affidavit of Albert DeBenedetti sworn to on the 27th day of December 2004.

ANSWER: Defendants admit that said affidavit is attached to the Amended Verified Complaint as Exhibit B.

AMENDED VERIFIED COMPLAINT PARAGRAPH 7: 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.

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

AMENDED VERIFIED COMPLAINT PARAGRAPH 8: Shortly after the meeting at the Liberty Building in attorney Anthony J. Colucci, III's office ended the 10 legislators present at that meeting voted in favor of the tax increase in

exchange for certain concessions on the part of the County Executive on the 2005 budget as amended and voted to adopt the 2005 tentative budget as so amended. Attached hereto and marked as Exhibit "C" 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 admit that said article is attached as Exhibit C to the Amended Verified Complaint but deny all other allegations contained in Paragraph 8 of the Amended Verified Complaint.

AMENDED VERIFIED COMPLAINT PARAGRAPH 9: 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 9 of the Amended Verified Complaint.

AMENDED VERIFIED COMPLAINT PARAGRAPH 10: Upon information and belief on various occasions which include but is [sic] not limited to December 8, 2004, January 6, 2005, February 12, 2005, February 13th 2005 and/or February 14, 2005 members of the Erie County Legislature in a number sufficient to constitute a quorum of the public body met in a closed session where the public was not allowed.

ANSWER: Defendants neither admit nor deny the allegations contained in Paragraph 10 of the Amended Verified Complaint because it is unclear to what "meetings" said paragraph refers. To the extent that any answer is warranted, Defendants deny the allegations of this paragraph.

AMENDED VERIFIED COMPLAINT PARAGRAPH 11: Upon information and belief, Sheriff Gallivan, Comptroller Naples, and David Swarts or their representatives were present at the meeting(s) of February 12, 2005, February 13, 2005 and/or February 14, 2005 together with the mediators appointed by Justice Makowski. Attached hereto and marked as Exhibit "D" is an article entitled "Sessions break open meetings laws" by James Heaney that appeared in The Buffalo News on February 15, 2005.

ANSWER: Defendants neither admit nor deny the allegations contained in Paragraph 11 of the Amended Verified Complaint because it is unclear to what "meetings" said paragraph refers. To the extent that any answer is warranted, Defendants deny the allegations of this paragraph except admit that said article is attached as Exhibit D to the Amended Verified Complaint.

AMENDED VERIFIED COMPLAINT PARAGRAPH 12: Upon information and belief debate and discussion of public budgetary matters including sales tax increase not otherwise exempted by the Open Meetings Law occurred and these meetings were not convened pursuant to the procedures required.

ANSWER: Defendants neither admit nor deny the allegations contained in Paragraph 12 of the Amended Verified Complaint because said paragraph is unintelligible. To the extent that any answer is warranted, Defendants deny the allegations of this paragraph.

AMENDED VERIFIED COMPLAINT PARAGRAPH 13: Upon information and belief the Erie County Legislature has repeatedly violated the provisions of the Open Meetings Law by conducting discussions and debates of public business and of public concern which includes [sic] but is [sic] not limited to budgetary issues and the proposed sales tax increase out of public view; [sic]

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

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

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

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

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

The Amended 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 Amended Verified Complaint.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

Many of the claims raised in the Amended Verified Complaint have been rendered moot by subsequent occurrences, ratified by subsequent action and/or resolved through this Court's decision dated January 21, 2005 in this case.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

Upon information and belief, the meetings that took place on February 12, 13 and perhaps 14 with Court-appointed mediators were countenanced by the Court itself.

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

DATED: Buffalo, New York
March 31, 2005

Respectfully submitted,

HARTER SECRET & EMERY, LLP

By 

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John G. Horn, Esq.
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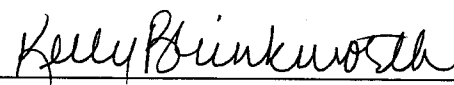
STATE OF NEW YORK)
COUNTY OF ERIE) ss:

George Michael Zimmermann, being duly sworn, deposes and says: That he is First Assistant County Attorney in the Erie County Department of Law; that he has read the foregoing Amended Verified 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.


George Michael Zimmermann

STATE OF NEW YORK)
COUNTY OF ERIE) ss.

On the 31st day of March in the year 2005 before me, the undersigned, a Notary Public in and for said State, personally appeared George Michael Zimmermann, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.


Notary Public

KELLY A. BRINKWORTH
Notary Public State of New York
Qualified in Erie County
My Commission Expires Oct. 7, 2006