

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
JOSHUA BRINN,

Plaintiff,

-against-

CV 09 1151  
(TCP) (WDW)

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

**REPLY MEMORANDUM OF LAW  
IN SUPPORT OF DEFENDANT  
MORRIS DUFFY ALONSO AND FALEY'S  
MOTION TO DISMISS**

L'ABBATE, BALKAN, COLAVITA & CONTINI, L.L.P.  
1001 FRANKLIN AVENUE  
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**TABLE OF CONTENTS**

	Page
TABLE OF AUTHORITIES .....	ii
PRELIMINARY STATEMENT .....	1
POINT I.....	1
COUNT I OF THE COMPLAINT SHOULD BE DISMISSED AS THE COMPLAINT AND PLAINTIFF’S OPPOSITION FAIL TO ALLEGE ANY EVIDENTIARY FACTS THAT MORRIS DUFFY WAS ACTING UNDER COLOR OF STATE LAW .....	1
POINT II.....	3
COUNT VI OF THE COMPLAINT SHOULD BE DISMISSED AS THE COMPLAINT AND PLAINTIFF’S OPPOSITION FAIL TO ALLEGE ANY ACTUAL INJURY NECESSARY TO SUSTAIN A FIRST AMENDMENT RETALIATION CLAIM .....	3
CONCLUSION .....	6

**TABLE OF AUTHORITIES**

	Page
Collins v. Goord, 438 F.Supp.2d 399 (S.D.N.Y. 2006) .....	3
Dwyer v. Regan, 777 F.2d 825, 828 (2d Cir 1985) .....	1
Fry v. McCall, 1999 WL 359766 (S.D.N.Y. 1999).....	1
Monsky v. Moraghan, 127 F.3d 243, 245 (2d Cir 1997).....	2,5
Murphy v. American Home Products Corp. 58 N.Y.2d 293, 461N.Y.S.2d 232 (1983) .....	4
Waters v. Sunshine, 2009 WL 750217 at *4 .....	5
West v. Atkins, 487 U.S. 42, 49, 108 S.Ct. 2250, 2255, 101 L.Ed.2d 40 (1988).....	4
Williams v. Greenburgh, 535 F.3d 71, 88 .....	5
Wolff v. Town of Mount Pleasant, 2009 WL 1268691, at *5 (S.D.N.Y. 2009) .....	4,5

**PRELIMINARY STATEMENT**

The defendant, Morris Duffy Alonso & Faley (“Morris Duffy”), submits this Reply Memorandum of Law in further support of its motion to dismiss the first, fourth and sixth counts of the plaintiff’s complaint under Fed.R.Civ.P. §12(c). Plaintiff’s opposition states that he is withdrawing the second and fifth causes of action.

**POINT I**

**COUNT I OF THE COMPLAINT SHOULD BE DISMISSED  
AS THE COMPLAINT AND PLAINTIFF’S OPPOSITION  
FAIL TO ALLEGE ANY EVIDENTIARY FACTS THAT  
MORRIS DUFFY WAS ACTING  
UNDER COLOR OF STATE LAW**

Plaintiff has not pled a cognizable claim against Morris Duffy for recovery under section 1983 which requires plaintiff to allege that (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).

There are no facts contained in the complaint to support plaintiff’s allegation that Morris Duffy was acting under color of state law when it requested that plaintiff withdraw his Notice of Claim against the Syosset Public Library (the “Library”). Neither plaintiff’s complaint nor his opposition contain any factual or evidentiary allegations to substantiate the conclusory allegation that Morris Duffy was acting under the color of state law. The plaintiff has failed to allege that

Morris Duffy exercised any power “possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law...a defendant in a § 1983 suit acts under color of state law when he abuses the position given to him by the State.” *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)). Morris Duffy did not exercise any power of state authority as none was given to it by the Library when it requested the plaintiff to withdraw his Notice of Claim. Furthermore, Morris Duffy has not abused any “position” given to it by the Library, since it has no “position” with the Library. There are no factual allegations in plaintiff’s complaint supporting a potential claim that Morris Duffy was an agent for the Library, and there were no allegations that Morris Duffy was the attorney for the Library.

Plaintiff alleges that the Library is a municipality (Compl. ¶ 5), and that Morris Duffy represents municipalities (Compl. ¶ 21), but there are no allegations of any agency relationship or attorney-client relationship that would give Morris Duffy the authority to act on behalf of the Library. As stated in the complaint, Morris Duffy is counsel for Utica National Insurance Company (“Utica”), a private entity. (Compl. ¶ 22). Morris Duffy is not counsel for the Library. Since Morris Duffy had no authority to act on behalf of the Library, or any other state actor, when it asked plaintiff to withdraw the Notice of Claim, it cannot be said that Morris Duffy was acting under color of state law.

Furthermore, the only injury plaintiff can claim is the termination of his employment. That action was taken by Morris Duffy as plaintiff’s employer. The termination of plaintiff’s employment was most definitely not “made possible only because [Morris Duffy] is clothed

with the authority of state law.....” *Monsky v. Moraghan* , supra at 245. In fact, the termination was motivated by a perceived ethical conflict and an actual business conflict. It was not motivated by the assertion of a claim against the Library, per se.

Not to be overlooked is the fact that the complaint does not and cannot allege that plaintiff was deprived of a right, privilege or immunity secured by the Constitution or the laws of the United States, the second component of a section 1983 cause of action. Plaintiff’s employment was terminated but he re-filed his notice of claim and this lawsuit is proof that he was not deprived of his ability to bring suit against the Library by virtue of any of the actions of Morris Duffy. Thus, plaintiff’s complaint fails to allege evidentiary facts sufficient to sustain either component of a section 1983 claim and, accordingly, we submit that Count I of the complaint should be dismissed.

## POINT II

### **COUNT VI OF THE COMPLAINT SHOULD BE DISMISSED AS THE COMPLAINT AND PLAINTIFF’S OPPOSITION FAIL TO ALLEGE ANY ACTUAL INJURY NECESSARY TO SUSTAIN A FIRST AMENDMENT RETALIATION CLAIM**

According to plaintiff’s brief, plaintiff’s First Amendment Retaliation Claim is based on his exercise as a private citizen of his First Amendment right to petition the Library by filing a Notice of Claim. (Brief on Behalf of Plaintiff in Opposition to Morris Duffy Alonso & Faley’s Motion for Judgment on the Pleadings, p. 11, Point II(B)). In support of his claim, plaintiff cites the elements set forth in *Collins v. Goord*, 438 F.Supp.2d 399 (S.D.N.Y. 2006)(prisoner brought

§1983 action against New York State Department of Correctional Services Commissioner and several employees of correctional facility alleging denial of access to courts among other claims). Plaintiff applies the wrong test. Claims of First Amendment retaliation asserted outside the prison context are generally divided into two categories: (1) claims made by public employees who claim that they were retaliated against for speaking out on matters of public concern; and (2) claims made by private citizens asserting that the government took retaliatory action against them based upon their exercise of their First Amendment Rights. *Wolff v. Town of Mount Pleasant*, 2009 WL 1468691, at \*5 (S.D.N.Y. 2009).

As a preliminary matter, since plaintiff is a private citizen, he must allege that the government took retaliatory action against him based upon his exercise of his First Amendment right to file a Notice of Claim. Since Morris Duffy is a private entity, and not a government entity, this cause of action cannot stand. As a private entity in the state of New York, Morris Duffy may terminate its employees 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's claim of retaliation against Morris Duffy for exercise of his First Amendment rights should be dismissed.

In 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. *Wolff v. Town of Mount Pleasant*, 2009 WL 1468691, at \*6. Absent some conduct causing an injury to a

plaintiff's rights, a plaintiff cannot maintain a claim for relief. *Id.*; *Williams v. Greenburgh*, 535 F.3d 71, 78; *Monsky v. Moraghan*, 127 F.3d 243, 247 (2d Cir. 1997); *Waters v. Sunshine*, 2009 WL 750217 at \*4. Plaintiff cannot claim that his First Amendment speech, the Notice of Claim, was chilled since after voluntarily withdrawing his first Notice of Claim dated January 7, 2009 plaintiff subsequently filed a second Notice of Claim. (Compl. ¶ 35). Plaintiff was not injured because his right to petition the Library by filing a Notice of Claim was not affected since plaintiff filed a second Notice of Claim and commenced this lawsuit. Plaintiff's First Amendment retaliation claim should be dismissed since plaintiff has failed to show any actual injury necessary to maintain this claim.

Plaintiff appears to be arguing in his brief that he was terminated for filing his Notice of Claim. As discussed above, in order to maintain a cause of action for First Amendment retaliation in the private context, plaintiff must prove that Morris Duffy took some action that effectively chilled the exercise of his First Amendment rights. *Wolff v. Town of Mount Pleasant*, 2009 WL 1468691, at \*6. Even presuming that plaintiff is claiming his "actual injury" is his termination, he still cannot maintain this cause of action because he cannot maintain that the termination chilled his exercise of his First Amendment rights as he filed the second Notice of Claim after he was terminated by Morris Duffy.



**CONCLUSION**

For the reasons set forth above, the remaining first, fourth 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  
November 6, 2009

Respectfully submitted,

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

By: \_\_\_\_\_

  
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Of Counsel:

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Susannah C. Lyson

**AFFIDAVIT OF SERVICE**

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

MARNA BLOOM-DERUITER, 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 6<sup>th</sup> day of November, 2009, deponent served the within **REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT MORRIS DUFFY ALONSO AND FALEY'S MOTION TO DISMISS** upon:

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Attorneys for Defendant  
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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.

  
**MARNA BLOOM-DERUITER**

Sworn to before me this 6<sup>th</sup> day of  
November, 2009.

  
\_\_\_\_\_  
Notary Public

KAREN R. LUCERO  
Notary Public, State of New York  
No. 4682543  
Qualified in Nassau County  
Commission Expires April 30, 2010