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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 MORRIS DUFFY ALSONO & FALEY'S MOTION FOR JUDGMENT ON THE PLEADINGS

Dated: October 27, 2009

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STATEMENT OF FACTS

The facts are set forth in the Complaint and the Brinn Declaration, submitted herewith. Plaintiff is withdrawing his second cause of action alleging a violation of due process and his fifth cause of action alleging breach of covenants of good faith and fair dealing. In addition, defendants Morris Duffy Faley & Alonso ("Morris Duffy") have already answered the complaint. Morris Duffy had an opportunity to move to dismiss, under Rule 12, rather than answering the complaint, but chose not to. Only after the codefendants filed two motions to dismiss did Morris Duffy thereafter file a motion for "judgment on the pleadings," thereby attempting to both answer and dismiss plaintiff's complaint. This Court should not lightly countenance these tactics. Had there been cause for a proper motion to dismiss the complaint for failure to state a cause of action, Morris Duffy would have so moved.

If the court entertains this motion, it should be denied for the reasons set forth herein.

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 . . . 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). 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 is a short and plain statement which, drawing all inferences in favor of plaintiff, establishes a plausible claim for relief.[1]

Defendant Morris Duffy answered the complaint and now argues, after other defendants moved to dismiss under Rule 12, that the complaint should be dismissed on the pleadings. Morris Duffy now claims that plaintiff's claims are vague and conclusory. As set forth herein, the complaint establishes a plausible claim for relief under Rule 8.

The complaint pleads, in relevant part, as follows:

> 10. At all times herein, defendant SYOSSET PUBLIC LIBRARY was acting under color of law and defendants MORRIS DUFFY ALONSO & FALEY and UTICA NATIONAL INSURANCE COMPANY were acting under color of law by participating and/or conspiring in joint activity with the SYOSSET PUBLIC LIBRARY and its agents.

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[1] A motion for judgment on the pleadings under Rule 12(c) is governed by the same standard as a motion to dismiss under Rule 12(b)(6). In re Ades and Berg Group Investors, 550 F.3d 240 (2d Cir. 2008).

> 11. At all times herein, defendants are jointly and severally liable under 42 U.S.C. Section 1983 due to the fact that the Director of the SYOSSET PUBLIC LIBRARY, Judith Lockman, and a Trustee of the SYOSSET PUBLIC LIBRARY, Robert Glick, acted as policymakers, and had authority to set policy for the Library, in coercing defendants UTICA NATIONAL INSURANCE COMPANY and MORRIS DUFFY ALONSO & FALEY to terminate plaintiff.
>
> 12. At all times herein defendants are jointly and severally liable under 42 U.S.C. Section 1983 due to the fact that the all defendants acted maliciously, or displayed a reckless or deliberate indifference, to the exercise of plaintiff's constitutional rights and/or acquiesced, ratified, or condoned the malice or reckless indifference displayed by the other defendants.

Consequently, the complaint alleges that all defendants conspired in a joint activity, that the State actor, Syosset Public Library, coerced Utica and Morris Duffy to terminate plaintiff, and that all defendants violated plaintiff's constitutional rights.

The complaint further pleads 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.

not under color of State Law

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.

Conclusory

Consequently, the complaint alleges that agents of the Library phoned plaintiff and threatened that it would be "very bad" for him to pursue his Notice of Claim. Thereafter, Glick contacted a partner at Morris Duffy to further interfere with plaintiff's employment, disclosed confidential library records of plaintiff, and also contacted defendant Utica Mutual Ins. Co., a client of Morris Duffy, to maliciously interfere with, and exert economic pressure upon, plaintiff. An agent of Utica (which funneled legal services to plaintiff's employer) also contacted

partners at Morris Duffy, and attempted to coerce Morris Duffy to have the notice of claim withdrawn (¶ 29) and to terminate plaintiff (¶ 11). Plaintiff details the communications between Glick and plaintiff, Morris Duffy, and Utica, gives dates where available, and details the undue coercion, which resulted in plaintiff's termination, solely because plaintiff sought to petition the Library to redress his suspension from the 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, Morris Duffy pre-notarized plaintiff's signature and refused to show plaintiff the complete content of what appeared to be a release (Brinn Declaration). This type of deceit, criminal fraud, and misrepresentation demonstrates that the defendants conspired to terminate plaintiff because he refused to sign a release in favor of the Library.[2]

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[2] 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.**"

Therefore, the pleading plausibly establishes that defendants conspired to deprive plaintiff of his First Amendment rights, along with the related causes of action.

Plaintiff's pleading, supplemented by the fax cover page and pre-notarized signature page of the Release, establishes 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. They are sufficient to satisfy the Rule 8 pleading requirement.

By offering a pre-notarized partial release to plaintiff, and secreting the fact that the document was a release, defendants engaged in misrepresentation, deceit, and criminal fraud.

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 an individual's freedom of speech or abridging an individual's right to petition the Government for redress of grievances. Morris Duffy blithely contends that plaintiff's First Amendment claim must relate to a "matter of public concern," citing Reuland v. Hynes, 53 Fed.Appx. 594, 2002 WL 31875655 (2d Cir. 2002). At best, Morris Duffy misapprehends 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 (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 worked as 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 by plaintiff's expression - 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 the 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.**

The "matter of public concern" requirement - upon which Morris Duffy rests its motion to dismiss the First Amendment claim - simply does not apply to a First Amendment retaliation claim

brought by a private citizen. As a result, plaintiff's First Amendment retaliation claim should not be dismissed because it did not allegedly raise a matter of public concern.

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.

The Notice of Claim constitutes a petition to the government for redress of plaintiff's library privileges, which were previously suspended by the Library. Plaintiff's First Amendment retaliation claim, outside the context of employment, must therefore be analyzed as follows:

This needs a strong response

> 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).[3] In Collins, the Court held that the first factor was properly pled because the "filing of both lawsuits and administrative grievances is constitutionally protected." Id. Similarly, plaintiff's filing of a Notice of Claim against a public entity (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 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 the "chilling effect," as set forth in Connell and Wolff because he was

[3] 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).

terminated for exercising his First Amendment right to petition a public Library. Consequently, plaintiff pleads a plausible First Amendment retaliation claim[4] - he was terminated for petitioning the government for redress - whether or not his petition relates to a "matter of public concern."[5]

C. Morris Duffy's Claim that It Acted to Protect Business Interests Cannot Entitle It to Judgment on the Pleadings

For judgment on the pleadings, the Court must discern whether the pleadings themselves set forth the proper causes of action. Morris Duffy attempts to raise issues of fact by adding facts to contradict the pleading. However, raising contradictory facts outside the record, especially where the facts alleged by plaintiff must be assumed true, cannot even result in a favorable summary judgment under Rule 56, much less a judgment on the

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[4] 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).

[5] 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.

pleadings under Rule 12(c). Matsushista Electric Industrial Co., Ltd. v. Zenith Radio Corporation, 475 U.S. 574, 587 (1986), quoting, United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

Without any factual gravamen, Morris Duffy claims that, according to Paragraph 30 of the complaint, "Morris Duffy indicated to plaintiff that he could not continue his employment with Morris Duffy while suing a client of firm" (Defendant's brief at 9). However, paragraph 30 of the complaint reads as follows: "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." There is no mention of suing a client of the firm in the pleading and, as set forth below, the Syosset Public Library was not a client of Morris Duffy.

Defendant further claims that, when presented with a release to sign, "[p]laintiff refused to sign the release and left the office," citing paragraph 33 of the complaint. However, paragraph 33 states as follows: "Plaintiff refused to sign this document." Defendant cavalierly adds the (false) claim that plaintiff "left the office," and then embellishes its own facts by claiming (without any citation to the pleading it seeks to

dismiss) that plaintiff "never returned to work. As a result of plaintiff's failure to report to work, he was terminated" (Defendant's brief at 9). These facts are untrue, not contained in any affidavit, and not contained in the pleading. Defendant wants the court to rule based on defendant's version of supplemental facts outside the pleading, which are not in the record. Such facts cannot form a basis to dismiss a pleading which defendant already answered.

Defendant continues interjecting disputed facts into its argument, claiming that the "sole motivation for requesting plaintiff to withdraw his Notice of Claim was to maintain Utica as a client of the firm" (Defendant's brief at 9). Again, this is not in the pleading, nor any affidavit, nor in the record. Defendant also claims that it asked plaintiff to withdraw his claim because Morris Duffy "could not at the same time continue to employ an associate of the firm that was essentially suing a client of the firm" (Defendant's brief at 10). Again, this is absent from the pleading and the record. Defendant also claims that it had to get written informed consent of Utica to waive this "apparent conflict," but Utica refused to do so (Defendant's brief at 10). Again, this is not in the pleading, nor is it in the record.

Defendant invites this Court to dismiss a pleading based on defendant's version of contradicted facts, which defendant wants

to add to the record. Defendant even attempt to buttress its fabricated facts by citing a Disciplinary Rule (without reference to any caselaw). However, Rule 1.7 does not apply because there was no conflict. The pleading contains no allegation that Syosset Public Library was a client of Morris Duffy. The pleading alleges that plaintiff had a claim against the Library, and the Library, which had a relationship with Utica, and the Library leveraged the fact that Utica hires Morris Duffy so that the Library could obtain a release from an employee of Morris Duffy. Plaintiff's petition for redress against the Library did not involve a client of Morris Duffy. Rule 1.7 does not apply; there is no conflict. Morris Duffy's factual wishlist does not appear record. Defendants must develop facts during discovery, not simply interpose them on a motion addressed to the pleading.

Defendant's logic is also specious. Suppose plaintiff had a bodily injury claim arising from a motor vehicle accident against another driver. Suppose the other driver was insured by an insurance company that also hired Morris Duffy for legal services. Would plaintiff have to release his bodily injury claim, or terminate his employment with Morris Duffy, simply because he was an associate of Morris Duffy,? Rule 1.7 simply does not apply because there is no conflict - actual or apparent.

Defendant's creation of facts to contradict the pleading and alleged a phantom conflict would only succeed if tested through

POINT III

THE COMPLAINT ALLEGES SUFFICIENT FACTS TO APPLY 42 U.S.C. § 1983 TO MORRIS DUFFY

In the wake of the Civil War, Congress passed the Civil Rights Act of 1871 to provide a civil remedy for constitutional injuries. While this applies to public entities, "[p]rivate persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents,'" Adickes v. S. H. Kress & Co., 398 U.S. 144, 152 (1970), quoting, United States v. Price, 383 U.S. 787, 794, 86 S.Ct. 1152, 1157 (1966).

Plaintiff's burden is indeed light to survive this motion. To "survive a motion to dismiss on [a] § 1983 conspiracy claim, [plaintiff] must allege (1) an agreement between a state actor and a private party; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." Ciambriello v. County of Nassau, 292 F.3d 307, 324-25 (2d Cir. 2002). Here, plaintiff has pled that the Library and Utica and Morris Duffy acted in concert to terminate him because he sought to petition the Library for redress of his grievance; that Morris Duffy took an overt act to further this by terminating plaintiff because he would not sign a

when plaintiff would not sign a release in favor of the Library (Complaint, ¶¶ 32-36). The Library faxed a general release to Utica, who faxed it to Morris Duffy, for plaintiff's execution (Brinn Declaration).[6] When plaintiff refused to sign the general release in favor of the Library, Morris Duffy terminated plaintiff (Complaint ¶¶ 32-34, Brinn Declaration). Consequently, the pleading establishes that Morris Duffy and Utica acted based on the compulsion, or coercion, of the Library to obtain a release.

Similar circumstances arose in United States v. Price, 383 U.S. 787, 794, 86 S.Ct. 1152, 1157 (1966). In that case, the United States Supreme Court reversed a grant of summary judgment and permitted a 42 U.S.C. § 1983 claim against a restaurant for deprivation of civil rights because the restaurant was alleged to be acting according to a state-enforced custom of segregating races in public eating places. In the present case, Utica and Morris Duffy acted pursuant to the Library's state-enforced attempt to punish plaintiff because plaintiff petitioned the Library for redress of his grievance. Morris Duffy acted at the behest of the Library, which is sufficient to plead liability under 42 U.S.C. § 1983 pursuant to the "compulsion test."

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[6] The cover letter of the fax from Betty Winkler, an employee of Utica, to Morris Duffy, plaintiff's employer, states, in part, as follows: "Attached please find a copy of the General Release we discuss. Please have Mr. Brinn sign the General Release and have his signature notarized" (Brinn Declaration).

The Library also provided "significant encouragement" to Morris Duffy by faxing a document to release plaintiff's claims to Utica, which Utica then sent to Morris Duffy. Morris Duffy, at the direction of the Library and Utica, attempted to coerce plaintiff to withdraw his First Notice of Claim (by trickery, without showing the full release to plaintiff), and, ultimately, Morris Duffy terminated plaintiff when he did not sign a general release releasing his claims against the Library. Morris Duffy became a "willful participant in joint activity with the State" by jointly conspiring to terminate plaintiff when he would not release his claims against the Library. In Carroll v. Blinken, 42 F.3d 122 (2d Cir. 1994), the Second Circuit held that where a public institution and NYPIRG, a private institution, unconstitutionally agreed that NYPIRG would receive a portion of a public institution's mandatory student activity fee, both were both liable under § 1983 because both "were joint participants in the unlawful conduct." Similarly, the Library, Utica, and Morris Duffy jointly conspired to punish plaintiff for exercising his First Amendment rights by terminating plaintiff because he refused to release his claims against the Library. See, also, Abdullahi v. Pfizer, Inc., 562 F.3d 163, 188-89 (2d Cir. 2009)(where the Second Circuit permitted a § 1983 claim against Pfizer and the Nigerian government because the complaint, "adequately allege[d] that the violations occurred as the result

POINT IV

properly pleaded?

PLAINTIFF PROPERLY 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 Utica, which funnels work to plaintiff's employer, to maliciously exert undue economic pressure upon plaintiff, which resulted in

plaintiff's termination. Further, the defendants disclosed plaintiff's confidential library records, proffered a signature page of a release, without permitting plaintiff to examine the full document, pre-notarized plaintiff's signature (which constitutes a misdemeanor), 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, especially since the defendants engaged in criminal conduct. 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 defendant's motion for judgment on the pleadings, and grant such other and further relief as the Court deems just and equitable.

Dated: October 27, 2009
Mineola, NY

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 27, 2009, I, Raymond Nardo, served by:

XXX mail, first class __ return receipt requested

__ overnite mailed __ faxed

__ served via ECF __ electronically mailed

the enclosed:

Brief on Behalf of Plaintiff in Opposition to Defendant's Motion to Dismiss

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10/27/09
DATE