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UNITED STATES DISTRICT COURT
for the
EASTERN DISTRICT OF NEW YORK

JOSHUA BRINN

Plaintiff,

09-01151 (TCP)(WDW)

-against-

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

Defendants.

BRIEF ON BEHALF OF PLAINTIFF IN OPPOSITION TO THE LIBRARY DEFENDANTS' MOTION TO DISMISS

Dated: October 12, 2009

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STATEMENT OF FACTS

The facts are set forth in the Complaint, annexed as Exhibit A to the Granofsky Declaration, and the Brinn Declaration, submitted herewith. In addition, plaintiff is withdrawing his second cause of action alleging a violation of due process and his fifth cause of action alleging a breach of covenants of good faith and fair dealing.

ARGUMENT

POINT I

PLAINTIFF'S CLAIM SETS FORTH PLAUSIBLE CLAIMS OF RELIEF UNDER RULE 8 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a pleading to state "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8 Fed.R.Civ.P. This pleading "statement must be concise 'because unnecessary prolixity in a pleading places an unjustified burden on the court and the party who must respond to it because they are forced to select the relevant material from a mass of verbiage.'" Shabtai v. Levande, 38 Fed. Appx. 684 (2d Cir. 2002)(internal citation omitted). As set forth in Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980)(emphasis added):

> The office of a motion to dismiss is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof. As formulated in Conley v. Gibson, 355 U.S. 41, 45, 78 S.Ct. 99 (1957), a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.

In Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007), the United States Supreme Court held that a plaintiff must "state a claim for relief that is plausible on its face." Further, "[o]n a motion to dismiss or for judgment on the pleadings we

'must accept all allegations in the complaint as true and draw all inferences in the non-moving party's favor.'" LaFaro v. New York Cardiothoracic Group, PLLC, 570 F.3d 471, 475 (2d Cir. 2009), citing, Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292, 300 (2d Cir. 2003). Plaintiff's complaint is a short and plain statement which, drawing all inferences in favor of plaintiff, establishes a plausible claim for relief.

The Library Defendants complain that plaintiff does not allege "he was present during the alleged conversation between [defendant] Glick and McMahon concerning him, nor does he allege that he has any personal, or even hearsay, knowledge that the conversation actually took place" (Library Defendants brief, p. 17). However, there is no such pleading requirement. Further, if the Library Defendants are able to demonstrate any technical pleading defect, plaintiff seeks leave of the court to replead.

Plaintiff's allegations, even as characterized by the Library Defendants, are factual allegations - not legal conclusions - which suffice to sustain a pleading. As set forth in Bell Atlantic Corp. V. Twombly, 550 U.S. 544 (2007), "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . ." Plaintiff's complaint pleads, in relevant part, as follows:

> 23. Upon information and belief, after receiving the First Notice of Claim, Judith Lockman, Director of the Syosset Public

Library, directed Robert Glick, Esq., a Member of the Board of Trustees of the Syosset Public Library, to call plaintiff at his place of work.

24. On or about January 10, 2008, Glick phoned plaintiff and advised him to drop the First Notice of Claim and also stated that Glick knew the attorneys at MORRIS DUFFY ALONSO & FALEY and that it would be very bad for plaintiff to pursue the Notice of Claim

25. On or about January 11, 2008, Glick made unsolicited phone calls to plaintiff at his workplace, further demanding that plaintiff discontinue the Notice of Claim.

26. Upon information and belief, Glick contacted Kevin Mahon, Esq., a partner at MORRIS DUFFY ALONSO & FALEY to further interfere with plaintiff's employment and demand that the First Notice of Claim be withdrawn.

27. During these conversations, Mr. Glick also disclosed information to a third party about plaintiff's confidential library records.

28. Betty Winkler is a Claims Examiner employed by defendant UTICA NATIONAL INSURANCE COMPANY.

29. On March 19, 2008, at the direction of defendant SYOSSET PUBLIC LIBRARY, and at the direction of her supervisor at UTICA MUTUAL INSURANCE COMPANY, Robin Nelson, Betty Winkler, also contacted partners of defendant MORRIS DUFFY ALONSO & FALEY to exert pressure on plaintiff to withdraw his First Notice of Claim.

30. At various times from March 19, 2008 through April 16, 2008, Faley, Alsono, and DeGennaro, partners of MORRIS DUFFY ALONSO & FALEY, demanded that plaintiff withdraw his Notice of Claim against defendant SYOSSET PUBLIC LIBRARY or he would be terminated.

31. Ultimately, plaintiff withdrew his First Notice of Claim, due to the threats regarding his employment.

32. On April 16, 2008, Andrea Alonso, Esq. directed plaintiff to sign a partial document which was apparently the signature page of a general release which would waive his claims against the defendant SYOSSET PUBLIC LIBRARY.

33. Plaintiff refused to sign this document.

34. Defendant MORRIS DUFFY ALONSO & FALEY terminated plaintiff because he refused to sign the general release.

35. Subsequently, plaintiff filed the Second Notice of Claim.

36. 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. This caused plaintiff to suffer economic and non-economic damages.

(Exhibit A to Granofsky Declaration). In sum, the complaint alleges that, on or about January 10 and January 11, 2008, the Individual Library Defendants phoned plaintiff, or were directed to phone plaintiff, and threatened that it would be "very bad"

for him to pursue his Notice of Claim. Thereafter, Library Defendant "Glick contacted Kevin Mahon, Esq., a partner at MORRIS DUFFY ALONSO & FALEY, ("Morris Duffy") to further interfere with plaintiff's employment." Glick also contacted defendant Utica Mutual Ins. Co., a client of Morris Duffy, to further exert undue economic pressure upon plaintiff's employment as an associate attorney at Morris Duffy. Morris Duffy obeyed the overtures of Glick and Utica, and directed plaintiff to withdraw his Notice of Claim, and then terminated plaintiff when he refused to sign a general release in favor of Syosset Public Library.

Since defendants urge this Court to consider evidence outside, but referred to, in the pleadings, the Court should also consider the fax cover page sent from the Library's counsel (Spellman Rice) to Defendant Utica National Ins. Co. ("Utica"), to Defendant Morris Duffy, requesting that Morris Duffy "have Mr. Brinn sign the General Release" (Exhibit 1 to Brinn Declaration). In violation of New York Penal Law, the space for plaintiff's signature was pre-notarized, and plaintiff was never shown the complete content of what appeared to be a release (Brinn Declaration). This type of deceit, fraud, and misrepresentation demonstrates that all three defendants conspired to terminate plaintiff because he refused to sign a release in favor of the Library. Therefore, the pleading plausibly establishes the underlying causes of action.

Plaintiff's pleading, supplemented by the fax cover page and pre-notarized signature page of the Release, details the conversations between Glick and plaintiff, Morris Duffy, and Utica, gives dates where available, and demonstrates the undue coercive pressure and unlawful tactics that Defendants exerted upon plaintiff simply because plaintiff sought to redress his suspension from the Library, and because he would not execute a release in favor of the Library regarding this grievance. These factual and legal allegations are more than speculative; they establish "more than a sheer possibility that a defendant has acted unlawfully," Ashcroft v. Iqbal, __ U.S. __, 129 S.Ct. 1937, 1949 (2009), citing, Twombly, 550 U.S. at 556, and are sufficient to satisfy the Rule 8 pleading requirement.

POINT II

THE PLEADING ALLEGES A PLAUSIBLE VIOLATION OF THE FIRST AMENDMENT

A. Plaintiff's Grievance Need not Raise a "Matter of Public Concern"

The First Amendment to the United States Constitution prohibits laws abridging freedom of speech and abridging the right to petition the Government for redress of grievances. The Library defendants correctly concede that "[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" (Library Defendants, p. 10). The Library Defendants then assert that "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'" Id. The Library Defendants rely on two cases where public employees alleged First Amendment violations in the workplace. At best, the Library Defendants misapprehend the law.

Since public employees may express opinions on a variety of matters in the workplace, the First Amendment protects only those matters which are a "matter of public concern." This Pickering test evolved because "a public employer has a distinct interest in regulating the speech of its employees in order to ensure and promote the 'efficiency of the public services it performs.'" Cioffi v. Averill Park Central School District, 444 F.3d 158, 162

(2d Cir. 2006), citing, Rankin v. McPherson, 483 U.S. 378, 384 (1987). However, in the instant case, plaintiff was not a public employee; plaintiff did not work for the Library; he was an associate attorney at Morris Duffy. Consequently, the expression of opinions by an employee in the public workplace, and the efficiency and potential disruption of a public employer's services are not implicated - the Pickering test does not apply. Where plaintiff is not a public employee at the time of his First Amendment speech, the Second Circuit has ruled that, "[b]ecause [plaintiff] was not a public employee when he criticized [defendant] Bland, his speech need not have been on a matter of public concern for it to fall within the protection of the First Amendment for the purposes of this action." Williams v. Town of Greenburgh, 535 F.3d 71 (2d Cir. 2008). Similarly, as set forth in Wolff v. Town of Mount Pleasant, 2009 WL 1468691 at *6, 06 Civ. 3864 (CS)(LMS)(S.D.N.Y. Apr 27, 2009)(internal citations omitted)(emphases added), the court held that:

> [i]n order to maintain a First Amendment retaliation claim, a **private citizen** complainant must allege that the defendant took some action in response to his or her First Amendment activity that 'effectively chilled the exercise of his [or her] First Amendment right. . . . **Differing from this test, a public employee** plaintiff who claims that he or she was retaliated against for exercising his or her First Amendment rights must show that he defendant implemented an 'adverse employment action' against the plaintiff because of his or her engagement in First Amendment activity **touching upon a**

matter of public concern.

Although defendants cite Town of Greenburgh, they fail to apprehend that the "matter of public concern" requirement - which defendants discuss at length in their motion papers by continuously citing inapposite cases involving public employees - does not apply to a First Amendment retaliation claim brought by a private citizen. Despite defendants' invitation to do so, the Court need not "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" (Library Defendants brief, p. 8).

B. Plaintiff Pleads a Valid First Amendment Retaliation Claim because he was Terminated for Petitioning the Government

Plaintiff alleges a First Amendment retaliation claim because, as a private citizen, he exercised his First Amendment right to petition the Library by filing a Notice of Claim. As set forth in Franco v. Kelly, 854 F.2d 584, 589 (2d Cir. 1988):

> The Supreme Court has described the right to petition government for redress of grievances as 'among the most precious of the liberties safeguarded by the Bill of Rights.' See United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 222, 88 S.Ct. 353, 356, 19 L.Ed.2d 426 (1967). Moreover, the right of petition applies with equal force to a person's right to seek redress from all branches of government.

There is no doubt that the Notice of Claim constitutes a petition

to the government for redress of plaintiff's library privileges, which were suspended. Plaintiff's First Amendment retaliation claim, outside the context of employment, must therefore be analyzed as follows:

> To survive dismissal, 'a plaintiff asserting First Amendment retaliation claims must advance non-conclusory allegations establishing: (1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action.'

Collins v. Goord, 428 F. Supp.2d 399, 419 (S.D.N.Y. 2006), citing, Dawes v. Walker, 239 F.3d 489, 492 (2d Cir. 2001), overruled on other grounds, Swierkiewicz v. Soremna N.A., 534 U.S. 506 (2002).[1] In Collins, the Court held that the first factor was pleaded because the "filing of both lawsuits and administrative grievances is constitutionally protected." Id. Similarly, plaintiff's filing of a Notice of Claim (Complaint, ¶ 13) satisfies this requirement. Plaintiff pleads the second factor by alleging that all defendants took an adverse action against plaintiff, in concert, (Compl. ¶¶ 11, 12, 36) by compelling him to withdraw the First Notice of Claim and then

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[1] Put another way, plaintiff must plead 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).

terminating his employment when he refused to sign a document releasing the public Library from liability (Complaint, ¶¶ 33, 34). Plaintiff pleads the third factor by alleging that there was a causal connection between the Notice of Claim and his termination since plaintiff alleges that all defendants terminated him in violation of his Constitutional rights, for filing a Notice of Claim, and refusing to release his claims (Complaint, ¶¶ 19-36). Plaintiff suffered a "chilling effect," as set forth in Collins and Wolff when he was terminated because he exercised his First Amendment right to petition a public Library. Consequently, plaintiff pleads a plausible First Amendment retaliation claim[2] - he was terminated for petitioning the government for redress - whether or not his petition relates to a "matter of public concern."[3]

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[2] Since, plaintiff's retaliation claim under the New York State Constitution is subject to the same analysis, plaintiff's sixth cause of action should also survive defendants' motion to dismiss. Kenney v. Genesee Valley Board of Cooperative Educational Services, 2008 WL 343110 at *3, 97-CV-6442, (W.D.N.Y. Feb. 6, 2008).

[3] Though not relevant, plaintiff's Notice of Claim for refusing him entry and access to a public institution would raise a "matter of public concern." A claim that "at least minimally touch[es] upon a matter of public concern" is sufficient. White Plains Towing Corp. v. Patterson, 991 F.2d 1049, 1060 (2d Cir. 1993). Further, "[w]hether or not speech addresses a matter of public concern 'must be determined by the content, form, and context of a given statement, as revealed by the whole record.'" Sousa v. Roque, 2009 WL 2568949 (2d Cir. 2009), citing, Connick v. Myers, 461 U.S. 138, 147-48 (1983). In the present matter, an individual seeking access to a public institution may raise a matter of public concern, when the form and context of plaintiff's banishment are taken into account, after the record is developed through discovery.

POINT III

QUALIFIED IMMUNITY DOES NOT PROTECT THE INDIVIDUAL DEFENDANT IN THEIR INDIVIDUAL CAPACITIES

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 (2d Cir. 1993), quoting, Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). To determine if a right was clearly established, the Court must 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 pre-existing law a reasonable defendant official would have understood that his or acts were unlawful.

Dean v. Blumenthal, 577 F.3d 60, 68 (2d Cir. 2009), citing, Jermosen v. Smith, 945 F.2d 547, 550 (2d Cir. 1991). A court has to determine whether, based on the pleading, "the defendants should have known that the specific actions complained of violated plaintiff's freedom of speech." Lewis v. Cohen, 165 F.3d 154, 166-67 (2d Cir. 1999).

Defendants claim that its termination of the plaintiff for petitioning the government for redress under the First Amendment

is protected by qualified by qualified immunity because it was objectively reasonable for the defendants to believe that its termination did not violate the First Amendment. Defendants premise their alleged "objectively reasonable" belief upon the fact that plaintiff could not have violated the First Amendment because the 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" (Library Defendants brief at p. 15). Again, defendants claim that the First Notice of Claim pertained to personal and private matters, and not to matters of public concern, which is entirely irrelevant to the constitutional analysis of plaintiff's claims. As set forth in Point II, supra, the Pickering test does not apply to private citizens who seek to petition the government for redress. Plaintiff's Notice of Claim constitutes a petition for redress under the law, since "the right of petition applies with equal force to a person's right to seek redress from all branches of government." Franco v. Kelly, 854 F.2d 584, 589 (2d Cir. 1988). Defendants cannot retaliate against a person for exercising his First Amendment rights. The individual Library Defendants' attempt to claim qualified immunity based on an objectively reasonable belief that the Notice of Claim did not pertain to matters of public concern must fail since the Pickering test does not apply, and the activities

of the defendants, as set forth in Point IV, supra, which include unlawful disclosure of Library records, a criminal notarial act, and an attempt to obtain a release through fraud, indicate that defendants used unlawful means and should have known, objectively, that both the means and the substance of the retaliation was unlawful.

POINT IV

PLAINTIFF PROPERLY PLEADS THAT DEFENDANTS INTENTIONALLY INTERFERED WITH A BUSINESS OPPORTUNITY BY TERMINATING HIM FOR REFUSING TO SIGN A RELEASE IN FAVOR OF THE LIBRARY

To plead tortuous interference with a business opportunity:

> a plaintiff must demonstrate that the defendant's interference with its prospective business relations was accomplished by 'wrongful means' or that defendant acted for the sole purpose of harming the plaintiff. 'Wrongful means' includes physical violence, fraud, misrepresentation, civil suits, criminal prosecutions and some degree of economic pressure, but more than simple persuasion is required.

Snyder v. Sony Music Entertainment, Inc., 252 A.D.2d 294, 300-01, 684 N.Y.S.2d 235 (1st Dep't 1999). This is true, even where plaintiff is an employee at will. Hoesten v. Best, 34 A.D.3d 143, 159, 821 N.Y.S.2d 40 (First Dep't. 2006)("As an at-will employee with no written contract, plaintiff could only succeed on his tortious interference claim if he established that Best acted solely to harm him or used wrongful means to achieve the interference"); Taylor v. New York University, 7 A.D.3d 401, 402, 776 N.Y.S.2d 474 (1st Dep't. 2004).

As set forth in Friedman v. Coldwater Creek, Inc., 551 F.Supp.2d 164, 170 (S.D.N.Y. 2008):

> for Defendants' interference to constitute the kind of 'wrongful means' that will support Plaintiff's claim for tortious interference, one of the following must be true: (1) that conduct must amount to an independent crime or tort; (2) that conduct

must have been taken solely out of malice; or (3) that conduct must amount to 'extreme and unfair' economic pressure.

In the present matter, despite the fact that Defendants blithely contend that there plaintiff has not pled any "malice" or "unlawful means," the pleading establishes that the defendants committed crimes, acted out of malice, and exerted undue economic pressure by having plaintiff terminated from his employment at Morris Duffy because he would not release the Library.

First, the Library Defendants disclosed confidential library records to the other defendants (¶ 27 of Complaint), including plaintiff's employer and an insurance company who were not involved in the Library's suspension of plaintiff's privileges. This violates CPLR 4509, which requires that "Library records . . . shall be confidential and shall not be disclosed except that such records may be disclosed to the extent necessary for the proper operation of such library and shall be disclosed upon request or consent of the user or pursuant to subpoena, court order or where otherwise required by statute."

Second, the Library Defendants conspired with the other defendants to procure a release by misrepresentation, deceit, fraud, and criminal notary fraud. As set forth in the Brinn Declaration, plaintiff was shown only the signature page of what purported to be a release, which was unlawfully pre-notarized. § 135-a(2) of the Executive Law provides that "[a] notary public or

commissioner of deeds, who in the exercise of the powers, or in the performance of the duties of such office shall practice any fraud or deceit, the punishment for which is not otherwise provided for by this act, shall be guilty of a **misdemeanor.**" By offering a pre-notarized partial release to plaintiff, and secreting the fact that the document was a release, defendants engaged in misrepresentation, deceit, fraud, and criminal conduct. This is sufficient to establish tortious interference with plaintiff's business opportunity as an associate attorney at Morris Duffy. See, Williams & Co. v. Collins, Tuttle & Co., 6 A.D.2d 302, 176 N.Y.S.2d 99 (1st Dep't. 1958)(sustaining a complaint for tortious interference with business opportunity where defendants conspired to deprive plaintiff of a real estate commission).

Further, the Library engaged in "interference" because it had no legitimate business interest in plaintiff's employment as an associate attorney with Morris Duffy. The Library Defendants' interference in Brinn's employment with Morris Duffy had no relationship to its mission of running a Library, and the method of their interference, as set forth above, was tortuous. Defendants' reliance on Hoeston, and similar cases, is misplaced. In all the cases relied upon by defendants, the defendant had a legitimate interest to "interfere" with the plaintiff's employment relationship. In this case, plaintiff's grievance

against the Library for his suspension had no relationship to his employment and an insurance company that referred business to plaintiff's employer. Therefore, defendants acted maliciously and used "unlawful means" to intimidate and coerce Morris Duffy to terminate plaintiff because he would not sign a release in favor of the Library.

For instance, in Hoeston, plaintiff, a stage manager for a television program employed by ABC, sued a union official for reporting his abusive behavior toward actors while on the job. The Union defendant had a legitimate interest in intervening by reporting the conduct of one of its members to an employer with which the Union has a collective bargaining agreement. Similarly, in Lawrence v. Union of Orthodox Jewish Corporations of America, 32 A.D.3d 304, 820 N.Y.S.2d 60 (1st Dept. 2006), plaintiff employee (employed by a kosher slaughterhouse) sued the Orthodox Union (OU), a kosher certifying organization, alleging that the OU threatened to boycott the slaughterhouse if plaintiff were not terminated from the slaughterhouse. Again, defendant had a legitimate business reason to intervene and ensure that all the requirements of kosher food preparation were complied with at the slaughterhouse. In Snyder v. Sony Music Entertainment, 252 A.D.2d 294, 684 N.Y.S.2d 235 (1st Dep't 1999)(where opposing counsel informed plaintiff's law firm that plaintiff was acting outside the scope of his employment with his law firm) and Taylor

v. New York University Medical Center, 7 A.D.3d 401, 776 N.Y.S.2d 474 (2004)(where plaintiff's former employer brought a "conflict of interest" to the attention of plaintiff's current employer), the defendants had legitimate reasons, and used legitimate means, to inform plaintiffs' former employers about plaintiff. Also, in Lobel v. Maimonides Medical Center, 39 A.D. 3d 275, 835 N.Y.S.2d 28 (2007), a co-employee was alleged to have interfered in plaintiff's contract with his employer. The court found that the co-employee was motivated by his own self interest, stating, "it is clear that any motivation on [the defendant's] part was based on economic self-interest and not for the sole purpose of harming plaintiff." Id. at 277.

These cases are inapposite to the present matter, in which the Library Defendants had no legitimate economic self-interest to meddle in plaintiff's employment. Further, the interference was accomplished by criminal means, misrepresentation, and deceit. The Library Defendants' interest in obtaining a release from Brinn's constitutional claims is not "economic self interest" within the purview of governing caselaw. And any "justification" proffered by defendants for its interference raises a jury question, which should not be resolved on a pleading. United Euram Corp. v. Occidental Petroleum Corp., 123 Misc.2d 574, 577-78, 474 N.Y.S.2d 372, 375 (Sup. Ct. 1984).

Since all defendants conspired to dismiss plaintiff because

of his constitutional claims, and did so by disseminating confidential records, fraudulently attempting to procure a release, criminally pre-notarizing plaintiff's signature, and having plaintiff terminated when he refused to sign the release, these facts sustain a plausible pleading of intentional interference with a business opportunity.

POINT V

PLAINTIFF PLEADS INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

To plead a claim of intentional infliction of emotional distress, plaintiff must demonstrate that (i) the defendant engaged in extreme and outrageous conduct; (ii) defendant intended to cause or disregarded a substantial probability of causing severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress. Howell v. New York Post Co., 81 N.Y.2d 115, 596 N.Y.S.2d 350, 353 (1993). Liability is found "only where the conduct has been 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 society." Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 303 (1983).

In the present matter, plaintiff pleads that, because of his suspension from a Library, the Library defendants, Utica Mutual Insurance Company, and Morris Duffy conspired to terminate him because he would not sign a document releasing the Library from liability. Plaintiff's dispute with the Library had no relation to his employment as an associate attorney with Morris Duffy. Yet the Library defendants enlisted plaintiff's employer, and an insurance company that provides work to plaintiff's employer, to maliciously exert undue economic pressure upon plaintiff.

Further the defendants proffered a signature page of a release, without permitting plaintiff to examine the full document, pre-notarized his signature (which constitutes a misdemeanor), disclosed confidential library records in violation of law, and terminated plaintiff when he would not execute a release in favor of the Library. This is sufficient to plead intentional infliction of emotional distress. Halio v. Lurie, 15 A.D.2d 62, 222 N.Y.S.2d 759 (2d Dep't. 1961); Sanchez v. Orozco, 178 A.D. 2d 391, 578 N.Y.S.2d 145 (1st Dept. 1991); Atherton v. 21 East 92nd Corp., 149 A.D. 2d 354, 539 N.Y.S.2d 933 (1st Dept. 1989).

CONCLUSION

For the foregoing reasons, plaintiff requests that this Court deny defendants' motion to dismiss, and grant such other and further relief as the Court deems just and equitable.

Dated: October 12, 2009
Mineola, NY

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 12, 2009, I, Raymond Nardo, served by

XXX mail, first class   __ return receipt requested

__ overnite mailed   __ faxed

__ served via ECF   X electronically mailed

the enclosed:

Brief on Behalf of Plaintiff in Opposition to the Library Defendants' Motion to Dismiss

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10/12/09
DATE