

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
AFFIDAVIT**

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,

12-CV-02858 (VB)

Return Date:

Defendants.
-----X

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 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"). I am fully familiar with the
prior proceedings and papers filed in this action.

2. I submit this Declaration in order to marshal exhibits in support of defendant's motion to dismiss pursuant to F.R.C.P. 4(m) or, alternatively, F.R.C.P. 12(b)(1), F.R.C.P. 12(b)(5), and F.R.C.P. 12(b)(6).

3. The facts underlying these claims are fully set forth in the accompanying memorandum of law and in the moving papers of co-defendant Kiryas Joel Community Ambulance Corp.

4. Upon information and belief, after several incidents with defendants Child Protective Services, Department of Social Services of Orange County, and other law enforcement entities in 2010, plaintiff Jacob Teitelbaum was transported to a psychiatric evaluation facility by Hatzalah EMS and defendant, in his role as a member of the Hatzalah EMS squad.

5. Upon information and belief, in July 2011, Hatzalah EMS and defendant returned to the area of plaintiff's residence to return plaintiff to the psychiatric evaluation facility, but were denied entry to plaintiff's home. After Hatzalah EMS and defendant departed without plaintiff, plaintiff checked himself into the psychiatric unit at Arden Hill Hospital.

6. Upon information and belief, Arden Hill Hospital subsequently released plaintiff from custody on the sole condition that he not return to his

home. When plaintiff later violated this directive, plaintiff's wife contacted Hatzalah EMS and requested that they remove him from their marital home.

7. Upon information and belief, plaintiff commenced this action by filing a complaint, *pro se*, on April 11, 2012. As relevant to defendant, the complaint alleges federal law causes of action under 42 U.S.C. §1983 and 42 U.S.C. §1985, as well as state law claims for negligent infliction of emotional distress and intentional infliction of emotional distress.

8. As a preliminary matter, it is respectfully submitted that this Court should dismiss all claims against defendant due to plaintiff's failure to serve him with a copy of the amended complaint within 120 days of the filing of the initial complaint pursuant to Federal Rule of Civil Procedure Rules 12(b)(5) and 4(m). Upon information and belief, plaintiff filed the original complaint nearly nine months ago, and has yet to serve defendant with the amended complaint despite this Court's orders (dated 07/02/12 and 07/31/12) to effect proper service (see Exhibit A).

9. Should this Court decline to dismiss plaintiff's action against him for that reason, defendant is entitled to dismissal of the action against him as a result of plaintiff's failure to state a cause of action under 42 U.S.C. § 1983.

10. A claim arising under § 1983 cannot be successful unless the plaintiff shows that such injury was caused by a party acting under the “color of state law.” Indeed, the Supreme Court has held that 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.

11. Upon information and belief, plaintiff asserts claims against defendant only in his capacity as a member of Hatzalah EMS. It is undisputed that defendant was a member of Hatzalah EMS at all times while responding to calls for help at plaintiff’s residence (see Exhibit A). It is well settled that volunteer ambulance associations and their employees are not State actors for purposes of 42 U.S.C. §1983.

12. Upon information and belief, plaintiff has also failed to demonstrate the existence of a conspiracy between defendant and a state actor to inflict an unconstitutional injury in furtherance of causing plaintiff to suffer damages. Beyond mere conclusory allegations, which, as this Court is aware, are insufficient to sustain a claim alleging conspiracy under § 1983, plaintiff has not alleged any specific facts in furtherance of a claim of conspiracy.

13. Similarly, it is further submitted that this Court should dismiss plaintiff’s cause of action alleging damages under 42 U.S.C. § 1985. Plaintiff has

failed to allege that: (a) he was a member of a protected class; (b) that the defendants conspired to deprive him of his constitutional rights; (c) that the defendants acted with class-based, invidiously discriminatory animus; and (d) that he suffered damages as a result of the defendants' actions. To the extent that it can be said that plaintiff has alleged any of these prerequisites to suit, it is respectfully submitted that such allegations are conclusory in nature and insufficient to sustain a claim under § 1985 (3).

14. Plaintiff's claim sounding in the state law action of negligent infliction of emotional distress should also be dismissed. Such actions must be premised upon the breach of a duty owed to the plaintiff that either unreasonably endangers the plaintiff's physical safety or causes the plaintiff to fear for his or her own safety.

15. Upon information and belief, 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. There is no evidence that defendant impermissibly engaged in any conduct whereby plaintiff's physical safety was unreasonably endangered.

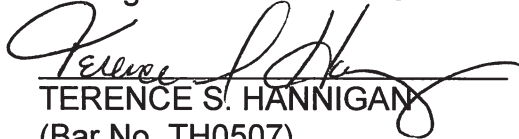
16. Finally, New York Public Health Law § 3013 (1) renders defendant immune from liability. Under that statute, a volunteer ambulance company and

its members are liable only for acts or omissions causing injury, death, or arising from gross negligence.

17. 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 deponent respectfully requests that this Court dismiss plaintiff's complaint pursuant to F.R.C.P. 4(m) or, alternatively, F.R.C.P. 12(b)(1), F.R.C.P. 12(b)(5), and F.R.C.P. 12(b)(6).

Dated: December 17, 2012

Hannigan Law Firm PLLC
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