UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 12-11117-MLW

FRIEDRICH LU,
Plaintiff,

v.

GEORGE HULME, in his individual capacity and in his official capacity, TRUSTEES OF THE BOSTON PUBLIC LIBRARY,
Defendants.

DEFENDANTS GEORGE HULME AND THE TRUSTEES OF THE BOSTON PUBLIC LIBRARY'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

The Defendants Trustees of the Boston Public Library ("Trustees") and George Hulme ("Hulme"), in his individual and official capacities, seek to dismiss Plaintiff's Complaint.[1] The Plaintiff in this matter, Friedrich Lu ("Plaintiff"), alleges violations of his civil rights under 42 U.S.C. § 1983 (Count I) and the Massachusetts Civil Rights Act, M.G.L. c. 12 § 11I ("MCRA") ("Count II"). Plaintiff's allegations, however, fail to articulate any plausible scenario under which his constitutional rights were violated by either the Trustees or Mr. Hulme (collectively, the "Defendants).

Per Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants now respectfully move to dismiss the Plaintiff's Complaint on the grounds that the Plaintiff has failed to state any claim for which relief can be granted.

[1] Defendants have also separately filed an Opposition to Plaintiff's Temporary Restraining Order.

FACTUAL BACKGROUND[2]

On the morning of June 13, 2012, Friedrich Lu arrived at the Copley branch of the Boston Public Library (the "BPL" or "Library") carrying his belongings in a two-wheeled, open-wire grocery shopper and holding three additional plastic bags in his hand. *See* Plaintiff's Complaint at ¶ 6 (hereinafter, "Compl. ¶ _"). Plaintiff's personal belongings consisted of several transparent plastic bottles, sheets of paper, paper grocery bags, and other miscellaneous items. Compl. ¶ 7. Plaintiff's property was damp due to rain that morning. *Id*.

Shortly after entering the BPL through the Boylston Street entrance, a single security guard stopped Plaintiff and recommended that Plaintiff leave his personal belongings at the entrance if Plaintiff wished to use the BPL's resources. Compl. ¶ 7. Plaintiff appealed to the BPL's Supervisor of Security, George Hulme. *Id*. After receiving a call on his radio, Mr. Hulme arrived within a short time and re-affirmed the order of the security guard. *Id*.

Plaintiff then inquired if he could re-arrange his belongs in a more acceptable manner and gain entry to the library with all of his belongings. *Id*. Mr. Hulme stated that Plaintiff could not rearrange his belongs within the open-wire grocery shopper. *Id*. Mr. Hulme explained that another homeless person was denied entrance to the library because of the state of his belongings. *Id*. According to Mr. Hulme, that person was subsequently allowed to enter the BPL because he had arranged his property within two large suitcases. *Id*. Plaintiff said that it would be "impossible" for him to find suitcases, but subsequently left the library after asking Mr. Hulme for his name. *Id*.

[2] Defendants dispute Plaintiff's depiction of the operative facts in this matter. For the limited purpose of this Motion, however, Defendant relies on Plaintiff's facts as this Court must accept them as true.

On June 22, 2012, Plaintiff filed a Complaint and Motion for Temporary Restraining Order against the Trustees of the Boston Public Library and Mr. Hulme, in his official and individual capacities.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." This standard does not require "detailed factual allegations, but demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id*. at 1950. Plausibility requires more than a sheer possibility of unlawful action. *Id*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. at 1949.

Where a complaint alleges facts that are "merely consistent with" a defendants liability, it "stops short of the line between possibility and plausibility of entitlement to relief." *Id*. at 1949. The First Circuit has cautioned that "despite the highly deferential reading which we accord a litigant's complaint under Rule 12(b)(6), we need not credit bald assertions, periphrastic circumlocutions, unsubstantial conclusions, or outright vituperations." *Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990), overruled on other grounds by, *Educardores Puertorriquenos en Accion v. Hernandez*, 367 F. 3d 61 (1st Cir. 2004).

ARGUMENT

PLAINTIFF'S COMPLAINT DOES NOT ALLEGE FACTUAL ALLEGATIONS PLAUSIBLY SUGGESTING ENTITLEMENT TO RELIEF.

Liberally read, Plaintiff's Complaint includes a claim under 42 U.S.C. § 1983 (Count I, Compl. ¶ 13) and a claim under M.G.L. c. 12, § 11I (Count II, Compl. ¶ 14) against the Trustees and Mr. Hulme. Collectively, these claims fail because the facts do not demonstrate how the Trustees or Mr. Hulme violated the Plaintiff's civil rights. *See Neinast v. Board of Trustees of Columbus Metropolitan Library*, 346 F.3d 585, 592 (6th Cir. 2003); *Kreimer v. Bureau of Police For the Town of* Morristown, 958 F.2d 1242, 1262-63 (3rd Cir. 1992); *Kennie v. Natural Resource Department of Dennis*, 451 Mass. 754, 759-60 (2008).

1. Plaintiff Fails to Establish Liability Under 42 U.S.C. § 1983.

To establish liability under 42 U.S.C. § 1983, "plaintiff[] must show by a preponderance of the evidence that: (1) the challenged conduct was attributable to a person acting under color of state law; and (2) the conduct deprived the plaintiff of rights secured by the Constitution or laws of the United States." *Velez-Rivera v. Agosto-Alicea*, 437 F.3d 145, 151-52 (1st Cir. 2006). Plaintiff alleges that the Defendants violated his First and Fourteenth Amendment rights under the United States Constitution. Compl. ¶ 13. These claims must be dismissed because (i) the Plaintiff fails to allege factual allegations suggesting a violation of his First Amendment rights, and (ii) the Plaintiff fails to allege factual allegations plausibly suggesting a violation of his Fourteenth Amendment rights. *See Iqbal*, 129 S. Ct. at 1949-50; *Velez-Rivera*, 437 F.3d at 151-52; *Kreimer*, 958 F.2d at 1262-65.

a. The Complaint Does Not Contain Facts that Establishing How Defendants Violated Plaintiff's First Amendment Rights

Plaintiff claims that Defendants violated his First Amendment Rights, based on their alleged interference with his "physical access to a government building and right to know." Compl. ¶ 13. As agents of a municipality, Defendants do not challenge the first element of the § 1983 claim; rather, it is the second element, "conduct depriv[ing] the Plaintiff of rights secured by the Constitution or laws of the United States," which cannot be met because the Plaintiff does not describe any facts suggesting a violation of his First Amendment rights. *See Neinast*, 346 F.3d at 592; *Kreimer*, 958 F.2d at 1262-63.[3]

Public libraries may establish rules and policies that impose reasonable limitations on use or prevent conduct or activity that reasonably could be expected to disturb other patrons. *See Kreimer*, 958 F.2d at 1262-63; *see also Neinast*, 346 F.3d at 592 (upholding library requirement that all patrons wear shoes in building). For example, in *Kreimer* the court upheld a library rule requiring patrons to leave the building if bodily hygiene was offensive as to constitute a nuisance to other persons. 958 F.2d at 1264. The court stated that even if certain regulations have a disproportionate effect on the homeless, such an impact is irrelevant because the First Amendment protects a right shared equally by all, and the library's regulations were broadly applied to ensure the general public's right to enjoy the public library. *See Kreimer*, 958 F.2d at 1264-65.

Here, the Boston Public Library's Appropriate Library Use Policy (the "Policy") contains general restrictions that prohibit bringing in "garbage, articles with a foul odor, or articles which, alone or in their aggregate, impede the use of the library by other

[3] Both *Kreimer* and *Neinast* involved First and Fourteenth Amendment claims in connection with library usage policies. To date, the First Circuit has not addressed these types of claims in the context of access to a public library.

users."[4] The Policy also precludes the use of shopping carts and other non-assistive wheeled devices, and reserves the BPL's right to limit "the size and number of items brought into the library."[5]

Such regulations do not violate Plaintiff's First Amendment Rights because they are reasonable limitations on use. Moreover, they are narrowly tailored to avoid unnecessary interference with other patrons' use and enjoyment of the library. *See Kreimer*, 958 F.2d at 1262-65.

Nevertheless, Plaintiff claims that he was denied access to the Boston Public Library because he insisted on bringing in his personal belongings that were contained in an open-wire grocery shopper and several plastic bags. Compl. ¶¶ 6-7. These facts, however, do not suggest a violation of his First Amendment Rights because the Mr. Hulme and his security staff were enforcing the BPL's Policy, which applies to all patrons. *See Kreimer*, 958 F.2d at 1262-65. Absent any facts demonstrating that Mr. Hulme or the Trustees sought to interfere with Plaintiff's First Amendment Rights, Plaintiff cannot establish a First Amendment claim. *See Neinast*, 346 F.3d at 592; *Kreimer*, 958 F.2d at 1262-63.

b. Defendants Did Not Violate Plaintiff's Rights Under the Fourteenth Amendment.

Plaintiff also contends that the Trustees and Mr. Hulme deprived him of his rights under the Fourteenth Amendment. Compl. ¶ 13. This portion of Count I must also fail because Plaintiff does not describe any facts sufficient to establish a violation of his

[4] In paragraph 11 of his complaint, Plaintiff alleges his belief that the BPL does not have any kind of library usage policy. The BPL's Appropriate Library Usage Policy is posted on its web site, which is publicly available at http://www.bpl.org/general/policies/acceptableuse.htm.

[5] The BPL does not prohibit assistive wheeled devices such as walkers, wheelchairs, and baby carriages.

Fourteen Amendment rights under either the Due Process Clause or the Equal Protection Clause. *See Neinast*, 346 F.3d at 596-97; *Kreimer*, 958 F.2d at 1262-63.

i. Due Process

Under § 1983, a procedural due process claim exists when the alleged conduct deprives an individual of his or her life, liberty, or property by a distortion and corruption of the legal process, such as falsifying evidence or some other egregious conduct resulting in the denial of a fair process of law. *Senra v. Cunningham*, 9 F.3d 168, 174 (1st Cir. 1993). Nowhere in his Complaint does Plaintiff allege that he was deprived of life, liberty, or his property. Compl. ¶¶ 6-7. The mere fact that Mr. Hulme and his staff told Plaintiff that he could not bring his possessions into the library does not constitute a deprivation of property.

To the extent that Plaintiff has asserted a claim based on a denial of substantive due process, this claim must also fail. *See Neinast*, 346 F.3d at 596-97; *Kreimer*, 958 F.2d at 1262-65. To establish a substantive due process violation, a plaintiff must demonstrate an abuse of governmental power that "shocks the conscience," or an action that is "legally irrational in that it is not sufficiently tied to any legitimate state interests." *Collins v Nuzzo*, 244 F.3d 246, 250 (1st Cir.2001). Here again, the facts do not suggest that the Defendants engaged in any behavior that remotely implicates a substantive due process violation.

Simply put, the BPL's Policy affects – and may even inconvenience – all patrons. The Policy is narrowly tailored with the goal of maintaining the BPL as a place where the general public may engage in a variety of activities in a calm, clean, and peaceful environment. *See Neinast*, 346 F.3d at 596-97; *Kreimer*, 958 F.2d at 1262-65.

ii. Equal Protection

Plaintiff's claim that Defendants violated his rights under the Equal Protection Clause must also fail for failure to alleged facts suggesting such a violation. *See Kreimer*, 958 F.2d at 1268-69. The homeless are not a suspect class, and thus, public library's rules regarding use of the library and conduct need only survive the lowest standard of review for equal protection purposes. *Id*. at 1265. Plaintiff's Complaint does not articulate how the Trustees, Mr. Hulme or even the Policy violates equal protection. *See Neinast*, 346 F.3d at 596-97; *Kreimer*, 958 F.2d at 1262-65. As such, Plaintiff's equal protection claim must also fail. *See id.*

Collectively, Plaintiff's allegations in Count I fail to state a claim on which relief may be granted. *See Iqbal*, 129 S. Ct. at 1949-50; *Neinast*, 346 F.3d at 596-97; *Kreimer*, 958 F.2d at 1262-65. Rather than set forth facts that would suggest a deprivation of his constitutional rights, Plaintiff makes bald assertions about constitutional rights, which do not entitle him to relief. *See id*. Count I, therefore, should be dismissed in its entirety.

2. Plaintiff Fails to Establish a Claim Under M.G.L. c. 12, § 11I.

In Count II, Plaintiff claims that Defendants violated his rights under the Massachusetts Civil Rights Act, M.G.L. c. 12, § 11I. Compl. ¶ 14 ("MCRA"). To sustain a claim under the MCRA, the plaintiff must prove that their exercise of enjoyment of rights secured by the Constitution of either the United States or the Commonwealth have been interfered with, or attempted to be interfered with, and that the interference or attempted interference was by "threats, intimidation or coercion." *Buster v. George*, 438 Mass. 635, 636 (2003).

These three elements have been characterized as the following: (1) a "threat" constitutes an interference in an intentional exertion of pressure to make another fearful or apprehensive of injury or harm; (2) "coercion" is the application to another of force to constrain him to do against his will something he would not otherwise have done; and (3) "intimidation" involves putting one in fear for the purpose of compelling or deterring conduct. *Kennie*, 451 Mass. at 763. Additionally, the MCRA requires establishing an objective basis for finding such a violation. *See Meuser v. Federal Express Corp.*, 524 F. Supp.2d 507, 520 (1st Cir. 2009) (holding that the MCRA requires plaintiff's perception of threat, intimidation, or coercion to be objectively reasonable).

Here, Plaintiff's complaint is devoid of any facts demonstrating that the Trustees or Mr. Hulme engaged in behavior that remotely resembles prohibited conduct under the MCRA. *See Kennie*, 451 Mass. at 763-65. At most, Plaintiff claims that if he did not comply with an unnamed security guard's instructions the police would be called, but Plaintiff does not say that Mr. Hulme threatened to call the police or to take any other drastic action. *See* Compl. ¶ 7. These facts, however, do not suggest a MCRA violation as Plaintiff was free at all times to find an alternative arrangement for his belongings or come back to the library another day. *See Kennie*, 451 Mass. at 763-65. Consequently, Count II should be dismissed.

CONCLUSION

For the reasons stated above, Defendants, the Trustees of the Boston Public Library and George Hulme, respectfully request that this Court dismiss this matter in its entirety with prejudice.

Respectfully submitted,

DEFENDANTS GEORGE HULME, in his individual capacity and in his official capacity and TRUSTEES OF THE BOSTON PUBLIC LIBRARY

Date: July 5, 2012

William Sinnott
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By their attorneys:

/s/Caroline O. Driscoll_____
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LOCAL RULE 7.1 CERTIFICATION

I hereby certify that on July 3, 2012 I emailed Plaintiff regarding the Defendants' intention to file this Motion and attempted to resolve or narrow the issues raised in this case. As of the time of filing, I have not received a response from Plaintiff.

I also certify that on July 5, 2012, I filed this document through the Court's CM/ECF system and that an electronic copy will be sent via email to those identified as non-registered participants per agreement with Plaintiff.

/s/Caroline O. Driscoll
Caroline O. Driscoll