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-

12 CIV 2858 (VB)

JUDA KATZ; CHAYA KATZ; JOEL TENNENBAUM; BLUMA TENNENBAUM; DAVID RUBENSTEIN; KIRYAS JOEL COMM. AMBULANCE CRP; DISTRICT FAMILY COURT OF ORANGE COUNTY 9th JUDICIAL DISTRICT; HON. ANDREW P. BIVONA; ATTY. MARIA PETRIZIO; CHILDREN'S RIGHTS SOCIETY OF ORANGE COUNTY; ATTY KIM PAVLOVIC; ATTY JOHN FRANCIS X. BURKE; CHILD PROTECTIVE SERVICES OF ORANGE COUNTY; DEPARTMENT OF SOCIAL SERVICES OF ORANGE COUNTY; CHRISTINE BRUNET; ATTY STEPHANIE BAZILEOR; JOHN DOES 1 THROUGH 95; JANE DOES 1 THROUGH 20,

Defendants.
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MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND AND SUPPLEMENT ON BEHALF OF DEFENDANTS COUNTY OF ORANGE, CHRISTINE BRUNET AND ATTORNEY STEPHANIE BAZILE s/h/a ATTY. STEPHANIE BAZILEOR

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PRELIMNARY STATEMENT

Plaintiff *Pro Se* commenced this action by filing a Complaint on or about April 11, 2012. Plaintiff filed an amended complaint (hereinafter, "AC") on June 20, 2012. This office appeared on behalf of defendants Christine Brunet, Child Protective Services of Orange County ("CPS"), Department of Social Services of Orange County ("DSS") and Stephanie Bazile (sued as Stephanie Bazileor) (collectively referred to herein as the County Defendants). The County Defendants moved pursuant to FRCP 12(b)(1) and (6) to dismiss all claims against them (as did the other defendants named in the Amended Complaint). In a Memorandum Decision dated February 11, 2013 this Court (Briccetti, U.S.D.J.) granted the County Defendants' motion to dismiss in its entirely and dismissed the complaint against all County Defendants.

On or about April 29, 2013 plaintiff filed a "Motion for Leave to Amend and Supplement" his amended complaint, to which was attached a proposed "Modified Second Amended Complaint." Plaintiff then filed a "Second Motion for Leave to File Modified Second Amended and Supplemental Complaint" on or about May 22, 2103. No proposed amended complaint was attached to that motion. For purposes of this response, however, it will be assumed that the second motion relates to the same proposed Modified Second Amended Complaint that was attached to the April 29, 2013 motion. The defendants, Christine Brunet, Stephanie Bazile and the County of Orange submit this memorandum of law in opposition to the plaintiff's motions to amend his AC on the grounds of futility.

PROCEDURAL AND FACTUAL BACKGROUND

The AC asserted four causes of action. The first cause of action, brought under 42 U.S.C. § 1983, alleged that the County Defendants deprived plaintiff of his Constitutional right to due process by confining him to Bellevue Hospital Center; deprived plaintiff of "unenumerated" Constitutional rights by depriving him of custody of his children; and deprived him of unidentified Constitutional rights "based on tenants of religious community." (AC, ¶s 218-222) The second cause of action alleged that these deprivations were pursuant to a conspiracy in violation of his rights under 42 U.S.C. s. 1985. (AC, ¶s 223-227). The third cause of action purported to state a claim against the County Defendants for "intentional infliction of emotional distress." The fourth cause of action, also sounding in intentional infliction of emotional distress, was asserted only against other named defendants, but not the County defendants.

Most of the claims in the AC refer to an alleged series of events involving kidnappings, involuntary hospitalizations, and interference with plaintiff's marital and parental relationships. The claims against the County Defendants were based on an alleged series of events and proceedings in Orange County Family Court, in which a finding of child neglect was entered against plaintiff by the Family Court and several orders were issued by the Family Court relating to plaintiff's custody of his two infant children. Christine Brunet was a DSS caseworker, and Stephanie Bazile is an attorney with the Orange County Attorney who represented DSS in the Family Court proceedings involving plaintiff and his wife.

The County Defendants moved to dismiss the AC pursuant to FRCP 12(b)(1) and (6). All of the County Defendants moved to dismiss the AC on the grounds that the Court lacked subject matter jurisdiction under the Rooker-Feldman doctrine, because the claims asserted in the AC had already been raised, litigated and adjudicated in Family Court. (Defendants'

memorandum of Law ["MOL"] at Point II; Reply MOL Point II) The County defendants also moved to dismiss the § 1983 and § 1985 conspiracy claims, for failing to allege facts sufficient to state a conspiracy claim under either statute. (MOL Point Ic) Bazile and Brunet moved to dismiss the § 1983 due process claims on the ground that, other than Bazile's representation of DSS in the Family Court proceedings, the AC failed to allege personal involvement by either in any of the events giving rise to plaintiff's claims, and thus failed to state a § 1983 claim against them. (MOL Point Ib) CPS and DSS moved to dismiss all claims on the grounds that neither is a legal entity capable of being sued, and even if the Court substituted the County as the proper defendant, the complaint would have to be dismissed because plaintiff did not allege that his injuries were the result of an unconstitutional, official policy. (MOL Point Id and e) The County defendants moved to dismiss the state tort claim for intentional infliction of emotional distress on two grounds: that plaintiff failed to timely serve a notice of claim, a prerequisite to the commencement of an action under New York law, and that he failed to plead facts sufficient to state a claim upon which relief may be granted. (MOL Point III)

In a Memorandum Decision and order dated February 11, 2013 this Court granted the County Defendants' motion to dismiss the AC in its entirety. All federal claims against Bazile and Brunet were dismissed on the ground the Court lacked subject matter jurisdiction under the Rooker-Feldman doctrine, which "bars federal courts from hearing claims 'brought by state court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.'" (Memorandum Decision, p. 10)

In granting the motion to dismiss the claims against DSS and CPS, the Court held that they were not suable entities, and that even if the complaint were liberally construed to assert a

claim against the County, it would be dismissed under the Rooker-Feldman doctrine. Having dismissed the claims under the Rooker-Feldman doctrine, the Court did not find it necessary to address the other grounds for dismissal of the federal claims raised by the County defendants. The Court also declined to exercise supplemental jurisdiction over the state law tort claims. (Memorandum Decision, p. 13).

The Court also granted the motions to dismiss brought by all of the other moving defendants, except that it granted plaintiff leave to file a second amended complaint "no later than March 11, 2013 for the sole purpose of alleging sufficient facts to support a § 1983 or 1985 claim against [defendants] Kiryas Joel EMS and/or Rubenstein." (Memorandum Decision p. 13)

LEGAL ARGUMENT

POINT I

THE MOTIONS TO AMEND SHOULD BE DENIED AS FUTILE

The proposed Modified Second Amended Complaint (Second AC) repeats, almost verbatim, the allegations contained in the AC. Plaintiff has dropped CPS and DSS as defendants and added the County of Orange as a defendant. The only new allegations against the County appear at ¶s 277 – 284 of the Second AC. The substance of these new allegations appear to be, simply, that in June 2012 DSS contacted plaintiff to arrange for visitation with his children; that plaintiff did not want DSS to arrange visitation because of an alleged incident that occurred in January 2012 (referring to allegations at ¶s 197-204 of the Second AC, which are virtually identical to the allegations at ¶s 191-198 of the AC); and that DSS did not tell plaintiff about an upcoming religious celebration involving one of his children. Plaintiff also alleges that the Orange County Sheriff (not named as a defendant) served plaintiff will "false criminal charges" which led the Family Court to issue an "order of protection" and "eviction from his marital

home." (Second AC, ¶s 317-318) Plaintiff alleges that the service of these documents was in furtherance of the alleged conspiracy between the named defendants. The only new allegations against Bazile appear at ¶s 313-314 of the Second AC, where plaintiff alleges that Bazile sent plaintiff a letter informing him of a scheduled inquest in Family Court, and that the inquest was being held at the request of Bazile and DSS. There is not a single allegation in the entire complaint against defendant Christine Brunet. In essence, as it relates to the County Defendants, the Second AC is virtually identical to the AC.

Under FRCP 15(d), plaintiff may seek leave of Court to supplement an Amended Complaint to include events that have occurred since the earlier pleading was filed. The principles for granting leave to serve a supplemental pleading under FRCP 15(d) are essentially the same as those granting leave to amend under FRCP 15(a). "Generally, a district court has discretion to deny leave [to amend] for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party." *Holmes v. Grubman,* 568 F.3d 329, 334 (2d Cir.2009) (internal quotation marks and alterations omitted).

An amendment is deemed futile where it could be dismissed for failure to state a claim upon which relief may be granted. S*ee Milanese v Rust-Oleum Corp.,* 244 F.3d 104,110 (2d Cir. 2001. Therefore, in order for an amended pleading to be deemed meritorious, it must "plead enough facts to state a claim that is plausible on its face" *Ruotolo v City of New York.* 514 F.3d 184, 188 (2d Cir. 2008).

The motions to amend and supplement the AC should be denied. This court has already dismissed the complaint on the grounds that it does not have subject matter jurisdiction under Rooker-Feldman doctrine. The proposed Second AC contains no new facts that overcome this jurisdictional defect. Moreover, plaintiff did not cross-move to amend his AC in response to the

dismissal motions, and waited for almost three months after the AC was dismissed to make this motion, which was not authorized by the Memorandum Decision, and offers no excuse for his delay. "In determining whether to grant leave to amend, the Court should consider whether the motion is being made after an inordinate delay without adequate explanation, whether prejudice to the defendants would result, whether granting the motion would cause further delay, and whether the amendment would be futile." *Mountain Cable Co. v. Pub. Serv. Bd.,* 242 F.Supp.2d 400, 403 (D.Vt.2003) (citing *Grace v. Rosenstock,* 228 F.3d 40, 53-54 (2d Cir.2000)); *Velez v. Burge,* 483 Fed.Appx. 626, 2012 WL 1889402 (2d Cir. 2012).

The motion should be denied on futility grounds also because it does not cure the defects in the AC that the County defendants raised as additional grounds for dismissal. First, it does not allege that Bazile or Brunet had any personal involvement in the constitutional violations and thus fails to state a § 1983 claim against them. *See, Hernandez v. Goord,* 312 F.Supp.2d 537, 547 (S.D.N.Y. 2004) (complaint dismissed because "[p]laintiff fails to allege any specific claim of personal involvement against Goord; indeed, he does not mention him at all in the body of the complaint but for including his name in a lengthy list of defendants."), and cases cited in County Defendants MOL, annexed to the affirmation of David L. Darwin.

Second, the proposed Second AC does not allege the existence of an official municipal policy or custom, and thus continues to fail to state a claim against the County. *See, Ricciuti v. New York City Transit Authority,* 941 F.2d 119, 122 (2d Cir.1991), and cases cited in Point Ie of the County Defendants MOL.

Third, there are no new facts alleged in the Second AC that state a conspiracy claim against any of the County Defendants under either § 1983 or § 1985. (See MOL Point Ic and cases cited therein.)

Finally the proposed state law tort claims are futile because plaintiff did not serve a notice of claim as required by County Law § 52 and General Municipal Law § 50-e. *See, Hardy v. New York City Health & Hosp. Corp*, 164 F.3d 789 (2d Cir. 1999)(failure to comply with GML §50-e requires dismissal of state causes of action).[1]

CONCLUSION

For the foregoing reasons, the plaintiff's motions to amend and supplement his amended complaint should be denied in their entirety.

Dated: Goshen, NY
May 29, 2013

Respectfully submitted,

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CHRISTINE BRUNET, STEPHANIE
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[1] It is not clear whether plaintiff's "abuse of process" cause of action is raised under state or federal law. In either case the amendment is futile. If it is asserted as a § 1983 claim it would be dismissed for the reasons stated above. If it is asserted as a state law claim, it would be dismissed on notice of claim grounds and because it fails to plead a cause of action for abuse of process under N.Y. State law. See, e.g., *Savino v. City of New York,* 331 F.3d 63, 76 (2d Cir.2003)

483 Fed.Appx. 626, 2012 WL 1889402 (C.A.2 (N.Y.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 483 Fed.Appx. 626, 2012 WL 1889402 (C.A.2 (N.Y.)))

H

This case was not selected for publication in the Federal Reporter.

United States Court of Appeals,
Second Circuit.
John VELEZ, Plaintiff–Appellant,
v.
John W. BURGE, Supt. Elmira C.F., Hartke, Corr. Officer, Bruner, Corr. Officer, Defendants–Appellees,
Brian Fischer, Comm. NYS Docs, Jane Doe, Registered Nurse, Defendants.

No. 11–2897–pr.
May 25, 2012.

Background: Prisoner filed suit under § 1983 against superintendent and corrections officers. The United States District Court for the Western District of New York, 2011 WL 2565653 and 2011 WL 2470664,Arcara, J., adopted reports and recommendations of Jeremiah J. McCarthy, United States Magistrate Judge, 2011 WL 2489964 and 2011 WL 2489987, and entered summary judgment in defendants' favor and denied prisoner's motion to amend complaint to add defendant. Prisoner appealed.

Holdings: The Court of Appeals held that:
(1) denial of prisoner's motion to amend complaint to add captain as defendant was not abuse of discretion, and
(2) prisoner had no constitutional right against being falsely or wrongly accused of conduct that resulted in loss of protected liberty interest.

Affirmed.

West Headnotes

[1] Federal Civil Procedure 170A ⚿392

170A Federal Civil Procedure
170AII Parties
170AII(J) Defects, Objections and Amendments
170Ak392 k. Amendments. Most Cited Cases

Denial of prisoner's motion to amend complaint to add captain as defendant was not abuse of discretion, in action brought under § 1983, where he sought amendment 18 months after magistrate's deadline for amended pleadings, and he failed to show good cause for delay. 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rules 15(a)(2), 16(b)(4), 28 U.S.C.A.

[2] Constitutional Law 92 ⚿4824

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)11 Imprisonment and Incidents Thereof
92k4824 k. Discipline and classification. Most Cited Cases

Prisons 310 ⚿325

310 Prisons
310II Prisoners and Inmates
310II(H) Proceedings
310k322 Abuse of Proceedings; False or Wrongful Claims
310k325 k. Wrongful proceedings against prisoners; false misconduct reports. Most Cited Cases

Prisoner had no constitutional right against being falsely or wrongly accused of conduct that resulted in loss of protected liberty interest; rather, inmate had to show that he was deprived of due process during disciplinary hearing or that report was filed in retaliation for inmate's exercise of constitutional rights. U.S.C.A. Const.Amend. 5.

***627** Appeal from the judgment of the United States District Court 13 for the Western District of

483 Fed.Appx. 626, 2012 WL 1889402 (C.A.2 (N.Y.))
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New York (Arcara, J.).
UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**John Velez, pro se, Stormville, NY, for Plaintiff–Appellant.

Zainab A. Chaudhry, Assistant Solicitor General (Barbara D. Underwood, Solicitor General, Andrea Oser, Deputy Solicitor General, on the brief), for Eric T. Schneiderman, Attorney General of the State of New York, Albany, NY, for Defendant–Appellee.

PRESENT: DENNIS JACOBS, Chief Judge, DENNY CHIN, CHRISTOPHER F. DRONEY, Circuit Judges.

SUMMARY ORDER

****1** Plaintiff–Appellant John Velez appeals the dismissal on summary judgment of his complaint brought pursuant to 42 U.S.C. § 1983 and the denial of his motion to amend. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

[1] Denial of leave to amend is reviewed for abuse of discretion. *See Holmes v. Grubman,* 568 F.3d 329, 334 (2d Cir.2009); *see also Sims v. Blot,* 534 F.3d 117, 132 (2d Cir.2008) (A district court has abused its discretion if it based its ruling on an erroneous view of the law or on a ***628** clearly erroneous assessment of the evidence, or rendered a decision that cannot be located within the range of permissible decisions.) (internal citations, alterations, and quotation marks omitted). Although "[a] court should freely give leave [to amend] where justice so requires," Fed.R.Civ.P. 15(a)(2), this "must be balanced against the requirement under Rule 16(b) that the Court's scheduling order shall not be modified except upon a showing of good cause." *Holmes,* 568 F.3d at 334–35 (citation and internal quotation marks omitted); *see also* Fed.R.Civ.P. 16(b)(4).

Velez attempted to add Captain Hughes as a defendant 18 months after the magistrate judge's deadline for amending pleadings, and has not shown good cause for the delay. On this record, we cannot say that the district court abused its discretion in denying Velez's motion to amend. *See Grochowski v. Phoenix Constr.,* 318 F.3d 80, 86 (2d Cir.2003) (finding no abuse of discretion in denial of leave to amend where "[t]he plaintiffs delayed more than one year before seeking to amend their complaint" and, at the time they filed their motion, discovery had been completed and a summary judgment motion was pending).

We review orders granting summary judgment *de novo* and focus on whether the district court properly concluded that there was no genuine issue as to any material fact and the moving party was entitled to judgment as a matter of law. *See Miller v. Wolpoff & Abramson, LLP,* 321 F.3d 292, 300 (2d Cir.2003).

[2] It is well-settled that a "prison inmate has no constitutionally guaranteed immunity from being falsely or wrongly accused of conduct which may result in the deprivation of a protected liberty interest." *Freeman v. Rideout,* 808 F.2d 949, 951 (2d Cir.1986); *see also Boddie v. Schnieder,* 105 F.3d 857, 862 (2d Cir.1997) ("[A] prison inmate has no general constitutional right to be free from being falsely accused in a misbehavior report."). The inmate must show something more, such as that he was deprived of due process during the resulting disciplinary hearing, or that the misbehavior report was filed in retaliation for the inmate's exercise of his constitutional rights. *See Boddie,* 105 F.3d at 862; *Freeman,* 808 F.2d at 951. Velez urges us to revisit and reconsider these cases. We decline the invitation.

****2** Finding no merit in Velez's remaining arguments, we hereby **AFFIRM** the judgment of the district court.

C.A.2 (N.Y.),2012.
Velez v. Burge

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