Simpson v The Village Voice, Inc.
2007 NY Slip Op 32532(U)
August 7, 2007
Supreme Court, New York County
Docket Number: 0118713/2006
Judge: Paul G. Feinman
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SCANNED ON 8/16/2007
[* 1]

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: **HON. PAUL G. FEINMAN** PART 52

Index Number : 118713/2006
SIMPSON, PHILLIS LU ESQ.
vs
VILLAGE VOICE
Sequence Number : 002
DISMISS

INDEX NO. 118713/2006
MOTION DATE 5/9/07
MOTION SEQ. NO. 002
MOTION CAL. NO. 11

The following papers, numbered 1 to ______ were read on this motion to/for 55

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits	3
Replying Affidavits	4,5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE [illegible] DECISION AND ORDER ANNEXED TO GRAM SHEET FOR MOTION SEQ. 001

FILED
AUG 16 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8/7/07

[signature]
J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

---X

PHILLIS LU SIMPSON, ESQ.,
Plaintiff,

against

THE VILLAGE VOICE, INC., JUDY MISZNER, Publisher of the Village Voice, DOUG SIMMONS, Editor-in-Chief of the Village Voice, ADAM F. HUTTON, Reporter of the Village Voice, THE CITY OF NEW YORK DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, SHAUN DONOVAN, Commissioner of the Department of Housing Preservation and Development, LUIZ ARAGON, Individually and in his capacity as Deputy Commissioner of Office of Preservation Services, Department of Housing Preservation and Development, NEIL COLEMAN, Assistant Commissioner of Communication, Department of Housing Preservation Development and DEBORAH RAND, individually, and in her capacity as Assistant Commissioner/Housing Litigation Division, Department of Housing Preservation and Development,
Defendants.

---X

Index Number 118713/2006
Mot. Seq. Nos. 001 & 002
Cal. Nos. 10 &11

DECISION AND ORDER

FILED
AUG 16 2007
NEW YORK
COUNTY CLERK'S OFFICE

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Papers considered in review of these motions to dismiss:

	Papers	Numbered
Seq. 001	Notice of Motion, Affidavits and Memo of Law	1, 2
	Affirmation in Opposition	3 *
	Reply Memo of Law	4
Seq. 002	Notice of Motion, Affidavits and Memo of Law	1, 2
	Affirmation in Opposition	3 *
	Reply Aff. And Memo of Law	4, 5

* Plaintiff's Affirmation in Opposition serves as opposition to both motions

PAUL G. FEINMAN, J.:

The motions bearing sequence numbers 001 and 002 are consolidated for purposes of decision.

Defendants the City of New York Department of Housing Preservation and Development ("HPD"), and its officials Donovan, Aragon, Coleman, and Rand, move to dismiss the complaint on the ground that it fails to state a cause of action pursuant to CPLR 3211(a)(7), and fails to particularize the statements at issue pursuant to CPLR 3013 and 3016(a). Defendants The Village Voice, its publisher Simmons, editor-in-chief Simmons, and reporter Hutton (together, the "Voice"), move separately to dismiss the complaint with prejudice for failure to state a cause of action (CPLR 3211[a][7]), based on documentary evidence (CPLR 3211[a][1]), and based on the "fair and true report" doctrine of section 74 of the Civil Right Law. Upon consideration of all the papers and after oral argument, both motions are granted.

Background

Plaintiff is employed by the HPD as a Level III Attorney in the Office of Preservation Services, Certification of No Harassment Review Unit (City Not. of Mot. Ex. 1, Complaint [hereinafter "Complaint"] ¶¶ 1, 2).

At issue is an article written by co-defendant Hutton which appeared on about July 5, 2006, in The Village Voice, one in a series entitled "NYC's 10 Worst Landlords " (attached to Complaint; also to Voice Not. of Mot., Hutton Aff. Ex. A). The July 5 article discusses one particular landlord and his history of tenant intimidation, and describes a 2005 administrative proceeding which found, based in part on affidavits by tenants submitted by HPD, that the landlord had harassed tenants in a building on the Upper West Side. The article mentions that

the landlord had, prior to the administrative proceeding, offered $500,000 to settle the issue with the Coalition for the Homeless, so as to be granted a certificate of no harassment. The article includes the landlord's allegations of "bullying" tactics by HPD's Rand, in particular, and his claim that after he sought the certificate, HPD inspectors "swarm[ed]" through his building in a "conspiracy" to deny him a certificate. The article notes that the landlord has since filed a lawsuit challenging the HPD and the administrative judge's findings. It further states that after he made his settlement offer, "other HPD officials supported the granting of a certificate of no harassment," and specifically refers to a memorandum written by an HPD assistant commissioner who recommended issuing the certificate based in part on the conclusions of a memorandum written by plaintiff, dated October 18, 2004, as well as "other sources." The article describes plaintiff's memorandum as mentioning the proposed settlement and stating that the HPD SRO Unit and the New York State Department of Housing and Community Renewal (DHCR) had no information regarding harassment at the premises in question. The article's final paragraph states that a State Senator had contacted the HPD assistant commissioner in 2001 concerning that building and that he believed the assistant commissioner "should have known" about some of the problems. "Obviously," the article concludes, "a judge later found that the memos from [the HPD assistant commissioner and plaintiff] did not tell the whole story."

The October 18, 2004 memo was written by plaintiff in her capacity as the Attorney in Charge/SRO Anti-Harassment Unit, and addressed to Assistant Commissioner Elizabeth Bolden of the Housing Litigation Section. It includes under the heading "recommendation," the sentence, "[b]ased on the foregoing [analysis and investigation], I respectfully recommend that a Certificate of No Harassment be granted." (Aff. in Opp. Ex. B, Simpson to Bolden Memo, of

Oct. 18, 2004, p. 3).

Plaintiff, acting *pro se*, filed a Notice of Claim on July 10, 2006 (City Not. of Mot. Ex. 2), and commenced her lawsuit by filing a summons and complaint on December 18, 2006. The complaint alleges that the "article and matters contained therein concerning the plaintiff so published, were false and untrue, or were published with reckless and wanton disregard of whether they were false and untrue." (Complaint ¶ 13). It alleges that HPD's Rand, Aragon, and Coleman either caused or allowed false statements to be published in the Voice which have defamed plaintiff's name, professional reputation, and social standing, and caused her to lose the esteem and respect of her friends, colleagues, and the public (Complaint ¶ 14).

Plaintiff argues that "no matter what the October [2004] memo purported to say, Plaintiff made so such recommendation [to grant a certificate of no harassment]." (Aff. in Opp. ¶ 10, p. 7).[1] Plaintiff contends that she was directed to write it by her supervisor. She further contends that her memorandum was privileged as an attorney-client communication, and that it should not have been released to the press nor referred to by the press. She also contends that the HPD attorneys either failed to inform the Voice that the memo was privileged and did not represent the whole story concerning the recommendation, or failed to persuade the Voice of these facts (Aff. in Opp. ¶ 12).[2] She apparently argues that the recommendation paints an incorrect picture of her

[1]She contends that after she filed an EEO complaint against co-defendant Rand and the HPD General Counsel in April 2005, she was granted permission to state her recommendations and not the recommendations of others (Aff. in Opp. ¶ 10, p. 8).

[2]In her opposition papers to the motions, plaintiff states that in the year in question, there were no Housing Maintenance Violations filed against the landlord and his building, and there was therefore "no legal, moral, or social duty to speak against [the landlord] by the City defendants," other than informing the Voice defendants "that the memo provided by [the landlord's attorney] was a privileged documents which could not be used publicly." (Aff. in

legal opinion, as she notes that it was she who commenced the administrative proceeding against the landlord seeking a finding that he had harassed his tenants, and it was she who opposed his motion to dismiss the proceeding (Aff. in Opp. ¶ 10, p. 5). She also points to another memorandum she wrote in mid-November 2004, also under the direction of her supervisor which, although nearly identical to the October 18, 2004 memorandum, included a slightly different analysis section and recommended denial of a certificate of no harassment (Aff. in Opp. ¶ 10, p. 4-5). This memorandum is not specifically mentioned in the Voice article.

Plaintiff additionally argues that the last sentence of the Voice article, that a judge found that the memos from Bolden and plaintiff "did not tell the whole story," is also defamatory (Aff. in Opp. ¶ 10, p. 9). She contends that when "the Village Voice opined that plaintiff withheld information, . . . this opinion implied that the Voice had gathered all the facts surrounding the recommendation and that there were no facts to the contrary" (Aff. in Opp. ¶ 13). She argues that defendant Coleman had told the Voice that she had not made the recommendation to grant a certificate of no harassment, but that the Voice chose to print that she did, thus defaming her (Aff. in Opp. ¶ 13).

The HPD defendants move to dismiss on the ground that the complaint does not conform to the pleading requirements for a claim of defamation as it does not contain sufficient particularity concerning the time, place, or manner of the publication of the words at issue. In addition, they argue that to the extent the words were defamatory, the doctrine of absolute privilege affords a complete defense to plaintiff's claim. Alternatively, they argue that the

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Opp. ¶ 12).

doctrine of qualified privilege affords a complete defense.

The Voice defendants move separately to dismiss on the ground that the article and the statements at issue fairly reported the official actions of the HPD and the administrative proceeding, and are thus protected by the absolute privilege accorded under Civil Rights Law § 74. They further argue that the statements lack a defamatory meaning and that the documentary evidence establishes that the statements were substantially true. They also argue that under Article 8 of the New York State Constitution, and the First Amendment of the United States Constitution, a public official may not maintain an action for libel or slander against a newspaper which reports something that the official wrote in his or her official capacity.

Legal Analysis

When considering a pre-answer motion to dismiss pursuant to CPLR 3211(a), the Court must accept as true the allegations in the complaint and any submissions in opposition to the motion. The "court is not authorized to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action." (*P.T. Bank Cent. Asia v. ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept. 2003]). In determining the motion, the Court will "accord plaintiff the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *accord Campaign for Fiscal Equity, Inc. v State of N.Y.*, 86 NY2d 307, 318 [1995]). Allegations consisting of bare legal conclusions or factual claims which are clearly contradicted by documentary evidence, are not entitled to such consideration (*Maas v Cornell University*, 94 NY2d 87, 91 [1999]; *Franklin v Winard*, 199 AD2d 220, 220 [1st Dept. 1993]). In order for a defendant to prevail in a motion to dismiss, it must convince the court that nothing the plaintiff

can reasonably be expected to prove would establish a valid claim (Siegel, New York Practice, § 265 [3d ed.]). A complaint may be dismissed based upon a defense founded upon documentary evidence if the documentary evidence resolves all factual issues as a matter of law and disposes of the plaintiff's claim (*Ozdemir v Caithness Corp.*, 285 AD2d 961 [3d Dept. 2001], *lv. denied* 97 NY2d 605 [2001]; *Weiss v Cuddy & Feder*, 200 AD2d 665, 667 [2d Dept 1994]; see CPLR 3211 [a] [1]).

In an action for libel or slander, the "particular words complained of shall be set forth in the complaint." (CPLR 3016[a]). In order to establish a claim of defamation, a plaintiff must allege and ultimately prove that a "substantially untrue" statement was made which could reasonably be understood to be about the plaintiff; that it tended to expose the plaintiff to "public hatred, contempt, ridicule, or disgrace"; that defendant communicated it to someone other than the plaintiff; and that when the defendant made the statement, the defendant knew that it was false or acted in reckless disregard of the statement's truth or falsity (2 N.Y. Pattern Jury Instructions 3:23, pp.198-199 [2007]). "In evaluating whether a cause of action for defamation is successfully pleaded, the words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction" (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept. 1999], citing *Silsdorf v Levine,* 59 NY2d 8, *cert denied* 464 US 831 [1983]).

The HPD Defendants

The HPD defendants argue that the complaint must be dismissed as it does not set forth the specific words that were communicated by them to the Voice, nor has it set forth which

defendant communicated which words to whom or when the communications were made.

The time, manner, and persons to whom the communication was made must be alleged in order to state an adequate claim of defamation (*Simon v 160 W. End Ave.*, 7 AD3d 318 [1st Dept. 2004] [dismissing claim because of failure to set forth with particularity to whom the statements were made]; *Vardi v Mutual Life Ins. Co. of N.Y.*, 136 AD2d 453, 456 [1988] [finding claim insufficient where complaint failed to allege the particular words complained of, nor the time, manner and persons to whom they were made]). The complaint here alleges only that the offending words were published on about July 5, 2006 in the Voice and read by readers on that date and thereafter. This recitation in the four corners of the complaint is clearly inadequate to establish a defamation claim with the specificity required by CPLR 3016(a).

Plaintiff seeks to supplement the allegations contained in the complaint through her opposition papers. Her papers explain that the information was published by HPD somewhere around March 2006 when HPD officials, including some of the defendants, made a presentation to the Voice regarding the "ten worst landlords," and in about April 26, 2006, when HPD's Coleman sought information about another landlord who was to be the subject of a Voice article in the same series, and again in May and July 2006 when plaintiff was told by Coleman not to speak to the Voice reporter and, in response to her question as to whether the Voice had contacted Coleman about the certificate of no harassment, was told that Coleman had "put our case but cannot control what the reporter writes" (Aff. in Opp. ¶10, unnumbered pp. 2-3, citing Ex. A, esp. emails between plaintiff and Coleman dated July 6, 2006).

Although plaintiff argues that she should be allowed to amend her complaint to include the above allegations, she continues to fail to set forth sufficient allegations that would establish

a claim of defamation as against the HPD. She cannot allege defamation by claiming that the statements were published internally among the HPD staff, as a claim of defamation requires that the words be published to a third party (*see, e.g., Sieger v Union of Orthodox Rabbis of the U.S. and Canada, Inc.*, 1 AD3d 180 [1st Dept. 2003], *app. dismissed* 2 NY3d 758; *app. denied* 3 NY3d 604 [2004] [publication element was not met where there was no evidence that the defendants disclosed existence or substance of a document allowing a husband to remarry to third parties unrelated to the procedure]). Her motion papers still do not allege with particularity which defendant said what to which Voice defendant (*Simon v 160 W. End Ave.*, 7 AD3d 318).

The HPD defendants also contend that any statements communicated by them were absolutely privileged, as the statements were made by officials who, based on their positions, divulged the information in the exercise of their public function, citing *600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, 135-136 (1992), *cert. denied* 502 US 910 [1993]; *Toker v Pollak*, 44 NY2d 211, 219 (1978); *Stukuls v State of N.Y.*, 42 NY2d 272, 275 (1977). Alternatively, citing *Shover v Instant Whip Processors, Inc.*, 240 AD2d 560 (2d Dept. 1997), *Shapiro v Central Genl. Hosp., Inc.*, 251 AD2d 317 (2d Dept.), *lv. denied* 92 NY2d 811 (1998), the HPD defendants argue that plaintiff must show that their communications were made with malice because they were made at a minimum under a qualified privilege. A qualified privilege exists when a communication is made to persons who share a common interest in the subject matter (*Foster v Churchill*, 87 NY2d 744, 751 [1996]; *Liberman v Gelstein*, 80 NY2d 429, 437 [1992]). A finding of malice requires that a defendant was solely motivated by a desire to injure plaintiff and that this animus was the only cause for the publication (*see, Morsette v "The Final Call,"* 309 AD2d 249, 255 [1st Dept. 2003], *app. dismissed* 5 NY3d 756 [2005]; *Saez v City of N.Y.*, 270

AD2d 55 [1st Dept. 2000]). Qualified immunity can be overcome as well by allegations that establish, in addition to actual malice, "personal spite, or culpable recklessness or negligence" (*Misir v New York City Hous. Auth.*, 245 AD2d 88 [1st Dept. 1997], *app. dismissed* 92 NY2d 915 [1998], citing *Kasachkoff v City of New York,* 107 AD2d 130 [1st Dept. 1985], *aff'd* 68 NY2d 654 [1986]). However, "[s]urmise, conjecture and suspicion" are insufficient to establish a claim of malice or recklessness, as are unsubstantiated allegations or assertions (*see, Shapiro v Health Ins. Plan of Greater N. Y.,* 7 NY2d 56, 63 [1959]; *Dano v Royal Globe Ins. Co.*, 59 NY2d 827, 829 [1983]). Here, even as supplemented, plaintiff has not sufficiently alleged that HPD's interactions with the Voice were motivated solely by a desire to injure her (*Present v Avon Prods., Inc.*, 253 AD2d 183, 189 [1st Dept.1999], *lv dismissed* 93 NY2d 1032 [1999]), and the allegations do not support that the publication was a product of personal spite, recklessness, or negligence.

Plaintiff's argument that the memorandum was privileged and that the HPD improperly published its contents to the Voice is unpersuasive, given that the document had previously been turned over in the course of the administrative proceeding and was part of an official HPD proceeding which became the subject of a Voice article.[3] Moreover, a privilege can be waived by the client, and it can be argued that if the HPD published the memorandum to the Voice, it freely chose to waive any conceivable privilege attached to the document (*see, New York Times Newspaper Div. of New York Times Co. v Lehrer McGovern Bovis, Inc.*, 300 AD2d 169, 172 [1st

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[3]The Voice reporter, co-defendant Hutton, states that the documents he received came from the landlord's attorney, were previously attached as exhibits to an Article 78 procedure brought on behalf of the landlord, and were turned over by plaintiff to the attorney in the course of discovery in the administrative proceedings (Voice Not. of Mot., Hutton Aff. ¶¶ 11-12).

Dept. 2002] [disclosure of a privileged document normally waives any privilege unless, among other things, it is shown "that the client intended to maintain the confidentiality of the document"]).

Finally, plaintiff herself acknowledges that the Voice obtained the October 18, 2004 memo not from any of the HPD defendants, but from the landlord's attorney (Aff. in Opp. ¶ 12).[4] Plaintiff is thus left to argue that her claim arises because the HPD defendants did not persuade the Voice to withhold reference to the October 2004 memorandum, did not inform the Voice that the memorandum did not state her actual opinion, and perhaps did not provide the Voice other information which would have shown her position in a different light. However, such speculation is simply insufficient to find that she has a viable cause of action against the HPD defendants (*see, Franklin v Winard*, 199 AD2d, at 220 [allegations consisting of bare legal conclusions or factual claims which are either inherently incredible or clearly contradicted by documentary evidence, will not survive motion to dismiss]). Accordingly, the motion by the HPD defendants is granted and the complaint is dismissed as against them based on the failure to adequately state a cause of action pursuant to CPLR 3011(a)(7) and 3016(a).

The Village Voice Defendants

The Village Voice defendants seek dismissal of the complaint on the grounds that it published a "fair and true report" of the background and administrative proceeding involving the

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[4]The email correspondence attached to her motion papers shows that defendant Coleman informed plaintiff on July 6, 2006 that "[t]he information and interpretation of your role came not from me but from [the landlord's] attorney," and that "that section of the article relies heavily on quotes and information (including documents obtained during the court proceedings) [that the attorney] gave the reporter." (Aff. in Opp. Ex. A, emails between plaintiff and Coleman dated July 6, 2006).

HPD and the landlord in question which is absolutely protected by the Civil Rights Law. They also argue that the published statements are not capable of containing a defamatory meaning or, at the very most, should be seen as charging the plaintiff with having made a one-time mistake, which is not actionable unless special damages are pleaded (Voice Reply Memo p. 7, citing *Bowes v Magna Concepts, Inc.*, 166 AD2d 347 [1st Dept. 1990]).

Section 74 of the Civil Rights Law protects the publication of "a fair and true report of any . . . official proceeding." (Civil Rights Law § 74). The test for whether an activity is an "official proceeding" is whether it was "taken by a person officially empowered to do so." (*Freeze Right Refrig. and Air Conditioning Svcs., Inc. v City of New York*, 101 AD2d 175, 182 [1st Dept. 1984], citing *Farrell v New York Evening Post*, 167 Misc. 412, 416 [Sup. Ct., New York County 1938]). An administrative agency investigation into activities within its purview is an "official proceeding." (*See, Freeze Right*, 101 AD2d at 182 [finding that a Department of Consumer Affairs investigation into air conditioning repair practices was an official proceeding]). A report of an official proceeding is "fair and true" as long as it is "substantially accurate." (*Holy Spirit Assn. v New York Times Co.*, 49 NY2d 63, 67-68 [1979]). Newspaper accounts "of official proceedings must be accorded some degree of liberality" (*Holy Spirit* at 68). Here, where the administrative proceeding as well as the HPD's prior investigation into the landlord's activities, are official proceedings, the reporting is covered by the Civil Rights Law.

Plaintiff's argument is that the Voice did not set forth the full facts, including that she did not agree with the position she took officially in her October 18, 2004 memorandum concerning the granting of the certificate of no harassment, and instead published an article that suggested she had withheld information in order to recommend that the certificate be granted. She relies on

Gross v New York Times Co., 82 NY2d 146, 153 (1993) to argue that an opinion that implies a basis in facts that are not disclosed to the listener is actionable. *Gross* is not applicable here, however, where the reporter has set forth a full range of background facts that led up to the administrative proceeding. The only "fact" the article apparently did not include was that the plaintiff did not agree with her memorandum, which could hardly have been known from the face of the memorandum. The last sentence of the article, that "obviously" plaintiff's memo and that of her supervisor did not tell the "whole story," is the opinion and conclusion of the reporter, based on the previous history as described by him. There is no implication that the article withheld facts from the reader, which is the requirement under *Gross* for a publication to be actionable (*Gross*, at 153-154; *see, Mercado v Shustek*, 309 AD2d 646 [1st Dept. 2003] [dismissing complaint where the publication contained opinion rather than hard fact, a recitation of background facts, and no suggestion of undisclosed facts by the defendant]). The least favorable reading of the reporter's words is that he charges plaintiff with making an error on that particular occasion. As noted above, where an article does not falsely accuse a professional with general ignorance or lack of skill, but describes a one-time mistake or error in judgment, it will not generally be actionable unless special damages are pleaded (*Fowler v Conforti*, 194 AD2d 394 [1st Dept. 1993]). Plaintiff has not pleaded special damages and thus her claim of defamation ultimately must also fail on this ground.

In addition, as set forth above, a reading of that memorandum in conjunction with the Voice article can only lead to the conclusion that the Voice accurately summarized the words of the memorandum. The defense of truth also requires dismissal of the complaint (*Dillon v City of New York,* 261 AD2d at 39).

Accordingly, it is

ORDERED that the HPD defendants' motion to dismiss the complaint bearing sequence number 001 is granted; and it is further

ORDERED that the Village Voice defendants' motion to dismiss the complaint bearing sequence number 002 is granted; and it is further

ORDERED that the Clerk of the Court shall enter judgment dismissing the complaint in its entirety with prejudice, together with costs and disbursements as taxed by the Clerk.

This constitutes the decision and order of the court.

Dated: August 7, 2007
New York, New York

J.S.C.
HON. PAUL G. FEINMAN

FILED
AUG 16 2007
NEW YORK
COUNTY CLERK'S OFFICE