

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,

12-CV-02858 (VB)

Defendants.
-----X

**MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO AMEND
AND SUPPLEMENT THE COMPLAINT**

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PRELIMINARY STATEMENT

Defendant David Rubenstein respectfully submits this memorandum of law in opposition to plaintiff's motion to amend and supplement the complaint pursuant to Fed. R. Civ. P. 15(b)(2) and Fed. R. Civ. P. 15(d). 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, 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.

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. Defendant now opposes that

motion, and asserts that plaintiff has failed to allege facts sufficient to support his Section 1983 and 1985 claims against defendant in conformance with this Court's order.

ARGUMENT

THIS COURT SHOULD DISMISS PLAINTIFF'S CAUSES OF ACTION UNDER 42 U.S.C. § 1983 AND 42 U.S.C. § 1985 WITH PREJUDICE.

Plaintiff contends that this Court should allow him to amend and supplement his first amended complaint, and has provided this Court with a copy of his proposed second amended complaint. This Court previously granted plaintiff leave with respect to his Section 1983 and 1985 claims, only.

As a preliminary matter, it should be noted that plaintiff's reliance on Fed. R. Civ. P. 15(b)(2) is of no moment here, given that no trial has occurred in this action. Turning to Fed. R. Civ. P. 15(d), that provision allows a plaintiff to seek leave of court to supplement the previous complaint to include events that occurred after the date of the pleading sought to be amended. A court may deny such a motion based on undue delay, bad faith, dilatory tactics, undue prejudice to the party to be served with the proposed pleading, or futility of the proposed pleading. See Astra Aktiebolag v. Andrx Pharms., Inc., 695 F. Supp. 2d 21, 25 (S.D.N.Y. 2010). Mere conclusory allegations are not sufficient to state a claim under Section 1983 or 1985. See Parent v. New York, 786 F. Supp. 2d 516, 539 (N.D.N.Y. 2011); Williams v. Reilly, 743 F. Supp. 168, 173-74 (S.D.N.Y. 1990).

In this case, the allegations contained in plaintiff's proposed 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. The only new allegations with respect to those claims are that all of the defendants have impermissibly “influenc[ed] the judicial system” (Second Amended Complaint, at ¶¶ 385, 402). Even if these allegations were true, they 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. See Mian v. Donaldson, Lufkin & Jenrette Sec. Corp., 7 F.3d 1085, 1087 (2d Cir. 1993).

This Court foresaw the apparent futility of plaintiff’s efforts to assert any cognizable claim against defendant at page 12 of its February 2013 decision, when it noted: “it appears unlikely that plaintiff can sufficiently plead a Section 1983 claim against Kiryas Joel EMS or Rubenstein by further amending his complaint.” Indeed, plaintiff’s proposed Second Amended Complaint fails to allege any new facts sufficient to state a Section 1983 or 1985 claim against defendant.

To the extent that the proposed second amended complaint seeks to reassert causes of action sounding in intentional infliction of emotional distress, this Court already dismissed that cause of action as against defendant, and should deny plaintiff’s motion as being futile. See Astra Aktiebolag v. Andrx Pharms., Inc., 695 F. Supp. 2d at 25. To the extent that plaintiff now seeks to assert causes of action against defendant for wrongful eviction, false arrest, abuse of process, and cruel and inhuman treatment, defendant submits that such claims are similarly futile based upon the facts alleged and the case law cited in defendant’s motion to dismiss. Moreover, such new claims clearly fall outside the scope of leave granted to plaintiff by this Court in February 2013 with

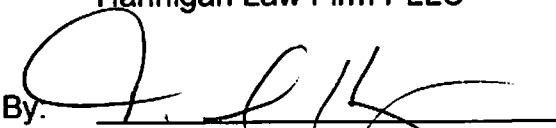
respect to Sections 1983 and 1985. Accordingly, this Court should deny plaintiff's motion and dismiss the complaint in its entirety with prejudice as against defendant.

CONCLUSION

Based on the foregoing, it is respectfully submitted that this Court should deny plaintiff's motion to amend and supplement his complaint, and dismiss the complaint in its entirety as against defendant with prejudice, together with any other and further relief as it deems just and proper under the circumstances.

Dated: May 10, 2013

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