

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Leon B. Artus, Gary Brownfield, and *
Steven Lewis, *

Plaintiffs *

Civil Action No. 09-CV-87

v. *

Town of Atkinson, Philip V. Consentino, *
Jack Sapia, Jr., Paul Sullivan, Fred Childs, *
William Friel, and Francis Polito *

Defendants *

ANSWER TO DEFENDANTS' COUNTERCLAIMS

NOW COME the plaintiffs, Leon Artus, Gary Brownfield, and Steven Lewis, and hereby provide their answer to the defendants' counterclaims.

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted.

5. The first two sentences are admitted. The remaining sentences constitute a hypothetical statement of intent on the part of the counter-plaintiffs to which no response is required. To the extent a response is required, such allegations are denied.

6. The first two sentences are admitted. The remaining sentences constitute a hypothetical statement of intent on the part of the counter-plaintiffs to which no response is required. To the extent a response is required, such allegations are denied.

7. Paragraph 7 states legal conclusions to which no responses are required.

8. The allegations of paragraph 8 are denied as stated. By way of further answer, certain residents of the Town of Atkinson have exercised their First Amendment rights and spoken out against Philip Consentino and some of his supporters because they have a track record of retaliating against those who disagree with them or call their official actions into question.

9. The allegations of paragraph 9 are denied as stated. By way of further answer, to the extent the counter-plaintiffs are implying that the present lawsuit has anything to do with the Viet Nam memorial, such allegations and implications are denied.

10. It is admitted that a petition was filed by Atkinson resident Carol Grant seeking the removal of the then-current Select Board members. The plaintiffs are without knowledge or information sufficient to admit or deny the remaining allegations of paragraph 10, and therefore deny the remaining allegations of this paragraph.

11. It is admitted that Carol Grant sued the Town and certain Atkinson officials, including Mr. Consentino, Mr. Sapia, Mr. Childs, and Mr. Polito. To the extent that the counter-plaintiffs imply that pro se plaintiff Carol Grant settled her lawsuit for lack of merit, such allegations are denied. It is further denied that the defendants settled the lawsuit solely due to litigation costs. There were many witnesses to the outrageous behavior on the part of Mr. Consentino which led to that lawsuit being filed. The lawsuit was settled shortly before trial. None of the plaintiffs had any direct role in that lawsuit.

12. It is admitted that warrant articles were petitioned in 2008 and 2009 concerning payment of legal fees for town officials sued in their official capacities, and that the warrant articles were amended at deliberative session to require the Town to pay officials' legal fees. Mr. Artus obtained signatures for the petitions in 2008 and 2009 and Mr. Brownfield was asked

to, and did, read the warrant article at the 2008 deliberative session. Both were engaged in First Amendment activities.

13. Denied.

14. Denied. The counter-defendants are aware of websites concerning events in the Town of Atkinson, including its politics and local officials. The postings and contents of those websites speak for themselves. To the extent the allegations of paragraph 14 are intended to imply that the plaintiffs personally control those websites such allegations and implications are denied. Moreover, blogs and websites are protected First Amendment activity.

15. Denied. The counter-defendants are aware of websites concerning events in the Town of Atkinson, including its politics and local officials. The postings and contents of those websites speak for themselves as protected First Amendment activity. The plaintiffs lack knowledge and information sufficient to form a belief regarding the last sentence of paragraph 15, and so those allegations are denied. In any event, the plaintiffs are not responsible for the postings of third parties, and any implication that they are responsible for such postings is denied.

16. Denied.

17. Admitted that plaintiff Artus' attorney wrote a notice letter to the Town of Atkinson, for the purpose of giving notice of the intended lawsuit as required by RSA 507-B. All other allegations and speculation are denied. The only purpose of the letter was to notify the Town that the suit was going to be filed but it contained no counts or the text of the lawsuit filed three weeks later.

18. Denied.

19. Denied. By way of further answer, Mr. Artus denies having any control over the content of the internet blogs at issue, other than the postings he makes in his own name.

20. Denied. See RSA 507-B:7.

21. Paragraph 21 states a legal conclusion to which no response is required. However, to the extent any response is required, the allegations and conclusions of this paragraph are denied.

22. Paragraph 22 states a legal conclusion to which no response is required. However, to the extent any response is required, the allegations and conclusions of this paragraph are denied. It is further denied that the letter was sent for any other purpose than providing notice to the Town of Atkinson of the impending filing of this lawsuit and was drafted and sent almost three weeks before this case was finalized and filed in state court.

23. The first sentence of paragraph 23 states a legal conclusion to which no response is required. However, to the extent any response is required, the allegations and conclusions of the first sentence are denied. With regard to the remaining allegations of this paragraph, the plaintiffs' notice letter speaks for itself. The letter was sent before other plaintiffs were added and the claims finalized for filing in state court.

24. The Declaration filed by the plaintiffs almost three weeks later in the New Hampshire Superior Court speaks for itself. It is admitted that as finally filed, the plaintiffs' lawsuit contained claims under 42 U.S.C. § 1983 and RSA 91-A. No state law claims have been waived.

25. Denied.

26. Denied. The notice letter speaks for itself. The plaintiffs deny that the statement that "After a death threat Mr. Kaye moved to Maine" is false. Based on a track record of Mr.

Consentino's supporters making threats and committing acts of vandalism explicitly on his behalf, it was reasonable for Mr. Kaye to assume that the death threat was made by a Consentino supporter.

27. Denied. The statement is true, and there is every reason to believe it was made by a Consentino supporter on his behalf. The statement in the notice letter was based on live testimony given by Mr. Kaye at a Board of Selectmen's meeting on June 5, 2006. The death threat came after publicly disagreeing with Mr. Consentino. Mr. Kaye sold his house and moved to Maine out of fear for his family's safety.

28. Paragraph 28 contains statements of legal opinion to which no response is required. To the extent any response is required, the statements of opinion in paragraph 28 are denied. It is specifically denied that the statements in the notice letter were "defamatory per se."

29. The counter-defendants incorporate their responses to paragraphs 1-28 as their responses to paragraph 29.

30. Denied.

31. Paragraph 31 states a legal conclusion to which no response is required. However, to the extent any response is required, the allegations and conclusions of this paragraph are denied.

32. Denied.

33. Denied. The letter was sent by plaintiffs' counsel for the purpose of providing notice of an impending lawsuit under RSA 507:B-7.

34. Paragraph 34 states a legal conclusion to which no response is required. However, to the extent any response is required, the allegations and conclusions of this

paragraph are denied. Truth is a defense to defamation and Mr. Kaye will testify that the death threat was why he moved to Maine.

35. The first sentence of paragraph 35 is admitted. The remaining sentences constitute a hypothetical statement of intent on the part of the counter-plaintiffs to which no response is required.

36. Denied. By way of further answer, the counter-defendants state that websites or blogs described in the counter-plaintiffs' pleading involve freedom of speech and press protected by the First Amendment.

37. Paragraph 37 contains no factual allegations regarding the counter-defendants, and so no response is required. To the extent any response is required, the statements contained in paragraph 37 are denied.

38. The counter-defendants incorporate their responses to paragraphs 1-37 as their responses to paragraph 38.

39. The first two sentences are admitted. The third sentence is denied.

40. Denied as stated. By way of further answer, the plaintiffs' claims against Mr. Polito and Mr. Sapia are not based on participation in the phone calls made by Mr. Consentino, but on their role in creating the de facto policies which encouraged him to infringe First Amendment protected activities, which is why they were included in the notice letter sent to the Town of Atkinson, and in this lawsuit.

41. Denied as stated. It is admitted that the letter did state that suit would be filed against other past selectmen. The remainder of the paragraph is denied for the reasons set forth in the counter-defendants' answers to paragraphs 40 and 41.

42. Denied.

43. Admitted.

44. Paragraph 44 appears to ask a rhetorical question, to which no response is required. The counter-defendants deny the underlying implication of this paragraph, which is that they did not have a good faith basis to file their lawsuit.

45. Denied.

46. Denied.

47. Denied.

48. Denied.

49. Denied.

50. Denied.

51. Denied.

52. Denied.

53. Denied that counter-plaintiffs are entitled to any of the relief they seek as there is no judgment in their favor.

AFFIRMATIVE DEFENSES

A. The counter-plaintiffs have failed to state a cause of action for which relief can be granted.

B. The counter-defendants are entitled to immunity for any statements made in the context of litigation and/or making a legal complaint for recovery of damages and other relief.

C. Any statements made by the counter-defendants about the counter-plaintiffs were truthful and/or protected First Amendment activities.

- D. The counter-plaintiffs are public figures, and have failed to demonstrate that any statements made by the counter-defendants were made with actual malice.
- E. The counter-defendants are not responsible for the actions of third parties who are not parties to this lawsuit.
- F. The counter-plaintiffs have not suffered any damages, and to the extent they have suffered any damages, they have failed to mitigate those damages.
- G. To the extent the counter-plaintiffs have suffered any damages, they were caused, in whole or in part, by the counter-plaintiffs' own conduct.
- H. Truth is a defense to defamation.
- I. Malicious prosecution does not lie because the judgment predicate is lacking for such count.

Respectfully submitted,

LEON B. ARTUS,
GARY BROWNFIELD,
STEVEN LEWIS

By their attorneys,

DOUGLAS, LEONARD &
GARVEY, P.C.

Date: June 8, 2009

By: /s/ Charles G. Douglas, III
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CERTIFICATE OF SERVICE

I hereby certify that this Answer to Defendants' Counterclaims was served this date via ECF on all counsel of record.

June 8, 2009

/s/ Charles G. Douglas, III (669)
Charles G. Douglas, III