

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JOSHUA BRINN,

Plaintiff,

-against-

CV 09 1151
(TCP) (WDW)

**DECLARATION IN SUPPORT
OF MOTION TO DISMISS**

SYOSSET PUBLIC LIBRARY, MORRIS DUFFY
ALONSO & FALEY, UTICA NATIONAL
INSURANCE COMPANY, JUDITH LOCKMAN,
Director of the SYOSSET PLUBLIC 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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PETER L. CONTINI, being an attorney duly licensed to practice before this court,
respectfully declares the following under the penalties of perjury:

1. I am a member of L'Abbate, Balkan, Colavita & Contini, L.L.P., attorney for
defendant, Morris Duffy Alonso & Faley, and I submit this declaration in support of the motion by
the defendant to dismiss the first, second, fourth, fifth and sixth counts in the complaint. Those are
the only counts which are addressed to the defendant Morris Duffy Alonso & Faley.

2. Plaintiff's complaint was filed on March 19, 2009, and a copy of same is attached
hereto as Exhibit "A". The complaint alleges essentially that the plaintiff's employment with
defendant Morris Duffy Alonso & Faley was terminated due to the plaintiff filing a claim against
the Syosset Public Library and that this conduct violated the United States Constitution as well as

federal statutes and New York common law. An answer to the complaint was filed and served on August 19, 2009 and a copy of the defendant's answer is attached as Exhibit "B".

3. The defendant Morris Duffy Alonso & Faley ("Morris Duffy") requests that all causes of action against it in the complaint be dismissed pursuant to Fed.R.Civ.P. 12(c). We submit that the complaint does not state a claim against Morris Duffy and, therefore, the action should be dismissed on the pleadings.

4. The complaint alleges that Morris Duffy is a law firm (complaint ¶6), that the plaintiff filed a General Municipal Law notice of claim against the Syosset Public Library ("Library") (complaint ¶13), that plaintiff was employed by Morris Duffy (complaint ¶19), that Utica National Insurance Company ("Utica") is a client of Morris Duffy (complaint ¶22), that there were communications between the Library, Utica and Morris Duffy (complaint ¶¶26-29), that Morris Duffy demanded the plaintiff withdraw his notice of claim against the Library or his employment would be terminated (complaint ¶30); and that Morris Duffy terminated plaintiff's employment because he refused to sign a release in favor of the Library (complaint ¶34).

5. By virtue of the foregoing conduct plaintiff alleges violations of 42 USC §1983 (Count I), due process violations (Count II), intentional infliction of emotional distress (Count IV), breach of the covenant of good faith and fair dealing (Count V), and a violation of plaintiff's right to free speech (Count VI).

6. Morris Duffy submits that the complaint should be dismissed as those allegations do not set forth a cognizable claim against it. As set forth in our accompanying memorandum of law,

the claim under 42 USC §1983 should fail because there is no allegation that Morris Duffy acted under color of state law. In fact, quite to the contrary, the complaint recognizes the professional and business relationship between Morris Duffy and Utica and that Morris Duffy threatened to terminate plaintiff if he did not withdraw his claim against an insured of Utica as Morris Duffy was at risk of engaging in a professional conflict as well as a business conflict which could have cost Morris Duffy substantial revenue. Thus, by the complaint's own pleadings, the requirement to withdraw the claim against the Library was under threat of termination of employment, not under threat of color of state law. Even with respect to the allegations of conspiracy, there are no allegations that the conspiracy was for the purpose of acting under color of state law. The parties are alleged to have communicated with respect to requiring the plaintiff to withdraw his claim, but there are no facts asserted (nor can there be) that the conspiracy was for the purpose of acting under color of state law. In fact, nowhere in the complaint is there an allegation that the plaintiff withdrew his claim against the Library or was required to withdraw the claim under color of state law.

7. The plaintiff does not allege he was employed pursuant to a contract or that he had contractual rights with Morris Duffy. As an at-will employee, his employment could be terminated at any time for any reason and, therefore, his claim for due process violations with respect to the termination of his employment is without merit.

8. For the reasons stated in the accompanying memorandum of law, the claims of intentional infliction of emotional distress and breach of the covenant of good faith and fair dealing are wholly without merit. For the reasons that Count I of the complaint are deficient, Count VI

which alleges that the defendant acting under color of law retaliated against the plaintiff for the exercise of his rights to free speech is also deficient. It is also significant that plaintiff did not engage in protected free speech with respect to the notice of claim filed with the Library.

9. We have attached hereto as Exhibit "C" a copy of the notice of claim which the plaintiff filed against the Library. Pursuant to the General Municipal Law §50-H, the plaintiff submitted to a hearing, and, at that hearing, a copy of the letter from the Library to the plaintiff explaining why his privileges were suspended was submitted in evidence. A copy of that letter is attached as Exhibit "D".

10. Our accompanying memorandum of law sets forth well established authority in support of this motion to dismiss the entire complaint of the plaintiff against the defendant Morris Duffy. We respectfully refer this court to our accompanying memorandum of law.

WHEREFORE, it is respectfully prayed that an order be made dismissing the entire complaint as against defendant Morris Duffy Alonso & Faley and that this defendant be granted such other and further relief which to this court may be just and proper.

Dated: Garden City, New York
September 16, 2009



PETER L. CONTINI