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 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

12-CV-02858 (VB)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT DAVID RUBENSTEIN'S MOTION TO DISMISS

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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 amended complaint pursuant to Fed. R. Civ. P. 12(b)(5) and Fed. R. Civ. P. 4(m). Alternatively, should this Court determine that defendant was properly served, defendant submits that this Court should dismiss plaintiff's amended complaint under Fed. R. Civ. P. 12(b)(1) and 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; and (3) plaintiff has failed to state a claim for negligent infliction of emotional distress, together with such other and further relief as this Court deems just and proper.

STATEMENT OF FACTS

This is an action brought by plaintiff Jacob Teitelbaum individually and on behalf of his two children against defendant and others alleging federal claims under 42 U.S.C. § 1983 and 42 U.S.C. § 1985, as well as a state cause of action sounding in negligent infliction of emotional distress. According to the publicly available amended complaint, child "A" ingested an indeterminate amount of Tylenol in April 2010 (AC, p.8).[1] Plaintiff's wife called Hatzalah EMS – the volunteer ambulance organization to which defendant belongs – to come to plaintiff's residence for assistance (AC, p.8). Plaintiff's wife and Child "A" were

[1] All references preceded by "AC" are to the publicly available copy of the amended complaint. References to AC preceded by "p." are to the page number listed in blue at the top of the page.

then transported to Presbyterian Hospital (AC, p.8-9). Ddefendant Child Protective Services (hereinafter CPS) removed Child "A" and Child "B" from the custody of plaintiff and his wife on or about April 28, 2010 (AC, p.9), and defendant Orange County Department of Social Services (hereinafter DSS) initiated a neglect proceeding against plaintiff and his wife soon thereafter (AC, p.9). At this proceeding, the Family Court of Orange County determined, among other things, that plaintiff had neglected his children (AC, p.10). Nevertheless, Child "A" and Child "B" were returned to the custody of plaintiff and his wife on or about September 7, 2010 (AC, p.10).

After several other run-ins with CPS, DSS, and law enforcement (AC, p.9-13), the plaintiff was transported to a psychiatric evaluation facility by Hatzalah EMS and defendant, in his role as a member of the Hatzalah EMS squad (AC, p.14). Plaintiff was released from the hospital with the assistance of a friend (AC, p.14). 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 (AC, p.14). After Hatzalah EMS and defendant departed without plaintiff, plaintiff checked himself into Arden Hill Hospital (AC, p.14). Arden Hill Hospital released plaintiff from custody on the sole condition that he not return to his home – an order which he subsequently violated (AC, p.15). Plaintiff's wife then contacted Hatzalah EMS and requested that they remove plaintiff from their marital home (AC, p.15).

In January 2012, DSS filed a petition to terminate the parental rights of plaintiff and his wife (AC, p.25). This petition was later withdrawn following

psychiatric evaluations of both plaintiff and his wife (AC, p.25). Nevertheless, Child "A" and Child "B" remain in the custody of DSS, and have been placed in foster care with co-defendants Joel and Bluma Tennenbaum (AC, p.26).

On April 11, 2012, plaintiff commenced this action by filing a complaint, *pro se*. On June 20, 2012, he filed an Amended Complaint, pro se. Plaintiff has pleaded four separate causes of action, alleging claims 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 (AC, p.29-32). Notably, plaintiff has not asserted his fourth cause of action, for intentional infliction of emotional distress, against defendant (AC, p. 31-32).

ARGUMENT

POINT I

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.

Federal Rule of Civil Procedure Rule 12(b)(5) provides for dismissal of an action if service of process was not timely made in accordance with Federal Rule of Civil Procedure 4(m). Rule 4(m) states that the Court "must" dismiss an action if service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint. However, if the plaintiff can show good cause for the failure to timely effect service, a court will "extend the time for service for an appropriate period." Fed.R.Civ.P. 4(m).

The plaintiff bears the burden of showing that he or she had good cause in failing to serve the defendant in a timely manner. *See,* Fed.R.Civ.P. 4(m); *Mason Tenders District Council Pension Fund v. Messera*, No. 95 Civ. 9341, 1997 WL 221200, at *3 (S.D.N.Y. April 1, 1997). Good cause is measured against the plaintiff's reasonable efforts to effect service and the prejudice to the defendant resulting from the delay. *See e.g.*, *Motel 6 Sec. Litig. v. Hugh Thrashe*r, No. 93 Civ. 2183, 1995 WL 431326, at *2 (S.D.N.Y. July 20, 1995). In particular, the court should look to whether "the plaintiff was diligent in making reasonable efforts to effect service, including but not limited to whether plaintiff moved under FRCP 6(b)" for an extension of time in which to serve the defendant. *Gordon v. Hunt*, 835 F.2d 452, 453 (2d Cir. 1987). "'A mistaken belief that service was proper does not constitute good cause.'" *Sikhs for Justice v. Nath*, 10 CIV. 2940, 2012 WL 4328329 (S.D.N.Y. Sept. 21, 2012), *quoting Jonas v. Citibank, N.A.*, 414 F.Supp.2d 411, 416 (S.D.N.Y. 2006).

In this case, it has been nearly nine months since the filing of the original complaint. *Compare, Bay Harbour Mgt., LLC v Carothers*, 474 F.Supp.2d 501, 503 (S.D.N.Y. 2007) (This Court denied the plaintiff's request to file its amended complaint five months after the filing of its initial amended pleading). Plaintiff has not even attempted to serve the amended complaint upon defendant. *See, Point–Dujour v. U.S. Postal Serv.*, No. 02–CV–6840, 2003 WL 1745290, at *3 (S.D.N.Y. 2003) ("[W]here a party fails to take any affirmative step to serve its adversary, courts should refrain from granting that party more time to serve."); *Astarita v. Urgo Butts & Co.*, No. 96–CV–6991, 1997 WL 317028, at *4 (S.D.N.Y.

1997) (dismissing complaint pursuant to Rule 4(m) when "no effort ha[d] ever been made to effect formal service"); *see also, E. Refractories Co. v. Forty Eight Insulations, Inc.*, 187 F.R.D. 503, 505 (S.D.N.Y. 1999) (holding that plaintiff's failure to serve the defendant within 120 days was not excusable for good cause because plaintiff "failed to make any reasonable efforts to timely serve the amended complaint"). Good cause is generally found only in exceptional circumstances, where the plaintiff's failure to serve process in a timely manner was the result of circumstances beyond his or her control. *See, E. Refractories Co.*, 187 F.R.D. at 505.

Plaintiff's failure to effect proper service of the amended complaint is even more problematic in view of the two orders from this Court directing that the time by which defendant was required to answer was stayed pending service of the amended complaint (orders of the Court dated 07/02/12 and 07/31/12, respectively). To the credit of this Court, it assisted the plaintiff as best as it could by invoking its authority to order that service be made by a United States marshal. *See,* Fed.R.Civ.P. 4(c)(3). Notably, plaintiff's pro se status alone neither justifies an extension of time for him to serve defendant nor establishes good cause for failure to serve under Rule 4(m). *See, Rosano v. Adelphi Univ.*, 11-CV-0148 JS GRB, 2011 WL 8320457 (E.D.N.Y. 2011); *Jonas v. Citibank, N.A.*, 414 F.Supp.2d at 417; *Cioce v. County of Westchester*, 2003 WL 21750052, *4 (S.D.N.Y. 2003), *affd*, 128 Fed.Appx 181 (2d Cir. 2005). Accordingly, it is respectfully requested that this Court dismiss plaintiff's action

against defendant for plaintiff's failure to serve defendant with the amended complaint within 120 days of the filing of the initial complaint.

POINT II

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

Notwithstanding the fact that Plaintiff's failure to timely serve defendant warrants dismissal of this action, should this Court decline to dismiss plaintiff's action against defendant 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.[2] 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). This Court reiterated this standard in *Woodward v. Office of*

[2] As articulated in Point I, defendant maintains that he has not been served with the amended complaint. However, counsel for the defendant has reviewed the publicly-available complaint that plaintiff filed with the Office of the Clerk of this Court.

Dist. Atty., 689 F.Supp.2d 655, 658 (S.D.N.Y. 2010), where the Court held that "allegations that are no more than legal conclusions are not entitled to the assumption of truth." (*internal quotation marks and citation omitted*). 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.

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.'" *Hollman v. County of Suffolk*, 06-CV-3589 JFB ARL, 2011 WL 2446428 (E.D.N.Y. 2011), quoting, *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 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 (AC, p. 8-9). Plaintiff also avers that defendant abducted both he and his wife in an ambulance and worked with other Hatzalah EMS personnel to bring plaintiff to a hospital for psychiatric evaluation (AC, p. 14, 16-17). 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*, 06-CV-3589 JFB ARL, 2011 WL 2446428, *supra*; *Glowczenski v. Taser Int'l Inc.*, CV04-4052(WDW), 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 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*, 11-2474-CV, 2012 WL 2213658 (2d Cir. 2012); *Green v. City of Yonkers, N.Y.*, 10 CIV. 3653 JFK, 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 14th 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 III

THIS COURT SHOULD DISMISS PLAINTIFF'S CAUSE OF ACTION 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." *Di Costanzo v. Henriksen*, 1995 WL 447766 at *3 (S.D.N.Y. July 28, 1995); *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 II, *supra*), "conclusory allegations are not sufficient to state a claim against each of the individual defendants under [s]ection 1985." *Di Costanzo v. Henriksen*, 1995 WL 447766 at *3; *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 IV

PLAINTIFF'S FAILURE TO STATE A CLAIM FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS REQUIRES DISMISSAL OF THAT CAUSE OF ACTION.

Plaintiff has asserted a cause of action against defendant sounding in negligent infliction of emotional distress. 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." *Matthews v. Malkus*, 377 F. Supp. 2d at 361.

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 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 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 amended complaint, it is submitted that there is no evidence of any gross negligence on behalf of defendant. Therefore, should this Court decline to dismiss plaintiff's 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 amended complaint should be dismissed in its entirety as against defendant, and that this Court should order any other and further relief as it deems just and proper under the circumstances.

Dated: December 17, 2012

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