

1 SUPREME COURT OF THE STATE OF NEW YORK  
2 COUNTY OF ERIE

3 DANIEL T. WARREN, )

4 Plaintiff, )

5 vs. )

6 COUNTY LEGISLATURE, COUNTY OF )  
7 ERIE, NEW YORK; and )

8 KEVIN M. KELLEY, as Clerk of the )  
9 Legislature of the County of Erie, New York; )  
10 and )

COUNTY OF ERIE, NEW YORK )

Defendants )

REPLY MEMORANDUM OF LAW

Index No.: I 2004-12768

11 LEAVE TO AMEND COMPLAINT

12  
13 Defendants allege that they will be prejudiced if leave is granted to amend the complaint  
14 at this time. As a basis for this allegation they point to the fact that I seek leave to “add alleged  
15 violations in meetings in February and March 2005.”  
16

17 First and foremost the Amended Verified Complaint dated February 25, 2005 (which was  
18 amended as of right under CPLR § 3025(a)) in ¶ 10 alleged:

19 “Upon information and belief on various occasions which include but is not  
20 limited to December 8, 2004, January 6, 2005, February 12, 2005, February 13,  
21 2005 and/or February 14, 2005 members of the Erie County Legislature in a  
22 number sufficient to constitute a quorum of the public body met in a closed  
23 session where the public was not allowed.”

24 Also in the Amended Verified Complaint it is alleged in ¶ 13 as follows:

25 “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 but is not limited to  
budgetary issues and the proposed sales tax increase out of public view”

1           Therefore the alleged violations for February 2005 were already included in the Amended  
2 Verified Complaint and the Defendants were on notice that I intended to plead and prove a  
3 pattern of violating the Open Meetings Law.

4           Defendants were on notice that I intended to use, as part of this pattern, the meeting in  
5 March 2005 as early as my Affidavit in Opposition to their Cross-Motion for Summary  
6 Judgment on or about June 3, 2005.

7           At a pre-trial on or about June 6, 2005 the court and the parties agreed to permit  
8 discovery during the pendency of the cross-motions for summary judgment.

9           Defendants had actual notice of the new facts alleged prior to any party waiving  
10 discovery in this matter. I do not know what discovery the Defendants would need from me  
11 since most the evidence regarding these matters is in their sole and exclusive possession.

12           Defendants also point to the pending motions for summary judgment as a reason for not  
13 granting leave to amend. Under CPLR § 3025(c) a court may deem a pleading amended to  
14 conform to the proof at any time prior to judgment, even on cross-motions for summary  
15 judgment (see *Cave v. Kollar*, 2 A.D.3d 386 (2<sup>nd</sup> Dept 2003). Further since I have alleged a  
16 pattern of violating the Open Meetings Law I could have waited until the close of my case to  
17 move to conform to the evidence for each date an illegal meeting was held.  
18

19           The Defendants have simply not demonstrated the type of prejudice that would be  
20 sufficient to deny this motion.

21           Wherefore, the motion should be granted in its entirety.

22  
23 DATED: August 24, 2005  
24 Buffalo, New York

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\_\_\_\_\_  
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