

**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 REPLY MEMORANDUM OF LAW IN SUPPORT OF
THEIR MOTION TO DISMISS PURSUANT TO Fed.R.Civ.P. Rule 12(b)(6)**

**Dated: Hauppauge, New York
August 13, 2018**

RESPECTFULLY SUBMITTED,

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**BRIAN C. MITCHELL
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PRELIMINARY STATEMENT

Jamie Greenwood and the Suffolk County District Attorney's Office (County Defendants), Defendants in this Civil Rights action pursuant to 42 U.S.C. §1981 and §1982, submit this reply memorandum of law in response to the plaintiffs' opposition to the County's 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. The claims against defendant Assistant District Attorney 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. Plaintiffs also bring claims against the "Suffolk County District Attorney's Office", which, as noted in our original moving papers, 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).

In response to the County's motion, the plaintiffs argue that, since these claims are brought under 42 USC § 1981 and § 1982 ADA Greenwood is not entitled to absolute prosecutorial immunity. This argument is entirely baseless as prosecutors are entitled to immunity for all suits seeking money damages. The plaintiffs also seem to argue that ADA Greenwood was acting in the absence of jurisdiction and as such immunity would not apply. This argument is equally without merit, as the actions taken by ADA Greenwood in prosecuting the plaintiff Silva are wholly authorized by statute and it cannot be said that she acted in clear

absence of jurisdiction. Plaintiffs further claim that the “District Attorney’s Office” can be sued, but then present an analysis relating to suing the “District Attorney” not the “District Attorney’s Office.” The County acknowledges that a “District Attorney” may be sued in his or her individual or official capacity; however, when such a suit is brought against the District Attorney in his official capacity it is construed as against the municipality, in this instance the State of New York.

Lastly, regarding the request for declaratory relief, as noted in this Honorable Court’s decision denying the plaintiffs request for a preliminary injunction (DE 48), the plaintiffs have not suffered any concrete injury and they cannot condition their request for declaratory relief upon what amount to speculative allegations.

POINT I

DEFENDANT GREENWOOD IS ENTITLED TO ABSOLUTE PROSECUTORIAL IMMUNITY FOR CLAIMS SEEKING MONEY DAMAGES

Assistant District Attorney Greenwood is entitled to absolute prosecutorial immunity for the claims against her seeking money damages regardless of the statutory vehicle chosen by the plaintiffs to bring their lawsuit. Whether brought under § 1983, § 1981 or § 1982, absolute immunity applies as they are suits seeking monetary damages.

As previously noted by this Honorable Court:

Under federal law, prosecutors enjoy absolute immunity from liability in suits seeking monetary damages for acts carried out in their prosecutorial capacities. *See Imbler*, 424 U.S. at 430, 96 S.Ct. 984, 47 L.Ed.2d 128; *Parkinson v. Cozzolino*, 238 F.3d 145, 150 (2d Cir.2001). Absolute prosecutorial immunity applies, *inter alia*, when a prosecutor prepares to initiate and pursues a prosecution, *see, e.g. Peay v. Ajello*, 470 F.3d 65, 68 (2d Cir.2006), or engages in administrative duties that are directly connected with the conduct of a trial, *Van de Kamp v. Goldstein*, 555 U.S. 335, 129 S.Ct. 855, 861–2, 172 L.Ed.2d

706 (2009); *see also* *Warnev v. Monroe County*, 587 F.3d 113 (2009) (“a prosecutor enjoys absolute immunity even when doing an administrative act if the act is done in the performance of an advocacy function.”)

High v. Rice, No. 12-CV-2887 SJF ARL, 2012 WL 3150589, at *3 (E.D.N.Y. Aug. 1, 2012).

Absolute immunity will also apply even if, as here, the plaintiff claims that the defendant acted with a discriminatory animus:

Once absolute immunity attaches, it “attaches to [the prosecutor's] function, not the manner in which he performed it. * * * Accordingly, a prosecutor's motivation, and whether preferable alternatives to the actions taken were available, are irrelevant.” *Parkinson*, 238 F.3d at 150 (internal quotations and citations omitted); *see also* *Shmueli*, 424 F.3d at 237 (holding that once the court determines that the challenged prosecution was not clearly beyond the prosecutor's jurisdiction, the prosecutor is shielded from liability for damages for commencing and pursuing the prosecution, regardless of any allegations that his actions were undertaken with an improper state of mind or improper motive).

High v. Rice, at *3 (E.D.N.Y. Aug. 1, 2012)

Even if absolute prosecutorial immunity did not apply to a § 1981 or § 1982 action, the plaintiffs' claims must be dismissed on other grounds. Plaintiffs 42 USC § 1981 action must be dismissed as § 1981 does not provide a private right of action against state actors. *Duplan v. City of New York*, 888 F.3d 612, 621 (2d Cir. 2018). To the extent they may be construed as an action pursuant to § 1983, the plaintiff concedes that prosecutorial immunity applies, and accordingly they must be dismissed.

Plaintiffs' claims pursuant to 42 USC § 1982 must also be dismissed as the complaint is void of any allegations against ADA Greenwood claiming she personally interfered with an

interest of the plaintiff involving real or personal property. As noted in our original moving papers, the sole allegation in the complaint against ADA Greenwood reads as follows:

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)

Section 1982 provides that, "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982. Though the statute has been interpreted broadly, a plaintiff, to state a claim, must allege interference with some right involving real or personal property. *See City of Memphis v. Greene*, 451 U.S. 100, 121–22, 101 S.Ct. 1584, 67 L.Ed.2d 769 (1981); *Bishop v. Toys "R" Us-NY LLC*, 414 F. Supp. 2d 385, 394–95 (S.D.N.Y. 2006), *aff'd sub nom. Bishop v. Toys R Us*, 385 F. App'x 38 (2d Cir. 2010).

It is axiomatic to establish a claim alleging an equal protection violation it must be done in the absence of due process. Even if the allegations against ADA Greenwood could be construed to establish an interference with a property right, that interference was not done without due process. That plaintiff Silva is being prosecuted in a New York State local court, and is being afforded every opportunity to defend the charges against him, confirms that he is being afforded the same process due to all citizens accused of an offence.

Clear Absence of Jurisdiction

While not entirely clear, it appears the plaintiffs may be arguing that ADA Greenwood is not entitled to absolute prosecutorial immunity because she was acting without authority or in the absence of jurisdiction and as such is not entitled to absolute prosecutorial immunity. However,

the actions taken by ADA Greenwood in prosecuting the charges against the plaintiff are wholly authorized by statute and it cannot be said that she acted in clear absence of jurisdiction.

The Second Circuit has held that absolute prosecutorial immunity will apply when attorneys are performing a prosecutorial function unless they act without any colorable claim of authority or proceed in the clear absence of all jurisdiction. *Barr v. Abrams*, 810 F.2d 358 (2d Cir, 1987); *Rudow v. City of New York*, 822 F.2d 324 (2d Cir, 1987). In considering whether a given prosecution was clearly beyond the scope of a prosecutor's jurisdiction, or if there was at least a colorable claim of authority, courts will look to whether relevant statutes authorize prosecution for the charged conduct. *Shmueli v. City of New York*, 424 F.3d 231 (2d. Cir. 2005); *Bernard v. County of Suffolk*, 356 F.3d 495 (2d. Cir. 2004). The issue is not whether the conduct undertaken was done with good or bad motive, or that the defendant acted in excess of authority, the question is whether the kind of conduct is that authorized of prosecutors. *Rudow v. City of New York*, 822 F.2d 324 (2d Cir, 1987); *Barret v. United States*, 798 F.2d 565 (2d Cir, 1986). It is only when the prosecutor acts in the "clear absence of all jurisdiction" and not merely in excess of his jurisdiction that they will be subjected to liability. *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099 (1978); *Lerwill v. Joslin*, 712 F.2d 435 (10th Cir. 1983).¹ Moreover, when determining if a prosecutor has lost his absolute immunity by committing a prosecutorial act beyond the scope of his authority, that authority should be interpreted broadly. *Stump*, 435 U.S. at 356. 98 S.Ct. at 1104.

Under New York law the duties and authorities of a district attorney are codified within section 700 of the New York County Law. *N.Y. County Law § 700 (McKinney)*. Pursuant to that statute "it shall be the duty of every District Attorney to conduct all prosecutions for crimes and

¹ While *Stump* involved judicial immunity the same concepts are generally applied to a prosecutor's quasi-judicial immunity as well. *Butz v. Economou*, 438 U.S. 478 (1978).

offenses cognizable by the courts of the county for which he or she shall have been elected or appointed.” Plaintiff Silva has been charged with violations of crimes or offenses defined within the New York Code of Rules and Regulations and the New York Environmental Conservation Law. As such all of the conduct undertaken by the defendant Greenwood in prosecuting the plaintiff was and is wholly authorized by statute and clearly the kind of conduct authorized of prosecutors.

As stated above, the standard in evaluating whether a prosecutor will lose the protection of absolute immunity is the “clear absence of jurisdiction” or where conduct is not “colorably prosecutorial in nature”. Merely acting in excess of enumerated authority is not sufficient to defeat a claim of prosecutorial immunity. As the conduct of ADA Greenwood in prosecuting the plaintiff was and is colorably prosecutorial and well within the defined statutory authority, it cannot be said that she acted in the “clear absence of jurisdiction”. When coupled with the applicable standard of interpreting that authority broadly, the action of the defendant must be afforded absolute immunity.

Claims against the “District Attorney’s Office”

Contrary to established law, the plaintiffs further claim that the “District Attorney’s Office” *can* be sued, but then present an analysis relating to suing the “District Attorney” not the “District Attorney’s Office.” As stated in our original moving papers, “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 acknowledges that a “District Attorney” may be sued in his or her individual or official capacity; however, when such a suit is brought against the District Attorney in his official capacity it is construed as against the municipality, in this instance the State of New York. Claims against the State of New York are entitled to the protections under Sovereign Immunity and accordingly must be dismissed. To the extent the claims can be construed as against the County of Suffolk, they 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 deprivation.

POINT II

PLAINTIFFS’ HAVE FAILED TO ALLEGE REAL OR IMMEDIATE HARM

The plaintiffs’ request for declaratory relief against the District Attorney’s Office in the instant matter must be dismissed for several reasons, chief among them that they have failed to establish an “actual controversy” or imminent concrete injury sufficient to warrant the issuance of a declaratory judgment. Based upon the arguments set forth in the County’s Memorandum of Law in Opposition to the plaintiffs’ motion for a preliminary injunction, and this Honorable Court’s decision denying the plaintiffs request for such relief (DE 48), it is clear that the plaintiffs have not suffered any concrete injury and they cannot condition their request for declaratory relief upon what amount to speculative allegations. Accordingly, the request for declaratory relief should be denied in its entirety.

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
August 13, 2018

Brian C. Mitchell
Brian C. Mitchell
Assistant County Attorney