

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JACOB TEITELBAUM, Individually and as father to
CHILD A and CHILD B,

Plaintiff,

-against-

**ATTORNEY
AFFIRMATION**

JUDA KATZ; CHAYA KATZ; JOEL TENNENBAUM;
BLUMA TENNENBAUM; DAVID RUBENSTEIN;
KIRYAS JOEL COMMUNITY AMBULANCE
CORPORATION; ATTY. MARIA PETRIZIO;
CHILDREN'S RIGHTS SOCIETY, INC.;
ATTY. KIM PAVLOVIC; ATTY JOHN FRANCIS X.
BURKE; COUNTY OF ORANGE; CHRISTINE BRUNET;
ATTY. STEPHANIE BAZILEOR; DAVID HOLLANDER;
MIRIAM TEITELBAUM; JOHN DOES 1 THROUGH 95;
JANE DOES 1 THROUGH 20,

12-CV-02858 (VB)

Defendants.

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TERENCE S. HANNIGAN, an attorney duly admitted to practice law before the United States District Court for the Southern District of New York, declares the following to be true and correct under penalties of perjury pursuant to 28 U.S.C. § 1746:

1. I am a member of Hannigan Law Firm PLLC, the attorneys for Defendant David Rubenstein (hereinafter "defendant"). As such, I am fully familiar with the prior proceedings and papers filed in this action.

2. I submit this affirmation in support of defendant's motion to dismiss the "Modified Second Amended Complaint" filed May 2, 2013 (Document No. 178) pursuant to Fed. R. Civ. P. 12(b)(6). Defendant submits that plaintiff has failed to allege sufficient facts to support a Section 1983 or 1985 claim against him in

accordance with this Court's order of February 11, 2013. Defendant further submits that plaintiff has failed to state a claim for false arrest, wrongful eviction, abuse of process, negligent infliction of emotional distress, and cruel, inhuman, and degrading treatment, and requests that this Court dismiss the complaint with prejudice, together with any such other and further relief as this Court deems just and proper.

3. The facts underlying plaintiff's claims were fully set forth in this Court's order dated February 11, 2013 and in defendant's motion to dismiss the original Complaint, which was filed on December 18, 2012. Accordingly, a brief recitation of the relevant facts is set forth in the accompanying memorandum of law.

4. The relevant procedural history is as follows. Upon information and belief, plaintiff commenced this action individually and on behalf of his two children against defendant and others alleging claims under 42 U.S.C. § 1983 and 42 U.S.C. § 1985. On December 18, 2012, defendant moved pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6) on the grounds that he is not a state actor for purposes of liability under 42 U.S.C. § 1983 and that plaintiff failed to state a claim of conspiracy under 42 U.S.C. § 1983 or 42 U.S.C. § 1985. On February 11, 2013, this Court granted the motions of defendant and several codefendants. In so doing, this Court granted plaintiff leave to file a second amended complaint "for the sole purpose of alleging sufficient facts to support a Section 1983 or 1985 claim against Kiryas Joel EMS and/or Rubenstein."

5. On April 29, 2013, plaintiff filed what amounts to a motion for leave to serve a second amended complaint against all defendants. On May 2, 2013, plaintiff filed a "Modified Second Amended Complaint". Upon information and belief, this is the

most recent pleading filed by plaintiff. Defendant now moves to dismiss the Modified Second Amended Complaint.

THIS COURT SHOULD DISMISS PLAINTIFF'S CLAIMS ALLEGING DAMAGES UNDER 42 U.S.C. § 1983 and § 1985.

6. Defendant submits that he is entitled to dismissal of the action against him as a result of plaintiff's failure to state a claim under 42 U.S.C. § 1983 and § 1985.

7. As explained in the accompanying memorandum of law, a claim arising under Section 1983 cannot stand unless the plaintiff shows that such injury was caused by a party acting under the color of state law. Indeed, the central inquiry for the Court is whether the alleged infringement of federal rights is fairly attributable to the state.

8. Upon information and belief, and as alleged in the modified second amended complaint, defendant was an employee of codefendant Kiryas Joel Community Ambulance Corp. at all times relevant to this action. It is well settled that volunteer ambulance associations and their employees are not State actors for purposes of 42 U.S.C. § 1983.

9. As this Court will recall, the allegations contained in plaintiff's modified second amended complaint in regard to his Section 1983 and 1985 claims are virtually identical to those contained in the first amended complaint that was the subject of this Court's February 2013 order granting defendant's motion to dismiss.

10. Even assuming the truth of plaintiff's new allegations, such allegations fail to demonstrate that defendant was a state actor for purposes of Section 1983. These allegations similarly fail to demonstrate that defendant was motivated by

invidious discriminatory animus to deprive plaintiff of his constitutional rights for purposes of Section 1985.

11. Plaintiff has not alleged – nor do the facts of this case suggest – that he is a member of a protected class, that defendant conspired against him, or that defendant acted with any invidiously discriminatory animus toward plaintiff. Given the lack of these prerequisites to suit, it cannot be said that plaintiff suffered any compensable damages pursuant to § 1985 (3) or § 1983.

12. This Court previously granted plaintiff leave to amend his complaint to assert facts sufficient to state a claim against defendant under Section 1983. In view of the absence of any such new facts, this Court should dismiss the Modified Second Amended Complaint with prejudice to prevent future attempts by plaintiff to pursue litigation against defendant that lacks merit.

PLAINTIFF HAS FAILED TO STATE A CLAIM FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

13. Plaintiff has asserted a claim against defendant for negligent infliction of emotional distress (¶406-410).¹ As explained in the accompanying memorandum of law, such an action must be premised upon the breach of a duty owed to the plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety. This Court requires that such allegations be clearly alleged in order for the complaint to survive a motion to dismiss.

14. Here, plaintiff has failed to allege that defendant owed him any duty or that he suffered any physical injury as a result of any action taken by defendant.

¹ All references preceded by “¶” are to the corresponding paragraph of plaintiff's Modified Second Amended Complaint.

Plaintiff has similarly failed to allege that defendant impermissibly engaged in any conduct whereby plaintiff's physical safety was unreasonably endangered. Indeed, the allegations contained in the amended complaint suggest that defendant acted pursuant to his lawful duties as a member of Hatzalah EMS in transporting plaintiff to a psychiatric hospital.

PLAINTIFF HAS FAILED TO STATE A CLAIM FOR WRONGFUL EVICTION FROM HOME, ABUSE OF PROCESS, FALSE ARREST, AND CRUEL AND INHUMAN TREATMENT.

15. Plaintiff has asserted four new causes of action against Defendant in his Modified Second Amended Complaint.

16. In regard to plaintiff's wrongful eviction claim, he was required to show that Defendant disseized, ejected, or put him out of real property in a forcible or unlawful manner, or that Defendant kept him out of his home by force or by putting him in fear of personal violence or by unlawful means. As alleged in the complaint, plaintiff asserts that he was wrongfully evicted in January 2013 (¶390). However, the only factual allegations of wrongdoing against Defendant are limited to 2010 and 2011 (¶44-55, 98-108). Accordingly, this claim should be dismissed.

17. With respect to a claim for abuse-of-process, a plaintiff must demonstrate that a defendant (1) employed regularly issued legal process to compel performance or forbearance of some act (2) with intent to do harm without excuse of justification, and (3) in order to obtain a collateral objective that is outside the legitimate ends of the process. In this case, plaintiff alleges that false criminal charges were brought against him on January 19, 2013 (¶402). As noted above, the only factual allegations of wrongdoing against Defendant are limited to 2010 and 2011

(¶¶44-55, 98-108). Moreover, the complaint is devoid of any allegation that Defendant used regularly issued legal process, acted with intent, or sought any collateral objective other than those that he was legally authorized to undertake as a member of a volunteer ambulance company. Thus, this claim should also be dismissed.

18. Turning to plaintiff's claim for false arrest, he was required to show that: (1) the defendant intended to confine him; (2) the plaintiff was conscious of the confinement; (3) the plaintiff did not consent to the confinement; and (4) the confinement was not otherwise privileged. Plaintiff asserts that he was wrongfully arrested on June 6, 2012 (¶¶386). As previously noted, the only factual allegations of wrongdoing against Defendant are limited to 2010 and 2011 (¶¶44-55, 98-108), and those allegations fail to satisfy the four elements of a claim for false arrest. Accordingly, this claim should be dismissed.

19. Finally, plaintiff's claim that he was subjected to cruel, inhuman, and degrading treatment is based upon the other vexatious tort claims previously discussed, and sets forth no new facts or allegations of wrongdoing (¶¶412-413). Thus, the Court should dismiss this claim as well.

**AS A MEMBER OF A VOLUNTEER AMBULANCE SERVICE, DEFENDANT
IS IMMUNE FROM LIABILITY PURSUANT TO NEW YORK STATE PUBLIC
HEALTH LAW § 3013.**

20. New York Public Health Law § 3013 (1) renders defendant immune from liability. Under that statute, a volunteer ambulance company and its members are liable only for acts or omissions causing injury, death, or arising from gross negligence.

21. Upon information and belief, plaintiff, his wife, other family members, and local authorities such as the Department of Social Services requested the services of an ambulance and crew on several occasions. Defendant was a member of Hatzalah EMS, one such ambulance crew. Plaintiff has not offered any authority in support of the proposition that a member of a volunteer ambulance company may disregard a lawful command from local authorities with respect to being dispatched to plaintiff's residence. Moreover, even if such authority existed, there is no evidence here that defendant caused plaintiff injury within the meaning of the statute or was grossly negligent in the fulfillment of his duties.

WHEREFORE, your affiant respectfully requests that this Court dismiss plaintiff's "Modified Second Amended Complaint" with prejudice pursuant to Rule 12(b)(6), together with any other and further relief as it deems just and proper under the circumstances.

Dated: May 22, 2013

Hannigan Law Firm PLLC

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