UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JOSHUA BRINN,

CV 09 1151
(TCP) (WDW)

Plaintiff,

-against-

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.

----------X

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT MORRIS DUFFY ALONSO & FALEY'S MOTION TO DISMISS

L'ABBATE, BALKAN, COLAVITA & CONTINI, L.L.P.
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PRELIMINARY STATEMENT

The defendant, Morris Duffy Alonso & Faley ("Morris Duffy"), moves to dismiss the first, second, fourth, fifth, and sixth counts of the plaintiff's complaint under Fed.R.Civ.P. §12(c).

BRIEF RECITATION OF FACTS

The plaintiff filed his complaint on March 19, 2009 asserting six causes of action. This motion is addressed to the first count (alleging violations of 42 USC §1983), second count (violation of Fourteenth Amendment, due process), fourth count (intentional infliction of emotional distress), fifth count (breach of the covenant of good faith and fair dealing regarding plaintiff's employment), and the sixth count (retaliation against plaintiff for exercising of his right to free speech) as those are the only counts asserted against Morris Duffy.

With respect to the first count, plaintiff alleges that defendant was acting under color of state law when it terminated plaintiff for the exercise of his First Amendment rights, in violation of the First and Fourteenth Amendments to the United States Constitution and that the defendant is therefore liable under 42 USC §1983. Plaintiff alleges that Morris Duffy was acting under color of state law by conspiring with the Syosset Public Library (the "Library") to terminate plaintiff. The plaintiff's complaint reflects that Morris Duffy is a private law firm and was not acting under color of state law when it terminated plaintiff. Morris Duffy terminated plaintiff in order to protect its professional and business interests and, in doing so, did not deprive plaintiff of any right or privilege of free speech or due process. Furthermore, the allegations by plaintiff

that Morris Duffy has engaged in a conspiracy with the Library are vague and conclusory, failing to meet the pleading requirements for this cause of action and should therefore be dismissed.

With respect to the second count, the plaintiff alleges that the defendant's employment was terminated without due process in violation of the Fourteenth Amendment. We set forth herein authority that plaintiff's employment with Morris Duffy is not a property interest protected by the Fourteenth Amendment. This cause of action should be dismissed because plaintiff was an at-will employee of Morris Duffy and his continued employment with Morris Duffy is not protected by due process.

With respect to the fourth count, plaintiff alleges that defendant intentionally inflicted emotional distress upon plaintiff. We provide established case law that this cause of action should be dismissed because plaintiff's allegations fail to meet the pleading requirements for this claim.

With respect to the fifth count, plaintiff alleges that defendant breached the covenant of good faith and fair dealing regarding plaintiff's employment, causing his termination. This cause of action should be dismissed since the plaintiff was an at-will employee and, therefore, cannot maintain such a claim against his former employer, Morris Duffy.

With respect to the sixth count, plaintiff alleges that defendant, acting under color of state law, retaliated against plaintiff for exercising his rights to free speech under the New York State Constitution. This cause of action should be dismissed for the same reasons as the first cause of action brought under 42 USC §1983.

ARGUMENT

POINT I

MORRIS DUFFY IS ENTITLED TO JUDGMENT ON THE PLEADINGS AS TO ALL COUNTS AGAINST IT

A. Standard on a Motion for Judgment on the Pleadings pursuant to Fed.R.Civ.P 12(c)

In deciding a motion to dismiss under Fed.R.Civ.P 12(c) for judgment on the pleadings, the same standard applies as to a motion under Fed.R.Civ.P 12(b)(6) for failure to state a claim. *Burnette v. Carothers*, 192 F.3d 52, 56 (2d Cir. 1999). On a motion to dismiss under Fed.R.Civ.P 12(b)(6), the general rule is that a court must "accept as true all factual allegations set forth in the complaint" and "must read the complaint generously and draw reasonable inferences in favor of the non-movant." *Payne v. Huntington Union Free School District*, 101 F.Supp.2d 116, 118 (E.D.N.Y 2000) (citing *Charles Wi v. Maul*, 214 F.3d 350 (2d Cir. 2000)).

Against that backdrop, however, the Supreme Court recently articulated the proper standard on a motion to dismiss pursuant to Fed.R.Civ.P 12(b)(6):

> Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in *Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929, the pleading standard Rule 8 announces does not require "detailed factual allegations," but it *demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation . . . A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do.*" 550 U.S., at 555, 127 S. Ct. 1955. *Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement. Id.*, at 557, 127 S.Ct. 1955. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim

to relief that is plausible on its face." *Id.*, at 570, 127 S. Ct. 1955 . . .

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. Ibid. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"* *Id.*, at 557, 127 S. Ct. 1955 (brackets omitted).

. . . the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Id., at 555, 127 S. Ct. 1955 . . . 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.* Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.*, at 556, 127 S. Ct. 1955. 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. 490 F.3d, at 157-158. But where 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 "show[n]"-"that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).

In keeping with these principles *a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.* While legal conclusions can provide the framework of a complaint, *they must be supported by factual allegations.*

Ashcroft v. Iqbal, 129 S.Ct. 1937 (May 18, 2009) (emphasis added).[1]

As set forth in detail in this brief, plaintiff's conclusory statements are not sufficient to support his claims. We respectfully submit that the plaintiff does not state plausible claims for relief necessary to survive a motion to dismiss his first, second, fourth, fifth and sixth causes of action.

POINT II

COUNTS I AND II AND VI SHOULD BE DISMISSED AS THE COMPLAINT FAILS TO ALLEGE THAT DEFENDANT, MORRIS DUFFY ALONSO & FALEY, WAS ACTING UNDER COLOR OF STATE LAW AND FAILS TO ALLEGE THAT PLAINTIFF WAS DEPRIVED OF RIGHTS AND PRIVILEGES UNDER THE FIRST OR FOURTEENTH AMENDMENTS PURSUANT TO 42 USC 1983

To recover under a section 1983 claim the plaintiff must allege (1) the conduct complained of was committed by a person acting under color of state law; and (2) such conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or the laws of the United States. *Dwyer v. Regan*, 777 F.2d 825, 828 (2d Cir. 1985); *Fry v. McCall*, 1999 WL 359766 (S.D.N.Y. 1999).

The plaintiff has not alleged a cognizable claim against Morris Duffy because he has not alleged facts substantiating a claim that Morris Duffy was acting under color of state law when it requested that plaintiff withdraw his Notice of Claim against the Library. In fact, Morris Duffy

[1] The *Iqbal* standard applies to motions for judgment on the pleadings as well because "[a] motion to dismiss under Rule 12(c) is governed by the same standard as a motion under Rule 12(b)(6)." *In re Ades and Berg Group Investors*, 550 F.3d 240, 243 n.4 (2d Cir. 2008) (citing *Burnette v. Carothers*, 192 F.3d 52, 56 (2d Cir.1999)); *see also Nicholas v. Goord*, 430 F.3d 652, 657 n.8 (2d Cir. 2005).

was acting to protect its professional and business interests in acting on the request of its client, Utica National Insurance Company ("Utica"), that plaintiff's Notice of Claim be withdrawn as against Utica's insured, the Library. In addition plaintiff was not deprived of his right to free speech under the First Amendment or his due process right to employment or access to the courts under the Fourteenth Amendment.

A. Defendant, Morris Duffy Alonso & Faley, Was Not Acting Under Color of State Law

In order to act under color of state law for the purposes of section 1983, the defendant "must have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Monsky v. Moraghan*, 127 F.3d 243, 245 (2d Cir 1997) (citing *West v. Atkins*, 487 U.S. 42, 49, 108 S.Ct. 2250, 2255, 101 L.Ed.2d 40 (1988). "The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." Id. (quoting *Wyatt v. Cole*, 504 U.S. 158, 161, 112 S.Ct. 1827, 1829, 118 L.Ed.2d 504 (1992). "It is axiomatic that under 'color' of law means 'pretense' of law and that acts of officers in the ambit of their personal pursuits are plainly excluded." Id. (quoting *Pitchell v. Callan*, 13 F.3d 545, 547-48 (2d Cir. 1994)). The defendant, Morris Duffy is a private law firm and did not exercise any power by virtue of state law when it requested the plaintiff to withdraw his Notice of Claim against the Library. The plaintiff's complaint alleges that Morris Duffy is a law firm (Compl. ¶ 6) and in strictly conclusory fashion alleges that it acted under color of state law (Compl. ¶ 10). Morris Duffy is clearly not a state actor using any badge of governmental authority to deprive plaintiff of any federally guaranteed right. It is well established that private attorneys, despite their status as officers of the court, do not act under

color of state law for purposes of §1983. *Livingston v. Singer*, 2003 WL 22952739 (S.D.N.Y. 2003); *Greene v. Berger & Montague, P.C.*, 1998 WL 99574 (S.D.N.Y. 1998). Plaintiff has not set forth evidentiary fact in his complaint supporting a claim that Morris Duffy is a state actor or that it acted under color of law, or that any conduct of Morris Duffy could be fairly attributable to the state.

a. Plaintiff's conspiracy allegations are vague and conclusory and should be dismissed.

The complaint alleges that the Library was acting under color of law and Morris Duffy and Utica National Insurance Company ("Utica") were acting under color of law by participating and/or conspiring in joint activity with the Library and its agents. Compl. ¶ 10. Private individuals may have liability under section 1983 if they have conspired with or engaged in joint activity with state actors. *Caporicci v. Nassau County Police Department*, 2007 WL 764535 (E.D.N.Y. 2007). In order to establish a section 1983 conspiracy claim, the plaintiff must prove the following elements: (1) an agreement between two or more state actors or a state actor and a private entity (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal, and causing some harm. *Peres v. Oceanside Union Free School District*, 426 F.Supp.2d 15 (E.D.N.Y. 2006). A plaintiff must allege facts sufficient to show the existence of any conspiracy designed to deprive him of his rights in order to make out a conspiracy claim based on section 1983. *Silverman v. City of New York*, 2001 WL 218943 (E.D.N.Y. 2001), aff'd 64 Fed. Appx. 799 (2d Cir. 2003). In this matter the plaintiff has only alleged in conclusory fashion that Morris Duffy and Utica conspired with the Library. Morris Duffy was acting to protect its own professional and business interests to maintain its business relationship with Utica. The complaint recognized the professional and business relationship

between Morris Duffy and Utica at paragraph 22 which correctly asserts that Morris Duffy is counsel to Utica. Since the Library was insured by Utica, and Utica was a client of Morris Duffy, in filing the Notice of Claim against the Library, the plaintiff was essentially suing one of the firm's clients. In order to maintain a continuing relationship with Utica, Morris Duffy requested that the plaintiff withdraw his Notice of Claim. In doing this, Morris Duffy was not conspiring with the Library to deprive the plaintiff of his rights and it certainly was not clothed with the authority of state law in making its request to the plaintiff, nor is there an allegation to the contrary. The plaintiff merely alleges communications between the Library, Utica, and Morris Duffy (Compl. ¶¶ 26, 29) without setting forth any facts as to how these parties were conspiring to act under color of law. The mere fact that the parties discussed having plaintiff withdraw his claim is a far stretch from conspiring to act under state law. In fact, there are no facts or allegations in the complaint that Morris Duffy ever attempted or purported under color or pretense of state law to induce the plaintiff to withdraw his claim.

To state a claim for conspiracy, the complaint must contain more than "mere conclusory allegations...diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct." *Timmons v. Alexion*, 2000 WL 194684 (E.D.N.Y. 2000), *aff'd* 7 Fed.Appx. 4 (2d Cir. 2001). In the instant case, plaintiff alleges no facts to support his assertions that Morris Duffy conspired with the Library to deprive him of his rights. The allegation that the Library contacted Morris Duffy concerning plaintiff's Notice of Claim does not state a conspiracy between Morris Duffy and the Library to clothe Morris Duffy with the authority of state law and, as such, any conspiracy claim under section 1983 should be dismissed.

b. Defendant Morris Duffy Alonso & Faley was acting to protect professional and business interests

Morris Duffy was not acting to deprive the defendant of any constitutional rights. Morris Duffy requested that plaintiff withdraw his Notice of Claim against the Library. The Library was insured by Utica and Utica was a client of Morris Duffy (Compl. ¶6). Morris Duffy indicated to plaintiff that he could not continue his employment with Morris Duffy while suing a client of the firm (Compl. ¶30). Plaintiff agreed to withdraw his first Notice of Claim against the Library (Compl.¶31). Plaintiff was presented with a release for his claims against the Library (Compl.¶32). Plaintiff refused to sign the release and left the office (Compl. ¶33). He never returned to work. As a result of plaintiff's failure to report to work, he was terminated.

The only thing established by these pleadings is that Morris Duffy was acting to protect its own business interests when it requested plaintiff to withdraw his Notice of Claim against the Library. Morris Duffy wanted to continue its business and professional relationship with Utica. Morris Duffy wanted to keep Utica as a client of the firm and believed it was a conflict of interests for an associate of the firm to sue a client of the firm. There are no facts asserted to support a claim that Morris Duffy asked the plaintiff to withdraw his Notice of Claim under pretense of state law in order to deny him of any of his constitutional rights. The sole motivation for requesting plaintiff to withdraw his Notice of Claim was to maintain Utica as a client of the firm. In fact, the complaint specifically asserts at paragraph 20 that if plaintiff didn't withdraw his claim, his employment would be terminated. Thus, the only "right" asserted was the right to terminate plaintiff's employment. This is directly opposite to the conclusory allegation that Morris Duffy was acting under color of state law. Morris Duffy, as set forth in plaintiffs own

pleadings, did not demand the withdrawal of the claim under pretense of state law but, rather, as an employer under threat of termination of employment.

Pursuant to Rule 1.7 of the Rules of Professional Conduct, a lawyer shall not represent a client if a reasonable lawyer would conclude that the representation will involve the lawyer representing differing interests. Rules of Prof.Con. Rule 1.7 (a)(1). Morris Duffy reasonably concluded that plaintiff's action against the Library that was insured by Utica, a client of the firm, presented a conflict of interests for the firm. The firm was of the opinion that if the firm wanted to continue to represent Utica it could not at the same time continue to employ an associate of the firm that was essentially suing a client of the firm. As set forth in Rule 1.7, Morris Duffy was required to get the written informed consent of Utica waiving this apparent conflict which Utica would not provide. Morris Duffy requested that the plaintiff withdraw his Notice of Claim against the Library in order to preserve its business relationship with Utica.

B. Defendant, Morris Duffy Alonso & Faley did not deprive plaintiff of his First Amendment right to Free Speech or his Fourteenth Amendment Right to Due Process

Plaintiff alleges that Morris Duffy terminated plaintiff for the exercise of his First Amendment Rights in violation of the First and Fourteenth Amendments of the U.S. Constitution and is liable under section 1983. Compl. ¶ ¶ 36, 38 and 46.

a. Violations of the First and Fourteenth Amendments and section 1983 apply only to state actors for purposes of constitutional challenge. Morris Duffy cannot be considered a state actor because its conduct is not attributable to the state.

The First and Fourteenth Amendments and section 1983 apply only to state actors. A private individual may only be considered a state actor if his/her conduct is fairly attributable to

the state. *Leeds v. Meltz*, 85 F3d 51,54 (2d Cir. 1996). A private actor is not transformed into a state actor unless the state exerted its coercive power over, or provided significant encouragement to, the defendant private actor. *Leeds*, 85 F3d at 54; *Altschuler v. University of Pennsylvania Law School*, 1997 WL 129394, 15 (S.D.N.Y. 1997), *aff'd* 201 F.3d 430 (2d Cir. 1999). "Private conduct qualifies as state action when 'the State has so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity," *Hadges v. Yonkers Racing Corporation*, 918 F.2d 1079, 1081 (2d Cir. 1990) (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961), "or when 'there is a sufficiently close nexus between the State and the challenged action' that the private party's action 'may be fairly treated as that of the State itself" *Hadges* 918 F.2d at 1081(quoting *Jackson v. Metropolitan Edison Co.* 419 U.S. 345, 351 (1974)).

Morris Duffy is a private law firm and is not a state actor. The conduct of Morris Duffy cannot be considered attributable to the Library as Morris Duffy did not purport to act as an agent of the Library. Furthermore, there is no allegation that the Library exerted any coercive power over or provided any encouragement to Morris Duffy to act as an agent of the Library. The Library cannot be considered in any position of interdependence with Morris Duffy and is in no way a joint participant in any activity with the Library such that Morris Duffy's request that plaintiff withdraw his Notice of Claim could be fairly treated as an action of the Library. There is also no allegation that Morris Duffy identified itself as an agent of the Library or that it was clothed with the authority of the Library. The request to withdraw the claim was not the result of any coercion or encouragement by the Library but was motivated by Morris Duffy's desire to maintain an ongoing business relationship with Utica. Morris Duffy perceived plaintiff's

continuation of a lawsuit against one of its existing clients as a conflict of interests and, therefore, requested that plaintiff withdraw his Notice of Claim against the Library that was insured by Utica, Morris Duffy's client.

b. Plaintiff was not engaged in protected free speech on a matter of public concern

Plaintiff alleges that Morris Duffy terminated him in retaliation against plaintiff for the exercise of his First Amendment rights under both the U.S. Constitution and New York State Constitution. Compl. ¶ 36, 46. "In order to state a section 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, 2002 WL 31875655 (2d Cir. 2002). Plaintiff alleges that his first Notice of Claim raises matters of public concern. Compl. ¶ 14, 15.

In paragraph 13 of his complaint, plaintiff alleges he filed his first Notice of Claim against the Library on January 7, 2008. The first Notice of Claim filed by plaintiff against the Library dated January 7, 2008 alleged violations of plaintiff's due process and civil rights based on the Library's decision to suspend plaintiff's personal library privileges for one year. See the Notice of Claim annexed hereto as Exhibit C. Plaintiff's personal Library privileges were suspended due to his disruption of Library operations on multiple occasions. The disruption cited by the Library included "inappropriately following a library page employee throughout the Library", interfering with that employee's performance of duties and "pacing the public areas of the Library in a visibly agitated manner, while loudly uttering various statements in a strident and harsh tone." See letter from counsel for Library to plaintiff dated October 15, 2007 annexed hereto as Exhibit D. Plaintiff's disruption of the quiet use and enjoyment of the Library was the reason for the suspension, which is not a matter of public concern. Expression is not a matter of

public concern when it cannot be considered to relate to a matter of political, social or other concern to the community. *Singh v. The City of New York*, 524 F.3d 361, 372. A library generally maintains a quiet atmosphere as it is a place where people go to study, research and read. Speaking loudly in "a strident and harsh tone" would certainly disrupt the quiet atmosphere of the library and cannot be considered to relate to any matters of political, social or other concern to the community. Neither the first Notice of Claim nor the October 15, 2007 letter reveals any issues of public concern. "The fundamental question is whether the employee 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 and Hospitals Corporation*, 905 F.Supp. 1236 (S.D.N.Y. 1995) (quoting *Connick v. Myers*, 461 U.S. 138, 146-148 (1983)). The Notice of Claim clearly shows that plaintiff is seeking to recover damages arising out of the suspension of his Library privileges, which is a private matter concerning only the plaintiff. Plaintiff's claims in Count I and Count VI of the complaint concerning the First Amendment and free speech should be dismissed as the plaintiff was not engaged in protected free speech on a matter of public concern.

c. Plaintiff was not denied access to the courts protected by due process since he filed a second Notice of Claim after he withdrew the first Notice of Claim

Plaintiff alleges defendant violated the First and Fourteenth Amendments and is therefore liable under section 1983. Compl. ¶36. While it appears that plaintiff's claims revolve solely around his termination, the First and Fourteenth Amendments also include a constitutional right of access to courts. *Waters v. Sunshine*, 2009 WL 750217 at *4 (E.D.N.Y. 2009). "In order to establish a violation of a right of access to courts, a plaintiff must demonstrate that defendant

caused actual injury." *Monsky v. Moraghan*, 127 F.3d 243 (2d Cir. 1997); *Waters v. Sunshine*, 2009 WL 750217 at *4. After voluntarily withdrawing his first Notice of Claim dated January 7, 2009 plaintiff subsequently filed a second Notice of Claim. Compl. ¶ 35. Since plaintiff filed a second Notice of Claim and commenced this lawsuit, he cannot claim any actual injury violating his right of access to courts and this claim should be dismissed.

POINT III

COUNT V SHOULD BE DISMISSED BECAUSE PLAINTIFF WAS AN AT-WILL EMPLOYEE WITH NO PROPERTY INTEREST IN HIS EMPLOYMENT PROTECTED BY DUE PROCESS, AND AS AN AT-WILL EMPLOYEE THERE IS NO BREACH OF THE CONVENANT OF GOOD FAITH AND FAIR DEALING CONCERNING PLAINTIFF'S EMPLOYMENT

Plaintiff alleges that he was terminated without due process of law, in violation of the Fourteenth Amendment. Compl. ¶ 36, 38. "In order to demonstrate an interest protectable under the Constitution, a person must have a 'legitimate claim of entitlement to it'". *Peres v. Oceanside Union Free School District*, 426 F.Supp.2d 15, 26 (E.D.N.Y. 2006) (citing *Abramson v. Pataki*, 278 F.3d 93, 99 (2d Cir. 2002)). While an employee who may be removed only for cause may have a property interest protectable by due process, employees at will share no such protection. *Peres v. Oceanside Union Free School District*, 426 F.Supp.2d at 26. Employees in New York may have their employment terminated at any time for any reason as there is no cause of action for wrongful discharge. *Murphy v. American Home Products Corp.* 58 N.Y.2d 293, 461N.Y.S.2d 232 (1983). Plaintiff was an associate with Morris Duffy. Compl. ¶19. In that position, plaintiff was an employee at-will and, therefore, plaintiff does not have any property

interest in his employment protected by due process. Accordingly, this claim should be dismissed.

Plaintiff further alleges that defendants breached the covenant of good faith and fair dealing regarding plaintiff's employment, causing his termination. Compl. ¶44. It is well settled that no covenant of good faith and fair dealing attaches to an at-will employment situation. *Kendall v. Fisse*, 2004 WL 1196811 (E.D.N.Y. 2004), *aff'd* 149 Fed.Appx. 19 (2d Cir. 2005); *Mirabella v. Turner Broadcasting Systems, Inc.*, 2003 WL 21146657 (S.D.N.Y. 2003); *Haffner v. Bryan Cave LLP*, 2000 WL 1159289 (S.D.N.Y. 2000)(plaintiff's claim for breach of implied covenant of good faith and fair dealing dismissed on the basis of at-will employment. Plaintiff was an associate at a law firm). Since plaintiff was an at-will employee of Morris Duffy, his claim for breach of the covenant of good faith and fair dealing must be dismissed.

POINT IV

COUNT IV OF THE COMPLAINT SHOULD BE DISMISSED AS THE ALLEGATIONS IN PLAINTIFF'S PLEADINGS DO NOT SUPPORT A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Plaintiff alleges that defendants intentionally inflicted emotional distress upon plaintiff causing him to suffer damages. Compl. ¶ 42. "The state law tort of intentional infliction of emotional distress has four elements: (1) extreme and outrageous conduct, (2) intent to cause severe emotional distress, (3) a causal connection between the conduct and the injury, and (4) severe emotional distress." *Bender v. City of New York*, 78 F.3d 787 (2d Cir. 1996). "Conduct has been considered 'extreme and outrageous' only 'where ...[it] 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 community." *Colliton v. Cravath, Swaine & Moore LLP*, 2008 WL 4386764 (S.D.N.Y. 2008)(quoting *Murphy v. Am. Home Prod. Corp.*, 58 N.Y.2d 293, 303 (1983)). Plaintiff has failed to plead any facts to support any inference of "extreme and outrageous conduct", intent or severe emotional distress necessary to meet the stringent elements of a cause of action for intentional infliction of emotional distress. As such, Count IV of the complaint should be dismissed.

POINT V

EXHIBITS "C" AND "D" MAY BE PROPERLY CONSIDERED BY THIS COURT ON THIS MOTION

We have appended as an exhibit to these motion papers a copy of plaintiff's first Notice of Claim as it was referenced in his complaint at paragraph 13. On a motion under Rule 12 (b) (6) (and, therefore, under Rule 12 (c)) documents which are appended to the complaint or incorporated in the complaint by reference may be considered by the court. *Allen v. West Point-Pepperell, Inc.*, 945 F2d 40, 44 (2d Cir 1991); *Kramer v. Time Warner, Inc.*, 937 F2d 767, 773 (2d Cir 1991). We have also appended as an exhibit a letter from the attorney for the Library to the plaintiff as it was an exhibit at the plaintiff's General Municipal Law 50-H hearing and courts may consider documents submitted in state administrative proceedings. *Wang v. Pataki*, 396 F.Supp.2d 446, 453 (S.D.N.Y.2005).

CONCLUSION

For the reasons set forth above, the first, second, fourth, fifth and sixth causes of action should all be dismissed as against defendant, Morris Duffy because these causes of action do not state cognizable claims against the defendant, Morris Duffy.

Dated: Garden City, New York
September 16, 2009

Respectfully submitted,

L'ABBATE, BALKAN, COLAVITA
& CONTINI, L.L.P.

By: _____

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) SS.:
COUNTY OF NASSAU)

KAREN R. LUCERO, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at Nassau County, New York.

That on the 16th day of September, 2009, deponent served the within **MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS** upon:

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the attorney(s) for the respective parties in this action, at the above address(es) designated by said attorney(s) for that purpose by depositing same enclosed in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office within the State of New York.

KAREN R. LUCERO

Sworn to before me this 16th day of September, 2009.

Notary Public

PETER L. CONTINI
Notary Public, State of New York
No. 4637417
Qualified in Suffolk County
Commission Expires July 31, 2010