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-

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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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT DAVID RUBENSTEIN'S MOTION TO DISMISS THE "MODIFIED SECOND AMENDED COMPLAINT" FILED MAY 2, 2013 (DOCUMENT No. 178)

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PRELIMINARY STATEMENT

Defendant David Rubenstein respectfully submits this memorandum of law in support of his motion to dismiss the pro se plaintiff's "Modified Second Amended Complaint" (Document No. 178) pursuant to Fed. R. Civ. P. 12(b)(6) on the grounds that: (1) defendant is not a state actor for purposes of liability under 42 U.S.C. § 1983; (2) plaintiff has failed to state a claim of conspiracy under 42 U.S.C. § 1983 or 42 U.S.C. § 1985; (3) plaintiff has failed to state claims for negligent infliction of emotional distress, wrongful eviction, abuse of process, and cruel and inhuman treatment; and (4) Defendant is immune from suit pursuant to Public Health Law § 3013. Defendant requests that this Court grant his motion together with such other and further relief as this Court deems just and proper.

STATEMENT OF FACTS

As this Court is aware, 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."

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", which purports to allege causes of action arising under 42 U.S.C. § 1983, 42 U.S.C. § 1985, and for: "false arrest without a warrant" in violation of the Fourth Amendment; "wrongful eviction from home" in violation of the Fourteenth Amendment; "abuse of process"; negligent infliction of emotional distress; and cruel, inhuman and degrading treatment in violation of the Fifth, Eighth, and/or Fourteenth Amendments. Defendant now moves to dismiss that complaint pursuant to Fed. R. Civ. P. 12(b)(6).

ARGUMENT

THIS COURT SHOULD DISMISS PLAINTIFF'S "MODIFIED SECOND AMENDED COMPLAINT".

As explained below, Defendant is entitled to dismissal of the action against him as a result of plaintiff's failure to state a claim upon which relief can be granted. A court will grant a motion to dismiss when it appears beyond doubt that a plaintiff cannot prove facts in support of his claim that entitle him to relief. *Warren v. Goord*, 476 F.Supp. 2d 407, 409 (S.D.N.Y. 2007). On a Rule 12(b)(6) motion, the court must "determine whether the complaint itself is legally sufficient." *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985). "In considering the motion, the court must examine the factual allegations of the complaint, including exhibits to the complaint and documents or statements incorporated in it by reference." *Romer v. Morgenthau*, 119 F.Supp.2d 346, 352 (S.D.N.Y. 2000). The Supreme Court stated that, although a motion to dismiss "must take all of the factual allegations in the complaint as true, [it is] not bound to

accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While Fed. R. Civ. P. 8(a)(2) "does not require detailed factual allegations, . . . it demands more than an unadorned, the-defendant-harmed-me-accusation." *Id.* at 678. The Second Circuit has stressed that this motion standard applies when a plaintiff alleges civil rights violations or appears pro se. *See, Romer*, 119 F.Supp.2d at 353.

POINT I

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

In this case, plaintiff has alleged that defendant is liable under 42 U.S.C. § 1983. To prevail on under this section, a plaintiff must demonstrate that he or she was deprived of rights, privileges, or immunities secured by the Constitution and laws by a person *acting under the color of state law* (*emphasis added*). *See* 42 U.S.C. § 1983. "'Section 1983 itself creates no substantive rights; it provides only a procedure for redress for the deprivation of rights established elsewhere.'" *Sykes v. James*, 13 F.3d 515, 519 (2d Cir. 1993). Notably, even if a plaintiff has adequately alleged a constitutional injury, a claim arising under section 1983 cannot be successful unless the plaintiff shows that such injury was caused by a party acting under the "color of state law." *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982). Thus, the central inquiry is whether the alleged infringement of federal rights is "fairly attributable to the state." *Lugar*, 457 U.S. at 937; *see, Wyatt v. Cole*, 504 U.S. 158, 161 (1992) ("The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails."); *Tancredi v. Metro Life Ins. Co.*, 316 F.3d 308, 312 (2d Cir. 2003) (A

plaintiff claiming a violation of his constitutional rights under § 1983 is required to show state action).

As alleged in the modified second amended complaint, plaintiff asserts that defendant was called to plaintiff's residence as a member of Hatzalah EMS to take one of plaintiff's children to the hospital (¶44-55)[1], and obtained consent to transport plaintiff's children (¶49-50). Plaintiff also avers that defendant abducted him in an ambulance and worked with other Hatzalah EMS personnel to bring plaintiff to a hospital for psychiatric evaluation (¶98). With respect to these activities, it is well settled that volunteer ambulance associations and their employees are not State actors for purposes of 42 U.S.C. §1983. *See, Hollman v. County of Suffolk*, 2011 WL 2446428 (E.D.N.Y. 2011); *Glowczenski v. Taser Int'l Inc.*, 2010 WL 1948249 (E.D.N.Y. 2010); *Spencer v. Eckman*, 2005 WL 711511 (E.D.Pa.); *McKinney v. West End Volunteer Ambulance Association*, 821 F. Supp. 1013, 1018-1020 (E.D.Pa. 1992). Defendant's alleged involvement in this case was, at all times, in his capacity as a member of Hatzalah EMS and at the request of plaintiff's wife, other familial relations and various local-government actors. In view of the fact that defendant was not acting under the color of state law as 42 U.S.C. § 1983 requires, it is respectfully submitted that this Court dismiss plaintiff's cause of action purporting to exist under that statute against defendant.

Finally, it is further submitted that plaintiff has failed to demonstrate a conspiracy pursuant to 42 U.S.C. § 1983. For plaintiff to prevail on such a claim, he was required to demonstrate an agreement between a state actor and a private party to act in concert

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

to inflict an unconstitutional injury, as well as an overt act done in furtherance of that goal causing damages. *See*, *Parent v. New York*, 786 F.Supp.2d 516, 539 (N.D.N.Y. 2011), *affd*, 2012 WL 2213658 (2d Cir. 2012); *Green v. City of Yonkers, N.Y.*, 2012 WL 554453 (S.D.N.Y. 2012). Mere "conclusory allegations that a private person acted in concert with a state actor" are not enough to sustain a claim alleging conspiracy under 42 U.S.C. § 1983. *Parent v. New York*, 786 F. Supp. 2d at 539; *see*, *Boddie v. Schnieder*, 105 F.3d 857, 862 (2d Cir. 1997).

Other than plaintiff's conclusory allegation that the named defendants acted "in cooperation with one another [to] deprive the Plaintiff of his Constitutional Rights pursuant to 42 USC §1983 by and through the Fourteenth Amendment to the United State[s] Constitution," plaintiff has failed to allege any specific facts in support of his claim that a conspiracy existed between defendant and any other named defendants. Accordingly, it is respectfully submitted that plaintiff has failed to demonstrate the existence of a conspiracy under 42 U.S.C. § 1983, and that this Court should dismiss his claims as to that statute in their entirety.

POINT II

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

Plaintiff has similarly alleged that defendant acted in concert with other defendants to deprive him of his constitutional rights, thereby giving rise to a cause of action under 42 U.S.C. § 1985 (3). To state a claim under this section, plaintiff was required to allege that: (1) he was a member of a protected class; (2) that the defendants conspired to deprive him of his constitutional rights; (3) that the defendants

acted with class-based, invidiously discriminatory animus, and (4) that he suffered damages as a result of the defendants' actions. *See*, *Gleason v. McBride*, 869 F.2d 688 (2d Cir. 1989). As in a claim made pursuant to 42 U.S.C. § 1983 (*see,* Point I, *supra*), conclusory allegations are not sufficient to state a claim against each of the individual defendants under Section 1985. *See*, *Williams v. Reilly*, 743 F. Supp. 168, 173-74 (S.D.N.Y. 1990) (dismissing section 1985(3) claim where plaintiff did not allege specific factual basis for allegation that defendants conspired together to deprive him of a benefit or right).

In this case, 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). Accordingly, given plaintiff's failure to allege facts sufficient to give rise to a conspiracy claim under 42 U.S.C. § 1985 (3), it is submitted that this Court should also dismiss plaintiff's cause of action allegedly arising thereunder.

POINT III

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

Plaintiff has asserted a cause of action against defendant sounding in negligent infliction of emotional distress (¶406-410). 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." *Matthews v. Malkus*, 377 F. Supp. 2d 350, 361 (S.D.N.Y. 2005). This Court requires that such

allegations "be clearly alleged in order for the complaint to survive a motion to dismiss." *Id.*

In this case, 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. Plaintiff has also 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. In view of these facts, it is respectfully submitted that plaintiff has failed to allege a claim for negligent infliction of emotional distress and, therefore, this Court should dismiss that cause of action against defendant.

POINT IV

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

Plaintiff has asserted four new causes of action against Defendant in his Modified Second Amended Complaint. 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. *See* N.Y. Real Prop. Acts Law § 853. 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.

With respect to a claim for abuse-of-process, a plaintiff must demonstrate that a defendant "(1) employ[ed] 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." *Savino v. City of New York*, 331 F.3d 63, 76 (2d Cir. 2003). 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.

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." *Jocks v. Tavernier*, 316 F.3d 128, 134-135 (2d Cir. 2003). 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.

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, this Court should dismiss this claim as well.

POINT V

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

Under New York Public Health Law § 3013 (1), a volunteer ambulance company and its members are liable only for acts or omissions causing injury, death, or arising from gross negligence. *See, Hollman v. County of Suffolk*, 06-CV-3589 JFB ARL, 2011 WL 2446428 at *12-*13; *Kowal v. Deer Park Fire Dist.*, 13 A.D.3d 489, 491 (4th Dept. 2004) ("[D]efendants, in view of their status as a voluntary ambulance service, would not be liable unless it is established that the plaintiff's decedent's injury and death were caused by their gross negligence") (*citing,* N.Y. Public Health Law § 3013[1]). Accordingly, since the defendant is a volunteer member of Hatzalah EMS, plaintiff was required to demonstrate gross negligence, which "'evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing.'" *Hollman v. County of Suffolk*, 2011 WL 2446428 at *12-*13, *quoting, Colnaghi, USA v. Jeweler's Protection Services*, 81 N.Y.2d 821, 823–24 (1993).

In this case, the modified second amended complaint and admissible evidence demonstrate that 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 or to institutionalize plaintiff against his will.

Under these facts and the allegations contained in the modified second amended complaint, it is submitted that there is no evidence of any gross negligence on behalf of defendant. Therefore, this Court decline to dismiss plaintiff's modified second amended complaint for the grounds previously stated herein, it is submitted that the Court should declare that defendant is immune from liability to plaintiff's suit pursuant to New York State Public Health Law § 3013 (1).

CONCLUSION

Based on the foregoing, it is respectfully submitted that plaintiff's "Modified Second Amended Complaint" should be dismissed in its entirety as against defendant with prejudice, and that this Court should order any other and further relief as it deems just and proper under the circumstances.

Dated: May 22, 2013

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