UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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JOSHUA BRINN,

Plaintiff,

-against-

Docket No.: 09 CV 1151

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 IN SUPPORT OF MOTION TO DISMISS

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INSURANCE COMPANY
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File No.: 462-4460

PRELIMINARY STATEMENT

This Reply Memorandum of Law is submitted in further support of defendant UTICA NATIONAL INSURANCE COMPANY's ("Utica") motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (6) since the complaint fails to set forth any valid cause of action against Utica. It should be noted that upon receipt of Utica's motion, Plaintiff Joshua Brinn ("Brinn") formally withdrew the Second and Fifth Counts of the Complaint. For all of the following reasons, as well as those set forth in Utica's moving papers, Utica respectfully requests that this Court dismiss the remaining Counts.

POINT I
PLAINTIFF'S ALLEGATIONS ARE MERE CONCLUSIONS WHICH FAIL TO MEET THE FEDERAL PLEADING STANDARDS

As set forth more fully in Utica's moving papers, Utica is an insurance company which issued a policy of insurance to the Library. (Nelson Aff. ¶3). When the Library received the First Notice of Claim filed by Brinn, it requested that Utica provide insurance to the Library for the Notice of Claim. (Nelson Aff. ¶3). Assuming without conceding for purposes of this motion that the only factual allegation asserted by Brinn against Utica is true, (Complaint ¶29), the only thing Utica has been "accused" of doing is the very job it is required to do, namely adjust the claim. As part and parcel to this adjustment process, it requested that the claimant (Brinn) withdraw a claim against one of its insureds ('the Library). Against this business background, the sheer absurdity of Brinn's claims against Utica becomes patently obvious.

Nonetheless, Brinn persists in arguing that he adequately alleged, under the new Supreme Court standard set forth in *Bell Atlantic Corp. v. Twombley*, 550 U.S. 544, 554-55, 127 S.Ct. 1955, 1964-65 (2007), that Utica engaged in a conspiracy to violate his First Amendment Rights; violated the New York State Constitution; intentionally interfered with his business opportunity and intentionally inflicted emotional distress. Brinn's arguments are, not, however, supported by the complaint which makes but one factual allegation against Utica:

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 ALSONSO & FALEY to exert pressure on plaintiff to withdraw his First Notice of Claim.

Complaint ¶29.

Apparently recognizing the insufficiency of his pleading, by way of opposition, Brinn impermissibly attempts to inject an additional factual allegation against Utica: that Utica allegedly faxed a release to Morris Duffy, with a fax cover page which asked that Brinn sign the release. However, this newly injected factual allegation must be disregarded, and cannot be considered in support of any of Brinn's claims since a plaintiff is not permitted to amplify his pleadings in opposition to a motion to dismiss. Indeed, "[a] complaint cannot be modified by a party's affidavit or by papers filed in response to a dispositive motion to dismiss or for summary judgment." *Streit v. Bushnell*, 424 F.Supp.2d 633, 639, fn 3 (S.D.N.Y. 2006), *See also, Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998).

Even if this Court does choose to consider this newly injected allegation, it does nothing to further advance Brinn's claims. In fact, the only thing that reference to this fax establishes is that Utica was doing what insurance companies do—adjust and settle claims against their insureds. Nowhere in the Complaint (paragraph 29 or elsewhere), or for that matter in the Declaration that Brinn submitted in connection with the within motion does Brinn himself ever allege that, as a result of Utica's request that Morris Duffy have Brinn withdraw the Notice of Claim, and sign a release, Utica somehow conspired with the Library to have Brinn terminated or intentionally interfered with Brinn's job at Morris Duffy. In other words, nowhere does Brinn himself allege the connection between Utica's request that he withdraw his Notice of Claim, and Morris Duffy's subsequent termination of Brinn. Instead, Brinn requests that the Court "fill in blanks" by assuming that somehow, somewhere, Utica met with, spoke to, or otherwise discussed with the Library and Morris

Duffy that if Brinn did not withdraw the Notice of Claim and sign the release, he should be terminated.

Although Brinn would like this Court to believe that he has made this connection by way of paragraph 11 of his complaint, this is simply not so. All that paragraph 11 alleges is the bald conclusion that all defendants are jointly liable because the Library had authority to coerce Utica to terminate Brinn. Nowhere in the Complaint, paragraph 11 or otherwise, does Brinn allege that the Library actually met or discussed with Utica the need for plaintiff to be terminated, nor does it allege that the Library, in fact, pressured Utica to pressure Morris Duffy to terminate Brinn. The bottom line is that Brinn's complaint, as against Utica, simply fails to set forth sufficient facts to meet the "flexible plausibility standard" set forth by the Supreme Court in *Twombley*, *supra*, and must be dismissed against Utica accordingly.

POINT II
BRINN CANNOT ESTABLISH THAT UTICA CONSPIRED WITH A STATE ACTOR

Brinn concedes that Utica is not, by itself, a state actor and further concedes that the only way for him to assert a claim against Utica for violating 42 U.S.C. §1983 is as a co-conspirator with the Library. However, as noted above, Brinn's conspiracy theory fails because, notwithstanding the unfounded statements made by Brinn's counsel in Brinn's brief (but not in Brinn's own declarations), there is no allegation that the Library ever requested that Utica pressure Morris Duffy to terminate him. *Jacobson v. Peat, Marwick, Mitchell & Co.*, 445 F.Supp. 518, 526 (S.D.N.Y. 1977). *See also, Wright v. Ernst & Young LLP,* 152 F.3d 169, 178 (2d Cir. 1998) ("a party is not entitled to amend his pleading through statements in his brief").

Brinn's counsel attempts to use the fax and the release submitted for the first time with his opposition to Utica's motion, to argue that Utica conspired with the Library to have Brinn terminated based on an allegation that Morris Duffy never showed the release to Brinn. However, there are simply no facts to support such a contention. In fact, Brinn never even alleges that Utica was aware that the release was not shown to Brinn by Morris Duffy (p. 7). The mere fact that Brinn alleges the

date that Utica called Morris Duffy and faxed the release does not transform Utica's request that Brinn sign the release into a conspiracy with the Library to have Brinn terminated from his employment.

"Communications between a private and a state actor, without facts supporting a concerted effort or plan between the parties, are insufficient to make the private party a state actor" to allege a conspiracy to violate section 1983. *Fisk v. Letterman,* 401 F.Supp.2d 362, 377 (S.D.N.Y. 2005). Rather, there must be a meeting of the minds of the parties sued to violate the plaintiff's constitutional rights. *See, Manbeck v. Micka,* --- F.Supp.2d ----, 2009 WL 2365243 at *20 (S.D.N.Y. 2009). Brinn has not met this standard by simply alleging that Utica, as a private insurer in the process of adjusting a claim made against an insured who happens to be a state actor, requested that the claim be dismissed and a release be signed. *Pangburn v. Culbertson*, 200 F.3d 65, 72 (2d Cir.1999). *See also, Ciambriello v. County of Nassau,* 292 F.3d 307 (2d Cir. 2002).

Notably absent from any of Brinn's allegations is any actual connection between the pressure that Utica allegedly exerted to have Brinn withdraw the First Notice of Claim (and sign the release), and the basis for the termination, which is alleged to be Plaintiff's refusal to sign a release. Instead, Brinn simply asks the Court to assume this connection, and assumptions do not give rise to claims—facts do. *Twombley, supra.* In the absence of a sworn statement by Brinn pleading any link between Utica's alleged phone call and fax to the Library, and Brinn's termination, Plaintiff's general allegations that "all defendants conspired" against him are, quite simply, insufficient to state a valid cause of action against Utica.

The cases relied upon by Brinn do not save his factually inadequate and legally implausible complaint since the courts in those cases analyzed complaints which were specifically and fully pled.[1]

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[1] *United States v. Price*, 383 U.S. 787, 86 S. Ct. 1152 (1966), did not arise out of a section 1983 claim of segregation against a restaurant (as asserted by Brinn) but, rather, arose out of a question of whether police officers and private individuals, who arrested, released and then killed prisoners, criminally violated the civil rights laws. Although the defendants were accused of conspiring with each other, the actions of the private defendants were clearly pled. *Carroll v. Blinken*, 42 F.3d 122 (2d Cir. 1994), involved a claim, clearly pled and proven, that NYPIRG, a not-for-profit organization funded, in part, by an arm of the state, was civilly liable under section 1983 because of certain statements set

Brinn's failure to allege the facts surrounding Utica's alleged conspiracy are akin to the plaintiff's failure to allege facts in *Mooney v. County of Monroe*, 508 F.Supp.2d 222 (W.D.N.Y. 2007), a case in which the court dismissed a section 1983 claim against a private hospital because the plaintiff's complaint which alleged that the hospital held him against his will failed to explain how the hospital conspired with the state to do so. Just as in *Mooney*, the plaintiff herein has not and cannot allege a valid cause of action against Utica sounding in constitutional violations, and its First Count must be dismissed as against Utica.

POINT III
PLAINTIFF'S CLAIM ALLEGING A VIOLATION OF THE FIRST AMENDMENT FAILS BECAUSE IT DOES NOT ALLEGE THE NECESSARY OBJECTIVE INTENT

In the case at bar, Brinn has alleged that that his right of free speech was violated because he was allegedly fired in retaliation for filing the First Notice of Claim. It is important to note that Brinn originally claimed that the protected First Amendment right arose because in the First Notice of claim, he "spoke out on matters of public concern." By way of Utica's motion, Utica pointed out that the First Notice of Claim, which dealt only with Brinn's own individual alleged right to use the Library, did not raise a matter of public concern, based upon *Rankin v. McPherson*, 483 U.S. 378, 384, 107 S.Ct. 2891, 2897 (1987).

In the face of the foregoing, Brinn now claims that, as private citizen, he need not have pled that the alleged protected speech dealt with a matter of "public concern". Rather, Brinn argues now that all he need plead is that (i) his speech was protected; (ii) the defendants took adverse action against him; and (iii) there was a causal connection between the speech and the adverse action (p 11). Leaving aside the absence of any allegation that Utica took an adverse action against the plaintiff, as well as the complete absence of an allegation that Utica caused Morris Duffy to terminate plaintiff, plaintiff has failed to plead the necessary intent.

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forth in NYPIRG's by laws. Because the claims against NYPIRG giving rises to its liability as a conspirator were both well pled and proven, the case is simply inapposite to the within matter. Likewise, *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009), involved a claim against the Nigerian government and Pfizer that they illegally conspired to test the effectiveness of a new antibiotic on Nigerian children without their consent. Because the activities of Pfizer were fully set forth, the case has absolutely no bearing on whether Brinn properly pled a conspiracy as against Utica.

In order to make out a First Amendment retaliation claim based upon an alleged effort to dissuade litigation, it is not enough to merely allege that a defendant's routine litigation conduct was retaliatory and in violation of section 1983. Rather, a plaintiff must allege facts which support the conduct's objective retaliatory intent. *Greenwich Citizens Committee, Inc. v. Counties of Warren and Washington Indus. Development Agency*, 77 F.3d 26, 30 (2d Cir. 1996). ("We think it clear that, at least for a claim of a First Amendment violation arising in the context of litigation, a governmental entity alleged to have chilled a litigant's freedom of speech... must be shown to have acted with retaliatory intent".) Just as importantly, and to protect the litigation process, counsel representing a litigant cannot be sued for violating section 1983 unless counsel's conduct was taken in "bad faith". *Burgess v. Harris Beach PLLC*, 2008 WL 850336 at *12 (W.D.N.Y. 2008).

In the case at bar, there is little question but that the only conduct alleged against Utica was routine litigation conduct, in that Utica, the insurer for the Library, requested that Brinn discontinue his First Notice of Claim and sign a release. In fact, Utica, as the Library's insurer, should be deemed to be in the same position as a litigant's counsel and, thus, is not even a proper defendant in a section 1983 retaliation claim in the absence of bad faith. *See Burgess supra.*

Just as importantly, as discussed more fully above, the complaint and Brinn declaration are absolutely devoid of any allegation that the Library requested Utica to pressure Morris Duffy to terminate Brinn, nor that Utica ever, in fact, pressured Morris Duffy to terminate Brinn. Again, it bears repeating that Utica's conduct amounted to nothing more than routine claim adjustment, and Brinn's use of the words "malicious" or "outrageous" to describe Utica's conduct, cannot and does not transform an objectively routine part of the claims handling process into an actionable, retaliatory action. As such, it is respectfully submitted that for this reason as well, the First Count against Utica must be dismissed.

POINT IV
THE REMAINING STATE LAW CLAIMS MUST BE DISMISSED AS WELL

Because Brinn believes his complaint states a valid Section 1983 cause of action, he wholly ignores the defect that arises once this Court finds that the section 1983 claim is invalid. Brinn's silence operates as a concession that, upon the dismissal of the Federal claims against Utica, this Court should not retain jurisdiction over the state court claim, pursuant to the case law more fully cited in Utica's prior Memo of Law.

A. **The Sixth Count:** Even if the Court retains jurisdiction over the state law claims dismissal of the claims set forth in the Sixth Count, which essentially mirror those set forth in the First Count, is, nevertheless, warranted for all of the same reasons that the First Count must be dismissed (*see* Points I,II,III above), since the analysis regarding whether the Plaintiff can validly state claims against Utica pursuant to 42 U.S.C. §1983 is identical to the analysis regarding the validity of claims brought pursuant to the New York State Constitution. *See, e.g., SHAD Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 498 N.Y.S.2d 99 (1985).

B. **The Third Count:** Even if the Court retains jurisdiction over the state law claims, which it should not, the Third Count, which alleges that the Library and Utica "intentionally interfered with Plaintiff's business opportunity, causing his termination" must, nevertheless, be dismissed. Complaint ¶ 40. It is not disputed that the "business opportunity" to which Brinn refers is his employment as an associate with Morris Duffy. Complaint, ¶19, 30, 34. Brinn concedes that he was an at-will employee and that, as a result, he can "only succeed on his tortious interference claim if he established that [defendants] acted solely to harm him or used wrongful means to achieve the interference." *Hoesten v. Best*, 34 A.D.3d 143, 159, 821 N.Y.S.2d 40, 52 (1st Dept. 2006), *citations omitted.* Brinn also concedes that in order to succeed on his claim, he must establish: (i) that conduct must amount to an independent crime or tort; (ii) that conduct must have been taken solely out of malice; or (iii) that conduct must amount to "extreme and unfair" economic pressure. *Friedman v.*

Coldwater Creek, Inc., 551 F.Supp.2d 164, 170 (S.D.N.Y. 2008), *aff'd,* 2009 WL 932546 (2nd Cir. 2009), *citing Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 785 N.Y.S.2d 359 (2004).

In opposition to Utica's motion, Brinn contends that his Complaint satisfies all of these elements since he has alleged that "defendants committed crimes, acted out of malice and exerted undue economic pressure by having plaintiff terminated from his employment at Morris Duffy because he would not release the Library" (p. 20). However, this is simply not so. Nowhere in his complaint did Brinn ever allege that Utica committed a crime; that Utica acted out of malice; or that Utica exerted economic pressure.

While Brinn contends that he did, in fact, allege a crime in the disclosure of confidential library records in violation of CPLR 4509, even a cursory review of the complaint reveals that the disclosure of confidential library records is something that Brinn alleged that the Library did, without any participation from Utica at all. *See Complaint* ¶¶26,27. Thus, even assuming the improper disclosure of library records gave rise to a private cause of action (which it does not, see *Lightman v. Flaum*, 97 N.Y.2d 128, 736 N.Y.S.2d 300 (2001)), it cannot form the basis of a claim against Utica for tortious interference with a business activity. Moreover, while the opposition papers also contend that "all defendants conspired to procure a release by misrepresentation, deceit, fraud and criminal notary fraud" (p.20), at the outset since, as noted above, because plaintiff cannot amplify his pleading through his argument, any reference to purported notary fraud cannot be considered. Moreover, even assuming this Court were to consider the release, nowhere in Brinn's Declaration did he ever allege that Utica presented the release to him. Rather, plaintiff's declaration asserts that Morris Duffy presented a pre-notarized release to him for signature. In fact, Brinn's Declaration does not assert that Utica had anything at all to do with the alleged pre-notarization.

Next, Brinn contends in opposition that Utica engaged in "interference because it had no legitimate business interest in plaintiff's employment as an associate attorney with Morris Duffy" (p. 21). This statement begs the question of exactly what Utica did to interfere with Brinn's employment. Utica is not alleged to have disclosed plaintiff's library records; Utica is not alleged to

have demanded that plaintiff sign a document without disclosing that document; and Utica is not alleged to have demanded that Morris Duffy terminate plaintiff. Just as with the section 1983 claim, Brinn's counsel's conclusion that Utica acted "maliciously and used unlawful means to intimidate and coerce Morris Duffy to terminate plaintiff because he would not sign a release in favor of the Library" (p. 21-22) does not allow this Court to overlook the complete absence of any factual support for such a bald conclusion.

In sum, not only does the complaint fail to allege that Utica did anything but request that a Notice of Claim be withdrawn and a release signed, the complaint also fails to allege that Utica's sole purpose was to harm Plaintiff. As such, Brinn clearly has not alleged the necessary elements of a tortious interference claim, and the Third Count must be dismissed accordingly.

C. **The Fourth Count:** Even if the Court retains jurisdiction over the state law claims, which it should not, the Fourth Count, which alleges that "Defendants intentionally inflicted emotional distress upon Plaintiff," (Complaint ¶ 42), must, nevertheless, be dismissed as well. Brinn agrees that, in order to sustain his intentional infliction of emotional distress claim against Utica, he must demonstrate that: (1) Utica's conduct toward Brinn was so outrageous and shocking that it exceeded all reasonable bounds of decency as measured by what the average member of the community would tolerate; (2) Brinn suffered severe emotional distress; (3) Utica's conduct caused such distress; and (4) Utica acted either with the desire to cause such distress to Brinn; under circumstances known to Utica which made it substantially certain that that result would follow; or recklessly and with utter disregard of the consequences. *See Bender v. City of New York,* 78 F.3d 787, 790 (2d Cir. 1996).

What Brinn fails to note is that courts are particularly wary of claims of intentional infliction of emotion distress in the employment context, since they correctly view such claims to be a way for plaintiffs to repackage and bring suit based upon a wrongful discharge, which is prohibited by law. *Lydeatte v. Bronx Overall Economic Development Corp.*, 2001 WL 180055 at *2 (S.D.N.Y. 2001).("A plaintiff cannot avoid the consequences of the employment-at-will doctrine by bringing a wrongful discharge claim under a different name.")

Brinn argues that his claim of intentional infliction of emotion distress should survive because Utica, along with the other defendants, conspired to terminate him because he would not sign the release; maliciously exerted undue economic pressure on him; demanded that he sign a pre-notarized release; and disclosed confidential library records. As noted above, not one of these assertions has been pled as against Utica except for the bald conclusory statement that Utica somehow conspired to terminate plaintiff, which statement has absolutely no factual support.

The case law referenced by Brinn does save his factually unsupportable claim. [2] The bottom line is that plaintiff's Fourth Count attempts to recharacterize an otherwise prohibited cause of action (wrongful discharge) into a claim of intentional infliction of emotional distress and as such, it is respectfully submitted that this Court must dismiss the Fourth Count.

CONCLUSION

For all the foregoing reasons, as well as those set forth in the accompanying moving papers, it is respectfully requested that the Court grant the within motion in its entirety, and dismiss the complaint, together with such other and further relief as this Court may deem just and proper.

Dated: Mineola, New York
November 2, 2009

Sherri N. Pavloff (SP 5373)
Braden H. Farber (BH 7175)

[2] *Halio v. Lurie*, 15 A.D.2d 62, 222 N.Y.S.2d 759 (2d Dep't 1961), arose out of a claim by an American woman of Turkish descent that a man deceived her into believing he was marrying her, married someone else and then sent a letter filled with embarrassing, harassing statements. The decision found that despite the absence of physical impact, such conduct can serve as the basis of a claim for intentional infliction of emotional distress. This case has no similarity to the case herein. *Sanchez v. Orozco*, 178 A.D.2d 391, 578 N.Y.S.2d 145 (1st Dep't 1991), arose out of a claim by a psychiatric patient against a psychiatrist for sexual harassment. Although the trial court dismissed the patient's claim of infliction of emotional distress, the Appellate Division found that allegations that the psychiatrist "persuaded plaintiff to have sexual relations with him in order for her to obtain a therapeutic benefit" and "placed numerous harassing telephone calls to plaintiff after she terminated their sexual relationship" were sufficient to allege such a claim. Finally, *Atherton v. 21 East 92nd Street Corp.*, 149 A.D.2d 354, 539 N.Y.S.2d 933 (1st Dep't 1989), arose out of a claim that by a tenant that her landlord breached the implied warranty of habitability by failing to fix a burst pipe, causing subsequent damage to her apartment, which in turn caused the emission of lethal levels of carbon monoxide. The Appellate Division allowed the tenant to plead a cause of action sounding in intentional infliction of emotional distress based upon much more precise than the allegations asserted by Brinn against Utica herein and thus, Atherton is also inapplicable.