

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
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.

-----X

**COUNTY DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS**

DAVID L. DARWIN
ORANGE COUNTY ATTORNEY

TABLE OF CONTENTS

Table of Authorities.....i

PRELIMINARY STATEMENT.....1

STATEMENT OF FACTS.....3

LEGAL ARGUMENT

**POINT I: THE AMENDED COMPLAINT MUST BE DISMISSED
BECAUSE IT FAILS TO STATE A CLAIM AGAINST THE
COUNTY DEFENDANTS UPON WHICH RELIEF MAY BE
GRANTED**.....8

a. The applicable standard in Rule 12(b)(6) motions to dismiss.....8

**b. The first cause of action fails to state a claim against the County
defendants**.....9

**c. The first and second causes of action fail to state a conspiracy
claim under § 1983 or § 1985**.....10

d. CPS and DSS are not proper parties to this action.....12

**e. The federal claims should be dismissed as against DSS and
CPS because Plaintiff has failed to allege the existence of an
unconstitutional municipal custom or policy**.....13

**POINT II: THIS COURT LACKS SUBJECT MATTER
JURISDICTION OVER THE FEDERAL CLAIMS UNDER
THE *ROOKER-FELDMAN* DOCTRINE**.....14

**POINT III: PLAINTIFF’S THIRD CAUSE OF ACTION MUST
BE DISMISSED AS AGAINST ALL COUNTY DEFENDANTS**16

**a. The failure to serve a notice of claim - a condition precedent
to the commencement of an action - requires dismissal**.....16

**b. The plaintiff has failed to plead a cognizable claim for
intentional infliction of emotional distress**.....17

CONCLUSION.....18

TABLE OF AUTHORITIES

Federal Cases

Atkins v. County of Orange, 251 F.Supp.2d 1225 (S.D.N.Y. 2003).....2

Barr v. Abrams, 810 F.2d 358 (2d Cir.1987).....10

Batista v. Rodriguez, 702 F.2d 393 (2d Cir.1983).....14

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955 (2007).....9, 11

Bernheim v. Litt, 79 F. 3d 318 (2d Cir.1996).....8

Brown v. City of Oneonta, New York 221 F.3d 329 (2d Cir. 2000).....11

Ciambriello v County of Nassau, 292 F.3d 307 (2d Cir. 2002).....11

City of Canton v. Harris, 489 U.S. 378, 109 S.Ct. 1197 (1989).....13

Clinton v. Broome County Department of Social Services,
3:06-Civ-1428, 2007 WL 2403199 (N.D.N.Y. Aug 17, 2007).....15

Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42 (2d Cir.1991).....2

De Jesus v. Sears, Roebuck & Co., Inc., 87 F.3d 65 (2d Cir.1996).....2

Dwares v. City of N.Y., 985 F.2d 94, 100 (2d Cir.1993).....11,13, 14

Fincher v. County of Westchester, 979 F.Supp. 989 (S.D.N.Y. 1997).....16

First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763 (2d Cir.1994),
cert. denied, 513 U.S. 1079 (1995).....8, 9

Gebhardt v. Allspect, Inc., 96 F.Supp.2d 331 (S.D.N.Y.2000).....9

Hafer v. Melo, 502 U.S. 21, 112 S.Ct. 358 (1991).....13

Hall v. City of White Plains, 185 F.Supp.2d 293 (S.D.N.Y.2002).....12

Hanig v. Yorktown Cent. School Dist., 384 F.Supp 2d 710 (S.D.N.Y. 2005).....9

Hardy v. New York City Health & Hosp. Corp., 164 F.3d 789 (2d Cir. 1999).....16, 17

Hernandez v. Coughlin, 18 F.3d 133 (2d Cir.1994),
cert. denied, 513 U.S. 836 (1994).....8

Hernandez v. Goord, 312 F.Supp.2d 537 (S.D.N.Y. 2004).....10

Hoblock v. Albany Cty. Bd. of Elections, 422 F.3d 77 (2d Cir. 2005).....14, 15

Hoisington v. Cnty. of Sullivan, 55 F.Supp.2d 212 (S.D.N.Y.1999).....12-13

Hucks v. Christopher Artuz, No. 99 Civ. 10420 RMB RLE, 2001 WL 210238 (S.D.N.Y. Feb. 27, 2001).....8

In Re Dayton, 786 F.Supp.2d 809 (S.D.N.Y. 2011).....12, 14, 17

Koch v. Yunich 533 F.2d 80 (2d Cir. 1976)..... 9, 10

Lee v. State, Dept. of Correctional Services, No. 97 Civ. 7112 DAB, 1999 WL 673339 (S.D.N.Y. Aug. 30, 1999).....2

Matthews v. Malkus, 377 F. Supp. 2d 350 (S.D.N.Y. 2005) 18

Mian v. Donaldson, Lufkin & Jenrette Sec. Corp., 7 F.3d 1085 (2d Cir.1993)11

Monell v. Department of Social Services of City of New York, 436 U.S. 658, 98 S.Ct. 2018 (1978)..... 12,13

Ostrer v. Aronwald, 567 F.2d 551 (2d Cir. 1977)..... 10

Phillips ex rel. Green v City of New York, 453 F.Supp.2d 690 (S.D.N.Y. 2006).....14

Powell v. Jarvis, 460 F.2d 551 (2d Cir. 1972)..... 10

Ricciuti v. New York City Transit Authority, 941 F.2d 119 (2d Cir.1991).....13

Swiekiewicz v. Sorema, N.A., 534 U.S. 506, 122 S.Ct 992 (2002) 11

Toussie v. Powell, 323 F.3d 178 (2d Cir. 2003).....11

U.S. Fidelity & Guaranty Co. v. Petroleo Brasileiro S.A.-Petrobras
No. 98 Civ. 3099 JGK, 2001 WL 300735 (S.D.N.Y. Mar. 27, 2001).....2

U.S. S.E.C. v. Mudd, --- F.Supp.2d ----, No. 11 Civ. 09202 PAC, 2012 WL 3306961 (S.D.N.Y. Aug. 10, 2012).....10

Wyatt v. County of Putnam, 75 A.D.2d 850, 427 N.Y.S. 2d 847 (2d Dept. 1980)12

Yapi v. Kondratyeva, No. 07-Civ-4800, 340 Fed.Appx. 683, 2009 WL 2030359 (2d Cir. July 10, 2009).....14,15

State Cases

Bardi v. Warren County Sheriff's Dept. 194 A.D.2d 21, 603 N.Y.S. 2d 90
 (3d Dept.,1993)17

Chapman v. State, 261 A.D.2d 814, 690 N.Y.S. 2d 328 (3d Dept., 1999)..... 16

Matter of Kondratyeva v. Yapi, 13 A.D.3d 376, 788 N.Y.S.2d 396 (2d Dept. 2004).....14

Tom Sawyer Motor Inns v. Chemung County Sewer District No. 1,
 33 A.D.2d 720 (3rd Dep't 1969).....12

Other Authorities

Fed. R. Civ. P. 10(c).....2

County Law §51.....12

County Law § 52.....16

General Municipal Law § 50-e.....17

General Municipal Law § 50-i.....17

2 James Wm. Moore, *Moore's Federal Practice* ¶ 12.34[1][b] (3d ed.1997).....9

PRELIMINARY 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. A conference was held in this Court before the Hon. Vincent Briccetti on July 2, 2012, at which plaintiff seemed to seek preliminary relief relating to the allegations raised in the Complaint and in a subsequent letter addressed to the Court amplifying those allegations. At that conference the Orange County Attorney explained to the Court that the issues raised by plaintiff in the Complaint were the subject of ongoing proceedings in Orange County Family Court. This Court declined to grant plaintiff any relief and allowed defendants 30 days from service of the AC to move or answer with respect thereto. Pursuant to an agreement between Plaintiff and this office, these answering defendants have until October 8, 2012 to answer or move with respect to the AC.

Defendants Child Protective Services of Orange County ("CPS"), Department of Social Services of Orange County ("DSS"), Christine Brunet and Stephanie Bazile (s/h/a Stephanie Bazileor) (hereinafter referred to collectively as "the County defendants") move herein to dismiss the AC pursuant to Rule 12(b)(1) and (6) of the Fed. R. of Civil P. on the grounds that 1) the AC fails to state a claim upon which relief may be granted; 2) the Court lacks subject matter jurisdiction over the claims asserted in plaintiff's first and second causes of action under the *Rooker-Feldman* doctrine; 3) CPS and DSS are not proper parties to this action; and 4) as to the State law claim contained in the third cause of action, that it is barred in that the plaintiff failed to serve a notice of claim - a condition precedent to commencing an action under State law.

In the AC plaintiff references several documents and/or Family Court proceedings, upon which plaintiff relies and that are integral to his complaint. The Court may consider these documents in assessing the sufficiency of the complaint without converting the motion into one

for summary judgment under FRCP Rule 56. *See, Atkins v. County of Orange*, 251 F.Supp.2d 1225 (S.D.N.Y. 2003):

In assessing the legal sufficiency of a claim, the court may consider those facts alleged in the complaint, documents attached as an exhibit thereto or incorporated by reference, *see Fed. R. Civ. P. 10(c); De Jesus v. Sears, Roebuck & Co., Inc.*, 87 F.3d 65, 69 (2d Cir.1996), and documents that are “integral” to plaintiff’s claims, even if not explicitly incorporated by reference. *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 46-48 (2d Cir.1991); *Lee*, 1999 WL 673339, at *2 n. 4; *see United States Fidelity & Guaranty Co. v. Petroleo Brasileiro S.A.-Petrobras*, No. 98 Civ. 3099, 2001 WL 300735, at *2 (S.D.N.Y. Mar. 27, 2001) (“the Court can consider documents referenced in the complaint and documents that are in the plaintiffs’ possession or that the plaintiffs knew of and relied on in their suit.”).

Accordingly, the following Orange County Family Court documents referenced or relied upon by plaintiff in the AC are attached to the accompanying Declaration of David L. Darwin, Esq.: **A)** summons and child neglect petition dated April 28, 2010 (AC, p. 9); **B)** Order Authorizing Service of Papers in a Mental Hygiene Facility (AC - p. 9); **C)** Order on Application for Temporary Removal of Child (AC p. 9); **D)** Order of Fact-Finding and Disposition as to Jacob Teitlebaum dated September 16, 2010 (AC - p. 10); **E)** Order (Adjournment in Contemplation of Dismissal) as to Miriam Teitlebaum dated September 16, 2010 (AC- p. 10); **F)** Permanency Hearing Order dated 8/2/11; **G)** Application to Restore Case Adjourned In Contemplation of Dismissal as to Miriam Teitlebaum); **H)** motion and Order to Show Cause to find plaintiff in violation of the 9-16-10 dispositional order (AC p. 11); **I)** Order finding plaintiff in willful violation of the dispositional order dated February 3, 2011 (AC - p. 11); **J)** Order modifying unsupervised visitation dated September 22, 2011 (AC, pp. 13, 17-18 and Exhibit “A” to the AC); **K)** Decision and Order dated 2/8/12 denying plaintiff’s motion to declare DSS actions politically motivated as frivolous (AC - pp. 23-24); **L)** Summons and Petition for Termination of Parental Rights (“TOPR”) dated January 25, 2012 (AC - p. 25); **M)** Plaintiff’s Affidavit in Opposition to Petition to Terminate Parental Rights dated February 7, 2012 (AC - p.

25); N) Order Withdrawing TOPR Petition (AC- p. 25); O) Orange County Local Law No. 3 of 1998.¹

STATEMENT OF FACTS²

Plaintiff is a resident of the Town of Monroe, located in Orange County, New York. He alleges that he is the victim of a campaign of intimidation, harassment and kidnappings in furtherance of a conspiracy by the defendants, including the County defendants, who forced him to separate from his wife, and who deprived him of custody of his two infant children (“child ‘A’ and child ‘B’” because of his involvement in a religious campaign “against forced divorces.” Plaintiff’s religious campaign began on or about March, 2010. (AC - pp. 2, 7)

In April, 2010, plaintiff’s child “A” was found by plaintiff’s wife playing with an open bottle of Tylenol, having apparently ingested an unknown quantity of the medication. The child was taken by ambulance to the hospital by defendant Rubenstein, a Kiryas Joel EMS volunteer. Child “B” was taken from plaintiff’s home by defendant Rubenstein while plaintiff’s wife was committed to a mental health unit of a hospital. (AC - pp.7-8) Defendant CPS determined that the children were at imminent risk and both children were removed from the custody of plaintiff and his wife on an emergency basis, on the basis of suspected child neglect. (Child Neglect Petition, Darwin Declaration, Exhibit "A"; Order On Application For Temporary Removal of Child, Darwin Declaration Exhibit "C", ¶ 1 ¶s 6 and 7).

A petition charging plaintiff and his wife with child neglect was filed against plaintiff and his wife in Orange County Family Court. (Darwin Declaration, Exhibit "A"). At a preliminary

¹ The Court may also take judicial notice of these documents. *In Re Dayton v. City of Middletown, et al*, 786 F.Supp.2d 809, 814 (S.D.N.Y. 2011).

² For purposes of this motion only, the factual allegations of the complaint must be assumed to be true. See, *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir.1994), *cert. denied*, 513 U.S. 836 (1994).

hearing in Family Court on or about April 29, 2010, Family Court Judge Andrew P. Bivona found that the "children appear to suffer from abuse or neglect by the parents" and that continued removal of the children "is necessary to avoid imminent danger to the children's life or health." (Darwin Declaration, Exhibit "C", ¶ C. The Court ordered the children placed in DSS custody. (*Id.*) Defendant Burke was assigned as legal counsel for plaintiff by the Court on or about May 5, 2010. (AC - p. 9)

A dispositional hearing was held in Family Court on or about August 16, 2010. (Darwin Decl. Exhibits "D" and "E".) Plaintiff and his wife were represented by counsel. The children were represented by defendant Christine Pavlovic, Esq. of defendant Children's Rights Society. DSS was represented by defendant Bazile, an assistant county attorney with the Office of David L. Darwin, Orange County Attorney. (Darwin Decl. Exhibit "D") Plaintiff consented to a finding of neglect (AC - p. 10; Order of Fact Finding and Disposition, Darwin Decl. Ex. "D") while his wife was granted an adjournment in contemplation of dismissal. (AC- p.10; Order/Adjournment In Contemplation of Dismissal, Darwin Decl. Ex. "E"). The Court ordered that the children were not to be left alone with plaintiff and plaintiff have supervised visitation on at least a weekly basis. (Darwin Decl. Ex. "D" and "E") As a condition of the Order, plaintiff willingly accepted supervision over his household by DSS for at least one year. (Darwin Decl. Exh. "D") The Court entered a finding that the children were neglected. (*Id.*) Both parents were ordered to undergo mental health evaluations and to attend parenting classes. (Darwin Decl. Ex. "D" and "E") The dispositional orders placed the entire household under the supervision of DSS. (Darwin Decl. Ex. "D" and "E") Plaintiff's attorney told plaintiff that if he wanted his children returned, he must keep medications out of the reach of his children. (AC, p. 11)

At some point in time, Plaintiff was being treated by a psychiatrist, Rabbi Dr. Price, who prescribed psychotropic medication for plaintiff. (AC - p. 13)

The dispositional order allowed the children to be returned to the family home on a trial basis. According to plaintiff the children were returned home on or about September 7, 2010. (AC- p. 10) Shortly thereafter, on or about September 15, 2010, child "B" failed to wake up from his nap as a result of having ingested plaintiff's psychotropic medication, Zyprexa, and was taken, apparently unconscious, to the hospital by defendant Hatzalah EMS to Westchester Medical Center. (AD, pp. 10-11). The child was admitted to Fareri Children's Hospital at WMC. (Darwin Decl. Exh. "G" and "H")

On or about October 21, 2010 an application was filed in Family Court asking the Court to suspend unsupervised visitation between the children and plaintiff's wife on the basis that she had violated the terms of the Order of Adjournment In Contemplation of Dismissal by leaving her child unsupervised. (Darwin Decl. Exh. "G"). At about the same time, an application was filed against plaintiff in Family Court on October 25th, 2011 alleging that plaintiff had willfully violated the terms of the Court's order that required plaintiff to keep medications out of the reach of his children. (AC, p. 11; (Darwin Dec. Ex. "H") Plaintiff was advised by his attorney to admit to the violation in order to have his children returned to him. Although Plaintiff denies in the AC that the child ingested the medication (AC - p. 11), he admitted in Family Court that he failed to properly secure the medication, (Darwin declaration, Exhibit "I"). The Court found plaintiff "willfully and without just cause disobeyed and failed to obey" the Dispositional Order. (*Id.*) and ordered that the children be placed in foster care under DSS custody (*Id.*). Plaintiff was ordered "to remain under the supervision of a child protective services agency, social services official or duly authorized agency." (*Id.*) Pursuant to an order of the Family Court,

Plaintiff's wife was allowed visitation every Friday, provided that plaintiff was not present during the visits. (AC- p. 13)

On July 18, 2011, plaintiff was taken by defendant Rubenstein and other EMS personnel to a mental institution (Bellvue Hospital Center). He was released the following day on the condition that he not return to his home. However, defendant Rubenstein and others chased plaintiff and attempted to abduct him. State police intervened, and plaintiff voluntarily sought a mental health evaluation at Arden Hill Hospital. He was told that he did not need to be institutionalized, and was released on the condition that he not return to his home. Against this direction, plaintiff returned to his home, whereupon his wife called the State Police and asked them to remove plaintiff from his home. She was told they did not have the authority to do so and that she must seek relief in Family Court. (AC-pp. 14- 15)

On or about September 8, 2011, plaintiff's wife was hospitalized for mental illness for approximately 2½ weeks. (AC - p. 16) Subsequently, she was taken to Horton Hospital on October 6, 2011 and released the same day. (AC - p. 17) On October 21, 2011, plaintiff's wife disregarded the terms and conditions of visitation imposed by Family Court by allowing her two children unsupervised contact with plaintiff at a synagogue. (AC- p. 17)

On September 22, 2011 DSS filed a motion in Family Court to modify an August 2, 2011 Permanency Hearing Order (Darwin Dec. Ex. F) and suspend unsupervised visitation between Mrs. Teitlebaum and the children. (Darwin Decl. Ex. G) She and the children were represented by counsel. The Court found that the mother suffered from mental illness and exhibited bizarre behavior, and that the safety of the children required modification of the unsupervised visitation. The Court ordered that that plaintiff's wife have two hours of supervised visitation at the mother's

home, in addition to one and one-half hours supervised visitation under the prior Permanency Hearing Order. (Decision and Order dated September 22, 2011, Darwin Decl. Ex. "J")

Plaintiff filed a motion in Family Court on or about December 11, 2011, in which he sought to "stop Defendant DSS's politically motivated actions" and a declaration from the Court that DSS involvement with his children was "based on political reasons." (AC-18) In a decision and order dated February 8, 2012, (Darwin Decl. Exh. "K") the motion was denied by the Court as "frivolous." The Court found that plaintiff

has already consented to a finding of neglect regarding his children and then admitted to violating the Court's order of disposition. There is clearly no merit to any allegations of political motivations on the part of Orange County Department of Social Services Child Protective Services. Mr. Teitlebaums's allegations have no basis in fact but are based solely on suspicion and conjecture. It appears that Mr. Teitlebaum is so enmeshed in his religious battle that he cannot see reality. It is reality that when medication is left where a one year old child can have access to it that the child will ingest it. It is reality that a child can die as a result of that ingestion. To suggest that proceedings brought on behalf of a one year old who has ingested his father's bi-polar medication and been seriously ill as a result of same are politically motivated because of a religious dispute indicates a serious lack of understanding of the legal process. Such a motion, in the realm of law, is frivolous and is therefore denied.

In January, 2012, a petition was filed in Family Court to terminate the parental rights of plaintiff and his wife. (Darwin Decl. Ex. "L") The Family Court ordered a mental evaluation of plaintiff and his wife. (AC - p. 25) Plaintiff's attorney did not object to his undergoing a mental evaluation (AC- p. 25). The attorney for plaintiff's wife in the Family Court proceedings, Maria Petrizio, advised Mrs. Teitlebaum "several times" that it was in her best legal interest to live in a separate home" from plaintiff, and that if she continued to reside with plaintiff her "parental rights could be terminated." (AC- Exhibit "B").

Plaintiff filed an affidavit in opposition to the motion. (Darwin Decl. Exh. "M") Many of the same allegations contained in the AC are included in plaintiff's affidavit, including a

reprise of his accusations - already rejected by the Court - that DSS actions were politically motivated. The Petition was withdrawn based upon the findings of the mental health evaluation.

At virtually every stage of the Family Court proceedings, plaintiff and his wife were represented by counsel. Every determination with respect to custody, visitation and mental health evaluation and treatment attributed by plaintiff to defendants were pursuant to orders of the Family Court.

LEGAL ARGUMENT

POINT I

THE AMENDED COMPLAINT MUST BE DISMISSED BECAUSE IT FAILS TO STATE A CLAIM AGAINST THE COUNTY DEFENDANTS UPON WHICH RELIEF MAY BE GRANTED

a) The applicable standard in Rule 12(b)(6) motions to dismiss.

A motion to dismiss under Rule 12(b)(6) should be granted “only if it appears beyond doubt that ‘no relief could be granted under any set of facts that could be proved consistent with the allegations.’” *Hucks v. Artuz*, 2001 WL 210238, 3 (S.D.N.Y. 2/27/01), *citing*, *Bernheim v. Litt*, 79 F. 3d 318, 321 (2d Cir.1996). In reviewing a Rule 12(b)(6) motion, this Court must accept the factual allegations of the complaint as true and must draw all reasonable inferences in favor of the plaintiff. See, *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir.1994), *cert. denied*, 513 U.S. 836 (1994).

“However, a court does not have to accept as true conclusions of law or unwarranted deductions of fact.” *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771 (2d Cir.1994), *cert. denied*, 513 U.S. 1079 (1995). “In order to avoid dismissal, plaintiff must do more than plead mere “[c]onclusory allegations or legal conclusions masquerading as factual conclusions.” *Gebhardt v. Allspect, Inc.*, 96 F.Supp.2d 331, 333 (S.D.N.Y.2000) (quoting 2

James Wm. Moore, Moore's Federal Practice ¶ 12.34[1][b] (3d ed.1997). See also, *Hanig v. Yorktown Sch. Dist.*, 384 F. Supp. 2d 710 ((S.D.N.Y. 2005); *Koch v. Yunich* 533 F.2d 80, 85 (2d Cir. 1976) (“Complaints relying on the civil rights statutes are plainly insufficient unless they contain some specific allegations of fact indicating a deprivation of civil rights, rather than state simple conclusions.”). “[C]ourts do not accept conclusory allegations on the legal effect of the events plaintiff has set out if these allegations do not reasonably follow from his description of what happened....”) *First Nationwide Bank, supra*, 27 F.3d at 772. “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)(internal citations omitted).

b. The first cause of action fails to state a claim against the County defendants.

In his first cause of action under 42 U.S.C. § 1983 plaintiff claims that he was deprived of his due process rights under the 14th Amendment by defendants “individually and in cooperation with each other” in that they did “facilitate and in fact confine Plaintiff to Bellvue Hospital Center” and that “they sought to and have deprived the Plaintiff of custody and reasonable and unfettered access to his children.” (AC- p. 29).

The § 1983 claims against Bazile and Brunet must be dismissed. Other than identifying Bazile as “an agent of DSS” and Brunet as “an agent of CPS”, there is not a single, specific factual allegation against either of them in the entire complaint that they acted in their individual capacities to illegally confine plaintiff to the hospital or to deprive plaintiff of custody of his children. To the contrary, the Family Court proceedings establish that every determination relative to custody and visitation was made pursuant to a lawful order of the Family Court after

affording plaintiff, who at all times was represented by counsel, a full and fair opportunity to be heard. There is not a single allegation that either Bazile or Brunet were even aware of plaintiff's religious campaign or had any personal involvement with the spate of kidnappings, abductions and incidents attributed to the other defendants that led to the hospitalizations of plaintiff and his wife. *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."); *U.S. S.E.C. v. Mudd*, --- F.Supp.2d ----, 2012 WL 3306961 (S.D.N.Y. 2012) ("[t]o state a facially plausible claim, a plaintiff must plead 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged....A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.' (internal citation omitted).

See, also, Barr v. Abrams, 810 F.2d 358 (2d Cir.1987):

Barr charges that the Assistant Attorneys General violated his rights in that they threatened witnesses, unlawfully seized property, submitted false statements to courts, told persons that he had engaged in fraud and sham, and illegally conspired with the Internal Revenue Service. These claims were properly dismissed for vagueness. As we have repeatedly held, complaints relying on the civil rights statutes are insufficient unless they contain some specific allegations of fact indicating a deprivation of rights, instead of a litany of general conclusions that shock but have no meaning. *See Ostrer v. Aronwald*, 567 F.2d 551, 553 (2d Cir.1977); *Koch v. Yulich*, 533 F.2d 80, 85 (2d Cir.1976); *Powell v. Jarvis*, 460 F.2d 551, 553 (2d Cir.1972). Accordingly, we need not reach any of the alternative grounds relied on by the district court in rejecting these claims.

c. The first and second causes of action fail to state a conspiracy claim under § 1983 or § 1985.

To the extent that the first cause of action purports to state a § 1983 conspiracy claim (that the County defendants conspired with the other defendants to deprive him of his due

process rights) it must be dismissed as well. *See, Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (“we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.”). Plaintiff’s purely conclusory allegations that the County defendants acted in concert with the other defendants to deprive plaintiff of his Constitutional rights is insufficient to survive a motion to dismiss. In order to survive a motion to dismiss on his § 1983 conspiracy claim, plaintiff must allege “(1) an agreement between a state actor and a private party; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages....” In addition, “complaints containing only conclusory, vague, or general allegations that the defendants have engaged in a conspiracy to deprive the plaintiff of his Constitutional rights are properly dismissed.” *Ciambriello v. County of Nassau*, 292 F.3d 307, 324-325 (2d Cir. 2002), citing *Dwares v. City of N.Y.*, 985 F.2d 94, 100 (2d Cir.1993).³

The elements of a claim under §1985(3) are: “(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, ...; (3) an act in furtherance of the conspiracy; (4) whereby a person is ... deprived of any right of a citizen of the United States.” *Brown v. City of Oneonta, New York*, 221 F.3d 329 (2d Cir. 2000), citing, *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir.1993) 7 F.3d at 1087. The conspiracy must be motivated by racial animus. *See id.* at 1088.

³ In *Hernandez v Goord*, 312 F. Supp., at 546, the court acknowledged that “the Second Circuit recently wrote that the standard set forth in *Dwares* may present too high a pleading burden for a plaintiff, and is overruled to the extent that it is inconsistent with *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002)]... Just how *Swierkiewicz* affects the pleading requirements for Section 1983 actions remains uncrystallized in the Second Circuit. *See Toussie v. Powell*, 323 F.3d 178, 185 n. 3 (2d Cir.2003) (“[W]e do not have occasion to examine the pleading requirements for § 1983 conspiracy claims. In particular we do not consider whether our previous statements on the pleading requirements for such conspiracy allegations, ... [requiring more than conclusory allegations to avoid dismissal] ... remain valid in light of ... *Leatherman* ... and *Swierkiewicz*” However, *Ciambriello* was decided after *Swierkiewicz* and cites *Dwares* with approval. In any event, the complaint in the case at bar fails to meet even the pleadings standard set forth in *Swierkiewicz*.”

The § 1985 claim must be dismissed for the same reasons that require dismissal of the § 1983 claim. Moreover, there is no allegation that plaintiff was subjected by defendants to disparate treatment because of racial or religious animus. Plaintiff never even identifies his religious faith. His complaint is that he was deprived of due process of law, and is more fairly characterized as a politically motivated violation of his First Amendment right to free speech, not religious discrimination. As such, it is not actionable under § 1985(3) and the second cause of action should be dismissed.

d. CPS and DSS are not proper parties to this action.

A municipal division or department may not be held liable separate from the municipality. *See County Law §51; Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978). County Law §51 states that “[a]ctions or proceedings by or against a county shall be in the name of the county.” Based on the foregoing provision, New York courts have held that a county department is not a legal entity capable of being sued, since an internal department of the county is merely an administrative unit of county government, lacking a separate legal existence apart from the county. *See Wyatt v. County of Putnam*, 75 A.D.2d 850, (2d Dept. 1980); *Tom Sawyer Motor Inns v. Chemung County Sewer District No. 1*, 33 A.D.2d 720 (3rd Dep’t 1969). Accordingly, the claims against DSS and CPS must be dismissed. *In Re Dayton v. City of Middletown, et al*, 786 F.Supp.2d 809 (S.D.N.Y. 2011). *See, Hall v. City of White Plains*, 185 F.Supp.2d 293, 303 (S.D.N.Y. 2002) (“Under New York law, departments which are merely administrative arms of a municipality, do not have a legal identity separate and apart from the municipality and cannot sue or be sued.”); *Hoisington v. Cnty. of Sullivan*, 55 F.Supp.2d 212, 214 (S.D.N.Y.1999) (“[M]unicipal departments like the Department of Social Services are not amenable to suit, and no claims lie directly against the Department.”)

e. The federal claims should be dismissed as against DSS and CPS because Plaintiff has failed to allege the existence of an unconstitutional municipal custom or policy.

Although, where a plaintiff improperly names a municipal department as a defendant, the Court may grant leave to amend the complaint to allow the plaintiff assert claims against the municipality, or substitute the municipality for the improperly named defendants, *In Re Dayton*, 786 F. Supp. at 819, that remedy does not apply in this case because plaintiff has failed to plead the existence of a municipal policy or custom - an essential element of a § 1983 claim against a municipality.

In order to hold a municipality liable under §1983 a plaintiff “must show that the violation of his constitutional rights resulted from a municipal custom or policy.” *Ricciuti v. New York City Transit Authority*, 941 F.2d 119, 122 (2d Cir.1991); *see Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978); *City of Canton v. Harris*, 489 U.S. 378, 389 (1989). “Similarly, there must be proof of such a custom or policy in order to permit recovery on claims against individual municipal employees in their official capacities, since such claims are tantamount to claims against the municipality itself.” *Dwares v. City of N.Y.*, 985 F.2d 94, 100 (2d Cir.1993), *citing*, *Hafer v. Melo*, 502 U.S. 21 (1991).

The AC does not contain a single allegation of the existence of a municipal policy or custom of depriving parents of constitutional rights in Family Court proceedings. Nor are there any facts alleged from which such a policy or custom may be inferred. *Ricciuti v. New York City Transit Authority*, 941 F.2d at 123. “The mere assertion, however, that a municipality has such a custom or policy is insufficient in the absence of allegations of fact tending to support, at least

circumstantially, such an inference.” *Dwares v. City of N.Y.*, 985 F. Supp. at 100, citing, *Batista v. Rodriguez*, 702 F.2d 393, 397 (2d Cir.1983).⁴

POINT II

THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THE FEDERAL CLAIMS UNDER THE *ROOKER-FELDMAN* DOCTRINE

This Court lacks jurisdiction to function as an appellate court and review and vacate orders issued by the Family Court under the *Rooker-Feldman* doctrine. The *Rooker-Feldman* doctrine provides that federal courts lack jurisdiction over lawsuits “that are, in substance, appeals from state court judgments.” *Hoblock v. Albany Cty. Bd. of Elections*, 422 F.3d 77, 84 (2d Cir. 2005). The Second Circuit has adopted a four-part test for the application of the *Rooker-Feldman* doctrine: (1) The federal court plaintiff must have lost in state court; (2) the state court judgment must have been rendered before the district court proceedings commenced; (3) plaintiff must complain of injuries caused by a state court judgment; and (4) plaintiff must invite district court review and rejection of that state court judgment. See *Yapi v. Kondratyeva*, No. 07-Civ-4800, 340 Fed.Appx. 683, 2009 WL 2030359 (2d Cir. July 10, 2009); *Phillips v City of New York*, 453 F.Supp.2d 690, 713 (S.D.N.Y. 2006); *Matter of Dayton v. City of Middletown*, *supra*.

In *Yapi*, the Kings County Family Court entered an order awarding custody of minor children to their mother, as well as an order of protection against the father. See *Kondratyeva v. Yapi*, 13 A.D.3d 376 (2d Dept. 2004). Plaintiff claimed that the Court’s rulings against him were erroneous and violated his constitutional and parental rights. See *Yapi v. Kondratyeva*, No. 07-Civ-5868, 2007 WL 1974308 (S.D.N.Y. July 9, 2007)(DC). The Second Circuit affirmed the

⁴ Plaintiff’s fourth cause of action for intentional infliction of emotional distress appears to be directed only against non-County defendants but should be dismissed on the same grounds if it were construed to be asserted against the County defendants.

District Court's decision dismissing the matter based on the *Rooker-Feldman* doctrine, among other grounds for dismissal. See *Yapi*, 2009 WL 2030359, *1. In its decision, the Second Circuit noted that *Rooker-Feldman* applied since Mr. Yapi lost in State Court; that "his complaint sought redress for injuries arising out of these decisions;" that State Court proceedings were final before the §1983 case was commenced; and that "his complaint sought review of the state court proceedings, which he alleged were based on prejudice and falsehoods." *Id.*

Here, the plaintiff is raising issues virtually identical to those already decided by the Family Court prior to the commencement of this action. He consented to a finding of neglect, resulting in a succession of orders removing the children from his home and placing them in DSS custody. He was ordered to undergo mental health evaluations. He moved in Family Court for an order declaring that the actions of the defendants were politically motivated based on his so-called religious campaign and which are identical to the claims raised in this federal action. That motion was denied by the Family Court as frivolous.

The Family Court orders are inextricably intertwined with this Federal Court action. See *Clinton v. Broome County Department of Social Services*, 06-Civ-1428, 2007 WL 2403199 (N.D.N.Y. Aug 17, 2007)("Plaintiff's present claims of denial of due process and access to courts" are inextricably intertwined with the state court judgment.")(citing *Hoblock v. Albany County Bd. of Elections*, 422 F.2d 77, 84 (2d Cir. 2005)(Federal claim asserting an injury based on a state judgment that, in essence, seeks reversal of that judgment is "inextricably intertwined with it).

The *Rooker-Feldman* doctrine squarely applies here: Plaintiff lost in Family Court in that a finding of neglect was issued against him, with his consent; his children were removed from his custody and his visitation privileges were limited and modified by successive Court Orders

after Court proceedings. This Complaint seeks redress for injuries arising from the finding of neglect, the removal of his children from his home and, as plaintiff alleges, “deny him custody and unreasonable, unfettered access to his children” (AC, pp. 29 and 30). Accordingly, the complaint should be dismissed.

POINT III

PLAINTIFF’S THIRD CAUSE OF ACTION MUST BE DISMISSED AS AGAINST ALL COUNTY DEFENDANTS

a. The failure to serve a notice of claim - a condition precedent to the commencement of an action - requires dismissal.

Plaintiff failed to serve a timely notice of claim with respect to the allegations grounded in State law in his third cause of action, alleging intentional infliction of emotional distress, as required by County Law § 52 and General Municipal Law § 50-e, prior to commencing this action against the County. Since “a failure to file a claim or notice of claim within the 90-day period constitutes a non-waivable jurisdictional defect depriving the court of subject matter jurisdiction,” *Chapman v. State*, 261 A.D.2d 814, 690 N.Y.S.2d 328 (3rd Dept. 1999) (citations omitted), the present matter should be dismissed. 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; *Fincher v. County of Westchester*, 979 F.Supp. 989 (S.D.N.Y. 1997)(same).

County Law § 52 states in pertinent part:

1. Any claims or notice of claim against a county for damage, injury or death or for invasion of personal or property rights, of every name and nature, and whether casual or continuing trespass or nuisance and any other claim for damages arising at law or in equity, alleged to have been caused or sustained in whole or in part by or because of any misfeasance, omission of duty, negligence or wrongful act on the part of the county, its officers, agents, servants or employees, must be made and served in compliance with section 50(e) of the general municipal law.

GML § 50-e states in pertinent part:

(a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation . . . the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises . . .

GML § 50-i states (with emphasis added):

No action or special proceeding shall be prosecuted or maintained against a city, county, town, village, fire district or school district for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city, county, town, village, fire district or school district or of any officer, agent or employee thereof . . . unless (a) a notice of claim shall have been made and served upon the city, county, town, village, fire district or school district in compliance with section fifty-e of this chapter...

It is undisputed that the Notice of Claim requirement applies to plaintiffs' pendant state claims, *Hardy*, 164 F.3d at 792 and the third cause of action, sounding in a state law claim for intentional infliction of emotional distress, must be dismissed. *In Re Dayton*, 786 F.Supp.2d 809, at 825 ("Federal courts do not have jurisdiction to hear complaints from plaintiffs who have failed to comply with the notice of claim requirement, or to grant permission to file a late notice.").

The failure to serve a notice of claim also bars plaintiff from bringing his state tort claim against Bazile and Brunet, since the County is required to defend and indemnify each under Orange County Local Law No. 3 of 1998 (a copy of which is annexed as Exhibit "O" to Darwin Declaration.) *Bardi v. Warren County Sheriff's Dept.* 194 A.D.2d 21 (3d Dept., 1993).

b. The plaintiff has failed to plead a cognizable claim for intentional infliction of emotional distress.

The defendants adopt and incorporate by reference the arguments raised by Kiryas Joel Community Ambulance Corp. at Point IV of its Memorandum of Law in support of its motion to

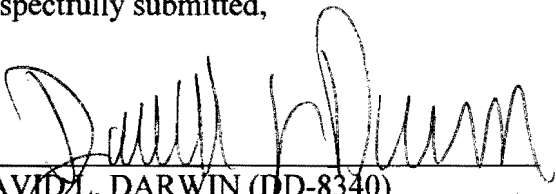
dismiss. For the same reasons, the third cause of action fails to state a claim against the County defendants. Plaintiff has failed to allege: that a duty was owed to him by any of the County defendants; that he suffered any physical injury as result of any actions by the County defendants; that the County defendants did anything that unreasonably endangered his physical safety; or that the County defendants engaged in conduct that could be characterized as “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Matthews v. Malkus*, 377 F. Supp. 2d 361 (S.D.N.Y. 2005)

CONCLUSION

For the foregoing reasons, the complaint should be dismissed as against the County defendants in its entirety.

Dated: Goshen, NY
October 9, 2012

Respectfully submitted,



DAVID L. DARWIN (DD-8340)
Attorney for Defendants
DEPARTMENT OF SOCIAL SERVICES
And ATTORNEY STEPHANIE BAZILE
s/h/a ATTY. STEPHANIE BAZILEOR
15 Matthews Street, Ste. 305
Goshen, New York 10924
(845) 291-3150