Brinn v. Syosset Public Library et al Doc. 23

LSK&D #: 895-8026 / 1263401

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JOSHUA BRINN,

Plaintiff,

-against-

SYOSSET PUBLIC LIBRARY, MORRIS DUFFY ALONSO & FALEY, UTICA NATIONAL INSURANCE COMPANY, JUDITH LOCKMAN, Director of the SYOSSET PUBLIC LIBRARY in her individual and professional capacities, ROBERT GLICK, Trustee of the SYOSSET PUBLIC LIBRARY in his individual and professional capacities,

Defendants.

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2:09-cv-01151-TCP-WDW

Filed by ECF on November 10, 2009

MEMORANDUM OF LAW ON BEHALF OF THE LIBRARY DEFENDANTS IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

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PRELIMINARY STATEMENT

This memorandum of law is submitted in support of defendants Syosset Public Library, Judith Lockman, and Robert Glick's (collectively, the "Library Defendants") motion to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6).

The gravamen of this action is a claim for retaliation due to the exercise of rights protected by the First Amendment. Plaintiff was a patron of the Syosset Public Library (the "Library"). Due to plaintiff's inappropriate conduct within the Library premises, his library privileges were suspended for one year, by a letter from the Library's counsel, dated October 15, 2007, which specified the conduct that was the basis for the suspension. In response to that letter, plaintiff filed a notice of claim against the Library seeking compensatory and punitive damages (referred to the Complaint as the "First Notice of Claim").

At the time, plaintiff was employed as an associate with Morris Duffy Alonso & Faley ("Morris Duffy"), a private law firm in New York City. One of Morris Duffy's clients is defendant Utica National Insurance Company ("Utica"). Plaintiff claims that the Library Defendants and Utica "contacted partners of [Morris Duffy] to exert pressure on plaintiff to withdraw his First Notice of Claim." Comp. ¶ 29.

Plaintiff eventually withdrew the First Notice of Claim, but claims that his employment was nevertheless terminated by Morris Duffy when he refused to sign a general release. He alleges that such conduct violated his rights under the First Amendment to the U. S. Constitution. Although the First Notice of Claim pertained exclusively to the one-year suspension of plaintiff's personal library privileges, he nevertheless alleges that the document "raised . . . matters of public concern."

The Library Defendants now move to dismiss the Complaint for the following reasons. The First Count of the Complaint should be dismissed on the grounds that since the First Notice of Claim did not raise issues of "public concern" it cannot form the basis for a retaliation claim under the First Amendment. The First Notice of Claim pertained exclusively to the suspension of plaintiff's personal library privileges, and did not implicate any issues concerning the public in general.

The Second Count of the Complaint, based upon the due process clause, should be dismissed as to the Library Defendants since they were not plaintiff's employer, and in any event, plaintiff was an at-will employee with no constitutionally protected property interest in his continued employment.

The Third Count of the Complaint alleging tortious interference with prospective contractual relations must be dismissed as to the Library Defendants since plaintiff has not pled that the moving defendants' interference with his employment was

accomplished by "wrongful means" or that they acted for the sole purpose of harming the plaintiff.

The Fourth Count of the Complaint for intentional infliction of emotional distress must be dismissed because plaintiff's allegations fail to meet the stringent pleading requirements for that tort.

The Fifth Count of the Complaint alleging breach of the covenants of good faith and fair dealing regarding plaintiff's employment must dismissed as to the Library Defendants since they were not plaintiff's employer, and in any event, as an at-will employee, plaintiff cannot maintain such an claim against any party.

Finally, the Sixth Count of the Complaint for violation of the New York State Constitution guarantee of freedom of speech must be dismissed for the same reasons as the First Count brought under the First Amendment to the U.S. Constitution.

THE COMPLAINT

It is alleged that, on about January 9, 2008, plaintiff filed a First Notice of Claim[1] pursuant to Section 50 of the N.Y. General Municipal Law with the Library which "raised constitutional issues and matters of public concern regarding his suspension" from the Library. Compl. ¶¶ 13- 15. The First Notice of Claim sought damages based upon a suspension of plaintiff's library privileges, which prevented him from using the Library building or borrowing books for one year. See First Notice of Claim, annexed as Exhibit B to the Granofsky Declaration. The First Notice of Claim refers to "a letter dated

[1] The complaint refers to the "First Notice of Claim" as the governmental petition that forms the substantive predicate for the First Amendment claim in this action. The "Second Notice of Claim" refers to the claim filed pursuant to N.Y. General Municipal Law § 50 that is the procedural prerequisite for the pendent state law claims (Counts Three through Six) in this action.

October 15, 2007 letter detailing claimant's suspension from the Syosset Public Library," which letter is annexed as Exhibit C to the Granofsky Declaration.[2]

Plaintiff alleges that he was an attorney who had been employed as an associate with the defendant law firm, Morris Duffy, where his performance had been "satisfactory or better." Morris Duffy is alleged to have represented municipalities, special districts, and insurance companies, including defendant Utica, the Library Defendants' insurer. Compl. ¶ 19-22.

The Complaint alleges that defendant Judith Lockman, the Director of the Library, directed defendant Robert Glick, Esq., ("Glick") a member of the Library's Board of Trustees, to call plaintiff at his place of employment, Morris Duffy. Plaintiff claims that on or about January 10 and 11, 2008, Glick purportedly telephoned him and requested that he discontinue the First Notice of Claim, implying that there would be adverse consequences to him if he failed to comply with his request. Compl. ¶¶ 23, 24.

Plaintiff alleges, "[u]pon information and belief," that Glick contacted Kevin Mahon, Esq., a partner at Morris Duffy, and demanded that plaintiff withdraw the First Notice of Claim, and in the process, he disclosed "plaintiff's confidential library records." Compl. ¶¶ 26, 27.

Utica is the insurer of the Library Defendants. The Complaint alleges that on March 19, 2008, Betty Winkler, a Utica claims examiner, acting "at the direction of defendant SYOSSET PUBLIC LIBRARY," and her own supervisor, contacted Morris

[2] Plaintiff chose not to annex to the complaint a copy of the First Notice of Claim, or the October 15, 2007 letter that is referred to in, and is the basis for, the First Notice of Claim. The complaint is, however, entirely based upon these documents. These documents are, therefore "integral to the complaint" and indispensible to the Court in deciding this motion to dismiss. "To be sure, even where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint." *Sahu v. Union Carbide Corp.*, 548 F.3d 59, 68 (2nd Cir. 2008) (citation, brackets, and internal quotation marks omitted). *See also, Faulkner v. Beer*, 463 F.3d 130, 134 (2nd Cir. 2006), *citing*, *Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2nd Cir. 1995) (contract between parties was "integral" to complaint and may be considered on a motion to dismiss).

Duffy "to exert pressure on plaintiff to withdraw his First Notice of Claim." Compl. ¶¶ 28, 29.

It is alleged that from March 19, 2008, through April 16, 2008, several Morris Duffy partners made demands to plaintiff that he withdraw the First Notice of Claim or face discharge from his employment. Plaintiff ultimately withdrew the First Notice of Claim, but refused to execute a general release. Plaintiff claims that Morris Duffy terminated his employment because he refused to sign the general release. Compl. ¶¶ 30-34.

ARGUMENT

POINT I

THE FIRST COUNT BASED UPON THE FIRST AMENDMENT SHOULD BE DISMISSED SINCE THE FIRST NOTICE OF CLAIM DOES NOT RAISE MATTERS OF PUBLIC CONCERN

The Twombly-Iqbal "plausibility" standard for motions to dismiss under Rule 12(b)(6).

In *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955 (2007), the Supreme Court rejected the pleading standard set forth in *Conley v. Gibson,* 355 U.S. 41, 48, 78 S.Ct. 99 (1957), that a complaint should not be dismissed, "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 45-46, 78 S.Ct. 99. The Court replaced the *Conley* standard with a requirement that a plaintiff must plead enough facts "to state a claim for relief that is plausible on its face." 550 U.S. at 570, 127 S.Ct. at 1974. "The pleading must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action on the assumption that all the allegations in the

complaint are true (even if doubtful in fact)." 550 U.S. at 555-556, 127 S.Ct. at 1965 (citations, brackets, and internal quotation marks omitted).

The Second Circuit has interpreted *Twombly* to require a complaint to "amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *Iqbal v. Hasty,* 490 F.3d 143, 158 (2d Cir. 2007) (emphasis in original), *rev. on oth. grds., Ashcroft v. Iqbal,*___U.S.___, 129 S.Ct. 1937, 1950 (2009) ("Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense"). Further, a complaint must "allege facts that are not merely consistent with the conclusion that the defendant violated the law, but which actively and plausibly suggest that conclusion." *Port Dock & Stone Corp. v. Oldcastle Northeast, Inc.,* 507 F.3d 117, 121 (2d Cir. 2007).

The Supreme Court has held that the *Twombly* standard applies to all complaints. "Our decision in *Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike." *Iqbal*, 129 S.Ct. at 1953.

The Complaint fails to state a claim under the Right to Petition Clause.

The First Count alleges that "Defendants, all acting under color of law, terminated plaintiff for the exercise of his First Amendment Rights, in violation of the First and Fourteenth Amendments to the United States Constitution, and are all liable under 42 U.S.C. Section 1983," causing damages. Compl. ¶ 36.

The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble,

and to petition the Government for a redress of grievances." The specific right at issue in this case is the last phrase of the First Amendment -- the so-called Right to Petition Clause. Essentially, plaintiff alleges that the defendants violated the Right to Petition Clause when an adverse employment action was taken against him in retaliation for his filing of the First Notice of Claim against the Library.

A plaintiff alleging retaliation for exercising rights protected by the First Amendment must allege that "(i) he has an interest protected by the First Amendment; (ii) the defendant's actions were motivated by or substantially caused by the plaintiff's exercise of that right; and (iii) the defendant's action effectively chilled the exercise of the plaintiff's First Amendment rights." *Connell v. Signoracci,* 153 F.3d 74, 79 (2d Cir. 1998) (citations omitted).

A notice of claim, being a petition to the government for redress of grievances, could conceivably form the basis for a claim under the Right to Petition Clause. However, not every governmental petition is protected by the First Amendment. In order for a petition to be actionable under the First Amendment, it must relate to a "matter of public concern." *Sussman v. New York City Health and Hospitals Corp.*, 1997 WL 334964, 9 (S.D.N.Y. 1997). "In order to state a § 1983 claim for retaliation based upon the First Amendment, one must demonstrate that the relevant speech pertained to a matter of 'public concern.' " *Reuland v. Hynes*, 53 Fed.Appx. 594, 595 (2nd Cir. 2002).

The "First Amendment right to petition the government for a redress of grievances, which is an assurance of a particular freedom of expression, is generally subject to the same constitutional analysis as the right to free speech." *Sussman,* at 9 (citations and internal quotation marks omitted). A "First Amendment claim based on the right to petition could be found meritorious only if the speech at issue constituted

comments upon a matter of public concern." *Id.* (emphasis added, citation and internal quotation marks omitted).

Plaintiff attempts to meet the "public concern" requirement by alleging that the First Notice of Claim "raised constitutional issues and matters of public concern." Compl. ¶¶ 14, 15. However, a fair reading of the First Notice of Claim, and the October 15, 2007 letter upon which it is based, reveals that no issues of public concern are raised. Instead, it is clear from the face of those documents that plaintiff only sought to recover damages arising out of a purely private matter, namely, the one-year suspension of his library privileges.

In deciding a motion under Rule 12(b)(6) this Court must determine, as a matter of law, whether the First Notice of Claim relates to a matter of public concern. "Whether speech is a matter of public concern is question of law that is determined by the 'content, form and context of a given statement, as revealed by the whole record.' " *Singh v. City of New York*, 524 F.3d 361, 372 (2nd Cir. 2008), *quoting, Connick v. Myers,* 461 U.S. 138, 147-48 & fn. 7, 103 S.Ct. 1684, 1690 (1983). "While this determination may be somewhat fact-intensive, it presents a question of law for the court to resolve." *Johnson v. Ganim*, 342 F.3d 105, 112 (2nd Cir. 2003).

Thus, the Court must examine the First Notice of Claim, and the October 15, 2007 letter referred to therein, and decide whether plaintiff was merely seeking to redress a personal grievance, or was raising a matter of public concern. "Generally, the First Amendment protects any matter of political, social or other concern to the community." *Cioffi v. Averill Park Central School Dist. Board of Ed.*, 444 F.3d 158, 163-64 (2nd Cir. 2006), *cert den.,* 549 U.S. 953, 127 S.Ct. 382 (2006). Therefore, in deciding whether the First Notice of Claim relates to a matter of public concern "the fundamental

question is whether the [plaintiff] is seeking to vindicate personal interests or to bring to light a matter of political, social, or other concern to the community." *Rao v. New York City Health & Hosps. Corp.,* 905 F.Supp. 1236, 1243 (S.D.N.Y. 1995) (emphasis added, citation, brackets, and internal quotation marks omitted); *Cahill v. O'Donnell*, 75 F.Supp.2d 264, 272 (S.D.N.Y. 1999) ("speech on matters of purely personal interest or internal office affairs does not constitute a matter of public concern and is, in contrast, not entitled to constitutional protection"). "In reaching this decision, the court should focus on the motive of the speaker and attempt to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose." *Lewis v. Cowen*, 165 F.3d 154, 163-164 (2nd Cir. 1999), *cert den.,* 528 U.S. 823, 120 S.Ct. 70 (1999).

For example, it has been held that a workers' compensation claim does not address matters of public concern, but is simply "a matter between an individual and his employer." *O'Malley v. New York City Transit Authority* 829 F.Supp. 50, 53 (E.D.N.Y. 1993); *Ganthier v. North Shore-Long Island Jewish Health System*, 298 F.Supp.2d 342, 348 (E.D.N.Y. 2004) ("First Amendment does not protect an employee from retaliation based on grievances which are private and not matters of public concern"). An "assistant district attorney's personal desire for a particular assignment is not a matter of public concern", *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1058 (2nd Cir. 1993), *cert den.,* 510 U.S. 865, 114 S.Ct. 185 (1993), *citing, Connick,* 461 U.S. at 148, 103 S.Ct. at 1691. A "medical resident's complaints regarding her treatment in residency program did not address matters of public concern," *Id.*, 991 at 1058, *citing, Ezekwo v. NYC Health & Hospitals Corp.,* 940 F.2d 775, 781 (2nd Cir. 1991); *Hoyt v.*

Andreucci, 433 F.3d 320, 330 (2nd Cir. 2006) ("mere employee grievances do not qualify as matters of public concern").

The claim at issue is the suspension of plaintiff's *personal* library privileges for one year, for which he seeks damages of $2,000,000 "in regular damages" and $10,000,000 in punitive damages (First Notice of Claim, p. 2, Exhibit B). The First Notice of Claim specifically states that it is a "claim . . . for damages . . resulting from a one-year suspension of claimant's library privileges." *Id.* The October 15, 2007 letter, referred to the First Notice of Claim, refers only to certain behavior on the part of plaintiff. There is nothing in the Notice of Claim which remotely refers to any other member of the general public, or other issue of public concern. The suspension of plaintiff's privileges came about because of certain behavior that plaintiff allegedly exhibited in the library (October 15, 2007 letter, Exhibit C).

Plaintiff may dispute the factual accuracy of the allegations contained in the October 15, 2007 letter. Regardless of whether the allegations in the October 15, 2007 letter are true, there can be no question that by this First Notice of Claim, plaintiff was only seeking to "vindicate personal interests." *Rao*, at 1243 (S.D.N.Y. 1995). There is nothing in either the First Notice of Claim or the October 15, 2007 letter upon which it is based, which remotely suggests that plaintiff was attempting to "bring to light a matter of political, social, or other concern to the community." *Id.* The suspension of plaintiff's library privileges was purely a private matter and was in no way a matter of public concern.

In sum, the First Notice of Claim "was calculated to redress [a] personal grievance[.]" and it did not have any "broader public purpose." *Lewis,* 165 F.3d at 163-164. Therefore, First Count of the Complaint must be dismissed.

POINT II

SINCE PLAINTIFF HAD NO PROPERTY RIGHT TO CONTINUED AT-WILL EMPLOYMENT, THE SECOND COUNT FOR VIOLATION OF DUE PROCESS SHOULD BE DISMISSED

The Second Count alleges that "Defendants terminated plaintiff without due process of law, in violation of the Fourteenth Amendment to the United States Constitution" causing damages. Compl. ¶ 38.

First, the Library Defendants were not plaintiff's employer. They had no ability to terminate his employment, nor were they in a position to institute procedures to provide "due process" to plaintiff. Therefore, at least as it may pertain to the Library Defendants, the allegation that "Defendants terminated plaintiff without due process of law" makes no sense. There simply is no factual or legal basis upon which plaintiff can state a claim for denial of due process as against the Library Defendants.

Secondly, plaintiff cannot state a procedural due process claim because he admits to being an at-will employee of Morris Duffy, Compl. ¶ 19. "In order to state a claim for violation of the right to due process, a party must allege the deprivation of a protected liberty or property right." *Lorett v. Brody & Fabiani*, 1993 WL 287651, 5 fn. 10 (S.D.N.Y. 1993) *citing, Kraebel v. New York City Department of Housing Preservation & Development,* 959 F.2d 395, 404 (2d Cir. 1992), *cert den.,* 506 U.S. 917, 113 S.Ct. 326 (1992).

"[A]t-will employment is not a constitutionally protected property interest." *Baron v. Port Authority of New York and New Jersey*, 271 F.3d 81, 89 (2d Cir. 2001). "Employees at will have no protectable property interest in their continued employment." *Abramson v. Pataki,* 278 F.3d 93, 99 (2d Cir. 2002), *as quoted in Johnson v. Rowley,*

569 F.3d 40, 44 (2nd Cir. June 11, 2009); *Mace v. County of Sullivan*, 2009 WL 413503, 2 (S.D.N.Y. 2009) (procedural due process claim cannot survive the defendants' motion to dismiss because at-will employment is not a constitutionally protected property interest"); *Lorett*, *supra* ("Even if the Court concluded that the Law Firm was a state actor, Plaintiff still would have no legitimate claim of entitlement to her position with the Law Firm under the Fourteenth Amendment").

Nor does plaintiff state a substantive due process deprivation claim, which would require a "conscience-shocking" exercise of power by government actors. *Johnson v. Newburgh Enlarged School District*, 239 F.3d 246, 252 (2d Cir. 2001). In *Mace*, plaintiff claimed that the defendant expelled plaintiff from the Board of Elections and "retaliated against her, in violation of the First Amendment, on account of her political activities did not rise to the conscience shocking level required to maintain a substantive due process claim". *Id.* (adopting Judge Yanthis's report and recommendation). Plaintiff clearly fails to adequately allege a due process claim.

POINT III

THE CLAIMS AGAINST DEFENDANTS LOCKMAN AND GLICK IN THEIR INDIVIDUAL CAPACITIES SHOULD BE DISMISSED UNDER THE DOCTRINE OF QUALIFIED IMMUNITY

Defendant Lockman is the Director of the Library and Defendant Glick is an elected member of its Board of Trustees. Both have been sued in their official and individual capacities. Both are entitled to qualified immunity and the Complaint as to each of them should be dismissed to the extent that they are sued in their individual capacities.

"The privilege of qualified immunity generally shields government officials from liability for damages on account of their performance of discretionary official functions

'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Ying Jing Gan v. City of New York*, 996 F.2d 522, 531 (2nd Cir. 1993), *quoting, Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982).

The qualified immunity defense "reflects an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also the need to protect officials who are required to exercise discretion and the related public interest in encouraging the vigorous exercise of official authority," *Harlow v. Fitzgerald,* 457 U.S. 800, 800, 102 S.Ct. 2727, 2729 (1982). "Qualified immunity shields government officials from liability for civil damages as a result of their performance of discretionary functions, and serves to protect government officials from the burdens of costly, but insubstantial, lawsuits." *Lennon v. Miller*, 66 F.3d 416, 420 (2nd Cir. 1995).

The defense of qualified immunity may be properly asserted in a motion to dismiss under Rule 12(b)(6) of the Rules of Civil Procedure when, as here, "the defense is based on facts appearing on the face of the complaint." *Benzman v. Whitman*, 523 F.3d 119, 125 (2nd Cir. 2008), *quoting, McKenna v. Wright,* 386 F.3d 432, 436 (2nd Cir. 2004); *Young v. Goord*, 192 Fed.Appx. 31, 34, 2006 WL 2268237, 3 (2nd Cir. 2006) ("Because no set of facts Young could prove would undermine the objective reasonableness of defendants' actions, the defense was properly granted as a matter of law and the amended complaint dismissed pursuant to Rule 12(b)(6).")

In order for a right to be clearly established "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034(1987). In

deciding whether particular right was clearly established at the time when defendants acted, a court should consider:

> (1) whether the right in question was defined with "reasonable specificity"; (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful.

Id., citing Jermosen v. Smith, 945 F.2d 547, 550 (2d Cir. 1991), *cert. den.,* 503 U.S. 962, 112 S.Ct. 1565 (1992). "The relevant inquiry is not whether the defendants should have known that there was a federal right, in the abstract, to 'freedom of speech,' but whether the defendants should have known that the specific actions complained of violated the plaintiff's freedom of speech." *Lewis v. Cowen*, 165 F.3d 154, 166 -167 (2nd Cir. 1999).

Whether or not the right is clearly established does not, however, end the inquiry. "[E]ven where the contours of the plaintiff's federal rights and the official's permissible actions were clearly delineated at the time of the acts complained of, the defendant may enjoy qualified immunity if it was objectively reasonable for him to believe that his acts did not violate those rights." *Frank v. Relin*, 1 F.3d 1317, 1328 (2nd Cir. 1993), *cert den.*, 510 U.S. 604, 114 S.Ct. 604 (1993). "A qualified immunity defense is established if (a) the defendant's action did not violate clearly established law, or (b) it was objectively reasonable for the defendant to believe that his action did not violate such law. *Salim v. Proulx*, 93 F.3d 86, 89 (2nd Cir. 1996) (emphasis added). *See also, Gilles v. Repicky,* 511 F.3d 239, 244 (2nd Cir. 2007); *Bizzarro v. Miranda*, 394 F.3d 82, 86 (2nd Cir. 2005) (qualified immunity applies if "officials could reasonably have believed they were not violating plaintiffs' constitutional rights"); *Reuland v. Hynes*, 460 F.3d 409, 420 (2nd Cir. 2006), *cert. den.*, ---U.S.---, 128 S.Ct. 119 (2007) ("First, we address whether it was

objectively reasonable for Hynes to believe Reuland's statement to *New York* magazine was not a matter of public concern").

In the present case, the issue of whether it was objectively reasonable for the individual defendants to have believed that their actions violated the First Amendment can be determined, as a matter of law, by reference to the First Notice of Claim that forms the basis for the action. A fair reading of the First Notice of Claim fails to reveal any clearly delineated issues of public concern that would have put a reasonable person on notice that First Amendment rights were implicated. The First Notice of Claim referred to a October 15, 2007 letter suspending plaintiff's personal library privileges. This letter concerned only plaintiff's personal behavior which led to the suspension of his library privileges. The First Notice of Claim, on its face, pertained solely to the issue of whether plaintiff's personal library privileges were properly suspended for the reasons stated in the October 15, 2007 letter referred to therein.

Therefore, it was objectively reasonable for Lockman and Glick to have believed that the First Notice of Claim pertained only to this personal issue involving the suspension of plaintiff's library privileges due to improper conduct, and not to any issues of public concern. Therefore, it would have been objectively reasonable for them to have assumed that any action taken by them with regard to the First Notice of Claim would not have violated plaintiff's First Amendment rights. Accordingly, the claims against Lockman and Glick, asserted against them their individual capacities, should be dismissed.

POINT IV

PLAINTIFF'S ALLEGATIONS AS TO THE LIBRARY DEFENDANTS ARE SPECULATIVE AND WITHOUT ANY FACTUAL FOUNDATION

For the reasons stated above, the First Amendment and due process claims as to the Library Defendants should be dismissed. In addition to the foregoing, the claims against the Library Defendants are speculative and should be dismissed based upon *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955 (2007). "[P]laintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." 550 U.S. at 545, 127 S.Ct. at 1959 (citation, brackets, and internal quotation marks omitted). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.' " *Iqbal*, 129 S.Ct. at 1949 (2009), *quoting Twombly*, 550 U.S. at 557, 127 S.Ct. at 1955.

While a complaint need not provide *detailed* factual allegations, it must nevertheless offer "more than labels and conclusions" and it must contain more than a "formulaic recitation of the elements of a cause of action." 550 U.S. at 545, 127 S.Ct. at 964-65 (2007). "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 129 S.Ct. at 1950.

Under the *Twombly* standard, a complaint should be dismissed if it fails to contain "enough facts to state a claim to relief that is plausible on its face." 550 U.S. at

570, 127 S.Ct. at 1974. *Twombly* requires that a complaint "allege facts that are not merely consistent with the conclusion that the defendant violated the law, but which actively and plausibly suggest that conclusion." *Port Dock & Stone Corp. v. Oldcastle Northeast, Inc.*, 507 F.3d 117, 121 (2nd Cir. 2007). "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. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 129 S.Ct. at 1949, *citing*, *Twombly*, 550 U.S. at 556.

Plaintiff bases his Complaint against the Library Defendants solely upon the unsupported allegations that (a) a member of the Library's Board of Trustees, Robert Glick, contacted Kevin McMahon, a partner of Morris Duffy, to "demand that the First Notice of Claim be withdrawn," Compl. ¶ 26, and (b) that the Library's insurance company, Utica, acting at the request of the Library, contacted Morris Duffy to exert pressure on plaintiff to withdraw the Notice of Claim, Compl. ¶ 29. There are, however, no factual assertions provided to support either of these allegations.

Plaintiff does not claim that he was present during the alleged conversation between Glick and McMahon concerning him, nor does he allege that he has any personal, or even hearsay, knowledge that the conversation actually took place. Likewise, plaintiff fails to allege any facts to support the allegation that the co-defendant Utica was acting at the behest of its insured, the Library, when it allegedly contacted Morris Duffy to urge plaintiff to withdraw the Notice of Claim. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 129 S.Ct. at 1950.

In *Iqbal*, plaintiff alleged that the defendants "knew of, condoned, and willfully and maliciously agreed to subject [him] to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." *Id.* at 1951 (*citing* plaintiff's Complaint ¶ 96, internal quotation marks omitted), and that "Ashcroft was the 'principal architect' of this invidious policy, and that [defendant] Mueller was 'instrumental' in adopting and executing it." (citation to the complaint omitted). The Complaint was dismissed under Rule 12(b)(6). "These bare assertions, much like the pleading of conspiracy in *Twombly,* amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim, 550 U.S., at 555, 127 S.Ct. 1955 [.]" . . . It is the conclusory nature of [plaintiff's] allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth."

There are no factual allegations that establish a causal connection between Library Defendants and anything that was purportedly said or done by Utica or Morris Duffy. The allegations in the Complaint in this regard are unsupported speculation and conjecture. In short, there are not "enough facts to state a claim to relief [as against the Library Defendants] that is plausible on its face." 550 U.S. at 570, 127 S.Ct. at 1974.

POINT V

THE PLAINTIFF HAS FAILED TO STATE A CLAIM FOR INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS OR "BUSINESS OPPORTUNITY"

The Third Count alleges that "Defendants SYOSSET PUBLIC LIBRARY and UTICA NATIONAL INSURANCE COMPANY intentionally interfered with plaintiff's business opportunity, causing his termination," causing damages. Compl. ¶ 40.

As an associate with Morris Duffy, plaintiff was an at-will employee with no written contract. "As an at-will employee with no written contract, plaintiff could only succeed on his tortious interference claim if he established that [defendants] acted solely to harm him or used wrongful means to achieve the interference." *Hoesten v. Best*, 34 A.D.3d 143, 159, 821 N.Y.S.2d 40, 52 (1 Dept. 2006), *citing*, *Guard-Life Corp. v. Parker Hardware Mfg. Corp.,* 50 N.Y.2d 183, 194, 428 N.Y.S.2d 628 (1980). In this context, "wrongful means" has been interpreted to mean physical violence, fraud, civil suits and criminal prosecution, or undue and unfair economic pressure. *Guard-Life Corp. v. S. Parker Hardware Manufacturing Corp.*, 50 N.Y.2d 183, 428 N.Y.S.2d 628 (1980).

In *Lawrence v. Union of Orthodox Jewish Congregations of America*, 32 A.D.3d 304, 820 N.Y.S.2d 60 (1st Dept. 2006), a terminated employee of a kosher slaughterhouse sued an organization which certified whether kosher laws were being followed by an employer. The employee alleged that the defendant threatened to boycott his employer if he was not terminated. There was no basis for any allegation that the defendant acted criminally or for the sole purpose of harming plaintiff who did not know the reason the defendant opposed his employment. The court held that the purported actions of the defendant did not amount to the sort of extreme and unfair economic pressure that could support the tort. The defendant was motivated by legitimate economic self-interest.

Also, in *Freeman v. Coldwater Creek, Inc.*, 551 F.Supp.2d 164 (S.D.N.Y. 2008), *aff'd,* 321 Fed.Appx. 58 (2nd Cir. 2009), a vendor requested that the plaintiff be removed from their account, which contributed to the employee's termination. The threat to pull

the account unless plaintiff was removed from the account was held to not constitute the "extreme and unfair" economic pressure necessary to establish the tort.

Further, in *Snyder v. Sony Music Entertainment*, 252 A.D.2d 294, 684 N.Y.S.2d 234 (1st Dept. 1999), an associate attorney who was improperly prosecuting a lawsuit independent of his firm, sued the opposing counsel who he alleged had gratuitously advised his law firm employer that he was practicing law outside the firm. The court held that the opposing attorney's call to the plaintiff's employer did not constitute the type of wrongful means or sole desire to hurt the plaintiff necessary to support a claim of tortious interference.

Likewise, in *Taylor v. New York University Medical Center*, 7 A.D.3d 401, 776 N.Y.S.2d 474 (1st Dept. 2004), an employee was fired when a former employer, who plaintiff had sued regarding his termination, brought to his current employer's attention that plaintiff had a conflict of interest by calling for an investigation of a project in which the current and former employers were engaged. The claim was rejected because the actions of the defendant did not constitute used wrongful means, nor did the defendant act solely to harm plaintiff.

Finally, in *Treppel v. Biovail Corp.,* 2005 WL 427538 (S.D.N.Y. 2005), the defendant securities company allegedly threatened to sue plaintiff's employer if he was not terminated because plaintiff had contributed to large losses by the defendant in securities transactions. The court held that this was not the kind of extreme and unfair financial pressure which could support a claim of tortious interference.

There are no allegations in the Complaint that establish that an action taken by the Library Defendants constituted "wrongful means" as that term is defined by the case law.

The Complaint additionally fails to allege that the Library Defendants' sole purpose was to harm the plaintiff. *Lobel v. Maimonides Medical Center*, 39 A.D.3d 275, 276-277, 835 N.Y.S.2d 28, 30 (1 Dept. 2007) (tortious interference claim dismissed since it is clear that any motivation on defendant's part was "based on economic self-interest and not for the sole purpose of harming plaintiff"). The entire Complaint is premised on the theory that the purpose of any action by the Library Defendants was to obtain withdrawal of the Notice of Claim. Plaintiff clearly has not alleged the necessary elements of a tortious interference claim.

POINT VI

THE PLAINTIFF HAS FAILED TO MEET THE STRICT CRITERIA FOR THE TORT OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The Fourth Count alleges that "Defendants intentionally inflicted emotional distress upon plaintiff," causing damages. Compl. 42.

> In order to make a showing of intentional infliction of emotional distress, a plaintiff must demonstrate that: (1) defendant's conduct toward plaintiff was so outrageous and shocking that it exceeded all reasonable bounds of decency as measured by what the average member of the community would tolerate; (2) plaintiff suffered severe emotional distress; (3) defendant's conduct caused such distress; and (4) defendant acted either (a) with the desire to cause such distress to plaintiff, (b) under circumstances known to defendant which made it substantially certain that that result would follow, or (c) recklessly and with utter disregard of the consequences. *See Bender v. City of New York*, 78 F.3d 787, 790 (2d Cir. 1996). New York sets a high threshold for conduct that is 'extreme and outrageous' enough to constitute intentional infliction of emotional distress." *Id.* Emotional distress is severe when it is of such intensity and duration that no reasonable person should be expected to endure it.

Brewton v. City of New York, 550 F.Supp.2d 355, 369 (E.D.N.Y. 2008).

"Ordinarily, whether the challenged conduct is sufficiently outrageous will be determined as a matter of law." *Nevin v. Citibank, N.A.,* 107 F.Supp.2d 333, 345-46 (S.D.N.Y. 2000), *as quoted* in *Rizzo v. Edison, Inc.*, 172 Fed.Appx. 391, 396, 2006 WL 759797, p. 4 (2nd Cir. 2006). "New York courts routinely dismiss claims for intentional infliction of emotional distress in the employment context, except where such claims were accompanied by allegations of sex discrimination and, more significantly, battery." *Rickard v. Western New York Independent Living Project, Inc.*, 2009 WL 1468459, 7 (W.D.N.Y. 2009) (citation omitted).

The allegation in the Complaint fails to meet the strict criteria of this tort.

POINT VII

AS AN AT-WILL EMPLOYEE, PLAINTIFF CANNOT STATE A CLAIM FOR BREACH OF THE COVENANTS OF GOOD FAITH AND FAIR DEALING

The Fifth Count alleges that "Defendants breached covenants of good faith and fair dealing regarding plaintiff's employment, causing his termination," causing damages. Compl. ¶ 44.

This claim is inapplicable to the Library Defendants since they had no contractual relationship with plaintiff. In any event, as an associate with Morris Duffy, plaintiff was an employee at-will, and cannot state a claim for breach of the covenants of good faith and fair dealing as against any defendant. "Because New York recognizes no covenant of good faith and fair dealing in an at-will employment relationship, that claim must be dismissed." *Guary v. Upstate Nat. Bank*, 618 F.Supp.2d 272, 276 (W.D.N.Y. 2009), *citing, Chimarev v. TD Waterhouse Investor Services, Inc.,* 99 Fed.Appx. 259, 262 (2nd Cir. 2004), *citing Horn v. New York Times,* 100 N.Y.2d 85, 96-97, 760 N.Y.S.2d 378

(2003). *See also, Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 305, 461 N.Y.S.2d 232, 237 (1983).

POINT VIII

PLAINTIFF'S CLAIM UNDER THE NEW YORK STATE CONSTITUTION FAILS FOR THE SAME REASON THAT HIS FIRST AMENDMENT CLAIM FAILS

The Sixth and final Count alleges "Defendants, acting under color of law, also retaliated against plaintiff for the exercise of his rights to free speech under the New York State Constitution." Compl. ¶ 46.

This claim is subject to dismissal for the same reason as the First Amendment claim under the United States Constitution. "Plaintiff purports to assert free-speech retaliation claims under the First Amendment, pursuant to 42 U.S.C. § 1983, and the New York State Constitution, and the analysis of both claims is the same." *Kenney v. Genesee Valley Bd. of Cooperative Educational Services*, 2008 WL 343110, 3 (W.D.N.Y. 2008).

CONCLUSION

For the reasons stated, plaintiff's Complaint should be dismissed.

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