

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE**

DANIEL T. WARREN,

Plaintiff,

vs.

COUNTY OF ERIE, NEW YORK, et al

Defendants

**MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT’S CROSS-MOTION FOR SUMMARY
JUDGMENT AND IN SUPPORT OF PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT**

Index No.: I 2004-12768

APPLICABLE STANDARD

Statute and case law are clear that ". . . the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 853; Zuckerman v. City of New York, 49 NY2d 557, 562; Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad, 64 NY2d851). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman, 49 NY2d 557). " (Alvarez v. Prospect Hospital, et al. 68 NY2d 320, 324). More is necessary than mere opinion, disputation, denial and conclusions. The opposing party must lay bare the requisite proof and present evidentiary facts sufficient to raise a triable issue of fact (Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.,32 N.Y.2d 285) However, the Court of Appeals has held in Phillips v. Joseph Kantor & Company, et al, 31 N.Y.2d 307 , “The case of Indig v. Finkelstein (23 N.Y.2d 728) restates the rule, however, applicable to summary judgment and indicates that an affidavit setting forth names of witnesses, the substance of their testimony, how it was known what their testimony would be, and how the witnesses acquired their knowledge, might be sufficient to defeat a motion for summary judgment, without the witnesses' own affidavits (id., at p. 730).”

1 Issue finding rather than issue determination is the Court's threshold inquiry on a motion for
2 summary judgment (Sillman, 3 NY2d 395). The process on such applications is for the Court to: (1)
3 decide if a fact issue is found; (2) if a fact issue is found, decide if the fact issue is material; and (3) decide
4 if the found material fact issue relates to liability (CPLR Rule 3212; Zuckerman, 49 NY2d 557; Barr v.
5 County of Albany, 50 NY2d 247).

6 POINT I

7 Plaintiff has submitted evidence in admissible form sufficient to demonstrate that there are no
8 material issues of fact and all that remains is for the court to apply the law and reach its judgment.
9 Plaintiff has submitted the Amended Verified Complaint (CPLR § 105(u); Lebar Construction
10 Corporation v. HRH Construction Corporation, 292 A.D.2d 506, 739 N.Y.S.2d 294); the Affidavit of
11 Albert DeBenedetti (Exhibit “B” of the Amended Verified Complaint) and the Affidavit of Anthony J.
12 Collucci, III, Esq. These affidavits were from people with personal knowledge of the events. Also
13 attached to the complaint are newspaper articles from the Buffalo News which are self-authenticating and
14 part of the complaint for all purposes (CPLR §§ 4532, 3014). On the other hand Defendants’ have not
15 submitted any affidavit from anyone with personal knowledge to dispute the evidence put forward in the
16 Plaintiff’s motion for summary judgment on the issue of the violations of the Open Meetings Law (Public
17 Officers Law Article 7). Although their Answer is verified it is not by one with personal knowledge nor
18 does it have any evidence to support the affirmative defenses and denials.

19 The Defendants also point to the fact that my Memorandum of Law in support of my motion
20 does not contain any “Statement of Facts.” Unlike the Federal Rules of Civil Procedure (FRCP 56(f)) the
21 CPLR does not require this and is best left to the evidence.

22 Defendants’ reference to the January 21, 2005 decision of this court does not help them because
23 since this decision the complaint in this action has been amended to seek relief solely on the basis of the
24 Open Meetings Law violations. The amended complaint seeks different relief than the original Verified
25 Complaint before the court at that time. The complaint does not seek to annul or invalidate any act of the
legislature, but to compel them to comply with the Open Meetings Law. In any event the decision of this
court to decline to convert my motion for a preliminary injunction into one for summary judgment is not

1 res judicata of any issue. However, the defense has correctly stated that this court's determination that the
2 meeting at the Liberty Building on December 8, 2004 was in violation of the Open Meetings Law is law
3 of the case.

4 "The statements made out of court by a party-opponent are universally deemed admissible , when
5 offered against him". (4 Wigmore, Evidence [3d ed.], §§ 1048, 1049.) However, it has long been
6 established that an admission by a party to the action, while technically hearsay, is receivable in evidence
7 under a definitely recognized exception to the hearsay rule. Matter of Anthus v. Rail Joint Co., 193 A.D.
8 571, 175 N.Y.S. 314 (3d Dept. 1920). It is also well settled that when the alleged admission is made not
9 by a party but by the party's agent or servant, it will be admissible against that party if it is within the
10 scope of his agent's or servant's authority. Brusca v. El Al Israel Airlines, 75 AD2d 798, 427 N.Y.S. 2d
11 505 (2d Dept. 1980). Therefore, according to legion of judicial precedent, out of court statements made
12 by a party's agent may be admissible if it is demonstrated that such statements were made within the
13 scope of the agent's authority. Spett v. President Monroe Building and Manufacturing Corp., 19 NY2d
14 203, 278 N.Y.S. 2d 826 (1967). It is well settled that statements made by an attorney concerning a matter
15 within his employment may be admissible against the party retaining the attorney (People v Rivera, 58
16 A.D.2d 147, 149, 396 N.Y.S.2d 26, aff'd on opinion below, 45 N.Y.2d 989; U.S. v Margiotta, 662 F.2d
17 121, 142, cert. denied, 461 U.S. 913, 77 L. Ed. 2d 282, 103 S. Ct. 1891). Dennis Ward an attorney for the
18 Legislative Majority of the Erie County Legislature stated that the meeting on or about March 19, 2005 as
19 well as the meetings on February 13th and 14th should have been open and stated "They all should have
20 been open," the lawyer said. "The law is straightforward and has to be obeyed. There are exemptions, but
21 none of them appropriately qualify here." (Exhibit "A" to Affidavit of Daniel T. Warren dated June 3,
22 2005)

23
24 According to the same article Justice Makowski addressed the assertions of some legislators that
25 he had directed the meetings be closed and is quoted as stating "I took no position on the Open Meetings
Law," and "I said nothing about the Open Meetings Law to anyone" the article continues to state that until
after the controversy at Medaille, Makowski said, after which he said he told one of the Legislature's

1 attorneys he should review the law to determine whether it would be applicable at future sessions.

2 Although Justice Makowski's statements in this article may be considered hearsay and inadmissible , it
3 combined with Mr. Ward's admission, is sufficient to defeat Defendants' motion for summary judgment.

4 Lastly Defendants predicate a large part of their motion for summary judgment on the fact that I
5 have moved for summary judgment, which they contend is insufficient, and since the time for discovery
6 as set by this court's January 21, 2005 order has passed I will therefore be unable to prove my case. This
7 assertion is nonsense. I may or may not obtain summary judgment, but my failure to obtain this relief is
8 not res judicata on any issue nor does it preclude me from prevailing at trial. Also my motion seeks in the
9 event that I am denied summary judgment an extension of time to conduct discovery and be trial ready.
10 CPLR § 2004 provides that this court may exercise its discretion to extend the time to perform any act,
11 even after the time to perform the act has expired. I was unable to conduct discovery since the subsequent
12 amending of my complaint and the defendants' amended verified complaint was served. In fact their
13 current Answer is dated March 31, 2005 which is the very date discovery was supposed to have been
14 completed by.

16 POINT II

17
18 An injunction compelling an entity covered by the Open Meetings Law to comply with its
19 provisions requires a different standard to be applied than an action seeking to invalidate a legislative act
20 for a violation of its provisions (see Buffalo Evening News v. Buffalo Municipal Housing Authority, 134
21 Misc.2d 155; Perez v. City University, 195 Misc.2d 16 reversed on other grds. 9 A.D.3d 310)

22
23 **WHEREFORE**, summary judgment should be denied to Defendants and granted to Plaintiff: 1)
24 dismissing the First Affirmative Defense; 2) dismissing the Second Affirmative Defense; 3) dismissing
25 the Third Affirmative Defense; 4) dismissing the Fourth Affirmative Defense; 5) granting the relief
demanded in the complaint or alternatively a modification of this courts scheduling order extending the
time to conduct discovery and to be trial ready.

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DATED: June 3, 2005
Buffalo, New York

Daniel T. Warren
Plaintiff, Pro Se
836 Indian Church Road
West Seneca, New York 14224

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

3 DANIEL T. WARREN,

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AFFIDAVIT IN OPPOSITION TO DEFENDANT'S
CROSS-MOTION FOR SUMMARY JUDGMENT AND
IN SUPPORT OF PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

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9 State of New York)
10 County of Erie) ss:
11 City of Buffalo)

12 Daniel T. Warren, being duly sworn, deposes and says:

- 13 1. I am the plaintiff in the above entitled action.
- 14 2. I am a resident taxpayer and pay taxes on property located within the Town of West Seneca, County of Erie and State of New York with an assessed value over \$1,000.00.
- 15 3. I am a registered voter of Erie County since 1984 and I have voted at the last general election.
- 16 4. I submit this affidavit in support of my motion for summary judgment and in opposition to the Defendants' cross-motion for summary judgment..
- 17 5. The allegation of the verified complaint sworn to on the 25th day of February, 2005 are incorporated by reference herein.
- 18 6. I attended the February 3, 2005 legislative session and the February 17, 2005 legislative session.
- 19 7. Attached hereto and marked as Exhibit "A" is a copy of an article that appeared in The Buffalo News on March 26, 2005, entitled Public's right to know is getting short shrift" by James Heaney.
- 20 8. In this article Daniel Ward and attorney for the Democratic Majority of the Erie County Legislature is quoted as stating "They all should have been open," the lawyer said. "The law is straightforward and has to be obeyed. There are exemptions, but none of them appropriately qualify here." Mr. Ward was referring to all the closed meetings in the budget process.
- 21 9. This article also contains statements from witnesses that although are not in admissible form demonstrates that at least triable issue of fact exists sufficient to defeat Defents' motion for summary judgment.

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Daniel T. Warren

Sworn to before me this
___ day of June, 2005

Notary Public