UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DAVID T. SILVA, GERROD T. SMITH, and JONATHAN K. SMITH, Members of the Shinnecock Indian Nation,

Plaintiff,

CV18-3648 (SJF)(SIL)

-against-

BRIAN FARRISH, JAMIE GREENWOOD, EVAN LACZI, BASIL SEGGOS, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and SUFFOLK COUNTY DISTRICT ATTORNEY'S OFFICE,

Defendants.

DEFENDANTS JAMIE GREENWOOD AND SUFFOLK COUNTY DISTRICT ATTORNEY'S OFFICE MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS PURSUANT TO Fed.R.Civ.P. Rule 12(b)(6)

Dated: Hauppauge, New York
July 20, 2018

RESPECTFULLY SUBMITTED,

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PRELIMINARY STATEMENT

Jamie Greendwood and the Suffolk County District Attorney's Office[1] (County Defendants), Defendants in this Civil Rights action pursuant to 42 U.S.C. §1981 and §1982, submit this memorandum of law in support of their motion to dismiss the complaint pursuant to FRCP 12(b)(6) for failing to state a claim upon which relief can be granted and for failing to meet the pleading requirements of FRCP 8.

On June 22, 2018, the plaintiffs David Silva, Gerrod Smith and Jonathan Smith filed a complaint pursuant to 42 U.S.C. §1981 and §1982 alleging a Pattern of Illegal Racial Discrimination as against them by the defendants and seeking monetary damages. The complaint also seeks declaratory relief against the defendants seeking to enjoin "the Defendants from enforcing the laws of the State of New York against Plaintiff Silva in Southampton Town Justice Court in Case No. 17-7008, and from otherwise interfering with Plaintiffs' use of the waters, fishing, taking fish, and holding fish and shellfish in Shinnecock Bay and its estuary and other usual and customary Shinnecock fishing waters."

The claims against defendant Assistant District Attorney (and apparently, the Suffolk County District Attorney's Office) arise out of ADA Greenwood's role in the prosecution of defendant Silva in a pending criminal action in Southampton Town Justice Court. ADA Greenwood is sued in her individual and official capacity.

The claims against ADA Greenwood in her individual capacity must be dismissed based upon absolute prosecutorial immunity. The claims against her in her official capacity, must be construed as claims against the State of New York and accordingly they must be dismissed based

[1] The County submits that the Suffolk County District Attorney's Office is not an entity susceptible to suit. *Steed v. Delohery*, No. 96 Civ. 2449, 1998 WL 440861, at *1 (S.D.N.Y. Aug. 4, 1998). To the extent the claims may be construed as against the County of Suffolk, they are addressed *infra*.

upon Sovereign Immunity. Lastly, to the extent the claims against her in her official capacity can be construed as claims against the County of Suffolk, they must be dismissed as the plaintiff has failed to plead that the alleged conduct was the result of a practice or custom of the County, and more significantly, the County cannot be liable for the actions of the District Attorney, who when prosecuting matters acts as a State actor.

The claims against the Suffolk County District Attorney's Office must be dismissed as the District Attorney's Office is not an entity susceptible to suit. Again, to the extent the claims can be construed against the State or County, they must be dismissed on the grounds of Sovereign immunity, or for failing to sufficiently plead municipal liability. *Monell v. Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978).

As the Defendants now explain, the complaint must be dismissed on the grounds that the Defendants are entitled to absolute prosecutorial immunity and for failing to state a cause action upon which relief can be granted.

POINT I

ALL CLAIMS AGAINST DEFENDANT GREENWOOD MUST BE DISMISSED AS SHE IS ENTITLED TO ABSOLUTE PROSECUTORIAL IMMUNITY

The basis for the plaintiffs' claims against Assistant District Attorney Greenwood are solely based upon her role in the prosecution of defendant Silva in a pending criminal action in Southampton Town Justice Court. But for the following paragraph, the complaint is void as to any conduct attributable to ADA Greenwood:

> This case is presently lodged and pending in the Southampton Town Justice Court as Case No. 17-7008 and is being prosecuted by Greenwood. Silva's attempt to obtain a voluntary dismissal by Greenwood was unsuccessful, and Silva's motion to dismiss for lack of jurisdiction was denied by that court. Over Silva's objection, that case is presently scheduled for trial on August 30, 2018 at 9:00 am. (See Compliant at PP. 20)

It is well settled that prosecutors enjoy absolute immunity from civil suits for acts committed within the scope of their official duties where the challenged activities are not investigative in nature, but rather are "intimately associated with the judicial phase of the criminal process", including the decision whether to prosecute, and the presentation of the state's case. *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984 (1976); see also *Jackson v. Cty. of Nassau*, No. 15-CV-7218(SJF)(AKT), 2016 WL 1452394, at *6 (E.D.N.Y. 2016), *adhered to on reconsideration*, No. 15-CV-7218(SJF)(AKT), 2016 WL 3093897 (E.D.N.Y. June 1, 2016). "It is by now well established that a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution is immune from a civil suit for damages under §1983." *Shmueli v. City of New York*, 424 F.3d 231, 236 (2d Cir. 2005) (quoting *Imbler, supra*). Because "absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity," our "courts are encouraged to determine the availability of an absolute immunity defense at the earliest stage, preferably before discovery." *Flores v. Levy*, 07-CV-3753 JFB WDW, 2008 WL 4394681 (E.D.N.Y. Sept. 23, 2008) at*12 (E.D.N.Y. 2008) (quoting *Deronette v. City of New York*, No. 05-CV-5275, 2007 U.S. Dist LEXIS 21766 at *12 (E.D.N.Y. 2007), citing *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806 (1985) and *Imbler*, *id*. at 419 n. 13)).

Prosecutorial immunity from civil liability is broadly defined, "covering virtually all acts, regardless of the motivation, associated with the prosecutor's function as an advocate." *Hill v. City of New York*, 45 F.3d 653, 661 (2d Cir 1995). Among the conduct that has been held to be within the scope of their duties in initiating and pursuing a criminal prosecution are acts taken in preparation for those functions, including evaluating and organizing evidence for presentation at trial or to a grand jury (*Hill, id.*, citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606

(1993)), or determining which offenses are to be charged (*Ying Jing Gan v. City of New York*, 996 F.2d 522 (2d Cir 1993); also protected by immunity, the decision whether or not to commence a prosecution (*Ying, id*.; see also, *Jackson v. Cnty. of Nassau*, 07-CV-0245 JFB AKT, 2009 WL 393640, , *4 (E.D.N.Y. Feb. 13, 2009)), and the decision to bring an indictment regardless of whether probable cause exists (*Coleman v. City of New York*, 08-CV-5276 DLI LB, 2009 WL 909742 (E.D.N.Y. Apr. 1, 2009), citing *Buckley*, 509 U.S. 259, 274 n. 5 (1993); see also *Pinaud, supra* at 1149 (district attorneys absolutely immune from claim for malicious prosecution and presentation of false evidence to the grand jury).

Motivation, whether it be malicious or negligent, is also irrelevant in deciding whether or not to apply absolute immunity. The concept of prosecutorial immunity from civil liability is broadly defined, covering "virtually all acts, regardless of motivation, associated with the prosecutor's function as an advocate." *Dory v. Ryan*, 25 F.3d 81 (2d Cir. 1994). Once a court determines that a prosecutor was acting as an advocate, "a Defendant's motivation in performing such advocate functions as deciding to prosecute is irrelevant to the applicability of absolute immunity." *Shmueli, supra* at 237; *Flores, supra* at *14 (noting that the Ninth Circuit has interpreted *Imbler* to support absolute immunity even where a plaintiff alleges the prosecutor went forward with a prosecution he believed not to be supported by probable cause). So long as the actions taken by the prosecutor are associated with the prosecutor's role as an advocate, even allegations of intentional conspiracy to violate someone's constitutional rights are insufficient to overcome the cloak of immunity -- as stated by the Second Circuit in *Pinaud*, the "fact that such a conspiracy is certainly not something that is properly within the role of a prosecutor is immaterial, because the immunity attaches to the function and not to the manner in which it was performed." *Pinaud, id.* at 1148.

Clearly, defendant Greenwood's actions fall squarely within the scope of a district attorneys' prosecutorial capacity as an advocate, and are therefore protected by absolute prosecutorial immunity.

The defendants are cognizant that although the functional approach affords prosecutors absolute immunity for conduct associated with the judicial phase of the criminal process, activities characterized as administrative or investigative, may not be afforded such protection, and the individual defendant may only be entitled to qualified immunity. *Ying Jing Gan v. City of New York*, 996 F.2d 522 (2d Cir. 1993); *Burns v. Reed*, 500 U.S. 478 (1991). However, the claims alleged by the plaintiffs relate to conduct on the part of ADA Greenwood entirely associated with the judicial phase of the criminal process and within the scope of her duties in pursuing a criminal prosecution.[2] There is nothing in the complaint to suggest that defendant Greenwood was involved in a determination that probable cause existed, or gave legal advice to the police on the propriety of investigative techniques, or were engaged in coercive interrogations of the plaintiffs. *See McCray v. City of New York*, Nos 03 CV-9685, 03 CV-9974, 03 CV-10080, 2007 WL 4352748 (S.D.N.Y. Dec. 11, 2007)(*citing Buckley v. Fitzsimmons*, 509 U.S. 259 (1993); *Crews v. County of Nassau*, No. 06 CV-2610 (JFB)(WDW), 2007 WL 4591325 (E.D.N.Y. Dec. 27, 2007).

ADA Greenberg's alleged conduct is solely related to her role in the prosecution of plaintiff Silva. All of the alleged acts are within the scope of her pursuing a criminal prosecution and as such she is immune from a civil suit for damages. Accordingly the claims against her must be dismissed.

POINT II

THE CLAIM AGAINST DEFENDANT GREENWOOD IN HER OFFICIAL CAPACITY MUST BE DISMISSED BASED UPON SOVEREIGN IMMUNITY

To the extent that defendant Greenwood is being sued in her official capacity as an Assistant District Attorney of Suffolk County, this claim must fail pursuant to the doctrine of state sovereign immunity. Actions taken in her prosecutorial role represent New York State's interests and are thus shielded from suit under the Eleventh Amendment. *Ying Jing Gan*, 996 F.2d at 536; ("[A] District Attorney is not an officer or employee of the municipality but is instead a quasi-judicial officer acting for the state in criminal matters") (internal quotation marks omitted); *Baez v. Hennessy*, 853 F.2d 73, 77 (2d Cir.1988) ("[w]hen prosecuting a criminal matter, a district attorney in New York State, acting in a quasi-judicial capacity, represents the state not the county"), *cert. denied*, 488 U.S. 1014, 109 S.Ct. 805, 102 L.Ed.2d 796 (1989); see also, *Jackson v. County of Nassau*,, 2009 WL 393640 at *4 (E.D.N.Y. 2009).

Moreover, to the extent that the claim against the ADA Greenwood in her official capacity can be construed as a claim against the municipality County of Suffolk, they must be dismissed for the same reasons. Any claims against the County must be dismissed because in New York State a county cannot be held liable for the prosecutorial acts of a district attorney, because, as noted above, the DA acts in that capacity on behalf of the state, not the county. *See Ying Jing Gan, supra; Cox v. County of Suffolk*, 780 F.Supp. 103, 108 (E.D.N.Y.1991) (county could not be held liable under § 1983 for acts by a DA in connection with grand jury proceedings). Any alleged policies concerning the conduct of Assistant District Attorneys or the manner in which cases were to be investigated or prosecuted are not policies of the County—which lacks the authority to set such policies—but policies of the DA, acting on behalf of New

York State. *Doe v. Green*, 593 F. Supp. 2d 523, 534 (W.D.N.Y. 2009) *citing Baez; see also Martin v. County of Suffolk*, 2014 WL 1232906 (E.D.N.Y 2014). A district attorney's powers and duties in connection with the prosecution of a criminal proceeding are the same as those of an assistant State Attorney General appointed to handle such a prosecution. A county has no right to establish a policy concerning how the district attorney should prosecute violations of law. Baez, *supra* at 77. As such, a district attorney's misconduct in prosecuting an individual cannot give rise to municipal liability.

The issue of whether a County can be liable for the prosecutorial acts of a District Attorney was discussed at great length in a decision by the Hon. Jack B. Weinstein in the matter of *Jones v. City of New York*, 988 F.Supp2d 305 (2013); which was a § 1983 case involving, *inter alia*, an allegation of the suppression of exculpatory evidence and the District Attorney's failure to properly train its assistants. In granting the City's motion to dismiss, the Court examined the history of the office of the District Attorney in New York State and noted that since the inception of the office it has been regulated by the State and not the municipality; and that the power to fill vacancies and to remove a District Attorney lies with the Governor. *Jones*, at 314. The Court further observed that "District attorneys must stand above and separate from any city or county or officers of any local entity in making prosecutorial decisions: "It is well established in New York that the district attorney, and the district attorney alone, should decide when and in what manner to prosecute a suspected offender. The responsibilities attendant the position of [district attorney] necessitate the exercise of completely impartial judgment and discretion." *Jones* at 314. *citing Baez*, 853 F.2d at 77.

The Court further observed that essential to the proper constitutional and effective administration of criminal justice is independence of district attorneys. When necessary, they are

expected to prosecute crimes by members of the governments of the municipalities they serve, including mayors and other city officials. Where "controlling law places limits on the County's authority over the district attorney, the County cannot be said to be responsible for the conduct at issue." *Jones* at 314, citing Baez at 78.

While the Second Circuit has recognized that in some limited administrative capacities the district attorney can be considered a municipal actor (*see*, *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992); *see also*, *McMillian v. Monroe Cnty.*, 520 U.S. 781, 795, 117 S.Ct. 1734 (1997) "in some "managerial" situations it is, accordingly, appropriate to treat district attorneys as municipal policymakers"); the inquiry is dependent on an analysis of state law, and the understanding of the actual function of a governmental official, in a particular area, will necessarily be dependent on the definition of the official's functions under relevant state law. *McMillian*, at 786. Applying this analysis, Judge Weinstein found that "with respect to building management, maintenance decisions, or discrimination against employees, for example, the district attorney can be considered a municipal actor." *Jones* at 314, citing, *Van de Kamp v. Goldstein*, 555 U.S. 335, 129 S.Ct. 855, 172 L.Ed.2d 706 (2009) . The Court, however, distinguished *Walker* from the case before it finding that it did not deal with such an administrative *municipal* policy or custom, but rather that the plaintiff alleged prosecutorial misconduct resulting from the "failure of the Kings County District Attorney to properly train its assistants not to suppress exculpatory evidence in criminal prosecutions." *Id*. at 316. "Tasks directly connected with the prosecutor's basic trial advocacy and prosecutorial duties—including *Brady* decisions—should under *Van de Kamp* be treated as "prosecutorial conduct." *Jones* at 316.

Other Courts in this district have similarly recognized that "a county cannot be liable for

the acts of a district attorney related to the decision to prosecute or not prosecute an individual." *Martin v. County of Suffolk*, 2014 WL 1232906, at *5 (E.D.N.Y 2014)(citations omitted). When determining if a District Attorney acts in a State capacity, and therefore is not a municipal actor, the focus of the inquiry is on whether the conduct is associated with the basic prosecutorial duties, including decisions on when and how to prosecute. It is only when a prosecutor acts in the limited administrative capacity recognized in *Walker*, that a District will be considered a municipal actor; acts which have been defined by the Supreme Court as those associated with bureaucratic and managerial tasks such as "workplace hiring, payroll administration, the maintenance of physical facilities, and the like." *Van de Kamp*, 555 U.S. 335, at 344.

The instant matter does not deal with such an administrative *municipal* policy or custom. The plaintiff here alleges prosecutorial conduct directly related to the prosecution of plaintiff Silva. This is not conduct that can be said to fall within the limited "administrative" acts by which the District Attorney could be considered a municipal actor, and as such the County cannot be liable.

Even if the claim against ADA Greenwood in her official capacity could be construed as a claim against the County of Suffolk, it still must be dismissed. It is well settled that in order to recover against a government entity pursuant to §§1981, 1982 or 1983, a plaintiff must demonstrate facts that one of the County's customs and/or policies caused the subject constitutional violation. *Monell v. Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978). It is not enough to simply allege a municipal employee violated plaintiff's rights – as there is no respondeat superior liability under the federal civil rights statutes embodied in §§ 1981 and 1982. A municipality may be held liable only for its own wrongs, that is, actions taken by the municipal employee pursuant to a municipal policy or practice. The complaint filed by the

plaintiffs is void of any such facts (sufficient or otherwise) to establish that a custom and/or policy of the County caused a violation of the plaintiffs' constitutional rights, and accordingly it fails to state a claim against the County upon which relief can be granted.

Claims Against the District Attorney's Office

Plaintiffs' claims against the "Suffolk County District Attorney's Office" must also be dismissed. The capacity of the District Attorney's Office to be sued is determined by New York law. *See* Fed.R.Civ.P. 17(b). "Under New York law, the [District Attorney's Office] does not have a legal existence separate from the District Attorney." *Gonzalez v. City of New York*, 1999 WL 549016, at *1 (S.D.N.Y. July 28, 1999). Correspondingly, the District Attorney's Office is not a suable entity. *See Steed v. Delohery*, No. 96 Civ. 2449, 1998 WL 440861, at *1 (S.D.N.Y. Aug. 4, 1998); *see also Jacobs v. Port Neches Police Dept.*, 915 F.Supp. 842 (E.D.Tex.1996) ("A county district attorney's office is not a legal entity capable of suing or being sued.").

The County defendants respectfully submit that suits against the District Attorney's Office should be properly construed as being brought against the State of New York, and as noted above are entitled to the protections under Sovereign Immunity. However, to the extent the Court construes the claim against the "District Attorney's Office" as one against the County of Suffolk , s*ee Sheikh v. City of New York, Police Dep't,* 2008 WL 5146645 (E.D.N.Y. Dec. 5, 2008), for the reasons stated above, it too must be dismissed as the County cannot establish policy regarding the manner in which the District Attorney prosecutes violations of law and the complaint is silent as to any custom or policy that caused the alleged constitutional depravation.

POINT II

PLAINTIFFS' REQUEST FOR DECLARATORY RELEIF MUST BE DENIED FOR FAILING TO ALLEGE REAL OR IMMEDIATE HARM

The Declaratory Judgment Act (28 USC § 2201 *et. seq.*) invests the district courts with discretionary authority to exert jurisdiction over an action in which the plaintiff seeks declaratory relief. ("In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 USC § 2201 (a). The Court has broad discretion regarding whether to render a declaratory judgment. *Orion Pictures Corp. v. Showtime Networks, Inc.*, 4 F.3d 1095, 1100 (2nd Cir. 1993) . In considering whether to exercise this authority, the court must compare the facts at issue against the two prong standard adopted by the Second Circuit, to determine whether (1) a declaratory judgment in the case before it would serve a useful purpose in clarifying or settling the legal issues involved; and (2) whether the judgment would finalize the controversy and offer relief from uncertainty. *Dow Jones & Co. v. Harrods Ltd*., 346 F.3d 357, 359-360 (2nd Cir. 2003).

Preliminarily, however, three basic considerations must be examined by the court when deciding whether to exercise the discretionary authority granted by the Act. First, does the action set forth in the pleadings raise an "actual controversy"; second, does this case come within the ambit of cases for which the Act was intended, and third, are there circumstances present in this case that render it sufficiently compelling to induce the Court to exercise this discretionary authority? *See Dow Jones & Co. v. Harrods Ltd*., 237 F.Supp.2d 394 (S.D.N.Y. 2002), *affd.*, 346 F.3d 357 (2nd Cir. 2003).

Actions brought under the Declaratory Judgment Act are justiciable if,

and only if, there is an "actual controversy" presented by the facts of the case. 28 U.S.C. § 2201 (a). This mirrors the criteria examined when determining whether a particular case satisfies the "case or controversy" requirement giving rise to federal court jurisdiction derived from Article III of the United States Constitution. "The judicial power does not extend to abstract questions . . . . claims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention." *See Public Serv. Comm'n of Utah v. Wycoff Co.,* 344 U.S. 237, 241- 42 (1952). The Court will examine whether the facts as alleged by plaintiff support the notion that there exists between the parties a "substantial controversy" of "sufficient immediacy and reality to warrant the issuance of a declaratory judgment". *See Maryland Casualty Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 273 (1941).

This analysis also necessarily looks at whether the issue plaintiff brings before the federal court is ripe for its intervention. If the legal consequence feared by the plaintiff seeking declaratory relief merely is a possibility, or even a probability based on the occurrence of some future event that may not occur, the case is not ripe for federal court review and the Court should refrain from invoking its discretionary authority under 28 U.S.C. § 2201 (a). *See Dow Jones & Co. v. Harrods Ltd.*, 237 F. Supp. 2d 394 (S.D.N.Y. 2002), *affd.*, 346 F.3d 357 (2nd Cir. 2003)(citing *Thomas v. Union Carbide Agric. Prod. Co*., 473 U.S. 568, 580 – 81 (1985)).

The plaintiff's request for declaratory relief against the District Attorney's Office in the instant matter must be dismissed for several reasons, chief among them that he has failed to establish an "actual controversy" or imminent concrete injury sufficient to warrant the issuance of a declaratory judgment. In support of this argument the County respectfully directs the Court to the arguments set forth in our Memorandum of Law in Opposition to the plaintiffs' motion for a preliminary injunction. As the plaintiffs have not suffered any concrete injury they cannot

condition their request for declaratory relief upon what amount to speculative allegations. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct 2130, 2136 (1992).

Lastly, as explained above, to the extent the request for a declaratory judgment can be construed as against the County of Suffolk, it must be dismissed as the County cannot establish policy regarding the manner in which the District Attorney prosecutes violations of law.

CONCLUSION

Based on the forgoing, defendants Jamie Greenwood and the Suffolk County District Attorney's Office respectfully request that this Court grant their motion pursuant to Fed. R. Civ. P. Rule 12(b)(6) for an order dismissing the complaint for failure to state a claim upon which relief can be granted.

Dated: Hauppauge, New York
July 20, 2018

Brian C. Mitchell
Brian C. Mitchell
Assistant County Attorney