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2008 WL 5215466
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United States District Court,
S.D. New York.

Cathy R. SASSCER, Plaintiff,
v.
Lillian BARRIOS–PAOLI, Commissioner of City of New York, Department of Social Service; and Verna Eggleston, Commissioner of City of New York, Department of Social Service; Jay Dankberg; the New York Foundation for Senior Citizens Guardian Services, Inc.; Michael Schmidt; Mental Hygiene Legal Services; Charles Schwab, Inc.; and Ira Salzman, Defendants.

No. 05 Civ. 2196(RMB)(DCF).
|
Dec. 8, 2008.

West KeySummary

1 **Federal Courts** Receivers, executors, administrators, and other court appointees

Mental Hygiene Legal Services (MHLS) was immune from patient's claim that her civil rights were violated by the New York Supreme Court's appointment of a guardian ad litem for patient pursuant to the New York Mental Hygiene Law. Because MHLS was a state-funded legal services agency under the discretion of the New York State Office of Court administration, it enjoyed the same Eleventh Amendment immunity from suit in federal court as was enjoyed by the state itself. U.S.C.A. Const.Amend. 11; McKinney's Mental Hygiene Law § 81.01.

6 Cases that cite this headnote

DECISION AND ORDER

RICHARD M. BERMAN, District Judge.

I. Introduction

***1** On or about November 4, 2005, Cathy R. Sasscer ("Plaintiff"), proceeding *pro se,* filed a Third Amended Complaint ("3d Am. Compl.") against Lillian Barrios–Paoli ("Barrios–Paoli") and Verna Eggleston ("Eggleston"), Commissioners of the New York City Department of Social Services ("DSS"), Jay Dankberg ("Dankberg"), Charles Schwab, Inc. ("Schwab"), the New York Foundation for Senior Citizens Guardian Services, Inc. ("NYF"), Michael Schmidt ("Schmidt"), Ira Salzman ("Salzman"), and Mental Hygiene Legal Service ("MHLS") (collectively, "Defendants"), alleging, among other things, that her civil rights were violated under 42 U.S.C. § 1983 ("Section 1983") by the New York Supreme Court, New York County's appointment of a guardian *ad litem* for Plaintiff pursuant to Article 81 of the New York Mental Hygiene Law ("Article 81") in 1997. (3d Am.Compl.¶¶ 1, 5, 10); *see also In re Cathy Raff,* No. 402820/97, at 2 (N.Y. Sup.Ct., N.Y. County Nov. 8, 1997) (Braun, J.) (Order and Judgment Appointing Guardian) ("Cathy Raff [Sasscer] is likely to suffer harm because she is unable to provide for her property management and cannot adequately understand and appreciate the nature and consequences of such inability[.]"). [1]

Between December 6, 2005 and January 27, 2006, Defendants filed multiple motions to dismiss the Third Amended Complaint pursuant to Federal Rules of Civil Procedure ("Fed. R. Civ.P.") 12(b)(6). (*See* Docket [# 30]; Docket [# 38]; Docket [# 40]; Docket [# 44]; Docket [# 47].) On or about March 30, 2006, the Court directed Defendants to file a joint motion to dismiss solely "focus[ed] on the statute of limitations" defense "without prejudice to [Defendants] having other arguments." (Tr. of Proceedings, dated Mar. 30, 2006, at 2, 9.)

On or about August 30, 2006, Defendants filed a joint motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), arguing, among other things, that "Plaintiff's Third Amended Complaint is barred by the applicable statute of limitations[.]" (Defs.' Mem. of Law in Further Supp. of Defs.' Mot. to Dismiss, dated June 8, 2006, at 6; *see also id.* at 1 ("Defendants submit this [ ] Memorandum of Law without waiving the numerous other arguments available to them in support of dismissal

of [P]laintiff's [Third Amended] Complaint.").) On or about October 11, 2007, the Court entered an Order ("October 2007 Order") dismissing Plaintiff's claims against Defendants Barrios–Paoli, Eggleston, Dankberg, and Schwab as time-barred. (*See* October 2007 Order at 7.) And, the Court found that any "claims against NYF, Schmidt, Salzman, and MHLS that arose after February 16, 2002 ... surviv[ed] Defendants' motion to dismiss [.]" (October 2007 Order at 2 (internal quotations omitted).)

On or about May 12, 2008, NYF, Schmidt, Salzman, and MHLS (collectively, "Remaining Defendants") moved to dismiss the Third Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b) (6), arguing, among other things, that: (1) "Plaintiff's suit [against MHLS] is barred by the Eleventh Amendment"; (2) Plaintiff "fails to state a claim under Section 1983" because "none of [the Remaining Defendants] acted under color of state law"; (3) Plaintiff "fails to state a claim under Section 1983" because "Plaintiff has failed to identify which constitutional rights were violated by [Remaining] Defendants with regard to the remaining claims"; and (4) "[i]f the Court dismisses all of the federal claims against any [Remaining] Defendant, it should also dismiss all of the related state law claims against that [Remaining] Defendant" pursuant to 28 U.S.C. § 1367(c)(3). (Mem. of Law in Supp. of Remaining Defs.' Mot. to Dismiss, dated May 12, 2008 ("Defs.Mem."), at 3, 10, 11.)

***2** On or about August 10, 2008, Plaintiff filed an opposition arguing, among other things, that NYF and Schmidt "must be deemed to be 'state actors' within the meaning of Section 1983" because they "were empowered by the State to enforce state law and did enforce state law against [Plaintiff]." (Pl. Mem. in Resp. to Defs .' Mot to Dismiss, dated Aug. 10, 2008 ("Pl.Mem."), at 1, 2 (emphasis omitted).) Plaintiff does not appear to respond to Remaining Defendants' arguments regarding Eleventh Amendment immunity, Plaintiff's alleged failure to identify which of her constitutional rights were allegedly violated by Remaining Defendants, and Plaintiff's state law claims.[2] On or about August 29, 2008, Remaining Defendants filed a reply ("Reply").

The parties waived oral argument.

For the reasons set forth below, Remaining Defendants' motion to dismiss the Third Amended Complaint is granted.

II. Background

For the purposes of this motion, the allegations of the Third Amended Complaint are taken as true. *Bernheim v. Litt,* 79 F.3d 318, 321 (2d Cir.1996).

On or about February 7, 1997, Plaintiff "voluntarily checked-in to Lenox Hill Hospital ['Lenox'] to delay an eviction ... [from] a co-op [she] owned." (3d Am.Compl.¶ 7.) On or about February 10, 1997, Lenox changed Plaintiff's hospital admission status to "involuntary." (3d Am.Compl.¶ 8.) Plaintiff challenged her involuntary status at a hearing but was unsuccessful and remained at Lenox "six more weeks after the hearing." (3d Am.Compl.¶ 9.)

On or about July 9, 1997, DSS petitioned the New York Supreme Court, New York County to appoint a guardian *ad litem* for Plaintiff pursuant to Article 81. (*See* 3d Am. Compl. ¶¶ 46–17.)[3] On or about October 17, 1997, in a decision issued from the bench ("October 1997 Decision"), the Honorable Richard Braun, Justice of the Supreme Court of the State of New York, New York County, found that Plaintiff " 'evidences her inability to manage her property by virtue of ... [a] summary proceeding for nonpayment of rent brought on [Plaintiff] and brought on by her using her assets to buy various gadgets and equipment and to take [educational] courses that relate to her belief that she was being surveilled, including through electronic surveillance[.]' " (3d Am. Compl. ¶ 163 (quoting October 1997 Decision).) On or about November 8, 1997, Justice Braun entered an order ("Article 81 Order") finding Plaintiff to be an "incapacitated person" and appointing NYF as Plaintiff's "legal guardian." (3d Am.Compl.¶¶ 5(A), (D); *see also id.* ¶ 227 ("As your legal guardian, [NYF] will be responsible for the care and maintenance of you, [Plaintiff], in regard to your ... financial needs.").) On or about January 18, 2000, the Appellate Division, First Department unanimously affirmed the Article 81 Order. (*See* 3d Am. Compl. ¶ 5(F)); *see also In re Barrios–Paoli,* 268 A.D.2d 302, 302, 702 N.Y.S.2d 241, 242 (1st Dep't 2000) ("The need for the appointment of a guardian to manage [Plaintiff's] property was established by clear and convincing evidence.... The record establishes that [Plaintiff] is a very intelligent woman capable of taking care of her personal needs. However, [Plaintiff] suffers from a long-standing mental illness sufficiently disabling to place management of her property beyond her capability.").

***3** Plaintiff alleges that Schmidt was "director of NYF," (3d Am. Compl. at (i) & ¶ 226), and that NYF and Schmidt "never prepared and filed" Plaintiff's tax returns for 1996 and 1997 and "incompetently" filed Plaintiff's tax returns for 1998, 1999, and 2000 and that "NYF's negligent [tax] returns caused the IRS to hound [Plaintiff] until" June 2005. (3d Am. Compl. ¶¶ 301, 308 (emphasis omitted); Pl. Mem. at 3 & Ex. B.) Plaintiff alleges that Salzman "represent[ed] NYF" in connection with Plaintiff's guardianship proceeding. (3d Am.Compl.¶ 312.)

Plaintiff alleges that MHLS appointed attorney Melinda Mlinack ("Mlinack") to represent Plaintiff in New York Supreme Court throughout the Article 81 proceedings, (*see* 3d Am. Compl. ¶¶ 213, 224), and that Mlinack "allowed coercive measures to force [Plaintiff] to forgo recovery of money that [Plaintiff] was rightfully due such as the prejudicial settlement with the co-op and all other coerced agreements [Plaintiff] was against[.]" (3d Am.Compl.¶ 224.)

III. Legal Standard

When considering a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6), the court "must accept the factual allegations of the complaint as true and must draw all reasonable inferences in favor of the plaintiff." *Bernheim,* 79 F.3d at 321; *see also* *Sharkey v. Quarantillo,* 541 F.3d 75, 83 (2d Cir.2008). The court's task is "not to weigh the evidence that might be presented at trial but merely to determine whether the complaint itself is legally sufficient." *Goldman v. Belden,* 754 F.2d 1059, 1067 (2d Cir.1985); *see also Duboys v. Bomba,* No. 01 Civ. 5448, 2002 WL 146483, at *3–4 (S.D.N.Y. Jan.31, 2002). At the same time, "a plaintiff's obligation to provide the grounds of [her] entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]" *Bell Atlantic v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 1964–65, 167 L.Ed.2d 929 (2007) (internal quotations and citation omitted). "[P]laintiff must provide the grounds upon which [her] claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.' " *ATSI Commc'n, Inc. v. Shaar Fund, Ltd.,* 493 F.3d 87, 98 (2d Cir.2007) (quoting *Twombly,* 127 S.Ct. at 1965)); *see also* *Iqbal v. Hasty,* 490 F.3d 143, 157–58 (2d Cir.2007).

"Since most *pro se* plaintiffs lack familiarity with the formalities of pleading requirements, we must construe *pro se* complaints liberally, applying a more flexible standard to evaluate their sufficiency than we would when reviewing a complaint submitted by counsel." *Lerman v. Bd. of Elections,* 232 F.3d 135, 139 (2d Cir.2000). But, "[t]he duty to liberally construe a [*pro se*] plaintiff's complaint is not the equivalent of a duty to re-write it ." *See* *Kirk v. Heppt,* 532 F.Supp.2d 586, 590 (S.D.N.Y.2008) (internal quotations and alterations omitted).

IV. Analysis

(1) Eleventh Amendment Immunity

***4** MHLS argues that "it is protected from [Plaintiff's Section 1983 claim] by the Eleventh Amendment because it is a New York State agency created under the New York Mental Hygiene Law § 47.01"; and "to the extent that Plaintiff alleges any state law claims against MHLS, MHLS is also immune from such claims in federal court." (Defs. Mem. at 9, 10.) Plaintiffs' opposition papers do not appear to respond to MHLS's arguments. (*See* Pl. Mem. at 1–7.)

"The Eleventh Amendment bars suits in federal court by citizens against a state and its agencies, absent waiver of immunity and consent to suit by the state or abrogation of constitutional immunity by Congress." *Miller v. Carpinello,* No. 06 Civ. 12940, 2007 WL 4207282, at *2 (S.D.N.Y. Nov. 20, 2007). "New York State has not consented to suit in federal court," *Abrahams v. Appellate Div. of Supreme Court,* 473 F.Supp.2d 550, 556 (S.D.N.Y.2007) (citing *Trotman v. Palisades Interstate Park Comm'n,* 557 F.2d 35, 38–40 (2d Cir.1977)), and "[Section] 1983 does not abrogate the immunity of the states, including New York." *Abrahams,* 473 F.Supp.2d at 556 (citing *Quern v. Jordan,* 440 U.S. 332, 345, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979)). "[MHLS] is an agency within the judicial branch of New York State government." *Shrader v. Granninger,* 870 F.2d 874, 876 (2d Cir.1989); *see also* N.Y. Mental Hyg. § 47.01; *Walker v. City of Waterbury,* 253 Fed. Appx. 58, 61 (2d Cir.2007); *Savastano v. Numbers,* 77 N.Y.2d 300, 305 n. 1, 567 N.Y.S.2d 618, 569 N.E.2d 421, 422 n. 1 (1990) ("[MHLS] is an agency authorized pursuant to article 47 of the Mental Hygiene Law to advocate for and protect the rights of mentally ill patients.").

Because MHLS is "a state-funded legal services agency under the direction of the New York State Office of Court administration," *Fisk v. Letterman,* 401 F.Supp.2d 362, 378 (S.D.N.Y.2005), MHLS "enjoys the same Eleventh Amendment immunity from suit in federal court as is enjoyed by the state itself." *Posr v. Court Officer Shield No. 207,* 180 F.3d 409, 414 (2d Cir.1999); *see also* *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.,* 466 F.3d 232, 250–51 (2d Cir.2006); *Posr,* 180 F.3d at 414 ("The State Office of Court Administration is an arm of the state and therefore immune.").

And, because the "Eleventh Amendment ... is a bar addressed to federal courts, not federal causes of action[,] Plaintiff's ... state law claims [against MHLS] are similarly barred." *Miles v. Baruch Coll.,* No. 07 Civ. 1214, 2008 WL 222299, at *3 (E.D.N.Y. Jan. 25, 2008); *see also* *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 120, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984).

(2) Lack of State Action

NYF and Schmidt

NYF and Schmidt argue, among other things, that "there is no allegation that NYF or Schmidt were acting under color of law" because "[p]roperty guardians ... do not become state actors simply by virtue of their appointment as fiduciaries by the court"; and "there is no allegation of a nexus between the activities of NYF or its employee Schmidt and the state" of New York. (Defs. Mem. at 4, 5.) Plaintiff counters, among other things, that "the cases [NYF and Schmidt] have used to support their arguments are not about guardians [appointed] under Article 81"; and the appointment of NYF and Schmidt pursuant to Article 81 "was as close a nexus to the state as if [NYF and Schmidt] were the state themselves." (Pl. Mem. at 2.)

***5** "To state a section 1983 claim, a plaintiff must allege a violation of his constitutional or statutory rights by a person acting under the color of state law." *Jones v. Westchester County Dep't of Corrs. Med. Dep't,* 557 F.Supp.2d 408, 413 (S.D.N.Y.2008). The Third Amended Complaint alleges that NYF and Schmidt were appointed as Plaintiff's guardians *ad litem* pursuant to Article 81, (*see* 3d Am. Compl. ¶ 5 ("Article 81 Order ... Appoin[ted] Guardian")), and that NYF and Schmidt "violated due process ... when they filed 4 years of [Plaintiff's] tax returns sometime after September 2001 knowing that they lacked essential information[.]" (3d Am. Compl. ¶ 301 (emphasis omitted).) But, "guardians *ad litem,* although appointed by the court, exercise independent professional judgment in the interests of the clients they represent and are therefore not state actors for purposes of Section 1983[.]" *Storck v. Suffolk County Dep't of Soc. Servs.,* 62 F.Supp.2d 927, 941 (E.D.N.Y.1999); *see* N.Y. Mental Hyg. § 81.20(a)(3) ("[A] guardian shall exhibit the utmost degree of trust, loyalty and fidelity in relation to the incapacitated person [.]"); *see also* *Rzayeva v. United States,* 492 F.Supp.2d 60, 81 (D.Conn.2007) ("Because a court-ordered conservator exercises independent professional judgment in the interest of his client, he cannot be considered a state actor."); *Di Costanzo v. Henriksen,* No. 94 Civ. 2464, 1995 WL 447766, at *2 (S.D.N.Y. July 28, 1995).

And, Plaintiff fails to allege that NYF and Schmidt "willfully engaged in joint activity with the state or its agents," *Fariello v. Rodriguez,* 148 F.R.D. 670, 682 (E.D.N.Y.1993), when NYF and Schmidt allegedly improperly filed Plaintiff's tax returns. (*See* 3d Am. Compl. ¶¶ 301–08): *see also* *Duboys v. Bomba,* 199 F.Supp.2d 166, 170 (S.D.N.Y.2002), *aff'd,* 62 Fed. Appx. 404 (2d Cir.2003).[4] In her opposition papers, Plaintiff asserts that "NYF has a contract with the City of New York to perform guardianship services[.]" (Pl. Mem. at 2.) Apart from the fact that a "[c]omplaint cannot be amended by the briefs in opposition to a motion to dismiss," *O'Brien v. Nat'l Prop. Analysts Partners,* 719 F.Supp. 222, 229 (S.D.N.Y.1989), "the fact that the law guardians ... were [allegedly] paid by state funds is [in] sufficient to render [NYF and Schmidt] state actors." *Storck,* 62 F.Supp.2d at 941; *see also* *Elmasri v. England,* 111 F.Supp.2d 212, 221 (E.D.N.Y.2000).[5]

Salzman

Salzman argues, among other things, that he was a "private attorney" retained by NYF and "there is no allegation anywhere in Plaintiff's [Third Amended] [C]omplaint that Salzman acted with any state official or on behalf of any state officials to withhold Plaintiff's tax returns, improperly prepare her tax returns, or improperly file them." (Defs. Mem. at 5–6.) Plaintiff counters, among other things, that "Judge Braun [and] Salzman ... acted willfully in a joint fashion to allow

NYF to fail to provide [Plaintiff] ... with copies of [Plaintiff s] tax returns." (PL Mem. at 5–6.)

***6** "[A] private attorney representing a client in either a civil or criminal action is not a state actor for purposes of [Section] 1983." *Koulkina v. City of N.Y.,* 559 F.Supp.2d 300, 320 (S.D.N.Y.2008) (internal quotations omitted). Salzman, a private attorney "representing NYF" in connection with Plaintiff's guardianship, (3d Am.Compl.¶ 312), was "act[ing] purely as [a] private individual[ ] in connection with [Plaintiff's] state court proceedings." *Elmasri,* 111 F.Supp.2d at 221.

And, construing the Third Amended Complaint liberally, "[P]laintiff has alleged no facts from which a conspiracy between [Salzman] and state actors could be inferred." *Fisk,* 401 F.Supp.2d at 378; *see also id.* ("[U]nless a [private] attorney conspires with a state official to violate the plaintiff's constitutional rights, that attorney cannot be liable under Section 1983,"). While Plaintiff argues for the first time in her opposition papers that "Judge Braun ... and Salzman (Salzman on behalf of NYF) acted willfully in a joint fashion to allow NYF to fail to provide [Plaintiff] ... with copies of [Plaintiff s] tax returns," (PL Mem. at 5–6), a "[c]omplaint cannot be amended by the briefs in opposition to a motion to dismiss." *O'Brien,* 719 F.Supp. at 229. And, in any event, Plaintiff's conclusory assertion is insufficient to allege a conspiracy between Salzman and Judge Braun. *See Gyadu v. Hartford Ins. Co.,* 197 F.3d 590, 591 (2d Cir.1999) ("[A] complaint containing only conclusory, vague, or general allegations of conspiracy to deprive a person of constitutional rights cannot withstand a motion to dismiss.") (internal quotations omitted).

MHLS

As noted above, MHLS is entitled to Eleventh Amendment immunity. Even assuming, *arguendo,* that MHLS were not entitled to Eleventh Amendment immunity, Plaintiff's Section 1983 claim against MHLS would be dismissed for the following reasons.

MHLS argues, among other things, that "Plaintiff ... cannot hold MHLS liable under Section 1983 for the alleged deficiencies in Ms. Mlinack's legal representation because court-appointed attorneys do not act under color of state law when performing their traditional functions as appointed counsel." (Defs. Mem. at 6.) Plaintiffs' opposition papers do not appear to respond to MHLS's arguments. (*See* Pl. Mem. at 1–7.)

"Court-appointed attorneys do not act under color of state law merely by virtue of their appointment," *Pecou v. Hirschfeld,* No. 07 Civ. 5449, 2008 WL 957919, at *2 (E.D.N.Y. Apr. 3, 2008), and "[t]his is true even if the attorney is employed by [MHLS]," *Fisk,* 401 F.Supp.2d at 378. The Third Amended Complaint alleges that Mlinack was a MHLS attorney "appointed by [the] court [pursuant to] Article 81" to represent Plaintiff during her guardianship proceeding. (3d Am.Compl.¶ 213.) Because the Third Amended Complaint contains no allegations against MHLS apart from the allegations concerning Mlinack's representation of Plaintiff, (*see* 3d Am. Compl. ¶¶ 224–25), Plaintiff would not be able to maintain her Section 1983 claim against MHLS. *See Williams v. Citibank, N.A.,* 565 F.Supp.2d 523, 527 (S.D.N.Y.2008).

(3) Constitutional or Statutory Deprivation

***7** As noted above, Plaintiff's Section 1983 claims against NYF, Schmidt, and Salzman are dismissed because Plaintiff fails to allege that any one of them acted under color of state law. Even assuming, *arguendo,* that Plaintiff (properly) alleged that NYF, Schmidt, and Salzman acted under color of state law, Plaintiff's Section 1983 claims against NYF, Schmidt, and Salzman would be dismissed for the following reasons. [6]

The Remaining Defendants argue that "Plaintiff's remaining timely allegations ... fail to identify which of Plaintiff's constitutional rights, if any, were violated and therefore [Plaintiff] fail[s] to state a claim under Section 1983." (Defs. Mem. at 11.) Plaintiff's opposition papers do not appear to respond to Remaining Defendants' arguments. (*See* Pl. Mem. at 1–7.)

"To withstand a motion to dismiss, a plaintiff asserting a violation of Section 1983 must allege a deprivation of a right secured by the Constitution or federal law." *Koulkina,* 559 F.Supp.2d at 316: *see also Alfaro Motors, Inc. v. Ward,* 814 F.2d 883, 887 (2d Cir.1987) ("[A] complaint must contain specific allegations of fact which indicate a

deprivation of constitutional rights ... broad, simple, and conclusory statements are insufficient to state a claim under [Section] 1983.").

Plaintiff alleges in conclusory fashion that NYF and Schmidt "violated due process ... when they filed 4 years of [Plaintiff s] tax returns ... knowing that they lacked essential information." (3d Am.Compl.¶ 301.) But, Plaintiff "do[es] not allege the Constitutional or federal statutory right of which [Plaintiff] [is] being deprived and, thus, [Plaintiff's Section 1983 claims] fail[ ] as a matter of law on this ground." *Sanchez v. Thompson,* No. 07 Civ. 0531, 2007 WL 4574727, at *4 (S.D.N.Y. Dec. 26, 2007); *see also Cok,* 876 F.2d at 4 ("Claims of mismanagement, for an accounting ... against the conservator should be pursued in state court and are not the proper subject of [Section] 1983 liability.").

Similarly, Plaintiff does not allege which of Plaintiff's "Constitutional or federal statutory right[s]" Salzman allegedly violated. *Sanchez,* 2007 WL 4574727, at *4; (*see also* 3d Am. Compl. ¶¶ 301–13.)

As noted above, Plaintiff does not make any allegation concerning MHLS independent from claims against Mlinack. (*See* 3d Am. Compl. ¶¶ 213–25.) And, construed liberally, the Third Amended Complaint appears only to allege legal malpractice against Mlinack. (*See* 3d Am. Compl. ¶ 224 ("[Mlinack] allowed coercise measures to force [Plaintiff] to forgo recovery of money that [Plaintiff] was rightfully due such as the prejudicial settlement with the co-op and all other coerced agreements [Plaintiff] was against[.]").) But, "an action for legal malpractice ... is not cognizable under [Section] 1983 since there is a total absence of state action as required by that section." *Sommer v. Rankin,* 449 F.Supp. 66, 67 (S.D.N.Y.1978).

(4) State Law Claims

***8** "Because there is no longer any federal claim and there is no assertion of diversity jurisdiction, the Court declines to exercise supplemental jurisdiction and dismisses [Plaintiff's] state law claims[.]" *Yak v. Bank Brussels Lambert,* No. 99 Civ. 12090, 2002 WL 31132963, at *7 (S.D.N.Y. Sept.26, 2002); (*see also* 3d Am. Compl. ¶ 2 ("Jurisdiction is based on the Federal Civil Rights Statute of 42 USCA Section 1983[.]")); 28 U.S.C. § 1367(c) (3); *Jackson v. Marshall,* No. 04 Civ. 3915, 2008 WL 800745, at *5 (S.D.N.Y. Mar. 25, 2008).

Amendment

"[T]he court should not dismiss without granting leave to amend at least once when a liberal reading of [a *pro se*] complaint gives any indication that a valid claim might be stated." *Cuoco v. Moritsugu,* 222 F.3d 99, 112 (2d Cir.2000); *see also Holmes v. Goldin,* 615 F.2d 83, 85 (2d Cir.1980). But, "it is well established that leave to amend a complaint need not be granted when [as here] amendment would be futile." *Ellis v. Chao,* 336 F.3d 114, 127 (2d Cir.2003). "An amendment is futile if the amended claim could not survive a motion to dismiss." *Mtshali v. New York City Coll. of Tech.,* No. 05 Civ. 358, 2006 WL 2850216, at *2 (S.D.N.Y. Oct. 4, 2006) (citing *Dougherty v. North Hempstead Bd. of Zoning Appeals,* 282 F.3d 83, 88 (2d Cir.2002).).

The Court does not afford Plaintiff a fourth opportunity to amend her Complaint because, among other reasons, Plaintiff has not requested such relief; Plaintiff has amended her complaint on three prior occasions, (*see supra* note 1); and, on or about March 12, 2007, Judge Freeman specifically advised Plaintiff that "[g]iven the extent of Plaintiff's pleading and other submissions in this case to date, no further motion for amendment or supplementation of the Third Amended Complaint should be made without prior leave of Court[.]" (March 2007 Order at 1); *see also Gomes v. Avco Corp.,* 964 F.2d 1330, 1335–36 (2d Cir.1992) ("The district court was well within its discretion in denying leave to amend a fourth time."); *Bey v. City of N.Y.,* No. 97 Civ. 4800, 1999 WL 544713, at *6 (S.D.N.Y. July 27, 1999) ("The plaintiff has not asked for leave to amend. This is the plaintiff's third pleading and the third motion to dismiss filed by the defendants. Given this history, the guidance provided [by the Court], and the fact that the Second Amended Complaint was filed by plaintiff's counsel, plaintiff shall not be permitted to amend her complaint.").

Most importantly, "even with the most liberal reading of the [Third Amended] [C]omplaint, the Court finds that the [Third Amended] [C]omplaint is completely devoid of any viable [Federal] cause of action and any amendment would therefore be futile." *Brown v. Nassau County,* No. 05 Civ. 872, 2005 WL 1124535, at *5 (E.D.N.Y. May 9, 2005); *see also Sharp v. N.Y.,* No. 06 Civ. 5194, 2007 WL 2480428, at *8 (E.D.N.Y. Aug.

28, 2007) ("[B]ecause [Defendants] are entitled to Eleventh Amendment immunity ..., plaintiff is denied leave to amend her claims against the State of New York [and] its agencies [.]"); *Brown,* 2005 WL 1124535, *2 ("In light of the fact that defendants ... are attorneys, ... [defendants] cannot be considered state actors for the purposes of a Section 1983 lawsuit. Accordingly, the Court finds that the complaint fails to state a claim upon which relief must be granted, and it must be dismissed as against [defendants] with prejudice.").

V. Conclusion and Order

***9** For the foregoing reasons, Remaining Defendants' motion to dismiss [# 100] is granted. The Clerk of the Court is respectfully requested to close this case.

All Citations

Not Reported in F.Supp.2d, 2008 WL 5215466

Footnotes

1 On or about February 16, 2005, Plaintiff filed a 32–page Complaint against Defendants. (*See* Docket [# 1].) On or about June 13, 2005, before Defendants answered the Complaint, Plaintiff filed a 185–page First Amended Complaint containing additional allegations against Defendants. (*See* Docket [# 5]); *see also* Fed.R.Civ.P. 15(a)(1)(A).

On or about July 13, 2005, United States Magistrate Judge Debra Freeman, to whom the matter had been referred, granted NYF's "motion under Fed.R.Civ.P. 12(e) to compel Plaintiff to frame a more definite statement of her [First] Amended Complaint[.]" (Order, dated July 14, 2005, at 1.) Judge Freeman "directed [Plaintiff] to serve and file a Second Amended Complaint ... with a short and plain statement of [her] claim in accordance with the requirements of Fed.R.Civ.P. 8(a)." (*Id.* (internal quotations omitted).) On or about August 29, 2005, Plaintiff filed a 98–page Second Amended Complaint. (*See* Docket [# 20].)

On or about October 26, 2005, Plaintiff sought to file a 51–page Third Amended Complaint, (*see* Docket [# 26]), which was "accepted for filing [.]" (Order, dated Nov. 8, 2005, at 1.)

On or about March 6, 2007, Plaintiff made an application ("Application") to "supplement" her Third Amended Complaint with a "Supplemental Affirmation," dated Mar. 3, 2007. (*See* Not. of Mot. to Include Supp. Aff., dated Mar. 6, 2007, ¶ 2.) On or about March 12, 2007, Judge Freeman denied Plaintiff's Application stating that the "[A]pplication is not a proper motion under Fed.R.Civ.P. 15(d) to supplement a pleading." (Order, dated Mar. 12, 2007 ("March 2007 Order"), at 1.)

2 The Court has afforded *pro se* Plaintiff leniency with respect to her opposition to Remaining Defendants' motion to dismiss. *See Bey v. Human Res. Admin.,* No. 97 Civ. 6616, 1999 WL 31122, at *2 (E.D.N.Y. Jan.12, 1999). The Court allowed Plaintiff two months, until July 12, 2008, to respond to Remaining Defendants' motion to dismiss. (*See* Tr. of Proceedings, dated Mar. 20, 2008, at 15.) On or about May 21, 2008, the Court granted Plaintiff's application for an extension to July 28, 2008 to file her opposition, and, on or about July 24, 2008, the Court granted Plaintiff's second application for an extension until August 11, 2008. (*See* Docket [# 104]; Docket [# 105].) And, on or about October 22, 2008, the Court entered an order "allow[ing] Plaintiff to serve and file a sur-reply ... no later than November 13, 2008 (noon)" based upon Plaintiff's claim, contained in her opposition papers, that she "needed more time to finish[.]" (Order, dated Oct. 22, 2008, at 1; PL Mem. at 7.)

3 Pursuant to Article 81, "[t]he court may appoint a guardian for a person if the court determines" that: (i) "the appointment is necessary ... to manage the property and financial affairs of that person"; and (ii) "the person is incapacitated." N.Y. Mental Hyg. § 81.02(a).

4 *Duboys,* 199 F.Supp.2d 166, a case NYF and Schmidt cite, involved a defendant "who purportedly acted in a fiduciary capacity ... in [a] guardianship proceeding[ ]" initiated under Article 81. (Am. Compl. in 01 Civ. 5448, dated Apr. 13, 2002, ¶¶ 13, 33, 43, 46, 50, 84, 86; *see also id.* ¶ 85 ("Instead of performing his required

duties as directed by the court and as mandated by statute (MHL 81), [defendant] engaged in breach of fiduciary duties ...."); *Keady v. J.P. Morgan Chase & Co.,* No. 07 Civ. 9896, 2008 WL 638444, at *2 (S.D.N.Y. Mar.3, 2008) ("[The] Complaint is a publicly filed document of which the Court may take judicial notice ... so the Court may consider [it] in adjudicating the motion to dismiss.") (citing *Kavowras v. N.Y. Times Co.,* 328 F.3d 50, 57 (2d Cir.2003)).

5 Although NYF and Schmidt do not raise the issue in their motion papers, NYF and Schmidt are also entitled to immunity to the extent they acted as "non-judicial persons fulfilling quasi-judicial functions." *Cok v. Cosentino,* 876 F.2d 1, 3–4 (1st Cir.1989) (court-appointed conservator entitled to quasi-judicial immunity); *see also* *Faraldo v. Kessler,* No. 08 Civ. 261, 2008 WL 216608, at *5 (E.D.N.Y. Jan.23, 2008).

6 And, even assuming, *arguendo,* that MHLS were not entitled to Eleventh Amendment immunity, Plaintiff's Section 1983 claim against MHLS would also be dismissed.