LSK&D #: 895-8026 / 1303589

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JOSHUA BRINN,

Plaintiff,

2:09-cv-01151-TCP-WDW

-against-

Filed by ECF on
November 10, 2009

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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REPLY MEMORANDUM OF LAW

Of Counsel,
Richard Granofsky
Thomas A. Catalano

LESTER SCHWAB KATZ & DWYER, LLP

120 BROADWAY – 38TH FLOOR
NEW YORK, N.Y. 10271-0071
(212) 964-6611
FAX: (212) 267-5916
Attorneys for Defendants
SYOSSET PUBLIC LIBRARY, JUDITH LOCKMAN, and ROBERT GLICK

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POINT I

PLAINTIFF'S ALLEGATION THAT THE LIBRARY DEFENDANTS CAUSED THE TERMINATION OF HIS EMPLOYMENT IS MERE SPECULATION THAT CANNOT SURVIVE A MOTION TO DISMISS

"To state a claim for First Amendment retaliation under § 1983, a plaintiff must allege: (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." *Holmes v. Poskanzer*, 2009 WL 2171326, 2 (2nd Cir. 2009). (citation and internal quotation marks omitted, emphasis added).[1]

Plaintiff has not pled sufficient factual allegations to show that the Library Defendants "took adverse action against [him]." As the Library Defendants were not plaintiff's employer, in order for him to prove the "adverse action" element of the claim he would need to plead that they had influence and control over Morris Duffy. There are, however, no factual allegations in the complaint to support such a theory. To the contrary, the papers submitted by Morris Duffy and Utica in support of their respective motions to dismiss amply demonstrate that each of them had their own business reasons for any actions they took that were adverse to plaintiff's interests.

In *Holmes,* the Court held that the plaintiffs' First Amendment claims were properly dismissed because the complaint "did not allege that any of the named defendants personally interfered" with the protected activity. *Id.* at 2 ("no personal involvement of any of the defendants to interfere with the elections"). Similarly, in the present case, there are no factual allegations that the Library Defendants exercised the requisite control over Morris Duffy. In short, allegations

[1] The Library Defendants concede, for the purposes of this motion, that plaintiff satisfies the first requirement since a notice of claim is protected speech under the Petition Clause of the First Amendment, and as a private citizen, he need not prove that the notice of claim pertained to a matter of public concern. *Williams v. Town of Greenburgh*, 535 F.3d 71 (2d Cir. 2008).

concerning the Library Defendants' ability to influence or "coerce[] . . . [Utica and Morris Duffy] to terminate plaintiff," [Compl.¶ 11] are mere "formulaic recitation[s]" of the causation element, *Twombly,* 550 U.S. at 555, and therefore do not pass the *Twombly-Iqbal* "plausibility test."

Although plaintiff may factually allege that Morris Duffy required him to withdraw the First Notice of Claim "under threats" regarding his continued employment, and that it terminated his employment for refusing to sign a general release (Compl. ¶¶ 32, 34), none of these allegations may be factually attributed to the Library Defendants. The only factual allegations against the Library Defendants are that Judith Lockman, as Director of the Syosset Public Library (the "Library"), directed defendant Robert Glick, Esq., a member of the Library's board of trustees to call plaintiff at Morris Duffy, and that Glick made those calls. (Compl. ¶¶ 22-25.) But there was nothing unlawful or inappropriate about Glick calling plaintiff --- a lawyer who had filed a notice of claim *pro se* --- to discuss the notice of claim, and request that it be withdrawn.

The allegation, made upon "[u]pon information and belief," that Glick contacted Kevin Mahon, Esq., a partner at Morris Duffy, to "further interfere with plaintiff's employment and demand that the First Notice of Claim be withdrawn" represents merely a legal conclusion, and is not an allegation of fact.

The complaint alleges that during these conversations, Glick "disclosed information to a third party about plaintiff's confidential library records," although the nature of this "information" is not stated (Compl. ¶ 27). The suspension of plaintiff's library privileges was the subject matter of a pending notice of claim, and that fact cannot possibly be considered "confidential" under CPLR 4509. CPLR 4509, by its terms and according to its legislative history, protects as confidential the library resources utilized by patrons. The purpose of the statute is "to insure [a library's] readers' right to read anything they wish, free from the fear that someone might see what they read and use

this as a way to intimidate them. . . . Without such protection, there would be a chilling effect on our library users as inquiring minds turn away from exploring varied avenues of thought because they fear the potentiality of others knowing their reading history." Mem. of Assemblyman Sanders, 1982 N.Y.Legis.Ann., at 25., *as quoted in Quad/Graphics, Inc. v. Southern Adirondack Library System*, 174 Misc.2d 291, 293-294, 664 N.Y.S.2d 225, 227 (N.Y.Sup. 1997). There is no allegation that any information regarding plaintiff's reading materials was disclosed, nor anything other than the fact that his library privileges were suspended, which became the basis for a notice of claim.

Paragraph 24 of the complaint alleges that a claims adjuster employed by defendant Utica Insurance Company ("Utica") acted "at the direction of defendant SYOSSET PUBLIC LIBRARY" and contacted Morris Duffy "to exert pressure on plaintiff to withdraw his First Notice of Claim." Again, this constitutes merely conclusory speculation as to causation. There are no factual allegations that would suggest that Utica, which had it own business interests in wanting to dispose of a pending claim, acted "at the direction" of the Library Defendants.

Thus, the entire claim against the Library Defendants is premised upon the alleged "conspiracy" and "joint action" among the defendants and the purported ability of the Library Defendants to "coerce" Utica and Morris Duffy to do its bidding. These are, however, precisely type of speculative allegations of conspiracy that the Supreme Court rejected in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007) and *Ashcroft v. Iqbal*, ___ U.S.___, 129 S.Ct. 1937 (2009).

The causation allegations in *Iqbal* are similar in substance to the causation allegations in the instant complaint. In *Iqbal*, plaintiff alleged that his detention in the aftermath of September 11 as a person "of high interest" had been directly caused by John Ashcroft, the United States Attorney General, and Robert Mueller, the Director of the FBI. He alleged, *inter alia*, that Ashcroft and

Mueller designated him as a person high interest on account of his race, religion, or national origin; instituted a policy of holding post-September-11th detainees in highly restrictive conditions of confinement; and knew of, condoned, and willfully and maliciously agreed to subject him to harsh conditions of confinement solely on account of his religion, race, and/or national origin. *Id.* at 1944.

The Court held that although F.R.C.P. 8 "does not require detailed factual allegations,[ ] it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 1949. (citation and internal quotation marks omitted). "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do, [n]or does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." *Id.* (citation, brackets, and internal quotation marks omitted).

In order 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.* (citation, brackets, and internal quotation marks omitted). A claim only has "facial plausibility" if the plaintiff has pled "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. There must be "more than a sheer possibility that a defendant has acted unlawfully. *Id.* Pleading facts that are "merely consistent with a defendant's liability" does not suffice. *Id.* (citation and internal quotation marks omitted).

Although the Court must assume that all of the factual allegations in the complaint are true, it is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* at 1949-50 (internal quotation marks omitted). Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.* at 1950. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but

it has not shown-that the pleader is entitled to relief." *Id.* (citation, brackets, and internal quotation marks omitted). "[L]egal conclusions . . . must be supported by factual allegations." *Id.*

In dismissing the complaint the Court relied upon *Twombly* for its decision. In *Twombly,* the plaintiff alleged that the defendants had entered into a conspiracy in violation of the Sherman Act, 15 U.S.C. § 1. The conclusory allegations of a conspiracy were not, however, not entitled to the presumption of truth. "[T]he plaintiffs' assertion of an unlawful agreement was a ' "legal conclusion" ' and, as such, was not entitled to the assumption of truth." *Id.*, *quoting Twombly* at 555. Although the "nonconclusory factual allegation of parallel behavior" might have suggested a conspiracy, "the [*Twombly*] Court nevertheless concluded that it did not plausibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior." *Id.* at 14950, *citing Twombly* at 567. "Because the well-pleaded fact of parallel conduct, accepted as true, did not plausibly suggest an unlawful agreement, the Court held the plaintiffs' complaint must be dismissed." *Id.*, *citing Twombly* at 570.

The *Iqbal* Court concluded that the allegations that defendants knew of and condoned plaintiff's unlawful treatment on account of his race, religion, or national origin, and that Ashcroft was the "principal architect" of the policy, and that Mueller was "instrumental" in adopting and executing it, were merely "bare assertions, much like the pleading of conspiracy in *Twombly,* amount[ing] to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim [.]" *Id.* at 1951, *quoting Twombly* at 555. "As such, the allegations are conclusory and not entitled to be assumed true." *Id.* These allegations were not rejected because they were "unrealistic or nonsensical," but because their "conclusory nature . . . disentitles them to the presumption of truth." *Id.*

Similarly, in the present case, plaintiff's allegations alleging a "conspiracy" among the defendants, linking the decisions made by Morris Duffy with commands dictated by the Library Defendants, are merely "bald assertions," *Id.,* which are not entitled to the presumption of truth.

Plaintiff attempts to supplement his complaint by his declaration, relying heavily upon a faxed general release from Utica, which also bears the fax header from the Library Defendants' law firm, Spellman Rice. Plaintiff argues that "[t]his 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."

The complaint *does not* allege, however, that the Library Defendants presented the release pre-notarized or with a missing page. (Compl. ¶ 32). Plaintiff neglects to point out that in the document annexed to his declaration, page "002" of the fax header is missing. There is absolutely no basis to infer that the Library Defendants were responsible for the missing "002" page. To the contrary, the obvious inference is that the *complete* release originated with and was sent by the Library's counsel, Spellman Rice, to Utica. After plaintiff withdrew his notice of claim, it would be entirely appropriate for the Library Defendants to ask their own counsel to draft a general release for plaintiff's signature. If Morris Duffy elected to pre-notarize the document, and present only the signature page to plaintiff, -- as alleged in the complaint at ¶ 32 -- that occurred solely within the confines of Morris Duffy's offices, and does not establish a claim against the Library Defendants, nor is does it serve as an adequate factual basis to allege a "conspiracy" or "joint action."

Although plaintiff alleges that he was terminated from his employment at Morris Duffy on account of unconstitutional conduct on the part of the Library Defendants, there is an "obvious alternative explanation," *Twombly*, at 567, for this adverse employment action. For its own business, ethical, and client-relations purposes, Morris Duffy did want to have one of its associates

involved in active litigation with the insured of one of its major insurance carrier clients. Such situation could easily become an embarrassment to the firm. However, the notion that the Library Defendants exercised control over Morris Duffy and its employment and client-relations policies, and used that control to deprive plaintiff of his Right to Petition under the First Amendment, "is not a plausible conclusion." *Id.* at 1951-52, In sum, plaintiff has not "nudged [his] claims" of retaliation "across the line from conceivable to plausible." *Id.* at 1950-51.

POINT II

THE INDIVIDUAL DEFENDANTS LOCKMAN AND GLICK ARE ENTITLED TO QUALIFIED IMMUNITY

"The presumption in favor of finding qualified immunity is necessarily high, protecting 'all but the plainly incompetent or those who knowingly violate the law.' " *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 102 (2nd Cir. 2003), *quoting Malley v. Briggs,* 475 U.S. 335, 341, 106 S.Ct. 1092 (1986). The doctrine will apply even if the official violated an established law, so long as he "was objectively reasonable in believing in the lawfulness of his actions." *Id.*

There are no non-speculative, factual allegations in the complaint that suggest that Lockman and Glick's were not "objectively reasonable in believing the lawfulness of [their] actions." The complaint alleges that Lockman and Glick, as "policymakers" of the Library, were responsible for "coercing" Utica and Morris Duffy to terminate plaintiff's employment. (Compl. ¶¶· 9-11). The *only* factual allegation against Lockman is that she directed Glick to call plaintiff at his place of employment. (Compl. ¶ 22). There was nothing improper in her request to a Library trustee to call a claimant who had filed a notice of claim against the Library, particularly where the claimant was an attorney. If her request was in violation of plaintiff's First Amendment rights, it was certainly objectively reasonable for her to believe that it was not. The complaint as against Lockman should be dismissed.

The only factual allegation against Glick is that he called plaintiff and asked him to withdraw the notice of claim. (Compl. ¶¶ 24-25). This too was not improper, and it would be objectively reasonable for Glick to believe that such a call would not interfere with plaintiff's First Amendment rights.[2] The allegation that Glick disclosed plaintiff's "confidential library records" is a red herring. As we have seen, the protections of CPLR 4509 are not implicated with the disclosure of the suspension of plaintiff's library privileges and a notice of claim. *See Quad/Graphics, supra.* The complaint against Glick should be dismissed.

POINT III

THE ALLEGATIONS OF THE COMPLAINT DO NOT STATE A CLAIM OF TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS

Plaintiff's allegations do not support any recognized theories of a claim of interference with prospective contractual relations: a) that conduct must be an independent crime or tort; b) that conduct must have been taken out of malice; or c) that conduct must amount to "extreme and unfair" economic pressure. *See Guard-Life Corp. v. S. Parker Hardware Manufacturing Corp.,* 50 N.Y.2d 183, 428 N.Y.2d 628 (1980). The tort does not provide a standard of good faith and fair dealing. *See Frieden v. Coldwater Creek, Inc.*, 551 F.Supp.2d 164 (S.D.N.Y. 2008), *aff'd,* 321 Fed.Appx. 58 (2nd Cir. 2009). "[I]n order for economic pressure to be wrongful . . . it must be extreme and unfair. *Treppel v. Biovail Corp.*, 2005 WL 427538, 9 (S.D.N.Y. 2005) (citations and internal quotation marks omitted) (S.D.N.Y. 2005) (smear campaign against a securities analyst does not satisfy the tort). None of the few allegations pertaining to the Library Defendants satisfy these elements.

[2] The bald allegation, made only upon "information and belief," that Glick contacted a Morris Duffy partner to "interfere with plaintiff's employment and demand that the First Notice of Claim be withdrawn" (Compl. ¶ 26) is entirely conclusory, and under *Twombly* and *Iqbal* cannot form the basis for a claim. *See* Point I.

The Complaint alleges that the Library Defendants made phone calls to plaintiff and to a partner at Morris Duffy requesting that the First Notice of Claim be withdrawn (Compl. ¶¶24-26). Such phone calls are manifestly insufficient to satisfy any of the aforementioned theories of the tort.

Plaintiff complains of the alleged disclosure of "confidential library records" (Comp. ¶27), but does not does not identify the nature of the "records." If by "confidential library records" plaintiff is referring to the First Notice of Claim, or any other conceivable document in the Library Defendants' possession that may relate to the suspension of his library privileges, he is not referring to a "library record" within the meaning of CPLR 4509. As discussed above, any document that dealt solely with the suspension of plaintiff's library privileges would not have not disclosed plaintiff's choice of reading materials or his use of the Library facilities. Moreover, no connection is pled between the purported disclosure of unidentified "library records" and the termination of plaintiff's employment.

The Complaint merely alleges that Morris Duffy presented a "partial document" to plaintiff and fired him for refusing to sign it (Compl. ¶31-34). As stated above, plaintiff's declaration annexes a document faxed from the Library's attorney which patently omits a page that had to have been faxed with the original document. These allegations clearly fail to provide a basis from which to infer involvement by the Library Defendants in plaintiff's termination.

All the actions attributed to the Library Defendants relate to either securing a withdrawal of the First Notice of Claim or a release from liability, actions which pertain to the promotion of the Library's business interests.

The Complaint does not identify any economic pressure by the Library, no less "extreme and unfair" economic pressure. Indeed, no economic relationship is alleged between the Library and Morris Duffy. The parties with an economic relationship were Utica and Morris Duffy. If economic

pressure had been brought to bear, Utica would have had its own independent business reasons to not want its panel attorneys to sue one of its insureds, and to wish to avoid a pending claim against one of its insureds. Morris Duffy of course had its own ethical and business reasons to not tolerate a conflict between one of its associate attorneys and a client insurance company insured. The alleged actions by the Library Defendants in requesting a withdrawal of the claim and a general release, and forwarding a form of general release, do not factually or logically suggest a conspiracy to terminate plaintiff's employment.

POINT IV

PLAINTIFF HAS FAILED ADEQUATE PLEAD AN INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM

The IIED claim is based upon the same conclusory allegations of "conspiracy" that mandate dismissal of the federal claims. It is claimed that 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" (Pltf. Br at 22.) In support of this claim, plaintiff relies upon the partial release that was presented to him by Morris Duffy and the disclosure of unspecified confidential library records, which have been discussed above and have been shown to be meritless.

Plaintiff has not attempted to distinguish *Rickard v. Western New York Independent Living Project, Inc.*, 2009 WL 1468459, 7 (W.D.N.Y. 2009), cited in the main brief, which held that "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" (citations and internal quotation marks omitted).

CONCLUSION

Plaintiff's complaint as against the Library Defendants should be dismissed.

Dated: New York, New York
November 4, 2009

LESTER SCHWAB KATZ & DWYER, LLP

_____/s/_____
Richard Granofsky
Thomas A. Catalano
Attorneys for Defendants
Syosset Public Library, Judith Lockman, and Robert Glick
120 Broadway – 38th Floor
New York, New York 10271
(212) 964-6611

TO:

Raymond Nardo, Esq.
129 Third Street
Mineola, New York 11501
Attorney for Plaintiff

Sherri Pavloff, Esq.
Farber Brooks & Zane, LLP
51 Charles Street, 2nd Floor
Mineola, New York 11501
Attorneys for Defendant
Utica National Insurance Company

Peter L. Contini, Esq.
L'Abbate, Balkan, Colavita & Contini, L.L.P
1050 Franklin Avenue
Fourth Floor
Garden City, New York 11530
Attorneys for Defendant Morris Duffy Alonso & Faley